

**SCHOOL FINANCE LITIGATION:
The History and its Current Status in New York**

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Introduction

It has been more than fifty years since the Supreme Court's landmark decision in Brown v. Board of Education¹ which stood for the premise that racial segregation in public schools was unequal per se, even if equal resources were provided in each setting. The decision answered the racial question but the fight over resources still remains a stubborn reality and continues to be litigated in state courts across the country. The Brown decision, however, did start the country on a journey to equalize the disparities in education "with all deliberate speed." That journey would be thrown in a lurch with the Supreme Court's decision in San Antonio Independent School District v. Rodriguez.² The plaintiffs in Rodriguez were parents of school children who were either members of a minority group or were poor and lived in districts with low property tax base from which public school funding was derived. The lower court held that the Texas school finance system was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.³ The court based its decision on the significant disparities in school funding which was largely the result of the amount of money collected from local property tax. On appeal the Supreme Court held that where wealth was involved, the Equal Protection Clause did not require absolute equality.⁴ Since Rodriguez no claimant has successfully asserted a constitutional right to an education on the federal level.⁵ Though the decision in Rodriguez was a devastating blow for the movement towards fulfilling the promise of Brown, it was not a fatal one.

In Serrano v. Priest⁶ (Serrano II) the California Supreme Court breathed new life into the movement.⁷ The court in Serrano II found the California

¹ Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

² San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

³ Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *overruled by* 411 U.S. 1 (1973).

⁴ Rodriguez, 411 U.S. at 25.

⁵ *See, e.g., Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stating that an education is not a right guaranteed by the U.S. Constitution).

⁶ Serrano v. Priest, 557 P.2d 929 (Cal. 1976) [hereinafter *Serrano II*].

⁷ Plaintiffs argued that the state had not equalized funding to the degree required in previous Serrano decision. *See Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) [hereinafter *Serrano I*]; *see*

education finance system to be in violation of the Equal Protection Clause of the state's constitution. In the wake of the Rodriguez and Serrano decisions, plaintiffs would bring their claims as equal protection violations based on the education clause contained in every state's constitution. The result has been a seemingly endless onslaught of litigation in state courts to bring equity to school finance.

School finance litigation has taken many twists and turns after Rodriguez before finally regaining a footing.⁸ Much has been written and said about the multitude of challenges inherent to any attempt to eliminate the disparities that exist in the public education system. Indeed some have argued it may not be possible to fix the problems.⁹ The reasons given are many and the defense afforded them, fierce. In fact despite the opportunity to advance claims in state courts which has led to many plaintiff victories, claimants continue to struggle to validate their favorable judgments. In Abbott v. Burke,¹⁰ the New Jersey Supreme court declared the most ambitious judgment in school finance litigation when it ordered an "unprecedented series of entitlements for disadvantaged children."¹¹ The New York Court of Appeals took a similar tack with its decision in Campaign for Fiscal Equity v. State of New York.¹²

The purpose of this paper is to present the history of school finance litigation recounting the progress and the setbacks. The paper will then examine the New York Court of Appeals decision in Campaign for Fiscal Equity II. The paper will end with a look at what happened in the aftermath of the historic decision.

also Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 U. ARK. LITTLE ROCK L. REV. 107 (2004) (discussing the history and trends of school finance litigation).

⁸ *Id.* at 109-112 (explaining the movement from Needs-Based claims to "fiscal neutrality" and the movement from equity to adequacy).

⁹ Denise C. Morgan, *The Less Polite Questions: Race, Place, Poverty and Public Education*, 1998 ANN. SURV. AM. L. 267, 275 (1998) (opposing arguments that children of color and/or poor children are not educable and arguing why it is important to maintain a public school system).

¹⁰ Abbott v. Burke, 710 A.2d 450 (N.J. 1998).

¹¹ Advocacy Ctr. for Children's Educ. Success with Standards, *Finance Litigation: New Jersey*, available at http://www.accessednetwork.org/litigation/lit_nj.html (last visited Nov. 1, 2005) [hereinafter ACCESS website].

¹² Campaign for Fiscal Equity v. State of New York, 187 Misc. 2d 1 (N.Y. Sup. Ct. 2001) [hereinafter *CFE III*].

I. The History of School Finance Litigation in “Waves”

The history of school finance litigation is often referred to as a series of three “waves”.¹³ Understanding the basis of the dispute starts with an examination of money. Basically, who has it, how is it distributed and who gets it. Public education throughout the United States is largely funded by local property taxes. Since there are substantial differences in property values from one area to the next within a state, the level of taxes generated mirrors this reality and consequently leads to uneven funding among school districts. School districts are creations of each state’s legislature, which also designs the system of funding which keeps these districts functioning. Funding, consequently, determines the quality of education a district can afford to provide to its students.

The first wave of cases alleged violations of the Equal Protection Clause of the U.S. Constitution. That wave ended when the Supreme Court declined in Rodriguez to acknowledge education as a fundamental right under the Federal Constitution or to find the plaintiffs in poor districts members of a protected class. Failing to find a fundamental right, the Court went on to find the state’s rationale of giving localities control over funding to be permissible when measured under the rational basis standard.

The beginning of the second wave was marked by the New Jersey Supreme Court decision in Robinson v. Cahill.¹⁴ After being turned away from the federal constitution, plaintiffs in this wave would seek relief under the equal protection guarantee of their respective state constitutions, wherein their state education clauses provided for the maintenance and support of a “thorough and efficient” education.¹⁵ Plaintiffs would primarily argue for the equalization of funding through the use of the same tax funding method to raise the same amount of revenue per student for all districts regardless of the property wealth within a particular district.¹⁶ The New Jersey Supreme Court’s focus on the state’s

¹³ See Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 n.9 (1995).

¹⁴ *Robinson v. Cahill*, 303 A.2d 273, 291-92 (N.J. 1973). The court rejected the plaintiffs’ argument of a State equal protection violation. But found that the state’s funding statute violated the “thorough and efficient” education clause of the state constitution. The “thorough and efficient” clause provides that, “The Legislature and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years.” N.J. CONST. art. VII, § 4 para.1.

¹⁵ See James E. Ryan et al., *School Finance Litigation: Foreword on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL’Y REV. 463, 466 (2004) (discussing the evolution of the arguments made in school finance litigation along with remedies ordered after various funding methods were found to be in violation of state’s constitutional protections).

¹⁶ *Id.*

educational clause and its reference to what the system should produce would provide the ammunition for future claims based on adequacy.¹⁷

The third wave of cases sought to establish clarification as to the substantive provisions of the education clauses in each state constitution. The 1989 Kentucky Supreme Court decision in *Rose v. Council*¹⁸ is traditionally viewed as the decision which launched the third wave. In declaring the entire state educational system unconstitutional, the Kentucky Supreme Court relied on an adequacy theory rather than an equity theory.¹⁹ Although plaintiffs would continue to bring equity claims well within the third wave, the Kentucky decision and subsequent adequacy victories would solidify adequacy as the dominant legal theory in school finance litigation.²⁰

A. Equity v. Adequacy

In the first two waves, plaintiffs' arguments primarily focused on attaining equity by reducing the disparity in funding caused by vastly unequal property values, while in the third wave the emphasis was on holding the state responsible for providing an education commensurate with a minimally adequate constitutional floor. Equity then refers to how much funding a particular group of students within a state gets relative to other groups of students in other parts of the state.²¹ Adequacy, on the other hand, looks at how much funding a particular student needs to meet specific outcomes or standards.²² The change in strategy was necessitated by the margin of defendant victories in the first two waves: defendants had victories in two-thirds of the cases brought versus the inverse in the third wave.²³ Additional credit for the success of adequacy cases can be attributed to the standards-based movement which was gaining momentum concurrently across the United States. Plaintiffs were able to prove that although states were moving decisively to raise academic standards, they repeatedly failed to follow through when the time came to provide the resources necessary to achieve the higher standards which they had voluntarily mandated.²⁴

¹⁷ Smith, *supra* note 7, at 111.

¹⁸ *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).

¹⁹ See *infra* Section A for a description of adequacy versus equity.

²⁰ Ryan, *supra* note 15, at 467.

²¹ Smith, *supra* note 7, at 111.

²² *Robinson*, 303 A.2d at 295. The court found the education clause required the state to provide students with "educational opportunities that will equip [him] for his role as citizen and competitor in the labor market"; Smith, *supra* note 7, at 111.

²³ See ACCESS website, *Know the issues*, available at http://www.schoolfunding.info/resource_center/know_the_issues.php3 (last visited Nov. 11, 2005).

²⁴ *Id.*

B. The Standards Movement

Concurrent to the time adequacy became the prevailing legal theory in school finance litigation the standards movement was also gaining prominence. The standards movement was prompted by evidence revealing a threat to the United States' dominance in the global economy if education was not improved.²⁵ According to the United States Department of Education, few American students had the ability to solve complex problems or developed skills for higher-order reasoning.²⁶ Research studies have also highlighted the difficulty encountered by American students as they strive to maintain consistent academic performance.²⁷ Adding to these dismal facts was the emergence of China and India as future economic powers to be reckoned with. China, it has been noted, is currently providing superior education in math and science, and is on a path to provide a sound, basic education to all its students by 2020.²⁸ Spurred by these realities and a call to action by the business community, states embarked on a mission to revamp their respective educational systems by raising degree standards. However, one consequence of adopting standards-based reforms was that the legislatures had given the courts a vital component which they lacked in prior decisions: judicially manageable standards to measure the adequacy of an educational system. To date, courts have used these standards in one of two ways.

The first approach has been to use the standards to generate a list of capabilities a student must have. In Rose v. Council for Better Education, the Kentucky Supreme Court went further than declaring the Kentucky education system unconstitutional. In its decision pioneering the use of a list of capabilities to measure adequacy, the Supreme Court of Kentucky directed the legislature to create an education system capable of providing every student the opportunity to develop seven capacities:²⁹

- i. sufficient oral and written communications skills to enable students to function in a complex and rapidly changing civilization;

²⁵ See NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

²⁶ See Ina V.S. Mullis et al., *America's Challenge: Accelerating academic achievement* (Rep. No. 19-OV-01), Princeton, N.J.: Educational Testing Service (1990).

²⁷ See UNITED STATES DEPARTMENT OF EDUCATION, *THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS 1992: TRENDS IN ACADEMIC PROGRESS* (1994).

²⁸ Editorial, *Urgency. And Candor*, THE JOURNAL NEWS (Nov. 6, 2005), available at http://www.cfeequity.org/Clippings/11-6-05_JournalNews.htm (last visited Nov. 11, 2005).

²⁹ *Rose*, 790 S.W.2d at 212 n.22.

- ii. sufficient knowledge of economics, 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 counterparts in surrounding states, in academics or in the job market.³⁰

The second approach, first adopted by the New Jersey Supreme Court,³¹ defines adequacy in broader, more flexible terms. To wit: “an educational system that precluded the students of poorer districts from competing in the same market and society as their peers could not, by definition, be providing an adequate education.”³² Without providing a list of capabilities a student would need to develop, the court described an adequate education in relative terms. Further, the court listed four main areas as the focus of its directives for reform: early childhood, elementary school curricula, supplemental programs and classroom facilities.³³ Though the mandate was unprecedented in its scope it stopped short of attaching a price tag.³⁴ This silence would provide the state with room to withhold money from the implementation of the mandate while giving the appearance of compliance.³⁵

C. Calculating the Cost

The enactment of standards provided useful guideposts to measure the adequacy of a public school educational system. However, they have not been

³⁰ *Id.* at 212.

³¹ *Abbott*, 710 A.2d at 450.

³² See generally Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY* 88, 116-117 (Jay P. Hubert ed., 1999).

³³ *Abbott*, 710 A.2d at 456-457, 470.

³⁴ *Id.* at 469.

³⁵ See *supra* text accompanying note 11.

illustrative of how a court should go about selecting an appropriate remedy to ensure their enforcement. This perceived weakness has led to sharp debates and conflicting decisions on whether or not expenditures and educational opportunities can be correlated.³⁶ Given the multitude of factors influencing the likelihood that a student from a poor family could achieve mastery of even the most rudimentary of academic standards and the constant jockeying for where to distribute tax revenues, it is to be expected that the issue of funding would need to run the gauntlet before ever achieving an actionable consensus on how to eliminate the proven deficiencies. Legislators often find themselves caught between court ordered changes which require greater funding to execute and a suburban electorate resolute on being included in any funding increase implemented by the legislature which they deem to be an increase achieved at their expense. In light of the failure of legislatures to act, courts have resorted to issuing more forceful decisions. Specifically, courts have issued orders directing legislatures to review the cost of providing an adequate education in deficient districts and then change their funding formulas accordingly.³⁷

There are four methodologies to measure the level of funding needed to provide an adequate education: (1) the professional judgment model; (2) the evidence based or “best practices” model; (3) the successful school model; and (4) the advanced statistical model. The first three have been utilized to determine adequacy in funding levels within a state. The fourth has been a tool used in Geographic Cost of Education Indices (GCEIs) which adjusts funding based on geographic variations rather than as a tool to identify varying funding levels within districts.

The four methods vary in two ways. The professional judgment and evidence based/best practice models rely on inputs to arrive at their results. Inputs are the ingredients needed to provide an adequate education and are identified by education experts and researchers. Conversely, successful schools and advanced statistical rely on the outputs of an educational system. This means these methods compare the performance of students in school districts of varying demographics to the level of funding provided to determine the appropriate level of funding.

³⁶ See, e.g., DOES MONEY MATTER?: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS (Gary Burtless ed., 1996); John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perspective*, 19 J. EDUC. FIN. 167, 169 nn.10-11 (1993) (listing state courts that have accepted and courts that have rejected the correlation between expenditures and educational opportunity); see also Morgan, *supra* note 9, at 275.

³⁷ Smith, *supra* note 7, at 114.

1. The Professional Judgment Approach

The professional judgment approach solicits from education experts their recommendations of what components are necessary to provide an adequate education. The education experts are teachers, administrators and district office personnel from a cross-section of schools. The experts are separated into groups and assigned a fictional school. They are asked to provide a report of what inputs would be needed to meet the state's academic standards. The inputs are then "cost out" -- a term used to describe the process of assigning a dollar value to the outcomes-- to arrive at an adequate funding level.

There are drawbacks to this method. First, two panels assigned to the same school can end up with differing results. The difference can be as high as twenty percent. A solution to this problem is having a hierarchy of panels to review and make adjustments to disparities. Another drawback is potential conflict in drawing on experts from the very system which stands to benefit from increased funding.

2. The Evidence Based or Best Practices Model

These methods seek to identify effective programs and practices already in use and then extrapolate the cost of adopting them on a wider scale. Advocates of this method point to the reliability in the scientific inputs measured, arguing the method has a concomitant benefit of providing useful information to the development of programs suited to particular districts. Critics, on the other hand, argue what works in theory may not come to fruition in reality. In other words, what works in one area may not work as well in another.

3. The Successful School Model

The successful schools model involves a survey of all schools or districts in the state to identify the ones that are attaining specific state academic standards. Then the average spending per student is taken for the respective schools or districts. That average becomes the funding level needed to attain an adequate education. Though this approach has credible attributes, there are limitations.

One drawback of the approach is that the results are based on a limited number of performance characteristics. This means the results do not address the myriad of outcomes courts have expressed concerns with. Another drawback is the model's assumption about the composition of students in a given locale. Specifically, the model assumes that even within a district where there is a high concentration of at-risk students, acceptable performance can be readily duplicated using a uniform level of funding.

4. The Advanced Statistical Model

The advanced statistical model is by far the most technical approach. Due to its reliance on a bevy of data inputs to reach its result, the model can be adjusted to control for impact each variable has on the overall outcomes. This level of sophistication can, in turn, have the unintended effect of overwhelming people not familiar with the methods it employs. This drawback then leads to hesitancy in adopting the model's particularized recommendations.

The creation of these models, however, has not led to wholehearted adoption by states charged with revamping their educational formulas. Among other reasons the delay can be attributed to the ongoing litigation brought by plaintiffs frustrated by the lack of compliance with earlier orders, the sometimes vast difference in funding level recommended by different studies and the occurrence of economic downturns at the moment some states commit to increasing funding levels.

D. Expenditures and student performance

Is money really the answer to eradicating poor performance? That question, or the many variations thereof, has been debated astride the progress plaintiffs seek to attain through the demolition and recreation of funding methods across the country. Essentially, it is argued, since there are no studies showing an unequivocal link between the amount of money spent on education and the resultant level of educational outcome achieved, increasing the level of funding will do nothing to erase the education gaps that now exist under the current system.

One origin of this debate can be traced back to the 1966 report of James Coleman titled *Equality of Educational Opportunity*. After the enactment of the Civil Rights Act of 1964 Congress established a commission to present a study detailing what educational opportunities were available to minorities. The resulting study is commonly referred to as the Coleman Report. In it, Mr. Coleman posits the following rationale for poor student performance:

[S]chools bring little influence to bear on a child's achievement that is independent of his background and general social context; and ... this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities with which they confront adult life at the end of school.³⁸

³⁸ James S. Coleman et al., U.S. Dep't of Health, Educ., and Welfare, *Equality of Educational Opportunity* 325 (1966).

Overall the study found that the average minority student attended schools with less qualified teachers, larger class sizes, inadequate libraries and textbooks, and less access to science laboratories than the average white student. The study then concludes, however, that the primary factors that determine a student's level of achievement are the "educational backgrounds and aspirations of other students in the school."³⁹ The report further concludes, as noted above, that schools have little influence on a child's achievement.⁴⁰

The impact of the Coleman report can still be seen today.⁴¹ This is in spite of the fact that the report's conclusions have refuted by more advanced regression analyses and other measuring techniques.⁴² Perhaps the least publicized conclusion of the Coleman report was the premise that "it is for the most disadvantaged students that improvements in school quality will make the most difference in achievement."⁴³ Debates since the publication of the report have led to two conclusions. First, research now shows that solely increasing funding will not improve the level of student performance.⁴⁴ Additionally, targeted funding increase to specific inputs such as teacher quality, lower class sizes, and early literacy programs can effectively increase student performance.⁴⁵

³⁹ *Id.* at 22.

⁴⁰ *Id.* at 325.

⁴¹ See CHRISTOPHER JENCKS, ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* 8 (1972); see also David J. Armor, *Facts and Fictions About Education in the Sheff Decision*, 29 CONN. L. REV. 981, 996 (1997) ("The reason that school desegregation does not improve minority achievement or close the achievement gap is that the cause of the gap lies beyond the reach of school policies. The principal causes of minority achievement deficiencies are family poverty and, possibly, concentrations of poverty in their neighborhoods"). But see Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465, 489 (1991) ("Since more and better teachers can help raise standardized test scores and higher salaries attract more and better teachers, money matters for raising test scores.").

⁴² Richard D. Laine et al., *Money Does Matter, A Research Synthesis of a New Universe of Education Production Function Studies*, in *WHERE DOES THE MONEY GO? RESOURCE ALLOCATION IN ELEMENTARY AND SECONDARY SCHOOL* 44-45 (Lawrence O. Picus & James L. Wattenbarger eds., 1996).

⁴³ Coleman, *supra* note 38, at 22 ("Whites, and to a lesser extent [Asian] Americans, are less affected one way or the other by the quality of their schools than are minority pupils.").

⁴⁴ Eric A. Hanushek, *The Quest for Equalized Mediocrity, School Finance Reform Without Consideration of School Performance*, in *WHERE DOES THE MONEY GO? RESOURCE ALLOCATION IN ELEMENTARY AND SECONDARY SCHOOL* 20, 26-27 (Lawrence O. Picus & James L. Wattenbarger eds., 1996).

⁴⁵ Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 REV. OF EDUC. RES. 361, 362 (1996).

II. New York Overview

New York entered the school finance litigation fray in 1978 in Board of Educ., Levittown Union Free School Dist. v. Nyquist.⁴⁶ The plaintiffs in Nyquist were “property poor” school districts who challenged the constitutionality of New York State’s system for funding public education. Under the system the money allocated to each district relied heavily on the amount of property tax generated therein. Thus, the plaintiff contended, property-rich districts have an ability to raise more tax revenue enabling them to provide enriched educational programs well beyond the fiscal ability of the property-poor districts. The New York Court of Appeals ruled that even though substantial inequalities were present, the state constitution did not require equal funding for education.⁴⁷ The court further held that the state was only constitutionally required to provide a “sound basic education.”⁴⁸

It was not until 1993 when, in Campaign for Fiscal Equity v. State, plaintiffs asserted the state was failing this constitutional duty that the Court of Appeals would distinguish Nyquist and remand the case for trial.⁴⁹ In distinguishing Campaign for Fiscal Equity from Nyquist, the court announced that it was its duty to adjudicate the nature of the state’s constitutional duty to provide a public education. The court also provided guidelines of what were the essential elements of a sound basic education. Additionally, it announced that if the facts alleged by the plaintiffs --the quality of the educational opportunity in New York City, the correlation [between] [opportunity] [and] the State’s funding, any discriminatory practices and any failure to fulfill the [state’s] constitutional mandate-- were proven on remand, the court directed that they would constitute violations of the state’s constitutional duty and of federal regulations.⁵⁰

On remand after a thorough examination of the evidence presented, the trial court ruled, on January 10, 2001, that the state had violated the Education Article of the Constitution, which provides: “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.”⁵¹ The trial court also found the state’s method of school funding, as it related to New York City, violated the plaintiffs’

⁴⁶ Bd. of Educ. v. Nyquist, 57 N.Y.2d 27 (1982).

⁴⁷ *Id.* at 48.

⁴⁸ *Id.*

⁴⁹ Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, at 314 (1995) [hereinafter *CFE I*]. The court held that by mandating a school system “wherein all the children of this state may be educated,” the state obligated itself to ensure the availability of a “sound basic education” to all children in the state.

⁵⁰ *Id.* at 317-318.

⁵¹ N.Y. CONST. art XI, § 1.

rights under United States Department of Education regulations pursuant to Title VI of the Civil Rights Act of 1964 (42 USC § 2000d).⁵² To reach its decision the trial court reviewed the necessary instructional “inputs,” as identified by the Court of Appeals in its order of remand, and found most of these factors to be deficient in the New York City schools.⁵³ The decision also ordered a costing-out study which it deemed to be the first task necessary to the development of a new school funding system.⁵⁴

In June 2002, the intermediate-level appeals court reversed on law and facts.⁵⁵ The majority rejected the trial court’s definition of a sound basic education, finding an eighth grade education was all the New York State Constitution required.⁵⁶ The Appellate Division also rejected the trial court’s findings of fact regarding inputs, outputs and causation.⁵⁷ Further, in light of the Supreme Court’s decision in Alexander v. Sandoval,⁵⁸ a united Appellate Court found the plaintiff failed to make a valid title VI claim.⁵⁹

In Sandoval, which postdated the trial court decision, non-English speaking residents of Alabama contended that the state’s English only driver’s license test violated their rights under the Department of Justice’s and the Department of Transportation’s implementing regulations for Title VI.⁶⁰ The Supreme Court held that the plaintiffs had no private right of action under the Title VI implementing regulations.⁶¹ The plaintiffs appealed to the New York Court of Appeals as of right on constitutional grounds.⁶² The Court of Appeals affirmed the Appellate court’s Title VI ruling but reversed its finding of law and facts.⁶³

⁵² *Id.* at 114.

⁵³ *Id.* at 90.

⁵⁴ *Id.* at 116.

⁵⁵ *CFE II*, 295 A.D.2d. 1 (2002).

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 14-18.

⁵⁸ Alexander v. Sandoval, 532 U.S. 275 (2001).

⁵⁹ *CFE II*, 295 A.D.2d at 23.

⁶⁰ See Alexander, 532 U.S. at 275; *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

⁶¹ *Id.* at 293. The Court held that Section 601 of Title VI, which prohibits discrimination based on race, color, or national origin in certain programs and activities does create a private right of action. Further it held that although Section 602 which mandates federal agencies to issue regulations not inconsistent with Section 601, Section 602 lacked the express language indicating a congressional intent to confer a private right of action. Therefore the Court could not imply a right to the plaintiffs.

⁶² *CFE II*, 100 N.Y.2d 893 (2003).

⁶³ *Id.* at 903.

A. A Sound Basic Education

When the trial began, the New York City public school system had nearly 1,200 schools serving 1.1 million children and employed a staff of over 135,000, including 78,000 teachers.⁶⁴ Approximately 84% of the children were racial minorities of which 80% were born outside the United States. The New York City public school is supervised by the Board of Education and its Chancellor.⁶⁵ At time of trial, the state provided 39.9% of all New York City public school funding⁶⁶ while districts provided 56% and the federal government four percent. The state portion, at \$3,562, was lower than its average contribution to its other districts. Similarly, New York City's contribution, at \$4,000, was lower than the average local contribution in other districts.

These results were the product of arcane funding formulas. In its decision the trial court described the formulas as needlessly complex, malleable and not designed to align funding with need.⁶⁷ In *Nyquist* the courts stated that the justification for a school funding system based on local taxation is "the preservation and promotion of local control of education."⁶⁸ The purposes of state aid are to assist school districts in the provision of an education that was effective; to equalize the school revenues by providing aid in inverse proportion to each school district's ability to raise local revenue; and to encourage programs to address needs in the community. In the case of New York City, students' needs were high as was the ability to pay as measured by the state's Combined Wealth Ratio. Although New York raised more revenue than surrounding districts various factors constrained its ability to increase its funding even while the state increased its level of aid to the city.

First, the school districts in New York City, unlike other local school districts, depend on municipal revenues for funding. Thirty-seven percent of these revenues come from property taxes. The rest comes from taxing activities that are susceptible to the ups and downs of the business cycle specifically the finance industry, real estate and insurance.⁶⁹ Additionally, the state has imposed on the city a matching requirement for Medicaid and public assistance. As a result City taxpayers pay \$300 more per capita for Medicaid and \$70 more for public assistance than other residents of the state. Finally, the trial court found the

⁶⁴ See generally *CFE II*, 187 Misc. 2d 1 (2001).

⁶⁵ The court made reference to the recent changes made to composition of the Board of Education and the responsibilities of the Chancellor since the start of trial but noted that in reaching its decision it was bound to the record. See *CFE II*, 100 N.Y.2d at 904 (2003).

⁶⁶ The state provided \$10 billion of the \$26 billion.

⁶⁷ *CFE II*, 187 Misc. 2d at 98.

⁶⁸ *Nyquist*, *supra* note 46, at 44.

⁶⁹ See *CFE II*, 187 Misc. 2d at 97-99.

Stavisky-Goodman Law⁷⁰ which requires New York City to appropriate a particular amount of funds towards education was ineffective. The law did not compel the City to increase its level of funding beyond a fixed percent of any funding increase from the state. The end result of this system was a process that allocated state aid and City funds to students with no direct relationship to their needs.

The threshold question in the New York school finance litigation was what level of education was the state obligated to provide. In *Nyquist* the Court of Appeals interpreted the provision of Education Article of the New York constitution as providing “a sound basic education.”⁷¹ Subsequently, in *Campaign for Fiscal Equity I* it found that a sound basic education would provide “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.”⁷² Though in *Campaign for Fiscal Equity II* the state would argue that a sound basic education was attained in the eight or ninth grade, the court rejected pegging a grade limit to the provisions of the Education Article.⁷³ Contrarily, the court noted, a more flexible standard was intended. In 1894 the Committee on Education expressed its concern “that the public problems confronting the rising generation [would] demand accurate knowledge and the highest development of reasoning power more than ever before.”⁷⁴ The court deemed the malleability inherent in this concern to be informative of the constitutional purpose of New York’s Education Article at its enactment.⁷⁵ Consequently, a sound basic education should prepare a student for the demands of an ever-changing modern society.

The next question was the kind and amount of education that the state needed to provide to ensure each student had the constitutional minimum level educational opportunity. In *Campaign for Fiscal Equity I* the Court of Appeals opted to set forth “essentials” rather than adopting a set of standards to measure whether the state has met its constitutional obligation. It stated:

“We do not attempt to definitively specify what the constitutional concept and mandate of a sound basic education entails.

⁷⁰ N.Y. EDUC. LAW § 2576 (Consol. 2006).

⁷¹ *Nyquist*, *supra* note 46, at 48.

⁷² *CFE I*, 86 N.Y.2d at 316.

⁷³ *CFE II*, 100 N.Y.2d at 906.

⁷⁴ *Id.* at 905.

⁷⁵ *Id.*

Rather, we articulate a template reflecting our judgment of what the trier of fact must consider in determining whether defendants have met their constitutional obligation.

[W]hether the children [] are provided the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants capable of voting and serving as jurors.”⁷⁶

In addition, the court stated that the children were entitled to certain essential “inputs.”⁷⁷ Having rejected the use of standards as the test of what constitutes a sound basic education, the issue to be decided was “whether the [State’s] [funding] affords New York schoolchildren the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.”⁷⁸

B. Evaluating New York City schools’ “Inputs” and “Outputs”

In Campaign for Fiscal Equity I the Court of Appeals directed the trial court on remand to evaluate whether the state was providing a sound basic education by examining the “inputs” -- teaching, facilities and instrumentalities of learning -- as well as the “outputs”-- test results, graduation and dropout rates -- being provided to New York City schools.⁷⁹

1. Inputs

In its review, the trial court first evaluated teaching, which it classified as the most important input. Based on the certification rates, test results, experience levels, and the ratings the teachers received from their principals, the court found the teaching quality in the New York City school system to be inadequate.⁸⁰ On appeal, the Court of Appeals would highlight the “mismatch” between the student need in New York City and quality of teaching given to meet that need.⁸¹ A

⁷⁶ *CFE I*, 86 N.Y.2d at 317-318.

⁷⁷ *Id.* at 317 (“Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date curricula such as reading, writing, mathematics, science and social studies, by sufficient personnel adequately trained to teach those subject areas.”).

⁷⁸ *CFE II*, 100 N.Y.2d at 908.

⁷⁹ *CFE I*, 86 N.Y.2d at 317.

⁸⁰ *CFE II*, 187 Misc. 2d at 29.

⁸¹ *CFE II*, 100 N.Y.2d at 909 (“17% of New York City public schoolteachers either were uncertified or taught in areas other than those in which they were certified.”).

review of the failure rates of city teachers on the state's certification specialty exams revealed further evidence of the deficiencies (40% in mathematics, even for math teachers currently teaching in the public schools). Having found numerous facts highlighting the poor quality of teaching in New York City schools coupled with its finding that better teachers produce better student performance, the trial court declared the quality of teaching provided to be inadequate.⁸²

Next the trial court evaluated the school facilities and classrooms. After examining the physical attributes of New York City schools and the occurrences of overcrowding, the trial court declared the schools to be deficient.⁸³ Although the trial court noted the difficulty in proving a causal link between the physical condition of the schools and performance, it found that the physical condition of the schools often presented an impediment for conducting pedagogical activities in their appropriate space.⁸⁴ The Court of Appeals affirmed the trial court's findings on this issue and highlighted the testimony of plaintiffs' witness Dr. Jeremy Finn regarding the benefits of smaller class sizes.⁸⁵

The final input was the "instrumentalities of learning," which included the classroom supplies, textbooks, libraries and computers. The court found the supply of textbooks to be adequate. The nine to one ratio of library books to students was half the ratio in schools around the state excluding the city schools, however. Moreover, the court found the books in school libraries were "inadequate in number and quality"⁸⁶ and were not integrated with contemporary curricula. The computers in city schools were similarly inadequate. There were half as many available in the city compared to other schools in the state. Tellingly, the computers were outdated and incapable of supporting present day software.

Given the level of deficiencies in the New York City school system and the amount of students exposed to the inadequate conditions, the Court of Appeals adopted the trial court's conclusion and found a systemic failure.⁸⁷ Even in the

⁸² See generally *CFE II*, 187 Misc. 2d at 25-36 (citing data from a study of Texas teachers, witness for the plaintiffs Dr Ronald Ferguson, was able to demonstrate a direct correlation between teacher certification tests results and the performance of students over time i.e., the longer a student was exposed to a teacher, good or bad, the better or worst she performed).

⁸³ *CFE II*, 187 Misc. 2d at 39.

⁸⁴ *Id.* at 49-57 (stating the physical reality of the schools led to regular classed being taught in areas normally reserved for special activities: libraries, laboratories and auditoriums).

⁸⁵ *CFE II*, 100 N.Y.2d at 912. The court noted Dr. Finn's demonstrated that "holding other variables constant, smaller class sizes in the earliest grades correlate with better results during those years and afterwards."

⁸⁶ *CFE II*, 187 Misc. 2d at 57.

⁸⁷ *CFE II*, 100 N.Y.2d at 914.

face of these findings, the state would still be given the opportunity to prove, with the outputs (good test results and graduation rates), that the current system was capable of giving its students the opportunity to attain a sound basic education. They failed to meet this burden.⁸⁸

2. Outputs

The first output, school completion, showed a 50% graduation rate of ninth graders who did not transfer to another school system.⁸⁹ Another 30% would not graduate or earn a general equivalency degree (GED) before age 21 when they become ineligible to receive a free public education. On this point the state offered several arguments why the system was fine as it was. It argued that a sound basic education could be achieved by eighth or ninth grade; some dropouts actually received a sound basic education before leaving; its duty was only to provide the opportunity and thus cannot be blamed for those who refuse to take advantage; students came to school burdened by problems in the home which was beyond the power of the state to control; there was a large amount of immigrants entering the ninth grade and they were unable to ever graduate. The trial court rejected these arguments, finding it was the state's duty to place the opportunity within the reach of its students which meant adjusting to the socioeconomic deficits some students might present; large dropout rates were also the byproduct of troubled schools; the poor academic performance in the system is apparent before the ninth grade and cannot therefore be completely attributed to the presence of immigrants entering the system at that level.⁹⁰

In finding the test results of city schools to be unsatisfactory, the trial court refused to accept the favorable exam results offered by the state. The court found that weaknesses with the tests made them a poor measure of success.⁹¹ Specifically, they were given in the eleventh grade to test eighth and ninth grade level material; were "norm-referenced" exams – which tested how well a student performs relative to other students – rather than "criterion-referenced" – which would test the students' knowledge of content; the results combined the scores of successful schools in the system causing a skewed result.

3. Causation

Lastly, to prevail, the plaintiffs had to prove a causal link between the funding level and the poor academic performance. A prima facie case would be proven if the plaintiffs could show that an increase in funding would attract better

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 63.

⁹¹ *CFE II*, 187 Misc. 2d at 65-66.

teachers, improve facilities and instrumentalities of learning.⁹² The trial found the evidence presented by the plaintiffs showing a direct correlation between the presence of certified teachers and the performance of students was sufficient to establish the plaintiffs' prima facie case.⁹³ The state countered with several arguments which the Court of Appeals deemed to be more directed towards assigning blame among various actors involved in the process than towards refuting plaintiffs' arguments of a causal link.

The first argument tendered by the state, socioeconomic disadvantage, sought to assign the cause of poor student performance to their socioeconomic background rather than to the quality of schools they attended. Such a reality, the state argued, would be better addressed with investments in other resources. The Court of Appeals rejected this argument and stated that while it was the province of the Legislature to determine spending priorities, it was the function of the court to determine whether the state was fulfilling its constitutional obligation to provide a sound basic education.

Next, the state argued that in comparison to other large cities in the United States the per-student expenditures in New York are favorable. Implicit in this premise was the rationale that at a certain expenditure level, relative to national figures, the state met its obligation, regardless of variances in student needs, local costs, and the quality of inputs and outputs. The argument failed because the state provided no information on whether those students, in those other states, were being provided a sound basic education.

Finally, the state sought to break the causal link by assigning responsibility for any system failure to mismanagement by the Board of Education and the City of New York. Their first argument of corruption was rejected outright. For its second argument the state argued that the Board of Education mismanaged the schools by referring too many students to special education. Although the Court of Appeals acknowledged there was evidence of such abuse, it noted that the state failed to prove that this abuse led to a shortage in funding necessary to provide a sound basic education. The court further reasoned that any savings that could be garnered from stopping the abuse would "not necessarily translate dollar-for-dollar into funds free for investment in better inputs."⁹⁴ For instance, some of these savings would be needed to offset the greater cost of teaching these wrongly assigned students with special needs in a mainstream environment. The state's mismanagement argument ultimately failed because the Board of Education and the city are "creature agents of the state,"⁹⁵

⁹² *CFE II*, 100 N.Y.2d at 919.

⁹³ *CFE II*, 187 Misc. 2d at 26-27.

⁹⁴ *CFE II*, 100 N.Y.2d at 922.

⁹⁵ *Id.*

acting on education through authority delegated to them by the state. Therefore the state ultimately maintains responsibility for the failure of its agents to fulfill its constitutionally-mandated obligations.

4. The Remedy

Having found that the plaintiffs met their burden, the Court of Appeals issued its groundbreaking remedy. The court started by reiterating the interests at stake. They were the state's interest in making policy decisions and the duty of the judiciary to ensure the constitutional rights of the plaintiffs are protected. The court then directed the state to: "ascertain the actual cost of providing a sound basic education in New York City"; reform the current system of school financing and management to address the present shortcomings by ensuring that every school in New York City has the resources it needs to provide the opportunity for a sound basic education.⁹⁶ The court then declared that the state should have until July 30, 2004 to comply with the order. It then remitted the case to the trial court.

C. The Aftermath

Faced with the decision announced in Campaign for Fiscal Equity II which, similar to Abbott V, mandates a major overhaul in the funding of urban education, the New York legislature and executive branch, rather than seeking to comply with the decision, chose to embark on a campaign of inaction and resistance. The plaintiffs, on the other hand, continue to fight the state to comply in the courthouse while attempting to work with the legislature and the community to move the process forward.

The July 30 deadline came and passed without state action. The judge on remand ordered a panel of special masters to make a recommendation. The panel issued its report on November 30, 2004. The panel recommended the court to order the legislature to enact legislation to:

- Provide \$5.63 billion additionally, for operating aid phased in over four years;
- Initiate a cost study every four years to determine the cost of a sound education;
- Provide a \$9.2 billion increase for building, renovating, and leasing facilities, phased in over five years;
- Initiate a facilities study every five years.

⁹⁶ *Id.* at 930.

March 2005, the trial courts adopted the panel's report and ordered the state to comply within 90 days. The state appealed.

The Campaign for Fiscal Equity (CFE), the organization that brought the lawsuit on behalf of the New York City students, drafted and succeeded in having introduced, a bill to ensure that the system provides an opportunity to attain a sound basic education. The Schools for New York's Future Bill, if adopted, would bring the legislature into compliance with Campaign for Fiscal Equity II. According to Campaign for Fiscal Equity, the bill will⁹⁷:

- Provide an additional \$8.6 billion statewide for school operations, to be phased-in over four years;
- Provide an additional \$10 billion statewide for improving facilities over five years;
- Create a simplified statewide funding system that consolidates over 30 existing state aid categories into a single funding stream;
- Create a fair formula for each district's state/local share that is based on the local district's ability to pay and its relative enrollment of students with high rates of poverty;
- Provide an enhanced accountability system to ensure that the influx of funds is used in ways that improve student achievement; and
- Require public engagement of parents, teachers, administrators, and require school-based planning via shared decision-making team.

Conclusion

Only the educated are truly free.⁹⁸ The struggle for that freedom and the quest toward an ideal method to attain it continues in courtrooms, legislatures, classrooms and homes across this country. Although it's not clear when the journey towards equity will reach its final destination, it is clear that equity in and of itself is a constantly mutating result.

The New York experience demonstrates that court orders alone will not bring about substantive education reform. The process requires contribution from

⁹⁷ See ACCESS website, at <http://www.accessednetwork.org/news/litigation/3-24-05cfebill.php3> (last visited Oct. 10, 2005).

⁹⁸ Epictetus (55 AD - 135 AD) (Epictetus was a Roman, Greek-born slave & Stoic philosopher).

various participants whose commitment varies in intensity and whose involvement in the process can be transitory. Even if the critical decision makers, the governor and the legislators, were intent on making the reforms happen, there are essential elements outside the realm of their control. States invariably face economic downturns and the supply of certified teachers cannot be dictated by legislation.

However, the constant evaluation of the system does lead to important changes. On the federal level, the No Child Left Behind Act of 2001⁹⁹ requires states to implement mechanisms to identify failing schools. In order to receive federal aid, states must give students in a failing school the option to either accept tutoring or the right to transfer to a better school. Since the litigation commenced in New York, the state has revamped the decision making apparatus and accountability structure of the New York Board of Education. Notably, the Board of Education was abolished and its authority was transferred to the Mayor. The state has also sought to reduce the number of uncertified teachers in the system. Only time will tell if these changes will help remedy the shortcomings. If they are successful then it will be for the better. Getting to this point, however, has shown that any future success will be fading at the very moment it is achieved because one factor that remains constant is change. Therefore, it is incumbent, on all involved, to continue to strive to uphold the values of the most basic principles learned thus far, so as to prevent fruitless journeys down roads already traveled.

⁹⁹ No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002).