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Brian J. Nickerson

Gernard M. Deenihan

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*Brian J. Nickerson**
*and Gerard M. Deenihan***

INTRODUCTION

Lawsuits challenging New York State's public elementary and secondary school funding formulas have followed, in several respects, the school finance litigation trends in other state and federal courts. The most notable linkage lies with New York plaintiffs' incorporation of doctrinal developments from successful litigation attacking public school funding systems in other states. As this Article demonstrates, the first New York school finance case, *Board of Education, Levittown Union Free District v. Nyquist*[1] ("*Levittown*") commenced after victorious public school funding cases in California, *Serrano v. Priest*,[2] and New Jersey, *Robinson v. Cahill*.[3]

The *Serrano* and *Robinson* cases provided a useful litigation blueprint for raising legal challenges to state public elementary and secondary school funding systems based largely upon "equity" principles and arguments.[4] Equity-based challenges in school finance litigation rely primarily upon state constitutional equality or equal protection provisions.[5] The most typical equity argument raised by plaintiffs is that a state public school funding system,

* Director, The Edwin G. Michaelian Institute for Public Policy and Management; Associate Professor of Political Science and Public Administration, Dyson College of Arts and Sciences, Pace University; J.D., Pace University; Ph.D., Suny-Albany.

** Research Associate, The Edwin G. Michaelian Institute of Public Policy and Management, Pace University; J.D. candidate, Fordham University School of Law, 2003; M.A., Fordham University, 2001.

1. *See generally* 439 N.E.2d 359 (N.Y. 1982).

2. 487 P.2d 1241, 1266 (Cal. 1971).

3. 303 A.2d 273, 298 (N.J. 1973).

4. *See Serrano*, 487 P.2d at 1252 (discussing plaintiff's argument "that there is a correlation between a district's per pupil assessed valuation and the wealth of its residents"); *see also Robinson*, 303 A.2d at 291-93 (discussing state statutes' creation of an equitable school system).

5. *Serrano*, 487 P.2d at 1249-55; *Robinson*, 303 A.2d at 288-98.

which relies largely upon local property taxes, is inherently unfair or impermissibly disadvantages poorer school districts.[6] Plaintiffs also frequently point to specific provisions within state financing practices benefiting wealthier public school districts at the expense of allocating more funds to poorer districts.[7]

Although the *Levittown* litigation was eventually unsuccessful,[8] in 1989, school finance reform advocates and interest groups were encouraged by three successful cases in Montana,[9] Kentucky,[10] and Texas.[11] These cases provided a related, but newer, legal argument revolving around a theory of "adequacy" to challenge state public elementary and secondary school finance practices.[12] Adequacy-based challenges revolve around the interpretation of education articles or guarantees found in respective state constitutions whereby plaintiffs argue that children in poorer school districts are deprived of a legally "adequate" level of education.[13] Plaintiffs frequently cite numerous inadequacies in education services, such as school facilities, lack of textbooks and qualified teachers, inferior computers, etc., to bolster claims that a state fails to meet its burden of providing an adequate public education to all school children in a given state.[14] Consequently, plaintiffs commonly assert that more state funding needs to be diverted to poorer school districts to address any inadequacy.[15]

Both the development in the 1989 cases and the New York Court of Appeals' recognition in *Levittown* that they could entertain future claims of a "gross and glaring inadequacy" in public education currently provides New York education finance reform groups with a new angle from which to challenge the state's public school funding formulas.[16]

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6. *See, e.g.*, *Robinson*, 303 A.2d at 293 (discussing New Jersey's school system).

7. Professional educators often refer to this as an "input" problem whereby money is considered one of the key input variables resulting in improved educational services or "outputs" within a school district. *Id.* at 277.

8. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 369-70 (N.Y. 1982).

9. Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 685 (Mont. 1989).

10. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215-16 (Ky. 1989).

11. Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 498-99 (Tex. 1991).

12. *Rose*, 790 S.W.2d at 219; *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 690; *Kirby*, 804 S.W.2d at 496-97.

13. *Rose*, 790 S.W.2d at 190-96; *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 688-90; *Kirby*, 804 S.W.2d at 495-98.

14. *See, e.g.*, *Rose*, 790 S.W.2d at 198 (discussing the disparity between school districts in poor and affluent neighborhoods).

15. *See, e.g.*, *Kirby*, 804 S.W.2d at 496-97 (stating that inequality will be solved only by diverting more funds to poor school districts).

16. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982).

Part I of this Article evaluates the influence of federal courts' school finance cases on the New York school finance groups' decision to litigate in the New York courts. Particular attention is paid to the holding, rationale, judgment, and legal claims of interest groups in relevant school finance cases decided by the United States District Court and the United States Supreme Court in *San Antonio Independent School District v. Rodriguez*,[17] which effectively closed the federal courts' door to school finance claims.

Part II analyzes the importance of other states' legal precedents in school finance cases as a factor influencing interest groups in New York to challenge the state's public education funding formulas.

Part III discusses in detail the progression of public elementary and secondary school funding formula litigation in New York, beginning with *Levittown*, up to the most recent case, *Campaign for Fiscal Equities, Inc. v. State of New York*.[18] The discussion focuses on the legal arguments raised by various interest group-plaintiffs and traces the development of those arguments to school finance cases in other states. Finally, the conclusion highlights the potential course of school finance reform in New York State.

I. FEDERAL SCHOOL FINANCE CASES

The equity ideas upon which the first public school finance cases relied upon begins in some respects with the decision handed down by the United States Supreme Court in *Brown v. Board of Education*.[19] During the 1950s, "Jim Crow segregation" laws discriminated against African-Americans in places of public accommodation, including public schools.[20] During the early 1950s, a number of African-American students in Delaware, Kansas, South Carolina, and Virginia, through their legal representatives—the National Association for the Advancement of Colored Persons ("NAACP")—filed suit in order to racially integrate public schools using the argument that segregated schools violate the Equal Protection Clause of the United States Constitution.[21] A three-judge panel of the United States District Court denied the relief sought by the plaintiffs, relying on the "separate but equal"

17. 411 U.S. 1, 24-28 (1973).

18. 655 N.E.2d 661, 663-64 (N.Y. 1995) (arguing that the state's public school financing system was unconstitutional).

19. 347 U.S. 483, 496 (1954).

20. *Id.* at 487.

21. *Id.* at 486.

doctrine established in 1896 by the Supreme Court in *Plessy v. Ferguson*.[22]

All four state cases made their way to the United States Supreme Court and were heard together.[23] In delivering the unanimous opinion of the United States Supreme Court, Chief Justice Earl Warren began by recognizing both the importance of public education to society and trial evidence demonstrating inequality in facilities, curricula, and salaries of teachers between African-American schools and white schools.[24] The Court determined that segregation of public schools based upon racial classifications violates the Equal Protection Clause.[25] It is generally understood that *Brown* served as a catalyst for many civil rights cases, including education reform litigation involving school finance in state and federal judiciaries.

In the summer of 1968, Demitro Rodriguez and a group of other Mexican-American parents—whose children attended elementary and secondary schools in the Edgewood Independent School District (an urban school district in San Antonio, Texas)—filed a lawsuit in the United States District Court for the Western District of Texas against the Board of Education, the Commissioner of Education, the Attorney General of Texas, the Bexar County Board of Trustees, and seven local school districts in the San Antonio metropolitan area.[26] At trial, a great deal of evidence was introduced surrounding the Texas system of school finance, the foundation of which was traced back to the late nineteenth century.[27]

The Texas Constitution provides for the establishment of a system of free schools.[28] The constitution was amended in 1883 to empower local school districts to levy *ad valorem* real property taxes with the consent of local taxpayers for the maintenance of the free system of public schools.[29] Locally raised funds were supplemented by revenue from the Available School Fund, a state-run program funded through a state *ad valorem* property tax and other state taxes.[30] The Texas legislature responded in 1947 to growing disparities in the value of assessable property between local dis-

22. 163 U.S. 537, 540 (1896).
23. *Brown*, 347 U.S. at 486-89.
24. *Id.* at 493-94.
25. *Id.* at 495.
26. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4-5 (1973).
27. *Id.* at 6-14.
28. TEX. CONST. art. VII, § 1.
29. *Id.* art. VII, § 3; *Rodriguez*, 411 U.S. at 6-7.
30. *Rodriguez*, 411 U.S. at 7.

tricts.[31] They appointed an eighteen-member committee composed of legislators and educators, to explore alternative systems used in other states and to propose a funding scheme guaranteeing minimum educational services to each child in Texas that would overcome interdistrict disparities in taxable resources.[32] The efforts of the committee resulted in the enactment of the Gilmer-Aikin bills establishing the Texas Minimum Foundations School Program,[33] which was the system challenged by the plaintiffs in *Rodriguez*.[34]

The Texas program provided for local and state contributions to a fund earmarked for teacher salaries, operating expenses, and transportation costs.[35] The State, which supplied funds from its general revenue, financed approximately eighty percent of the program's cost, while the local school districts, acting as a single unit, financed the remaining twenty percent.[36] The latter's share, referred to as the Local Fund Assignment, was apportioned among the school districts under a complex formula designed to reflect the relative local real property taxpaying ability of each district.[37]

The plaintiffs challenged this system on the ground that it violated the Equal Protection Clause of the United States Constitution by discriminating against school children residing in poorer districts, while favoring those residing in more affluent districts.[38] At trial, the petitioners compared their neighborhood, the Edgewood Independent School District (one of the poorest in the San Antonio area), with the Alamo Heights Independent School District (one of the most affluent in that area).[39]

Approximately 22,000 students, of which ninety percent were Mexican-American, were enrolled in twenty-five elementary and secondary schools within Edgewood Independent School District at the time of the trial.[40] The average assessed property value per pupil was $5,960 and the median family income was $4,686.[41] As a result, Edgewood district taxpayers contributed only twenty-six dollars per pupil for the 1967-68 school year.[42]

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31. *Id.* at 9.
32. *Id.*
33. S. 115-117, 1949 Leg., 50th Sess. (Tex. 1949).
34. *Rodriguez*, 411 U.S. at 9.
35. *Id.*
36. *Id.*
37. *Id.* at 10.
38. *Id.* at 69.
39. *Id.*
40. *Id.* at 11-12.
41. *Id.* at 12.
42. *Id.*

On the other hand, approximately 5,000 students, who were primarily white, attended the six elementary and secondary schools within Alamo Heights Independent School District.[43] Only approximately eighteen percent of the student population was of Mexican-American descent.[44] The average assessed property value per pupil at that time exceeded $49,000 and the median family income was approximately $8,001.[45] As a result, the district contributed $333 to the education of each child for the 1967-68 school year, which was $307 more than the Edgewood District.[46]

The plaintiffs relied upon an affidavit submitted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute; Professor Berke is a well-known advocate of school finance reform.[47] His affidavit was based upon a survey of ten percent of the school districts in Texas and it demonstrated: 1) that a positive correlation existed between the wealth of school districts, measured in terms of their assessable real property wealth per pupil, and their levels of education expenditures per pupil; and 2) that a positive correlation existed between the wealth of each district and the personal wealth of its residents.[48]

In December 1971, the United States District Court for the Western District of Texas rendered its judgment in a per curiam opinion using a standard of strict scrutiny to judge the Texas school funding system.[49] The court found that personal wealth represents a suspect classification under the Equal Protection Clause of the United States Constitution, and furthermore, that education is a fundamental right guaranteed by the United States Constitution.[50] Consequently, the court determined, in light of the evidence submitted at trial, that the Texas school finance system operated to the disadvantage of school children residing in poorer districts and interfered with the exercise of the fundamental right to receive an education.[51]

After the court rendered its judgment, the State of Texas appealed to the United States Supreme Court, which issued a writ of

43. *Id.* at 12-13.
44. *Id.*
45. *Id.* at 13.
46. *Id.*
47. *Id.* at 25.
48. *Id.* at 26.
49. *Id.* at 6.
50. *Id.* at 18.
51. *Id.*

certiorari and heard oral arguments on October 12, 1972.[52] It should be noted that the Attorney General and other public officials from a number of other states filed amicus curiae briefs because they feared the prospects of similar lawsuits in their own states, and urged the Supreme Court to reverse the decision of the lower court.[53] Several interest groups—the American Civil Liberties Union ("ACLU"), the NAACP Legal Defense and Education Fund, and the National Education Association—filed amicus curiae briefs urging the Supreme Court to affirm the decision of the district court.[54]

The Supreme Court on March 21, 1973, in an opinion by Justice Lewis Powell, held that it was not a proper case in which to examine a state's laws under standards of strict scrutiny because the plaintiffs had not shown that the Texas system discriminated against any definable class of "poor" people and, thus, was not shown to discriminate against any suspect classification.[55] Additionally, the Court found that the Texas system did not interfere with the exercise of any fundamental right protected by the United States Constitution, because education does not represent such a right and the case involved the issues of local taxation, fiscal planning, education policy, and federalism; issues beyond the Court's proper scope of authority.[56] Consequently, the Court used the less stringent standard of deferential scrutiny in judging whether the Texas school funding system constitutional.[57]

With respect to the assertion that the Texas system discriminated against some "suspect classification," the Supreme Court noted that this case contained "no definitive description of the classifying facts or delineation of the disfavored class."[58] The Supreme Court reasoned that only those whose income falls below the poverty level might constitute a suspect classification.[59] Since the plaintiffs, however, made no effort to demonstrate that the Texas system operated to the peculiar disadvantage of any class fairly definable as indigent or as composed of persons whose incomes were beneath any designated poverty level, the Court could not find the exis-

52. *Id.* at 1.
53. *Id.* at 3.
54. *Id.* at 5.
55. *Id.* at 2.
56. *Id.*
57. *Id.*
58. *Id.* at 19.
59. *Id.* at 19-20.

tence of a suspect class.[60] Furthermore, the plaintiffs failed to demonstrate that a "lack of personal resources had occasioned an absolute deprivation of the desired benefit," i.e., education.[61]

In considering the plaintiffs' fundamental right argument, the Court noted its belief, as previously articulated in its decision in *Brown*, that education represents one of the most important services provided by the various states.[62] The Court added that the importance of a service provided by the various states does not determine whether it represents a fundamental right protected by the United States Constitution, and at no time had the Court recognized education as such a right.[63] Consequently, the Court opined that it could not be said that the Texas system of school finance interfered with the exercise of a "fundamental right" guaranteed by the United States Constitution.[64]

Finally, the Court concluded that the case represented "a direct attack on the [manner] in which Texas [chose] to raise and disburse state and local tax revenues."[65] The Court believed that it was "asked to condemn the State's judgment in conferring on [its] political subdivisions the power to tax local property to supply revenue for local interests."[66] This political question represents an area in which the Court has traditionally deferred to states' legislatures.[67] Therefore, the Supreme Court determined that the *Rodriguez* case did not represent a proper case in which to strictly scrutinize a state's laws.[68]

Hence, the Court utilized the standard of deferential scrutiny in its examination of the constitutionality of the system established under the Texas Minimum Foundations School Program.[69] Under this standard, the Texas system bore a rational relation to two interrelated "legitimate governmental interests": 1) ensure a basic education for every child in Texas; and 2) permit and encourage a large measure of local voter participation in and control over each district's schools.[70] The Supreme Court reversed the decision of

60. *Id.* at 25.
61. *Id.* at 23.
62. *Id.* at 29 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
63. *Id.* at 35.
64. *Id.* at 37.
65. *Id.* at 40.
66. *Id.*
67. *Id.*
68. *Id.* at 44.
69. *See id.* at 41-44 (refusing to apply strict judicial scrutiny because these were matters that the legislature was more familiar with).
70. *Id.* at 49.

the district court and determined the system established under the Texas Minimum Foundations School Program was constitutional.[71]

The *Rodriguez* decision closed the federal courts to school finance challenges based upon the Equal Protection Clause of the United States Constitution and, consequently, shifted the public school finance litigation's emphasis to state government.[72] School finance equity advocates who wished to litigate had to turn their efforts to state courts and use equal protection provisions or education clauses of *state* constitutions.

In stressing the influence of federal school finance litigation on New York cases, Daniel P. Levitt, lead counsel of the Levittown and Reform Education Finance Inequities Today ("REFIT") coalitions in New York's education funding cases, emphasized that the groups studied the progression of the *Rodriguez*, *Serrano*, and *Robinson* cases because they were seen as seminal test cases for school finance litigation.[73] Levitt stated:

> the idea for commencing the Levittown litigation actually began in an advanced seminar on constitutional litigation at Columbia Law School in 1974 whereby the class drafted model pleadings for a school finance case as an academic exercise. The Rodriguez decision had come down a year earlier and we [the class] were well aware of the procedural and doctrinal implications for future school finance litigation.[74]

The Campaign for Fiscal Equities ("CFE") coalition also stressed that their decision to commence a public school finance suit in New York State court was due to the unfavorable (to school finance reformers) decision rendered in *Rodriquez* as well as successful state cases in Montana, Kentucky, and Texas.[75] Jessica Garcia of CFE noted "we view the federal courts as mostly closed to substantive school finance claims, but we include a federal claim

71. *Id.* at 55.

72. UNITED STATES SUPREME COURT EDUCATION CASES 248-59 (Steve McEllistrem ed., 10th ed. 2002). The United States Supreme Court, however, still decides cases affecting public schooling, such as ones involving school prayer and free speech. *E.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001) (discussing whether a denial of the use of school grounds for after school use was a free speech violation); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294-95 (2000) (discussing whether student led prayers prior to football games are a violation of the Establishment Clause).

73. Interview with Daniel P. Levitt, Lead Counsel, Levittown Coalition, in Scarsdale, N.Y. (June 27, 2001) (emphasis added).

74. *Id.*

75. Telephone interview with Jessica Garcia, Outreach Coordinator, Campaign for Fiscal Equity, Inc. (June 25, 2001).

under Title VI to preserve a federal right of appeal in the event of an unfavorable decision by the New York Court of Appeals."[76] Thus, the *Levittown* and *Campaign for Fiscal Equities*[77] litigations in New York have been directly influenced by the Supreme Court decision in *Rodriquez*.

II. DEVELOPMENT OF LEGAL DOCTRINE IN STATE SCHOOL FINANCE LITIGATION

This Part analyzes legal precedents established in key school finance cases in California, New Jersey, Montana, Kentucky, and Texas. These cases/states are chosen because the California and New Jersey litigants were the first to use equity-based legal claims successfully, while the Montana, Kentucky, and Texas litigants were the first to use adequacy-based legal claims successfully.[78] Analysis of these cases is followed by a detailed evaluation of school finance cases in New York.

Legal challenges to public school finance systems have been an active area of state court litigation since 1971, when plaintiffs successfully challenged California's public school funding system in *Serrano v. Priest*.[79] The litigants, a group of parents of school children in the Baldwin Park school district in Los Angeles County, claimed that the state aid portion of the local property tax-based school finance system violated the United States Constitution's Fourteenth Amendment Equal Protection Clause and the California State Constitution's provision requiring that "all laws of a general nature have uniform operation."[80] The parents submitted evidence demonstrating that, despite paying a tax rate less than one-half of that of Baldwin Park, Beverly Hills residents were able to spend twice as many dollars per student as were the residents of Baldwin Park and, consequently, Beverly Hills schools provided a superior education.[81]

The California Supreme Court held that education is a fundamental right[82] and that children residing in California's poorer districts represented a "suspect" class under the Equal Protection Clause.[83] The court agreed with the plaintiffs' position by conclud-

76. *Id.*
77. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995).
78. Telephone interview with Jessica Garcia, *supra* note 75.
79. Serrano v. Priest, 487 P.2d 1241, 1266 (Cal. 1971).
80. CAL. CONST. art. IV, § 16.
81. *Serrano*, 487 P.2d at 1248.
82. *Id.* at 1258.
83. *Id.* at 1250-52.

ing that the State's reliance on local property taxes to fund public education produced significant per-pupil expenditure disparities between school districts and resulted in real property wealth as the primary determinant of the quality of a child's education.[84] Consequently, the court applied a standard of "strict judicial scrutiny" requiring the state to demonstrate that the funding system furthered a compelling governmental interest; because the court found no such interest, however, it declared the California school funding system unconstitutional.[85]

School finance reform advocates in other states understandably were optimistic about the possibility of achieving funding policy changes through equity-based litigation after the *Serrano* decision, and filed at least thirty similar equal protection based claims against public education funding systems in various state trial courts in the subsequent eighteen months.[86] The *Serrano* plaintiffs' success also fueled the attempt by reformers to use the United States Supreme Court to challenge the Texas public school funding system in the *Rodriguez* case.

The highest courts in most states have heard and decided an important school finance case since the *Serrano* decision, including *Robinson v. Cahill*[87] in New Jersey, decided approximately two weeks after *Rodriguez* in 1971.[88] The cities of Jersey City, Patterson, Plainfield, and East Orange challenged the constitutionality of the state's school funding system, which permitted wide variations in per-pupil expenditures from district to district.[89]

The *Robinson* plaintiffs alleged that wealth-based disparities deprived city students of a "thorough and efficient" education in violation of the New Jersey Constitution that required the state legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eigh-

84. *Id.* at 1263.

85. *Id.*

86. William Evans et al., *Schoolhouses, Courthouses, and Statehouses after* Serrano, 16 J. POL'Y ANALYSIS & MGMT. 10, 11 (1997).

87. 303 A.2d 273, 295-98 (N.J. 1973) (holding that New Jersey's existing system of financing schools was unconstitutional).

88. Evans et al., *supra* note 86, at 11; Douglas Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC. REV. 176, 176-77 (1998). By 1999, thirty-six state high courts have rendered a decision in a school finance case and at least forty-three states have rendered some decision in the lower courts. Evans et al., *supra* note 86, at 11; Reed, *supra*, at 176-77.

89. *Robinson*, 303 A.2d at 276.

teen."[90] The New Jersey Supreme Court ruled that the state funding system was unconstitutional.[91] It interpreted the wide disparities in per-pupil expenditures as violating the state constitutional based-requirement that all students be provided equal educational opportunity, which the court viewed as critical to the effective preparation of children for citizenship and for the workforce.[92] The *Robinson* decision restored equity proponents' optimism that state court litigation could mandate public school finance reform.[93]

This renewed optimism was also apparent in New York State when the Levittown School District and twenty-six other school districts spending less than the state average on public education challenged the state funding system as unconstitutional.[94] The *Levittown* plaintiffs adopted the arguments of the *Serrano* litigants, claiming that the New York State system impermissibly allowed school expenditures to vary with property wealth, which, in turn, affected the educational opportunity available to students.[95] Even though the New York Court of Appeals rejected the plaintiffs' equity arguments, reform advocates continued to use the New York courts to challenge the state funding system.[96]

The general state trend in school funding litigation after *Serrano* and *Robinson* and prior to 1989 primarily focused on the use of state constitutional guarantees of equality to challenge school funding practices.[97] Plaintiffs mostly used equity-based arguments by claiming that state financing systems, relying heavily upon revenues from local property taxes, discriminated against students in low-wealth property districts because of the relatively lower values of taxable property per student.[98] State courts, however, consistently required a clear showing by plaintiffs that either a use of wealth classifications for the distribution of state educational funds

90. *Id.* at 285; *see* N.J. CONST. art. VIII, § 4.

91. *Robinson*, 303 A.2d at 295.

92. *Id.* at 294 (quoting Landis v. Ashworth, 31 A. 1017 (N.J. 1895)).

93. A comprehensive assessment of the *Robinson* case and its impact is provided by RICHARD LEHNE, THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM 165-73 (1978).

94. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 361-63 (N.Y. 1982).

95. *Id.* at 361-62.

96. *Id.* at 366.

97. William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222-32 (1990).

98. *Id.*; *see* Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 572-77 (1998).

automatically was discriminatory and, therefore, more deserving of heightened judicially scrutiny, or that the finance system in question was not reasonably related to a legitimate state function.[99] The state court equity-based cases after *Robinson* had mixed results for plaintiffs because of the substantial evidentiary burden of proving government sponsored educational discrimination and the difficulty in establishing a precise standard defining legal equity.

A new trend in state court school finance litigation emerged after 1989 and was led by important state court decisions in Montana, Kentucky, and Texas.[100] The Montana State Supreme Court, in *Helena Elementary School District No. 1 v. State of Montana*, adjudicated a class-action lawsuit challenging the constitutionality of the Montana system of school finance.[101] During the 1985-88 school year, Montana used a foundation system to fund local schools whereby the State provided funds for basic operations.[102] Most local school districts, however, had budgets that exceeded the funds provided under the state foundation system and thus, were forced to generate supplemental revenue through local real property taxation.[103] Since many property-poor local school districts were unable to generate a sufficient amount of supplemental revenue, they allegedly were unable to provide their students with an adequate education mandated by the Montana Constitution.[104]

The Montana Supreme Court, on February 1, 1989, relying upon the Education Clause of the Montana Constitution, delivered its unanimous opinion that "equality of educational opportunity is guaranteed to each person of the state."[105] The court subsequently ruled that the State's foundation system failed to provide sufficient funds to achieve even a minimal level of quality, and that it had failed to provide a system of public education where each student could enjoy the equal educational opportunity guaranteed under the Education Clause of the Montana Constitution.[106]

The Kentucky Supreme Court, in *Rose v. Council For Better Education Inc.*, heard a similar class action lawsuit challenging the

99. *Id.* at 574-76.

100. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215-16 (Ky. 1989); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 685 (Mont. 1989); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 498-99 (Tex. 1991).

101. *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 685.

102. *Id.* at 686.

103. *Id.*

104. *Id.* at 687-89.

105. MONT. CONST. art. X, § 1(1).

106. *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 690.

constitutionality of the school finance system that used a combination of state funds, federal funds, and district revenue generated through local real property taxation to satisfy the mandate of the Kentucky Constitution.[107] On June 8, 1989, the Kentucky Supreme Court held that all Kentucky school children have the right to an adequate education under the Kentucky Constitution.[108] The court found that Kentucky's school finance system violated the state constitutional right of children residing within many property-poor local school districts because they were not receiving an education of adequate quality, especially compared to the education provided by wealthier districts.[109]

The Texas Supreme Court, in *Edgewood Independent School District v. Kirby*, also heard a similar class action lawsuit.[110] By the mid-1980s, there existed an even larger real property wealth gap between certain districts than during the *Rodriguez* litigation.[111] On October 2, 1989, the Supreme Court of Texas ruled that the Education Clause of the Texas Constitution mandates that the Texas State Legislature provide an "efficient" system of free public schools and that the legislature had failed to meet this obligation.[112]

These state cases are important because the plaintiffs successfully raised questions as to whether the respective state was "adequately" fulfilling its obligation under the education provisions of its constitution, rather than using equality arguments as the plaintiffs did in the *Serrano* and *Robinson* cases.[113] This adequacy-based argument focuses on the quality of education, in contrast to the equality of funding, provided to children in poor districts and can be used to demonstrate that inadequate educational services violate a state's constitutional obligation to provide for a basic or sound education to its citizens.[114] It also incorporates an attack on state funding systems relying heavily upon local property tax-based

107. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189 (Ky. 1989). The constitutional mandate was that the Kentucky General Assembly shall "provide an efficient system of common schools throughout the state." *Id.*

108. *Id.* at 206, 212.

109. *Id.* at 215.

110. Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 493 (Tex. 1991).

111. *Compare id.* at 496, *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 74-75 (1973).

112. TEX. CONST. art. VII, § 1; *Kirby*, 804 S.W.2d at 498.

113. *Rose*, 790 S.W.2d at 215-16; Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 685-86 (Mont. 1989); *Kirby*, 804 S.W.2d at 498-99.

114. *Rose*, 790 S.W.2d at 215-16; *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 690; *Kirby*, 804 S.W.2d at 498-99.

financing primarily because plaintiffs have been able to establish that states do not provide poor districts with proper levels of funding to achieve an adequate level or quality of education.[115] In a sense, the adequacy argument focuses on the outcomes of allegedly inequitable funding of education as opposed to exclusively arguing that the funding, per se, is inequitable.[116] The adequacy argument also avoids plaintiff groups' reliance on the federal equal protection doctrine, avoiding the difficulty and courts' apparent reluctance to precisely define equity.[117]

Most state court litigation throughout the 1990s has been shifting away from equity-based legal doctrine to an adequacy-based legal doctrine because of the plaintiffs' successes in Kentucky, Montana, and Texas, and the ostensibly more well-received legal claims. Plaintiffs launched a broader attack on a variety of educational practices, including funding issues, with a higher degree of success.[118] Post-*Levittown* school finance litigation by reform groups in New York State has followed this trend of moving away from the direct use of equity arguments towards the use of more promising adequacy arguments.

III. NEW YORK SCHOOL FINANCE CASES

Different interest group coalitions advocating greater school finance equity since 1974 initiated legal challenges to New York State's school funding formula in the state courts. The involved interest groups are the Levittown Group, REFIT, and the Campaign for Fiscal Equity.

A. *Board of Education, Levittown Union Free School District v. Nyquist*

A coalition of twenty-seven local school districts throughout the state, led by the Levittown district, filed a cause of action in New York State Supreme Court, Nassau County, in 1974, and argued significant differentials in district per pupil property wealth resulted in unacceptable differences in per pupil expenditures, thereby violating the Equal Protection Clause and Education Arti-

115. *Rose*, 790 S.W.2d at 228-29; *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 688-89; *Kirby*, 804 S.W.2d at 497-98.

116. *Rose*, 790 S.W.2d at 196-99; *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 687-89; *Kirby*, 804 S.W.2d at 495-96.

117. *E.g.*, *Rose*, 790 S.W.2d at 201; *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 685.

118. Peter Enrich, *Leaving Equality Finance Reform*, 48 VAND. L. REV. 101, 104-15 (1995).

cle of the New York State Constitution.[119] In particular, the school districts claimed that the New York school finance system was unconstitutional because the system discriminated against students in low real property-wealth districts by making the allocation of educational resources largely a function of the local real property wealth of the school districts.[120] The plaintiffs stressed the randomness of local property wealth distribution as the primary factor determining allocation of the state's public education funds.[121]

Prior to the commencement of the trial, local boards of education, resident taxpayers, and students in New York City, Buffalo, Rochester, and Syracuse, together with a host of local parent-teacher associations in the City of New York, joined the lawsuit.[122] Without objection by any of the original parties, they joined as intervenor-plaintiffs on the grounds that the issues raised by the original plaintiffs did not address the unique problems faced by urban school systems.[123] The intervenor-plaintiffs, however, relied generally on the same legal basis as the original plaintiffs.[124]

At the time of trial, the New York school finance system consisted of a combination of state aid, federal funds, and local revenue generated by local real property taxation.[125] The New York State Legislature provided each local school district with a uniform, minimum per-pupil grant purportedly to ensure that a basic education was provided to every student attending a public school within the State.[126] This grant amounted to $1,885 per pupil during the 1974-75 school year.[127]

A key piece of evidence submitted at trial by the original plaintiffs was a detailed report prepared by two expert witnesses, Joel S. Berke, a school finance expert whose affidavit comprised the heart of the plaintiffs' case in *Rodriguez*, and Jay H. Moskowitz, who used a large volume of official New York State education finance data.[128] Berke and Moskowitz first demonstrated the existence of a substantial disparity among New York's 708 local school districts

119. Bd. of Educ. v. Nyquist, 408 N.Y.S.2d 606, 609 (Sup. Ct. 1978).
120. *Id.* at 610.
121. *Id.*
122. *Id.* at 608.
123. *Id.* at 619-20.
124. *Id.* at 608.
125. *Id.* at 614.
126. *Id.* at 613.
127. *Id.* at 615.
128. JOEL S. BERKE ET AL., POLITICIANS, JUDGES, AND CITY SCHOOLS: REFORMING SCHOOL FINANCE IN NEW YORK 32-33 (1984).

in the distribution of taxable real property.[129] There existed more than $412,000 worth of taxable real property per student in the richest district.[130] In contrast, there existed less than $9,000 worth of real taxable property per student in the poorest district.[131] Berke and Moskowitz also found the variation in taxable wealth per student during the year 1974-75 ranged from more than $86,000 to less than $21,000 (a ratio of approximately four-to-one) when considering only the median eighty percent of all districts above the ten percent and below the ninety percent per pupils pending.[132]

Other evidence in Berke and Moskowitz's report demonstrated a very strong correlation between the assessed value of the real property contained within each local school district and the amount of education funds expended per student by each district.[133] While the highest spending local school district in New York raised $4,200 through local real property taxation, the lowest spending district raised less than $1,000 per student during the 1974-75 school year.[134]

Moreover, Berke and Moskowitz established that the real property wealth of each local school district was linked directly to the per-pupil education expenditures of each district.[135] In other words, the wealthier districts exhibited greater per-pupil education expenditures, while the poorer districts exhibited smaller per-pupil education expenditures. Berke and Moskowitz contended that this correlation was "direct, positive, and significant."[136] They stopped short, however, of arguing that interdistrict disparities in property value caused or brought about interdistrict disparities in per-pupil education expenditures.[137]

Finally, the report concluded that the interdistrict disparities in per-pupil education expenditures had a "regular, direct, and discriminatory impact upon the educational opportunities afforded to the various public school children" within the State of New York.[138] While those children residing in property-rich local school districts received an education of a comparatively higher quality,

129. *Id.* at 32.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 32-33.
134. *Id.* at 33.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

those residing in property-poor local school districts received an education of a comparatively lower quality.[139] Berke and Moskowitz found, for instance, a strong positive correlation between a local school district's per-pupil education expenditures and its ability to attract teachers and professional staff members with superior qualifications.[140]

The remainder of the original plaintiffs' case consisted of lengthy testimony given by various administrators, teachers, parents, and students from many of the twenty-seven local school districts that filed the lawsuit.[141] The purpose of such testimony, according to the lead counsel, was to put a "human face" on the statistics reported by Berke and Moskowitz.[142] The plaintiffs also offered testimony by the superintendents of a number of property-rich local school districts, such as Great Neck and Scarsdale, in order to demonstrate the educational benefits associated with greater per pupil expenditures.[143] Finally, the plaintiffs offered a number of plans to eliminate the inequities existing within the system, that could be exacted by the state legislature.[144]

Therefore, according to the plaintiffs, because property-poor local school districts were less able to generate local revenue through local real property taxation than were property-rich local school districts, the education of students residing in property-poor districts was not equivalent to that of students residing in property-rich districts.[145] This inequality was in violation of the Equal Protection Clauses of the New York Constitution and the United States Constitution, as well as the Education Article of the New York Constitution.[146]

Intervenor-plaintiffs representing four big city school districts—Buffalo, New York, Rochester, and Syracuse—underscored the special concerns of large urban districts.[147] They argued that citizens' greater demands for increased municipal services prevented the cities from funding education more fully, and that a school finance system that fails to compensate for this municipal overbur-

139. *Id.* at 33-35.
140. *Id.* at 33-34.
141. *Id.* at 35.
142. Interview with Daniel P. Levitt, *supra* note 73.
143. BERKE ET AL., *supra* note 128, at 35.
144. *Id.* at 38-39.
145. *Id.* at 33-35.
146. *Id.* at 39-41.
147. *Id.* at 35-41.

den was unequal and, therefore, unconstitutional.[148] The cities' central position was that the state aid formula overstated the ability of urban districts to support education from local real property tax revenues because the state ignored the differences between large urban districts and non-urban ones in fiscal capacity, educational needs, and school operating costs.[149]

The intervenor-plaintiffs presented four overburdens unique to large urban districts in New York that allegedly constrained the ability of such districts to finance public schools:

> 1. The Municipal Services Overburden
>
> Due to the great needs of urban populations for police, fire, sanitation, and welfare services, which impose a massive burden on the fiscal resources of major cities, urban school districts are unable to devote a high percentage of their revenue towards education. These service requirements are necessary given the nature of large cities and do not simply represent the "tastes" of their residents.
>
> 2. The Cost Overburden
>
> Due to higher teacher salaries and higher costs of operation, the costs of education are unavoidably higher in large cities than in other non-urban districts. The urban tax dollar, therefore, buys fewer educational services than does the suburban tax dollar.
>
> 3. The Absenteeism Overburden
>
> The formula utilized by the State in measuring fiscal capacity and distributing education funds counts students by attendance instead of enrollment. This system penalizes urban school districts due to the greater rates of absenteeism that typically exist within such districts. The effect of this system is to reduce the amount of aid received by urban school districts at the same time that greater absenteeism raises remedial services costs.
>
> 4. The Education Overburden
>
> Despite the higher concentration within urban school districts of students with special needs, such as handicapped and non-English-speaking students, who are far more expensive to educate than typical students, urban school districts receive lower per-pupil aid to meet these needs than do other local school districts.[150]

148. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 362 (N.Y. 1982); BERKE ET AL., *supra* note 128, at 39.

149. BERKE ET AL., *supra* note 128, at 38-39.

150. *Id.* at 38-39.

In essence, the cities contended that the state aid system was discriminatory because it did not give any consideration to the unique overburdens faced by cities.[151]

In response, the State attempted to demonstrate the constitutionality of the New York school finance system despite its acknowledged imperfections.[152] First, the State argued that the education aid formulas were an inappropriate subject for judicial consideration because educational funding must be balanced against the State's many other needs and interests, such as health and public protection.[153] The State contended that such balancing is an appropriate subject only for legislative and executive decisions.[154]

Moreover, the State argued that it had met its constitutional responsibility by providing public schools with adequate levels of state aid, including more than three billion dollars during the 1974-75 school year.[155] The State argued that no specific level of achievement is guaranteed to any student under the Education Article of the New York State Constitution.[156] The Education Article guarantees only a basic minimum standard for education, a standard that New York had met under any reasonable financial measure.[157] At the time, the $1,885 foundation guarantee level was approximately equal to the average per-pupil expenditure for all fifty states within the United States.[158]

The State also argued the school finance system had reduced significantly the disparities in local real property tax resources among local school districts.[159] The system functioned to provide a greater amount of aid to poorer districts and to close the gap between the per-pupil education expenditures of districts at the tenth percentile of wealth to about one-half that of the districts at the ninetieth percentile of wealth.[160]

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151. *Id.* at 38-41.
152. *Id.* at 41-42.
153. *Id.* at 41.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. Bd. of Educ. v. Nyquist, 408 N.Y.S.2d 606, 616-17 (Sup. Ct. 1978); *see* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE DIGEST OF EDUCATION STATISTICS 1996/TABLE 166: TOTAL AND CURRENT EXPENDITURE PER PUPIL IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS: 1919-20 TO 1995-96 (1996), *available at* http://nces.ed.gov/pubs/d96/D96T166.html (last visited May 15, 2003).
159. BERKE ET AL., *supra* note 128, at 41-42.
160. *Id.* at 42.

Finally, the State relied upon the testimony of a number of state legislators and school superintendents to demonstrate a rational basis for the maintenance and operation of the New York school finance system.[161] The State argued that the system sought to preserve local control of education while providing a minimum level of state educational funding.[162]

On June 23, 1978, presiding New York State Supreme Court Justice, L. Kingsley Smith, delivered his decision.[163] Using the rational means test, Justice Smith found that the State failed to demonstrate a compelling governmental interest in maintaining the New York school finance system and that the original plaintiffs had established a violation under both the Equal Protection Clause and the Education Article of the New York Constitution.[164] Justice Smith, moreover, determined that the intervenor-plaintiffs, representing the four large cities outside of New York City, had established a violation by the state officers under the Equal Protection Clause of the United States Constitution.[165] The judge placed great weight on the compelling nature of the claimants' evidence and the critical importance of providing education to New York's children.[166]

Following the trial court's decision, the State appealed to the Appellate Division of the New York Supreme Court, which allowed the State the opportunity to improve the factual record on which the New York Court of Appeals would eventually decide the case.[167] The Appellate Division reasoned that because the original trial had taken place over the course of nearly four years, a number of subsequent hearings and stipulation submissions were required in order to ensure the record accurately reflected the situation on appeal, especially since a number of reforms had been implemented through legislation.[168]

On October 26, 1981, the Appellate Division handed down its unanimous decision modifying the trial court's judgment.[169] The Appellate Division refused to utilize the standard of strict scrutiny

161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 48.
165. Bd. of Educ. v. Nyquist, 408 N.Y.S.2d 606, 642 (Sup. Ct. 1978).
166. *Id.* at 612-16.
167. BERKE ET AL., *supra* note 128, at 42. It is important to note that the Appellate Division is a finder of fact as well as of law, which allowed the State to add to the factual record.
168. *Id.* at 42-43.
169. *Id.* at 43.

against the State, and employed the less stringent intermediate scrutiny standard in determining the validity of the New York system of school finance.[170] The court found the original plaintiffs had, despite the reforms enacted during the interim, established violations under both the Equal Protection Clause and the Education Article of the New York Constitution.[171] The court, however, determined the intervenor-plaintiffs had failed to establish a violation under the Equal Protection Clause of the United States Constitution.[172] Subsequently, the State and the intervenor-plaintiffs appealed to the New York Court of Appeals.[173]

Attorney General Robert Abrams argued the case for the State and Daniel P. Levitt, Edward H. Rosenthal, and Miriam R. Best argued the case for the original plaintiffs.[174] The Public Education Association, the Educational Priorities Panel, and the New York Civil Liberties Union filed amicus curiae briefs in support of the original plaintiffs' claim with the Court of Appeals.[175] The Council of Churches for the City of New York, the NAACP Legal Defense and Educational Fund, and the New York Metropolitan Council of the American Jewish Congress also filed a joint-brief.[176] A joint amicus brief, supporting the State's contentions, was also filed on behalf of eighty-five suburban local school districts and the New York State Senate majority leader.[177]

Judge Hugh R. Jones delivered the opinion of the Court of Appeals on June 23, 1982 and noted, "No claim is advanced in this case . . . by either the original plaintiffs or the intervenors that the educational facilities or services provided in the school districts that they represent fall below the statewide minimum standard of educational quality and quantity fixed by the Board of Regents."[178] The lack of such a claim, according to the court, was the fatal flaw in the plaintiffs' case.[179]

Relative to the claims advanced by the original plaintiffs and intervenor-plaintiffs, the court first addressed the argument that the New York school finance system violated the Equal Protection

170. *Id.* at 47.
171. *Id.* at 48.
172. *Id.*
173. *Id.* at 43.
174. Bd. of Educ. v. Nyquist, 408 N.Y.S.2d 606, 645 (Sup. Ct. 1978).
175. BERKE ET AL., *supra* note 128, at 43.
176. *Id.*
177. *Id.*
178. *Nyquist*, 408 N.Y.S.2d at 647-48; BERKE ET AL., *supra* note 128, at 47-48.
179. BERKE ET AL., *supra* note 128, at 48.

Clause of the United States Constitution.[180] Judge Jones noted that the United States Supreme Court in *Rodriguez* had ruled that in adjudicating such a claim the least stringent judicial standard of deferential scrutiny should be used in assessing the legality of any state's school funding system.[181] The New York Court of Appeals determined that New York did provide a minimum level of funding to each local school district and allowed for the maintenance of local control over education, which constituted a legitimate governmental interest.[182] Thus, applying the standard of deferential scrutiny, the court rejected the notion the New York system of school finance violated the Equal Protection Clause of the United States Constitution.[183]

The Court of Appeals responded, relative to the intervenor-plaintiffs' argument about the municipal overburden problem, that the inequalities existing in large cities are the result of intrinsic demographic, economic, and political factors not attributable to the action or inaction of the New York State Legislature.[184] Judge Jones, quoting the Supreme Court of the State of New York, added:

> "It is beyond the power of the court . . . to determine whether the appropriations of the intervenor-plaintiffs have been wisely directed or reasonable applied, or whether their budgets are fairly divided in terms of priority of need between the competing services, such as police, fire, health, housing and transportation, and it is, equally, beyond the power of this court to determine whether the resources of the intervenor-plaintiffs can otherwise be employed so that their educational needs can be met."[185]

Therefore, the court rejected the claim advanced by the intervenor-plaintiffs with respect to the Equal Protection Clause of the United States Constitution.[186]

The Court of Appeals next addressed the claims of the original plaintiffs and the intervenor-plaintiffs, that the New York school finance system violated the Equal Protection Clause of the New

180. *Id.* at 46.

181. *Id.* at 48.

182. *Id.*

183. *Id.*

184. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 364-66 (N.Y. 1982).

185. *Id.* at 365 (quoting Bd. of Educ. v. Nyquist, 443 N.Y.S.2d 843, 871 (Sup. Ct. 1981)); BERKE ET AL., *supra* note 128, at 49-50.

186. *Nyquist*, 439 N.E.2d at 365-66; BERKE ET AL., *supra* note 128, at 48.

York Constitution.[187] Relying upon the logic utilized by the United States Supreme Court in deciding *Rodriguez,* the New York Court of Appeals again used the less stringent deferential scrutiny standard and reasoned that:

> [t]he circumstances that public education is unquestionably high on the list of priorities of governmental concern and responsibility . . . does not automatically entitle it to classification as a "fundamental constitutional right" triggering a higher standard of judicial review for the purposes of equal protection analysis.[188]

Based on this standard, the court determined that the State had demonstrated a rational basis for the maintenance of a program fulfilling a legitimate governmental interest; thereby, rejecting the claim that the New York system of school finance violated the Equal Protection Clause of the New York State Constitution.[189]

Regarding the claim advanced by the original and intervenor-plaintiffs that the school finance system violated the education article of the New York Constitution, the Court of Appeals ruled that:

> [the] constitutional language . . . makes no reference to any requirement that the education to be made available be equal or substantially equal in every district, [nor does it include] any provision either that districts choosing to provide opportunities beyond those that other districts might elect or be able to offer be foreclosed from doing so, [or any provision] that local control of education, to the extent that a more extensive program were locally desired and provided, be abolished.[190]

Based upon this reasoning, the court concluded that the only requirement placed upon the state legislature under the Education Article is to provide for the maintenance and support of a system of free public schools; a requirement the state legislature clearly met.[191]

The New York Court of Appeals left its doors open for possible future legal challenges by noting that proof of a "gross and glaring inadequacy" in the education system might give the court cause to mandate higher priorities for public funds to education.[192] Additionally, the majority attributed significance to the absence of a claim by plaintiffs that educational services in the state fell below a

187. *Nyquist*, 439 N.E.2d at 365-66; BERKE ET AL., *supra* note 128, at 47.
188. *Nyquist*, 439 N.E.2d at 365-66; BERKE ET AL., *supra* note 128, at 50.
189. *Nyquist*, 439 N.E.2d at 365; BERKE ET AL., *supra* note 128, at 49.
190. *Nyquist*, 439 N.E.2d at 368.
191. BERKE ET AL., *supra* note 128, at 49-52.
192. *Id.* at 48.

minimum standard of quality fixed by the Board of Regents.[193] Although the court rejected plaintiffs' equity-based arguments under the Equal Protection doctrine, it expressly recognized that New York courts legitimately could entertain adequacy-based legal arguments.[194]

B. The 1995 Cases

The New York Court of Appeal's recognition of the state's obligation to provide an adequate education in the 1982 *Levittown* decision, and the successes of school finance litigation in Kentucky, Montana, and Texas in 1989, prompted several additional lawsuits by school finance reformers in New York.[195] The plaintiffs in more recent New York cases differ from the *Levittown* litigants by incorporating and focusing legal arguments around claims the State is failing to meet its burden under the state constitution of providing an adequate level of public elementary and secondary education.[196]

Daniel P. Levitt, lead counsel and litigator for the Levittown and REFIT coalitions, noted that the Reform Educational Financing Inequities Today litigation raised, in essence, many of the same claims made in Levittown.[197] He remarked, "the big difference, however, was that REFIT was making the argument the State public school finance system created a 'gross and glaring inadequacy' between school districts and, therefore, violated the standard announced in *Levittown*."[198]

The Campaign for Fiscal Equities coalition, on the other hand, has been influenced by plaintiffs' successes in Kentucky, Montana, and Texas.[199] Jessica Garcia of CFE stressed that the organization carefully tracks national trends in school finance cases, and that the plaintiffs' successes were "extremely" influential in CFE's decision to commence litigation and in shaping its legal claims.[200] As shown below, the CFE coalition has emphasized many of the adequacy-based arguments found in suits from other states.

193. *Id.*

194. *Id.* at 51.

195. *E.g.*, Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 655 N.E.2d 647, 648 (N.Y. 1995) (stating an equal protection claim and violation of the Education Article of the New York Constitution).

196. *Id.*

197. *Id.*

198. Interview with Daniel P. Levitt, *supra* note 73.

199. Telephone interview with Jessica Garcia, *supra* note 75.

200. *Id.*

In response to several post-*Levittown* lawsuits, the New York Court of Appeals issued three decisions in June 1995 concerning the State's public school finance system: *City of New York v. State of New York*;[201] *Reform Educational Financing Inequities Today (R.E.F.I.T.) v. Cuomo*[202] ("*REFIT*"); and *Campaign for Fiscal Equity, Inc. v. State of New York*.[203] The plaintiffs in *City of New York* were the New York City Mayor, Board of Education, and boards of several city community school districts who sought issuance of an injunction against the State on behalf of the city's school children.[204] The plaintiffs alleged that the State school finance system: 1) denied New York City school children their educational rights guaranteed by the Education Article of the New York Constitution by producing a gross and glaring inadequacy with respect to public education within the city; 2) provided separate and unequal treatment for the public schools within the city in violation of the Equal Protection Clauses of the New York and the United States Constitutions; and 3) disadvantaged New York City schoolchildren who were members of racial and ethic minorities in violation of Title VI of the Civil Rights Act of 1964.[205]

At trial, the State moved for dismissal on the grounds of sovereign immunity, claiming that a state cannot be sued by one of its political subdivisions.[206] The State's motion was granted and the court dismissed the lawsuit without ruling on the substantive merits of the plaintiffs' arguments.[207] The City of New York appealed the decision to the Appellate Division, which affirmed the Supreme Court ruling.[208]

The City of New York subsequently appealed to the New York Court of Appeals and advanced several arguments.[209] First, the City asserted that the *Levittown* decision constitutes a controlling precedent in favor of the City's capacity to sue because the New York Court of Appeals allowed school districts to sue the State.[210] The Court of Appeals, however, responded that *Levittown* does not represent a controlling precedent favoring the City's capacity

201. 655 N.E.2d 649, 654 (1995).
202. 655 N.E.2d at 647.
203. 655 N.E.2d 661 (1995).
204. *City of N.Y.*, 655 N.E.2d at 650.
205. 42 U.S.C. § 2000d (2001); *City of N.Y.*, 655 N.E.2d at 650-51.
206. *See City of N.Y.*, 655 N.E.2d at 649, 651-53 (discussing the court's response to the State's argument that a municipality cannot sue its state).
207. *Id.* at 651.
208. *Id.*
209. *Id.*
210. *Id.* at 652.

to sue the State because the opinion did not address specifically sovereign immunity, as it was not raised by the State as a defense.[211] The Court of Appeals added that, in the absence of express authority to bring the specific action in question, the plaintiff must establish intent on the part of the state legislature to confer such capacity by inference, which the City failed to due in this case.[212]

The City also argued that a municipality's lack of capacity to sue under the doctrine of sovereign immunity applies only to statutory restrictions on a municipality's power and state-mandated expenditures.[213] The Court of Appeals responded that this contention ignored long-established precedent by which the lack of capacity to sue doctrine was extended to a wide range of state actions that have various adverse impacts upon municipal governing bodies and their constituents.[214]

Finally, the City of New York argued it should be allowed to sue the State because of challenged legislation adversely affecting New York City's proprietary interests in the State's funding formulas.[215] The court replied that the City failed to point to any specific fund in which they were entitled to a proprietary interest and sought only a greater portion of the general State funds than the state legislature chose to appropriate for public education.[216]

Judge Levine of the New York Court of Appeals concluded that a state could not be sued by one of its political subdivisions.[217] This general incapacity of a municipality to sue flows from the notion that a state's political subdivisions are created by the state for the convenient administration of the state's governmental policies.[218] As purely creatures or agents of the state, the court continued, a political subdivision may not contest the actions of its creator affecting them in their governmental capacity or on behalf of its inhabitants.[219] Therefore, the Court of Appeals upheld the decisions of the Supreme Court and the Appellate Division, which dismissed the City's action based on the doctrine of sovereign immunity, con-

211. *Id.*
212. *Id.* at 653.
213. *Id.*
214. *Id.*
215. *Id.* at 654.
216. *Id.*
217. *Id.*
218. *Id.* at 651.
219. *Id.* at 651-52.

tending that the plaintiffs failed to establish claims falling within any recognized exceptions to the doctrine.[220]

In *Reform Educational Financing Inequities Today (R.E.F.I.T.) v. Cuomo*, a coalition of taxpayers, parents, students, principals, and superintendents in sixty-one low-wealth suburban school districts throughout the state filed suit in New York State Supreme Court against the State of New York.[221] The plaintiffs specifically alleged that the New York public school finance system violated the Education Article of the New York State Constitution and the Equal Protection Clauses of the New York State and United States Constitutions.[222]

The plaintiffs' primary argument was that the New York State school finance system had changed so drastically since the Court of Appeals delivered its *Levittown* decision that there developed a gross and glaring inadequacy of education funding within certain property-poor local school districts.[223] Levitt, the lead litigator for REFIT, stressed that the driving force behind the commencement of litigation was the "feeling among school superintendents and boards in low-wealth districts that things had gotten much worse than they were when *Levittown* was decided and elected officials in Albany were paralyzed to reform the system."[224]

REFIT contended that the disparity among a number of local school districts within Suffolk County with respect to real property wealth allegedly had grown from approximately 17-1 to approximately 330-1 in the years after the *Levittown* decision.[225] Furthermore, the plaintiffs asserted that the disparity among these local school districts with respect to per pupil education expenditures ranged from approximately $7,000 to approximately $43,000.[226]

The Supreme Court, however, responded that disparities among certain local school districts with respect to per-pupil education expenditures were not solely the result of interdistrict disparities with respect to real property wealth.[227] The court found other factors had contributed to the alleged gross and glaring inadequacy of education funding such as a significant increase in non-English speak-

220. *Id.* at 654.
221. Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 578 N.Y.S.2d 969, 969 (Sup. Ct. 1991).
222. *Id.* at 969-70.
223. *Id.* at 970.
224. Interview with Daniel P. Levitt, *supra* note 73.
225. *Cuomo*, 578 N.Y.S.2d at 971-72.
226. *Id.* at 972.
227. *Id.*

ing students, a proliferation of expensive State mandates, and the disproportionate impact of recently reduced State appropriation on the budgets of property-poor local school districts.[228] The New York State Supreme Court dismissed the lawsuit for failure to state a cause of action because the plaintiffs did not specifically allege that the quality of the education provided to the students residing within property-poor local school districts fell below a minimum standard.[229]

The plaintiffs appealed the decision to the Appellate Division, which affirmed the decision of the trial court and added that the New York school finance system was constitutional.[230] The plaintiffs subsequently appealed to the New York Court of Appeals where Levitt again argued the case for REFIT.[231] The Puerto Rican Legal Defense and Education Fund, the Campaign for Fiscal Equality, Inc., the plaintiffs in the *City of New York* case, the American Civil Liberties Union, and the New York State Association of Small City School Districts filed amicus curiae briefs in support of the plaintiffs.[232]

The New York Court of Appeals echoed the *Levittown* rationale and rejected the plaintiffs' equal protection argument because the court reasoned that the desire to maintain local control of education was a sufficient rational justification for the state school funding system.[233] The court, however, refused to endorse the Appellate Division's determination that the school aid formula was per se constitutional.[234] The Court of Appeals limited its holding to the specifics of the case and directly noted, as it had in the *Levittown* ruling, that evidence of gross and glaring inadequacies in the state's provisions of a sound education to children could support a court declaration of unconstitutionality.[235]

An important aspect of the *REFIT* case, similar to *Levittown*, was the plaintiffs' use, and the Court of Appeal's consideration, of the Education Article of the New York State Constitution which mandates: "the legislature shall provide for the maintenance and

228. *Id.*

229. *Id.* at 976.

230. Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 606 N.Y.S.2d 44, 45 (App. Div. 1993).

231. Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo, 655 N.E.2d 647, 647 (N.Y. 1995).

232. *Id.*

233. *Id.* at 648-49.

234. *Id.* at 649.

235. *Id.* at 648.

support of a system of free common schools, wherein all the children of this state may be educated."[236] The *REFIT* plaintiffs claimed that substantial spending disparities between property-rich and property-poor districts per pupil constituted a violation of the Education Article.[237] The court responded that the claim of extreme spending disparities alone could not satisfy the "gross and glaring inadequacy" standard established in *Levittown*.[238] The Court of Appeals reasoned that although the state constitution's Education Article required the state legislature to provide a state system of free schools and an adequate education to the state's children, the constitution did not expressly mandate equal educational opportunity.[239] Acknowledging the gross spending disparities between school districts in the state, the court opined that such disparities did not establish students in low-wealth and urban districts were receiving less than a "sound basic education" in violation of the New York State Constitution.[240] Consequently, all claims against the State of New York were dismissed in the *REFIT* case.[241]

The *Campaign for Fiscal Equity v. State of New York* was initiated in New York State Supreme Court by a coalition of fourteen of New York City's thirty-two community school districts, individual citizens, various parent advocacy groups, and New York City public school students and their parents, against the State of New York, the New York State Senate Majority Leader, and the Assembly Minority Leader.[242] The plaintiffs alleged that the State school finance system violated the Education Article,[243] the Anti-discrimination Clause and the Equal Protection Clause of the New York Constitution,[244] the Equal Protection Clause of the United States Constitution,[245] and Title VI of the Federal Civil Rights Act of 1964.[246]

At trial, the defendants brought a motion to dismiss the claims contending certain plaintiffs lacked standing to sue and that the plaintiffs' complaint failed to state a cause of action that could be

236. N.Y. CONST. art. XI, § 1.
237. *Cuomo*, 655 N.E.2d at 649.
238. *Id.* at 648-49.
239. *Id.* at 648.
240. *Id.*
241. *Id.* at 649.
242. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 663 (N.Y. 1995).
243. N.Y. CONST. art. XI, § 1.
244. *Id.* art. I, § 11.
245. U.S. CONST. amend. XIV.
246. 42 U.S.C. § 2000d (2001).

adjudicated properly.[247] The Supreme Court granted the defendants' motion in part by dismissing all claims asserted by the local school districts based on sovereign immunity precedent, which prevents any municipal subdivision from suing the state.[248] The court also dismissed the equal protection claims and Title VI claims filed by CFE and the individual parents and students for failure to state a cause of action.[249] The court ruled, however, that the plaintiffs' complaint raised prima facie claims under the Education Article and Anti-Discrimination Clause of the New York Constitution as well as under Title VI's implementing regulations.[250]

The plaintiffs appealed and the Appellate Division modified the order of the Supreme Court by granting the State's motion to dismiss.[251] The Appellate Division ruled that the plaintiffs' argument—that reduced resources have interfered with the opportunity of New York City public school students to receive a minimally adequate education—embodied a theory almost identical to the one advanced and ultimately rejected by the Court of Appeals in *Levittown*.[252] Furthermore, the Appellate Division ruled that Title VI's prohibition against methods of administration that disadvantage racial and ethnic minorities was not violated by the State's education aid to the New York City school system.[253]

The CFE coalition subsequently appealed the Appellate Division decision's regarding claims under the Education Article and the Equal Protection Clause of the New York Constitution, the Equal Protection Clause of the United States Constitution, and Title VI of the Civil Rights Act of 1964 to the New York Court of Appeals.[254] The plaintiffs did not appeal the decision of the Appellate Division with respect to the anti-discrimination clause of the New York Constitution.[255] Michael A. Rebell, lead counsel and Executive Director of the CFE coalition, argued the case for the plaintiffs.[256] The American Civil Liberties Union and the New York State Association of Small City School Districts, filed briefs of amicus curiae in support of the position of the plaintiffs.[257]

247. *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 664.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 663-64.
254. *Id.*
255. *Id.* at 664 n.2.
256. *Id.* at 663.
257. *Id.*

The Court of Appeals first addressed the issue of whether the plaintiffs properly stated a cause of action under the Education Article by claiming that the State's school finance system deprived public school students within New York City of a sound basic education.[258] The Education Article, according to the Court of Appeals, requires the State to offer all of its students the opportunity to receive a sound basic education which; "should 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."[259] The court found that the plaintiffs' complaint relied upon the minimum statewide educational standards established by the Board of Regents and the Commissioner of Education and, therefore, the plaintiffs properly stated a cause of action under the Education Article.[260] The court reinstated the plaintiffs' Education Article claim.[261]

The court, however, could not adjudicate the merits of plaintiffs' arguments because there was no factual record developed by the lower courts, but it did articulate a standard for assessing whether the State has met its constitutional obligation as follows:

> If the physical facilities and pedagogical services and resources made available under the present system are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation . . . The trial court will have to evaluate whether the children in plaintiffs' districts are in fact being 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 . . . In order to succeed in the specific context of this case, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education.[262]

The Court of Appeals addressed the allegations advanced by the plaintiffs that the State school finance system violated the Equal Protection Clauses of the New York and the United States Constitutions.[263] Although the court recognized that the financial circumstances of the school districts might have changed during the course of the case, the court dismissed the allegations because its

258. *Id.* at 664-68.
259. *Id.* at 666.
260. *Id.* at 666-67.
261. *Id.* at 667-68.
262. *Id.* at 666-67.
263. *Id.* at 668-69.

interpretation of the equal protection arguments had not changed since *Levittown*.[264]

Finally, the Court of Appeals dealt with the plaintiffs' claims that the state school finance system violated Title VI of the Civil Rights Act of 1964 and its implementing regulations, which provide that, "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."[265] The court concluded the instant complaint contained no showing of intentional discrimination and, as a result, the plaintiffs' Title VI claim was dismissed.[266]

The implementing regulations, nonetheless, contained within Title VI provide that recipients of federal funding may not utilize methods of administration that disadvantage individuals because of their race, color, or national origin.[267] A successful claim under Title VI's implementing regulations need only demonstrate discriminatory *effect*, as opposed to discriminatory intent, and establish that the challenged practice disadvantages individuals belonging to a racial minority group and that the practice is not adequately justified.[268]

Once a prima facie case is established, the burden of proof shifts to the defendant, who must demonstrate that a legitimate nondiscriminatory basis exists for maintaining the challenged practice.[269] If the defendant is able to meet its burden and shows that the challenged practice is justified or necessary, the plaintiff still has the opportunity to prevail by demonstrating that less discriminatory alternatives exist.[270] Accordingly, the Court of Appeals found such a prima facie case in plaintiffs' allegations and reinstated the plaintiffs' claim that the State school finance system violated the implementing regulations contained within Title VI of the Civil Rights Act.[271]

In reviewing the court's reasoning in school finance cases, it is apparent that the New York Court of Appeals currently refuses to

264. *See id.* (finding that case law requires intentional discrimination to constitute an equal protection violation).
265. 42 U.S.C. § 2000d (2001).
266. *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 669.
267. *Id.*
268. *Id.*
269. *Id.* at 670.
270. *Id.*
271. *Id.* at 670-71.

entertain equity-based claims under equal protection doctrine.[272] It has, however, accepted the validity of adequacy-based challenges to the State's education system and to funding formulas as the arguments relate to achieving a sound basic education mandated by the state constitution's education article.[273]

The plaintiffs' claims were litigated at a trial that commenced on October 12, 1999 in New York State Supreme Court.[274] On January 9, 2001, Judge Leland DeGrasse rendered his opinion declaring the State's school funding system unconstitutional because it deprived New York City school children of a "sound basic education" guaranteed in the state constitution.[275] In particular, Judge DeGrasse held: 1) the State failed to ensure that New York City's public schools received adequate funding to afford its students the "sound basic education" guaranteed by the education article of the New York Constitution; and 2) the State's funding mechanisms had an adverse and disparate impact upon New York City's minority public school students in violation of the implementing regulations of Title VI of the federal Civil Rights Act.[276]

Regarding the plaintiffs' Education Article claim, the court emphasized that differences in spending among school districts do not, standing alone, establish that students in the lower-spending districts receive less than a "sound basic education" in violation of the Education Article.[277] Nonetheless, the "sound basic education" standard mandated by the Education Article of the State Constitution consists of the foundation students need to become productive citizens capable of civic engagement and sustaining gainful employment.[278] Judge DeGrasse also stressed that children are entitled to at least minimally adequate physical facilities and classrooms providing enough light, space, heat, and air to permit children to learn.[279]

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272. *See id.* at 666-67 (discussing adequacy arguments instead of equity arguments in analyzing equal protection arguments).

273. *Id.*

274. Abby Goodnough, *Major Court Challenge on How State Allocates School Funds*, N.Y. TIMES, Oct. 12, 1999, at B1 [hereinafter Goodnough, *Major Court Challenge*].

275. Abby Goodnough, *The Ruling in the Schools: The Overview; State Judge Rules School Aid System is Unfair to City*, N.Y. TIMES, Jan. 11, 2001, at A1 [hereinafter Goodnough, *State Judge Rules*].

276. *See id.* (stating that "the school financing system also violated federal civil rights law because it disproportionately hurt minority students").

277. Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 484 (Sup. Ct. 2001).

278. *Id.* at 485-86.

279. *Id.* at 501.

Applying the "sound basic education" standard to the facts of the case, Judge DeGrasse found: 1) the quality of New York City's public school teachers, as measured by the number of uncertified teachers teaching in New York City public schools, teachers' scores on certification examinations, and the quality of teachers' undergraduate education, in the aggregate, was inadequate;[280] 2) a substantial number of school facilities required major infrastructure repair and many more were plagued by overcrowding, poor wiring, pock-marked plaster and peeling paint, inadequate climate control, and other deficiencies;[281] 3) there was a causal link between New York City's poor school facilities and the performance of students;[282] 4) instruments of learning such as desks, chairs, pencils, and reasonably current textbooks were minimally adequate;[283] and 5) evaluative examinations indicated New York City's schools were not imparting the requisite minimum educational skills are indicative of a sound basic education.[284]

Consequently, Judge DeGrasse held that the State is primarily responsible for the persistence of such educational inadequacies.[285] He also emphasized that the school aid distribution system is unnecessarily complex and opaque and is based on an array of often conflicting formulas and grant categories as understood by only a handful of officers in State government.[286] He found, moreover, that the evidence at trial demonstrated that the formulas do not operate neutrally to allocate school funds, but rather, are manipulated to conform to political budget agreements reached by the Governor, the Speaker of the Assembly, and the Senate Majority Leader.[287] Based on these findings, Judge DeGrasse concluded the State failed to ensure New York City's public schools received adequate funding to afford students the "sound basic education" guaranteed by the Education Article of the New York State Constitution.[288]

Relative to the plaintiffs' Title VI claim, the court agreed that money is a crucial determinant of educational quality, and receipt of less state educational funding per pupil by minority students is

280. *Id.* at 492.
281. *Id.* at 501.
282. *Id.*
283. *Id.* at 491.
284. *Id.* at 491-92.
285. *Id.* at 529.
286. *Id.*
287. *Id.* at 533.
288. *Id.* at 540.

an adverse, disparate impact as contemplated by Title VI regulations.[289] The court found that comparisons of New York City's funding with average school district funding in the rest of the State can be an accurate and legitimate indicator of a disparate impact based on race because seventy-three percent of the State's overall minority student population reside in the City of New York and eighty-four percent of the city's public school children are members of minority groups.[290]

Judge DeGrasse also placed emphasis on the fact that New York City receives less funding per pupil, on average, than other districts in the rest of the State.[291] The court found that from 1994-95 to 1999-2000, New York City consistently received less total state aid than its percentage share of total enrolled students.[292] During those years, New York City had approximately thirty-seven percent of the State's enrolled students, yet received a percentage of total state aid ranging from 33.98 percent to 35.65 percent.[293] Judge DeGrasse concluded that these figures are also clear evidence of disparate impact.[294]

The State advanced several broad justifications for the distribution of public elementary and secondary school aid. First, the State argued that the school funding formula is redistributive in nature and since New York City is a relatively affluent school district it should not expect a percentage of state funding to exactly match the percentage of school children in the State attending New York City schools.[295] Second, the State asserted that a funding formula based upon each district's average attendance, rather than enrollment, is related to the State's legitimate objectives of encouraging districts to maintain high attendance while discouraging inflation of enrollment figures.[296] Next, the State contended that distributing transportation and building aid on a reimbursement basis is fiscally prudent since school districts must first demonstrate a local financial commitment of facility construction.[297] Finally, New York asserted that the funding formulas take student need into account.[298]

289. *Id.* at 541.
290. *Id.* at 542.
291. *See id.* at 542, 543 n.46 (discussing New York City's per pupil spending).
292. *Id.* at 543.
293. *Id.*
294. *Id.*
295. *Id.* at 547.
296. *Id.*
297. *Id.*
298. *Id.*

In response to the State's assertions, the court found redistribution, when properly implemented, can be a valid goal for state school aid, but the State's measure of wealth is inaccurate because it does not account for differences in regional costs and, therefore, the measure does not further a substantial legitimate purpose.[299] Additionally, Judge DeGrasse held that the basing of school funding on districts' average attendance is unnecessarily punitive in directing state aid away from districts with large numbers of at-risk students.[300] The court reasoned that the State neither quantified the effects of building and transportation aid, nor established how the system of reimbursement is related to classroom education.[301] Consequently, the court found unpersuasive the State's justifications for the adverse disparate racial impact caused by the distribution of state aid, and concluded that the plaintiffs established a violation of the relevant Title VI implementing regulations.[302]

On the appropriate remedy issue, Judge DeGrasse ruled that the New York State Legislature, rather than the courts, would be given the first opportunity to reform public school financing system which failed to provide the opportunity for a sound basic education to New York City public school students and had an unjustified disparate impact on minority students in violation of federal law.[303] The court reasoned that the New York State Legislature is in a better position to gauge the effects of reform on the state as a whole, and is better positioned to work with the governor in reforming the current educational system.[304]

In response to Judge DeGrasse's decision, Governor George E. Pataki announced, one week after the ruling, his intention to direct the State Attorney General to appeal the decision to the Appellate Division of the New York State Supreme Court.[305] The Governor's announcement was made despite his calls for revamping the State's school funding system in his January 3, 2001, State of the State address.[306] The State filed its appellate brief with the Su-

299. *Id.* at 548.

300. *Id.* at 548-49.

301. *Id.* at 549.

302. *Id.*

303. *Id.* at 549-50.

304. *Id.*

305. Richard Perez-Pena & Abby Goodnough, *Pataki to Appeal Decision by Judge on Aid*, N.Y. TIMES, Jan. 17, 2001, at A1.

306. *Id.*; *see* Abby Goodnough, *New Formula for Schools: More Money and Leeway*, N.Y. TIMES, Jan. 5, 2001, at B1 [hereinafter Goodnough, *New Formula*].

preme Court, Appellate Division on August 13, 2001, and the State and plaintiffs presented oral arguments on October 25, 2001.[307]

On appeal, the State argued that the plaintiffs failed to meet their burden of demonstrating that: 1) students in urban school districts are not receiving a "sound basic education"; and 2) the education funding formula utilized by the State is the cause of this problem.[308] First, addressing the issue whether New York City students are receiving a "sound basic education," the State argued that the "State of New York ranks third in the nation in education spending, and that the New York City Board of Education [ ] has more money per pupil than nearly any other urban school district in the entire nation."[309] Moreover, the State argued that New York City schools receive less funding overall than schools in several other districts throughout the State because the city does not contribute its fair share to its own public schools and because some of the Board of Education's resources are wasted through mismanagement and fraud.[310] The State, therefore, cannot be held accountable for such shortcomings.

Additionally, while the State conceded that the plaintiffs demonstrated several pressing concerns facing schools in New York City, the education available in the city's schools, nonetheless, exceeds the constitutional standard of a "sound basic education."[311] The State noted that the city's schools have one of the lowest pupil-teacher ratios among large school districts throughout the nation, and according to the city's own evaluation system, nearly all of its teachers are rated as "satisfactory" or better.[312] The city's educational materials and supplies rank at or near the "exemplary" level and "[s]chool facilities are in fair condition or better, and are sufficient to permit children to learn, as required by the Education Article."[313]

The State next relied on the performance of the New York City students themselves pointing to statistics showing that "[ninety-two] percent of the City's eleventh-graders demonstrate graduation

307. Brief for Defendants-Appellants filed by Eliot Spitzer, Attorney General of the State of New York at 1, Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475 (Sup. Ct. 2001) (No. 93-111070); Telephone interview with Jessica Garcia, *supra* note 75.

308. Brief for Defendants-Appellant's at 2, 6, *Campaign for Fiscal Equity, Inc.* (No. 93-111070).

309. *Id.* at 1.

310. *Id.*

311. *Id.* at 3.

312. *Id.*

313. *Id.*

competency in basic skills" and that New York City students "score near or above the national average in tests [that compare] their achievement in reading and math to other students across the United States."[314] The State thus characterizes the New York City school system, despite its many documented flaws, as one of the best large urban public school systems in the nation.[315]

The State asserted that the trial court simply ignored such factors.[316] "Instead, the trial court measured the constitutional adequacy of New York City's schools, [especially] the quality of its teachers, against the resources and performance of wealthy" suburban schools in neighboring districts, despite the fact that the Court of Appeals has twice held, in both *Levittown* and *REFIT*, that this type of comparative evidence has no relevance to an Education Article claim.[317]

In addressing the question of whether any failure to provide a constitutionally adequate education was caused by the State's education funding mechanism, the State argued that the trial court ignored three key factors.[318] The court failed to adequately examine: 1) whether the total funding available to New York City's schools was "sufficient to provide a sound basic education, (even if it was not actually being used to that effect)"; 2) "whether available resources are squandered due to local mismanagement and corruption"; or 3) "whether any shortfall in funding is attributable to the City's failure to make an adequate local contribution."[319] Instead, the trial court held that such factors were not germane to the inquiry because the responsibility to provide a constitutionally adequate education rests squarely with the State.[320]

The State contended, however, that had the trial court adequately examined these factors, the answer to the question of whether any failure to provide a constitutionally adequate education was caused by the State's education funding mechanism would have been an emphatic "no."[321] The State points to statistics showing that "New York City spends more than almost all other urban school districts across the country—$9,500 per student (based on Fiscal Year 2000 data)"—and that "[many] schools in New York

314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.* at 3-4.
319. *Id.*
320. *Id.* at 4.
321. *Id.*

City, including those in Community School District [ ] 2 and local Catholic schools, provide excellent education with significantly less funding."[322] Moreover, even if these resources are not adequate, the blame for such insufficiency rests squarely with New York City and its Board of Education and not with the State's funding formula.[323]

Finally, the State noted that, since the present "lawsuit was commenced, the State Legislature has dramatically increased education funding for New York City on its own accord."[324] On the other hand, New York City has "dramatically decreased the proportion of the cost of public education [ ] that it absorbs."[325] "At the same time, the [New York City Board of Education] has wasted vast sums of money through mismanagement and corruption."[326]

In its reply, CFE disputed the State's depiction of the quality of the education available to New York City school children.[327] In order to illustrate the State's failure to provide a constitutionally adequate education, CFE examined the group of New York City students scheduled to graduate high school in 1999.[328] CFE contended that only "[sixty percent] of the Class of 1999 who entered the ninth grade would receive a high school diploma."[329] Of those receiving diplomas, many will take as many as seven years to do so and most will find that they are unprepared for the demands of citizenship or a productive workplace.[330]

CFE next examined the conditions under which the members of the Class of 1999 were forced to learn. "In 1988, when the Class of 1999 was in second grade, the system was short 100,000 seats."[331] The state legislature, in fact, declared that New York City's schools "were in such 'deplorable physical condition' that they were 'a serious impediment to learning.'"[332] "In 1995, when the Class of 1999 was in ninth grade, a blue-ribbon commission [declared that the New York City school system was in] a state of 'imminent calamity'

322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.* at 4-5.
326. *Id.* at 5.
327. Brief for Plaintiffs-Respondents at 1, Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475 (Sup. Ct. 2001) (No. 93-111070).
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at 2.
332. *Id.*

and described overcrowded schools that lacked adequate heat, light and air."[333]

According to the CFE, unprepared and unqualified teachers taught the Class of 1999.[334] "When the Class of 1999 was in elementary school, at least one in ten teachers lacked the minimum credentials required for certification by the State [and] one of four elementary teachers had failed the basic teacher competency exam at least once."[335] "As [these students] moved [up] through junior and senior high school, [they were] taught by at least 1,500 uncertified math and science teachers, [compared with] only a handful of uncertified teachers in the rest of the state."[336] "More than [forty] percent of the math teachers, [thirty-seven] percent of the biology teachers, and [twenty-four] percent of the chemistry teachers failed the certification tests in their subject matter at least once."[337]

Finally, CFE focused on other substantial inadequacies within the New York City school system.[338] For several years, many schools lacked up-to-date textbooks, libraries, a sufficient number of computers together with enough teachers who understood how to use them, and a sufficient supply of basic classroom necessities, such as pencils and paper.[339] Overall, the "Class of 1999 suffered a collective and cumulative denial of adequate resources, collective because the multiple inadequacies reinforced each other and cumulative because the inadequacies continued year after year, with the effects snowballing."[340]

The consequences of these inadequacies, according to the CFE, were devastating.[341] "When the Class of 1999 took its first standardized literacy test in the third grade, [approximately] one-third of the class, [or about] 20,000 children, was judged to be functionally illiterate."[342] "By the time the Class reached junior high school, it ranked last in the state in social studies and science competence."[343] "In 1999, just one-half of the members of the Class of 1999 that entered the ninth grade graduated on time."[344] By way

333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at 2-3.
337. *Id.* at 3.
338. *Id.* at 4.
339. *Id.*
340. *Id.*
341. *Id.* at 4-5.
342. *Id.* at 4.
343. *Id.* at 4-5.
344. *Id.* at 5.

of comparison, more than eighty percent graduated on time in the rest of the State.[345] "By the year 2002, when the Class of 1999 is no longer eligible for free education, [CFE projected that] only another [ten] percent will have graduated."[346]

"The history of the Class of 1999 [illustrates] overwhelming support for the trial court's finding that the [quality of the] 'education provided to New York City students . . . falls well below the minimum constitutional standard.'"[347] The gross inadequacies plaguing the New York City school system are directly attributable to the unmitigated failure of the state education funding mechanism.[348]

On June 25, 2002, the Appellate Division, First Department, issued a ruling reversing the decision of the trial court.[349] Judge Lerner delivered the opinion of the court.[350] Beginning with basic principles, Judge Lerner stated that, while the "sound basic education" standard pronounced by the Court of Appeals requires the State to provide a minimally adequate educational opportunity, it does not guarantee some higher, largely unspecified level of education.[351] Instead, children are entitled to physical facilities and classrooms that provide sufficient light, space, heat, and air so as to permit children to learn.[352] In addition, children must be given access to minimally adequate instrumentalities of learning, such as desks, chairs, pencils, and reasonably up-to-date textbooks.[353] Finally, children are entitled to minimally adequate teaching of basic curricula, such as reading, writing, arithmetic, science, and social studies, by personnel that are adequately trained to teach those subjects.[354]

Judge Lerner then focused the court's analysis to the issue of minimally adequate facilities.[355] Although there was evidence that some schools lack science laboratories, music rooms, or gymnasia, the plaintiffs failed to demonstrate that these conditions were so pervasive as to constitute a system-wide failure.[356] Moreover, the

345. *Id.*
346. *Id.*
347. *Id.* (citations omitted).
348. *Id.*
349. Campaign for Fiscal Equity, Inc. v. State, 744 N.Y.S.2d 130, 134 (Sup. Ct. 2002).
350. *Id.*
351. *Id.*
352. *Id.* at 135.
353. *Id.*
354. *Id.*
355. *Id.* at 139-40.
356. *Id.*

plaintiffs certainly failed to demonstrate the existence of a failure that was caused by the educational funding system or of one that can be cured only by way of reforming the system.[357]

Furthermore, the evidence at trial established that class sizes for kindergarten through the eighth grade average between 23.8 and 28.72 students per class.[358] While experts testified that student performance is superior in a class of twenty or fewer children, there was no indication that students could not learn in classes consisting of more than twenty pupils.[359] The plaintiffs, in fact, conceded that the city's Catholic schools outperform the city's public schools despite having larger classes.[360] Thus, the trial court's holding that classes consisting of greater than twenty students is unconstitutional is unsupported and erroneous.[361]

Judge Lerner next turned attention to the issue of minimally adequate instrumentalities of learning.[362] The plaintiffs conceded that recent increases in funding have alleviated the shortage of textbooks and were able to offer only anecdotal evidence regarding alleged shortages of chalk, paper, desks, chairs, and laboratory supplies.[363] Although the average number of books per student in the city's schools lags behind the rest of the State, and the State allocates only $4 per student for library materials, such factors do not demonstrate the city's libraries are inadequate.[364] Moreover, the plaintiffs' assertion the books are inadequate with regard to quality was based solely on certain superintendents' opinions that most of the books were antiquated and did not address multicultural themes.[365] Judge Lerner rejected such a standard, holding that a library consisting of classics does not deprive students of a sound basic education.[366]

He then addressed the issue of minimally adequate teachers. The trial court held that teachers in the city's public schools were unqualified based predominantly on a comparison with teachers in the rest of the state on teacher certification status, scores on certification tests, experience, turnover rate, quality of the institutions

357. *Id.* at 140.
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.* at 140-41.
363. *Id.*
364. *Id.* at 141.
365. *Id.*
366. *Id.*

the teachers themselves attended, and the percentage of teachers holding a Master's Degree or higher.[367] Judge Lerner, however, held that the city's teachers cannot be deemed inadequate simply because they have lower qualifications than teachers in the rest of the state.[368]

The focus was then shifted to the issue of student performance.[369] The trial court relied primarily upon poor student performance on standardized tests such as Regents Exams and on the determination of a City University of New York Task Force that most graduates of city high schools need remediation in one or more basic skills in holding that students in the city's schools were being deprived of a sound basic education.[370] Judge Lerner, however, ruled that a minimally adequate education consists only of those skills necessary to enable students to become productive civic participants capable of voting and serving on a jury, not to qualify them for advanced college courses or even attendance at an institution of higher education.[371]

Finally, the plaintiffs' case was addressed as a whole.[372] In order to prevail in this case, the plaintiffs would have to demonstrate a causal link between the present funding system and any proven failure to provide a minimally adequate educational opportunity.[373] Judge Lerner, however, characterized the plaintiffs' position as a form of *res ipsa loquitur*—the fact that thirty percent of city students drop out and an additional ten percent obtain only a GED, must mean the funding mechanism utilized by the State has deprived city students of a sound basic education.[374] Under the correct constitutional standard, however, "the State must [simply] offer all [students] the *opportunity* of a sound basic education."[375] The State is under no obligation to ensure students actually receive such.[376] "[T]he mere fact that some students do not achieve a sound basic education does not [by itself demonstrate] that the State has defaulted on its obligation . . . as the State [cannot] be

367. *Id.*
368. *Id.* at 142.
369. *Id.* at 142-43.
370. *Id.* at 142.
371. *Id.* at 142-43.
372. *Id.* at 143-48.
373. *Id.* at 144.
374. *Id.* at 143.
375. *Id.*
376. *Id.*

faulted when students fail to avail themselves of the opportunities [provided]."[377]

Judge Lerner held, therefore, that the plaintiffs failed to demonstrate that students in New York City's schools were not being provided with the opportunity to receive a sound basic education.[378] Moreover, the plaintiffs failed to demonstrate that any failure on the part of the city's students to receive a minimally adequate educational opportunity is the result of the funding mechanism utilized by the State.[379] As a result, the decision of the trial court was reversed.

The plaintiffs represented by the Campaign for Fiscal Equity coalition filed a Notice of Appeal with the New York Court of Appeals on July 22, 2002, citing a major issue of the state constitutional interpretation thereby requesting an appellate review as a matter of right.[380] Under procedural rules of the Court of Appeals, the plaintiff's brief was due by September 20, 2002 and the State's reply brief due by November 4, 2002, with oral arguments potentially occurring as early as the winter of 2003.[381]

C. Other School Finance Cases Originating in New York

In *Algier Ceaser, Jr. v. George E. Pataki*, a group of thirty-three students and their parents or guardians filed a class action lawsuit in the United States District Court for the Southern District of New York against New York Governor George Pataki and other state officials and entities on behalf of approximately 80,000 students attending "high-minority public schools" (defined as schools with over eighty percent minority enrollment) across New York, excluding New York City.[382] The plaintiffs alleged a violation of regulations enacted under Title VI of the Civil Rights Act of 1964 and sought injunctive relief to remedy the "unlawful discrimination that pervades the education that New York State officials are providing" to the proposed class.[383]

The plaintiffs cite, in support of their complaint, data published by the State Education Department showing the academic achieve-

377. *Id.*
378. *Id.* at 144.
379. *Id.*
380. Plaintiffs-Appellants' Opening Brief at 1-6, 9-10, Campaign For Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995) (No. 93-111070).
381. N.Y. CT. APP. R. 500.4, 500.5, 500.7.
382. Algier Ceaser, Jr. v. George E. Pataki, No. 98 Civ. 8532, 2000 U.S. Dist. WL 1154318, at *1 (S.D.N.Y. Aug. 14, 2000).
383. *Id.*

ment of students in high-minority public schools in New York State, excluding New York City, is much lower than students in other non-minority schools across the State.[384] The data showed great disparities in student performance on several state-administered standardized exams, in the awarding of Regents Diplomas, and in dropout rates.[385] The plaintiffs further alleged high-minority schools have fewer educational resources than other schools due to the methods of administration the State has utilized in its operation of its school system, which have disparately effected students in high minority schools.[386]

According to the plaintiffs, such methods of administration include the discriminatory manner in which the State complies with and enforces: 1) teacher certification; 2) remedial instruction; 3) access to suitable and appropriate buildings and grounds; 4) access to appropriate libraries; 5) the opportunity to take Regents courses and to earn Regents diplomas; and 6) monitoring of educational services.[387] With this lawsuit, the plaintiffs seek to enjoin these methods of administration.[388]

In response to the plaintiffs' complaint, the State filed a motion to dismiss for failure to state a claim upon which relief can be granted.[389] On August 14, 2000, United States District Court Judge McKenna issued a Memorandum and Order denying the defendants' motion.[390] Section 601 of Title VI of the Civil Rights Act of 1964 "prohibits any recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in any federally funded program"[391] The Civil Rights Act also prohibits only intentional discrimination, but does bar actions that disparately impact upon minorities.[392] Title VI, however, delegates the authority to federal agencies to enact regulations incorporating a disparate impact standard.[393] In their complaint, the plaintiffs relied upon a regulation enacted by the former Department of Housing, Education and Welfare, the predecessor to the current Department of Education.[394]

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384. *Id.*
385. *Id.*
386. *Id.* at *2.
387. *Id.*
388. *Id.*
389. *Id.* at *1.
390. *Id.*
391. 42 U.S.C. § 2000d (2001).
392. *Ceaser*, 2000 WL 1154318, at *2.
393. *Id.*
394. *Id.* at *3.

Plaintiffs need only plead sufficient allegations to put the defendants on notice of what they intend to prove at trial to survive a motion to dismiss.[395] In this case, Judge McKenna ruled that the plaintiffs satisfied this burden and that the defendants' motion to dismiss was denied.[396] The trial, thus, moved forward, the conclusion to which has yet to be reached.

In *Amber Paynter v. State of New York*, a group of fifteen students in the Rochester City School District ("RCSD") and their parents or guardians filed a lawsuit in New York State Supreme Court, individually and on behalf of approximately 37,000 other students in the RCSD.[397] The suit was filed against New York State and several state officers and entities, alleging that students are being deprived of a sound basic education, in violation of the New York Constitution, in light of the concentration of poor and minority students within the Rochester City School District.[398] Moreover, the plaintiffs alleged an intentional discrimination under Title VI of the Civil Rights Act of 1964,[399] a disparate impact claim under regulations implementing Title VI,[400] and a claim for violation of those regulations under 42 U.S.C. § 1983.[401]

The plaintiffs sought declaratory and injunctive relief to enjoin the State to provide them with constitutionally adequate education, educational opportunities on par with those provided to students in the other school districts in Monroe County, a racially diverse learning environment not characterized by high concentrations of poverty, and an educational system that does not impose a racially disparate impact.[402] In response, the State filed a motion to dismiss all claims.[403] The Supreme Court granted the State's motion in part, dismissing the cause of action under the Education Article, but not the cause of action alleging an intentional discrimination claim under Title VI of the Civil Rights Act of 1964, the disparate impact claim under regulations implementing Title VI, and a 42 U.S.C. § 1983 claim for violation of those regulations.[404]

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395. *Id.* at *4.
396. *Id.*
397. Amber Paynter v. State, 735 N.Y.S.2d 337, 340 (Sup. Ct. 2001).
398. *Id.*
399. 42 U.S.C. § 2000d (2001).
400. 34 C.F.R. § 100.3(b)(2) (2000).
401. *Paynter*, 735 N.Y.S.2d at 340.
402. *Id.*
403. *Id.*
404. *Id.*

The plaintiffs appealed the ruling to the Appellate Division, Fourth Department, and the State cross-appealed.[405] The State contended that the lower court erred in not dismissing the plaintiffs' complaint in its entirety.[406] The plaintiffs contended that the cause of action under the Education Article should be reinstated.[407] On December 21, 2001, the Appellate Division issued its ruling.[408]

With respect to their Education Article claim, the court noted that the plaintiffs do not challenge the sufficiency of State funding, nor do they challenge the adequacy of the educational services and facilities being provided.[409] Instead, the court explained that the plaintiffs focus solely on the "wholesale academic future" of the students in the RCSD, which they attribute to the high concentration of poor and minority students within the district as well as the system of public education mandating that students attend schools only within the district in which they live.[410]

The plaintiffs went on to allege that but for this residency requirement, the demographics of RCSD would be greatly different, the quality of education would be far better, and they would receive the sound basic education they are entitled to under the Education Article.[411] They argued that they stated a viable cause of action under the Education Article by virtue of their allegations of "wholesale academic failure" alone.[412]

The Appellate Division, however, disagreed.[413] Academic failure as measured by students' performance on standardized tests does not, by itself, represent a constitutional violation.[414] Academic failure may be the result of a variety of causes that are beyond the scope of State control.[415] A constitutional violation arises only when such academic failure is the result of the State's failure to provide for the maintenance and support of the public school system.[416] The obligation imposed upon the State under the Education Article is satisfied as long as the physical facilities and edu-

405. *Id.*
406. *Id.* at 340-41.
407. *Id.* at 341.
408. *Id.* at 337.
409. *Id.* at 343.
410. *Id.*
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.*

cational resources made available under the current system are adequate to provide students with the opportunity to obtain a sound basic education.[417] In light of the plaintiffs' failure to allege that minimally adequate educational services and facilities were provided in the RCSD by the State, they failed to state a claim under the Education Article for which relief can be granted.[418]

The Appellate Division next addressed the plaintiffs' additional claims.[419] Under the regulations established by the United States Department of Education, programs that receive federal funds are prohibited from using methods of administration that impose a disparate impact upon individuals because of their race, color, or national origin.[420] This proscription applies to determinations regarding the types of services, financial aid, or facilities that are provided under such programs or the class of individuals to whom such services are to be provided.[421]

The Appellate Division rejected the plaintiffs' claim that the residency-based system of education provided for under New York Education Law section 3202[422] has exacted a racially disparate impact upon the students in the RCSD.[423] Moreover, even assuming, arguendo, such a system does have a racially disparate impact, the Appellate Division held that it did not violate 34 C.F.R. section 100.3(b)(2) as long as it is uniformly applied because the State has a substantial interest in imposing bona fide residency requirements in order to maintain the quality of local public schools.[424] Thus, because the plaintiffs failed to allege that Education Law section 3202 is not being uniformly applied, they did not state a cause of action under 34 C.F.R. section 100.3(b)(2) for which relief can be granted.[425] Therefore, the decision of the Supreme Court was modified and the Appellate Division granted the State's Motion to Dismiss in its entirety.[426]

In March of 2001, the New York Civil Liberties Union ("N.Y.C.L.U.") filed a class action lawsuit, *New York Civil Liberties Union v. State of New York*, in the Supreme Court in Albany

417. *Id.*
418. *Id.* at 343-44.
419. *Id.* at 344.
420. *Id.*
421. *Id.*
422. N.Y. EDUC. LAW § 3202 (McKinney 2003).
423. *Paynter*, 735 N.Y.S.2d at 344.
424. *Id.*
425. *Id.*
426. *Id.* at 344-45.

County against New York State and several State officers and entities on behalf of parents and children in "failing schools" throughout the State.[427] Building on the decisions in *Campaign for Fiscal Equity* and relying upon the Education Article of the New York Constitution, this is a school-based litigation that seeks to supplement the remedy requested in *Campaign for Fiscal Equity* and seeks judicial supervision of a school by school analysis of the roots of failure and the particular remedies for each failing school to be provided by the State.[428]

A substantial number of students, the plaintiffs argue, in each of these "failing schools" are unable to perform at the minimum standards established by the New York State Department of Education on standardized tests in the areas of reading, writing and math.[429] These "failing schools" tend to generally possess some or all of the following characteristics: a highly transient teaching staff, unqualified teachers, textbooks and computers that are inadequate in both quality and quantity, crumbling facilities, overcrowding, inadequate focus on the core-curriculum, poor administrative leadership, class sizes far too large for the many "high need" children in the classes, no sense of community, inability to involve parents in school activities, and insufficient programs for art, music, and athletics.[430]

The plaintiffs also assert student performance in these "failing schools" is terrible.[431] A large number of students read below grade level and many fail to perform well enough on standardized tests in reading, writing, and math to demonstrate even basic skill levels.[432] Students at the high school level rarely receive Regents diplomas, as most are suspended or drop out at a staggering rate.[433]

The plaintiffs charge that the New York State Department of Education is keenly aware these schools are failing.[434] Nonetheless, the State has failed to take adequate measures to remedy the deficiencies plaguing these "failing schools."[435] Those students

427. Brief for New York Civil Liberties Union at 1, NYCLU v. State (Sup. Ct. 2001) (No. 01-1778).

428. *Id.* at 1-4; *see* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 661-65 (N.Y. 1995).

429. Brief for New York Civil Liberties Union at 68, *NYCLU* (No. 01-1778).

430. *Id.* at 140.

431. *Id.* at 3-4, 27.

432. *See id.* 29-30, 88-91 (discussing programs to remedy the significant amount of students reading below level and students substandard performance on tests).

433. *Id.* at 199-200.

434. *Id.* at 191-92.

435. *See id.* at 193-200 (discussing the states remedy to inferior education).

who, by reason of race, residency or economic status, are consigned to these failing schools are being denied the opportunity to receive a "sound basic education."[436] These students, according to the plaintiffs, are at serious risk of failing to acquire the basic skills necessary to become productive citizens capable of civic engagement and of sustaining competitive employment.[437] As of the writing of this Article, the trial has yet to take place.

CONCLUSION

The Unites States Supreme Court decision in *Rodriguez*, in effect, forced public school finance reformers to litigate their claims against state education funding schemes in state courts.[438] Efforts of reform-minded plaintiffs in state courts resulted in two distinct litigation and doctrinal trends—equity and adequacy. Although equity theory showed some promise in the earlier state cases of *Serrano*[439] and *Robinson*,[440] legal challenges based on arguments for greater equity proved difficult to substantiate because the courts were not willing to hold states to substantial or strict scrutiny standards for their public elementary and secondary school funding systems. The New York Court of Appeals in *Levittown* particularly emphasized that the State is only required to provide a sound basic education, not to provide an equitable distribution of funding to public schools. Consequently, equity-based legal arguments resulted in few litigation victories in other states and have been de-emphasized by New York school finance reform plaintiffs.[441]

Successful litigation in Montana, Kentucky, and Texas, however, has demonstrated the efficacy of adequacy-based legal arguments and offered renewed and real hope of litigation success for plaintiffs challenging state public school financing systems. Adequacy theory in school finance litigation is predicated on the use of state constitutional provisions requiring a state to provide a minimally adequate public education to its schoolchildren. Plaintiffs have been able to convince state high courts that poor educational outputs, such as high failing percentages on statewide tests and high

436. *See id.* at 6 (discussing the inadequacies and disadvantages that these students encounter).

437. *Id.*

438. *Supra* notes 26-76 and accompanying text.

439. *Supra* notes 79-93 and accompanying text.

440. *Supra* notes 79-93 and accompanying text.

441. *Supra* notes 94-96 and accompanying text.

dropout rates, and lack of sufficient education tools including textbooks, classrooms, and teachers, together constitute a failure of a state to meet its constitutional burden of providing adequate public education.

Accordingly, adequacy theory offers a potentially greater chance of success to the plaintiffs in the *Campaign for Fiscal Equity* case because plaintiffs have little difficulty citing numerous shortcomings of the public schools, especially in poor urban districts, to support their arguments that the state is failing to provide a sound, basic education. This litigation strategy cleverly avoids the problem of focusing too much attention upon only the levels or equity of funding New York is providing to public education, instead emphasizing the numerous inadequacies of public elementary and secondary schools which are exacerbated by lack of sufficient state funding. The remaining difficult legal challenge is convincing the New York Court of Appeals that the daunting problems of poor public schools establishes a "gross and glaring inadequacy" and, consequently, a failure of the state to provide a sound basic education as required by the state constitution.