Fordham Urban Law Journal

Volume 31 | Number 5 Article 5

2003

Campaign for Fiscal Equity, Inc. v. New York: No Slam Dunk Victory for Public School Children

Denise C. Morgan
New York Law School

CAMPAIGN FOR FISCAL EQUITY, INC. V. NEW YORK: NO SLAM DUNK VICTORY FOR PUBLIC SCHOOL CHILDREN

*Denise C. Morgan**

INTRODUCTION

You have before you the only person in New York state—besides the folks in the Attorney General's office who actually litigated and lost the case—who does not see the Court of Appeals' decision in *Campaign for Fiscal Equity, Inc. v. New York*[1] as an absolute, complete, slam dunk victory. Please believe me when I say that I'm no Chicken Little. I don't routinely think that the sky is falling down, nor is it my habit to try to convince other people that every silver lining is attached to a major storm cloud. The fact is, however, that right along with the *CFE* plaintiffs' overwhelming victory on their *state* constitutional claims, in this most recent New York state public school finance litigation, came a tremendous, and frightening loss in *federal* rights.

A lot of well deserved attention has been paid to the *CFE* plaintiffs' victories—even George Pataki now says that the decision provides "an historic chance to improve our [public] schools."[2] But, almost no attention has been paid to what was lost. And over the course of the ten years that I worked on the plaintiffs' side of the *Campaign for Fiscal Equity* case—first representing New York City and the Board of Education as an associate at Cleary Gottlieb, then representing the Black, Puerto Rican, and Hispanic Legislative Caucus—a great deal has been lost.

I would like to talk about both what was won and what has been lost. First, I'll talk about the *CFE* case and how the Court of Appeals decision promises to make the distribution of state aid for public education to New York City more equitable. Then I'll talk about the *CFE* plaintiffs' federal civil rights claim—which was brought under Title VI of the Civil Rights Act of 1964—and which was rejected by the Court of Appeals. I'll end by explaining why

* Professor, New York Law School; B.A., Yale College, 1986; J.D., Yale Law School, 1990.

1. 100 N.Y.2d 893 (2003) (*CFE V*).

2. Governor George Pataki, State of the State, (Jan. 7, 2004), *available at* http://www.state.ny.us/sos2004/sos2004pdf.pdf (last visited Aug. 11, 2004).

the loss of that claim is bad for the children of New York state and is ominous for urban equity in general.

I. *CAMPAIGN FOR FISCAL EQUITY*: THE VICTORY

The CFE plaintiffs made two claims. I really want to focus on their losing argument. But, so as not to play too much into a Chicken Little image, I'll start by talking about their winning state law claim.

It has been apparent since the turn of the twentieth century that the New York State school funding formula is unfair in that it consistently underfunds certain school districts. Despite repeated reform efforts,[3] however, those inequities have been stubbornly resistant to change. As a result, thousands of students in New York City remain in underfunded, overcrowded schools with inadequate supplies and too many uncertified teachers.[4] Those funding and resource shortfalls have a profound effect on the quality of teaching and learning in public schools in the City. Indeed, the Board of Regents' most recent 655 Report documented

> a dismaying alignment of disadvantaged students (disproportionately children of color), schools with the poorest educational resources (fiscal and human), and substandard achievement. . . . Perhaps the sharpest contrasts exist between public schools in New York City and those in districts (most suburban) with low percentages of students in poverty and high levels of income and property wealth.[5]

Given that 73% of the children of color in New York State go to schools in the City, that inequitable distribution of educational resources hits children of color particularly hard.[6]

---

3. *See* EDWIN MARGOLIS, ET. AL, THE ELUSIVE QUEST: THE STRUGGLE FOR EQUALITY OF EDUCATIONAL OPPORTUNITY 28, 30, 35-38 (1992) (discussing the state's first equalization efforts in 1902, the 1921 educational Finance Inquiry Comm'n, the 1972 Fleischmann Commission, the 1982 Rubin Task Force, and a number of other studies); *see also* The New York State Temporary State Commission on the Distribution of State Aid to Local School Dists., *Funding for Fairness* (Dec. 1988) (the Salerno Commission report); N.Y. State Special Comm'n on Educational Structure, Policies and Practices, *Putting Children First* (Dec. 1993) (the Moreland Act Commission report).

4. *The State of Learning: A Report to the Governor and the Legislature on the Educational Status of the State's Schools* vi (July 2003), *available at* http://www.emsc.nysed.gov/irts/655report/2003/volume1-2003/655report-volume1.pdf (last visited April 20, 2004).

5. *Id.*

6. *See id.* at 143.

In 1993, *CFE* brought suit to challenge this injustice. Unlike many of the school finance cases in other states which are based on arguments for equity (plaintiffs are entitled to the same amount of school aid, or educational opportunity as some other group of students), the New York state case was based on an argument for adequacy. The *CFE* plaintiffs argued that the New York state school financing scheme shortchanges students in New York City and deprives them of a sound basic education in violation of the Education Article of the state constitution.[7]

This past June, the Court of Appeals handed the plaintiffs an overwhelming victory.[8] That court finally gave some content to the New York State Education Article, which says that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[9] An earlier attempt to flesh out that constitutional provision, the *Levittown* case decided in 1982, was a miserable failure.[10] In *Levittown* the Court of Appeals held that the Education Article "makes no reference to any requirement that . . . education . . . be equal or substantially equivalent in every district."[11] That court concluded that as long as children in New York State were getting a "sound basic education,"[12] and in the absence of some "gross and glaring inadequacy" in the state education system,[13] it was inappropriate for it to alter the state's school financing scheme.

The *CFE* case pushed the Court of Appeals to answer the question left open in *Levittown*: how do we know if our kids are getting a sound basic education? That's a difficult question, but Judge Kaye did not avoid it. Her majority opinion states that "a sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."[14]

---

7. Campaign for Fiscal Equity, Inc. v. State, 616 N.Y.S.2d 851 (Sup. Ct. 1994) (*CFE I*); *see* N.Y. CONST. art. XI, § 1.

8. Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 931-32 (2003) (*CFE V*).

9. N.Y. CONST. art. XI, § 1.

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

11. *Id.* at 47.

12. *Id.* at 48.

13. *Id.*

14. Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 905 (2003) (*CFE V*); *see also* Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 316 (1995) (*CFE II*) (stating "the basic literacy, calculating, and verbal skills necessary to enable children

Shockingly, the Appellate Division had accepted the state's arguments that students receive a sound basic education by the time they have reached eighth or ninth grade (As if the State making such a claim was not shocking enough already).[15] The Appellate Division acknowledged that that level of education was not likely to prepare anyone for college, or for anything other than minimum wage employment—but it dismissed that fact by saying: "It cannot be said, however, that a person who is engaged in a 'low-level service job' is not a valuable, productive member of society. Society needs workers in all levels of jobs, the majority of which may very well be low level."[16] There is, of course, nothing wrong with minimum wage work, but it is a spectacularly low standard to which to aspire for New York City children, most of whom are black or brown.

The Court of Appeals saw things differently. Judge Kaye's opinion states unequivocally that "More is required. While a sound basic education need only prepare students to compete for jobs that enable them to support themselves, the record establishes that for this purpose *a high school level* education is now all but indispensable."[17] The Court of Appeals refused to peg the state constitutional minimum to the current Board of Regents standards, but rather described a few essential components of a meaningful high school education: physical facilities and classrooms that provide enough light, space, heat, and air to permit children to learn; adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks; and reasonably up-to-date basic curricula taught by personnel who are adequately trained to teach those subject areas.[18]

Thus, a lot was won in *CFE*. Compared to the refusal of the *Levittown* court to articulate any standard, or to the impossibly low Appellate Division standard, the *CFE* court's interpretation of the New York state Education Article has teeth and bite.

The *CFE* case was also a victory because the plaintiffs were able to convince the court of the truth of a common sense proposition (that turns out not to be easy to prove or to disprove): that there is a causal link between school funding and educational opportu-

---

to eventually function productively as civic participants capable of voting and serving on a jury").

15. Campaign for Fiscal Equity, Inc. v. State, 744 N.Y.S.2d 130, 138 (App. Div. 2002) (*CFE IV*).

16. *Id.*

17. *CFE V*, 100 N.Y.2d at 906 (emphasis added).

18. *Id.* at 907 (citing *CFE II*, 86 N.Y.2d at 317).

nity.[19] The Court of Appeals reasoned that "better funded schools would hire and retain more certified teachers, and that students with such teachers would score better. [And that] the same is true with respect to class size and instrumentalities of learning."[20] Therefore, the Court accepted that educational outcomes—graduation/dropout rates, and standardized test scores—in New York City do not satisfy constitutional requirements,[21] because educational inputs—meaning teachers, school facilities, classroom supplies, libraries, and textbooks—in the City are inadequate.[22] The Court refused to be distracted by the State's attempts to blame the Board of Education, the City, and the children who live here for the failure of our public schools, but instead placed the responsibility for ensuring a sound basic education right where the New York constitution mandates—with the state legislature.[23]

How the legislature will respond to that responsibility is not yet clear. Although the *CFE* plaintiffs argued for a statewide remedy,[24] the court only mandated that the inequities in New York City be corrected.[25] The state is, of course, free to improve any educational deficiencies that it identifies. And hopefully, the state will chose to do so, because the old funding formula did not serve children in poor rural areas any better than it served City kids.[26] The Court gave the Governor and the state legislature until the end of July 2004 to respond to its decision—so, it will soon be apparent whether our state officials choose to work constructively with the court, or whether they will have to be forced to implement a constitutionally adequate school funding formula. Hopefully, the *CFE* decision will force the Governor and legislature to make a long term commitment to ensuring that every school in this City has the resources necessary to provide children the opportunity for a sound basic education. If it does, New York City's children will really have won a great deal.

19. *Id.* at 919.
20. *Id.*
21. *Id.*
22. *Id.* at 914-19.
23. *Id.* at 920-25.
24. *Id.* at 925-26.
25. *Id.* at 930.
26. *Id.*

II. *CAMPAIGN FOR FISCAL EQUITY*: THE PLAINTIFF'S LOSING FEDERAL CLAIM

In addition to their state constitutional claim, the *CFE* plaintiffs also asserted a claim under the Department of Education's implementing regulations for Title VI of the Civil Rights Act of 1964.[27] The plaintiffs sued under those regulations because they were unable to bring their claim of race-based injury under either the Equal Protection Clause[28] or Title VI itself—both of which the Supreme Court has interpreted to require proof of intentional discrimination.[29] In contrast, the Title VI implementing regulations prohibit policies that disproportionately harm minority students and that cannot be educationally justified.[30] The plaintiffs argued that the state's funding formula violates the civil rights act regulations because it treats minority students poorly relative to their similarly situated white counterparts.[31]

To support their race-based claims, the *CFE* plaintiffs introduced evidence showing that, in recent years, New York City has educated 37% of the students in New York State, but has received only 34-35% of the State's aid for education.[32] While 2% may seem like a small percentage, it means that the City was shortchanged by at least $400 million dollars annually. Moreover, that shortfall disproportionately impacts minority children because the City educates 73% of the students of color in New York State and its public school population is 84% children of color.[33] Indeed, at trial plaintiffs introduced a regression analysis that showed that instead of ensuring that similarly needy students received the same amount of education aid, the New York state school funding formula tends to give "minority students . . .less State aid as their over-all concentration increases in a particular district."[34]

---

27. 42 U.S.C. § 2000d (1964).

28. U.S. CONST. amend. XIV

29. *See* Guardians Assn. v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (holding that compensatory relief was not available as a private remedy under Title VI in the absence of violations which involved intentional discrimination); Washington v. Davis, 426 U.S. 229 (1976) (holding that a statute, which was neutral on its face, had to be applied in a way that invidiously discriminated on the basis of race).

30. 34 C.F.R. § 100.3(b)(1)-(2).

31. Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 478 (Sup. Ct. 2001) (*CFE III*).

32. *Id.* at 543.

33. *Id.* at 478, 542.

34. *Id.* at 546. The plaintiffs' regression analysis held constant factors that should affect school funding, like district wealth, the number of English language learners, local tax effort, student enrollment, and student attendance. *Id.* at 545-46.

To make matters worse, the State could not justify the racially disparate impact of its funding formula because the plaintiffs submitted proof that it was the result of a political compromise.[35] For fifteen years or so, New York City had received 38.86% of any annual increase in aid from the state.[36] As the components of the state's funding formula—student need, the city's wealth, student attendance, and enrollment—fluctuated over time, that number, 38.86%, remained constant.[37]

The trial court judge, Leland DeGrasse, was convinced by the plaintiffs' evidence and held "that New York City does not receive State aid commensurate with the needs of its students and. . . it in fact receives less State aid than districts with similar student need."[38] Judge DeGrasse also understood why this funding shortfall mattered so much. He wrote that money is a crucial determinant of educational quality, and that receipt of less educational funding by minority students is an adverse disparate impact within the purview of Title VI.[39]

So, why did the Court of Appeals reject what is apparently a basic civil rights claim—namely that the state cannot treat people of color differently than it treats similarly situated white people? Because of the Rehnquist Court's civil rights rollback. Title VI remains a valid law—as are the regulations that have been promulgated over the years to enforce that statute. Recently, however, the Rehnquist Court has fundamentally undermined Americans' ability to bring suit under those civil rights laws.[40] Sadly, it turns out that a right, without a right to sue for a remedy, is often no right at all.

One way the Supreme Court has cut back on our ability to enforce federal rights in general is by asserting that there is a difference between having a right and having the right to sue to enforce that right (a private right of action). Under current case law, unless it can be shown that Congress made a clear statement of intent that private individuals be able to sue to enforce a federal law, individuals will be denied that right.[41] The consequences of this interpretation are all too clear. When individuals have a private right of

35. *Id.* at 533.
36. *Id.* at 534.
37. *Id.*
38. *Id.* at 547.
39. *Id.* at 529, 533, 546.
40. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 293 (2001).
41. *See id.* at 286-87; *see also* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).

action to enforce their federal rights, potential violators, concerned with the possibility of being sued, are more likely to follow the law. Without this deterrent those same persons may feel free to violate the federal rights of others with impunity.

In crafting its statutes, Congress has historically not always been explicit about whether it intended to confer a private right of action.[42] One common reason for this is that the legislators may not have all actually agreed upon their intent. In the past, the Supreme Court had usually chosen to imply a private right of action and allow individuals to sue to enforce their federal rights whenever it deemed it was necessary to fulfill Congress' objectives.[43] In the last twenty-five years, however, the Court has required much more explicit proof of Congressional intent.[44] Once the Supreme Court revised its test to determine whether a private right of action exists, Congress should have understood that it was its responsibility to be explicit about whether a law was meant to grant this right. Congress does not, however, have that option with older statutes, like Title VI, that were passed before the Supreme Court ratcheted up the standard.

This issue came to a head in *Alexander v. Sandoval*, in which non-English speaking residents of Alabama argued that offering the state driver's license test only in English had a disproportionate negative impact on them, and therefore violated their rights under the Department of Justice's and the Department of Transportation's implementing regulations for Title VI.[45] The *Sandoval* plaintiffs lost because the Rehnquist Court held that there is no private right of action under the Title VI implementing regulations.[46] Although the plaintiffs did have the right not to be discriminated against, they had no means by which to enforce that right.[47]

---

42. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 717-18 (1979) (Rehnquist, J., concurring).

43. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 433-35 (1964).

44. *See* Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 536 (1989); *Redington*, 442 U.S. at 568.

45. 532 U.S. 275 (2001).

46. *Id.* at 293.

47. *See id.* In this complex case, the Court held that while Section 601 of Title VI, which prohibits discrimination based on race, color, or national origin in certain programs and activities, creates a private right of action, Section 602, which authorizes federal agencies to issue regulations consistent with Section 601, does not create a private right of action. Based on the lack of explicit language in Section 602 indicating Congressional intent to create private rights, the Court could not simply presume that Section 601 works hand-in-glove with Section 602.

The Court has similarly rolled back the protections that other civil rights laws have historically provided. For example, 42 U.S.C. § 1983,[48] a Reconstruction Era civil rights statute, has been used by plaintiffs to enforce federal statutes that do not contain private rights of action.[49] Under § 1983, plaintiffs are granted the right to sue state officials in federal court for violations of "any rights, privileges, or immunities secured by the Constitution and laws [of the United States]." The Rehnquist Court, however, has also curtailed our ability to enforce our civil rights against states and state officials through these types of suits.[50] In recent cases, the Court has narrowly construed both who can be sued under § 1983[51] and what constitutes a federal right for the purposes of that statute.[52]

In *Gonzaga University v. Doe*, the Supreme Court reversed prior case law which had distinguished between the rigorous test for inferring a private right of action under a federal statute and the more lenient one for determining whether a statute confers a federal right that is enforceable through § 1983.[53] Now, § 1983 suits are virtually superfluous because they are available only when a private right of action would exist anyway.[54]

After *Sandoval* and *Gonzaga*, although the Title VI implementing regulations remain valid federal laws, it is exceedingly difficult to go to court to sue to enforce them. There is neither a private right of action to sue directly under the regulations, nor is there the possibility of enforcing them through a § 1983 suit. Thus, while the facts underlying the *CFE* plaintiffs' Title VI claim are still true, the Court of Appeals was forced to dismiss their race-based claim.

---

48. (2004)

49. *See* Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 429 (1987) (permitting private § 1983 action by tenants for violation of the Brooke Amendment to the Housing Act of 1937).

50. *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 394-401 (2004) (discussing that the Supreme Court has deliberately limited the availability of § 1983 as a mechanism for enforcing rights created by federal statutes).

51. *See* Will v. Mich. Dept. of State Police, 491 U.S. 58, 71 (1989).

52. *See* Sloss, *supra* note 50.

53. 536 U.S. 273, 283 (2002) ("[A] plaintiff suing under an implied right of action still must show that the statute manifests an intent to create not just a private right but also a private remedy.").

54. *See* Sloss, *supra* note 50 (discussing the substantial similarity between the tests for determining whether there is a private right of action and for determining whether suit can be brought under § 1983).

III. WHY THE LOST FEDERAL CLAIM MATTERS

Why does it matter if we won the *CFE* case on state grounds or on federal grounds? I have two reasons: an immediate, practical one and a deeper, longer-term, and more theoretical one.

The immediate problem is one of strategy. The rejection of the *CFE* plaintiffs' Title VI argument signals the demise of one of the more promising new strategies to ensure that children in the United States have access to quality education. In recent years, Title VI education rights suits have been brought all across the country—many of them on behalf of children of color in urban areas. For example, cases have been brought to challenge: the inappropriate shunting of black children into special education classes;[55] the fact that qualified students lack access to advanced placement classes;[56] the failure of school districts to provide appropriate programs for children whose first language is not English;[57] and, of course, the unfair distribution of public school finance dollars.[58] The Rehnquist Court's rollback of civil rights threatens the outcome of these and similar future suits. Particularly for children who live in states where the state constitution has not been interpreted to protect educational rights as generously as it has been in New York state, the loss of that federal claim could be disastrous.

That, of course, does not explain why I think that the loss of the plaintiffs' Title VI claim is any more significant than the loss of any other claim would have been. But, the loss of that civil rights claim is particularly worrisome—something significant is lost when the law fails to recognize the type of race-based injury that the *CFE* plaintiffs proved at trial.

---

55. *See* Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984) (affirming district court's holding that placement mechanisms for remedial classes operated with a discriminatory effect in violation of regulations promulgated pursuant to Title VI).

56. Daniel v. California, No. BC214156 (Cal. Super. Ct. filed July 27, 1999), *available at* http://www.povertylaw.org/legalresearch/cases/index.cfm?action=abstract&id=52606 (last visited Aug. 11, 2004).

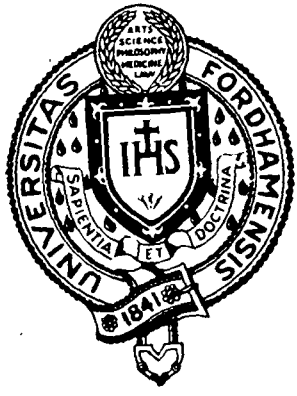
57. *See* Serna v. Portales Mun. Sch., 499 F.2d 1147, 1153-54 (10th Cir. 1974) (holding the school district violated Title VI because they failed to institute a program that would rectify language deficiencies in "Spanish-surnamed" children); Flores v. Ariz., 48 F. Supp. 2d 937, 940 (D. Ariz. 1999) (holding that plaintiffs may bring suit under Title VI).

58. *See* Powell v. Ridge, 189 F.3d 387, 397 (3d Cir. 1999) (reversing lower court's determination that plaintiffs failed to state a valid claim regarding disparate impact of funding); Robinson v. Kansas, 117 F. Supp. 2d 1124, 1140 (D. Kan. 2000) (holding plaintiffs met pleading requirements); Ceasar v. Pataki, No. 2000 WL 1154318, 4 (S.D.N.Y. Aug. 14, 2000) (holding plaintiffs met pleading requirement to survive motion to dismiss); Kasayulie v. State, No. SAN 97-3782CTV, at 11 (Alaska Sup. Ct. Sept. 1, 1999).

The plaintiffs winning state law claim argues that each individual child in New York state is entitled to a sound basic education. The law recognizes that when the state fails to provide any individual child with that minimum entitlement, that child is harmed—and the law provides a remedy. In contrast, the plaintiffs' federal claim also recognizes that the children who are shortchanged by the state's school aid formula are not randomly distributed throughout the state but, rather, along racial lines. The plaintiffs' federal claim, and *only* their federal claim, takes into account the particular injuries caused by the unjustified misdistribution of government resources by race, the harm to communities of color, and the harm to our democratic society.

A distribution that has a racially disparate impact that cannot be justified by educational necessity has consequences beyond the individual unfortunate child. State aid formulas that systematically apportion less money to children of color than to their similarly situated White peers reinforce the notion that people of color are somehow less deserving, somehow less equal. Moreover, a state funding scheme that deprives communities of color of necessary educational resources and thereby ill prepares our children to exercise their full citizenship rights, is likely to create an enduring underclass. If equal citizenship is truly important to our national identity, it is important that we acknowledge when we systematically fail to live up to that ideal. We then must destroy any remaining patterns of injustice that are incompatible with democracy.

Unfortunately, the facts underlying the *CFE* plaintiffs' Title VI implementing regulation claim have not changed simply because they are no longer legally actionable.


ARTS
SCIENCE
PHILOSOPHY
MEDICINE
LAW
IHS
SAPIENTIA
ET
DOCTRINA
UNIVERSITAS
FORDHAMENSIS
1841