

A Quality Education for Every Child: Stories from the Lawyers on the Front Lines



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Introduction

by Michael A. Rebell

In recent years, as the federal courts have decisively retreated from active enforcement of school desegregation¹ and have declared that education is not a “fundamental interest” under the federal constitution,² the state courts have become the main judicial forum for advancing concepts of equal educational opportunity. In 1973, the U.S. Supreme Court recognized, but refused to remedy, the severe funding inequities caused by Texas’s property-tax-based education finance system.³ Since then, civil rights advocates have sought relief in the state courts for the funding inequities that have existed in almost every state between schools that serve disadvantaged students and schools that serve their wealthier peers. The response of these courts has been extraordinary. Challenges to the constitutionality of state education finance systems have been brought in 45 of the 50 states, and education finance reform has become the most extensive and dynamic area of state court constitutional involvement in the history of the United States.

Overall, plaintiffs have prevailed in 60 percent of these state court litigations, and, in the more recent subset of “education adequacy” cases decided since 1989, plaintiffs have won 20 of 29 (almost 70%) of the final constitutional decisions.⁴ In this area, Justice Brandeis’s vision of “a laboratory of the states” developing creative approaches to legal doctrine and social reform⁵ has been fulfilled. Indeed, judges and lawyers in New Jersey overwhelmingly voted that state’s education adequacy decision “the most important state court decision of the 20th century.”⁶

Although many have marveled at plaintiffs’ successes in these litigations, few have analyzed how plaintiffs and their attorneys actually managed to achieve this remarkable record during a basically conservative era. This book fills that gap. It documents the litigation history, the doctrinal developments, and the political and educational impact of fiscal equity and educational adequacy litigations in fourteen states, ranging from the urban centers of New York and Pennsylvania to the rural settings of West Virginia and Nebraska.

The attorney-authors of these chapters candidly discuss the extensive background research and consultations with educational experts that is required to develop the educational theories that are presented in these cases,⁷ the need to draft flexible complaints that advance plausible alternative legal theories,⁸ and the trial strategies that are used to present in convincing fashion the reams of evidence that need to be marshaled.⁹ They also reveal some of the interesting tactical maneuvers attorneys use to maximize adversarial advantage, like the Omaha, Nebraska, attorneys’ gaining a hometown advantage by suing two state board members who lived their county in order to avoid having to file the case in Lincoln, the state capital, where they thought their claims would be viewed less sympathetically.¹⁰

All litigation, like all politics, is fundamentally local. Each of these

chapters describes the context of the particular case, the emphases and the quirks of the particular state law, and the personalities of the judges, the lawyers, and the policymakers whose decisions influenced the ultimate outcomes. Nevertheless, a number of important cross-cutting strategic themes permeate the volume. The first is the importance of invoking the state's own educational standards in order to develop a strong constitutional definition of an adequate education. In New York, for example,

....[P]laintiffs embraced the State's standards. The Regents had recently established higher learning standards, raising the academic bar for all students, and the State's position at trial was that these standards were aspirational. Plaintiffs' position was that, as the public record demonstrated, the Regents' standards had been specifically developed to ensure that students would be prepared for successful civic participation and competitive employments, and, therefore, that these standards were an important barometer of what the minimum acceptable constitutional standards would be.¹¹

Such invocation of the state's own standards explains why "the concept of an adequate education emerging from state courts invalidating school finance systems goes well beyond a basic or minimum educational program that was considered the acceptable standard two decades ago."¹² The emphasis on the state's own standards also was used to show the gap between the state's academic expectations and the resources it had committed to achieving those ends, especially for poor and minority students. For example, in New Jersey, the litigation's emphasis on substantive educational content and standards led the court to recognize "that the State might have an

A Quality Education for Every Child: Stories from the Lawyers on the Front Lines

obligation 'to spend in excess of the norm in view of the presumed greater needs of [disadvantaged] students.'¹³

A second theme is the importance of using of cost studies, especially studies that are endorsed by the legislature or state education department, to demonstrate decisively to the court the gap between the resources currently being made available to students in high-needs urban and rural areas and the amounts that are needed to allow students in these schools to meet the state's challenging academic expectations. In Alaska, for example, plaintiffs' experts used three separate methodologies to calculate the cost of an adequate education, and, interestingly, "each of the methods used came out with the same results."¹⁴ In Kansas, plaintiffs' emphasis on a cost study that the state legislature had commissioned but then ignored in its educational funding allocation decisions proved to be a decisive factor in the successful outcome of the case.¹⁵

The intersection of law and politics throughout the progression of these case studies constitutes a third major cross-cutting theme. These attorney-authors are realists: they acknowledge that at times the positions of their clients will shift because of changing political tides.¹⁶ And they certainly know that the political background of the judges is a factor with which they must reckon: the replacement of six of the seven justices who had issued the original education adequacy decision in Massachusetts with Republican appointees by the time of the follow up compliance ruling a decade later was a reality that the plaintiff attorneys recognized and tried to counter by seeking "to garner bipartisan support . . . outside the courthouse."¹⁷

Although the composition of the court is a matter that attorneys always consider, the cases also demonstrate that the judges' political background does not invariably predetermine the outcomes in these cases. The strong evidence that plaintiffs have been able to present in

these cases has repeatedly overcome the skepticism of conservative jurists. Speaking of both the trial judge and the author of the supreme court's major decision in North Carolina, the dean of the University of North Carolina Law School wrote:

What I find surprising — and hugely encouraging — about these rulings is that they came from Manning and Orr. These are hardly wide-eyed social engineers or Warren Court enthusiasts. They don't believe in government by judiciary.... They aren't...liberals or bleeding hearts. They aren't ideologues or utopians. They aren't even Democrats. They are, instead, old-fashioned craftsmen who followed where the cases led.¹⁸

In order to deal with the realities of these high visibility public policy litigations, the authors repeatedly remind us of the importance for plaintiffs of building coalitions of urban and rural districts at the outset of the litigation, of trying to include broad groupings of parents, teachers, school boards, and advocacy groups in the plaintiff class, of making effective use of the media, and of consciously promoting public engagement at every stage of the process. The attorneys for the Omaha Public Schools (OPS) described in detail how they dealt with the political environment in which they knew their case would be developed:

First, OPS decided it could not bring suit alone for both legal and political reasons. Hence there was a need for parents, students, and other interested individuals in OPS with a stake in funding of schools to come forward and be willing to sue. Likewise, there was a need for other similarly situated school districts to join with OPS....Second, OPS recognized that

ultimately the Legislature would be called on to deal with the issue and that political as well as social policy and legal considerations would be important there. Therefore, OPS helped put together a coalition of school districts, the Nebraska State Education Association, the Nebraska Association of School Boards, and the Nebraska Department of Education to fund a cost study of education in Nebraska.¹⁹

The Campaign for Fiscal Equity's strategy in New York went even further. CFE developed a multi-year, statewide public engagement campaign that brought the major statewide education organizations into a dialogic coalition and genuinely utilized public input in the formulation of trial strategies and remedial proposals:

CFE's commitment to public engagement meant that ... critical remedial concepts and legal strategies would be decided not just by lawyers and experts, but also by the broad group of stakeholders who would be drawn into the public engagement process — and that these stakeholders would likely then form a strong core of supporters who could help implement the remedies in the Court should ultimately adopt them.²⁰

Most studies of judicial involvement in cases of this type concentrate on analyzing the final decisions of the court and their relation to existing legal doctrines. These chapters provide ample doctrinal analysis, but they also go much further. Many of them reveal important details of the judicial and legislative follow through. For example, we learn that in North Carolina, as a result of the *Leandro* litigation, spending increased by over \$2 billion from 2004-2009 and

[t]he litigation has resulted in creation of a new Disadvantaged Students Supplemental Fund for at-

risk students, full funding of a separate Low Wealth fund to enhance education opportunities in low wealth counties, institution of a Statewide pre-kindergarten education program for at-risk four year olds, significant reductions of class sizes in early grades, and a variety of other reforms and new programs.²¹

In New Jersey and Arkansas, among other states, sufficient data have now been accumulated to demonstrate that the reforms also resulted in marked improvement in student performance.²² The case studies also candidly discuss outcomes that plaintiffs did not anticipate and do not relish, like the fact that, in Arkansas, the legislative response to the court order included a massive program of consolidation of rural districts that resulted in the elimination of the prime, named plaintiff school district.²³

Another unique aspect of this volume is the inclusion of a number of case studies of litigations that were unsuccessful from plaintiffs' point of view. The lessons that the attorney-authors drew from these experiences are instructive. For example, Michael Churchill, lead counsel for the plaintiffs in several unsuccessful cases brought by the City of Philadelphia, candidly concluded that "a case brought on behalf of Philadelphia alone rather than on behalf of a wide cross section of districts was inherently weak."²⁴

Win or lose, one point on which virtually all of the authors seemed to agree is that initiation of a funding litigation tends to put the issues of fiscal equity and educational adequacy at the top of the political agenda. Although at times it is difficult to pinpoint precise causal relationships, these cases tend to send shock waves through the political system that almost invariably result in increased spending on education, and a focus on issues of equity and efficiency.

Some critics have recently opined that the courts have begun to step back from their support of constitutional rights in this area,²⁵ but the pattern of plaintiff victories on the basic constitutional liability issues has remained constant over the past decade. There has been no diminution in the willingness of the state supreme courts to issue strong rulings on students' basic constitutional right to an adequate education. What has changed in recent years is that more cases have reached the remedy stage, and more courts are experiencing difficulty in seeing constitutional compliance through to a successful conclusion.

The adequacy movement has matured, and the courts are now grappling with many of the same implementation and compliance issues that have stymied governors and legislatures for years. The remedial problems faced by the judges in these cases call for thoughtful responses and nuanced solutions, rather than the knee-jerk charges of "judicial activism" that many critics lodge against the courts if their intervention does not immediately cure long-standing educational ills. Many people tend to assume that judicial intervention is a panacea for education reform and for resolving inequities that have plagued a state's school systems for decades. If, several years after a court order has been issued, inequities persist in state funding formulas and/or student test scores have not dramatically risen, they lose faith in the courts' powers or join the chorus of critics of "judicial activism."

As Wisconsin law professor Neil Komesar has insightfully pointed out, however, "All societal decision makers are highly imperfect."²⁶ Governors, state education departments, legislatures, and the U.S. Congress have been unable to solve the nation's educational problems over the past half century, so why should anyone expect judicial interventions magically to achieve prompt, decisive results? The

courts have gotten involved in educational issues in most states in recent years precisely because the consequences of inequity are great, and governors and legislatures have promised much and delivered little. Although raising expectations for both educational excellence and equity, the political branches have maintained highly inadequate and inequitable educational funding systems that block progress on both counts. These failings raise significant issues under state constitutions that judges cannot ignore.

The stakes involved in this endeavor are extremely high, both for the individuals involved and for the nation as a whole. Whereas 30 years ago, a high school dropout earned about 64 percent of the amount earned by a diploma recipient, in 2004 he or she would earn only 37 percent of the graduate's amount.²⁷ Inadequate education also dramatically raises crime rates and health costs, denies the nation substantial tax revenues, and raises serious questions about the civic competence of the next generation to function productively in a complex democratic society.²⁸ The stark fact is that over the next 50 years, the students from minority groups who are now disproportionately represented among dropouts and low achievers, will constitute a majority of the nation's public school students. If they are not capable citizens and productive workers, the continued vitality of our democratic culture and America's ability to compete effectively in the global marketplace will be seriously jeopardized.²⁹

At this stage, all three branches of our state governments must work in concert to solve the nation's pressing educational problems. Courts on their own cannot solve these immense educational problems. But neither can the legislative or executive branches.

The greatest progress toward school desegregation was achieved in the late 1960s when Congress's enactment of Title VI of the 1964 Civil Rights Act,³⁰ which authorized the termination of funding to

A Quality Education for Every Child: Stories from the Lawyers on the Front Lines

school districts that failed to desegregate their schools, was combined with active enforcement efforts by the federal Office for Civil Rights and by assiduous efforts federal courts throughout the South to implement *Brown*. Similarly, fiscal equity and education adequacy reforms have proved most effective in states like Kentucky, Vermont, and Massachusetts where the legislative and executive branches decided early to cooperate with their state courts in developing effective remedies to cure constitutional inequities in school finance.

To achieve excellence and equity in our public school systems requires a concerted effort by all three branches of government to bring their relative functional strengths to bear on ensuring constitutional compliance and solving the nation's educational ills. Legislatures should make basic educational policy decisions; state education departments and local school district should determine how best to implement educational reforms. What courts can add to the mix is a principled insistence on providing students meaningful educational opportunities, mandates to motivate the political branches to develop appropriate policies and workable implementation mechanisms for achieving this end, and the "staying power" to monitor the enterprise over time to ensure that the legislative and executive branches actually do their jobs. The educational chaos that has accompanied the imposition of substantial budget cuts in many states during the current recession also points to a need for the courts to apply constitutional mandates for educational adequacy not only to the amounts, but also to the stability of educational funding.

Although basic policy making and its implementation are the responsibility of the legislative and executive branches, the courts must ensure that these policies meet constitutional requirements and that they are coherent, adequately funded, and consistently implemented; moreover, the court should maintain jurisdiction and a

