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Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems

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TOWARDS A THEORY OF ADEQUACY: THE CONTINUING SAGA OF EQUAL EDUCATIONAL OPPORTUNITY IN THE CONTEXT OF STATE CONSTITUTIONAL CHALLENGES TO SCHOOL FINANCE SYSTEMS

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I. INTRODUCTION

There is a movement growing across the country on behalf of poor and at-risk children who have been left out and left behind in the realization of an equal educational opportunity for adequate schooling. It is comparable to past movements on behalf of linguistic minorities and children with disabilities[1] and addresses the twin problems of inequality and inadequacy among school districts within a state through judicial reform of school finance systems. Since 1989, high courts in over half of the states have issued rulings on the constitutionality of their school finance systems. In seventeen states, the state high court has found the finance system unconstitutional, or a lower court ruling has gone unchallenged.[2] In eleven states the system has been upheld.[3]

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1. William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376, 379 (1994), *adaption from* William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 THE WORLD AND I 389 (1993); Deborah A. Verstegen & Terry Whitney, *From Courthouses to Schoolhouses: Emerging Judicial Theories of Adequacy and Equity*, 11 EDUC. POL'Y 330, 352 (1997).

2. States where the finance system has been overturned since 1989 include: Alabama — Opinion of the Justices No. 338, 624 So. 2d 107 (Ala. 1993); Arizona — Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); Roosevelt Elem. Sch. Dist. No. 66 v. State, 74 P.3d 258 (Ariz. Ct. App. 2003) (holding that school districts did not show current unmet funding needs related to academeic achievement); Arkansas — Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002); Idaho — Idaho Sch. for Equal Educ. Opportunity v. State, 976 P.2d 913 (Idaho 1998); Kentucky — Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Massachusetts — McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Missouri — Comm. for Educ. Quality v. State, 878 S.W.2d 446 (Mo. 1994); Montana — Helena Elem. Sch. Dist. No. l v. State, 769 P.2d 684 (Mont. 1989), *modified by* Helena Elem. Sch. Dist. No. 1 v. State, 784 P.2d 412 (Mont. 1990); New Hampshire — Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); New Jersey — Abbott v. Burke, 748 A.2d 82 (N.J. 2000) (concluding that preschool programs violated *Abbot V* requirements); Abbott v. Burke, 710 A.2d 450 (N.J. 1998) (explaining the remedial measures that must be implemented to meet

Moreover, all recent decisions have been decided on behalf of plaintiffs representing children in poor schools and districts, and the necessity of extra assistance for children with special needs is being acknowledged by the courts.[4] Currently, litigation is active in another nineteen states,[5] and concern over the threat of a possible court challenge or the aftershocks of a past decision affects most of the remaining states.

The new wave of school finance litigation is forcing states to reexamine all the issues concerning educational equity with which they have previously dealt, but there are important new directions as well.[6] High courts have examined funding policies for rural schools in Tennessee[7] and urban areas in

constitutional standards); Abbott v. Burke, 693 A.2d 417 (N.J. 1997) (holding the Comprehensive Educational Improvement and Financing Act of 1996 unconstitutional as applied to special needs districts); Abbott v. Burke, 643 A.2d 575 (N.J. 1994) (declaring New Jersey's Quality Education Act unconstitutional); Abbott v. Burke, 575 A.2d 359 (N.J. 1990) (holding Public School Education Act of 1975 unconstitutional as applied to poorer urban districts); Abbott v. Burke, 495 A.2d 376 (N.J. 1985); New York — Campaign for Fiscal Equity v. State, 801 N.E.2d 326 (N.Y. 2003); North Carolina — Hoke County Bd. of Educ. v. State, No.No. 95CVS1158, 2000 WL 1639686 (N.C. Super. Oct. 12, 2000), *discretionay review allowed*, Hoke County Bd. of Educ. v. State, 579 S.E.2d 275 (N.C. 2003); Ohio — DeRolph v. State, 754 N.E.2d 1184 (Ohio 2001) (requiring changes to state's formula to make its new plan constitutional); DeRolph v. State, 728 N.E.2d 993 (Ohio 2000) (holding that mandate of the constitution has not yet been fulfilled); DeRolph v. State, 677 N.E. 733 (Ohio 1997); Tennessee — Tennessee Small Sch. Sys. v. McWherter, 894 S.W.2d 734 (Tenn. 1995) (holding that the State Basic Education Program meets constitutional mandates); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Texas — Edgewood Indep. Sch. Dist. v Kirby, 777 S.W.2d 391 (Tex. 1989); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991) (holding that constitutional violations remained following enactment of new legislation); Vermont — Brigham v. State, 692 A.2d 384 (Vt. 1997); Wyoming — Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995).

3. States where the finance system has been upheld since 1989 include: Alaska — Matanuska-Susima Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997); Illinois — Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Kansas — Unified Sch. Dist. 229 v. State, 885 P.2d 1170 (Kan. 1994); Maine — Sch. Admin. Dist. No. 1, v. Comm'r, 659 A.2d 854 (Me. 1994); Minnesota — Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Nebraska — Gould v. Orr, 506 N.W. 349 (Neb. 1993); North Dakota — Bismark Pub. Sch. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); Oregon — Coalition For Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991); Rhode Island — Pawtueket v. Sundlan, 662 A.2d 40 (R.I. 1995); Virginia — Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); Vincent v. Voight, 614 N.W.2d 388 (Va. 2000) (note that a majority of the court overturned the funding system, but a supermajority was required); Wisconsin — Kukor v. Grover, 436 N.W.2d 568 (Wisc. 1989).

4. *See, e.g.*, Abbott v. Burke, 693 A.2d 417, 438 (N.J. 1997).

5. Steve Smith, National Center on Education Finance, *North Carolina Decision, at* http://www.ncsl.org/programs/educ/litigationnc.htm.

6. *C.f.*, Deborah A. Verstegen, *The New Wave of School Finance Litigation*, 76 PHI DELTA KAPPAN 243 (1994); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C.L. REV. 597, 598 n.4 (1994).

7. Tennessee Small Sch. Sys. v. McWherter, 91 S.W.3d 232 (Tenn. 2002).

New Jersey;[8] facilities financing in Arizona and Idaho;[9] and special education funding systems in Alabama, Wyoming, and Ohio.[10] Preschool has been a focus of high court decisions in North Carolina and New Jersey, while assistance for at-risk children or children from low income homes has been addressed by high courts in New York, North Carolina, New Jersey, Wyoming, and Wisconsin.[11] Overall, however, recent court challenges have incorporated a new approach, basing their claims on the concept of "educational adequacy" rather than relying solely on the ideal of education finance equity.

This raises several questions. How do adequacy claims differ from traditional equity complaints? What is an adequate education, and how is it defined? Why have some state finance policies been found unconstitutional while others have been upheld? These questions are addressed in this article. State high court decisions emerging during the new wave of school finance litigation are reviewed, and two major findings are discussed: 1) a bifurcated theory of adequacy emerging from state high courts, and 2) the substantive contours of an adequate education, which is of interest to courts as a means to determine whether resources are sufficient in all districts to meet state statutes and standards consistent with the federal Constitution.

II. BACKGROUND: ADEQUACY VERSUS EQUITY

Finance equity has been a chief concern of the courts for over thirty-five years, but the focus on educational adequacy is relatively recent in legal challenges to state school finance systems, beginning in earnest in 1989 with rulings in Kentucky, Texas, and Montana.[12] Finance equity claims focus mainly on the disparities in funding between high-wealth and low-wealth school districts within a state that results from the happenstance of unequal

8. Abbott v. Burke, 495 A.2d 376 (N.J. 1985).

9. Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); Idaho Schs. for Equal Educ. Oppurtunity v. State, 976 P.2d 913 (Idaho 1998).

10. *See* Alabama Coalition for Equity, Inc. v. Hunt, No. DV-90-883-R, 1993 WL 204083 (Ala. Cir. Ct. Apr. 1, 1993); DeRolph v. State, 677 N.E.2d 733, 738-39 (Ohio 1997). For a thorough discussion, *see* Deborah A. Verstegen, *New Directions in Special Education Finance Litigation*, 23 J. EDUC. FIN. FIN. 277 (1998).

11. Abbott v. Burke, 748 A.2d 82 (N.J. 2000); Abbott v. Burke, 693 A.2d 417 (N.J. 1997); Campaign for Fiscal Equity, Inc. v. State, 801 N.Y.S.2d 326 (N.Y. 2003); Harrell v. Wilson County Sch., 293 S.E.2d 687 (N.C. 1982); Sneed v. Greensboro City Bd. of Educ., 264 S.E.2d 106 (N.C. 1980); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); State v. Campbell County Sch. Dist., 19 P.3d 518 (Wyo. 2001).

12. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Helena Elem. Sch. Dist. No. l v. State, 769 P.2d 684 (Mont. 1989), *modified by* Helena Elem. Dist. No. 1 v. State, 784 P.2d 412 (Mont. 1990); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); 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 (1990).

property tax bases among school districts.[13] Remedies typically apply to low-wealth districts only.

The conceptualization and measurement of equity have been well developed over time and include principles of horizontal equity (equal treatment of equals), vertical equity (unequal treatment of unequals), and equal opportunity (wealth neutrality). The conceptualization and measurement of equity have been set out in a seminal work by Robert Berne and Leanna Stiefel.[14] Their book draws on measures used by economists to evaluate income inequality.[15] Equity measures fall into five conceptual groupings, including measures of: 1) the extremes in the distribution, 2) all observations, 3) measures of the lower portion of the distribution, 4) other measures (e.g., federal range ratio), and 5) measures for the upper portion of the distribution.[16]

An educational adequacy claim focuses directly on inadequacies in the level of educational opportunities offered to children and youth in schools and classrooms within a state. The claim asserts that some students are not receiving an adequate education as defined by state standards, regulations, or educational goals consistent with constitutional requirements.[17] Thus, an educational adequacy claim alleges that one or more school districts cannot provide their students with an adequate education due to insufficient funding. These claims often seek relief for all districts within a state, rich and poor alike.[18] However, unlike the notion of equity, the conceptualization and measurement of adequacy in education have received a paucity of attention until recently.

13. *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, 545, 571-73 (1998); Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 318-19 (1998).

14. *See* ROBERT BERNE & LEANNA STIEFEL, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE: CONCEPTUAL, METHODOLOGICAL, AND EMPIRICAL DIMENSIONS (1984).

15. *See id.* at xvi-xvii, 1-6.

16. Deborah A. Verstegen, *The Assessment of Equal Educational Opportunity: Methodological Advances and Multiple State Analyses*, *in* OPTIMIZING EDUCATION RESOURCES, 127, 139 (B.S. Cooper & S.T. Speakman eds., 1996). *See also* Deborah A. Verstegen, *Concepts and Measures of Fiscal Inequality: A New Approach and Effects for Five States*, 22 J. EDUC. FIN. 145 (1996).

17. *See* WEST ED. ORG, SCHOOL FUNDING POLICY BRIEF: FROM EQUITY TO ADEQUACY 2 (2000); Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 175-208 (Helen F. Ladd et al., eds., 1999); James W. Guthrie & Richard Rothstein, *Enabling "Adequacy" to Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangements*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 209-59 (Helen F. Ladd et al., eds., 1999).

18. Rose v. Council of Better Educ., Inc., 790 S.W.2d 186, 215 (finding the entire education system unconstitutional, "all of its parts and parcels").

Over the past decade or so, the conceptualization and measurement of adequacy have developed briskly, although their genesis dates several decades hence.[19] The standards-based reform movement established concepts of an adequate education that are used together with state constitutions and regulations to determine base funding for schools and districts.[20] Four main methods are generally used for determining the cost of an adequate education: statistical analysis, costing comprehensive reform models (also called the evidence based approach), the successful district approach, and the professional judgment model.[21] However, two key approaches are generally employed to determine the cost of an adequate education in judicial and legislative deliberations: 1) the successful school district approach, where districts meeting state standards and goals are examined to determine costs; and 2) the professional judgment method, where service providers and local experts define the resource needs and costs of schools and school districts based on state standards, regulations, and constitutional requirements.[22] These approaches, sometimes combined in practice, yield a cost of education that can be adjusted for students and districts with special needs, as well as serving as the basis for state foundation guarantees in state finance policies.[23] In many states, the finance guarantee is based on the availability of funding or politics rather than the rational determination of the cost of an adequate education. It is this irrational method of funding a child's education to which courts overturning funding systems take umbrage.[24] As the Ohio court found in *DeRolph v. State*, "The formula amount has no real relation to what it actually costs to educate a pupil."[25] In *DeRolph II*, the court reiterated that "education

19. *See, e.g.,* J. Chambers & T. Parrish, *The Issue of Adequacy in Financing Public Education: How Much Is Enough?,* Project Report No. 1 82-A19 (Stanford, CA: Institute for Research on Educational Finance and Governance, 1982). *See also* Deborah A. Verstegen, *Judicial Analysis During the New Wave of School Finance Litigation: The New Adequacy in Education,* 24 J. EDUC. FIN. 51, 52 (1998).

20. Standards-based reform focuses on reaching a consensus on, and establishing standards for, what students need to know and be able to do at each grade or developmental level, EDSOURCE.ORG GLOSSARY, *available at* http://www.edsource.org/viewglossary.cfm?Term=standards-based%20reform (last visited Apr. 7, 2004). For a discussion of standards-based reform, *see* William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y Rev. 301 (2001).

21. *See* Deborah A. Verstegen, *Financing the New Adequacy: Towards New Models of State Education Finance Systems that Support Standards Based Reform*, 27 J. EDUC. FIN. 749, 768-76 (2002).

22. *Id.* JOHN G. MORGAN, TN. OFFICE OF THE COMPTROLLER OF THE TREASURY, FUNDING PUBLIC SCHOOLS: IS THE BEP ADEQUATE?, iii (2003).

23. *Id.*

24. *See* Verstegen, *supra* note 21, at 768-76.

25. DeRolph v. State, 677 N.E.2d 733, 738 (Ohio 1997) [hereinafter *DeRolph I*].

can no longer be funded as a residual."[26] Likewise, the Arkansas high court admonished:

> In order that an amount of funding for an education system based on need and not on the amount available but on the amount necessary to provide an adequate education system, the [lower] court concludes an adequacy study is necessary and must be conducted forthwith.[27]

Studies of the cost of an adequate education have now been completed in about twenty-four states, often at request of high courts, in an effort to align resources with state requirements and provide a rational basis for school finance systems.[28]

III. HIGH COURT DECISIONS IN THE NEW WAVE OF SCHOOL FINANCE LITIGATION – BIFURCATED THEORY OF ADEQUACY

School finance litigation is not new. Most scholars would agree it began in earnest in 1971 with *Serrano v. Priest*[29] in California, followed by the landmark federal case *San Antonio v. Rodriguez.*[30] The *Serrano* Court employed an equal protection analysis in examining the plaintiffs' equity challenge to the constitutionality of the U.S. and California Constitutions.[31] In overturning the funding system, the court held education to be a fundamental right, and poor children to be a suspect classification. It opined that "affluent districts can have their cake and eat it too; they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all."[32] Conversely, the U.S. Supreme Court in *Rodriguez* found that inequalities in spending among Texas school districts did not indicate a constitutional violation under the Equal Protection Clause of the U.S. Constitution.[33] In a five to four decision, the Court found that a suspect classification was not implicated and that education was neither explicitly nor implicitly defined as a fundamental right although the nexus between education and other rights and liberties afforded protection under the

26. DeRolph v. State, 728 N.E.2d 993, 1020 (Ohio 2000) [hereinafter *DeRolph II*].

27. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 486 (Ark. 2002).

28. Molly Hunter, Advocacy Center for Children's Educational Success with Standards, *Costing-Out*, *at* www.accessednetwork.org. For examples of studies, *see* DEBORAH A. VERSTEGEN, THE COUNCIL FOR BETTER EDUCATION, INC., CALCULATION OF THE COST OF AN ADEQUATE EDUCATION IN KENTUCKY (2003); AUGENBLICK, PALAICH AND ASSOCIATES, INC., NORTH DAKOTA DEPARTMENT OF PUBLIC INSTRUCTION, CALCULATION OF THE COST OF AN ADEQUATE EDUCATION IN NORTH DAKOTA IN 2002-2003 USING THE PROFESSIONAL JUDGMENT APPROACH (2003).

29. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971).

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

31. *Serrano*, 487 P.2d at 1244, 1249-66.

32. *Id.* at 1251-52.

33. *Rodriguez*, 411 U.S. at 54-55.

Constitution, i.e., speech and the exercise of the franchise, was asserted by plaintiffs.[34] However, the Court took the opportunity to state that the plaintiffs had not alleged that the funding system in Texas was inadequate, declaring that "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of education expenditure in Texas provide an education that falls short."[35] Although the Texas system was "chaotic and unjust," the Court found that solutions must come from lawmakers at the state level and the democratic pressures of those who elect them.[36]

Following *Rodriguez*, most challenges to inequitable state funding systems moved to state courts, with the 1973 decision *Robinson v. Cahill* following quickly in New Jersey.[37] The state high court overturned the funding system based on the plain meaning of the state constitution's education clause, which is the current approach, rather than invoking the Equal Protection Clause.[38] The court found that education was neither "thorough nor efficient," as required by the constitution.[39] In 1976, a second *Serrano* decision based solely on the state constitution was forthcoming.[40] Again, the funding system was found unconstitutional, this time based solely on the state constitution.[41]

Finance litigation proliferated over the decade of the 1970s and early 1980s. At the end of the school finance reform decade, twenty-one high court decisions were issued — seven in favor of plaintiffs and fourteen for defendants.[42] Analysts have surmised that courts were reluctant to hold

34. *Id.* at 25, 35-36.

35. *Id.* at 36-37. For a discussion of federal court challenges, *see* THE IMPACTS OF LITIGATION AND LEGISLATION ON SCHOOL FINANCE: ADEQUACY, EQUITY, AND EXCELLENCE (Julie K. Underwood & Deborah A. Verstegen eds., 1990).

36. *Rodriguez*, 411 U.S. at 58-59.

37. Robinson v. Cahill, 303 A.2d 273 (N.J. 1973).

38. *Id.* at 283, 294.

39. *Id.* at 295, 297-98.

40. *Serrano*, 557 P.2d at 951.

41. *Id.* at 957-58.

42. Between 1973 and 1988 plaintiffs prevailed in New Jersey — *Robinson*, 303 A.2d at 273; California, *Serrano*, 557 P.2d at 929; Connecticut — Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Washington — Seattle Sch. Dist. No. 1 of King County v. Washington, 585 P.2d 71 (Wash. 1978); West Virginia — Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Wyoming — Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980); and Arkansas — Dupree v. Alma Sch. Dist. No. 30 of Crawford County, 651 S.W.2d 90 (Ark. 1983). Defendants prevailed in Arizona — Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Colorado — Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Georgia — McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Illinois — Blasé v. State, 302 N.E.2d 46 (Ill. 1973); Michigan — Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); Montana — State *ex rel.* Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Idaho — Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Pennsylvania — Danson v. Casey, 399 A.2d 360 (Pa. 1979); Ohio — Bd. of Educ. of City Sch. Dist. of City of

finance systems unconstitutional under the Equal Protection Clause given its broad reach to all other areas of the Constitution. Then in 1983, finance reform was eclipsed with education reform: the release of *A Nation at Risk* hit a national nerve with its warning about "a rising tide of mediocrity that threatens our very future as a nation and a people."[43] Overnight education was front page news as attention turned away from funding, equity, and fairness to curriculum, testing, pedagogy, standards, and excellence. By 2000, forty-nine states had adopted curriculum standards that defined what all children should know and be able to do upon graduation. States also aligned curriculum standards to performance standards through exams that were intended to indicate the progress children were making towards state curriculum standards. School districts, schools, and education officials were held accountable for results, and state policies provided rewards or sanctions. However, noticeably absent were resource standards that would assure that all districts and all students would have equal opportunity to learn the material they would be held accountable for under the new state standards.

IV. THREE WAVES OF SCHOOL FINANCE LITIGATION

Since its emergence almost three and one-half decades ago, school finance litigation has been so plentiful that some scholars have categorized its history into three waves.[44] The first wave was based on federal challenges to finance inequalities among schools within a state and the federal Equal Protection Clause; it lasted from the 1960s to the U.S. Supreme Court's ruling in *Rodriguez* in 1973.[45] Wave two was characterized by equity challenges to state constitutions; it began with *Robinson* in 1973 and ended in 1989 when the new wave of school finance began.[46] Wave three was based on the plain meaning of state education articles and began with cases in Kentucky (*Rose*), Texas (*Edgewood*), and Montana (*Helena*), and continues to the present.[47] The emphasis is on equal opportunities to a certain quality of education. Reliance on the education article of state constitutions has fewer implications for other

Cincinnati v. Walker, 390 N.E. 813 (Ohio 1979); Maryland — Hornbeck v. Somerset County Bd. of Educ., 458A.2d 758 (Md. 1983); Oklahoma — Fin. Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (Okla. 1987); New York — Bd. of Educ. Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); North Carolina — Britt v. North Carolina State Bd. of Educ., 357 S.E.2d 4323 (N.C. Ct. App. 1987); and South Carolina — Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988).

43. National Commission on Excellence in Education, A NATION AT RISK (1983), *available at* http://www.ed.gov/pubs/NatAtRisk/risk.html.

44. Thro, *supra* note 12, at 222 (advancing the notion of three waves of litigation and discussing the first cases decided in the new wave of litigation).

45. *Id.* at 222-24.

46. *Id.* at 228-33.

47. *Id.* at 233-38.

areas of law, unlike Equal Protection Clause arguments, and makes plaintiff victories more likely.[48]

In examining the full gamut of high court decisions handed down since the emergence of the "new wave" of school finance litigation, one is struck by the prominence of adequacy issues, although equity issues continue.[49] In large part these decisions turn on whether a finance system provides sufficient resources for all students to obtain a certain level or standard of education that is constitutionally required. It is important to note that an examination of court decisions during the third wave of school finance litigation indicates that there is a bifurcated theory of adequacy emerging from the courts based on how adequacy is defined.

V. ANTIQUATED DEFINITION OF ADEQUACY – DEFENDANT VICTORIES

In states where the finance system has been upheld, courts appear to be invoking an age-old minimalist standard of adequacy set down in the 1920s: because all students had access to a minimum, basic education, the finance system was not constitutionally infirm despite disparities in educational quality and financing.[50] Significant changes that have occurred in society and the economy over time appear unacknowledged. However, even these courts have taken the opportunity to point out that 1) petitioners either have failed to mount a challenge to the adequacy of the finance system, or 2) petitioners themselves conceded that the education system was adequate, apparently using a "basic minimum" standard.[51]

For example, the Virginia Supreme Court found that education was a fundamental right but upheld the inequitable finance plan, stating, in part, that "the Constitution guarantees only that the [state minimum] Standards of Quality be met" and the "students do not contend that the manner of funding prevents their schools from meeting" these standards.[52] In a split Minnesota decision, the court stated: "this case never involved a challenge to the *adequacy* of education in Minnesota" and that even the plaintiffs conceded that the system was adequate apparently using a minimalist definition.[53] Likewise, Wisconsin's high court, upholding the finance plan, stated that "[o]ur deference would abruptly cease should the legislature determine that it was 'impracticable' to provide to each student a right to attend a public school at which a basic education could be obtained, or if funds were discriminatorily

48. *Id.* at 241. *See also* Verstegen, *supra* note 6, at 243-50; Wayne Buchanan & Deborah A. Verstegen, *School Finance Litigation in Montana*, 66 ED. L. REP. 19, 29, 32 (1991).

49. *Cf.*, Verstegen, *supra* note 6, at 243-50; Thro, *supra* note 12, at 598 n.4.

50. Deborah A. Verstegen, *Equal Education Under the Law: School Finance Reform and the Courts*, 14 J.L. & POL. 555, 575 (1998).

51. *Id.*

52. Scott v. Commonwealth, 443 S.E.2d. 138, 140, 142 (Va. 1994).

53. Skeen v. State, 505 N.W.2d 299, 302-03 (Minn. 1993) (emphasis in the original).

disbursed and there was no rational basis for such a finance system."[54] In Maine, the supreme court upheld the state finance system, noting that plaintiffs "presented no evidence at trial that any disparities in funding resulted in their students receiving an inadequate education." [55] The Rhode Island Supreme Court, in upholding the state aid system, noted that all children received instruction in the minimum "basic-education program, and that these subjects are taught in all schools irrespective of district wealth."[56] The Alaska Supreme Court upheld the state's practice of giving a larger share of state money to regional school districts than to municipal and borough systems.[57] However, the adequacy of the state's finance system was not challenged. In Illinois, although the constitution's education article called for a "high quality" public education, in a striking departure from current legal thinking, the court ruled the provision was non-justicable.[58]

VI. DEFINING ADEQUACY IN LIGHT OF THE TIMES – PLAINTIFF VICTORIES

Where state finance systems have been invalidated by high courts, adequacy is defined in the context of the information age and a global economy. In this context, a minimum or basic education is found to be insufficient and therefore unconstitutional. As the New Jersey court stated: "what seems sufficient today may be proved inadequate tomorrow."[59] According to the high court in Wyoming, "[t]he definition of a proper education is not static and necessarily will change" with the times.[60] Likewise, the Vermont high court opined: "Yesterday's bare essentials are no longer sufficient to prepare a student to live in today's global marketplace."[61] The Massachusetts high court admonished that "[o]ur Constitution, and its education clause, must be interpreted in accordance with the demands of modern society or it will be in constant danger of becoming atrophied . . . ."[62] In New Hampshire, the state supreme court declared that "a constitutionally adequate public education is not a static concept removed from the demands of an evolving world."[63] In Ohio, the high court, in determining whether the

54. Kukor v. Grover, 436 N.W.2d 568, 582 (Wis. 1989).

55. Sch. Admin. Dist. 1 v. Comm'r, 659 A.2d 854, 857 (Me. 1994).

56. Pawtucket v. Sundlan, 662 A.2d 40, 63 (R.I. 1995).

57. Matanuska-Sustna Borough Sch. Dist. v. State, 931 P.2d 391, 400 (Alaska 1997).

58. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1189 (Ill. 1996).

59. Abbott v. Burke, 575 A.2d 359, 367 (N.J. 1990) (quoting Robinson v. Cahill, 355 A.2d 129, 133 (N.J. 1976)).

60. Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1274 (Wyo. 1995).

61. Brigham v. State, 692 A.2d 384, 396-97 (Vt. 1997).

62. McDuffy v. Sec'y of the Exec. of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (quoting Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978)).

63. Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997).

funding system was "thorough and efficient" under the education article of the state constitution, opined:

> The definition of "thorough and efficient" is not static; it depends on one's frame of reference. What was deemed thorough and efficient when the state's constitution was adopted certainly would not be considered thorough and efficient today. Likewise, an education system that was considered thorough and efficient twenty-five years ago may not be so today.[64]

Similarly, the New York high court admonished that "the definition of a sound basic education must serve the future . . . ."[65]

Using a contemporary standard, the New Jersey court held that an adequate education would equip all children to be "citizens *and* competitors" in the labor market.[66] It would require equal opportunities to learn including "course offerings resulting in such intangibles as good citizenship, cultural appreciation, and community awareness."[67] This would require funding equity approximating one hundred percent between poor and wealthy school districts, the court stated, with imbalances favoring the needy.[68]

In Kentucky, the supreme court accepted the trial court's statement that an "efficient" system of education must be uniform, adequate, and unitary.[69] An adequate education was defined by the court as providing each child with facility in certain essential competencies.[70] An adequate education system, according to the lower courts in Ohio and Alabama and the high courts in Massachusetts, New Hampshire, North Carolina, and Arkansas, also sought to ensure each student the "essential competencies" cited in Kentucky, including "sufficient levels of academic or vocational skills to enable [him or her] to compete favorably with counterparts in surrounding states."[71] To this, the Alabama Supreme Court added "across the nation, and throughout the world in academics or in the job market."[72]

64. *DeRolph II*, 728 N.E.2d at 1001.

65. Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 349 (N.Y. 2003).

66. Abbott v. Burke, 575 A.2d 359, 374 (N.J. 1990).

67. For a discussion, *see* Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey and Kentucky*, 28 HARV. J. ON LEGIS., 401, 414 (1991) (quoting *Abbott*, 575 A.2d at 397).

68. *Abbott*, 575 A.2d at 408.

69. Rose v. Council of Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

70. *Id.*

71. Alabama Coalition for Equity v. Hunt, No. DV-90-223-R, WL 204083 at *53 (Ala. Civ. App. April 1, 1993); DeRolph v. State, No. 93-22043, slip op. at 460-61 (Ct. of C.P., July 1, 1994), *aff'd* 677 N.E. 733 (Ohio 1997); *Rose*, 790 S.W.2d at 212; Claremont Sch. Dist. v. Governor, 635 A.2d 1353, 1359 (N.H. 1990); McDuffy v. Sec'y of the Exec. of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Lake View Sch. Dist. v. Huckabee, 91 S.W.3d 472, 487-88 (Ark. 2002).

72. Opinion of the Justices, 624 So.2d 107, 166 (Ala. 1993).

The mandate emerging from the Massachusetts court in finding the finance system inequitable, inadequate, and unconstitutional was to provide opportunities that were available to children in the most affluent school systems to children in all school systems, rich or poor alike.[73] Both a Montana court and the Texas court concurred by finding that more than a basic education was constitutionally required and that accreditation standards were only a foundation upon which a quality education might be built.[74] The Wyoming court, in defining the constitutional command for a "thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state," [75] underscored that an "equality of quality" was necessary and achievable through an equitable financing scheme; all differences in funding must be based on research that verified relevant and justifiable differences in costs for students or districts with special needs.[76] The court instructed the legislature to define the "proper" education system, cost it out, and fund it.[77] Lack of resources would not suffice as an excuse to fall short, as the court concluded that, "all other financial considerations must yield until education is funded."[78]

The New Hampshire Supreme Court explained:

> Mere competence in the basics — reading, writing, and arithmetic — is insufficient in the waning days of the twentieth century to insure that this State's public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in the twenty-first century.[79]

The court stated that in "order to deliver a constitutionally adequate public education to all children, comparable funding must be assured in order that every school district will have the funds necessary to provide such an education."[80]

In Vermont, although both parties agreed that the finance system (the Foundation Program) paid for the cost of a "minimum quality" education, the court found the funding system inadequate and unconstitutional, stating that "we find no authority for the proposition that discrimination in the distribution of a constitutionally mandated right such as education may be excused merely

73. *See McDuffy*, 615 N.E.2d at 555.

74. Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 692 (Mont. 1989); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989).

75. *Campbell County*, 907 P.2d at 1263-64 (quoting WYO. CONST. art VII, § 1(9)).

76. *Id.*

77. *Id.* at 1279.

78. *Id.*

79. Claremont Sch. Dist. v. Governor, 635 A.2d 1353, 1359 (N.H. 1990).

80. *Id*. at 1360.

because a 'minimal' level of opportunity is provided to all."[81] The high court in Ohio held the funding system unconstitutional; it was inadequate to educate children "to their fullest potential"; it was not even minimally satisfactory.[82] The Ohio court also struck down the provisions for facilities and special education, as did the Wyoming and Alabama courts.[83]

In Arkansas, finding that equity and adequacy necessarily overlapped, the high court opined, "[t]here is no question in this court's mind that the requirement of a general, suitable and efficient system of free public schools places on the State an absolute duty to provide the school children of Arkansas with an adequate education."[84] Quoting from a previous decision handed down almost twenty years prior, the court reiterated, "[f]or some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. Bare and minimal sufficiency does not translate into equal educational opportunity."[85]

Likewise, the New York high court found:

> In *CFE* we equated a sound basic education with "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." We thus indicated that a sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in *contemporary society* . . . . As the Committee on Education reported at the time, the "public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before."[86]

Thus, according to theories emerging from the courts invalidating finance plans, an adequate education ensures that a child is equipped to participate in political affairs and compete with his or her peers in the labor market regardless of circumstances of birth or where that child is educated. An adequate education "works as well for the least advantaged as it does for the most advantaged."[87] In these cases, and others like them, what was adequate was determined in light of the times. Using a contemporary standard, funding systems that supported a basic minimalist education were found to be inadequate and therefore unconstitutional. Moreover, as courts in Ohio, Wyoming, New Hampshire, New Jersey, and other states have pointed out, a

81. Brigham v. State, 692 A.2d 384, 397 (1997).

82. *DeRolph I*, 677 N.E.2d at 745.

83. *Id.* at 779; *Campbell County*, 907 P.2d at 1244; Alabama Coalition for Equity v. Hunt, No. DV-90-223-R, WL 204093 at *1 (Ala. Civ. App. April 1, 1993).

84. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 493 (Ark. 2002).

85. DuPree v. Alma Sch. Dist. No. 30 of Crawford County, 651 S.W.2d 90, 93 (Ark.1983).

86. Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 330 (N.Y. 2003) (emphasis in original) (quoting the documents of 1894 N.Y. Constitutional Convention No. 62, at 4).

87. *DeRolph II*, 754 N.E.2d at 1244 (Sweeney, J., dissenting).

quality education, in contrast to minimum basic skills, would provide broad benefits not only to the individual but also to the public at large.[88] The New Jersey court explained:

> While the constitutional measure of the educational deficiency is its impact on the lives of these students, we are also aware of its potential impact on the entire state and its economy-not only in its social and cultural fabric . . . . So it is not just that their future depends on the State, the State's future depends on them.[89]

The Supreme Court in New Hampshire concurred by stating: "Education provides the key to individual opportunities for social and economic advancement and forms the foundation for our democratic institutions and our place in the global economy."[90]

VII. JUDICIAL REVIEW OF EDUCATIONAL ADEQUACY: ADEQUATE OPPORTUNITIES AS MEASURED BY CITIZENSHIP AND THE ABILITY TO COMPETE

Recent state high court rulings have highlighted factual evidence related to the state funding scheme, constitutional history, and other state contextual factors. In addition, however, the evidence presented in the "new wave" of school finance litigation focuses directly on adequacy in the level of educational opportunities offered to schoolchildren in one or more schools and districts within a state. This evidence shows that some students are not receiving a sufficient education as required under the constitution and as measured by contemporary education standards, state regulations, and/or comparisons to other school systems (or states). Thus, in assessing the constitutionality of the finance system, courts have shifted their focus, moving to include substantive educational content, in addition to dollar disparities and other educational input, process, and output factors. In essence, they are interested in determining whether a certain quality of education is available in all schools and districts and are looking at not only disparities in dollars but in what dollars buy, including teachers, class sizes, technology, materials, curriculum, facilities, budget flexibility, and other indicators of adequate educational opportunities for all children.

For example, the *McDuffy* Court in Massachusetts cited evidence indicating that less affluent school districts were offered significantly fewer educational opportunities and lower educational quality than students in schools in districts where per pupil spending was among the highest of all Commonwealth districts.[91] These high spending districts, the court stated, "are

88. *See generally, e.g.*, *DeRolph I*, 677 N.E.2d at 733; Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Abbot v. Burke, 495 A.2d 376 (N.J. 1985).

89. Abbott v. Burke, 575 A.2d 359, 411-12 (N.J. 1990).

90. Claremont Sch. Dist., 703 A.2d 1353, 1358 (N.H. 1997).

91. McDuffy v. Sec'y of the Exec. of Educ., 615 N.E.2d 516, 521 (Mass. 1993).

able to educate their children," calling for the state to fulfill its obligation "to educate all its children."[92] The Supreme Judicial Court (SJC) reviewed the facts in the case, leading to the conclusion that the Commonwealth was in violation of its constitutional duty to provide all public school students with an "adequate" education.[93] A comparison of four of the sixteen towns and cities in which plaintiffs lived and attended school (Brockton, Winchedon, Leicester, and Lowell) were compared to wealthier communities with expenditures in the top twenty-five percent of school spending in the Commonwealth (Brookline, Concord, and Wellesley).[94] The comparisons showed disadvantages for the poorer schools.[95] Inadequacies in these districts resulted in fewer educational opportunities and lower educational quality.[96]

Poor districts, the Massachusetts high court noted, had inferior educational programs and conditions including: crowded classes; reductions in staff; inadequate teaching of basic subjects including reading, writing, science, social studies, mathematics, computers, and other areas; neglected libraries; the inability to attract and retain high quality teachers; the lack of teacher training; the lack of curriculum development; the lack of *predictable* funding; administrative reductions; and inadequate guidance counseling.[97] In contrast, wealthy districts were characterized by multifaceted reading programs, extensive writing programs and resources, thorough computer instruction, active curriculum development and review ensuring a comprehensive and up-to-date curriculum, extensive teacher training and development, comprehensive system-wide student services, and a wide variety of courses in visual and performing arts.[98] Funding levels in plaintiff schools were "substantially less" than the financial resources of public schools in other towns and cities in the Commonwealth; so low as to render poor localities "unable to provide students with the opportunity to receive an adequate education."[99] The plaintiffs claimed the state funding system was responsible for "wide disparities" and the insufficiencies in education support, a finding of the SJC.[100]

The Tennessee high court, finding inadequacy and inequity in the school finance system, invalidated the finance plan by citing testimony that schools in poorer districts often have "decaying physical plants, some school buildings are not adequately heated" and that textbooks and libraries are "inadequate,

92. *Id.* at 553.
93. *Id.* at 519-23.
94. *Id.* at 555.
95. *Id.* at 553.
96. *McDuffy*, 615 N.E.2d at 553.
97. *Id.*
98. *Id.*
99. *Id.* at 521.
100. *Id.* at 553-54.

outdated, and in disrepair."[101] Lack of funds prevented poor schools from "offering advanced placement courses, more than one foreign language at a high school, state-mandated art and music classes, drama instruction, and extracurricular athletic teams . . . ."[102] In addition, some schools did not provide adequate science laboratories, in which "the teachers buy supplies with their own money to stock the labs, . . . [or] schools engage in almost constant fundraising by students to provide the needed materials."[103]

In addition, in wealthier Tennessee school districts, sixty-six percent of the elementary schools and seventy-seven percent of the secondary schools were accredited, compared to seven percent and forty percent among the ten poorest districts.[104] All of the schools in wealthy Kingsport and Shelby County districts were accredited.[105] In contrast, none of the schools in poor Clay, Wayne, Hancock, and Crockett Counties were accredited.[106] Students attending the unaccredited schools had a higher need for remedial courses at college, the court pointed out, "resulting in poorer chances for higher education."[107] This resulted in a "vicious cycle" where poor districts without accreditation could not recruit new industry and related business to the area.[108] Without additions to the tax base provided by new industry, the tax base would continue to decline, further reducing funds available for schools, the court noted.[109] Differences in spending among poor and wealthy districts in Tennessee varied considerably, as wealthy districts had two times more than poor districts.[110] The court found "a direct correlation between dollars expended and the quality of education a student receives."[111]

In Vermont, holding the finance system unconstitutional, the high court found that school districts of equal size but unequal funding would not have the capacity to offer "equivalent foreign language training, purchase equivalent computer technology, hire teachers and other professional personnel of equivalent training and experience, or to provide equivalent salaries and benefits."[112] Taking aim directly at the property tax as both a revenue source and mainstay of fiscal disparity, the Vermont Supreme Court invalidated the finance system, stating that local fiscal choice for poor districts was "illusory,"

101. Tennesee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 145 (Tenn. 1993).
102. *Id.* at 145-46.
103. *Id.* at 145.
104. *Id.* at 144.
105. *Id.*
106. *Tennessee Small Sch.*, 851 S.W.2d at 144.
107. *Id.*
108. *Id.*
109. *Id.* at 145.
110. *Id.* at 143.
111. *Tennessee Small Sch.*, 851 S.W.2d at 141.
112. Brigham v. State, 692 A.2d 384, 390 (Vt. 1997).

especially as "nowhere [does the constitution state] that the revenue for education must be raised locally, that the source of the revenue must be property taxes . . . ."[113]

In holding the Ohio finance system unconstitutional, the high court stated "we find that exhaustive evidence was presented to establish that the appellant school districts were starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity."[114] Testimony cited in the opinion revealed that under the school funding system, the amount of money that supported Ohio schools bore no relationship to the actual cost of educating a student. New Jersey's high court and the Wyoming high court have come to the same conclusion.[115] A substantial part of the opinion addressed the appalling condition of Ohio's school facilities, including accommodations for children with disabilities.[116]

Citing the "dirty, depressing" conditions of the schools that young children attended, the Ohio high court also reviewed evidence of the unsafe conditions that existed in the schools.[117] For example, in one school district "three hundred students were hospitalized because carbon monoxide leaked out of heaters and furnaces."[118] Asbestos was present in 68.6 percent of Ohio's school buildings, and "a scant thirty percent" had adequate fire alarm systems and exterior doors.[119] There were leaking roofs, outdated sewage systems that caused raw sewage to flow onto the baseball field, and arsenic in the drinking water of certain schools.[120] In other schools, "cockroaches crawled on the restroom floors," and "plaster was falling off of the walls."[121] "Only twenty percent of the buildings had satisfactory handicapped access."[122] For example, the court noted:

> Deering Elementary is not handicapped accessible. The library is a former storage area located in the basement. Handicapped students have to be carried there and to other locations in the building. One handicapped third-grader at Deering had never been to the school library because it was inaccessible to someone in a wheelchair.[123]

113. *Id.* at 395, 397.
114. *DeRolph I*, 677 N.E.2d at 742.
115. *Id.* at 759; Abbott v. Burke, 693 A.2d 417, 433 (N.J. 1997); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1275 (Wyo. 1995).
116. *DeRolph I*, 677 N.E.2d at 742-44.
117. *Id.* at 743-44.
118. *Id.* at 743.
119. *Id.* at 742-43.
120. *Id.* at 743.
121. *DeRolph I*, 677 N.E.2d at 744.
122. *Id.* at 742.
123. *Id.* at 743.

In Texas, the high court thrice invalidated the system in less than twenty-eight months.[124] In the initial *Edgewood Independent School District v. Kirby* decision, the court pointed out the gross disparities that existed among school districts in the state and found that educational programs in poor districts were not only inferior to wealthy districts, many did not even meet minimum state standards.[125] For example, "San Elizario I.S.D. [Independent School District] offer[ed] no foreign language, no pre-kindergarten program, no chemistry, no physics, no calculus and no college preparatory or honors program."[126] Its extracurricular programs were almost nonexistent as it had no band, debate, or football.[127] On the other hand, the court said:

> High wealth districts are able to provide for their students broader educational experiences including more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement programs, and drop-out prevention programs. They are also better able to attract and retain experienced teachers and administrators.[128]

In Kentucky, the high court dramatically extended the reach of school finance litigation and found the entire education system unconstitutional, not only the finance system, including the statutes creating, implementing, governing, and financing the system and all regulations.[129] Experts testified that "without exception . . . there is great disparity between the poor and more affluent school districts with regard to . . . basic educational materials; student-teacher ratio; curriculum; quality of basic management; size, adequacy and condition of physical plant."[130] They found "a definite correlation between the amount of money spent per child on education and the quality of education received," which was corroborated by evidence.[131] Variations among poor and rich districts were found in finances, taxable property, curriculum (especially foreign language, science, mathematics, music, and art), test scores, and student teacher ratios.[132] Not only did poorer districts provide an inadequate education, when judged by "accepted national standards," the more affluent districts' efforts were found to be inadequate as well.[133]

124. Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 515 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 498 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989).

125. *Edgewood*, 777 S.W.2d at 392.

126. *Id.* at 393.

127. *Id.*

128. *Id.*

129. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 214 (Ky. 1989).

130. *Id.* at 198.

131. *Id.*

132. *Id.* at 197.

133. *Id.* at 198.

Comparisons of Kentucky with adjacent states — Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, and West Virginia — included rankings on per pupil expenditures, average annual salary of instructional staff, classroom teacher compensation, property tax revenue as a percent of total revenue, percentage of ninth grade students graduating from high school, pupil-teacher ratio, and ACT scholastic achievement test scores.[134] The data showed Kentucky ranked nationally in the lower twenty to twenty-five percent in virtually every category that was used to evaluate educational performance and did not provide uniform opportunities among the school districts.[135] Thus, the court found the system inadequate and unconstitutional for all districts, both rich and poor alike.[136]

In Montana, the high court struck down the finance system based on the "plain" meaning of the education article of the Montana Constitution, after reviewing it to determine whether all children had equal access to a quality education, not a basic or minimum education.[137] It found the system inadequate to this task, noting that the accreditation standards provided only "minimum standards upon which quality education must be built."[138] Comparisons of similarly sized high and low spending school districts showed advantages for high spending districts such as "greater budget flexibility to address educational needs and goals," in addition to enriched and expanded curricula, better equipped schools in terms of textbooks, instructional equipment, audio-visual instructional materials, consumable materials and supplies, computer labs, libraries, and better facilities.[139] The evidence demonstrated that the "wealthier school districts are not funding frills . . . ," and disparities could not be described as the result of local control.[140] In fact, the present system "may be said to deny to poorer school districts a significant level of local control, because they have fewer options due to fewer resources."[141]

In New Jersey, the court has struck down the finance system seven times since 1985, not in total, but for the poor, urban districts only. [142] In the second

134. *Rose*, 790 S.W.2d at 197.

135. *Id.*

136. *Id.* at 215.

137. *See* Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 689-90 (Mont. 1989), *opinion amended by* 784 P.2d 412 (Mont. 1990).

138. *Id.* at 691-92.

139. *Id.* at 686-88.

140. *Id.* at 690.

141. *Id.*

142. *See* Abbott v. Burke, 790 A.2d 842, 845 (N.J. 2002) [hereinafter *Abbott VII*] (finding that the mandates set out in *Abbott V* and *Abbott VI* had not been met, and setting forth objectives and dates concerning preschool programs); Abbott v. Burke, 748 A.2d 82, 85 (N.J. 2000) [hereinafter *Abbott VI*] (clarifying further the requirements dealing with preschool programs in the poor urban school districts in order to provde an efficient and thorough education); Abbott v.

ruling (*Abbott II*), the court noted that poorer urban districts, in contrast to more affluent localities, were found to have inferior course offerings, dilapidated facilities, greater student needs, higher drop-out rates, lower educational expenditures, and failing scores on the High School Proficiency Test (HSPT).[143] Thus, the high court found that the poorer the district, the greater its need, the less the money available, and the worse the education.[144] The New Jersey court held that a thorough and efficient education means more than teaching the basic skills needed to compete in the labor market, although this was important.[145] It means being able to fulfill one's role as a citizen and to participate fully in society, in the life of one's community, and to appreciate art, music, and literature.[146] As the court stated, "[i]f absolute equality were the constitutional mandate, and 'basic skills' sufficient to achieve that mandate, there would be little short of a revolution in the suburban districts when parents learned that basic skills is what their children were entitled to, limited to, and no more."[147] The opinion cited disparities in education curricula that were linked to local district wealth and spending.[148] For instance, affluent Princeton had one computer per eight children, but poor Camden had one computer per fifty-eight children.[149] Princeton had seven science laboratories in its high school, each with built-in equipment; but some poor urban districts offered science in labs built in the 1920s or 1930s; others

Burke, 710 A.2d 450, 454 (N.J. 1998) [hereinafter *Abbott V*] (explaining the remedial measures that must be implemented in public education funding in order to ensure that public school children from the poorest urban communities receive the educational entitlements that the Constitution guarantees them); Abbott v. Burke, 693 A.2d 417, 420-21 (N.J. 1997) [hereinafter *Abbott IV*] (finding public education financing legislation facially constitutional in its adoption of substantive educational standards, but unconstitutional as applied to districts located in poor urban areas because funding was not guaranteed); Abbott v. Burke, 643 A.2d 575, 576 (N.J. 1994) [hereinafter *Abbott III*] (declaring Quality Education Act of 1990 unconstitutional as applied to districts located in poor urban areas, or special needs districts, and the more affluent districts); Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990) [hereinafter *Abbott II*] (holding the Public School Education Act of 1975 unconstitutional and finding that the state must guarantee funding of education in poorer urban districts at the level of property-rich districts, that such funding must be guaranteed and mandated by the state, and that the level of funding must also be adequate to provide for the special educational needs of those poorer urban districts in order to redress their extreme disadvantages); Abbott v. Burke, 495 A.2d 376, 381 (N.J. 1985) (remanding challenge to public school funding scheme to administrative tribunal for consideration and development of an administrative record sufficient to guide the adjudication of the constitutional issues on any future appeal).

143. *See Abbott II*, 575 A.2d at 375, 383, 395-97, 400-01.

144. *Id.* at 363.

145. *Id.* at 397.

146. *Id.*

147. *Id.* at 397-98.

148. *See Abbott II*, 575 A.2d at 394.

149. *Id.* at 395.

provided no laboratory experience at all or wheeled science materials around the school on a cart to furnish supplies.[150] Montclair's students began instruction in French or Spanish at the pre-school level; in Princeton's four-year high school, programs were also available in German, Italian, Russian, and Latin in addition to advanced placement courses.[151] In contrast, many poorer schools did not even offer upper level foreign language courses and only limited courses were available in high school.[152] South Brunswick offered music classes starting in kindergarten; Montclair began with preschoolers, and every elementary school had an art classroom and art teacher.[153] In contrast, in 1981 poor Camden eliminated all of its elementary school music teachers and could only provide "helpers" to teach art.[154] Another poor urban school provided an art room in the back of the lunchroom, and there were no art classrooms at all in East Orange elementary schools.[155]

Many richer suburban school districts had flourishing gymnastics, swimming, basketball, baseball, soccer, lacrosse, field hockey, tennis, and golf teams with fields, courts, pools, lockers, showers, and gymnasiums, but in East Orange the track team practiced in the second floor hallway, and there were no sports facilities.[156] Many district elementary schools did not have a cafeteria or suitable place to eat lunch.[157] Facilities in poor urban districts were often in disrepair, overcrowded, unsafe, and threatened the safety of children.[158] However, most schools in wealthy localities were newer, cleaner, and safer. For example, in East Orange, thirteen schools needed asbestos removal or containment; thirteen required structural system repairs; and fifteen had heating, ventilation, or air conditioning problems.[159] Moreover, poor urban districts were crowded. In Patterson, children ate lunch in a small area in the boiler room of the basement; remedial classes were taught in a former bathroom.[160] A school in East Orange had no cafeteria, and the children ate lunch in shifts in the first floor corridor while one class was held in a converted coal bin.[161] The court ordered funding parity between poor urban and wealthy suburban districts with additional funds for the special needs of Abbott's urban schoolchildren.[162]

150. *Id.*
151. *Id.* at 396.
152. *Id.*
153. *Abbott II*, 575 A.2d at 396.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Abbott II*, 575 A.2d at 396.
159. *Id.*
160. *Id.* at 397.
161. *Id.*
162. *Id.* at 410.

In the 1997 *Abbott IV* litigation, the court underscored the importance of sufficient funding, again ordering parity between poor urban and wealthy suburban districts in addition to a study of supplemental programmatic and facilities needs of urban schools.[163] Of the Comprehensive Improvement and Financing Act (CEIFA), enacted in 1996 to address the issues, it stated:

> CEIFA fails to address the estimated '$6 billion' facilities needs . . . . Such a failure is of constitutional significance - we cannot expect disadvantaged children to achieve when they are relegated to buildings that are unsafe and often incapable of housing the very programs needed to educate them.[164]

The New Jersey high court also ordered a full complement of "supplemental programs . . . to reverse the educational disadvantage these children start out with," including well planned, high quality preschool education for all three and four year old children in the *Abbott* urban districts.[165] These must be adequately funded by the state, the court declared.[166]

In Arizona, the high court reviewed and found the capital outlay provisions of the state finance system to be unconstitutional.[167] According to the facts presented in the case, facilities varied enormously across the state and were directly proportional to the value of real property within the district — including commercial property and power plants.[168] For example, the high court stated:

> There are disparities in the number of schools, their condition, their age, and the quality of classrooms and equipment. Some districts have schoolhouses that are unsafe, unhealthy and in violation of building, fire and safety codes. Some districts use dirt lots for playgrounds. There are schools without libraries, science laboratories, computer rooms, art programs, gymnasiums, and auditoriums. But in other districts, there are schools with indoor swimming pools, a domed stadium, science laboratories, television studios, well stocked libraries, satellite dishes, and extensive computer systems.[169]

163. *Abbott IV*, 693 A.2d at 439-40.

164. *Id.* at 438. In *Abbott V*, the court substantially accepted the state's plan for improving urban schools. *Abbott V*, 710 A2d at 512. Also, in *Abbott VII* the New Jersey Supreme Court in May of 2000 found that the state must fully fund all facilities improvements and new construction in Abbott districts. *Abbott VII*, 751 A.2d at 1035. For a discussion *see* Margaret E. Goertz, *New Jersey School Finance in the New Millenium*, *in* SCHOOL FINANCE LITIGATION ACROSS THE STATES: AN UPDATE 6 (Deborah A. Verstegen ed., 2001), *available at* ERIC, http://www.eric.ed.gov/.

165. *Abbott IV*, 693 A.2d at 436.

166. *Id.* at 439-40.

167. Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 815-16 (Ariz. 1994).

168. *Id.* at 809.

169. *Id.* at 808.

Facility disparities, the court pointed out, resulted from heavy reliance on local property tax revenues which also varied enormously across the state.[170] For instance, the assessed value of Ruth Fisher Elementary School District, with the highest valuation per pupil in the state, was $5.8 million.[171] In San Carlos Unified District, the poorest, it was $749.[172] Moreover, a property-poor district with a high tax rate could generate less revenue than a property rich district with a low tax rate.[173]

In Arkansas, finding the finance system inequitable, inadequate, and unconstitutional, the high court recounted Arkansas's "abysmal rankings in certain key areas respecting education" and noted that the state "ranks fiftieth among the states in per capita state and local government expenditures for elementary and secondary education . . . [and] between forty-ninth and fiftieth among the states in teachers pay."[174] In addition, there were serious disparities in teachers salaries and "poor districts with the most ill-prepared students [were] losing their teachers due to low pay."[175] Citing a "few examples" of conditions in schools, the high court noted that in Lake View School District, where ninety-four percent of the students recieved free and reduced price lunches:

> [there is] one uncertified mathematics teacher who teaches all high school mathematics courses. He is paid $10,000 a year as a substitute teacher and works a second job as a school bus driver, earning $5,000 a year. He has an insufficient number of calculators, too few electrical outlets, no compasses and one chalkboard, a computer lacking software and a printer that does not work, an inadequate supply of paper, and a duplicating machine that is overworked . . . . The college remediation rate for Lake View is 100%.[176]

The court further noted that Holly Grove School District offered no advanced courses.[177] The buildings had both leaky roofs and restrooms in need of repair.[178] The Barton Elementary School had two bathrooms with four stalls for over 100 students, and Lee County Schools had no advanced placement classes, school buildings in need of repair, school buses that did not meet state standards, and only thirty computers for 600 students.[179]

In New York, the high court found the finance system unconstitutional and asked whether insufficient funding led to inadequate inputs and therefore

170. *Id.* at 815.
171. *Id.* at 809.
172. *Roosevelt*, 877 P.2d at 809.
173. *Id.*
174. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 488 (Ark. 2002).
175. *Id.* at 489.
176. *Id.* at 489-90.
177. *Id.* at 490.
178. *Id.*
179. *Lake View*, 91 S.W.3d at 490.

unsatisfactory results.[180] The answer was affirmative.[181] As the court held, "considering all of the inputs, we conclude . . . New York City schools are inadequate. . . . [T]ens of thousands of students are placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure."[182]

The *CFE* Court reviewed resource inputs and outputs including teaching, facilities, and instrumentalities of learning.[183] The court found the most important factor to be teaching, as measured by certification rates, test results, experience levels, and the ratings teachers receive from their principals.[184] There was a "mismatch between need in New York City and the quality of the teaching directed to that need . . . . Uncertified or inexperienced teachers tend to be concentrated in the lowest performing schools . . ., and the longer students are exposed to good or bad teachers, the better or worse they perform."[185] In New York City, eighty-four percent of the student population were minority children, most of whom were poor, but of the teaching force; seventeen percent were either uncertified or taught in an area other than those in which they were certified.[186] New York City also had the largest percentage of teachers with only two or fewer years experience, e.g., novices, and the teachers had high failure rates on the certification exam. For example, more than forty percent had failed math.[187] Further, the city schools could neither attract nor retain quality teachers, and the court noted "the quality of the teaching correlates with student performance."[188]

In addition, thirty-one city high schools serving over 16,000 students had no science laboratory, and the court found that there was an "encroachment" of ordinary classroom activities on other specialized spaces such as libraries, laboratories, and auditoriums.[189] Schools had "excessive class sizes," which "affects learning," and over half of New York City schoolchildren were in classes of twenty-six or more, while "tens of thousands are in classes of over 30."[190] Instrumentalities of learning were also deficient, as library books that were "old and not integrated with contemporary curricula," city schools had

180. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 336 (N.Y. 2003) [hereinafter CFE].

181. *Id.*

182. *Id.*

183. *Id.* at 332.

184. *Id.* at 333.

185. *CFE*, 801 N.E.2d at 333-34.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 333 n.4.

190. *CFE*, 801 N.E.2d at 333.

half as many computers as in other New York schools, and the computers were "aging . . . [and] in some cases, simply cannot support presently-available software."[191]

The defendants argued in part that high drop out rates and low test scores in city schools resulted from students' low socio-economic status and were independent of the quality of the schools. However, the court held that "we cannot accept the premise that children come to New York City schools ineducable, unfit to learn."[192] The high court admonished, "[a]s the trial court correctly observed, this opportunity [for a sound basic education] must still 'be placed within reach of all students,' including those who present with socio-economic deficits."[193]

VIII. DEFINING ADEQUACY: SUBSTANTIVE EDUCATION CONTENT, STANDARDS, AND OTHER RELATED FACTORS

A key approach used by high courts in determining educational adequacy that meets constitutional muster includes defining substantive education content as a basis for resource allocations. The Kentucky Supreme Court accepted a trial court's statement that an "efficient" educational system, as required by the constitution, was uniform, adequate, and unitary.[194] The court stated that an adequate system must provide each child with facility in seven essential competencies.[195] These include:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
(ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
(iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
(iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
(v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

191. *Id.* at 336.

192. *Id.* at 341. The court here is commenting on immigrants and declines "to pin the blame" solely on the deficits a "troubled child" brings with him to school. *Id.* The court found no proof that drop out rates result from high numbers of teenage immigrants who enter ninth grade unable to graduate. *Id.* Instead, the court determined poor completion rates of high school students in New York City schools results from learning deficits that begin to be accumulated long before high school. *Id.* at 341-42.

193. *CFE*, 801 N.E.2d at 341-42.

194. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

195. *Id.*

> (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
>
> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[196]

The lower courts in Ohio and Alabama and the high courts in Massachusetts, New Hampshire, and Arkansas[197] also found that an adequate education system sought to ensure each student the "seven essential competencies" cited in Kentucky, including a "sufficient level of academic or vocational skills to enable him or her to compete favorably with counterparts in surrounding states."[198] To this the Alabama court added that each student should be able to compete favorably not only among surrounding states but also "across the nation, and throughout the world, in academics or the job market."[199]

The Wyoming court in *Campbell I* underscored that an "equality of quality" was necessary and was achievable through an equitable financing scheme.[200] The court instructed the legislature to define the "best" educational system and to identify the proper "package" for each student.[201] Thus, the Wyoming court called for a definitional standard of adequacy based on the presumption of a quality education for all children across the state. Importantly, this standard included additional revenue for legitimate and justifiable educational needs and costs of school districts and students, reflecting a concern for at-risk children also found in North Carolina, New

196. *Id.*

197. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 487-88 (Ark. 2002).

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

Id.

198. *Rose*, 790 S.W.2d at 212.

199. Opinion of the Justices, 624 So.2d 107, 108 (Ala. 1993).

200. Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995).

201. *Id.*

Jersey, Wisconsin, Wyoming, and New York.[202] Thus, like other courts, adequate funding did not require absolute equality in expenditures. The *Campbell I* Court, for example, held that a constitutional finance system required the legislature to take into consideration various balancing factors and devise a state formula that weighted the calculation to compensate for the special needs of children and other legitimate educational cost differentials.[203] It provided allowances for such variances among individuals, groups, and local conditions but held that these factors must not be arbitrary but be justifiable, that is, based on research and studies.[204]

In striking down the finance system as unconstitutional for poor urban districts, the New Jersey court in *Abbott II* called for: (1) the same level of education funding in poorer urban districts as in property-rich districts, (2) funding to be independent of the ability of local school districts to tax, (3) the state to guarantee and mandate such funding, and (4) the level of funding to be adequate to provide for the special educational needs found in poorer urban districts.[205] In *Abbott III*, the court clarified that "substantial equivalence approximating 100 percent" was required between affluent and poor urban school districts and that additional programs for children in poor urban districts meant that additional funding was necessary-beyond the average amounts affluent districts spend and "in addition to those for regular education."[206] Ultimately, the New Jersey court found that a "thorough and efficient" educational system was one that gave every student "a modicum of variety and a chance to excel."[207]

This approach to reaching a fair, adequate, and constitutional finance system for poor urban districts was later underscored when the new finance statute, created in response to the litigation and entitled CEIFA, was also found unconstitutional due to the lack of a rational basis for quantifying costs used to fund the Act.[208] The court held that neither the per pupil amount provided under the foundation program, nor the extra assistance for the special needs of children in poor urban areas, was based on legitimate cost studies that recognized the differences in needs and funding between wealthy and poor districts.[209] Thus, the financial aspects of the new Act were found wanting and in need of repair. The interim remedy "we mandate," the court stated in part,

202. The Wisconsin Supreme Court, while upholding the system, also included in the constitutional definition of adequacy supplemental services for students with extraordinary needs. Vincent v. Voight, 614 N.W.2d 388, 418 (Wis. 2000).

203. *Campbell County*, 907 P.2d at 1279.

204. *See id.*

205. *See generally Abbott II*, 575 A.2d at 359.

206. *Abbott IV*, 643 A.2d at 577.

207. *Abbott II*, 575 A.2d at 398.

208. *Abbott IV*, 643 A.2d at 421.

209. *Id.*

is the improvement of regular education through increased funding.[210] "By the commencement of the 1997-1998 school year, the State must guarantee that each SND [special needs district] has the money required to spend at the [wealthy] DFG I & J average budgeted (as opposed to predicted) per-pupil expenditure."[211]

In April of 1999, the South Carolina Supreme Court, reinstating a school finance case, declared that all children are entitled to a "minimally adequate" education establishing a qualitative standard and affirmative duty of the state toward schooling.[212] Defining with "deliberately broad parameters" the outlines of the constitution's requirement, the high court mandated that state must provide safe and adequate facilities in which students will have the opportunity to acquire: 1) the ability to read, write, and speak the English language and knowledge of mathematics and physical science; 2) a fundamental knowledge of economics, social and political systems, and of history and governmental processes; and 3) academic and vocational skills.[213]

In North Carolina the high court in *Leandro* held that unequal funding did not violate constitutional principles but addressed adequacy directly when it asked: Does the right to an education have a qualitative content?[214] Is the state required to provide children with an education that meets some minimum standard?[215] The high court answered "yes."[216] "An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."[217] Adequacy was defined as providing students with the essential competencies cited in Kentucky.[218] To determine educational adequacy, the court stated that several factors should be considered including: educational goals and standards adopted by the legislature, the achievement of children on standard achievement tests, and per pupil expenditures, but other factors may be relevant and no single factor may be treated as absolutely authoritative.[219] The case was remanded to the lower court to determine if the funding and substance of the state educational system was constitutionally adequate.[220]

210. *Id.*

211. *Id.* at 443.

212. Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

213. *Id. See also* Jennifer L. Fogle, Abbeville County School District v. State*: The Right of a Minimally Adequate Education in South Carolina*, 51 S.C. L. Rev. 420, 421-22 (2000).

214. Leandro v. State, 488 S.E.2d 249, 254, 256 (N.C. 1997).

215. *Id.* at 254.

216. *Id.*

217. *Id.*

218. *Id.* at 255.

219. Leandro v. State, 488 S.E.2d at 259-60.

220. *Id.* at 259.

Additionally:

> In April 2002, Judge Manning of the Superior Court of Wake County, North Carolina issued his fourth order in *Hoke v. State.* Building off of previous decisions, Judge Manning found that at-risk students could learn with effective instruction by a competent well-trained teacher. The state argued that sufficient resources were being provided for at-risk students, but local school districts were not spending the resources appropriately. Judge Manning rejected this claim and stated, "it is up to the executive and legislative branches to provide solutions to the constitutional deficits with at-risk children. These branches can no longer stand back and point their fingers at individual school districts."[221]

The high court in New York also found that substantive educational content determined an adequate education when it stated:

> the measure of a sound basic education is educational content — the set of "basic literacy, calculating, and verbal skills" children acquire and its fit with the goal of productive citizenship. Of course, results on a national norm-referenced exam may be translatable into a measure of the skills students must master to have a sound basic education . . . , [but the] State has not shown how to translate these results into proof that the schools are delivering a sound basic education, properly defined.[222]

IX. SUMMARY

The analysis of judicial decisions emerging during the new wave of school finance litigation indicates that there is a bifurcated concept of adequacy emerging from the courts. Where school finance systems are upheld, a minimalist education is considered adequate. When finance systems are invalidated, the concept of an adequate education goes well beyond a minimalist educational program that was once considered the acceptable standard. Today, according to the courts invalidating finance plans, minimums and basic skills are considered to be inadequate to ensure that all children will be "citizens and competitors" in an age of information and globalization. Nor will this minimalist standard of adequacy provide economic and social benefits to the nation at large, as the New Jersey and New Hampshire high courts have noted.

The high courts invalidating state finance systems have found that an adequate education is defined by the "best" system; it is a "quality" system; it provides "excellence in education"; it equips all children with certain

221. National Center on Education Finance, *North Carolina Decision: Recent Activity, at* http://www.ncsl.org/programs/educ/litigationnc.htm (last viewed Apr. 16, 2004) (citing Hoke County Bd. of Educ. v. State, No. 95-CVS-1158, at 107-08 (Apr. 4, 2002), *available at* http://www.ncjustice.org/edlaw/LeandroIV-FinalJDT.doc).

222. CFE, 801 N.E.2d at 339-40.

knowledge and competencies that allow them to compete in the labor market-across the country and internationally as well.

This conclusion has also found overwhelming agreement in the policymaking community. There, a consensus has emerged on the need to turn the education system to world class standards aimed at ambitious outcomes for all children and at all schools, and challenging state curriculum and performance standards towards these ends have been implemented in forty-nine states. However, most states have failed to define resource standards that ensure that all students in all districts have an equal opportunity to obtain an adequate education and excel on curriculums and exams for which they are held accountable. Moreover, as the focus of litigation has spotlighted adequacy issues while continuing to focus on equity, plaintiffs have more recently brought suits that go beyond challenging the per-pupil expenditures of school districts within a state. They have broadened their complaints, calling into question whether the amount being spent equates to an "adequate" education and is aligned with a certain level of resources and opportunities necessary to meet constitutional requirements and state standards for all children, including children in poverty and at-risk of educational failure. Resource indicators of adequacy in education include opportunities provided to children in schools and classrooms, such as the depth and breadth of curriculum, teacher quality, the ability to attract and retain quality teachers, facilities needs and safety, class sizes, budget flexibility and stability, and other input, output, and process indicators. Interestingly courts in New Jersey, Kentucky, Wyoming, Massachusetts, and other states have ruled in favor of plaintiffs, finding that the amount of money determined largely by the foundation formulas used in forty states to fund education and that support a minimal, basic education, is insufficient, irrational, and therefore unconstitutional. These courts have vacated earlier notions of minimal adequacy for basic education while maintaining constructs that do not sever theories of educational adequacy from educational equity.[223] They have defined adequacy in light of the times through input, output, or definitional standards, consistent with the federal Constitution.

This suggests that to support the *new adequacy* in education, finance systems must be linked to quality programs and services offered to children in schools and in classrooms, they must provide additional assistance to meet a child's legitimate and educationally relevant special learning needs and the uncontrollably high costs some small, sparse, or large districts experience.

223. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 496 (Ark. 2002) (stating that "[t]here is no doubt in our minds that there is considerable overlap between the issue of whether a school-funding system is inadequate and whether it is inequitable. Deficiencies in certain public schools in certain school districts can sustain a finding of inadequacy but also, when compared to other schools in other districts, a finding of inequality.").

Overall, they must align resources to substantive education content that will equip a child to be a citizen and competitor in the twenty-first century and provide a rational basis for financing education for children in America's public elementary and secondary schools. They must close the gap between the best and worst finance system within a state and give to the many what is reserved to the fortunate few: equal opportunities for an adequate quality education.