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## Fulfilling the Promise of Brown: The Experiences of Lawyers Challenging State School-Funding Systems

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# Symposium Revisited: Equitable and Adequate School Funding—Practice Perspectives

## Introduction

Gregory C. Malhoit\*

### Fulfilling the Promise of *Brown*: The Experiences of Lawyers Challenging State School-Funding Systems

A half-century ago, in *Brown v. Board of Education of Topeka*,<sup>1</sup> the Supreme Court struck down racially segregated schools, concluding that “equal protection” demands that states provide students with education on equal terms. While *Brown* focused attention on inequities caused by racial segregation of schools, it also implicitly raised questions about inequities in the way states fund public education. Since 1954, the constitutional commitment to “equal educational opportunity” has been the law of the land. In 1971, however, the Supreme Court in *San Antonio v. Rodriguez*,<sup>2</sup> determined that education is not a fundamental right under the U.S. Constitution, thereby leaving in place Texas’s grossly inequitable school funding system.

The decision in *Rodriguez* dealt a severe blow to the movement for equal educational opportunity and paved the way for states to continue inequities in their education-funding systems. As a consequence, vast numbers of children in the United States suffered irrevocable educational harm as they were forced to attend schools that lacked qualified teachers, did not offer students a high-quality

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1. 347 U.S. 483 (1954).

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

curriculum, or failed to support classrooms that were safe or conducive to learning. Advocates for “equal educational opportunity,” nevertheless, persevered. Relying on provisions in state constitutions, they shifted their focus away from federal courts and concentrated their efforts on state courts. Across the country during the last thirty-five years, lawsuits have been brought in forty-five states seeking reform in the way schools are funded. This litigation met with considerable success, and as courts struck down state education-funding systems, two key concepts in education funding were defined: (1) schools must be funded equitably and (2) schools must be funded at an adequate or sufficient level.

Cases based on the concept of “educational equity” argued that large disparities in the amount of per-pupil funding for schools, caused by states’ over-reliance on local property taxes to pay for education, were unconstitutional under equal protection principles. Several courts ruled in favor of the plaintiffs, and, as a result of these decisions, states reduced the funding gap between rich and poor school districts.

In contrast, “educational adequacy” argues that even if states reduce variations in spending among school districts, the State also is responsible for providing sufficient funding for schools to offer all students a quality education. The language about education found in state constitutions, along with educational goals and requirements set by state legislatures, have been interpreted by state courts to require the State to offer students an “adequate” education.

Traditionally, funding for education has been politically determined by state legislatures based on how much money legislators deem available and how much they are willing to spend. In a number of school finance cases, courts have ruled that legislatures must reverse this process and begin instead by determining the amount of money that is “sufficient” to ensure students an equal opportunity to obtain an education consistent with the state’s constitution. Several states have responded to court rulings by using various methods to determine a sufficient level of education funding.

The expanding field of school finance policy and law has generated considerable attention by legal and education scholars. Indeed, in 2003, the *Nebraska Law Review* published a series of articles that focused on issues in rural school finance.<sup>3</sup> While research and scholarly writing have done much to explain and advance the often arcane issues associated with school finance, very little attention has been paid to the work of the lawyers serving on the front line in litigating these groundbreaking cases.

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3. Symposium, *Equitable and Adequate Funding for Rural Schools: Ensuring Equal Educational Opportunity for All Students*, 82 NEB. L. REV. 1 (2003).

This follow-up collection in the *Nebraska Law Review* is intended to further illuminate the field of school finance policy and law by presenting the stories of five lawyers who have handled these important cases in recent years. These short and “nontraditional” Articles present a unique and candid “behind-the-scenes” look at what is involved in litigating a school finance case.

What, do being “naked in the YMCA” and “Dr. Seuss” have to do with school finance litigation? Readers will find the answer to this question and much more in Andru H. Volinsky’s spirited personal account of school finance litigation in New Hampshire. As he relates his experiences with *Claremont School District v. Governor*,<sup>4</sup> Mr. Volinsky makes the point that lawyers seeking to advance school funding reform must always be prepared to fight the battle for educational equity and adequacy, not only in the courts and in the state legislature, but also in the court of public opinion. Education of the general public about the relevant issues in school funding is essential in his view. Based on his experiences, Mr. Volinsky also concludes that active and ongoing court involvement is essential, because the state constitution “is the repository of important rights, and those rights cannot be protected absent faith in the viability of our courts as an equal branch of government.”<sup>5</sup>

As lawyers know, the facts in a case often are more important than the law itself. Graphic facts presenting a glaring injustice can motivate lawyers to represent clients on a *pro bono* basis. The experience of Kathleen J. Gebhardt, a solo practitioner from Boulder, provides a case in point. Sewage running down school halls and classrooms without heat in winter led her to represent a group of parents and children in a lawsuit arguing that Colorado’s system for funding facilities was constitutionally inadequate and inequitable. In *Challenges to Funding School Facilities in Colorado*,<sup>6</sup> she chronicles litigation that ultimately led to a settlement agreement with state officials. While the settlement resulted in improved funding for school buildings, securing the necessary follow-through by the legislature and Governor have been elusive. As Ms. Gebhardt notes, the state legislature has consistently failed to live up to the terms of the agreement.

Lawyers litigating school finance cases have learned that implementing a remedy in the state legislature can prove as difficult as winning in court. In *Arizona School Finance: A Primer on Strategy and*

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4. Andru H. Volinsky, *New Hampshire’s Education-Funding Litigation: Claremont School District v. Governor*, 635 A.2d 1375 (N.H. 1993), modified, 703 A.2d 1353 (N.H. 1997), 83 NEB. L. REV. 836 (2005).

5. *Id.* at 855.

6. Kathleen J. Gebhardt, *Challenges to Funding School Facilities in Colorado*, 83 NEB. L. REV. 856 (2005).

*Enforcement*,<sup>7</sup> Timothy M. Hogan describes his personal odyssey in challenging inequities and inadequacies in the way the State funded school facilities. In a tribute to his determination and commitment, Mr. Hogan's nonprofit organization—The Arizona Center for Law in the Public Interest—overcame adverse precedent and won in court. When Mr. Hogan did not see the court victory quickly result in better school buildings and classrooms, he found it essential to play a different role in the case—he became the chief lobbyist for a remedy.

"The forces of inequity never rest" could be inscribed on a plaque in Ronald J. VanAmberg's law office. A small-firm lawyer from Santa Fe, Mr. VanAmberg discusses his experience in representing the Zuni Public School District in *Separate But Unequal: One School District's Struggle for Fair Educational Facilities Funding in New Mexico*.<sup>8</sup> Like the experience in Arizona, Mr. VanAmberg's Native-American clients won in court only to see the battle ground shift to the state legislature. Once there, the political power of wealthier school districts and the active involvement of the former dean of the state's law school served to undermine the court victory. While the litigation has generated additional school facilities funding for Zuni and other school districts, the legal and political struggle for equitable and adequate school facilities continues in New Mexico.

School finance litigation can be slow and tedious. In his account of *Leandro v. State*,<sup>9</sup> Robert H. Tiller vividly describes ten years of litigation, including two trips to the state supreme court, that were necessary to secure a major victory for low-income students. Mr. Tiller, a private attorney working with one of North Carolina's leading law firms, also confirms the experience of other school finance lawyers—even before a final court ruling, school finance litigation often can pressure state legislators to improve school finance systems.

A sixth Article in this series addresses the role of the courts in school finance cases. Once a court determines that a state's school finance system is unconstitutional, it faces the perplexing challenge of engaging state legislators and executives to implement a comprehensive remedy. In her case comment on *Montoy v. State*,<sup>10</sup> University of Nebraska Law Professor Anna Shavers describes a Kansas trial judge's struggle with this crucial issue. In a case that has attracted

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7. Timothy M. Hogan, *Arizona School Finance: A Primer on Strategy and Enforcement*, 83 NEB. L. REV. 869 (2005).

8. Ronald J. VanAmberg, *Separate But Unequal: One School District's Struggle for Fair Educational Facilities Funding in New Mexico*, 83 NEB. L. REV. 882 (2005).

9. Robert H. Tiller, *Litigating Educational Adequacy in North Carolina: A Personal Account of Leandro v. State*, 488 S.E.2d 255 (N.C. 1997), 83 NEB. L. REV. 893 (2005).

10. Anna Williams Shavers, *Closing the School Doors in the Pursuit of Equal Education Opportunity: A Comment on Montoy v. State*, 2003 WL 22902963 (Kan. Dist. Ct. 2003), 83 NEB. L. REV. 901 (2005).

national attention, Professor Shavers chronicles the trial court's response to the legislature's failure to implement a school finance remedy as directed by the court. That extraordinary response—a court order closing all Kansas public schools until the legislature takes corrective action to make the system constitutional—reminds readers of past judicial efforts to desegregate schools “with all deliberate speed.” But it also raises questions about separation of powers. Professor Shavers concludes that the Kansas court is fulfilling its constitutional duty by taking a bold, but appropriate, step to ensure compliance with the state constitution.

These personal and candid accounts suggest a number of lessons that may help guide lawyers that are considering or may be involved in school finance litigation.

- (1) Committed and persistent lawyers representing their clients zealously are essential to secure equal educational opportunity.
- (2) Plaintiffs' lawyers must not only litigate in the courts, they also must be prepared to build public support for a remedy and work in the legislative arena.
- (3) School funding reform takes time, and lawyers and courts should be prepared for the long haul. In a very real sense, school finance work is never completed.
- (4) State courts are the protectors of state constitutions. Judges must take a firm stand on educational equity and adequacy, even if their decisions are not popular with those who seek to reduce the role of government.
- (5) Courts and judges must be willing to use their full panoply of powers in order to ensure that the legislative and executive branches of government live up to their constitutional obligations.
- (6) Lastly, school finance reform advocacy truly makes a difference for students and public schools. Despite many obstacles along the way, state education systems have generally been improved, albeit not always to the extent plaintiffs' lawyers would like, through litigation. As Timothy M. Hogan notes in his Article: “I have had no greater satisfaction than traveling around [Arizona] and seeing the hundreds of new and renovated schools in poor communities and knowing that our work helped build them.”<sup>11</sup>

For more than fifty years, the promise of “equal educational opportunity” so simply and eloquently stated in *Brown* has proved to be elusive for millions of our nation's schoolchildren. Yet, during this time,

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11. Hogan, *supra* note 7, at 881.

a small group of courageous and committed lawyers, aided by thoughtful courts, have carried on the fight for equal educational opportunity. We may not have achieved the full promise of *Brown*, but substantial progress has been made. To be sure, school finance litigation has positively affected funding for education, shaped efforts to improve schools, and clarified the role of state and local government in education. The lawyers and judges involved in this noble endeavor deserve both our praise and thanks.