

## “RACE-CONSCIOUS” SCHOOL FINANCE LITIGATION: IS A FOURTH WAVE EMERGING?

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School finance litigation, whether equality-based or adequacy-based, has helped steer state legislators and policymakers toward fairer, more appropriate school finance laws for over five decades and counting. Yet, a common criticism of these cases lingers: simply asking for more dollars for schools will not create the systemic changes needed to help students achieve in the classroom.<sup>1</sup> Those criticisms often fail to acknowledge the research evidencing gains in student performance, including a longitudinal study showing long-term impacts on the most challenging student groups.<sup>2</sup> While those gains are important markers for the school finance movement, the results are limited. We continue to witness significant opportunity gaps between racial and other student groups, such as access to high-quality teachers and rigorous

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1. See, e.g., William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923, 926 (2011) (reviewing ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS* (2009) (expressing skepticism and unfavorable opinions on school finance)).

2. See C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 22–37 (Nat’l Bureau of Econ. Research, Working Paper No. 20118, 2014) (discussing a comprehensive longitudinal study finding a significant causal relationship between increased student funding resulting from litigation and educational outcomes, including high school completion, adult earnings and income, and decreases in adult poverty). For a more in-depth discussion of other studies reaching similar results, see Brief for Ctr. for Pub. Policy Priorities et al. as Amici Curiae Supporting Plaintiffs-Appellees at 29–36, *Williams v. Tex. Taxpayer & Student Fairness Coal.*, No. 14-0776 (Tex. Aug. 11, 2015) [hereinafter *Williams* Brief of Amici].

curricula. The ongoing inequalities likely result from a confluence of factors, including reticent courts, advocates' narrow claims focused on school funding, misdirected state legislatures, failures to account for the impact of race and ethnicity, and annual solicited educational reforms in state capitols.<sup>3</sup>

Some civil rights organizations have taken notice of these limitations and have filed claims seeking to make greater returns on their cases. Acknowledging the strong link between inadequate and inequitable school finance systems and educational opportunity and race and ethnicity, the plaintiffs in each case have filed claims that not only raise the important theories based on inequitably and inadequately financed public education systems, but also address deeper, race-conscious issues that foster inequality in educational opportunities. This article examines two of those cases: *Martinez v. New Mexico*,<sup>4</sup> filed by the Mexican American Legal Defense and Educational Fund, and *Silver v. Halifax County School Board Association*,<sup>5</sup> filed by the University of North Carolina Civil Rights Center and the Lawyers' Committee for Civil Rights Under Law. As further examined below, *Martinez* is one the most progressive education lawsuits pending in the country, implicating not only school finance and education as a fundamental right, but also multicultural education, state expenditure monitoring duties, and state accountability and teacher evaluation systems, which tend to negatively impact high-minority communities. *Silver* is an aggressive and exciting case filed by plaintiff organizations and African American parents challenging both the remnants of racial segregation and the Jim Crow era laws that sustain segregated schools within Halifax

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3. To be fair, school finance litigation has never been intended to be the "magic bullet" that fixes all that is wrong in schools, given the many factors affecting educational quality and opportunity. For example, the IDRA's "Quality Schools Action Framework" shows several interlinking elements impacting the quality of schools, such as engaged citizens, accountable leadership, curriculum quality and access, and governance efficacy. *Quality School Action Framework*, INTERCULTURAL DEV. RES. ASS'N (Mar. 22, 2011), [http://www.idra.org/images/stories/IDRA\\_Quality\\_Schools\\_Action\\_Framework\\_HO\\_Eng\\_Spa.pdf](http://www.idra.org/images/stories/IDRA_Quality_Schools_Action_Framework_HO_Eng_Spa.pdf).

4. First Amended Complaint for Declaratory and Injunctive Relief, *Martinez v. New Mexico*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. June 12, 2014) [hereinafter *Martinez* Amended Complaint].

5. Complaint, *Silver v. Halifax Cty. Bd. of Comm'rs*, No. 15-CVS-767 (N.C. Super. Ct. Aug. 24, 2015) [hereinafter *Silver* Complaint]. Both the *Martinez* and *Silver* lawsuits now also include pro bono law firms. It should be noted that although the litigants in both cases pursue adequate educational opportunities, the cases do differ in some important aspects, such as implications of equal protection claims, as described further in the article.

County's three districts, as well as inadequate opportunities and resources that deprive minority and at-risk students of educational opportunities guaranteed under North Carolina's education clause.

These race-conscious school finance cases<sup>6</sup> show great promise, but promise alone will not yield equity and opportunity for all students. The litigants must present strong evidence supporting each claim. The courts must also be willing to tackle these tough issues by weighing the evidence, applying the law to the facts, and issuing declaratory and injunctive relief that appropriately addresses the specific harms proven.<sup>7</sup> Should the courts effectively take on these cases in both the evidentiary and remedial stages, it could help pave the way for greater educational opportunity for our nation's most challenging students.<sup>8</sup>

## I. THE FIRST THREE WAVES

Much has been written about the first three generations, or waves, of school finance litigation.<sup>9</sup> In searching for a response to

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6. Several authors have previously predicted the fourth wave of school finance cases, including some describing the "race/ethnicity conscious" school finance cases arising out of federal or state disparate impact or intentional discrimination claims. *See, e.g.*, Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. L. & SOC. CHANGE 47, 57–65 (2009). However, those limited cases never materialized into a movement for a number of reasons, including insurmountable hurdles in trying to prove an intentional discrimination case. The cases presented in this article are "race-conscious" in the sense that the race and ethnicity of Latino, African American, and Native American students are an integral part of the claim, but the race-related claims remain premised on the state education clauses. *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996), often cited as a fourth wave case directly implicated race, but it was decided based on a reading of both the state education clause and a state-antisegregation clause. *See id.* at 1271, 1290. The merits of the adequacy part of the case were never reached. *See id.* at 1286.

7. *See* David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown [But How It Can Get Us Closer]*, 2014 MICH. ST. L. REV. 575, 613–14 (discussing "the courts' concern with . . . encroaching upon the legislatures' power to enact laws . . . in education-related cases").

8. *See* Rebecca Merrill, *Reading the Waves: Evaluating Predictions of the Fourth Wave of School Finance Litigation Using Current School Funding Litigation Across the States*, Address at the 2015 American Education and Finance Policy 40th Annual Conference (Feb. 28, 2015), <http://www.aefpweb.org/conferences/aefp40-download> (discussing various factors that seemingly impact the effectiveness of injunctive relief, such as when courts fail to enforce the ordered relief or when legislatures are reluctant to stir the pot).

9. *See e.g.*, Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152–53 (1995); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222 (1990).

striking inequalities in the distribution of state school finance resources to school districts and school children, advocates first turned to the federal courts. On the heels of the successful equal protection arguments made in *Brown v. Board of Education*, the litigants in these cases filed claims under the Equal Protection Clause of the United States Constitution's Fourteenth Amendment.<sup>10</sup> The Supreme Court shut the door on these claims in the seminal case *San Antonio Independent School District v. Rodriguez*, despite overwhelming evidence showing stark inequalities in funding based solely on where the students attended school.<sup>11</sup> The Court held that education was not a fundamental right under the Constitution and that residents in low-funded school districts were not a sufficiently discrete, definable class for equal protection purposes deserving strict scrutiny.<sup>12</sup> Applying the less rigorous rational basis standard to the Texas school finance system, the Court found that the system was rationally related to the state's goal of ensuring local control.<sup>13</sup>

Advocates next turned to state constitutional equal protection and education clauses for redress as part of the second wave of school finance cases.<sup>14</sup> Here, they made similar arguments challenging unequal school funding systems disparately impacting predominantly poor and/or minority communities.<sup>15</sup> Advocates often sought to establish education as a fundamental right, thereby invoking the much tougher strict scrutiny standard.<sup>16</sup> These cases were largely successful in the early years with California, New Jersey, and West Virginia being among those with final state

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The categorization of cases under the second and third waves must be carefully reviewed, because prior writings often misrepresent the nature of the claims. For example, *Edgewood v. Kirby* was based clearly on an equality-based claim filed by property-poor school districts under the state education clause, yet it is often referred to as an adequacy case. See 777 S.W.2d 391, 397 (Tex. 1989). In fact, Texas did not face an adequacy claim until the fifth Texas school finance case tried in 2004. David Hinojosa, *Rodriguez v. San Antonio Independent School District, Forty Years and Counting*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY* 23, 31 (Charles J. Ogletree, Jr. & Kimberly Robinson eds., 2015).

10. See Thro, *supra* note 9, at 222–24.

11. See 411 U.S. 1, 24 (1973).

12. *Id.* at 37.

13. See *id.* at 55.

14. Christopher Roellke et al., *School Finance Litigation: The Promises and Limitations of the Third Wave*, 79 PEABODY J. EDUC. 104, 112 (2004).

15. See *id.* at 116.

16. *Id.* at 114.

court rulings in favor of the plaintiffs.<sup>17</sup> However, many courts grew resistant to these challenges. In addition, at least one state, California, responded to such decisions by leveling down wealthier school districts to the level of poorer ones, which did not help resolve the issues confronting those school districts.<sup>18</sup>

Some advocates continued to pursue equality-based claims, but others developed new theories focused on adequate funding.<sup>19</sup> The litigants in this third wave of cases typically argued that the amount of resources available for public education was insufficient, whether in helping students achieve the state goals and performance standards or the more societal, value-based goal of achieving personal capabilities so that they may become positive contributors to the economic, social, and democratic fabric.<sup>20</sup> The litigants in these cases had turbulent success, although the tide again appeared to turn in favor of the plaintiffs with wins in two-thirds of cases over the past twenty-two years.<sup>21</sup>

## II. THE FOURTH WAVE?

Over the years, several articles have been written about a “fourth wave.”<sup>22</sup> Some authors have attempted to predict how this next wave needs to evolve and tackle other issues outside of school funding.<sup>23</sup> Other commentators have suggested that the

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17. See Thro, *supra* note 9, at 228, 231 nn.56 & 58.

18. See Hinojosa & Walters, *supra* note 7, at 599.

19. James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229 (2008). The line between equality-based or adequacy-based lawsuits, and thus classification as second or third wave cases, is not finite and clear. As at least one scholar has noted, “[d]ecisions focused solely on adequate funding, with no attention paid to funding disparities, are rare indeed.” *Id.* Supreme Court decisions in Kansas, New Jersey, and South Carolina are only a few examples of rulings noting the strong roots in equality-based evidence and claims comparing the resources in one group of school districts against another. See, e.g., *Gannon v. State*, 319 P.3d 1196, 1204 (Kan. 2014); *Montoy v. State*, 120 P.3d 306, 310 (Kan. 2005) (holding the legislative modifications to the school finance system unconstitutional); *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 408 (N.J. 1990); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 180 (S.C. 2014).

20. See Hinojosa & Walters, *supra* note 7, at 604–06 (discussing third wave cases from Texas, Kansas, and Colorado).

21. *Litigation*, EDUC. L. CTR., <http://www.educationjustice.org/litigation.html> (noting the recent victories in Texas, Kansas, and Colorado) (last visited Feb. 19, 2016).

22. See, e.g., Bowman, *supra* note 6, at 57.

23. See Merrill, *supra* note 8, at 1–2.

fourth wave is presently occurring and has shifted to matters such as teacher quality.<sup>24</sup> Both arguments are mistaken.

First, the three waves described above are about how school finance litigation is employed as a vehicle to positively reform resource-broken school funding systems. Consequently, cases that fail to include school finance claims, and instead invoke other claims, cannot possibly constitute a “fourth wave” of school finance litigation. Second, teacher quality issues are not a novel theory uncommon to school finance. Several school finance cases have litigated the state of teacher quality.<sup>25</sup> For example, in *Neeley v. West Orange-Cove Consolidated Independent School District*, the Supreme Court of Texas acknowledged evidence in the case showing the need for more qualified math and science teachers to help students meet the new performance standards.<sup>26</sup> In *Williams v. California*, the plaintiffs argued that the California Constitution required the state to provide all students with qualified teachers, among other essential tools—eventually settling with the state to reform the equity gaps in access to teacher quality for poor and minority communities.<sup>27</sup>

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24. Michele Aronson, *The Deceptive Promise of Vergara: Why Teacher Tenure Lawsuits Will Not Improve Student Achievement*, 37 CARDOZO L. REV. 393, 407 (2015); see Nipun Kant, *Teachers, School Spending, and Educational Achievement: Toward a New Wave of School Quality Litigation 3* (2014) (unpublished paper) (on file with the Yale Law School Legal Scholarship Repository), [http://digitalcommons.law.yale.edu/student\\_papers/130](http://digitalcommons.law.yale.edu/student_papers/130).

25. See Ryan, *supra* note 19, at 1233, 1235 (noting that courts deciding school finance cases typically examine several factors including qualified teachers, and citing decisions in Tennessee and New York as examples); Bruce Baker, *On “Access to Teacher Quality” as the New Equity Concern*, SCH. FIN. 101 (July 2, 2014), <https://schoolfinance101.wordpress.com/2014/07/02/on-access-to-teacher-quality-as-the-new-equity-concern/> (noting that Dr. Baker and other education experts regularly address teacher quality, both in their reports and on the witness stand in school finance litigation).

26. 176 S.W.3d 746, 769 (Tex. 2005); see also Hinojosa & Walters, *supra* note 7, at 611. Even the students who walked out of Edgewood High School in 1968, spearheading the lawsuit that resulted in *Rodriguez v. San Antonio Independent School District*, complained to the Edgewood I.S.D. administration of the lack of access to quality teachers and adequate teaching conditions. *Id.* at 597.

27. See Complaint for Injunctive and Declaratory Relief, *Williams v. State*, No. 312236 (Cal. Super. Ct. Aug. 14, 2000); Jeannie Oakes & Martin Lipton, “*Schools that Shock the Conscience*”: *Williams v. California and the Struggle for Education on Equal Terms Fifty Years After Brown*, 15 BERKELEY LA RAZA L.J. 25–27 (2004); *The Williams Case—An Explanation*, CAL. DEPT EDUC., <http://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp> (July 17, 2015); cf. *Lobato v. State*, No. 2005CV4794, at 54, 59–64 (Colo. Dist. Ct. Dec. 9, 2011) (discussing favorably the testimony of Dr. Darling-Hammond on teacher quality and teaching conditions, while dismissing testimony of Dr. Hanushek), <https://www.coloradoattorneygeneral.gov/sites/default/files/120911%20District%20Court%20Order.pdf>; Tex. Taxpayer & Student Fairness Coal. v. *Williams*, No. D-1-GN-11-003130, 2014 WL

In contrast to second and third wave cases, the two cases discussed here seek to address the deeper roots of inequitable opportunities connected to race, language, and ethnicity, in addition to more traditional claims focused on high-need students. In *Martinez*, those roots include a systemic failure by the state to include multicultural education in its basic education, compounded by “reforms” to teacher evaluation models and accountability systems that drive high-quality teachers away from high-need and high-minority schools.<sup>28</sup> In *Silver*, the plaintiffs attack the segregative practices of the County Board of Commissioners that continue to impact the education of African American students.<sup>29</sup> Whether others follow suit will ultimately determine if these types of race conscious cases indeed constitute a “wave.”

#### A. *Martinez v. New Mexico*<sup>30</sup>

On April 1, 2014, several families of low-income and English language learner (“ELL”) children filed one of the most comprehensive educational opportunity lawsuits in the country, *Martinez v. New Mexico*.<sup>31</sup> These Latino and Native American parents, whose children attend seven predominately minority school districts across New Mexico, filed a complaint that raises several systemic issues that allegedly deprive their students of a uniform and sufficient education as guaranteed under the New Mexico

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4254969, at \*90, \*108–12, \*130–36, \*175, \*246–47 (Tex. Dist. Ct. Aug. 28, 2014) (describing findings supporting adequacy ruling based on expert reports of Dr. Jacob Vigdor and Dr. Bruce Baker related to teacher quality and criticizing expert testimony of Dr. Hanushek on teacher quality).

28. See *Martinez* Amended Complaint, *supra* note 4, at 3, 33–34, 41.

29. See *Silver* Complaint, *supra* note 5, at 1–2.

30. *Martinez* Amended Complaint, *supra* note 4. The *Martinez* lawsuit was the culmination of a two-year investigation by MALDEF into the educational challenges facing students, schools, and communities for approximately two years. See *MALDEF Challenges New Mexico’s Denial of the Fundamental Right to Education in Most Comprehensive Opportunity Lawsuit Yet Filed*, MALDEF, [http://www.maldef.org/news/releases/maldef\\_challenges\\_nm\\_denial\\_of\\_education/](http://www.maldef.org/news/releases/maldef_challenges_nm_denial_of_education/) (last visited Feb. 19, 2016). This investigation was aided by a Latino education task force and included interviews with several families, community-based organizations, educators, school administrators, education task forces, and state elected officials, among others. One of the resounding messages heard from several New Mexicans was that the lack of sufficient funding was, of course, a great concern, but so too was the impact of state reforms and the state’s failure to monitor effectively expenditures and school programs. *Id.* The author headed this investigation and served as the lead attorney for the *Martinez* plaintiffs until April of 2015. See *David G. Hinojosa, J.D.*, IDRA, [http://www.idra.org/About\\_IDRA/IDRA\\_Staff/DHinojosa/](http://www.idra.org/About_IDRA/IDRA_Staff/DHinojosa/) (last visited Feb. 19, 2016).

31. See Complaint for Declaratory and Injunctive Relief, *Martinez v. New Mexico*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. Apr. 1, 2014).

Constitution.<sup>32</sup> They challenge the state's failure to provide the necessary resources for an adequate education to their high-need<sup>33</sup> children in the quantitative sense, and they assert that the state has enacted, or failed to enact, statutes and regulations that collectively deprive them of an adequate education in the qualitative sense.<sup>34</sup> They also allege that a "uniform and sufficient education" under the New Mexico Constitution is a fundamental right and that the state discriminated against high-need students by failing to provide the opportunities they need to reach their potential and to meet the standards imposed by the state and society, violating the state's equal protection and due process clauses.<sup>35</sup>

What sets the *Martinez* complaint apart from many other school finance cases is that the allegations reach into other areas impacting educational opportunity, such as the failure to include

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32. See *Martinez* Amended Complaint, *supra* note 4, at 1–5, 9. The primary education clause provides as follows: "A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." N.M. CONST. art. XII, § 1.

33. The author uses the term "high-need" in this article to describe, collectively, economically disadvantaged, ELL, and/or special education students.

34. See *Martinez* Amended Complaint, *supra* note 4, at 48–49. According to the plaintiffs, a sufficient education can be interpreted in the qualitative sense as

a fundamental right under the New Mexico Constitution and qualitatively requires, at a minimum, an education that is "founded on the sound principle that every child can learn and succeed" and is sufficient to "meet the needs of all children" through a "multicultural education system" with "quality and diverse teachers" "proper assess[ment], place[ment] and monitor[ing]" and a "rigorous and relevant curriculum that prepares them to succeed in college and the workplace."

*Id.* at 3 (first quoting N.M. STAT. ANN. § 22-1-1.2(A) (2007); then quoting *id.*; then quoting *id.* at § 22-1-1.2(B) (2007); then quoting *id.*; then quoting *id.* at § 22-23-1.1(C) (2004); and then quoting *id.* at § 22-1-1.2(B) (2007)). The plaintiffs' use of state standards in the interpretation of the uniform and sufficient standards in the New Mexico Constitution is consistent with other state court practices. See Roellke et al., *supra* note 14, at 122–23 (reflecting on some courts' use of statutory standards to interpret the duties owed to students under state education clauses).

35. See *Martinez* Amended Complaint, *supra* note 4, at 49–51. Although the plaintiffs assert equal protection claims on behalf of high-need students and compare their educational opportunities to students who are not high-need, they also state,

while Plaintiff children and other ELL and economically disadvantaged children bear the brunt of an insufficient, low-quality education, the diversion of limited funds from other students and other programs would only worsen the problem. As stated earlier, such action would likely result in non-ELL and non-economically disadvantaged students being denied a sufficient education. "Robbing Peter to pay Paul" is not the remedy sought by Plaintiffs.

*Id.* at 33. Substantive due process is premised on the state's alleged failure to provide high-need students with the tools they need to achieve the graduation standards enacted by the state, which is similar to a standard articulated in *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981). See Roellke et al., *supra* note 14, at 129.



multiculturalism and bilingualism into the basic fabric of a sufficient education, relying on unique state constitutional provisions and several state statutes.<sup>36</sup> In addition, the plaintiffs assert that a constitutionally sufficient education requires the state to effectively monitor the expenditures by school districts, but the state has been derelict in this duty.<sup>37</sup> Finally, the plaintiffs allege that a sufficient education includes fair and effective oversight of teacher and student performance but the design and implementation of the state's teacher evaluation model and accountability system are arbitrary and punitive, driving high-quality teachers away from high-need students and schools.<sup>38</sup> Though seemingly non-

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36. See *Martinez* Amended Complaint, *supra* note 4, at 4, 10–13. The constitutional provisions include the New Mexico Constitution's Children of Spanish Descent Clause, which provides:

Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools . . . and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state . . . .

N.M. CONST. art. XII, § 10.

The Spanish Teacher Training Clause states that “[t]he legislature shall provide for the training of teachers . . . so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils . . .” N.M. CONST. art. XII, § 8. The plaintiffs cite to state statutes recognizing “that the key to student success in New Mexico is to have a multicultural education system,” which includes but is not limited to “attract[ing] and retain[ing] quality and diverse teachers,” and “integrat[ing] the cultural strengths of its diverse student population into the curriculum with high expectations.” *Martinez* Amended Complaint, *supra* note 4, at 11. They also refer to state statutes codifying the goals for bilingualism and multiculturalism and specifying educational program goals in the Hispanic Education Act, Indian Education Act, and Bilingual and Multicultural Education Act. *Id.* The Indian Education Act, for example, defines the purpose of the Act as to “ensure equitable and culturally relevant learning environments, educational opportunities and culturally relevant instructional material for American Indian students enrolled in public schools . . .” and “maintenance of native languages . . .” N.M. STAT. ANN. § 22-23A-2(A)–(B) (2003).

37. See *Martinez* Amended Complaint, *supra* note 4, at 48. This claim is not often found in school finance cases as school districts typically bring this litigation and districts may be less inclined to have their expenditures closely monitored. Nevertheless, there is precedent. See *Hoke Cty. Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 390 (N.C. 2004) (noting the trial court's ruling that the state “failed to oversee how educational funding and resources were being used and implemented in Hoke County schools”). In this case, the court found that the state has a duty to ensure that school districts appropriately and efficiently spend resources. *Id.* at 397.

38. See *Martinez* Amended Complaint, *supra* note 4, at 37–40. The punitive evaluations may have a secondary effect on recruitment of high-quality teachers in high-minority schools as the research “suggests that teachers with stronger academic backgrounds are likely to avoid teaching in schools with higher percentages of black children.” Preston C. Green, III et al., *Race-Conscious Funding Strategies and School Finance Litigation*, 16 B.U. PUB. INT. L.J. 39, 43 (2006). In a related case challenging the design and application of the New Mexico teacher evaluation system, but not implicating school finance or the state education clause, elected officials, teacher federations, and teachers challenged the

traditional allegations, they hold true to the chief goal of ensuring that the state legislature fully delivers the quality of educational opportunities required under the state constitution and the resources needed to sustain that quality of education in providing a uniform and sufficient education.<sup>39</sup>

The plaintiffs' fifty-five-page complaint paints a sobering picture for the courts. According to the complaint, New Mexico enrolled 336,980 public school students in eighty-nine districts and 855 schools (including charter schools) in the 2013–14 school year.<sup>40</sup> Of these students, Latinos constitute 60%, Caucasians 25%, Native Americans 10%, African Americans 2%, and Asian/Pacific Islanders 1%.<sup>41</sup> The percentage of economically disadvantaged students in New Mexico Public Schools was one of the highest in the country at 68%, an increase of over ten percentage points in the last decade, with some school districts attended by the plaintiff children enrolling up to 90% economically disadvantaged students.<sup>42</sup> ELL students accounted for 16% and students with disabilities 13.9%.<sup>43</sup> This incredibly diverse student population presents challenges but also incredible opportunities to tap the talent of resourceful students. However, based on the plaintiffs' allegations, a combination of arbitrary, inadequate inputs and dismal outputs for high-need students demonstrates that the

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evaluations as arbitrary and capricious and failing to adhere to the "objective and uniform" statutory mandate. See Findings and Conclusions and Memorandum Order Granting Plaintiffs' Motion for Preliminary Injunction, *State v. N.M. Pub. Educ. Dep't*, No. D-101-CV-2015-00409 (N.M. Dist. Ct. Dec. 2, 2015). On December 2, 2015, the state district court granted the plaintiffs' motion for preliminary injunction, finding the evaluation system, as applied, "is less like a model than a cafeteria-style evaluation system where the combination of factors, data, and elements are not easily determined and the variance from school district to school district creates conflicts with the statutory mandate." *Id.* at 2. This ruling may help bolster the *Martinez* plaintiffs' related claim, but will not settle it, as it does not address the meaning of the sufficiency clause.

39. *Martinez* is not the first school finance case filed in New Mexico, but it is the first systemic adequacy case filed in the state. The other cases shed little light on what can be expected from the courts. See generally *School Funding Cases in New Mexico*, NAT'L EDUC. ACCESS NETWORK (Dec. 2014), <http://schoolfunding.info/2014/12/school-funding-cases-in-new-mexico/> (describing an equality-based lawsuit filed in the early 1970s, which resulted in the Public School Finance Act of 1974 and a capital outlay funding case filed by school districts primarily located on federal or tribal lands).

40. *Martinez* Amended Complaint, *supra* note 4, at 15.

41. *Id.*

42. *Id.*

43. *Id.*

state is failing miserably at providing a sufficient education for these students.<sup>44</sup>

On the input side, the plaintiffs complain of a school finance system that arbitrarily sets the cost adjustment for at-risk students at about 10% of the basic costs, which plaintiffs allege is far too low to cover the additional costs needed to help those students achieve in the classroom.<sup>45</sup> The essential opportunities include high-quality pre-Kindergarten and before and after school programs, as well as reduced class size.<sup>46</sup> In addition, the plaintiffs state that the at-risk classification arbitrarily fails to include economically disadvantaged students as a group, despite their educational need.<sup>47</sup> They similarly complain of the inadequacy of the bilingual weight, which “often constrain[s] district’s services to helping students transition to English without any concern of the bicultural element of [the Bilingual Multicultural Education Program] or students’ retention of the native language.”<sup>48</sup> Although the state sets aside money to help implement the Indian Education Act, the plaintiffs allege that the state misallocates these funds, “hindering access to needed compensatory and cultural programs for Native American students.”<sup>49</sup> In addition, the “lack of a culturally sensitive environment, a culturally relevant curriculum, and the lack of resources to provide such deprives minority students of a sufficient education,” resulting in higher student discipline rates for African American, Latino/Hispano, and Native

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44. Several cases across the country have considered educational inputs and outputs in weighing adequacy-based claims. *See, e.g., Williams* Brief of Amici, *supra* note 2, at 9–10 (arguing that the consideration of educational inputs and outputs constitute a proper constitutional analysis).

45. *See* INTERCULTURAL DEV. RESEARCH ASS’N, REPORT OF THE INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION RELATED TO THE EXTENT OF EQUITY IN THE TEXAS SCHOOL FINANCE SYSTEM AND ITS IMPACT ON SELECTED STUDENT RELATED ISSUES 36 (2012), [http://www.idra.org/images/stories/IDRA\\_School\\_Finance\\_Equity\\_Report\\_08162012.pdf](http://www.idra.org/images/stories/IDRA_School_Finance_Equity_Report_08162012.pdf) (citing a 2008 study showing estimated add-on costs for compensatory education, ranging from a low of 22.5% in Arkansas to a high of 167.9% in Minnesota); *see also* Ross Rubenstein et al., Rethinking the Intradistrict Distribution to Disadvantaged Students 23, Conference on “Rethinking *Rodriguez*: Education as a Fundamental Right” (April 2006), [https://www.law.berkeley.edu/files/rubenstein-schwartz-stiefel\\_paper.pdf](https://www.law.berkeley.edu/files/rubenstein-schwartz-stiefel_paper.pdf) (showing that students with different characteristics—including ELL, economically disadvantaged, and students with disabilities—require more resources to educate).

46. *Martinez* Amended Complaint, *supra* note 4, at 17.

47. *See id.* at 3.

48. *Id.* at 31.

49. *Id.* at 28.

American students who eventually drop out at disproportionate rates.<sup>50</sup>

The plaintiffs further allege that the inadequate funding for students with disabilities results in “significant delays, backlogs, and errors in the proper identification of students.”<sup>51</sup> The plaintiffs claim the state’s poor monitoring and oversight of federal special education grants deprives students of needed services and their fundamental right to a sufficient education.<sup>52</sup>

The complaint also asserts that the qualitative sufficiency claim is further bolstered by the state’s arbitrary design and application of its teacher evaluation model and school/district grading accountability system.<sup>53</sup> At first blush, these allegations may appear to be more political than justiciable, but a closer examination shows that these claims are meritorious. First, as stated earlier, courts hearing school finance cases routinely weigh evidence on factors impacting teacher quality.<sup>54</sup> Courts have also measured accountability standards against the judicially interpreted adequacy standard.<sup>55</sup> Second, these are not independent constitutional violations like those filed in some of the recent teacher quality cases,<sup>56</sup> but instead are part of the evidence supporting the broader sufficiency claim. Third, the plaintiffs do not seek to force the state to eliminate the model and system altogether, which could encroach too closely upon legislative decision making.<sup>57</sup> In fact,

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50. *Id.* at 32.

51. *Id.* at 26.

52. *Id.* at 27.

53. *Id.*

54. *See supra* notes 21–25 and accompanying text.

55. The Supreme Court of Texas has equated an accredited rating with an adequate education, though it has also held that the state can set the bar too low to be afforded the presumption. *See W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 581 (Tex. 2003) (discussing *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 730 n.8 (Tex. 1995)). In a more recent Texas case, a trial court found that the plaintiffs effectively rebutted the presumption that a “general diffusion of knowledge” is equivalent to accreditation requirements. *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130, 2014 WL 4254969, at \*46–48, (Tex. Dist. Ct. 2014); *see also Montoy v. State*, 62 P.3d 228, 234–35 (Kan. 2003) (finding that the State of Kansas did not have unfettered discretion in setting the goals of education and accreditation standards and that the courts may independently weigh other evidence measuring student performance in order to determine whether the adequacy standard is met).

56. *See Aronson*, *supra* note 24, at 408.

57. *See, e.g., Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 740, 784 (Tex. 2005) (noting that the legislature has “much latitude in choosing among any number of alternatives that can reasonably be considered adequate, efficient, and suitable. These standards do not require perfection, but neither are they lax. They may be satisfied in

the plaintiffs allege that fair teacher evaluation models are part and parcel to ensuring that the state “attracts and supports a quality and diverse teaching force” needed to support a sufficient education.<sup>58</sup> The plaintiffs also do not ask the court to adopt their preferred measures. Rather, the plaintiffs assert that the state’s ill-fated schemes for teacher evaluations and accountability operate in contravention to its duty to provide a sufficient education. The plaintiffs aver several supporting facts showing that the state’s 50% reliance on student test scores in a teacher’s evaluation goes far beyond any reasonable percentage, especially in light of the strong research questioning the correlation between teaching and student performance.<sup>59</sup> They also allege that teachers are leaving high-need and high-minority schools because of the fear that they may lose their job due to student performance that is beyond their control.<sup>60</sup> Additional allegations point to the school grading accountability process, which is described as “highly technical, confusing, and results in inconsistent outcomes that ultimately harm students because it fails to convey clearly and effectively student proficiency, student growth, or school success,” negatively affecting a community’s perceptions and a school’s ability to recruit and retain high-quality teachers and school leaders.<sup>61</sup> With over half of the state’s schools allegedly receiving a grade of “C” or less, the potential harm to a sufficient education may be quite significant.<sup>62</sup>

The plaintiffs allege several disturbing outcomes for racial minority and high-need students in the New Mexico public education system. The state standardized test results for 2012–13 showed less than 20% of fourth grade students with disabilities achieving proficiency in reading and math, and only one out of four ELL eighth grade students reaching proficiency in reading,

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many different ways, but they must be satisfied”).

58. *Martinez Amended Complaint*, *supra* note 4, at 39.

59. *See id.* at 40. As one author states, “[t]he teacher evaluation and accountability reforms suffer from a range of problems, including technical issues with the design of testing systems, the likely effects of these systems on teachers’ motivation, and ultimately the watered-down vision of teaching and learning underlying these systems.” Benjamin M. Superfine & Jessica J. Gottlieb, *Teacher Evaluation and Collective Bargaining: The New Frontier of Civil Rights*, 2014 MICH. ST. L. REV. 737, 742.

60. *Martinez Amended Complaint*, *supra* note 4, at 40.

61. *Id.* at 38. In fact, experts have had much difficulty in determining how one of the Los Alamos schools received a “C” under the state accountability system. *Id.*

62. *Id.* at 38.

with even fewer in math.<sup>63</sup> Non-Latino white students achieved proficiency in reading across grade levels at much higher rates (67%) than African Americans (48.6%), Latinos (45.9%), and Native Americans (34.7%).<sup>64</sup> Approximately one out of three high-need students failed to graduate high school in four years, and the state dropout rates for Latino, Native American, and African American students was much higher than their respective national peer groups.<sup>65</sup> And though the state laws expect schools to prepare students for college and the workplace, well over half of Latino, Native American, and economically disadvantaged students attending college must take remedial courses.<sup>66</sup> According to plaintiffs, these dismal results reflect “a failing, insufficient system.”<sup>67</sup>

In June of 2014, the defendants moved to dismiss the sufficiency claim, arguing that the court lacked jurisdiction because the claim was nonjusticiable and not redressable, the equal protection and due process claims were subject to the rational basis standard as in *Rodriguez*, and the challenged New Mexico statutes met this test.<sup>68</sup> The nonjusticiability, or political question, defense is commonplace in school finance litigation, where defendants argue that the courts cannot hear cases where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”<sup>69</sup> As appealing as the defense may appear in school finance cases, very few courts dismiss cases as nonjusticiable, holding instead, for instance, that it is their “duty, certainly since *Marbury* . . . to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with [or fall short of] the requirements of the Constitution.”<sup>70</sup>

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63. *Id.* at 4.

64. *Id.* at 5.

65. *Id.* at 45.

66. *Id.* at 47.

67. *Id.* at 41. Many courts consider student performance metrics in weighing the merits of adequacy claims. Ryan, *supra* note 19, at 1243–45 (describing various decisions considering outputs).

68. Memorandum in Support of Defendants’ Motion to Dismiss at 10, 17–19, *Martinez v. New Mexico*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. June 18, 2014) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973)) [hereinafter *Martinez* Memorandum in Support of Defendants’ Motion to Dismiss].

69. *Baker v. Carr*, 369 U.S. 186, 217 (1962); see also Hinojosa & Walters, *supra* note 7, at 578 n.11.

70. *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 550 (Mass. 1993); see

In *Martinez*, the court similarly rejected the justiciability argument, following the lead of most states.<sup>71</sup> The court also rejected the defendants' standing argument, in which they claimed that the plaintiffs' professed injury could not be properly redressed by the court without violating the separation of powers doctrine.<sup>72</sup> The court concluded that there are various forms of relief that could be ordered within its judicial power that would remedy the injury.<sup>73</sup>

Several other state rulings have held education to be a fundamental right under their respective constitutions<sup>74</sup> and the *Martinez* court, in denying the defendants' motion to dismiss, followed their lead, pronouncing:

Frankly, it is difficult to conceive of a service that the State provides its citizens that is more fundamental than the right to education. Nothing really promotes the ability to be a good citizen or to be a productive member of society more than having an education. An educated populace is not only something that is fundamental to our current well-being, it is fundamental to our future well-being. The Court is of the opinion that if directly confronted with this issue, the appellate courts of New Mexico would find that there is a fundamental state constitutionally-based right to an education.<sup>75</sup>

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Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 780–81 (Tex. 2005) (noting that only a “few” courts dismiss claims as nonjusticiable). Other states hold that the *Baker* test does not apply and invoke state law in striking down justiciability challenges. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989) (“To avoid deciding the case because of ‘legislative discretion,’ ‘legislative function,’ etc., would be a denigration of our own constitutional duty.”); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997) (noting “the judiciary has the duty to construe and interpret the word ‘education’ by providing broad constitutional guidelines” (quoting *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 95 (Wash. 1978))); *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 539 (S.C. 1999) (“[T]he circuit court erred in using judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause.”); *State v. Campbell Cty. Sch. Dist.*, 32 P.3d 325, 334–35, 337 (Wyo. 2001) (refusing to apply *Baker* in determining the justiciability of the adequacy case, relying instead on state constitutional principles and case law).

71. Order Denying Defendants' Motion to Dismiss Plaintiffs' First & Second Amended Complaint at 2, 4, *Martinez v. New Mexico*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. Nov. 14, 2014) [hereinafter *Martinez* Order Denying Defendants' Motion to Dismiss].

72. *Id.* at 3–4; see also *Martinez* Memorandum in Support of Defendants' Motion to Dismiss, *supra* note 68, at 4–6.

73. *Martinez* Order Denying Defendants' Motion to Dismiss, *supra* note 71, at 3–4.

74. Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss & Brief in Support at 20, *Martinez v. New Mexico*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. Aug. 7, 2014).

75. *Martinez* Order Denying Defendants' Motion to Dismiss, *supra* note 71, at 5–6. Although the defendants argued that the two intermediate court of appeals' decisions previously relied on *Edgington* and *Ramah* in holding that education was not a fundamental

The court also stated that it would apply intermediate scrutiny to the three classes of high-need students (ELL, students with disabilities, and economically disadvantaged students) but would allow the parties to present evidence demonstrating otherwise.<sup>76</sup> The defendants did not appeal and trial is set for the summer of 2017.<sup>77</sup> With the major legal barriers out of the way, the plaintiffs can now test their race-conscious theories.

### B. *Silver v. Halifax County Board of Commissioners*

In August of 2015, a contingent of African American parents, school children, and two organizations shocked the education community by filing suit against the Halifax County Board of Commissioners (“Board”), claiming that the Board denies Halifax County’s school children the right to a “sound basic education” as guaranteed under the North Carolina Constitution.<sup>78</sup> While education advocates in North Carolina have pursued reform to the unequal and inadequate state school finance system dating back to the 1980s, what makes the *Silver* lawsuit so shocking and unique from the other school finance cases are stinging allegations that the Board chose “to maintain and fund an inefficient three-district system that divides its children along racial lines into ‘good’ and ‘bad’ school districts,” violating the constitutional rights of its school children.<sup>79</sup> According to the plaintiffs, the Board’s actions result in two overwhelmingly African American districts—Halifax County Public Schools (“HCPS”) and Weldon City Schools (“WCS”)—and one majority white district—Roanoke Rapids Graded School District (“RRGSD”)<sup>80</sup>—that have access to incredibly disparate resources, depriving the students principally enrolled in the African American districts of a sound basic education.<sup>81</sup> Although the courts have ordered additional expenditures in school desegregation cases to address unequal educational op-

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right, the plaintiffs effectively distinguished those cases and convinced the court that Article XII, Section 1 of the New Mexico Constitution was not at issue there. *See id.* at 5.

76. *Id.* at 6–7.

77. Second Amended Scheduling Order, *Martinez v. New Mexico*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. Oct. 2, 2015).

78. *Silver* Complaint, *supra* note 5, at 5–8.

79. *Id.* at 1–2.

80. *See id.* at 9. According to the complaint, WCS is 94% African American and 4% white, HCPS is 85% African American and 4% white, and RRGPSD is 26% African American and 65% white. *Id.*

81. *Id.*



portunities,<sup>82</sup> litigants rarely, if ever, invoke allegations of racial segregation in school finance litigation.<sup>83</sup> The *Silver* plaintiffs upset that trend by directly attacking the creation and maintenance of three segregated school districts and the negative impact on educational quality and student performance among the three districts.<sup>84</sup>

As noted above, North Carolina's storied history of school finance litigation covers four decades, and the *Silver* plaintiffs similarly complain of the denial of a sound basic education. Although the courts turned back the first reported school finance challenge, *Britt v. North Carolina State Board of Education*, on the grounds that the state constitution guaranteed no right to equality-based funding,<sup>85</sup> seven years later in *Leandro v. State (Leandro I)*, the Supreme Court of North Carolina reversed a dismissal of an adequacy claim and concluded that all students attending public schools in North Carolina have a constitutional right to a "sound basic education."<sup>86</sup> This sound basic education is societal value-based and standards-based. It is societal-value based in that it must prepare "students to participate and compete in the society in which they live and work."<sup>87</sup> It is standards-based in that it minimally guarantees all students an education that helps them acquire:

- (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the stu-

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82. *Cf. Missouri v. Jenkins*, 495 U.S. 33, 51–52 (1990) (acknowledging that the district court's broad remedial powers include the authority to order millions in expenditures on various educational programs to ensure the elimination of the vestiges of discrimination to the extent practicable, but striking down the district court's order raising taxes).

83. See Douglas S. Reed, *Court-Ordered School Finance Equalization: Judicial Activism and Democratic Opposition*, in DEVELOPMENTS IN SCHOOL FINANCE, 1996, at 91, 93 (1997) (observing that school finance litigation has not focused on remedying racial segregation); James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 530–32 (1999) (noting the absence of school desegregation issues in school finance cases and recounting the significance of the Connecticut Supreme Court's ruling in *Sheff v. O'Neill*, where the court reasoned that the education clause is "informed" by the segregation clause and concluded "that the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity." 678 A.2d 1267, 1281 (Conn. 1996)).

84. See *Silver* Complaint, *supra* note 5, at 5–7.

85. 357 S.E.2d 432, 436 (N.C. Ct. App. 1987).

86. 488 S.E.2d 249, 254–55 (N.C. 1997) (citing N.C. CONST. art. I, § 15, art. IX, § 2(1)).

87. *Id.* at 254.

dent to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.<sup>88</sup>

According to the *Silver* plaintiffs, the Board has a constitutional obligation to ensure that every child educated in the county's schools receives a sound basic education, and the county is the sole body that can rectify the structural deficiencies described in the complaint.<sup>89</sup> The plaintiffs allege that the "three-district system is a vestige of the Jim Crow era that perpetuates a racial stigma because it maintains two failing and under-resourced black school districts and one white, better-performing, and better-resourced school district, all in a majority non-white county."<sup>90</sup> The plaintiffs recite a long history of segregation in the area, including the operation of separate and unequal schools for African American and white school children in each of the county's three school districts and an inter-district transfer policy that perpetuated the segregation.<sup>91</sup> In addition, the plaintiffs also allege that the majority-white district, Roanoke Rapids, drew its school district boundaries during the Jim Crow era in 1907 to include areas outside the city limits which were (then and now) majority-white neighborhoods, while excluding at least three majority-African American neighborhoods located within the city limits.<sup>93</sup>

The plaintiffs aver that the past segregative actions of the Halifax County Board and related inequalities have rolled forward into the present, denying the children of the majority African American districts of WCS and HCPS a sound basic education.<sup>94</sup>

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88. *Id.* at 255 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)).

89. *Silver* Complaint, *supra* note 5, at 2.

90. *Id.* at 27.

91. *Id.* at 27–29. Even after the *Brown v. Board* decision in 1954, the districts allegedly continued to openly defy the mandate to desegregate their schools. *See id.* at 28 (“[A]ll three districts resisted federal desegregation efforts throughout the mid-1960s and early 1970s.”).

93. *See id.* at 31–32.

94. *Id.* at 33–34. Although the heart of the allegations seemingly blame the denial of the right to a sound basic education to African American students on the Board's racially segregated school districts, the plaintiffs do allege that *all* students in the Halifax County schools are denied a sufficient education. *Id.* at 2. This may be due to the fact that a large majority of students in the County's three districts are at-risk and/or African American

They allege that the Board's failure to efficiently disperse county resources to the school districts forces the three districts to compete for resources—a "competition" that the majority-African American districts cannot win.<sup>95</sup> The *Silver* plaintiffs also claim that the Board's structuring of the local education system "imposes a racial stigma that deters the investment of educational resources into the black districts and undermines the academic achievement of black students in all three districts."<sup>96</sup>

Like the *Martinez* plaintiffs, the *Silver* plaintiffs allege a bleak picture of inadequate inputs and outputs, evidence of which the North Carolina courts weigh in adequacy cases. In *Leandro I*, the court noted that on remand, the trial court could consider in its ruling of whether the state fulfilled its mandate of providing a sound basic education to all students the following, non-exclusive factors: goals and standards established by the state, the level of performance on state achievement tests, and general and per-pupil expenditures.<sup>97</sup> In *Leandro II*, the court held that "test score evidence, in and of itself, addresses the question of whether students are obtaining a sound basic education . . . ."<sup>98</sup> The court also found that the trial court had correctly determined that the state defendants had not fulfilled their duty of monitoring the funding and resources used in Hoke County schools and that its remedial

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and that those students in the Roanoke schools (62% of whom are identified for the Free or Reduced-Price Lunch Program) are performing at fairly low levels. *See id.* at 8–9 (showing Roanoke ranking 70th in the state out of 115 total school districts for statewide composite end-of-grade and end-of-course exams). The inclusion of *all* students, including white students, also may serve to dispel the notion of white superiority, as the "good" majority-white school, while better performing than the majority-African American school, may not be emblematic of a sound basic education. By including the students in Roanoke, the plaintiffs may avoid setting the bar too low for a sound basic education. These allegations also recognize the research showing that white students attending classes and schools without their African American peers miss out on the benefits of learning in diverse settings. *See, e.g.,* Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, NAT'L COAL. ON SCH. DIVERSITY (Oct. 2012), <http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf>.

95. *Silver* Complaint, *supra* note 5, at 13.

96. *Id.* at 9.

97. *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 259–60 (N.C. 1997).

98. *Hoke Cty. Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 383 n.11 (N.C. 2004). However, the test score evidence, on its own, is not conclusive of a state constitutional violation. *See id.* ("[P]laintiffs must show that their failure to obtain such an education was due to the State's failure to provide them with the opportunity to obtain one.").

plan for at-risk students entering the school system was insufficient to allow such students to avail themselves of a sound basic education.<sup>99</sup>

The *Silver* input allegations include access to fewer experienced and fully licensed teachers, absence of high-quality extra-curricular programs, inequitable access to college-preparatory coursework, decaying facilities, and significantly higher suspension rates of African American students compared to RRGSD, among other allegations.<sup>100</sup> According to the complaint, these low-quality educational inputs lead to African American student achievement levels that are among the worst in the state.<sup>101</sup> WCS and HCPS rank 114th and 115th out of 115 total public school districts on the composite end-of-grade and end-of-course state tests for grades three through eight.<sup>102</sup>

On November 2, 2015, the Board filed its motion to dismiss the complaint on several grounds.<sup>103</sup> The defendant generally argued that the plaintiffs failed to state a claim upon which relief can be granted.<sup>104</sup> In *Leandro I*, the Supreme Court of North Carolina made quick work of a similar motion to dismiss for failure to state a claim filed by the state defendants, holding that the courts' principal duty is to interpret the constitution and that although the courts would not intrude upon legislative decision making, they would ensure the state had fulfilled its duties owed to the students under the state constitution.<sup>105</sup>

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99. *Id.* at 392. Importantly for the *Silver* plaintiffs, the North Carolina Supreme Court has previously recognized that poverty and a student's racial or ethnic minority group are factors considered for identifying at-risk students. *Id.* at 389–90 n.16.

100. *Silver* Complaint, *supra* note 5, at 2, 10–18.

101. *See id.*

102. *Id.* at 9.

103. *See* Motion to Dismiss, Motion to Strike and Answer at 1, *Silver v. Halifax Cty. Bd. of Comm'rs*, No. 15-CVS-767 (N.C. Super. Ct. Nov. 2, 2015) [hereinafter *Silver* Defendant's Motion to Dismiss].

104. *Id.*

105. 488 S.E.2d 249, 253, 259 (N.C. 1997). In *Leandro II*, the court concluded that whether the courts could require the state to provide pre-Kindergarten to all four-year-old children, including at-risk children, was a decision reserved solely for the legislature. *Hoke Cty. Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 391, 393 (N.C. 2004). However, this did not entirely foreclose the issue because the court called the age-for-entering-school question “a distinct and separate inquiry” from the question of “whether the General Assembly must address the particular needs of children prior to entering the school system.” *Id.* at 391–92.

The Board also moved to dismiss the complaint on the grounds that the plaintiffs lacked standing,<sup>106</sup> but this defense appears to have little merit based on the North Carolina courts' broad interpretation of standing. The *Leandro II* court found that students were "within the zone of interest" to be protected by the education clause.<sup>107</sup> That court also concluded that although the school boards were not bestowed the right to a sound basic education, they "were properly maintained as parties because the ultimate decision of the trial court was likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings."<sup>108</sup> It is highly unlikely that a court would deny standing to the plaintiff guardians,<sup>109</sup> students, and the organizations, which include parents of children attending Halifax County Schools as members.

The Board further argued that the plaintiffs failed to join the State of North Carolina, the State Board of Education, and the three local school district boards and board members as necessary defendant parties.<sup>110</sup> Indeed, the Board points out that the Halifax County School Board was a plaintiff in the *Leandro I* and *II* lawsuits against the state defendants and that the obligations of providing a sound basic education fell on the state and state board actors, not on local county commissioner boards.<sup>111</sup> It also argued that if the plaintiffs are seeking consolidation of the three districts, then the North Carolina General Assembly is the appropriate defendant because that body retains that power.<sup>112</sup> In contrast, the Board minimized its authority, although it does admit that its duties include providing funding for the "county's share of the cost of kindergarten, elementary, secondary, and post-secondary public education."<sup>113</sup> The *Silver* plaintiffs seemed to have anticipated this response to the lawsuit, wherein they allege that "[e]very attempt to provide students the opportunity to

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106. *Silver* Defendant's Motion to Dismiss, *supra* note 103, at 3–4.

107. *Leandro II*, 599 S.E.2d at 376–77.

108. *Id.* at 378.

109. On a technical issue, the Board also challenges the capacity of the three guardians named in the complaint, arguing that the guardians lacked the appropriate guardianship required to sue on behalf of guardian children under North Carolina Rule of Civil Procedure 17(c)(1) and, therefore, that they were not real parties in interest. *Silver* Defendant's Motion to Dismiss, *supra* note 103, at 3–4.

110. *Id.* at 4.

111. *Id.* at 6.

112. *Id.* at 7–9.

113. *Id.* at 11 (citing N.C. GEN. STAT. § 153A-149(b)(7) (2013)).

receive a sound basic education through additional funding and other state intervention have failed, because none have addressed the adverse educational impact of the Board's educational delivery mechanism and its maintenance of three racially identifiable and inadequately funded school districts."<sup>114</sup>

On February 2, 2016, the state district court granted the Board's motion, holding that the *Silver* plaintiffs failed to cite any "provision of the Constitution of the State of North Carolina that is a clear foundation for nor offer any compelling authority supportive of the proposition that it is the constitutional responsibility of the Defendant to implement and maintain a public education system for Halifax County."<sup>115</sup> The court did not articulate much behind its two-page ruling and a negative ruling was anticipated by the plaintiffs' counsel. These cases are rarely decided at the trial court level and an appeal is expected.

If the plaintiffs decide to appeal the ruling, the precedent in North Carolina seems promising for the plaintiffs to obtain the relief they are seeking. The Supreme Court of North Carolina has previously held that the right to a sound basic education is a fundamental right under the North Carolina Constitution, and its opinions discussing that right have been very strong when that right is threatened by governmental actors.<sup>116</sup> In *Leandro II*, the court voiced its concern for the ten classes of students who had passed through the school system without proper relief during the pendency of the *Leandro I* litigation.<sup>117</sup> If the plaintiffs are correct that the Board exercises authority over the maintenance of the three school district system and can establish a clear constitutional violation of the right to a sound basic education due to the actions or inactions of the Board, the courts should be well-positioned to enter an appropriate remedy to correct the harm. This is especially true in light of the alleged stigmatization of African American school children, which greatly compounds the in-

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114. *Silver* Complaint, *supra* note 5, at 3. This theory is supported by some research in the field suggesting that even with additional funds, education in racially isolated schools is still a challenge. See Genevieve Siegel-Hawley, *Tearing Down Fences: School Boundary Lines and Equal Educational Opportunity in the Twenty-First Century*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY* 183, 186 (Charles J. Ogletree, Jr. & Kimberly Robinson eds., 2015).

115. Order, *Silver v. Halifax Cty. Bd. of Comm'rs*, No. 15-CVS-767 (N.C. Super. Ct. Feb. 2, 2016).

116. See *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 254, 261 (N.C. 1997).

117. *Hoke Cty. Bd. of Educ. v. State (Leandro II)*, 599 S.E.2d 365, 377 (N.C. 2004).

jury resulting from the adequacy violation. The court has previously articulated that it “cannot similarly imperil even one more class unnecessarily” when an existing violation occurs under the education clause related to inadequate opportunities.<sup>118</sup> It should follow that the courts would be willing to come down swiftly on the governmental actors responsible for denying a sound basic education by continuing to segregate schools.

#### CONCLUSION: PROMISE OF RACE-CONSCIOUS LITIGATION AWAITS

Whether other advocates and litigators follow suit by incorporating race issues into their school finance complaints may depend on whether the plaintiffs in *Martinez* and *Silver* can get the appropriate relief. In cases of this magnitude, going to trial and proving the allegations is only half the battle. The relief that is ultimately ordered by the courts is equally important in systemic reform cases.<sup>119</sup>

Precedent in the two states shows that the equitable powers of the courts can afford proper relief to the plaintiffs if successful. In New Mexico, the state supreme court has stated that it, “[a]s the branch of state government responsible for interpreting the constitution, the judiciary has the authority and the duty to protect individuals from violations of rights guaranteed in [its] constitution.”<sup>120</sup> This power allows the court to ensure that any legislative action remedies the specific harms proven. The court need not control the purse strings, but it can ensure that the state fulfills the duty it owes to students by scrutinizing the actions the legislature may take in responding to an injunction.<sup>121</sup>

Although the North Carolina courts have carefully considered the arguments in school finance cases and rendered strong opinions affirming the trial courts’ decisions on the merits, they have been slow in effectuating appropriate relief when necessary. Nevertheless, precedent allows for stronger action when warranted. In *Leandro II*, the court stated that

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118. *Id.* at 393.

119. See Hinojosa & Walters, *supra* note 7, at 613–15.

120. *State v. Vallejos*, 945 P.2d 957, 966 (N.M. 1997).

121. See Merrill, *supra* note 8, at 7–8 (noting that among the most effective judicial interventions is an “appropriately activist judicial branch”).

when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.<sup>122</sup>

However, the court drew pause at requiring the more specific pre-Kindergarten remedy because it determined that the legislature retained authority over establishing the beginning age for all school children. The evidence also showed that the state recognized the problem for at-risk students and seemed to have a plan to help address the constitutional violation—aside from a mandatory pre-Kindergarten program for all four-year old children.<sup>123</sup> If the allegations are proven in the *Silver* case and the Board—and other responsible parties, if added—has not shown that it seriously intends to appropriately address the violation, then the trial court may impose a more specific injunction, which could include consolidation of the three districts.<sup>124</sup>

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122. 599 S.E.2d at 393 (citations omitted).

123. *Id.* at 393–94.

124. Indeed, just as the research has shown the dreadful harm of stigmatization imposed on minority school children as a result of segregated schools for over half a century, so too the research shows the lasting impact on educational attainment and adult earnings, among other positive lifetime outcomes for African Americans, resulting from school desegregation coupled with the accompanying increases in quality of schooling. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); Rucker C. Johnson, *Long-Run Impacts of School Desegregation and School Quality 2* (Nat'l Bureau of Econ. Research, Working Paper No. 16664, 2011) (explaining that school desegregation increased education, occupational attainments, and several other benefits).