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# Minnesota's Education System Is Unconstitutional: Will Someone Bring a Compelling Case?

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**MINNESOTA’S EDUCATION SYSTEM IS  
UNCONSTITUTIONAL:  
WILL SOMEONE BRING A COMPELLING CASE?**

Gerald Von Korff<sup>†</sup>

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## I. INTRODUCTION

For several decades, Minnesota commissions, task forces, and advocacy groups have warned that our education system has been failing to meet twenty-first century challenges for students who come to school with educational disadvantages.<sup>1</sup> Three constitutional challenges have been made to Minnesota's education system, though each was founded on an inadequate theory. Although three constitutional challenges have been launched in the last three decades, all three have been founded on inadequate legal theories. The central thesis of this article is that Minnesota's education system needs to be reinvigorated with ambitious litigation that remedies the state's failure to provide an education that meets state standards. As discussed throughout this article, "state educational standards" or "state standards" refer to the robust statutory framework included in Minnesota Statutes Chapters 120B, 124D, and 125A.<sup>2</sup>

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1. *E.g.*, MINN. EDUC. EQUITY P'SHIP, STATE OF STUDENTS OF COLOR AND AMERICAN INDIAN STUDENTS REPORT 2 (2016), <https://mneep.org/wp-content/uploads/2016/04/SOSOCAI-Report-2016.pdf> [<https://perma.cc/BR8F-N8PM>] ("This Report is informed by the very persistence of those disparities through a period of intense reform efforts."); DAN MUELLER, WILDER RES. FOUND., EDUCATION DISPARITIES—INCOME: A CRADLE TO COLLEGE PERSPECTIVE 7 (2014), <https://www.wilder.org/Wilder-Research/Publications/Studies/STEM%20in%20Minnesota/Education%20Disparities%20Income,%20A%20Cradle%20to%20College%20Perspective.pdf> [<https://perma.cc/5FXC-P9MY>]; MINN. DEP'T OF EDUC., FUNDING EDUCATION FOR THE FUTURE 4 (2011), <http://www.amsd.org/wp-content/uploads/2012/03/EFReport-2.pdf> [<https://perma.cc/4P3L-ZL8C>] (discussing the little progress made in closing wide gaps in reading and math proficiency by race and by economic status between 2006 and 2010); BUDGET TRENDS STUDY COMMISSION, REPORT TO THE LEGISLATURE 7 (2009), <https://www.minnpost.com/sites/default/files/asset/0/0p728b/0p728b.pdf> [<https://perma.cc/6XZU-H9LG>].

2. MINN. STAT. §120B.02, subdiv. 1 (2017) ("Educational Expectations And Graduation Requirements for Minnesota's Students"); MINN. STAT. § 120B.02, subdiv. 1(a) (2017) (requiring the commissioner to adopt rigorous academic standards); MINN. STAT. § 120B.021 (2017) (listing required academic standards); MINN. STAT. § 120B.018, subdiv. 2 (2017) (defining "academic standard" as "a summary description of student learning in a required content area under section 120B.02 or elective content area under section 120B.022"); MINN. STAT. § 120B.11

In *Skeen v. State*, the Minnesota Supreme Court affirmed that the Education Clause of the Minnesota Constitution provides a fundamental right to an education, including the right to “what is necessary to provide an adequate level of education which meets all state standards.”<sup>3</sup> However, because the *Skeen* plaintiffs conceded that their school districts were already meeting all existing state standards, the court had no occasion to enforce the fundamental right to education and thus denied the relief sought.<sup>4</sup>

Despite this holding, two recent cases—*Forslund*<sup>5</sup> and *Cruz-Guzman*<sup>6</sup>—challenged only discrete components of Minnesota’s complex education system. The plaintiffs in both cases failed to tie their challenges to state standards, and did not seek relief under *Skeen* that would “provide an adequate level of education which *meets all state standards*.”<sup>7</sup> Rather, the plaintiffs based their claims on the amorphous concept of an “adequate” education.<sup>8</sup> Both cases were dismissed as nonjusticiable by two separate Minnesota Court of Appeals panels.<sup>9</sup>

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(2017) (listing programmatic standards and requiring school boards to align strategic plan with world’s best workforce requirements); MINN. STAT. § 120B.024 (2017) (discussing course credit and academic standards); MINN. STAT. § 120B.11, subdiv. 1(c) (2017) (defining “World’s Best Workforce”); LEAPS Act, MINN. STAT. §§ 124D.65, subdiv. 6, 124D.58–.64 (2017); MINN. STAT. § 125A (2017) (“Special Education and Special Programs”); MINN. STAT. §§ 125A.01, subdiv. 2 (defining “Dyslexia”), 125A.56, subdiv. 1 (2017) (“Alternate Instruction Before Assessment Referral”).

3. 505 N.W.2d 299, 315–16 (Minn. 1993) (“Thus, we believe that challenges to the state’s financing of education beyond what is necessary to provide an adequate level of education which meets all state standards must be evaluated, not under strict scrutiny, but rather under the rational basis test, and we will not set aside the legislature’s determination unless the funding system employed somehow impinges upon the adequacy with which the state meets the fundamental right to a general and uniform education.”).

4. *Id.* at 316.

5. *Forslund v. State*, No. A17-0033, 2017 WL 3864082, at \*1 (Minn. Ct. App. Sept. 5, 2017) (discussing tenure and seniority).

6. *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. Ct. App. 2017) (discussing racially and economically imbalanced schools).

7. *Skeen*, 505 N.W.2d at 316 (emphasis added).

8. The use of the term “adequate” to describe a high-quality education and the financial resources necessary to provide education that meets state educational standards creates confusion. This article uses the term “adequate” in conjunction with the provision of resources.

9. *Forslund*, 2017 WL 3864082, at \*9 (“[R]esolution of appellant’s claims . . . ‘is a task for the legislature and not the judiciary’ . . .”); *Cruz-Guzman*, 892 N.W.2d

*Skeen, Forslund, and Cruz-Guzman* all failed to seek the systemic changes necessary to address the needs of students who have traditionally failed to thrive in Minnesota's educational system. Even if the courts granted all the relief sought in these constitutional challenges, Minnesota's system still would still fail to produce an education that the legislature decrees meets twenty-first century standards.<sup>10</sup> This is because no plaintiff urged the court to require the state to provide adequate financial resources or reform Minnesota's delivery system to meet state educational standards. As a result, the three branches of Minnesota government are presiding over a dysfunctional education system, and they are doing so in a dysfunctional way.<sup>11</sup>

Article XIII, section 1, of Minnesota's Constitution ("Education Clause") mandates that the legislature "establish a general and uniform system of public schools and to make such provisions . . . as will secure a thorough and efficient system of public schools throughout the state."<sup>12</sup> In fulfillment of the constitution, the legislature established a rigorous statutory framework of academic standards and programmatic requirements that, if implemented thoroughly and efficiently, would meet the educational requirements of the twenty-first century.<sup>13</sup> To deliver new state and federally mandated education in Minnesota, the state must spend at least two billion dollars per biennium or more.<sup>14</sup> However, two

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at 541 (dismissing respondent's claims because they presented a nonjusticiable political question).

10. See Christopher Magan, *15 Years Later, MN Schools are More Segregated, and Achievement Gap has Barely Budgeted*, PIONEER PRESS (Aug. 21, 2017), <http://www.twincities.com/2017/08/18/15-years-later-mn-schools-are-more-segregated-and-achievement-gap-has-barely-budgeted/> [<https://perma.cc/9T26-L2XP>]. One study ranked Minneapolis dead last in big city graduation rates for 2013. *Measuring Up, Educational Improvement & Opportunity in 50 Cities*, CTR. FOR REINVENTING PUB. EDUC. (October 2015); see also *Minnesota's Graduation Gap*, MINN. PUB. RADIO (Mar. 7, 2016), <https://www.mprnews.org/story/2016/03/07/graduation-gap-by-the-numbers> [<https://perma.cc/62YU-T75G>] (last visited Dec. 23, 2017); MINN. EDUC. EQUITY P'SHIP, *supra* note 1, at 39.

11. See *infra* Part IV.A.

12. MINN. CONST. art. XIII, § 1.

13. See *Minn. Assessments*, MINN. TECHNICAL MANUAL 1 (2007), [http://www.leg.state.mn.us/webcontent/lrl/guides/AcademicStandards/MCAHis\\_tory.pdf](http://www.leg.state.mn.us/webcontent/lrl/guides/AcademicStandards/MCAHis_tory.pdf). [<https://perma.cc/TB34-364F>]; see also MINN. STAT. § 120B.30 (2017) (mandating a system of statewide testing and accountability for students enrolled in grades 3, 5, and 7, originally enacted as MINN. STAT. § 121 (1997)).

14. See JOHN MEYERS ET AL., DETERMINING THE COST OF EDUCATION IN

governors and the Minnesota Department of Education (MDE) have scrupulously avoided providing official notification to the legislature of that fact.<sup>15</sup> In doing so, the state has failed to provide resources sufficient to achieve those standards and programmatic requirements and has failed to create a systemic organizational framework that would allow local districts to meet state standards and requirements even if they had every last dollar they needed.<sup>16</sup>

Adequate funding is not enough.<sup>17</sup> Two leading authorities on configuring schools to deliver high performance for disadvantaged students emphasize the importance of structural changes to accompany the appropriation of adequate resources.

The education system will need to implement enormous changes for the country to attain these lofty goals. Change will be required in school and classroom organization, curriculum programs, instructional practices, professional development, use of computer and information technologies, and the way the system recruits, develops, and manages its most important talent—teachers and principals.<sup>18</sup>

Karin Chenoweth, who has been studying schools that produce extraordinary educational results, despite student demographics traditionally associated with failing schools, writes:

As long as schools are organized in traditional ways, schools will be entirely dependent on the social capital students bring to their schooling. Schools serving low income students will for the most part be low performing; schools

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MINNESOTA: CONTINUING THE WORK OF THE GOVERNOR'S EDUCATION FUNDING REFORM TASK FORCE 10 (2005), [<https://perma.cc/3TC8-89EG>] (identifying a shortfall of nearly one billion dollars per year).

15. See *infra* Part IV.B.

16. *Id.*

17. See Jared S. Buszin, *Beyond School Finance*, 62 EMORY L.J. 1613, 1631 (2013) (“The increasing judicial distrust of education finance suits has led some scholars to suggest that education reform litigants should reframe their suits so they do not appear simply to be seeking greater funding.”)

18. Allan R. Odden & Sarah J. Archibald, DOUBLING STUDENT PERFORMANCE . . . AND FINDING THE RESOURCES TO DO IT at ix (2009); see Linda Darling-Hammond et al., *How High-Achieving Countries Develop Great Teachers*, STAN. CTR. FOR OPPORTUNITY POL'Y IN EDUC. 1, 2 (Aug. 2010) (“Studies of U.S. professional development show that a small minority of American teachers receive the kind of sustained, continuous professional development that research indicates can change teaching practice and improve student achievement.”).

serving middle class and upper middle-class families will appear to be reasonably successful.<sup>19</sup>

For decades, Minnesota has sought to close the achievement gap solely by mandating outcomes and launching new, inadequately funded initiatives.<sup>20</sup> The results demonstrate the futility of trying to make significant changes in educational outcomes for economically disadvantaged students by only changing the legislatively mandated outcomes.<sup>21</sup> Minnesota students are still waiting for their school districts and legal advocates to bring a case—predicated on state education standards—that will transform Minnesota’s public education system and bring it into compliance with its constitution.

This article begins by describing the urgency of a more rational system of public education calculated to achieve state standards.<sup>22</sup> Then, it discusses the legal and educational significance of Minnesota’s transformation from a “seat-based” educational system, existing when *Skeen* was decided, to a proficiency-based system in the 1990s.<sup>23</sup> This article next examines the funding adequacy decision in *McCleary v. State*,<sup>24</sup> which addresses one essential component of a thorough, efficient twenty-first century education system: the correlation of revenues to the cost of meeting state requirements.<sup>25</sup> This article further argues that Minnesota needs its own *McCleary*

19. KARIN CHENOWETH, *SCHOOLS THAT SUCCEED: HOW EDUCATORS MARSHAL THE POWER OF SYSTEMS FOR IMPROVEMENT* 6 (2017).

20. See, e.g., Timothy D. Lynch, *Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence*, 26 HOFSTRA L. REV. 953, 984–86 (1998) (discussing this problem generally); Gerald Von Korff, *Underfunded Mandate Reform: Are They Serious, or Are They Just Talking*, JVN KORFF ON EDUCATION (Feb. 20, 2010, 7:03 AM), <http://jvonkorff.blogspot.com/2010/02/underfunded-mandate-reform-are-they.html> [<https://perma.cc/XU3Q-UZLX>] (discussing this problem in Minnesota). But see, e.g., *Minnesota Education Initiatives Work Together to Secure \$6 Million in Government Funding*, THE INTERSECTOR PROJECT (Aug. 23, 2016, 6:23 PM), <http://intersector.com/minnesota-education-initiatives-work-together-to-secure-6-million-in-government-funding/> [<https://perma.cc/U74A-8RMN>].

21. Von Korff, *supra* note 20 (arguing that unfunded mandates are “breaking the backs of public school districts across the state”). See generally William S. Koski & Bob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why it Matters*, 56 EMORY L.J. 545 (2006).

22. See *infra* Part II.

23. See *infra* Part III.A.

24. 269 P.3d 227 (Wash. 2012).

25. See *infra* Part IV.B.

decision that seeks financial adequacy as well as organizational and operational authority.<sup>26</sup>

This article then argues that the two most recent attempts to challenge the educational system, *Cruz-Guzman* and *Forslund*, have failed to state claims enforcing the constitutional mandate; they merely asked the courts to tinker with individual components of it.<sup>27</sup> The plaintiffs' failure to ground constitutional claims on legislatively-established educational standards prevents those cases from creating precedent applicable to a suit that forces the state to provide economically disadvantaged students with the education the legislature requires.<sup>28</sup> Finally, the article proposes reform to the way the three branches of government deliver the thorough, efficient system that the Minnesota Constitution requires.<sup>29</sup>

## II. HISTORIC BACKGROUND

### A. *Minnesota's Educational Crisis*

Minnesota is experiencing a dramatic change in the ratio of productive workers in the labor force as Baby Boomers retire.<sup>30</sup> The aging of Minnesota's largest generational cohort has extraordinary implications for the state's economic and workforce development priorities—health care, public assistance, social service, and education.<sup>31</sup> Thus, it is critical that Minnesota fully educates the upcoming generations.

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26. See *infra* Part IV.C.

27. See *infra* Part IV.D.

28. See *infra* Part V.

29. See *infra* Parts V.A–B.

30. Megan Dayton, *Will Minnesota Soon Be Laboring to Find Workers?*, ADA TO ZUMBROTA BLOG (July 20, 2017), <https://mn.gov/admin/demography/news/ada-to-zumbrota-blog/?id=36-303494> [<https://perma.cc/8C76-D3C6>] (“With Minnesota Baby Boomers aging into retirement, a new labor force landscape is emerging across the state—one in which the number of workers is expected to continue to grow, but only very slowly, into the foreseeable future.”).

31. From 1970 to 1980, Minnesota's labor force grew by about 450,000 according to the State Demographer. *Population Data: Our Projections*, MINN. STATE DEMOGRAPHIC CTR., <https://mn.gov/admin/demography/data-by-topic/population-data/our-projections> [<https://perma.cc/5JUY-GYFY>] (last visited Dec. 15, 2017). Since that time, net labor force growth has fluctuated between 300,000 and 400,000 per decade. *Id.* “In the coming two decades, the under 18 population will grow modestly, gaining about 32,000 between 2015 and 2035. Meanwhile, the state's 65 and older population will grow much more rapidly, adding more than half a



In 2009, the Budget Trends Commission warned of a rising dependency ratio—persons active in the labor force versus those who are not.

As baby boomers reach retirement age and Minnesota's labor force growth rates start to decline, the dependency ratio will begin to rise. This will mean that the earnings of the working age population will need to be stretched further to support the state's economically dependent population.<sup>32</sup>

As this demographic change occurs, the percentage of the student population that does not achieve educational proficiency is growing.<sup>33</sup> More children are poor; more children are coming to school without the necessary family support systems; and more children are coming to school with accumulated educational deficits.<sup>34</sup>

These large gaps, in combination with the significant demographic changes already underway, are threatening the economic future of our country. Thus, closing racial and ethnic gaps is not only key to fulfilling the potential of people of color; it is also crucial to the well-being of our nation. . . . [T]here are enormous payoffs to closing the gaps through public policies. If the United States were able to close the educational achievement gaps between native-born white children and black and Hispanic children, the U.S. economy would be 5.8 percent—or nearly \$2.3 trillion—larger in 2050.<sup>35</sup>

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million people (510,000+) over those same years. As a result of this growth, in 2035, the age 65+ group is expected to eclipse the under 18 population for the first time in our state's history." *Id.*

32. ASS'N OF MINN. CTYS., COUNCIL ON SERV. INNOVATION, SOLVING TODAY'S CHALLENGES THROUGH INNOVATIVE AND SUSTAINABLE SOLUTIONS 11 (Sept. 16, 2010), <https://www.lcc.leg.mn/inactive/csi/AMCMNREDESIGNPresentation9-162010.pdf> [<https://perma.cc/PBX3-SJAN>].

33. *Race Matters: Unequal Opportunities in Education*, ANNIE E. CASEY FOUND. (2006), <http://www.aecf.org/m/resourcedoc/aecf-racemattersEDUCATION-2006.pdf> [<https://perma.cc/7QBD-CZLJ>].

34. *See id.*

35. MINN. EDUC. EQUITY P'SHIP, *supra* note 1, at 19 (quoting Robert Lynch & Patrick Oakford, *The Economic Benefits of Closing Educational Achievement Gaps*, CTR. AM. PROGRESS (Nov. 10, 2014, 8:00 AM)); *see Population Data: Our Projections*, *supra* note 31 (estimating that the percent of Minnesota's population represented by people of color (those self-identifying as one or more races other than White or Latino) is projected to grow from 14% in 2005 to 25% by 2035).

According to the Annie E. Casey Foundation, “[t]he consequences of failing to ensure educational success are far-reaching. The adverse impact is long term and reflected in future employment prospects, poverty and incarceration rates, as well as limited capacity to participate in the world community.”<sup>36</sup>

In Minnesota, advantaged students perform quite well statistically, even under the new state proficiency standards.<sup>37</sup> Of students not eligible for free and reduced lunch (FRL), 71% score proficient on the Minnesota Comprehensive Assessment (MCA-III) of reading.<sup>38</sup> However, only 42% of non-English-speaking FRL-eligible students meet the proficiency standards.<sup>39</sup> Statewide, 38% of non-ELL black students score proficient in reading, and the proficiency rate for non-ELL, FRL-eligible students is five points lower in Minneapolis, at 33%.<sup>40</sup> The statistics for mathematics and science are similar.<sup>41</sup>

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36. *Race Matters*, *supra* note 33. Additionally, the Minnesota Private College Research Foundation Report warned that:

[F]rom 2003 to 2013, the number of high school graduates in Minnesota will decrease by 10.3 percent. . . . The overall decline of 10.3 percent in Minnesota masks widely divergent racial/ethnic patterns: 18.7 percent decline in the number of white high school graduates[,] 51.9 percent growth in the number of minority high school graduates[, and] [t]he share of Minnesota high school graduates who are students of color will grow from just 12 percent to nearly 20 percent of all high school graduates. Because most of the decline is projected among students who are currently among the most likely to attend college and most of the growth is in students who are least likely to attend college, we project a decline of 11.6 percent in baccalaureate degree production from all Minnesota post-secondary education institutions—private and public. This decline will be from about 27,000 graduates in 2007 to 24,000 in 2017.

*Challenge: Fewer High School Graduates, Fewer College Graduates*, MINN. PRIVATE COLL. COUNCIL 1 (2005), <https://www.leg.state.mn.us/archive/leg/minutes/database/84-s-1285-1376-20050215-a.pdf> [<https://perma.cc/BXF3-QWP3>].

37. See Gerald Von Korff, *MDE Proficiency Data Promotes False School District Comparisons*, JVONKORFF ON EDUC. (Sept. 26, 2017, 5:10 AM), <http://jvonkorff.blogspot.com/2017/09/mde-proficiency-data-promotesfalse.html> [<https://perma.cc/52XW-RA9R>] (comparing the proficiency rates of FRL eligible students and non-FRL eligible students).

38. MINN. REPORT CARD, MINN. DEPT. OF EDUC., <https://rc.education.state.mn.us> [<https://perma.cc/D7RJ-E3FX>] [hereinafter MINN. REPORT CARD] (providing statistics for Minnesota test scores).

39. Von Korff, *supra* note 37.

40. See MINN. REPORT CARD, *supra* note 38.

41. See *id.*

Despite years of active efforts at the state and federal levels, Minnesota's gaps in performance between FRL-eligible and non-FRL-eligible students, and between white and non-white students, have remained persistently resistant to change.<sup>42</sup> Statewide math proficiency rates for FRL-eligible students fell to 38.5% in 2017.<sup>43</sup> For the last several years, black proficiency rates in reading and science have remained in the mid-30% range across Minnesota.<sup>44</sup> Despite the persistence of these low academic indicators, there is strong evidence that properly organized schools, with sufficient resources, can dramatically improve the performance of lower income students.<sup>45</sup>

The education gap between children of high and low socio-economic status begins before kindergarten.

The existence of significant education inequalities at the starting gate poses a strong challenge to education policy. Programs and policies must account for the fact that schools and teachers serve students who do not start school on equal terms. Many students haven't participated in preschool education and care, nor have they engaged in equal amounts of developmental and play time with adults. Not only are children unequally prepared to learn when they enter school, but, as research shows, their chances of attending unequally resourced schools are high, as they are much more likely to share school with children who face the same circumstances . . . . In short education policies must grapple with the relative disadvantages that many

42. See Magan, *supra* note 10 ("Minnesota schools have grown more segregated and the state's nation-leading academic achievement gap refuses to close."); see also Anthony Lonetree et al., *Minnesota Test Results Show Math Down a Bit, Reading Flat*, STAR TRIB. (Aug. 7, 2017, 8:39 PM), <http://www.startribune.com/the-mca-test-scores-reading-math-proficiency-exam-flat/438990683/> [<https://perma.cc/NRJ8-P8UG>] ("[T]he gaps in results between white and minority students statewide have barely budged in reading and math . . . .").

43. See MINN. REPORT CARD, *supra* note 38.

44. *Id.* (providing proficiency rates for black students from 2015–17).

45. See HIGHER GROUND ACADEMY, <https://high-schools.com/directory/mn/cities/st-paul/higher-ground-academy/270014002719/#section-1> [<https://perma.cc/FJ2W-R9HN>] (last visited Mar. 25, 2018) (noting that Higher Ground Academy, a St. Paul charter with a FRL eligible rate of 97.4%, has a non-ELL black reading proficiency rate of 57%, more than double the rate for St. Paul); MINN. REPORT CARD, *supra* note 38. Minnesota's failure to systematically implement strategies that have demonstrated success could justify an article on its own. Extended school days, high quality early childhood education, robust summer learning, and co-teaching are all examples.

children face—disadvantages that are concentrated and compounded, and accumulate over time.<sup>46</sup>

To overcome this educational deficit, public education must deploy more resources and must do so more effectively.<sup>47</sup> However, neither of these changes will occur unless the judicial system enforces the Minnesota Constitution.

*B. Education as “the Great Equalizer of the Conditions of Men”*

The authors of the Minnesota Constitution crafted a constitutional mandate designed to assure that our educational system would meet the very challenges Minnesota faces today.<sup>48</sup> The Minnesota Constitution's Education Clause was drafted under the influence of the common school movement,<sup>49</sup> inspired by Horace Mann and others.<sup>50</sup> Mann's thesis was that “public education had the power to become a stabilizing as well as an equalizing force in American society” . . . and that “Education . . . is the great equalizer

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46. Emma Garcia, *Inequalities at the Starting Gate: Cognitive and Noncognitive Skills Gaps Between 2010–2011 Kindergarten Classmates*, ECON. POL'Y INST. (June 17, 2015), <http://www.epi.org/publication/inequalities-at-the-starting-gate-cognitive-and-noncognitive-gaps-in-the-2010-2011-kindergarten-class> [https://perma.cc/964H-Y794].

47. See Matthew Lynch, *Allocating Resources to Improve Student Learning*, HUFFINGTON POST (Oct. 19, 2011, 6:48 PM), [https://www.huffingtonpost.com/matthew-lynch-edd/allocating-resources-to-i\\_b\\_1018778.html](https://www.huffingtonpost.com/matthew-lynch-edd/allocating-resources-to-i_b_1018778.html) [https://perma.cc/9AA3-L966] (“Allocating and developing resources to support improvement in teaching and learning is critical to school reform efforts.”).

48. See Minn. CONST. art. XIII, § 1 (“[I]t is the duty of the legislature to establish a general and uniform system of public schools.”).

49. David L. Kiehle, *History of Education in Minnesota, Address at the Annual Meeting of the Minnesota Historical Society* (Jan. 19, 1903), in MINNESOTA HISTORICAL SOCIETY COLLECTIONS, EDUCATION IN MINNESOTA 366 (1905), [https://www.loc.gov/resource/lhbum.0866e\\_0388\\_0435/?sp=2](https://www.loc.gov/resource/lhbum.0866e_0388_0435/?sp=2) [https://perma.cc/SZZ7-ZT4F].

50. Barbara Winslow, *Education Reform in Antebellum America*, GILDER LEHRMAN INST. AM. HIST. (Nov. 14, 2017) (“Mann's ideology was based upon a strong sense of Protestant Republicanism that was rooted in a secular, non-sectarian morality. He believed that education was a child's ‘natural right,’ and that moral education should be the heart of the curriculum. To accomplish education reform, Mann advocated state-controlled boards of education, a more uniform curriculum, and greater state involvement in teacher training.”). Horace Mann (1796–1859) was a member of the Massachusetts state legislature, and then secretary of the Massachusetts Board of Education. *Id.*

of the conditions of men—the balance-wheel of the social machinery.”<sup>51</sup>

Thus, the Education Clause reflects the conviction of Mann’s contemporaries: that the provision of an appropriate and adequate education was central to the survival of a democracy.<sup>52</sup> Recognizing the inherent vulnerability to legislative whim in funding, the Minnesota Constitution’s authors did not simply grant the power to establish a school system, but instead used mandatory language that requires the legislature<sup>53</sup> to “establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or through other means that will secure a thorough and efficient system of public schools throughout the state.”<sup>54</sup>

Over 150 years, the Minnesota legislature’s assessment of the education level required to “equalize the conditions of men” evolved with changing social, economic, and demographic conditions. The flexibility of Minnesota’s education clause allowed for this

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51. *Id.* (citation omitted); see HORACE MANN, Sec’y of the Bd. of Educ. in Mass., TWELFTH ANNUAL REPORT TO THE SECRETARY OF THE MASSACHUSETTS STATE BOARD OF EDUCATION (1848), <https://genius.com/Horace-mann-twelfth-annual-report-to-the-secretary-of-the-massachusetts-state-board-of-education-1848-annotated> [http://perma.cc/K3B5-QJDH]; A Bill for the More General Diffusion of Knowledge, 79 Va. Gen. Assembly (June 18, 1779), <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079> [http://perma.cc/GAQ9-DDVD] (“[I]t is believed that the most effectual means of preventing [tyranny] would be, to illuminate, as far as practicable, the minds of the people at large, and more especially to give them knowledge of those facts, which history exhibiteth, that . . . they may be enabled to know . . .”).

52. See Josh Kagan, Note, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U. L. REV. 2241, 2263–64 (2003).

53. The suggestion in the appellate panel’s *Cruz-Guzman* decision that this duty falls solely upon the legislature is a careless misreading of the Constitution. Under our constitutional system, the legislature acts through legislation, but that legislation does not become law without the Governor’s signature. See Tom Todd, MAKING LAWS (Dec. 2002), <http://www.house.leg.state.mn.us/hrd/pubs/mkglaws.pdf> [https://perma.cc/K39A-LXYC]. If the educational duty fell solely on the legislature, that would imply that the Governor could not veto legislation necessary to fulfill the constitutional mandate. Moreover, a central function of the executive is to provide data, policy guidance, and recommendations necessary to craft constitutionally compliant legislation.

54. MINN. CONST. art. XIII, § 1. The first legislative session of the new State of Minnesota in 1858 provided for a uniform system of public schools to be supported by the sale of school lands, and for three state normal schools in Winona, Mankato, and, St. Cloud. See Kiehle, *supra* note 49.

adaptation.<sup>55</sup> In the mid-1800s, the common school movement fostered a basic McGuffey's reader-based education that was deemed sufficient to accommodate the then-existent agrarian-based economy.<sup>56</sup>

Then, at the turn of the century, the Minnesota legislature recognized that the education system could not remain stagnant, while serving as the "great equalizer of the conditions of men"<sup>57</sup> envisioned by the Constitution. To this end, in 1899, the legislature passed a compulsory attendance law requiring children age eight to sixteen, living within the borders of a school district or city, to attend public or private school.<sup>58</sup> In 1913, the Minnesota Supreme Court heard and rejected a challenge to the legislature's efforts to elevate Minnesota's public-school system by creating centralized shared high schools, thus reaffirming the court's recognition of the robust role of our Education Clause.<sup>59</sup> Justice Hallam<sup>60</sup> wrote that the words of the Constitution "were not [merely] a grant of power to the Legislature, for all the powers there mentioned would have existed without such grant. *They were inserted as a mandate to the Legislature, prescribing as a duty the exercise of this inherent power.*"<sup>61</sup>

As of 1910, less than half of the United States population had completed an eighth-grade education,<sup>62</sup> a statistic that remained

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55. See MINN. CONST. art. XIII, § 1 (directing the legislature to create provisions that "will secure a thorough and efficient system of public schools").

56. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169 (1996) (discussing generally the common school movement).

57. Winslow, *supra* note 50.

58. Act of Apr. 14, 1899 Minn. Laws 248–250, <https://www.revisor.mn.gov/laws/?year=1899&type=0&group=General+Laws&doctype=Chapter&id=226> [<https://perma.cc/PK7W-5ED9>].

59. *Assoc. Schs. of Indep. Dist. No. 63 v. Sch. Dist. No. 83*, 122 Minn. 254, 142 N.W. 325 (Minn. 1913).

60. After his retirement from the court in 1924, Justice Hallam served on the faculty, then as Dean and President, of St. Paul College of Law (now Mitchell Hamline School of Law). See Oscar Hallam, MINN. STATE LAW LIBR., <https://mn.gov/law-library/research-links/justice-bios/oscar-hallam.jsp> [<https://perma.cc/PT7V-VBAR>].

61. *Assoc. Schs. of Indep. Dist. No. 63*, 122 Minn. at 258, 142 N.W. at 327 (emphasis added).

62. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 7 (1993), <https://nces.ed.gov/pubs93/93442.pdf>. [<https://perma.cc/ZS33-JNZF>]. In the last half of the 19th century, only about half of all 5- to 19-year-olds were enrolled in school. *Id.* at 6.

relatively constant until 1940.<sup>63</sup> Compulsory attendance—and a great expansion of Minnesota public high schools—began to transform the education levels of the next generation of Minnesota students. By 1991, the enrollment rate for five- to nineteen-year-olds rose to ninety-three percent for blacks, whites, males, and females alike.<sup>64</sup> Although the median years of education rose dramatically, American leaders and decision-makers became increasingly convinced that our public school system was not preparing our young to compete in the new global economy.<sup>65</sup>

### III. THE TRANSFORMATION OF MINNESOTA'S EDUCATION SYSTEM

#### A. *State Standards in a Seat-Based Versus Proficiency-Based System*

In 1983, President Ronald Reagan's National Commission on Excellence in Education issued *A Nation at Risk*.

Our Nation is at risk. Our once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world . . . We report to the American people that while we can take justifiable pride in what our schools and colleges have historically accomplished and contributed to the United States and the well-being of its people, the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.<sup>66</sup>

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"The overall enrollment rates for 5- to 19-year-olds rose from 51 percent in 1900 to 75 percent in 1940." *Id.* In 1940, "[o]nly 6 percent of males and 4 percent of females had completed 4 years of college . . ." *Id.* at 7.

63. *Id.*

64. *Id.* at 6.

65. See, e.g., Joel Klein, *The Failure of American Schools*, THE ATLANTIC (June 2011), <https://www.theatlantic.com/magazine/archive/2011/06/the-failure-of-american-schools/308497/> [<http://perma.cc/H23E-E85A>].

66. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK (1983), <https://www2.ed.gov/pubs/NatAtRisk/risk.html> [<https://perma.cc/G6KR-QB2L>] [hereinafter *A Nation at Risk*] (finding that (1) some twenty-three million American adults were functionally illiterate by the simplest tests of everyday reading, writing, and comprehension; (2) about 13% of all seventeen-year-olds in the United States could be considered functionally illiterate, with functional illiteracy among minority youth that may be as high as 40%; (3) average achievement of high school students on most standardized tests is now lower than twenty-six years prior, when Sputnik was launched; and (4) over half the population of gifted students do not match their tested ability with comparable achievement in school).

Although it fostered a new focus on proficiency, *A Nation at Risk* was not focused merely on what students knew and how they performed on tests.<sup>67</sup> It also focused on the ability to solve problems and apply those skills in future careers and civic endeavors.<sup>68</sup>

Many 17-year-olds do not possess the “higher order” intellectual skills we should expect of them. Nearly 40 percent cannot draw inferences from written material; only one-fifth can write a persuasive essay; and only one-third can solve a mathematics problem requiring several steps.<sup>69</sup>

Thus, a national movement began to examine the perceived failures of public education and to institute reforms to assure that all students capable of doing so learned at high levels of proficiency.<sup>70</sup>

As of 1983, Minnesota's definition of state-mandated, adequate education might well have served as “Exhibit A” in *A Nation at Risk's* indictment of state laws setting the standards for public school districts. Specifically, Minnesota's legislative requirement for elementary education merely included a minimum length of school day, a minimum number of school days per year,<sup>71</sup> and certain licensure and staff ratio requirements.<sup>72</sup> The state, for example, did not require all students to be able to read by third grade and provided no sanction for a lack of reading and math proficiency.<sup>73</sup> Instead, for middle and junior high schools, the state simply established a chart prescribing the minimum number of hours required for each subject, along with certain staffing requirements.<sup>74</sup>

For secondary schools, the state only required 120 hours of credit.<sup>75</sup> No meaningful proficiency or outcome-based state standard

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67. *Id.*

68. *Id.*

69. *Id.* (emphasis added).

70. These reform efforts culminated in 2001 in the federal No Child Left Behind Act and related standards-based reform initiatives undertaken by virtually all the states over the past two decades. Unfortunately, these efforts have made limited progress in achieving the goal of raising the performance of disadvantaged students. Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARVARD C.R.-C.L. L. REV. 47, 49 (2012).

71. MINN. R. 3500.1200 (1985) (repealed 1993).

72. MINN. R. 3500.1400 (1985) (repealed 1993).

73. MINN. R. 3500.1100 (1985) (repealed 1993).

74. MINN. R. 3500.1600, 3500.1800 (1985) (repealed 1993).

75. The regulation stated only that “[s]atisfactory completion of at least 120 hours shall be the basis for a credit course, or subject, in grades 9, 10, 11, and 12 in four-year secondary schools and in grades 10, 11, and 12 in three-year secondary schools. Length of periods and frequency of meeting may be determined by the



existed for high school graduation.<sup>76</sup> A local school district could deliver basic consumer math—a form of applied arithmetic—or algebra II as its exit mathematics requirement.<sup>77</sup> No state requirement prohibited school districts from granting a diploma to students who did not know that ten percent of one hundred is ten, or that two-thirds is greater than one-half. In addition, the state did not prohibit school districts from granting a diploma to students who were unable to write a complete sentence or understand a paragraph written at an eighth-grade level.

This system of education that existed in the 1980s was a “seat-based” or “teaching-based” education system.<sup>78</sup> In a seat-based education system, the state mandates that each school district supply a minimum amount of total “seat time” allocated to particular subjects.<sup>79</sup> Stripped to essentials, a seat-based paradigm delivers time

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district.” 7 Minn. Reg. 592–93 (Oct. 18, 1982).

76. See *Minnesota Issues Resource Guides, Academic Standards*, MINN. LEGIS. REFERENCE LIBR., <https://www.leg.state.mn.us/lrl/guides/guides?issue=academic> [<https://perma.cc/58BP-DQMT>] (last reviewed July 2017) [hereinafter *Academic Standards*].

77. See 7 Minn. Reg. 586 (Oct. 18, 1982); see also *id.* at 591–92 (listing the minimum clock hours for mathematics and communication skills). A review of the state rules shows that the minimum content standards lacked any requirement of demonstrated proficiency. See *id.* Standards for testing and promotion were delegated to local districts. See *id.* at 587. The Minnesota Department of Education kept the recommended curriculum on file, but imposed no mandatory requirement. See MINN. CODE OF AGENCY RULES, RULES OF THE STATE DEPARTMENT OF EDUCATION (Sept. 15, 1982).

78. See *Academic Standards*, *supra* note 76 (“Historically, Minnesota high schools awarded diplomas based on Carnegie units (‘seat time requirements’) or course credits completed by students. Critics maintained that this system provided no statewide standards on subject content and no statewide assessment of what students had learned.”); see also ARTHUR LEVINE, *EDUCATING SCHOOL TEACHERS* 12 (2006), [http://edschools.org/pdf/Educating\\_Teachers\\_Report.pdf](http://edschools.org/pdf/Educating_Teachers_Report.pdf) [<https://perma.cc/2ARN-8AJL>] (“Industrial societies focus on achieving common processes and information societies seek common outcomes. Reflecting this change, the focus of schooling has shifted from teaching to learning—to the skills and knowledge students must master, rather than the skills and knowledge teachers must teach. This is not a rhetorical difference. It turns education on its head as the focus shifts from assuring common processes for all schools (*e.g.*, 12 grades, 180-day school years, and five major subjects a semester) to assuring common outcomes for all students. The emphasis on learning outcomes mirrors this change. The states now set minimum acceptable achievement levels, the highest in history, that students must attain, and mandate testing regimens to assess whether students are meeting state standards.”).

79. Sean Cavanagh, *States Loosening “Seat Time” Requirements*, EDUC. WEEK (Mar.

in a chair, with a teacher at the front of the classroom.<sup>80</sup> These minimal requirements allow local public school districts to unilaterally determine the quality of the teaching and the curriculum.

The lack of state mandates in a seat-based system pose problems for students. For instance, because teachers need only “deliver education” for a set number of hours, nothing prohibits schools from increasing class sizes or cutting necessary teacher resources, such as time for professional development.<sup>81</sup> Additionally, because the seat-based system does not impose proficiency requirements that must be met before graduation, state educational standards could be satisfied without regard to the quality of the educational outcomes attained.<sup>82</sup>

As discussed above, statistically, economically disadvantaged students start out significantly behind.<sup>83</sup> Under the seat-based paradigm, estimating a district's cost to deliver education was far less demanding.<sup>84</sup> It was possible to limit spending without impairing a district's ability to meet state requirements, because a district could

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5, 2012), <https://www.edweek.org/ew/articles/2012/03/07/23biz-state.h31.html> [<http://perma.cc/9UXW-6RMU>].

80. *Id.*

81. This stripping of teacher resources and professional development time directly impacts teacher quality. In his seminal study of effective practices, author John Hattie argues that the four most important elements to teacher knowledge and behavior are: (1) observation of actual classroom methods; (2) microteaching; (3) video/audio feedback; and (4) practice. JOHN HATTIE, *VISIBLE LEARNING: A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT* 2783–85 (2009) (Kindle ed.).

82. See Dale Frost, *Moving From Seat-Time to Competency-Based Credits in State Policy: Ensuring All Students Develop Mastery*, INACOL (Apr. 12, 2016), <https://www.inacol.org/news/moving-from-seat-time-to-competency-based-credits-in-state-policy-ensuring-all-students-develop-mastery/> [<https://perma.cc/F734-E7R Y>] (discussing the benefits to transitioning from a seat-based system to a competency- or proficiency-based system).

83. See Garcia, *supra* note 46.

84. The cost of teaching thirty students for a fixed number of course hours could be computed by calculating the direct cost of supplying the required number of instructional hour, instructional materials, and indirect costs. See *FUND THE CHILD*, *infra* note 146 and accompanying text. The cost of supplying differentiated instruction, remediation, tutoring, and other instructional services necessary to deliver students to a predetermined proficiency is a function of the students' readiness. *Id.*

produce an hour of seat time for any student at the same price, regardless of the student's educational challenge.<sup>85</sup>

If state funding was reduced, or if collective bargaining drove up district costs beyond state revenue increases, the district could compensate by increasing class sizes, cutting the textbook budget, or lowering educational rigor, all without compromising state standards.<sup>86</sup> If a student's preparation was substantially behind the standard curriculum, the district could voluntarily provide remedial instruction to the extent that it could afford to do so or place the student in a less rigorous course of study.<sup>87</sup> But, there was no *requirement* that a district take any measures if proficiency began to fall, as state standards required only that students sit in seats for the requisite hours.<sup>88</sup>

The seat-based system also had implications for non-financial aspects of the delivery system. For schools to significantly improve educational outcomes for economically disadvantaged students, the school staff must function as a coherent, collaborative team, under masterful leadership, to implement a comprehensive plan and appropriate curriculum.<sup>89</sup> The seat-based school was an individual sport and the teacher the athlete; a collaborative team was not essential to meet seat-based education requirements.

It is likely that most Minnesota lawyers, as well as legislators, do not understand the true cause of Minnesota's failure to achieve high levels of proficiency among disadvantaged students because most of us are products of classrooms in which teaching was an individual sport. Our school's outcome was merely the sum of what individual teachers acting alone could accomplish in disconnected and isolated classrooms. If our classmates failed to master the material, that was simply a failure on the part of the students, their families, or their socio-economic statuses.<sup>90</sup> The students served their minimum

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85. See *Academic Standards*, *supra* note 76 (“[The seat-based] system provided no statewide standards on subject content and no statewide assessment of what students had learned.”).

86. See *id.*

87. See *id.*

88. See Frost, *supra* note 82.

89. See *infra* Part III.C.

90. See Michael Price, *6 Reasons Why We Must Stop Blaming Teachers for Our Failing Education System*, HUFFPOST (June 23, 2014), [https://www.huffingtonpost.com/michaelprice/6-reasons-why-we-must-sto\\_b\\_5520170.html](https://www.huffingtonpost.com/michaelprice/6-reasons-why-we-must-sto_b_5520170.html) [<https://perma.cc/B3EC-N238>] (identifying several common sources of blame for failed education).

required seat-time, and hence state requirements were satisfied.<sup>91</sup> Those of us educated under the old paradigm have trouble envisioning a school that really leaves no child behind because the system capable of accomplishing that is beyond our experience.

Pundits and politicians who cannot conceive a school as an organic team often assert that schools must be failing because of bad teachers.<sup>92</sup> They make the mistake of assuming that to transcend the tremendous educational deficit discussed above, one need only place a good teacher in front of the classroom, and, as if by magic, the students will somehow surpass a full standard deviation deficit,<sup>93</sup> or more.<sup>94</sup> Rather, good teaching results come from a great team that is well-led and properly mentored,<sup>95</sup> with curriculums and

91. See generally MINN. DEP'T OF EDUC., *Highlights of State Education Policies From 1970-2000, State Education Policies - The 1980s* (2000), <https://mn.gov/mnddc/past/pdf/00s/00/00-HSE-MDE.pdf> [<https://perma.cc/X27C-BYUX>].

92. See, e.g., Jonathan Zimmerman, *Why Is American Teaching So Bad?*, THE NEW YORK REVIEW OF BOOKS, (Dec. 14, 2014), <http://www.nybooks.com/articles/2014/12/04/why-american-teaching-so-bad/> [<https://perma.cc/L5X6-V6UE>] (critiquing American teaching as a primary cause of low proficiency); George Leef, *A Key Reason Why American Students Do So Poorly*, FORBES (Oct. 24, 2013), <https://www.forbes.com/sites/georgeleef/2013/10/24/a-key-reason-why-american-students-do-poorly/#7985be412349> [<https://perma.cc/UG8L-A2WX>]. This claim, that the central cause of the achievement gap is bad teachers, is implied in the allegations of the plaintiffs in *Forslund v. State*, A17-0033, 2017 WL 3864082 (Minn. Ct. App. Sept. 5, 2017), and its California companion, *Vergara v. State*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016).

93. See Roland G. Fryer & Steven D. Levitt, *Falling Behind: New Evidence on the Black-White Achievement Gap*, 4 EDUC. NEXT 4, 1 (Fall 2004) (“On average, black students typically score one standard deviation below white students on standardized tests—roughly the difference in performance between the average 4th grader and the average 8th grader.”). It is a mistake to confuse the task of overcoming this deficit in a single selected individual student, or a select group of a few hundred students—something often described as “beating the odds.” Overcoming this deficit statistically for all of Minnesota’s nearly 100,000 black students requires systemic change. See MINN. REPORT CARD, MINN. DEP'T OF EDUC., [https://rc.education.state.mn.us/#demographics/orgid—999999000000\\_\\_group type—state—p—1](https://rc.education.state.mn.us/#demographics/orgid—999999000000__group type—state—p—1) [<https://perma.cc/946N-5JQR>].

94. See Zimmerman, *supra* note 92.

95. See INSIDE OUR SCHOOLS: TEACHERS ON THE FAILURE AND FUTURE OF EDUCATION REFORM 61 (Brett Gardiner Murphy ed., 2017) (“When beginning teachers are just starting out, they should be paired with a strong mentor. Beyond that, schools and districts need to help teachers build their skill set by providing them with extended and connected professional development. When it comes to improving their performance, research has demonstrated that teachers work best in collaboration with other teachers. This requires inquiry groups and self-study

teaching practices tailored to the students served.<sup>96</sup> The school is making up for hundreds of hours of deficits in reading and other educational activities that should be occurring in students' homes.<sup>97</sup> Almost inevitably, that is going to take more teaching time, with additional support staff needed for mentoring, tutoring, and differentiated instruction.<sup>98</sup>

Perhaps the greatest failure of the seat-based system is that it did not demand that students exit their classrooms mastering grade-level materials and did not provide the organizational support to make it possible to address the challenges faced by disadvantaged students.<sup>99</sup> As Chenoweth points out, the culture of education often convinced educators that students who are poor or from a racial or ethnic minorities simply could not be expected to reach a high level of

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programs." (citations omitted)).

96. *Id.*

97. *See generally* MARILYN BINKLEY & TREVOR WILLIAMS, NAT'L CTR. FOR EDUC. STATS., *READING LITERACY IN THE UNITED STATES* (1996), <https://nces.ed.gov/pubs/96258.pdf> [<https://perma.cc/2USG-JG47>].

98. *See generally* KARIN CHENOWETH & CHRISTINA THEOKAS, *GETTING IT DONE: LEADING ACADEMIC SUCCESS IN UNEXPECTED SCHOOLS* (2011) (discussing the need for teachers to work hard to master the skills and knowledge necessary to teach students and expect them to learn); ANTHONY S. BRYK ET AL., *ORGANIZING SCHOOLS FOR IMPROVEMENT: LESSONS FROM CHICAGO* (Anthony S. Bryk ed., 2010) (identifying and discussing a comprehensive set of practices and conditions that are key factors for education improvement, including school leadership, the professional capacity of the faculty and staff, and student-centered learning climate); Odden & Archibald, *supra* note 18.

99. *See generally* CHENOWETH & THEOKAS, *supra* note 98. Until the 1990s, the Minnesota Department of Education lacked a uniform state standardized test to track student performance. ERNEST C. DAVENPORT ET AL., OFF. OF EDUC. ACCOUNTABILITY, UNIV. OF MINN., *THE MINNESOTA BASIC SKILLS TEST: PERFORMANCE GAPS FOR 1996 TO 2001 ON THE READING AND MATHEMATICS TESTS, BY GENDER, ETHNICITY, LIMITED ENGLISH PROFICIENCY, INDIVIDUAL EDUCATION PLANS, AND SOCIO-ECONOMIC STATUS 1-4* (2002), [https://www.researchgate.net/publication/237796516\\_The\\_Minnesota\\_Basic\\_Skills\\_Test\\_Performance\\_Gaps\\_for\\_1996\\_to\\_2001\\_on\\_the\\_Reading\\_and\\_Mathematics\\_Tests\\_by\\_Gender\\_Ethnicity\\_Limited\\_English\\_Proficiency\\_Individual\\_Education\\_Plans\\_and\\_SocioEconomic\\_Stat](https://www.researchgate.net/publication/237796516_The_Minnesota_Basic_Skills_Test_Performance_Gaps_for_1996_to_2001_on_the_Reading_and_Mathematics_Tests_by_Gender_Ethnicity_Limited_English_Proficiency_Individual_Education_Plans_and_SocioEconomic_Stat) [<https://perma.cc/Z8JD-U7TL>]. Under the profiles of learning law, Minnesota began to deliver a basic skills test to all students in 1996. *Id.* That testing system disclosed major gaps in learning between white student and other racial groupings, and between upper and lower income students. *Id.* at 41-44.

proficiency<sup>100</sup>; Chenoweth terms this the “demographic excuse.”<sup>101</sup> There was no reason to reorganize the educational delivery system to attain proficiency for all because the state did not demand proficiency, nor did it train educators to expect it.<sup>102</sup>

One alternative to the seat-based model is a proficiency- or competency-based system. In the proficiency-based system, school success also depends upon the school principal and leadership’s ability to meld the entire staff into a coherent team that is greater than the sum of its parts.<sup>103</sup> That is because state standards in a proficiency-based system include student competency requirements for each grade level.<sup>104</sup> Minnesota’s transition from a seat-based to proficiency-based system provided the necessary foundation upon which the three branches of government could begin to create a system capable of ensuring quality education to each student.<sup>105</sup>

#### B. *Skeen v. State: Reaffirmation of the Constitutional Mandate*

This article’s central thesis is that Minnesota’s education system needs to be reinvigorated by ambitious litigation that remedies the state’s failure to provide education that meets state standards. To advance that thesis, it is critical to analyze the Minnesota Supreme Court’s 1993 decision in *Skeen v. State*.<sup>106</sup>

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100. Karin Chenoweth, *A Primer on Reading Your Child’s Language Abilities*, WASH. POST (Dec. 19, 2002), <https://www.washingtonpost.com/archive/local/2002/12/19/a-primer-on-reading-your-childs-language-abilities/8319afb1-b9dc-42fd-869f-7045c5a94278> [<https://perma.cc/QW9V-PVZW>] (discussing how teachers and future teachers have been told repeatedly in the past few decades that they could have little effect on this demographic reality). Instead of reacting to the Coleman Report by thinking deeply about what schools need to do to offset the ill effects of poverty and discrimination on academic achievement, the education profession used it as what could be called the “demographic excuse”—poor children do not do well because they are poor, and schools can’t do anything to change that. *See id.*

101. *Id.*; *see* Rebell, *supra* note 70, at 47 (“While vital school improvement efforts must continue, the country’s ambitious national educational goals cannot be met unless the nation understands and confronts the core problem underlying the achievement gap: the extensive pattern of childhood poverty that inhibits educational opportunity and educational achievement.”).

102. *See* MINN. R. 3500.0500(3) (1985) (repealed 1993); *see also* Rebell, *supra* note 70, at 47.

103. *See* CHENOWETH & THEOKAS, *supra* note 98.

104. *See* MINN. R. 3501.0640–.1345 (2017).

105. *See infra* Part III.C.

106. 505 N.W.2d 299 (Minn. 1993).

At the launch of the *Skeen* litigation, Minnesota did not have proficiency standards.<sup>107</sup> Minnesota's system, by any statistical performance measure, performs well for advantaged students.<sup>108</sup> Nationally, advantaged students arrive at school with larger vocabularies,<sup>109</sup> greater phonemic awareness, and better social coping skills than disadvantaged students.<sup>110</sup> Parents of advantaged students can make up for the deficiencies and assure that their child remains on track for success, even if the school fails to provide the essential educational building blocks.<sup>111</sup> To close the achievement

107. See MARGARET E. GOERTZ, STATE EDUCATIONAL STANDARDS IN THE 50 STATES: AN UPDATE Tables 1–3, EDUC. TESTING SERV. (Mar. 1988), <http://onlinelibrary.wiley.com/doi/10.1002/j.2330-8516.1988.tb00278.x/epdf> [<https://perma.cc/6DL3-99NQ>].

108. See MINN. REPORT CARD, *supra* note 38 (charting test scores and graduation rates across racial, socioeconomic, and other categories).

109. See Karin Chenoweth, *Piece by Piece: How Schools Solved the Achievement Puzzle and Soared*, AM. EDUCATOR 15, 15–16 (Fall 2009); FRAN LEHRAT ET AL., PAC. RESOURCES FOR EDUC. & LEARNING, RESEARCH-BASED PRACTICES IN EARLY READING SERIES: A FOCUS ON VOCABULARY 6 (2004) (“Young students who don’t have large vocabularies or effective word-learning strategies often struggle to achieve comprehension. Their bad experiences with reading set in motion a cycle of frustration and failure that continues throughout their schooling.”); E.D. Hirsch, Jr. & Louisa C. Moats, *Overcoming the Language Gap*, 25 AM. EDUCATOR 5, 8–9 (2001) (discussing the gap in word knowledge between advantaged and disadvantaged children as “word poverty.” The authors define word poverty as “partial knowledge of word meanings, confusion of words that sound similar but that contrast in one or two phonemes, limited knowledge of how and when words are typically used, and knowledge of only one meaning or function when there are several.”).

110. See Julia B. Isaacs, *Starting School at a Disadvantage: The School Readiness of Poor Children*, BROOKINGS INST. 4 (Mar. 19, 2012), <https://www.brookings.edu/research/starting-school-at-a-disadvantage-the-school-readiness-of-poor-children/> [<https://perma.cc/KQ39-FFZT>]; (“[P]oor children are much more likely than other children to score very low on math and reading skills: three out of ten poor children (30 percent) score very low on early reading skills, compared to only 7 percent of children from moderate- or high-income families. Differences are smaller but still substantial on the behavioral and health measures. More than half (52 percent) of poor children score very low on at least one of the five measures, and so fail to be school ready, compared to one-quarter of children from moderate- or high-income families.”).

111. See *id.* (“Poor children in the United States start school at a disadvantage in terms of their early skills, behaviors, and health. Fewer than half (48 percent) of poor children are ready for school at age five, compared to 75 percent of children from families with moderate and high income, a 27-percentage point gap.”). See generally CHENOWETH & THEOKAS, *supra* note 98 (focusing on what some disadvantaged schools have done to combat their issues).

gap, this difference must be made up with mentoring, tutoring, additional learning time, outstanding differentiated instruction, and appropriate curriculum.<sup>112</sup>

Given Minnesota's dismal achievement gap, it is remarkable that Minnesota school districts and Minnesota lawyers failed, at the time of *Skeen*, to challenge the existing system as constitutionally inadequate.<sup>113</sup> Yet, despite the fact that *Skeen* was brought in the shadows of *A Nation at Risk*, neither the *Skeen* plaintiffs nor any other school advocacy groups followed the example of ambitious constitutional cases brought in other states.<sup>114</sup> Indeed, Justice Page, writing in dissent, expressed his surprise that the plaintiffs sought relief for advantaged students.<sup>115</sup> Moreover, the court specifically referenced the Washington Supreme Court's *Seattle School District* decision, which noted "that a 'general and uniform system' had not been established because the funding for 'basic education' was not derived from 'dependable and regular' tax sources."<sup>116</sup>

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112. See *supra* note 98 and accompanying sources; cf. Dora W. Klein, *Beyond Brown v. Board of Education: The Need to Remedy the Achievement Gap*, 31 J.L. & EDUC. 431 (2002) (discussing various remedies that may help close the educational achievement gap).

113. See generally *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993) (holding in part that various portions of Minnesota's funding provisions for school districts had been adequately addressed by legislature, and any disparities did not violate the state constitution).

114. See, e.g., *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 666 (N.Y. 1995) (explaining that the Education Article of the New York State Constitution requires the State "to offer all children the opportunity of a sound basic education"); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (holding that the state's constitutional duty is to "make ample provision for the education of all children" in terms of the "educational opportunities needed in the contemporary setting to equip children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas"). See *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

115. *Skeen*, 505 N.W.2d at 320 (Page J., dissenting) ("[E]ducation is a fundamental right under the Minnesota Constitution, the state's duty toward its children is not satisfied unless it provides equal educational opportunities for all children. This duty is not satisfied when some children receive an 'adequate' education while others receive a more-than-adequate education.").

116. *Id.* at 311 (citing *Seattle Sch. Dist.*, 585 P.2d at 97). *Seattle School District* later served as the foundation for the Washington Supreme Court's subsequent decision in *McCleary v. State*, 269 P.3d 227, 235 (Wash. 2012).



Justice Page was correct. The *Skeen* plaintiffs were not, as a statistical matter, disadvantaged.<sup>117</sup> On the contrary, they represented an association of school districts serving primarily white students outside the metropolitan area<sup>118</sup>—school districts that, in most other constitutional litigation contexts across the country, would have been regarded as educationally advantaged.<sup>119</sup> The plaintiff districts in *Skeen* actually conceded to the court that their students were already receiving all state-mandated services and an education in compliance with state educational standards.<sup>120</sup>

Instead, the *Skeen* plaintiffs focused on equality of taxation.<sup>121</sup> Consequently, the *Skeen* decision explained that fundamentally different rules apply to equality of taxation in comparison to equal delivery rights of state-mandated educational programs.<sup>122</sup> The school districts in *Skeen* claimed that their lower property tax base made it more difficult for them to support referendum levies, supplemental revenues, and excess levies.<sup>123</sup> As the court examined whether the unequal taxing power, resulting from the existing finance system, was unconstitutional, the court felt compelled to determine whether our constitution treated public education as a

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117. *Skeen*, 505 N.W.2d at 301.

118. *See id.*

119. *Id.* (“The majority of the plaintiff districts belong to the Association of Stable and Growing School Districts (ASGSD). These districts have been experiencing a higher than average enrollment increase, with their enrollment rising by 22% between the 1973–74 and 1987–88 school years. Meanwhile, state-wide enrollment declined by 12% over the same time period. Although the resident income and home values in plaintiff districts are somewhat above the state average, their school districts have property tax base per pupil unit (ppu) below the state average.”). This was because they lacked strong commercial and industrial tax bases. *Id.*

120. *Id.* at 315 (holding the state of Minnesota’s system of education funding formula survives strict scrutiny analysis because plaintiffs concede they already receive an adequate education).

121. *Id.* at 306 (“The crux of the plaintiffs’ claim is that these additional revenue sources which are above and apart from the wholly equalized basic formula result in wealth-based funding disparities among Minnesota school districts.”).

122. *Id.* at 320 (Page J., dissenting) (“This duty [prescribed by the constitution to provide an ‘adequate’ education] is not satisfied when some children receive an “adequate” education while others receive a more-than-adequate education.”).

123. *Id.* at 306 (“[S]tate funding is fully equalized for the approximately 93% of state funding attributable to the basic revenue formula. However, the remaining 7% of funding is not equalized and is often left to local control.”) These funding streams include referendum levies, supplemental revenues, and debt service levies. *Id.* at 301–302.

fundamental right.<sup>124</sup> Harkening back to its 1913 decision,<sup>125</sup> the *Skeen* court reaffirmed that the Education Clause provides an enforceable constitutional mandate.

[T]he Education Clause not only contains language such as “shall” but in fact places a “duty” on the legislature to establish a “general and uniform system” of public schools. This is the only place in the constitution where the phrase “it is the duty of the legislature” is used. This, combined with the sweeping magnitude of the opening sentence of the Education Clause—“The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools”—provides further support for holding education to be a fundamental right.<sup>126</sup>

Notably, the supreme court recognized that Minnesota's Education Clause serves the same function in our constitution as the similar clause in the State of Washington.<sup>127</sup> The upshot of the *Skeen* decision is that it holds financing to lesser scrutiny under the Minnesota Constitution.

[W]hile strict scrutiny analysis should be applied in determining whether the legislature has met a student's fundamental right to a general and uniform system of public schools, a lesser standard, such as a rational basis test, should apply to the determination of whether the *financing* of such a system is “thorough and efficient.”<sup>128</sup>

And, while *Skeen* focused on taxation, the court held that the Education Clause provided a fundamental right to an education,

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124. *Id.* at 313.

125. *Associated Sch. of Indep. Dist. No. 63 v. Sch. Dist. No. 83*, 122 Minn. 254, 142 N.W. 325 (1913).

126. 505 N.W.2d at 313.

127. *Id.* (“The conclusion that education is a fundamental right has also been recognized by other states with similar constitutional provisions. In *Seattle Sch. Dist.*, the Washington Supreme Court noted that the statute placed a ‘paramount duty’ on the state to provide ample education. The court noted that this is the ‘*declaration* of the State’s social, economic and educational *duty* as distinguished from a mere policy or moral *obligation*,’ and that, ‘[f]ollowing from this constitutionally imposed “duty” is its jural correlative, a correspondent “right” permitting control of another’s conduct.’”) (citation omitted)).

128. *Id.* at 315.

including the right to “what is necessary to provide an adequate level of education which meets all state standards.”<sup>129</sup>

*Skeen* is, in one respect, a central case in understanding Minnesota’s constitutional Education Clause because it reaffirmed the constitutional mandate and recognized that the right to education is fundamental, which includes the constitutional law implications that follow.<sup>130</sup> However, in another respect, *Skeen* is nothing but the exclamation point at the end of a sentence describing Minnesota’s former seat-based education system. State educational standards were about to change markedly, leading to a significant change in the financial support and operational and managerial framework necessary to achieve those standards for disadvantaged students. This article now turns to Minnesota’s attempt to radically change the output of its public school system, without implementing equally radical changes in the framework of its delivery system.

### C. *Minnesota’s Proficiency-Based Standards Legislation*

Minnesota’s transition to a proficiency-based education system followed national recognition that under a seat-based system too many students were either not graduating from high school or graduating without basic proficiencies necessary to thrive in a career or post-secondary education.<sup>131</sup> The highest concentration of students graduating without necessary competencies and proficiencies fell among certain demographic groups: so-called “first-generation” students whose families did not have members with post-secondary education, students in families with low incomes, students whose native language is not English, African Americans, Hispanics, and Native Americans.<sup>132</sup> Yet, these were demographic groups that were becoming a larger share of Minnesota’s school-age population.<sup>133</sup> Recognizing that the nation

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129. *Id.* at 316.

130. *See id.* at 313 (holding that education is a fundamental right under the Minnesota Constitution “not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate”).

131. *See* NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 62, at 30–31.

132. *See* ASS’N OF MINN. CIYS., *supra* note 32; MINN. REPORT CARD, *supra* note 38.

133. Brit C. Henderson & Andi Egbert, *Young Adults in Minnesota: A Demographic & Economic Profile*, MINN. STATE DEMOGRAPHIC CTR. 2 (June 2015), [https://mn.gov/admin/assets/young-adults-in-mn-profile-popnotes-june2015\\_tcm36-219658.pdf](https://mn.gov/admin/assets/young-adults-in-mn-profile-popnotes-june2015_tcm36-219658.pdf) [<http://perma.cc/6MNP-327T>].

could not afford to waste the talents of these students, and prodded by the outcome-based education movement—and the proficiency-focused federal No Child Left Behind law—the Minnesota legislature began to radically change the state-mandated education standards. These standards now form the framework describing “what is necessary to provide an adequate level of education which meets all state standards.”<sup>134</sup>

Under new statutory mandates, the Minnesota Department of Education was tasked to build a standards-based, proficiency-producing system and, by rulemaking, determine the essential proficiencies required for all students.<sup>135</sup> The MDE would require all students—even students not yet having mastered the ability to read, write, and speak English—to partake in its rigorous regimen of standardized testing: the Minnesota Comprehensive Assessments.<sup>136</sup> The MDE’s proposed standards would measure all schools by whether their EL students attained “proficiency,” which is measured by robust and challenging criterion as established through an administrative rulemaking process.<sup>137</sup> Understanding the role of these new standards is essential to giving new life to the Education Clause.

134. *Skeen*, 505 N.W.2d at 315–16.

135. *See* MINN. R. 3501.0640–.1345 (2017).

136. Under the most recent version of proficiency tracking when identifying schools for improvements, former English Learners (EL) will be included in a school’s EL student group for four years after exiting EL status. MINN. DEP’T OF EDUC., THE EVERY STUDENT SUCCEEDS ACT (ESSA): ESSA ENGLISH LEARNER COMMITTEE 4 (2017), [http://education.state.mn.us/mdeprod/idcplg?IdcService=GET\\_FILE&dDocName=MDE071003&RevisionSelectionMethod=latestReleased&Rendition=primary](http://education.state.mn.us/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE071003&RevisionSelectionMethod=latestReleased&Rendition=primary) [<https://perma.cc/EK26-YL8B>]. Recently arrived English Learners will be tested in all subjects during their first year of enrollment, but results from the state reading test are not used to identify schools for improvement. *Id.* at 5. Academic progress in reading will be included in the student’s second year of enrollment, and academic achievement in reading will be included in their third year of enrollment. *Id.* *See generally* STATEWIDE TESTING, MINN. DEP’T OF EDUC., <http://education.state.mn.us/MDE/fam/tests> [<https://perma.cc/F65K-GKJQ>] (last visited Nov. 21, 2017).

137. *See generally* ACCOUNTABILITY COMMITTEE, MINN. DEP’T OF EDUC., <http://education.state.mn.us/MDE/dse/ESSA/meet/acc/MDE071208> [<https://perma.cc/K2DQ-LZVJ>] (establishing categories of schools which warrant additional scrutiny for failing to meet EL programming guidelines). None of these standards were referenced by the parties or the courts in *Cruz-Guzman* or *Forlund*, nor were any cited in the briefs to the Minnesota Supreme Court.

Once this transformation occurred, under new legislative education standards, individual classroom teachers simply could not deliver the state-required level of proficiency to all students without a marked transformation of the organization of schools.<sup>138</sup> Further, existing legislation substantially impaired such reorganization efforts.<sup>139</sup> Just as production of twenty-first century phones required a completely different industrial process than the outmoded rotary dial phone, a complex transformation is required to meet twenty-first century educational demands.<sup>140</sup> The legal and constitutional implications of this transformation form the basis of many of the great state court education clause decisions in states beyond Minnesota.<sup>141</sup> Regrettably, the three most recent Minnesota constitutional challenges have failed to seek the ambitious relief required to reshape Minnesota's education system to meet the legislature's new and properly ambitious mission.<sup>142</sup>

Conducting business as usual, Minnesota schools have successfully educated most socio-economically advantaged students to the new higher levels imposed by the state legislature, but they

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138. See generally *The Objective of Education Is Learning, Not Teaching*, THE WHARTON SCH. AT THE U. PA.: KNOWLEDGE @ WHARTON (Aug. 20, 2008), <http://knowledge.wharton.upenn.edu/article/the-objective-of-education-is-learning-not-teaching/> [<https://perma.cc/82DM-D79P>] [hereinafter *Objective of Education*] (providing a transcript of the podcast and describing how a traditional teacher led education system is a semi-effective mechanism for promoting mass student understanding but fails when discussing individual, particularized student learning).

139. See, e.g., Arthur Levine, *Better Schools Through Smarter Testing*, L.A. TIMES (Aug. 3, 2012), <http://latimes.com/2012/aug/03/opinion/la-oe-levine-school-testing-20120803> [<https://perma.cc/4KQK-5VKV>] (identifying how state mandated, comprehensive testing—that occurs late in the school year—impairs students from receiving corrective feedback earlier and leads to compounding detrimental effects for those students, such as student disengagement from the subject and the learning process as well as the social stigma of being forced to repeat a grade).

140. See *The Objective of Education*, *supra* note 138 (arguing that in a modern, digitized age, teacher-led environments do not comport with the optimal capabilities for individualized learning).

141. See *McCleary v. State*, 173 Wash.2d 477 (Wash. 2012); *Conn. Coal. For Justice in Educ. v. Rell*, 295 Conn. 240 (Conn. 2010) (holding that the education provision of the state constitution guarantees public school students suitable educational opportunities); *Lobato v. State*, 218 P.3d 358 (Colo. 2009) (holding that the adequacy of public school financing system under the state constitution was justiciable a issue).

142. See *infra* Part IV.D.

have utterly failed to meet those norms for students of lower socio-economic status.<sup>143</sup> However, scholarship and practical experience have demonstrated that with appropriate transformations, public schools can overcome the challenge of demographics and disadvantage.<sup>144</sup>

In short, while the Minnesota legislature has appropriately adjusted statutory education standards to meet today's imperatives, the three branches of government have entirely failed to adjust and deliver an education system that meets the Minnesota legislature's purpose of creating a quality education for all students capable of attaining it.<sup>145</sup> Once a state changes to the proficiency-based paradigm, as both Washington and Minnesota have done, providing the resources sufficient to achieve those goals requires examination of the resources required to produce the desired proficiency.<sup>146</sup> Minnesota's legislative process has proven incapable of producing the required changes necessary to meet state standards. Until litigation is commenced to trigger such reforms, Minnesota's proficiency rates will continue to stagger.

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143. See Compl. ¶ 37, *Cruz-Guzman v. Minnesota*, 27-CV-15-19917, 2015 WL 6774682 (Minn. Dist. Ct. Nov. 5, 2015) (identifying Minneapolis pass rates for reading at 15 points below the state average, mathematics at 18 points below, and overall lower than the pass rates for suburban school districts); Compl. ¶ 112, *Forlund v. State*, 62-CV-16-2161, 2016 WL 8608311 (Minn. Dist. Ct. May 2, 2016) (enumerating significant disparity in proficiency rates for urban core schools); see also *supra* text accompanying notes 37–44.

144. See Chenoweth & Theokas, *supra* note 98; see also Odden & Archibald, *supra* note 18, at 31–43; DAVID L. KIRP, *IMPROBABLE SCHOLARS: THE REBIRTH OF A GREAT AMERICAN SCHOOL SYSTEM AND A STRATEGY FOR AMERICA'S SCHOOLS 4–12* (2013). See generally ALAN M. BLANKSTEIN, *FAILURE IS NOT AN OPTION: 6 PRINCIPLES THAT ADVANCE STUDENT ACHIEVEMENT IN HIGHLY EFFECTIVE SCHOOLS* (3d ed. 2012); BRYK, *supra* note 98 (finding five essential elements of school improvement: collaborative teachers, ambitious instruction, effective leaders, involved families, and a safe and supportive environment).

145. See *infra* Part IV.A.

146. See, e.g., THOMAS B. FORDHAM INST., *FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 2–32* (2006), [http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FundtheChild062706\\_7.pdf](http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/FundtheChild062706_7.pdf) [<https://perma.cc/8B2Q-WBTG>] (“Although we may wish that achieving this [proficiency] goal was easy for every student, numerous studies have shown that *some students require more resources than others . . .*” (emphasis added)) [hereinafter FORDHAM INST.].

## IV. CONTINUED CHALLENGES TO MINNESOTA'S EDUCATION SYSTEM

A. *Minnesota's Dysfunctional Education Budgetary System*

The Minnesota Senate's Fiscal Issue Brief describes Minnesota's budgetary process as a "traditional" and "incremental" system of budgeting.<sup>147</sup> It is "[i]ncremental in that the immediately preceding state budget tends to be the starting point for making future budget decisions and traditional in the sense that budgets tend to focus on expenditure controls or inputs (what money buys) rather than outcomes."<sup>148</sup>

In keeping with its traditional and incremental nature, the governor's education budget is not based on the cost of delivering the services and outcomes required by state law.<sup>149</sup> In fact, no such official costing estimate exists. Instead, state-provided revenues are calculated using complex arrays of funding formulas, such as the basic formula (basic formula rate times average daily members), and revenue rates by categories of students, which include compensatory revenue (rate times number of disadvantaged students) and state and federal special education revenues.<sup>150</sup>

Three components contribute to the incremental part of the biennium's base budget: (1) adjustments for estimated changes in the number and category of projected students to be served; (2) adjustments in the basic formula rate; and (3) adjustments in the categorical rates.<sup>151</sup> Districts serving high rates of students with economic disadvantages and disabilities, and their representatives, fight for higher adjustments in the categorical rates.<sup>152</sup> Districts

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147. See MINN. SENATE OFF. OF COUNSEL, RESEARCH & FISCAL ANALYSIS, MINNESOTA BUDGET PROCESS REQUIREMENTS 1 (2008).

148. *Id.*

149. See MINN. HOUSE OF REPRESENTATIVES RESEARCH DEP'T, MINNESOTA SCHOOL FINANCE: A GUIDE FOR LEGISLATORS (2016) [hereinafter A GUIDE FOR LEGISLATORS].

150. *Id.* at 2.

151. See generally Greta Kaul, *The Legislature is Going to be Debating Education Funding Again. How, Exactly, Does Minnesota Pay For its Schools?*, MINNPOST (Feb. 17, 2017), <https://www.minnpost.com/education/2017/02/legislature-going-be-debating-education-funding-again-how-exactly-does-minnesota-p> [<https://perma.cc/4ZED-MWXR>] (providing a recent lay person's description of the components of school funding).

152. See A GUIDE FOR LEGISLATORS, *supra* note 149, at 58 ("School districts receive state aid and some federal aid to pay for special education services. If these funds are insufficient to pay for the costs of the programs, districts must use other general fund revenue.").

serving lower rates of those students tend to fight for allocating all or most of the incremental funding based on the basic formula.<sup>153</sup> These adjustments are not calculated based on cost of services.<sup>154</sup> The governor's proposal is derived by working backwards from the total amount of new revenue he or she is willing to allocate to public education, and his or her policy preferences as to how much new revenue should be placed in the basic formula versus categorical funding (e.g., compensatory revenue and special education).<sup>155</sup> During a divided government, Democrats and Republicans play a game of chicken; the Democrats demand higher increments and Republicans demand lower, until the deadlock is finally broken at the last minute.<sup>156</sup>

Still, no process exists to link the budgetary submission to the estimated cost of delivering the programs and outcomes mandated by state and federal law. When the budget arrives at the legislature, legislators have no data-based estimate of the funding gap inherent in the governor's proposed budget between cost of mandated programs and the proposed budget targets. This author testified to

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153. See Kaul, *supra* note 151 (explaining that basic education funding may cover up to eighty percent of a district's total cost while the remaining costs vary depending on a district's characteristics and its student population).

154. See *id.*

155. In the 2007 legislative session, Democrats, controlling the legislative branch, complained that the special education cross subsidy had increased by hundreds of millions of dollars during the Pawlenty administration and proposed a major increase in the special education formula to redress that problem. See Laura McCallum, *Senate Focuses Attention of Special Education as it Passes "Lean" Bill*, MINN. PUB. RADIO (Mar. 26, 2007), <https://www.mprnews.org/story/2007/03/26/ed> [<https://perma.cc/S3AH-9C4Q>]. Governor Pawlenty withheld his support, seeking to reprogram that money onto the basic formula. Democrats in the senate refused to allow this transfer, and eventually the branches compromised on a significantly lower basic formula increase to accompany the special education relief. See Governor Tim Pawlenty, Statement of Line Item Veto, May 30, 2007, [https://www.leg.state.mn.us/archive/vetoes/2007veto\\_ch146.pdf](https://www.leg.state.mn.us/archive/vetoes/2007veto_ch146.pdf) [<https://perma.cc/9WMX-ETEG>] ("This K-12 education bill failed to provide the level of general formula funding I proposed."). In following years, the legislature gradually took back much of the special education relief to fund formula increases. ASS'N OF METRO. SCH. DIST., POSITION ON SPECIAL EDUCATION 1-2 (2013), <http://www.amsd.org/wp-content/uploads/2011/11/2015-AMSD-Special-Education-Position-Paper.pdf>. [<https://perma.cc/66U8-MABS>].

156. See Governor Mark Dayton, Veto Letter (May 12, 2017), [http://mn.gov/gov-stat/pdf/2017\\_05\\_12\\_Letter\\_Ch\\_43\\_Veto.pdf](http://mn.gov/gov-stat/pdf/2017_05_12_Letter_Ch_43_Veto.pdf) [<https://perma.cc/BQN6-D98U>] (vetoing omnibus E-12 education appropriations bill and detailing the lack of agreement regarding spending amounts).



the Senate Finance Committee in 2007, and many committee members professed amazement at the magnitude of the discrepancy between special education costs and revenues, and many wrongly attributed that gap to shortfalls in the federal share of funding.

Independent of this budgeting process, stakeholders and advocacy groups encourage legislators to initiate new programs, or enhance old ones, in ways that make significant new claims on existing resources.<sup>157</sup> These policy initiatives are developed independently of their impacts on local district costs and generally do not factor into overall budget levels.<sup>158</sup>

In recent years, for example, two such major initiatives were passed which, if faithfully implemented by local districts, would make major unfunded claims on already insufficient funds.<sup>159</sup> The Minnesota LEAPS Act<sup>160</sup> demands major reforms in the delivery of services to the over 65,000 EL students.<sup>161</sup> A study by the Association

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157. See, e.g., STAKEHOLDERS ADVISORY GROUP, MINN. EDUC. EQUITY P'SHIP (last visited Dec. 1, 2017), <https://mneep.org/el-stakeholders-advisory-group/> [<https://perma.cc/GYZ2-2ZA5>] (demonstrating how new EL programs could cause financial strain on existing programs).

158. See *id.*

159. See generally LEAPS ACT, MINN. DEP'T OF EDUC., <http://education.state.mn.us/MDE/dse/el/leap/> [<https://perma.cc/E8BW-4Q8M>] (last visited Dec. 1, 2017) ("The Learning English for Academic Proficiency and Success (LEAPS) Act was passed in Minnesota in 2014. The law revises many state statutes to add an increased emphasis to support English Learners. The law is embedded into many existing statutes, including early childhood, curriculum and instruction, higher education, adult education, and teacher licensing.").

160. MINN. STAT. §§ 124D.58–.64, 124D.65, subdiv. 6 (2017); Conor P. Williams & Colleen G. Ebinger, *The Learning for English Academic Proficiency and Success Act: Ensuring Faithful and Timely Implementation*, MCKNIGHT FOUND. 4 (Oct. 2014) ("During the 2014 legislative session, lawmakers passed the nation's most comprehensive legislation in support of English Learners (ELs). The law has three principal goals for all EL students: a) academic English proficiency, b) grade-level content knowledge, and c) multilingual skills development. Chief among the mandates is the requirement that *all* teachers be skilled in teaching ELs. Delivering these goals will require action at every level of the educational system: state agencies and the Board of Teaching, teacher preparation programs at institutions of higher education, school districts and charter schools, and classroom teachers and school staff.").

161. Williams & Ebinger, *supra* note 160, at 4. The largest EL populations include Latino, Somali and Hmong students. *Id.* The total number of EL students increased by 300 percent in the past 20 years, making ELs the fastest growing part of Minnesota's student population. *Id.* But, "nearly half of EL students do not graduate from high school . . ." *Id.*

of Metropolitan School Districts estimated the operating deficit for existing EL programs before LEAPS at about ninety-five million dollars per year, with the shortfalls unequally distributed to districts with high EL populations.<sup>162</sup> A year later, in 2015, the legislature passed legislation requiring dyslexia services.<sup>163</sup> The legislature and Department of Education have utterly failed to budget for these costs,<sup>164</sup> yet the target population is likely more than ten percent of the student population.<sup>165</sup> Importantly, within this target population are students who can radically improve their performance if they receive proper services.<sup>166</sup>

162. MINN. DEP'T OF EDUC., ENGLISH LEARNER CROSS-SUBSIDY FY 2016 (Feb. 2017), <http://www.amsd.org/wp-content/uploads/2011/11/AMSD-EL-Cross-Subsidy-2016.pdf> [<https://perma.cc/46MS-4RTW>].

163. MINN. STAT. § 120B.12, subd. 2 (2017) (“Each school district shall identify before the end of kindergarten, grade 1, and grade 2 students who are not reading at grade level before the end of the current school year . . . . The district also must annually report to the commissioner by July 1 a summary of the district’s efforts to screen and identify students with dyslexia [or] convergence insufficiency disorder; (b) A student identified under this subdivision must be provided with alternate instruction under section 125A.56, subdivision 1.”).

164. These costs will likely include identifying and training staff to conduct screening and verify diagnoses, and then implementing curriculum designed for students with dyslexia. *See generally* SALLY SHAYWITZ, *OVERCOMING DYSLEXIA: A NEW AND COMPLETE SCIENCE-BASED PROGRAM FOR READING PROBLEMS AT ANY LEVEL* (Alfred A. Knopf ed., 1st ed. 2003). In Minnesota, Groves Academy provides a charter-based program for students with dyslexia. Its reading program relies on the Wilson Reading System, an Orton-Gillingham based approach to reading designed for classroom instruction. Many other students receive Orton-Gillingham based instruction from individual tutors. *Tutoring—Developing Skills for Academic Success*, GROVES ACADEMY, <https://www.grovesacademy.org/learning-center/tutoring/> [<https://perma.cc/TD73-ELF8>] (last visited Nov. 28, 2017).

165. Chris H. Johnson, *The Impact of Dyslexia in Rural Minnesota Communities*, COLL. ST. SCHOLASTICA (May 8, 2017), <https://search.proquest.com/openview/46ede643bcd31ba3ff02320d9f3314e4/1?pq-origsite=gscholar&cbl=18750&diss=y> [<https://perma.cc/7QZK-64C5>]; *see The State of LD: Understanding the 1 in 5*, NAT'L CTR. FOR LEARNING DISABILITIES, <https://www.nclld.org/archives/blog/the-state-of-ld-understanding-the-1-in-5> [<https://perma.cc/EZ7L-8V6M>] (last visited Dec. 15, 2017) (“One in five children in the U.S. have learning and attention issues such as dyslexia and ADHD . . .”).

166. *The State of LD*, *supra* note 165 (“Children with learning and attention issues are as smart as their peers and with the right support can achieve at high levels, but a lack of early or effective interventions leads too many kids on a downward spiral.” (quoting Mimi Corcoran, President and CEO of the National Center for Learning Disabilities)).

Collective bargaining further complicates Minnesota's school finance system.<sup>167</sup> There is absolutely no guarantee that increased funding—even if historically large—will translate into improved programs for disadvantaged students.<sup>168</sup> Collective bargaining commences in the biennial budget year.<sup>169</sup> The political and economic power granted to teachers unions<sup>170</sup> in Minnesota often drives boards and superintendents to allocate virtually all additional funds, unless categorically dedicated, to increased employee compensation and benefits.<sup>171</sup> This results in a series of budget

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167. See MINN. STAT. §§ 179A.01–.25 (2017) (establishing the Public Employment Labor Relations Act (PELRA) and state collective bargaining laws that govern Minnesota public employers and representatives of unionized public employees). Under PELRA, public employers and representatives of public employees must negotiate terms and conditions of employment. Negotiated terms and conditions include hours of employment, fringe benefits, and personnel policies affecting employee working conditions. While most retirement benefits are not negotiable, school districts may negotiate contributions to premiums for group insurance coverage of retired employees and severance pay provisions.

168. See Benjamin A. Lindy, *The Impact of Teacher Collective Bargaining Laws on Student Achievement: Evidence from a New Mexico Natural Experiment*, 120 YALE L.J. 1130, 1177 (explaining how a study done of collective bargaining's effects on student achievement in New Mexico found that “under mandatory collective bargaining, any improvement in student achievement comes at the expense of poor-performing students”).

169. Lisa Larson, *School District Collective Bargaining*, HOUSE RESEARCH (2011), <http://www.house.leg.state.mn.us/hrd/pubs/ss/sscollbarg.pdf> [https://perma.cc/9HPF-TKX3].

170. See Joshua Cowen & Katharine O. Strunk, *How do Teachers' Unions Influence Education Policy? What We Know and What We Need to Learn* 5–8 (The Educ. Pol'y Ctr. at Mich. St. U., Working Paper No. 42, 2014). “Nearly every aspect of teachers' work and school operations is negotiated into teachers' union contracts, leading one scholar to note that union contracts are the most important policy document governing school district operations.” *Id.* at 5–6. Several studies have found that collective bargaining agreements inhibit administrators' ability to operate. See *id.* at 7–8.

171. In both Minneapolis and St. Paul, teachers' unions have historically dominated school board elections through the DFL endorsements. One indication of labor's power in collective bargaining is the magnitude of future unfunded benefits granted in agreements with licensed union employees. By way of example, as of 2008, the St. Paul District had granted its licensed employees future unfunded post-retirement benefits (OPEB) with a present value of \$312 million (\$8,000 per pupil), about 55% of its operating revenue. OFF. OF STATE AUDITOR, SPECIAL STUDY OTHER POST EMPLOYMENT BENEFIT LIABILITIES OF SCHOOL DISTRICTS IN MINNESOTA 3 (Mar. 31, 2009). Some Iron Range school districts have granted OPEB benefits equal to, or even double, annual operating revenues. *Id.* These are examples of concessions improvidently made in bargaining, to find a way to meet labor's

increases and cuts that shift the focus away from student achievement.

This cycle of revenue increases—followed by cuts and pleas for further increases—can cause appropriators to believe that when they increase the budget, they are not buying improved programs but instead funding compensation increases and restoring some of the prior biennium's catastrophic cuts.<sup>172</sup> Financial equilibrium is not struck around school transformation and meeting state educational proficiency goals, but instead on buying labor peace and keeping districts out of statutory operating deficit.<sup>173</sup>

If Minnesota is to meet the constitutional goal of providing an education that prepares economically disadvantaged students for twenty-first century careers, it needs to reorganize and reform the process by which the legislature makes “such provisions . . . as will secure a thorough and efficient system of public schools throughout the state.”<sup>174</sup> To this end this article turns next to a case with constitutional lessons for Minnesota, *McCleary v. State*.<sup>175</sup>

#### B. *Financing Adequacy: Lessons from McCleary*

As the movement for new state proficiency standards gained steam, proponents began to raise concerns as to whether existing state financial support was adequate to meet the new standards.<sup>176</sup> The National Conference of State Legislatures urged its member

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demands outside currently available funds.

172. See, e.g., Christopher Magan, *Minnesota Schools are Getting \$483M in New Funding. Why Are So Many Still Tightening Belts?*, PIONEER PRESS (June 17, 2017, 7:00 AM), <http://www.twincities.com/2017/06/17/new-money-from-capitol-but-minnesota-schools-still-cant-meet-their-budgets/> [<https://perma.cc/VT4L-H37Z>] (surmising whether teacher pay is the problem for Minnesota school district budget issues).

173. See *id.* (“[T]he Center for Fiscal Excellence found the state would need to increase per-pupil funding by roughly 4 percent a year to keep pace with growing costs [of teacher compensation] . . . . [T]he group recommends overhauling the pay structure to focus more on student outcomes and teacher performance.”).

174. MINN. CONST. art. XIII, § 1.

175. 269 P.3d 227, 251–52 (Wash. 2014).

176. See, e.g., Kathy Checkley, *Money Matters: A Primer on K-12 School Funding*, CTR. FOR PUB. EDUC. (July 2, 2008), <http://www.centerforpubliceducation.org/Main-Menu/Policies/Money-matters-At-a-glance/Money-matters-A-primer-on-K12-school-funding.html> [<https://perma.cc/Z7AP-V4V5>] (noting the rise in state adequacy lawsuits against state-level funding agencies following the increase in standards-based reform legislation).

legislatures to set clear and measurable educational goals or objectives expected of students as the basis for an adequate school finance system.

[S]tate policymakers and courts should apply the test of “adequacy” as a primary criterion in examining the effectiveness of any existing or proposed school finance system . . . [and e]nsure that sufficient funding is provided to establish and maintain the identified capacity that is essential for schools to provide every student a reasonable opportunity to achieve expected educational goals or objectives.<sup>177</sup>

To his credit, Governor Pawlenty recognized at the beginning of his first term that delivering proficiency to all students required a different school finance system.<sup>178</sup> He appointed a commission to make recommendations on how to respond to the emerging education crisis and to determine the funding required to accomplish new state education standards.<sup>179</sup> The Commission’s mission was “to examine and make recommendations to revamp Minnesota’s K-12 education finance system.”<sup>180</sup>

The Commission’s initial report recognized the growing educational challenges<sup>181</sup> and the failure of Minnesota’s finance

177. TERRY N. WHITNEY, NAT’L CONF. OF STATE LEGISLATURES, EDUCATIONAL ADEQUACY: BUILDING AN ADEQUATE SCHOOL FINANCE SYSTEM 3 (1998).

178. Tim Pugmire, *Task Force Recommends New School Funding System* MINN. PUB. RADIO (Mar. 15, 2004), [http://news.minnesota.publicradio.org/features/2004/03/16\\_pugmiret\\_edfunding/](http://news.minnesota.publicradio.org/features/2004/03/16_pugmiret_edfunding/) [<https://perma.cc/UXA4-UAKR>] (detailing Governor Pawlenty’s task force on education finance reform).

179. See *Information on Minnesota State Agencies, Boards, Task Forces, and Commissions*, MINNESOTA LEGISLATIVE REFERENCE LIBRARY, [https://www.leg.state.mn.us/lrl/agencies/agencies\\_detail?AgencyID=1757](https://www.leg.state.mn.us/lrl/agencies/agencies_detail?AgencyID=1757) [<https://perma.cc/SG7N-JFBG>] (last visited Nov. 22, 2017); Ric Dressen et al., *Investing in Our Future*, SCHOOL FUNDING TASK FORCE (July 2004), <https://www.leg.state.mn.us/docs/2004/other/040378.pdf> [<https://perma.cc/9N5R-NAWB>] [hereinafter *Investing in Our Future*].

180. *Investing in Our Future*, supra note 179, at 2.

181. “The Commission found that evolving conditions included:

- Achievement disparities occurring among our student ethnic populations,
- Limited English Proficient students are increasing in our schools,
- Student mobility from one school to another is creating greater educational demands,
- Students from families of poverty are increasing in our schools,
- Greater Minnesota’s student population is in a steady decline,

system to correlate revenues to the cost of achieving adequacy.<sup>182</sup> The Commission challenged the legislature to respond to the changing societal and demographic conditions impacting schools and school funding. To that end, it urged that “Minnesota’s 21st century educational funding formula should be a rationally determined, learning-linked, student-oriented, and cost-based Instructional Services Allocation.”<sup>183</sup>

The Commission initiated a preliminary review to provide an estimate of the new funding under such a system.<sup>184</sup> However, there were concerns that continuation of these efforts might support a conclusion that Minnesota education was being underfunded by six to fourteen percent.<sup>185</sup> This drew the ire of the Governor, who cancelled the Commission’s costing efforts.<sup>186</sup> In response, the Association of Metropolitan School Districts, the Minnesota Rural Education Association, and the Schools for Equity in Education retained the Augenblick firm to continue the Commission’s

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- Minnesota’s population is getting older and living longer,
  - Minnesota’s tax revenue, which supports public services, is slowing, [and]
  - Limitations in the current education funding formula, including its lack of understandability and limited link to student and school performance.”

*Id.* at 5.

182. Pugmire, *supra* note 178 (“The [commission] is recommending a funding formula based on the actual cost of providing a student with an education sufficient to meet state standards.”).

183. *Investing in Our Future*, *supra* note 179, at 24.

The dollar value of an “Instructional Services Allocation” (ISA) should be: (1) Cost-based by translating the abstract costs into actual school and district operating costs. (2) Funded on an individual student basis. (3) Tailored to *relevant characteristics* of each individual student. “Relevant characteristics” means a student’s grade level and incorporates, where appropriate, extraordinary conditions such as: student disabilities, household or neighborhood poverty, pre-K or Kindergarten readiness, English language learners, [or] high incidence of school-to-school mobility.

*Id.* at 25.

184. *Id.* at 24.

185. See MEYERS ET AL., *supra* note 14, at 9.

186. See John Fitzgerald, *April 25: The Day School Quality Died*, EDUC. POL’Y REV. (Apr. 30, 2008), <http://www.mn2020.org/issues-that-matter/education/april-25-the-day-school-quality-died> [https://perma.cc/P422-27VP]; see also MEYERS ET AL., *supra* note 14, at 1.

preliminary work.<sup>187</sup> Augenblick's preliminary report confirmed the one billion dollar estimated funding shortfall and urged Minnesota to undertake a full costing study to fulfill the recommendation of a learning-linked school finance system.<sup>188</sup> The Augenblick report stated:

From the beginning of the standards-based reform movement in this country (starting with the reform of the Kentucky education system in 1990), most states and the federal government have not attempted to estimate the costs that every school or district would incur to help each of their students meet state/federal performance standards. Determining these costs has become an essential missing piece that state policymakers need in order to understand what resources schools require to enable each student to succeed. In addition, once these costs are determined, state policymakers also need to properly address them in the state's school finance system.<sup>189</sup>

In the *Skeen* decision, the Minnesota Supreme Court referenced the State of Washington's approach to the role of the judiciary under its Education Clause.<sup>190</sup> Washington, like Minnesota, had transformed to a proficiency-based education system.<sup>191</sup> Additionally, like Minnesota, neither the governor nor legislature had attempted to rationally link the funding of public education to the new legislative education standards.<sup>192</sup> In *McCleary*, a statewide coalition of community groups, public school districts, and education organizations alleged that although the legislature had radically changed the elements of the legislatively required education, it had failed to adjust state funding to achieve that objective.<sup>193</sup> Unlike the *Forshund* and *Cruz-Guzman* cases, the *McCleary*

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187. MEYERS ET AL., *supra* note 14, at 1.

188. *Id.* at 9–10.

189. *Id.* at 2. Governor Dayton, after facing from the education community to restart the Pawlenty Commission's work, established the Education Finance Working Group. See MINN. DEP'T OF EDUC., FUNDING EDUCATION FOR THE FUTURE 1 (May 2011), <http://www.amsd.org/wp-content/uploads/2012/03/EFReport-2.pdf> [<https://perma.cc/V244-HH7Z>]. Governor Dayton insisted that the Working Group limit its efforts to recommending ways to reallocate existing resources and prohibited the Working Group from estimating the shortfall in funding. *Id.*

190. *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993).

191. *McCleary v. State*, 269 P.3d 227, 234 (Wash. 2012).

192. *Id.* at 234–36.

193. *Id.* at 235 (Wash. 2012); see *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1975) (holding that the Washington constitution imposed a judicially

lawyers represented school districts and school organizations with the experience and expertise necessary to advance a claim for relief that might offer the massive fiscal relief school districts needed.<sup>194</sup>

Applying the principles of *McCleary* is an important element in any effort to reinvigorate the Education Clause in Minnesota. Minnesota and Washington have faced challenges with striking parallels—both states have transitioned from a seat-based (or teaching-based) education system to a proficiency-based system.<sup>195</sup> Like Minnesota, Washington failed to adjust its funding to correlate with the demands of a new state educational paradigm, despite reports from officially established commissions.<sup>196</sup> *McCleary* held that the state does not meet its constitutional obligation to public education if its funding formulas do not correlate to the level or resources needed to meet the state's educational standards.<sup>197</sup> This holding, if adopted in Minnesota, would strike down the incremental and traditional education funding system. Such a holding would not be an attack on the legislature's powers. On the contrary, it would empower the legislature by providing the data necessary to fulfill its duty to provide adequate education to Minnesotans. Moreover, this holding would provide a data-driven basis for budgeting. Providing the legislature with the true cost of achieving Minnesota's education standards, which are set by the legislature itself, would vindicate the principles articulated by the National Conference of State Legislatures, promote sound legislative decision-making, and comport with plain common sense.<sup>198</sup>

*McCleary* agreed with the trial court's finding that the cost of delivering students to a preset level of proficiency must necessarily be significantly greater than the cost of simply putting them in classrooms and hoping that they take advantage of the standard

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enforceable affirmative duty on the state to make ample provision for the education of all children residing within its borders).

194. See *McCleary*, 269 P.3d at 227.

195. See *id.* at 234–35.

196. See *id.* at 235–36.

197. *Id.* at 254.

198. See *State Role in Education Finance*, NAT'L CONFERENCE OF ST. LEGISLATURES, <http://www.ncsl.org/research/education/state-role-in-education-finance.aspx> [https://perma.cc/3Y8E-UPJ8] (last visited Dec. 1, 2017) (“A sound state school finance system . . . [p]rovides adequate resources to local school districts so that they may achieve state and local educational goals and standards.”). See generally MEYERS ET AL., *supra* note 14 (recommending several methodologies for determining educational funding).



curriculum delivered by the teacher.<sup>199</sup> As *McCleary* recognized, the cost of achieving a designated proficiency level must rise significantly because schools must address the needs of students who would otherwise be left behind in the old paradigm.<sup>200</sup> A student who is two years behind in third grade simply cannot catch up in the same amount of time or with the same pedagogical resources as a student who is at, or above, his or her grade level.<sup>201</sup>

Unfortunately, in Minnesota, and many other states, legislatures generally focus not on the cost of the newly specified educational result, but rather on how much money has historically been provided to public education.<sup>202</sup> From there, the legislatures then adjust the level of funding based on existing revenues, tax policy, and the political philosophy of the legislators, rather than on what is needed to meet the new standards.<sup>203</sup> The need to correlate revenues with the true cost of providing services is further magnified when it arises in the context of the billion-dollar biennial deficit in special education funding.<sup>204</sup>

When revenues are not learning-linked, as recommended by the Pawlenty Education Finance Reform Task Force, districts serving high percentages of students with disabilities or economic disadvantages must cannibalize programs delivered to low-cost advantaged students, or skimp on programs serving disadvantaged

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199. *McCleary*, 269 P.3d at 252–58 (finding that the legislature failed to change its educational funding mechanism to meet the new standards it created in transitioning from a seat-based to a performance-based education system).

200. *See id.* at 257–58.

201. THE WALLACE FOUND., REIMAGINING THE SCHOOL DAY: MORE TIME FOR LEARNING 7–8 (2011), <http://www.wallacefoundation.org/knowledge-center/Documents/Reimagining-the-School-Day-More-Time-for-Learning.pdf> [<https://perma.cc/J2QK-FYTM>].

202. *See generally* MINN. HOUSE OF REPRESENTATIVES FISCAL ANALYSIS DEP'T, FINANCING EDUCATION IN MINNESOTA 2016-2017 (Aug. 2016), <https://www.house.leg.state.mn.us/fiscal/files/16fined.pdf> [<http://perma.cc/36Y9-KSA2>] [hereinafter FINANCING EDUCATION] (describing the method of financing education in Minnesota).

203. *See id.*; Tim Pugmire, *GOP Lawmakers Question Need for School District Levies*, MINN. PUB. RADIO (Sept. 12, 2011), <https://www.mprnews.org/story/2011/09/12/republican-lawmakers-school-levies> [<https://perma.cc/TJ9S-WCDT>]; Kaul, *supra* note 151.

204. MINN. OFF. OF THE LEGIS. AUDITOR, EVALUATION REP.: SPECIAL EDUC. 49 (March 2013), <http://www.auditor.leg.state.mn.us/ped/pedrep/sped.pdf> [<https://perma.cc/T6P2-H3CH>].

students.<sup>205</sup> When a district is forced to “cross subsidize” these additional programs, it places the district at a competitive disadvantage compared to neighboring school districts with lower special cross subsidies.<sup>206</sup> Minnesota’s school system, open enrollment options, and charter system create an unstable environment. This system encourages the migration of low-cost advantaged students out of schools and school districts that serve high-cost disadvantaged students.<sup>207</sup> This contributes to a downward financial spiral because advantaged students migrate to neighboring school districts with superior fiscal circumstances. In some districts, this migration also contributes to the development of charter school competition.<sup>208</sup> Ironically, this irrational fiscal system accelerates racial and economic isolation in schools. Yet in *Cruz-Guzman*, the plaintiffs conspicuously avoided addressing the financial issues faced by urban school districts.<sup>209</sup> Such financial issues are major contributors to concentrations of poverty.<sup>210</sup>

In *McCleary*, the Washington Supreme Court pointed out that the state of Washington completed a study by nationally recognized experts Lawrence O. Picus and Allan R. Odden.<sup>211</sup> The results of this

205. See *Investing in Our Future*, supra note 179, at 8.

206. See *id.*

207. See Julian V. Heilig et al., *Separate and Unequal? The Problematic Segregation of Special Populations in Charter Schools Relative to Traditional Public Schools*, 27 STAN. L. & POL’Y REV. 251, 269 (2016), [http://www.academia.edu/33623412/Vasquez\\_Heilig\\_J.\\_Holme\\_J.\\_LeClair\\_A.\\_V.\\_Redd\\_L.\\_and\\_Ward\\_D.\\_2016\\_.Separate\\_and\\_unequal\\_The\\_problematic\\_segregation\\_of\\_special\\_populations\\_in\\_charter\\_schools\\_relative\\_to\\_traditional\\_public\\_schools.\\_Stanford\\_Law\\_and\\_Policy\\_Review\\_27\\_2\\_251-293](http://www.academia.edu/33623412/Vasquez_Heilig_J._Holme_J._LeClair_A._V._Redd_L._and_Ward_D._2016_.Separate_and_unequal_The_problematic_segregation_of_special_populations_in_charter_schools_relative_to_traditional_public_schools._Stanford_Law_and_Policy_Review_27_2_251-293) [<https://perma.cc/X7P3-2EGU>]; Eang L. Ngov, *Following Fisher: Narrowly Tailoring Affirmative Action*, 64 CATH. UNIV. L. REV. 1 n.139 (2014), <http://scholarship.law.edu/cgi/viewcontent.cgi?article=3299&context=lawreview> [<https://perma.cc/776Z-73E5>] (“[Professor Orenthlicher] projects that parents might move their children to less rigorous schools to provide their children a competitive edge, and in doing so, schools in disadvantaged neighborhoods might benefit financially and politically from the migration of wealthier students.”).

208. Michael M. Amir et al., *Charter Fights: The Competing Rights of Charter Schools and Local School Districts Are Triggering Myriad Legal Disputes*, 31 L.A. LAWYER 24, 27 (2008), <https://www.lacba.org/docs/default-source/lal-back-issues/2008.../july-august-2008.pdf> [<https://perma.cc/Y237-VKV3>] (“While this funding system can promote competition among charter and traditional school districts to attract students and teachers, it can also create a tension between the two groups.”).

209. Myron Orfield, *Why Are the Twin Cities So Segregated?*, 43 MITCHELL HAMLINE L. REV. 1, 8 (2017).

210. *Id.*

211. *McCleary v. State*, 269 P.3d 227, 240 (Wash. 2012).

study estimated that Washington schools were underfunded by about two billion dollars.<sup>212</sup> This figure is nearly identical to the results of a similar study which was abandoned in Minnesota.<sup>213</sup> The Washington Supreme Court's opinion details at length other studies and reports showing that the funding system in Washington did not rationally connect to the state legislature's package of basic educational programs.<sup>214</sup> The court explained:

“[T]he funding model for K-12 education has not been updated to reflect the new expectations and has not addressed the question of how to use resources most effectively in order to improve student outcomes.” Tellingly, the report concluded that “[s]table and significantly increased funding is required to support the evolving needs of our education system.”<sup>215</sup>

The court also found that the state could not meet its obligation without connecting actual cost to actual revenues:

The evidence at trial showed that the State's now-abandoned basic education funding formulas did not correlate to the real cost of amply providing students with the constitutionally required “education.” As a result, the State has consistently failed to provide adequate funding for the program of basic education, including funding for essential operational costs such as utilities and transportation. To fill this gap in funding, local districts have been forced to turn increasingly to excess levies, placing them on . . . [an] unstable financial foundation . . . . The basic education funding formulas examined by the trial court did not correlate to the level of resources needed to provide all students with an opportunity to meet the State's education standards. This disconnect had its genesis in the legislature's failure to update the funding formulas after the state transitioned from a seat-based education system to a performance-based system in 1992. The legislature continued to fund schools using the formulas adopted in the Basic Education Act—formulas that were based on a snapshot of actual staffing levels and school district expenditures in the mid-1970s, not the level

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212. *Id.* at 241.

213. *See* MEYERS ET AL., *supra* note 14 (identifying a shortfall of almost one million dollars per year, or two million on a biennial basis).

214. *McCleary*, 269 P.3d at 253–58.

215. *Id.* at 253–54 (quoting the Washington Learns final report (citations omitted)).

of resources needed to allow students to meet the new performance-based standards. . . . Because the state's funding formulas did not correlate to the actual cost of maintaining its basic education program, state funding for "basic education" consistently fell below the mark.<sup>216</sup>

*McCleary* held that the legislature does not do its job if it ignores the true cost of providing mandated services.<sup>217</sup> Accordingly, the Washington Supreme Court found that the legislature has a duty to "correlate" the resources provided to schools with the actual cost of state mandates for "basic education."<sup>218</sup>

This shortage in funding is so transparent and so clearly a major contributing factor to Minnesota's failure to achieve legislatively established academic standards that it is strange that neither the *Forslund* nor the *Cruz-Guzman* plaintiffs alleged funding as a substantial contributing factor causing the achievement gap.<sup>219</sup> A constitutional suit must seek relief that addresses systemic problems. Otherwise, the claim fails because it does not require economically disadvantaged students to meet state education standards.<sup>220</sup>

### C. Challenging Non-Financial Components of the System

Part I noted the necessity of making major changes in the organization of schools, particularly the way teachers and administrators collaborate to deliver instruction.<sup>221</sup> Merely adding two billion dollars to the existing system, without corresponding changes in how Minnesota operates and organizes schools, would only produce a more costly system that continues to fail disadvantaged students.<sup>222</sup> Odden and Picus, two leading experts in school reform, warn that there are deeply embedded systemic forces

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216. *Id.*

217. *Id.* at 257.

218. *Id.* at 253.

219. Compl. ¶ 112, *Forslund v. State*, 62-CV-16-2161, 2016 WL 8608311 (Minn. Dist. Ct. May 2, 2016); Compl. ¶ 37, *Cruz-Guzman v. Minnesota*, 27-CV-15-19917, 2015 WL 6774682 (Minn. Dist. Ct. Nov. 5, 2015).

220. *Cf. Vergara v. State*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016) (describing the court's examination of a statute in question that affects similar groups in an unequal manner).

221. *See supra* Part I.

222. *See MEYERS ET AL.*, *supra* note 14, at 2–3 (explaining that schools lack the "resources to meet state and federally mandated accountability for provisions for student achievement," especially those students "who live in poverty and who may also experience language barriers").

that impair the allocation of new resources, even when provided, to fund appropriate strategies:

[F]rom assessing the education system's use of new resources over time, Odden and Picus (2008) concluded that the education system has used the bulk of new resources for programs outside the core instructional program—not the best strategy if the goal is to dramatically improve student performance in core subjects.<sup>223</sup>

There are also deeply embedded systemic forces that resist the changes in the delivery system. A necessary adjunct of adequate state funding is a system to ensure that state funding buys staff the services and additional learning and preparation time necessary to achieve state goals.<sup>224</sup> There have been modest efforts to recognize the need for reform embedded in a voluntary legislative program: the Minnesota Quality Compensation program (Q Comp).<sup>225</sup> That program is based on modern best practices research that substantiates the position taken here: that both funding and systemic reform are essential components in meeting state established goals.<sup>226</sup> In 2005, both legislative caucuses and the Pawlenty administration created a program that would transform pilot schools into professional learning communities, and significantly change the

223. Odden & Archibald, *supra* note 18, at page x. As this article is written, Minnesota school districts across the state are settling their labor contracts to provide compensation increases that vastly outweigh increased revenues provided by the legislature. See Magan, *supra* note 172. This in turn will trigger cuts in the programs most directly associated with achievement improvements of disadvantaged students. See *id.*

224. See generally QUALITY COMPENSATION: SUPPORTING AND REWARDING EXCELLENCE IN TEACHING, EDUCATORS FOR EXCELLENCE 12 (Aug. 2014), <https://e4e.org/what-we-do/policy-solutions/quality-compensation> [https://perma.cc/RHT2-25JA] (recommending four components of a state funding system including a career ladder, professional development, teacher evaluations, and performance pay).

225. See Q COMP REQUIREMENTS AND GUIDING PRINCIPLES, MINN. DEP'T OF EDUC. (2017–18), [https://education.state.mn.us/mdeprod/idcplg?IdcService=GET\\_FILE&dDocName=054793&RevisionSelectionMethod=latestReleased&Renderition=primary](https://education.state.mn.us/mdeprod/idcplg?IdcService=GET_FILE&dDocName=054793&RevisionSelectionMethod=latestReleased&Renderition=primary) [https://perma.cc/HXJ3-FNPY]; Q COMP: QUALITY COMPENSATION FOR TEACHERS, OFF. LEGIS. AUDITOR 1, 7 (Feb. 2009), <http://www.auditor.leg.state.mn.us/ped/pedrep/qcomp.pdf> [https://perma.cc/ZR9B-RGN8] [hereinafter OFFICE LEGIS. AUDITOR].

226. See OFF. LEGIS. AUDITOR, *supra* note 225, at 3–4 (describing Q Comp as using “pedagogical best practices” and involving reform efforts on the training and evaluation of teachers as well as “the use of financial incentives to improve teacher performance”).

structure of the teaching profession in those schools.<sup>227</sup> A further element of Q Comp was that the teaching profession did not make adequate provision for instructional leadership, which was based upon the conviction of both Governor Pawlenty and his Education Commissioner Seagren.<sup>228</sup>

Specifically, the traditional step-and-lane system, which makes no provision for leadership positions including master teachers or subject matter experts, results in a few leadership positions compared to the total number of teacher and staff positions.<sup>229</sup> The

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227. See *id.* at 3 (“A wave of research in the 1990s suggested that professional development activities were most effective when they addressed how students learn, focused on instructional practices specifically related to the curriculum, drew upon multiple sources of information and data, and involved collaborative work by teachers. One influential innovation was the use of ‘professional learning communities,’ in which groups of teachers worked together to educate themselves about pedagogical best practices.”). See generally RICHARD DUFOUR & ROBERT EAKER, PROFESSIONAL LEARNING COMMUNITIES AT WORK: BEST PRACTICES FOR ENHANCING STUDENT ACHIEVEMENT (1998); Louise Stoll et al., *Professional Learning Communities: A Review of the Literature*, 7 J. EDUC. CHANGE 221, 230 (2006) (discussing a study that concluded “collaborative continuing professional development (CPD) and its effect on teaching and learning . . . could have a positive impact on teachers and pupils”).

228. See OFF. LEGIS. AUDITOR, *supra* note 225, at 2–3. Even with Q Comp in place, one common concern that this author frequently hears from his peers is that there are few leadership opportunities for teachers to expand their impact without leaving the classroom. In fact, research shows that one of the main reasons successful teachers leave the profession is because of a lack of meaningful opportunities for career advancement. See *Where Have All the Teachers Gone?*, LEARNING POL’Y INST. (Aug. 16, 2017), <https://learningpolicyinstitute.org/press-release/where-have-all-teachers-gone> [<https://perma.cc/RC6U-2D8Y>] (noting that lack of advancement opportunities was among the most cited reasons for teacher departures). Traditional career pathways like the ones supported by Q Comp plans are a good start, but too often they are just supplementary responsibilities that need to be completed as opposed to embedded leadership roles that require teachers to develop new professional skills. See QUALITY COMPENSATION, *supra* note 224 (discussing how roles of teachers could be more flexible and differentiated to meet the unique needs of individual school settings, instead of standard roles for the whole district).

229. See generally James W. Guthrie, *School Finance: Fifty Years of Expansion*, 7 FUTURE CHILD. 24 (1997), [https://slideblast.com/school-finance-fifty-years-of-expansion-princeton-university\\_594179af1723ddea237aee57.html](https://slideblast.com/school-finance-fifty-years-of-expansion-princeton-university_594179af1723ddea237aee57.html) [<https://perma.cc/GR55-8UTT>] (“Compared with other large enterprises, a relatively small number of school administrators supervise a large number of staff members. An association of school administrators analyzed data from the U.S. Bureau of Labor Statistics and concluded that elementary and secondary schools employ 14.5 persons per executive, administrator, or manager, compared with 9.3 in the transportation industry, 8.4 in food products, 7.1 in manufacturing, 6.3 in

traditional organization of the teaching profession might be compared to a battalion staffed only by a single lieutenant colonel, no captains, lieutenants or sergeants—that is, a complete absence of intermediate leadership and expertise. To remedy this problem, the Q Comp program expanded career advancement opportunities, required the participating districts to purchase desperately needed time for professional development,<sup>230</sup> data evaluation, collaboration amongst teachers and other professionals, and implemented of a rigorous intentional and structured curriculum.<sup>231</sup> However, in Minnesota, as a practical matter, management needs the consent of its labor union to make many of these reforms.<sup>232</sup> Minnesota has a system of education in which a public school district, charged with meeting a constitutional responsibility and fulfilling a statutory mandate, must obtain the consent of a majority of its teaching force to approve the Q Comp reforms.<sup>233</sup>

construction, 5.4 in mining, and 3.6 in public administration.”).

230. See Darling-Hammond, *supra* note 18, at 14. The highest-achieving countries on international measures such as Programme for International Student Assessment (PISA) and Trends in International Mathematics and Science Study (TIMSS) have been particularly intent on developing teachers’ expertise both before they enter the profession and throughout their careers. *Id.* “[Their teacher development practices] stand in stark contrast to those in the United States where, with sparse and fragmented governmental support, teachers typically enter:

- With dramatically different levels of preparation, largely unsupported by government funding, with those least prepared teaching the most educationally vulnerable children;
- At sharply disparate and often inadequate salaries—with those teaching in the poorest communities earning the least, stimulating a revolving door of underprepared teachers;
- With little or no mentoring, on-the-job coaching, or embedded professional learning opportunities in most communities.”

*Id.* at 1–2.

231. See OFF. LEGIS. AUDITOR, *supra* note 225.

232. MINN. STAT. § 122A.414, subdiv 1(a)–(b) (2017). See Christopher Magan, *Twin Cities Parents Continue Argument That Unions Protect Bad Teachers, Hurt Education*, PIONEER PRESS (June 29, 2017, 8:35 AM), <http://www.twincities.com/2017/06/29/twin-cities-parents-continue-argument-that-unions-protect-bad-teachers-hurt-education> [https://perma.cc/D88P-UDTW]; Annette Meeks, *State of the Unions: Let Public School Teachers Decide If They Want Representation, or Not*, STAR TRIB. (Jan. 8, 2016, 9:26 AM), <http://www.startribune.com/state-of-the-unions-let-public-school-teachers-decide-if-they-want-representation-or-not/364582951> [https://perma.cc/PR9G-9YW4].

233. MINN. STAT. § 122A.414, subdiv. 2(a)–(b) (2008) (requiring that a school district’s application to enter the Q Comp program be “submitted jointly by a district and the exclusive representative of the teachers. Charter schools, which are not

Although the Q Comp program is based on necessary structural reforms, the Governor capped the amount of money allocated to these reforms.<sup>234</sup> Legislative leaders also bowed to pressure from the labor movement to make the reforms because doing so would require the assent of teachers in a collective bargaining agreement.<sup>235</sup> Education Minnesota, a public school employee union, urged its locals to agree to a Q Comp program only if the CBA contained an annual escape clause so that the local union could end the program if the union felt that the program was invading labor objectives.<sup>236</sup> The statewide amount of aid for the program is capped at \$88.118 million for fiscal year 2017 and later.<sup>237</sup>

The validity of proposals to change Minnesota's delivery system is beyond the scope of this article. However, Minnesota fails to provide school district management the power to reorganize and retool schools in accord with research on best practices, especially practices required to meet disadvantaged students' needs. To make Minnesota's broken education system work for the economically disadvantaged, a suit under the Education Clause must force the legislature to provide both school district revenues and school district management power sufficient to achieve their statutory mission. It is imperative for the executive branch to submit budgets adequate to the task in odd numbered years and policy reforms adequate to the task in even numbered years.

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unionized, must hold a vote of their teachers in which at least 70 percent support the Q Comp plan submitted in the application"); MINN. STAT. § 122A.415, subdiv. 1(b) (2008). The "exclusive representative of the teachers" is typically a representative of the teachers' union. *See* MINN. STAT. § 179A.03, subdiv. 8; *see also* Magan, *supra* note 232 ("Last month, state lawmakers agreed to a minor change that will require districts and union leaders to negotiate local policies governing teacher layoffs by 2019.").

234. *See* OFF. LEGIS. AUDITOR, *supra* note 225, at 7.

235. *Id.*

236. HOW TO UNDERSTAND A Q COMP SALARY SCHEDULE AND ENSURE IT STILL EXISTS IF Q COMP (ATPPS) GOES AWAY IN 5 EASY STEPS, <https://www.educationminnesota.org/EDMN/media/edmn-files/advocacy/atpps/how-to-understand-qcomp-salary-schedule.pdf> [<https://perma.cc/HD3Z-Q5X6>] (last visited Nov. 21, 2017). *See, e.g.,* *Q-Comp Memo of Understanding Letter of Agreement—Alternative Compensation Plan 2016-17*, EDEN PRAIRIE SCHOOLS, <https://www.edenpr.org/cms/lib/MN01909581/Centricity/Domain/44/2016-2017%20Q-Comp.pdf> [<https://perma.cc/KJL9-2X7U>] (providing that "the School District and the Association agree . . . to enter into a one-year Letter of Agreement that includes a professional compensation system [Q Comp]").

237. A GUIDE FOR LEGISLATORS, *supra* note 149, at 94.



D. Cruz-Guzman and Forslund Suits Challenging Discrete System Components

Across the country, almost all state education clause litigations involve attempts to seek fairness in the apportionment of state and local funding (equity suits)<sup>238</sup> or increases in the overall funding provided to districts with high populations of economically disadvantaged students (adequacy suits).<sup>239</sup> School districts or their allies design adequacy suits to assure that school districts have sufficient funds to deliver an education that meets state standards found in state law.<sup>240</sup> In states where the legislature has not set state standards in law, courts have fashioned standards regarding the education necessary for graduates to function effectively in modern society.<sup>241</sup> Influenced by the national proficiency movement, some

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238. See *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1251, 1264 (Wyo. 1995) (determining whether Wyoming’s method for funding schools was “equitable”); *Abbott v. Burke*, 495 A.2d 376, 379–81 (N.J. 1985) (determining whether the combination of inadequate local tax base and the low contributions to schools from the state resulted in a violation of New Jersey’s education clause); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980) (“It is our view that until equality of financing is achieved, there is no practicable method of achieving equality of quality.”).

239. See *Conn. Coalition for Just. in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 244–50 (Conn. 2010) (discussing adequacy decisions of other states); *History of Abbott v. Burke*, EDUC. L. CTR., <http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html> [<https://perma.cc/4YSW-5UZG>] (last visited Dec. 1, 2017). See generally Michael A. Rebell, *Educational Adequacy, Democracy and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218* (Timothy Ready et al., eds., 2002).

240. See Daarel Burnette II, *School Finance Suits: More Than Just a Legal Roll of Dice?*, EDUC. WEEK (May 31, 2016), <https://www.edweek.org/ew/articles/2016/06/01/school-finance-suits-more-than-just-a.html> [<https://perma.cc/BUG6-AV5K>].

241. For example, the Massachusetts Supreme Court stated:

An educated child must possess “at least the seven following capabilities: (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 students 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

courts required funding adequate to assure that students achieve an education sufficient to meet state proficiency standards.<sup>242</sup>

However, in a few recent cases, advocacy groups have styled suits as adequacy suits that are not really adequacy suits.<sup>243</sup> In this new brand of suit, the plaintiff is not attempting to empower school districts (financially or otherwise) to educate all students to state required standards. Rather, the plaintiff is seeking to change one aspect of the education system by alleging that the plaintiff-students will receive some benefit from this change. In doing so, these suits suffer from two fundamental flaws. First, these suits fail to root the claims on the legislature's failure "to make such provisions . . . as will secure a thorough and efficient system of public schools throughout the state."<sup>244</sup> Second, these suits attack merely one isolated, discrete part of the larger education system rather than attempting to fix the system itself.

As to the first fundamental flaw, the Minnesota legislature comprehensively established rigorous academic proficiency

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intelligently; and (vii) sufficient level 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."

*McDuffy v. Sec'y of Exec. Off. of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

242. See *Gannon v. State*, 368 P.3d 1024, 1031 (Kan. 2017) (ruling that the state must fund education that meets the test from *Rose v. Council for Better Education*, as well as legislatively established standards); *Montoy v. State*, 102 P.3d 1160, 1164 (Kan. 2005) (concluding that "accreditation standards may not always adequately define a suitable education," but examination of the legislature's definition of suitable education leads to the conclusion that "the standard is not being met under the current financing formula"); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257, 261 (Mont. 2005) ("Because the Constitution mandates that the Legislature provide a quality education, we determine that the Legislature can best construct a 'quality' system of education if it first defines what is a 'quality' system of education."); *Skeen v. State*, 505 N.W.2d 299, 316 (Minn. 1993) ("Because the present system provides uniform funding to each student in the state in an amount sufficient to generate an adequate level of education which meets all state standards, the state has satisfied its constitutionally-imposed duty of creating a 'general and uniform system of education').

243. See, e.g., *Forslund v. State*, No. A17-0033, 2017 WL 3864082 (Minn. Ct. App. Sept. 5, 2017); *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. Ct. App. 2017); *Vergara v. State*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016) (using adequacy provision of state's constitution to attack teacher tenure, dismissal, and layoff policies).

244. MINN. CONST. art XIII, § 1.

standards and costly programmatic requirements.<sup>245</sup> There can be little doubt that Minnesota's education system is failing to educate students to those standards.<sup>246</sup> But, in neither of these suits did the plaintiffs assert that the state had failed to meet legislatively established academic proficiency and programmatic standards; they did not even mention those standards.<sup>247</sup> Moreover, in neither case did the plaintiffs ask the courts to require the state to provide adequate resources to meet the unidentified standards.<sup>248</sup> Lastly, neither *Cruz-Guzman* nor *Forslund* directly connected the claimed educational deficiencies to the *Skeen* test: "what is necessary to provide an adequate level of education which meets all state standards."<sup>249</sup>

The two panels confronting these two litigations must have been bewildered at being asked to adjudicate a dispute about students' failure to achieve high standards when they were not told what those standards are or where they come from. Both appellate panels dismissed the two cases on the grounds that the legislature, not the courts, must establish the operative standards for the public education delivery system.<sup>250</sup>

Importantly, however, both panel decisions were issued in apparent ignorance of Minnesota's rigorous educational standards. As a consequence, on appeal, the Minnesota Supreme Court will be

245. See MINN. STAT. §§ 120B.11, 120B.021 (2017).

246. In December 2017, a coalition of metropolitan school superintendents, under the umbrella of the Association of Metropolitan School Districts, issued their "Reimagine Minnesota" draft report stating that "[o]ur K-12 education system is the foundation for the upcoming workforce yet our educational data and statistics show that schools and districts need to improve all of the educational markers that serve as benchmarks of success in the current educational system." *Reimagine Minnesota*, ASSOC. OF METRO. SCHOOL DIST. (Dec. 2017), <http://www.amsd.org/wp-content/uploads/2017/12/Reimagine-MN-Roadmap-for-Action.pdf> [<https://perma.cc/ET9D-RNUX>].

247. See Complaint, *Forslund v. State*, 62-CV-16-2161, 2016 WL 8608311 (Minn. Dist. Ct. May 2, 2016); Complaint, *Cruz-Guzman v. Minnesota*, 27-CV-15-19917, 2015 WL 6774682 (Minn. Dist. Ct. Nov. 5, 2015).

248. See Complaint, *Forslund v. State*, 62-CV-16-2161, 2016 WL 8608311 (Minn. Dist. Ct. May 2, 2016); Complaint, *Cruz-Guzman v. Minnesota*, 27-CV-15-19917, 2015 WL 6774682 (Minn. Dist. Ct. Nov. 5, 2015).

249. *Skeen v. State*, 505 N.W.2d 299, 316 (Minn. 1993).

250. *Forslund v. State*, No. A17-0033, 2017 WL 3864082, at \*9 ("[R]esolution of appellant's claims . . . 'is a task for the legislature and not the judiciary' . . ."); *Cruz-Guzman v. State*, 892 N.W.2d 533, 541 (Minn. Ct. App. 2017) (dismissing respondent's claims because they presented a nonjusticiable political question).

reviewing these two cases on an inadequate legal framework. Since the appellate court panels were shielded from the existence of state educational standards, the panel decisions (if affirmed) will be of no precedential value in a case where the plaintiffs rely on the actual legislative education standards.<sup>251</sup> Accordingly, these decisions do not impair a future student's right to challenge the legislature's failure to provide funding necessary to provide an education in conformance with legislatively established state standards.

A second fundamental flaw in the *Cruz-Guzman* and *Forslund* cases arises from the plaintiffs' attempts to use the Education Clause to challenge discrete features of Minnesota's education system.<sup>252</sup> Merely changing a single component part of our system cannot possibly produce an education that meets state educational standards.<sup>253</sup> This is not to suggest that concerns about racial isolation and the tenure system are insignificant. However, neither eliminating the tenure and seniority system nor attempting to integrate racially isolated schools would end the achievement gap. Public schools are complex systems; fixing them requires providing management adequate financing and with comprehensive tools to run them effectively.

There are many educational policies that arguably have a negative impact on educational results, and educational advocacy groups of all types have varying positions on which policies are better than others—but these policies do not raise constitutional concerns.<sup>254</sup> A school's textbook selection committee might choose

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251. See *Forslund*, 2017 WL 3864082, at \*1; *Cruz-Guzman*, 892 N.W.2d at 533.

252. See *Forslund*, 2017 WL 3864082, at \*1; *Cruz-Guzman*, 892 N.W.2d. at 533.

253. See, e.g., *Forslund*, 2017 WL 3864082, at \*3 (citing appellant's argument "that the teacher-tenure statutes result in the assignment of an ineffective teacher to some students and not to others, and thus limit their children's fundamental right to an adequate education"); *Cruz-Guzman*, 892 N.W.2d at 535 (describing the parents' complaint alleging that racial segregation of the school caused its "racial achievement gap," suggesting that racially integrating the school would close the achievement gap).

254. For example, in New Jersey, Governor Christie filed a motion in the above-discussed *Abbott* litigation requesting the New Jersey Supreme Court to modify the plaintiff's relief. See *History of Abbott v. Burke*, EDUC. L. CTR., <http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html> [https://perma.cc/4YSW-5UZG] (last visited Dec. 1, 2017). Governor Christie wanted the Commissioner of Education to be able to override collective bargaining agreements to the extent the Commissioner determines that they impede the delivery of a thorough and efficient education in certain School Development Authority (SDA) districts. *Id.* The governor's motion primarily focused on certain aspects of

a textbook that is not ideal for all students, and the selection of a different textbook might allegedly result in a superior education for disadvantaged students. A claim that asserts that selection of the allegedly inferior textbook impairs achievement of state proficiency norms clearly ought not to be heard by the courts under the constitutional clause. Similarly, a suit that seeks to advance an organization's advocacy for a specific education reform (such as integration, tenure, or seniority reform) should not state a claim under Minnesota's education clause. This is because a single isolated reform, no matter how beneficial, cannot alone make the system achieve state standards.<sup>255</sup>

In *Forslund v. State*, parents of students attending urban school districts alleged that Minnesota's Continuing Contract Law<sup>256</sup> and Tenure Act<sup>257</sup> violated the Minnesota Education Clause.<sup>258</sup> The parents alleged that Minnesota schools hired and retained ineffective teachers at alarming rates.<sup>259</sup> The Minnesota complaint was modelled heavily on a parallel litigation, *Vergara v. California*, which contended that in California five percent of teachers in the school districts were grossly ineffective, yet were retained in preference to other teachers who were more effective.<sup>260</sup> In *Vergara*, a state district court held that tenure and seniority laws caused the allocation of ineffective tenured teachers disproportionately to disadvantaged students, thereby impairing their educational success.<sup>261</sup> However, the California Court of Appeals reversed, holding that management practices, not tenure laws, were the direct and proximate cause of such retention and assignment of ineffective

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collectively negotiated agreements and provisions of state law, including teacher tenure statutes. In January 2017, the court dismissed Governor Christie's motion. *Id.*

255. See *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 255 (Conn. 2010) ("In order to succeed in the specific context of this case, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education . . . ." (citing *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 667 (N.Y. 1995))).

256. MINN. STAT. § 122A.40 (2017).

257. *Id.* § 122A.41 (2017).

258. See Complaint ¶16, *Forslund v. State*, 62-CV-16-2161, 2016 WL 8608311 (Minn. Dist. Ct. May 2, 2016).

259. See *id.* ¶¶ 56–68.

260. Complaint pt. B ¶ 37, *Vergara v. California*, 209 Cal. Rptr. 3d 532 (Cal. Ct. App. 2016).

261. See *Vergara v. California*, No. BC484642, 2014 WL 2598719 at \*5 (Cal. Super. Ct. June 10, 2015).

teachers.<sup>262</sup> If grossly ineffective teachers are retained and granted tenure after three years (as is the Minnesota requirement),<sup>263</sup> one needs to look to causes other than the ineffective teachers themselves. The Minnesota Court of Appeals did not get even this far, dismissing the plaintiffs claims as nonjusticiable.<sup>264</sup> *Forslund* and *Vergara* reveal that even if a component of the education system may be flawed, one is unlikely to be successful suing to change that single component rather than the system itself.

In *Cruz-Guzman*, the plaintiffs alleged that Minneapolis and Saint Paul were failing to provide students with an “adequate” education because city schools are segregated on the basis of race and socioeconomic status.<sup>265</sup> Although school integration is supported by some advocates as a tactic arguably leading to better educational results, the plaintiffs sought to represent *all students* enrolled or to be enrolled in the two districts during the pendency of the litigation, including families who would oppose this reform.<sup>266</sup> The plaintiffs alleged education in a racially or economically isolated school is, per se, a constitutionally inadequate education, although the legislature has carefully avoided including that requirement in its legislative mandates.<sup>267</sup> They further alleged that segregation by race and socioeconomic status in the Minneapolis and Saint Paul public school system has resulted in low graduation rates for students of color, depressed proficiency scores, and placed some students at an educational disadvantage.<sup>268</sup> Plaintiffs then alleged that the

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262. *Vergara v. State*, 209 Cal. Rptr. 3d 532, 538 (Cal. Ct. App. 2016) (“Plaintiffs failed to establish that the challenged statutes violate equal protection, primarily because they did not show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students because . . . plaintiffs failed to show that the statutes themselves make any certain group of students more likely to be taught by ineffective teachers than any other group of students.”).

263. MINN. STAT. § 122A.40, subdiv. 5 (2017).

264. *Forslund*, 2017 WL 3864082, at \*9 (“[R]esolution of appellant’s claims . . . ‘is a task for the legislature and not the judiciary’ . . .”).

265. See *Cruz-Guzman*, 892 N.W.2d at 533.

266. *Id.* at 535.

267. *Id.*

268. Compl. ¶ 36, *Cruz-Guzman v. Minnesota*, 27-CV-15-19917, 2015 WL 6774682 (Minn. Dist. Ct. Nov. 5, 2015). The complaint stated:

[F]or 2014, 23.2 percent of Black (not of Hispanic origin) students in Minneapolis public schools demonstrated proficiency in reading, 22.7 percent demonstrated proficiency in mathematics, and 12.5 percent demonstrated proficiency in science. For 2014, 25.2 percent of Black

educational output of those schools is “inadequate because it is substandard by any reasonably, widely accepted measure, and because it is unequal to the education being provided in surrounding suburban school districts.”<sup>269</sup> Notice again that this allegation fails to reference the legislature’s own education standards.<sup>270</sup> The complaint vaguely asked the court to order the defendants to “remedy the violations of law set forth hereinabove[,]” and to order the defendants “to provide the [plaintiffs] forthwith with an adequate and desegregated education.”<sup>271</sup>

The district court accepted these allegations as true during the Rule 12 stage, denying the State’s motion to dismiss.<sup>272</sup> As to the underlying claim, the research is mixed on the extent to which segregation is correlated with achievement, and more importantly, whether any such correlation derives from integration or from actual school practices in the integrated schools.<sup>273</sup> Nonetheless, the court of appeals reversed, holding the claim a nonjusticiable political question because establishing qualitative education standards is a legislative function.<sup>274</sup> Like in *Vergara* and *Forslund*, while research supported plaintiffs’ claims, attacking a small component of the larger educational system proved unsuccessful.

Moreover, in *Cruz-Guzman*, the parties failed to tell the court, and the court failed to recognize, that the legislature intentionally

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(not of Hispanic origin) students in Saint Paul public schools demonstrated proficiency in reading, 24.4 percent demonstrated proficiency in mathematics, and 14 percent demonstrated proficiency in science. These results compared negatively with statewide averages for all students of 58.8 percent, 60.5 percent, and 53.4 percent respectively. These results for Black students also compared negatively with proficiency of white Minneapolis students of 77.7 percent in reading, 76.1 percent in mathematics, and 71.1 percent in science, and with proficiency of white Saint Paul students of 72 percent in reading, 67 percent in mathematics, and 64.2 percent in science.

*Id.*

269. *Id.*

270. See generally *Academic Standards*, *supra* note 76.

271. *Cruz-Guzman*, 832 N.W.2d at 535.

272. *Id.* at 534–35.

273. See, e.g., Eric A. Hanushek & Steve G. Rivkin, *Harming the Best: How Schools Affect the Black-White Achievement Gap*, 28 J. POL’Y ANALYSIS MGMT. 366 (2009); David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91 J. PUB. ECON. 11 (2007); Michael D. Cook & William N. Evans, *Families or Schools? Explaining the Convergence in White and Black Academic Performance*, 18 J. LAB. ECON. 729 (2000).

274. *Id.* at 541.

omitted from the governing statutes language forcing schools to integrate.<sup>275</sup> This may explain the court of appeals' otherwise inexplicable assertion that "respondents have not identified, and we do not ascertain, any 'judicially discoverable and manageable standards' for resolving respondents' inadequate-education claims."<sup>276</sup> The court then stated "judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."<sup>277</sup>

The court was correct that the standards and rules must govern judicial action.<sup>278</sup> But, the claim that the laws evaluated under the Education Clause are "inconsistent, illogical, and ad hoc"<sup>279</sup> is a sweeping, indefensible assertion. The court borrowed this language from *Vieth*,<sup>280</sup> a gerrymandering case in which the United States Supreme Court refused to interfere with Pennsylvania's congressional redistricting because it was inherently ad hoc.<sup>281</sup>

This gerrymandering dicta<sup>282</sup> should not be applied to the legislature's responsibility under an Education Clause because this responsibility creates a fundamental right.<sup>283</sup> Minnesota's Constitution demands that the legislature make provisions for a system of public education that is "thorough and efficient" and "general and uniform."<sup>284</sup> Asserting that the legislature can meet its responsibility in an "inconsistent, illogical, and ad hoc" way is hardly founded on any standard or rule.<sup>285</sup> How could the legislature meet its solemn responsibility to create a thorough and efficient, general and uniform system in an ad hoc, inconsistent, and illogical fashion? The application of gerrymandering law to the administration of the education system seems fairly indefensible.

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275. See MINN. STAT. § 124D.855 (2017); see also MINN. R. ch. 3535 (2017).

276. *Cruz-Guzman*, 892 N.W.2d at 540.

277. *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).

278. *Id.*

279. *Id.*

280. *Vieth*, 541 U.S. at 278.

281. The Supreme Court's approach to gerrymandering is now subject to reconsideration in *Gill v. Whitford*. 137 S. Ct. 2289 (2017).

282. *Vieth*, 541 U.S. at 278.

283. See *Skeen v. State*, 505 N.W.2d 299, 301 (Minn. 1993).

284. MINN. CONST. art. XIII, § 1.

285. *Cruz-Guzman v. State*, 892 N.W.2d 533, 540 (Minn. Ct. App. 2017).



Nonetheless, one can be sympathetic to the court's frustration. The plaintiffs asked the court to find a standard based on principled, rational, and reasoned distinctions.<sup>286</sup> Yet, the plaintiffs failed to rely on the legislative standard for delivery of education and seemingly asked the court to invent the definition of adequate education out of whole cloth. Constitutional issues under the Education Clause arise when the governor and legislature fail to provide adequate funding and adequate managerial powers for the legislatively required educational standards that schools must deliver.<sup>287</sup> Courts cannot adjudicate claims that do not rely on the legislative standard found in law.<sup>288</sup>

Under *Skeen*, a claim that segregated schools violate the constitutional guarantee of an education that meets state standards would require the plaintiffs to show either (1) that integrating schools will result in an education that meets state proficiency and other educational standards, or (2) that integrated schools are part of the state established education standards.<sup>289</sup> The *Cruz-Guzman* plaintiffs did neither. On the first issue, they failed to ground their complaint on (or even reference) the existing legislative proficiency standards.<sup>290</sup> On the second issue, they could not ground their claim on state school integration standards, because the state school integrations statute, Chapter 124D, contains no desegregation mandate.<sup>291</sup> Thus, rather than finding the claim nonjusticiable, the *Cruz-Guzman* court could have simply recognized and relied upon the legislature's decision to not demand integration.<sup>292</sup>

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286. *Id.* (quoting *Vieth*, 541 U.S. at 278 (2004)).

287. "Appellants argue that the . . . Education Clause sets forth the legislature's duty to establish a 'general and uniform system of public schools.'" *Id.* at 538. Additionally, the Minnesota Supreme Court noted that the Education Clause "does not state that the legislature must provide an education that meets a certain qualitative standard." *Id.*

288. *See id.* at 541 (finding that respondents' claims "present[ed] a nonjusticiable political question").

289. *Skeen v. State*, 505 N.W.2d 299, 312, 316 (Minn. 1993).

290. *See* Complaint, *Cruz-Guzman v. Minnesota*, 27-CV-15-19917, 2015 WL 6774682 (Minn. Dist. Ct. Nov. 5, 2015).

291. *See* MINN. STAT. § 124D.861 (2016) (listing legislative educational purposes, including goals to "pursue racial and economic integration" and "reduce academic disparities based on students' diverse racial, ethnic, and economic backgrounds in Minnesota public schools"); MINN. STAT. § 124D.896 (2014) (identifying this section as "Desegregation/Integration and Inclusive Education Rules").

292. *See* MINN. CONST. art. XIII, § 1 ("The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public

This leads us to the central thesis of this article: that the two most recent constitutional litigations, *Forsland* and *Cruz-Guzman*, failed to bring a compelling and winning constitutional case. Moreover, Minnesota has failed to provide the funding and management powers necessary to educate our students to the state standards adopted by the legislature. When will someone bring that compelling case?

#### V. CONCLUSION: MINNESOTA SCHOOL DISTRICTS AND THEIR ALLIES CAN ENFORCE THE CONSTITUTIONAL EDUCATION CLAUSE

Minnesota's education system will never close the achievement gap until the judicial branch acts decisively to require the executive and legislative branches to implement practices that enable achievement of state standards. To accomplish that objective, an appropriate plaintiff could bring a constitutional claim that respects the constitutional role of each of the three branches. Six principles would support such a case.

First, the Minnesota legislature already defined the term "academic standard" in legislation.<sup>293</sup> That definition could provide the starting point for litigation, since the legislature's statutory framework clearly passes the standards for judicial review of legislation.<sup>294</sup>

Second, Minnesota's schools are not meeting state-established educational standards. This is because the legislature has failed to create a funding and operational framework that enables schools that serve economically disadvantaged students to meet the standards it has established.<sup>295</sup> There is compelling evidence that with adequate resources and proper management, schools can

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schools throughout the state.").

293. MINN. STAT. § 120B.018, subdiv. 2 (2017).

294. See *McCleary v. State*, 269 P.3d 227, 257 (Wash. 2012) (en banc) ("[T]he legislature devised a basic education system to provide the constitutionally required 'education' . . ."); *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993) ("In this case, the available evidence suggests . . . that there is a fundamental right under the Education Clause, to a 'general and uniform system of education' . . . . In evaluating a challenge to such a fundamental right, this court must employ the strict scrutiny test.").

295. MINN. STAT. § 120B.021 (2017); *Minnesota Issues Resource Guides: Academic Standards*, MINN. LEGIS. REFERENCE LIBR., <https://www.leg.state.mn.us/lrl/guides/guides?issue=academic> [<https://perma.cc/HWB2-S8SA>] (last visited Nov. 28, 2017).

dramatically improve achievement for disadvantaged students.<sup>296</sup> Once the “demographic excuse” is abandoned, there is both a moral and constitutional imperative to act.

Third, it is not the role of the judiciary to micromanage public education by allowing interest groups to attack individual flaws in the system piecemeal.<sup>297</sup> A constitutional challenge should focus on making the whole system work. To accomplish that objective, the executive and legislative branches must function rationally to operate the system in a more effective manner.

Fourth, the courts should require the executive branch to radically reform the procedure for education budget preparation. Each budget should be fashioned from hard financial data and provide the legislature with the revenue figure necessary to accomplish the mission assigned to school districts *by the legislature itself*.<sup>298</sup> That budget should be prepared by a cadre of persons within an independent budgetary department that has the professional competence to provide accurate costing of proven delivery systems.

Fifth, finance committee hearings on the education budget should no longer focus on legislators’ favorite new initiative. Instead, committees should scrutinize the executive branch’s determination of the revenues (including allocation of those revenues) needed to accomplish legislatively established educational goals. These hearings, along with the record of an independent executive department, could provide a rational basis for legislative action.

Finally, the collective bargaining system in Minnesota must be reformed to prevent collective bargaining from invading school management’s ability to meet its constitutional responsibility.<sup>299</sup> This

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296. See generally CHENOWETH & THEOKAS, *supra* note 98 (describing what leaders of successful high-poverty and high-minority schools have done to promote and sustain student achievement); CHENOWETH, *supra* note 19 (describing how school leaders improved outcomes for low income students and students of color).

297. See *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 255 (Conn. 2010) (“[I]n order to succeed in the specific context of this case, plaintiffs will have to establish a causal link between the present funding system and any proven failure to provide a sound basic education.” (quoting *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995))).

298. See, e.g., *Abbott v. Burke*, 495 A.2d 376, 385–87 (N.J. 1985) (detailing how funding formula inadequacies violate the state right to education).

299. See FORDHAM INST., *supra* note 146, at 15–16, 26 (discussing how school leaders are constrained by collective-bargaining agreements when making decisions regarding things like staffing structures, hiring decisions, academic programs to offer, and non-academic services).

is not a call for abolition of collective bargaining, but rather a call to prevent the bargaining power from interfering with the delivery of constitutionally required education.<sup>300</sup> Management must have the unrestrained power to organize the delivery of instruction consistent with best practices.<sup>301</sup> Of course, that power should not be exercised in a top-down manner. But, our system of education cannot be required to meet its constitutional responsibility only upon the permission of employees.<sup>302</sup> School districts must be prohibited from making cuts to fund labor settlements. And, the legislature must, in conjunction with this reform, begin separately to budget adequate funding increases for teacher compensation sufficient to attract and retain excellent teachers.

A. *Implementation of Constitutional Mandate Begins with Legislative Educational Standards*

In *McCleary*, as in other adequacy cases, the court attempted to develop an approach to funding adequacy that harnesses the respective roles of the legislature, judiciary, and executive branches.<sup>303</sup> The lynchpin of the *McCleary* decision is the requirement that the legislature begins the process of implementing the constitutional mandate by determining what a twenty-first century education requires.<sup>304</sup> The legislative determination as to what education is mandated under state law is entitled to traditional judicial deference,<sup>305</sup> but that determination should not be

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300. See *id.* at 26 (concluding that there must be revisions—not a clear-cut removal—to these existing regulations and contracts to enable maximum flexibility and allow compliance with constitutionally required education responsibilities such as adherence to the No Child Left Behind Act).

301. See *id.* (discussing how school districts need to make spending decisions as easy as possible for schools at the base—the teachers—to send a message that they have the authority to make decisions and tradeoffs based on their individualized needs and requirements).

302. *Id.* (“Another reason to embrace autonomy is that buy-in . . . is likely to be stronger when local education leaders have more say in how funds are spent.”).

303. *McCleary v. State*, 269 P.3d 227, 258 (Wash. 2012) (“The other reason that the remedy question proves elusive has to do with the delicate balancing of powers and responsibilities among coordinate branches of government.”).

304. See *id.* at 247 (“[T]he Legislature is obligated to give specific substantive content to the word [‘education’] and to the program it deems necessary to provide that ‘education’ within the broad guidelines.” (quoting *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 95 (Wash. 1978))).

305. See, e.g., *Heller v. Doe*, 509 U.S. 312, 333 (1993); *Minnesota v. Clover Leaf*

completely immunized from judicial review in appropriate circumstances.

For example, imagine if the Minnesota legislature established new state education standards based on the learning objectives reflected in the century-old common school curriculum and McGuffey's Reader, or scaled back the public education system to eighth grade. Surely the judiciary would not fail to act to force the legislature to develop a more modern standard of education based upon legislative facts and evidence. In either of these instances, it seems unlikely that the court would hold that the legislature's implementation of our system of public education is completely beyond judicial review.<sup>306</sup> Those actions would defy the command that the legislature act to create a thorough and efficient, general and uniform system of public education.<sup>307</sup>

The *Cruz-Guzman* parties failed to advise the court that Minnesota now has robust legislative educational standards. But, the legislative process has certainly met constitutional requirements for the first step of establishing a thorough and efficient system—setting state educational standards.<sup>308</sup> These legislative mandates are founded on legislative facts, subject to a standard of review not yet set by the Minnesota Supreme Court.<sup>309</sup> Whatever the appropriate standard of review, it is clear that the legislature has properly adjusted the legislative mandates over the last century in response to the economic, social, and political conditions of our time.<sup>310</sup>

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Creamery Co., 449 U.S. 456, 481–82 (1981).

306. See, e.g., *Montoy v. State*, 102 P.3d 1160, 1164 (2005) (referring explicitly to legislative standards, but acknowledging that the legislature's power to set standards is not unlimited).

307. See MINN. CONST. art. XIII, § 1 (“The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”).

308. See *supra* note 2 (outlining state educational standards).

309. See *Cruz-Guzman v. State*, 892 N.W.2d 533, 538 (Minn. Ct. App. 2017) (“[T]he word ‘adequate’ does not appear in Minnesota’s Education Clause.”).

310. *Williams & Ebinger*, *supra* note 160, at 4 (“During the 2014 legislative session, lawmakers passed the nation’s most comprehensive legislation in support of English Learners (ELs). The law has three principal goals for all EL students: a) academic English proficiency, b) grade-level content knowledge, and c) multilingual skills development. Chief among the mandates is the requirement that all teachers be skilled in teaching ELs.”).

*B. Maintaining a Thorough and Efficient System Requires the Executive Branch to Credibly Determine Resources Necessary to Meet State Educational Standards*

Fundamentally, this author argues that, for constitutional reasons, Minnesota's education budget cannot be based on the traditional and incremental system.<sup>311</sup> The current process begins with budgetary decisions based on political allocation of revenues, followed by frequent calls for fiscal discipline at the local level.<sup>312</sup> However, this incremental approach only works when districts are not expected to educate economically disadvantaged students to high degrees of proficiency. Minnesota schools and districts simply cannot deliver student proficiency with any degree of efficiency through the current budgeting process.

Public schools operate like public utilities with public education as their mission, instead of electricity, natural gas, or water. Public schools serve an important public function, just like public utilities, but their revenues are provided by the state on behalf of their customers.<sup>313</sup> Though the analogy is imperfect, when a public utility asks for a revenue increase, the request begins with presentation of financial and operational data. This information provides a basis for an educated decision about how much revenue the utility needs. Similarly, in the context of public education, the governor and the Department of Education should offer information about school district needs and educational outcomes. Playing the role of public utilities commission, the legislature should then scrutinize this data. It is unlikely that the courts would deem nonjusticiable a challenge to a state statute directing Xcel Energy to deliver electricity to customers for less than it costs to produce. This illustrates the absurdity of unfunded mandates in other contexts. Indeed, if the public utilities commission produced a regulation based on interest group politics, the courts would almost certainly strike it down.

Budgetary requests by the state education system should be similarly supported by cost-based data generated by the executive branch's independent cost experts. Sadly, no governor in recent

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311. This section represents the author's opinion and is based on his experience working on school funding in Minnesota.

312. See Pugmire, *supra* note 203 (stating that local legislators are beginning to object to state funding decisions that use tax increases to fund school districts). See generally A GUIDE FOR LEGISLATORS, *supra* note 149.

313. See FINANCING EDUCATION, *supra* note 202.

history has attempted to submit to the legislature a budget sufficient to educate all students at the state-mandated levels.<sup>314</sup> Disadvantaged students are left short on funding.<sup>315</sup> No commissioner of education has compiled cost-based information and presented that data to the governor as part of the budget process. As mentioned above, it seems that Governors Pawlenty and Dayton were disinterested in the cost-based model. The disinterest is evidenced by a failure to act upon findings supporting a cost-based system and a seemingly intentional structural constraining of their commission's focus.<sup>316</sup> This is the constitutional case that Minnesota school districts and their counsel have failed to bring.

Basing budgetary recommendations on data would require a different kind of staff at the Department of Education, with a different mission, different expertise, and a different vision of their responsibility under the constitution. For example, the Minnesota Public Utilities Commission retains financial and policy analysts with expertise in economics and finance. When confronted with costing public utility services, the staff performs professionally, not politically, because their decision on how much revenues the regulated utility should receive is subject to judicial review based upon an administrative record and the arbitrary and capricious standard.<sup>317</sup> These employees understand that it is not possible for a public utility to deliver electricity below cost. Public schools likewise cannot meet the statutory mandate when operating below cost. Budgetary information supplied to the legislature should display this level of competence and professionalism. If Minnesota is not prepared to budget in this way, its claim to be concerned about the

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314. See *Magan, supra* note 172 (“Many school advocates see a state funding system that hasn’t kept pace with rising costs and has never fully met its obligations to pay for special education and other mandated services.”); MEYERS ET AL., *supra* note 14 (Minnesota underfunded schools by almost \$1 billion, but that figure is almost 12 years old).

315. MINN. DEP’T OF EDUC., *supra* note 1, at 4 (“There are wide gaps in reading and math proficiency by race and by economic status. Little progress was made in closing these achievement gaps between 2006 and 2010.”).

316. See *supra* Part IV.B.

317. See generally MINN. R. 7825.3800 (2017) (stating the financial information required for rate adjustments in gas and electric utilities). See MINN. STAT. § 216B.16 (2017) (setting out the requirement for a hearing and hearing’s procedures with respect to a utility rate change); *In re Grand Rapids Pub. Utils. Comm’n*, 731 N.W.2d 866, 870 (Minn. Ct. App. 2007) (applying an arbitrary and capricious standard of review).

achievement gap and a twenty-first century education is a smokescreen—an instrument of self-deception.

The Minnesota Department of Education is not organized to provide information on the cost of providing education because nobody wants that answer. The legislature needs revenue and cost information when it acts in budget years and when it acts in policy years so that it can deliver adequate education. In the absence of expertise in the executive branch, if the legislature wanted to know how much revenue is required to deliver state mandates, it would have to hire an outside expert such as the Augenblick firm that developed the estimated two billion dollar budgetary shortfall discussed above.<sup>318</sup> A better way to develop a cost-based budget would be to lodge that expertise in an independent executive branch similar to a public utility commission economic and financial analysis section. Currently, the budget presented to the legislature is not based upon a rational determination of the cost of meeting state standards, and the Minnesota Department of Education simply lacks the capacity and expertise to provide that information.<sup>319</sup> When, for example, the legislature commanded that districts identify and provide services to students with dyslexia,<sup>320</sup> it received no information on the cost and staffing implications of that new initiative. As a consequence, Minnesota school districts were forced by the new legislation to choose between cannibalizing funds from other underfunded programs, or evading compliance with the new mandate.<sup>321</sup>

We expect the public utility commission to determine utility revenues, costs, and rates based on data and independent analysis. Similarly, rate setting for the public utility we call “school” should be based on sound data and independent professional judgments. Research and experience shows that economically disadvantaged students need more learning time, and that substantial resources are needed before any dent in the achievement gap can be made. But,

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318. See MEYERS ET AL., *supra* note 14.

319. CTR. FOR APPLIED RESEARCH & EDUC. IMPROVEMENT, MINNESOTA NEEDS ASSESSMENT: RESEARCH, EVALUATION, ASSESSMENT, AND DATA USE IN SCHOOLS 12 (Theodore J. Christ & Kimberly Gibbons eds., 2016).

320. See MINN. STAT. § 120B.12, subdiv. 2 (2017) (requiring districts to provide annual reporting on its efforts to screen and identify students with dyslexia).

321. Carolyn Lange, *Unfunded School Mandates Questioned*, W. CENTRAL TRIB. (June 15, 2016, 11:46 PM), <http://www.wctrib.com/news/education/4055828-unfunded-school-mandates-questioned> [<http://perma.cc/K3H8-YSNC>].



Minnesota will never make that transformation until the executive branch provides sufficient budgetary information to the legislature. Furthermore, if research establishes that teachers need more resources or more time to collaborate and analyze data, it is preposterous that school districts be forced to obtain the consent of a union to implement reforms necessary to achieve these results.<sup>322</sup>

Education, as Horace Mann foresaw, is the great equalizer of the conditions of men and women—the balance-wheel of the social machinery.<sup>323</sup> Our economy is generating increasing inequality, and a society that fails to provide economic opportunity broadly, threatens to divide us into class and caste.<sup>324</sup> This growing economic divide is exactly what the authors of Minnesota’s constitution sought to guard against, by installing an educational clause that speaks in mandatory terms.<sup>325</sup> Minnesota’s education system needs to be reinvigorated with an ambitious litigation that remedies the state’s failure to provide an education that meets state standards. It is high time that the education community enforce the constitutional mandate by bringing a litigation founded on an understanding of what must be done to educate disadvantaged students.

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322. See, e.g., Magan, *supra* note 232; Annette Meeks, *State of the Unions: Let Public School Teachers Decide If They Want Representation, or Not*, STAR TRIB. (Jan. 8, 2016, 9:26 AM), <http://www.startribune.com/state-of-the-unions-let-public-school-teachers-decide-if-they-want-representation-or-not/364582951> [https://perma.cc/U8LC-WNDT]. See generally MINN. STAT. § 122A.414, subdiv. 1(a)–(b).

323. HORACE MANN, TWELFTH ANNUAL REPORT TO THE SECRETARY OF THE MASSACHUSETTS STATE BOARD OF EDUCATION ¶ 10 (1848), <https://genius.com/Horace-mann-twelfth-annual-report-to-the-secretary-of-the-massachusetts-state-board-of-education-1848-annotated> [https://perma.cc/K3B5-QJDH].

324. See generally *id.* (noting that Horace Mann thought education was the key to economic equality).

325. See MINN. CONST. art. XI, § 8; MINN. CONST. art. XIII, § 1.

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