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EDUCATIONAL ADEQUACY: A THEORY AND ITS REMEDIES

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INTRODUCTION

This Symposium concerns adequacy as a theory of school finance litigation. School finance litigation typically has been based on one of two theories: equity or adequacy. "Equity" in school finance means equal resources across a state; for example, equal spending per pupil or equal taxable resources. "Adequacy" refers to resources that are sufficient (or adequate) to achieve some educational result, such as a minimum passing grade on a state achievement test.[1] The two theories are not always clearly distinguishable in practice. Adequacy theory may be used as the legal basis for reaching equity when courts have rejected traditional equity theories, such as equal protection. Conversely, equity litigation may produce adequacy as a by-product. State legislatures that are required to equalize school funding often allocate large amounts of minimum-level funding in order to achieve equality without excessive budget cutting.

In at least three circumstances, adequacy may dictate results or remedies that are different from those required by equity: (1) where practically all schools in a state are inadequate and the remedy must guarantee new resources for education; (2) where certain groups of students, schools, or districts need extra resources to meet minimum achievement standards, and the remedy must include some kind of compensatory aid, such as for children in poverty; and (3) where reaching minimum achievement levels requires schools to become more effective and efficient, forcing the remedy to include elements of educational reform and accountability.

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1. *See generally* William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994) (describing adequacy and equity theories in school finance).

The Articles in this volume explore a broad range of issues raised by adequacy litigation. This Introduction will summarize the Articles, discuss the theory of adequacy, and explore highlights of the Articles' examination of key aspects of judicial remedies.

In *School Finance Adequacy as Vertical Equity*,[2] Dean Julie K. Underwood examines the evolution of school finance theory, arguing that traditional notions of fiscal equity are outdated and are being replaced with theories based on student needs, such as adequacy or vertical equity. Recent cases have focused on what is actually provided to a student in light of that student's needs, not just on a mathematical calculation of dollars per scholar. These cases reason in terms of fulfilling the state's constitutional obligation to provide an adequate education. The trend is to find that state constitutional provisions require, at a minimum, an education that provides each student with the opportunity to develop and become a productive worker and citizen. This goal is made more difficult, however, because the children most in need of high-cost programs are typically clustered in districts of average or below average wealth. Success for such students also requires integrated management of multiple programs, such as compensatory, bilingual, or special education.

In *Achieving Equity and Excellence in Kentucky Education*,[3] C. Scott Trimble and Andrew C. Forsaith discuss the landmark Kentucky school finance case, *Rose v. Council for Better Education*,[4] and the school reform efforts it spawned. In *Council for Better Education*, the Kentucky Supreme Court held that the state had failed in its duty under the state constitution to provide all students with an adequate education, which it defined in terms of seven categories of knowledge and skills that students should acquire. The State General Assembly responded with the Kentucky Education Reform Act[5] (KERA), a comprehensive approach to school reform involving increased funds, dollar equity, specific services such as preschool and

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2. Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REF. 493 (1995).

3. C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REF. 599 (1995).

4. 790 S.W.2d 186 (Ky. 1989).

5. Kentucky Education Reform Act of 1990, ch. 476, 1990 Ky. Acts 1208 (codified as amended in scattered sections of KY. REV. STAT. ANN., chs. 156–65 and other scattered chapters).

social services for the poor, state testing, and an ambitious accountability system based on high minimum outcomes for all students. Trimble and Forsaith demonstrate the extent to which *Council for Better Education* and KERA mark a major departure from previously modest reform efforts in Kentucky, and they attempt to identify what brought about this major development. In addition, they discuss the substantial challenges involved in implementing the *Council for Better Education* mandate by examining the new statewide assessment system, a central component of KERA. The Kentucky experience is important because, of all the states, Kentucky has the most experience with the methods and problems of state implementation of adequate student performance standards.

In *Establishing Education Program Inadequacy: The Alabama Example*,[6] Martha I. Morgan, Adam S. Cohen, and Helen Hershkoff examine the standards and proof that were used in *Harper v. Hunt*[7] to demonstrate the inadequacy of the public school system in Alabama. Their Article raises three particularly interesting points. First, a variety of standards for both inputs and outputs now exist in state constitutions, state statutes and regulations, regional accreditation requirements, professional standards, and federal laws. Such standards solve potentially serious problems of judicial manageability, competence, and political legitimacy. Second, different kinds of standards have offsetting advantages and disadvantages. For example, state standards have a certain measure of political legitimacy, while regional and nationally recognized standards are insulated from local political retrenchment and local underenforcement of constitutional norms. Third, the remedial phase of *Harper*, now pending, grapples with the question of how to make new, court-ordered resources effective in raising the achievement of Alabama students.

In *Oklahoma School Finance Litigation: Shifting from Equity to Adequacy*,[8] Mark S. Grossman discusses the political and legal consequences of a lawsuit brought by an association of

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6. Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REF. 559 (1995)

7. The case was later consolidated with another. *See* Alabama Coalition for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. Montgomery County filed Apr. 1, 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107 app. (Ala. 1993) [hereinafter *Harper v. Hunt*].

8. Mark S. Grossman, *Oklahoma School Finance Litigation: Shifting from Equity to Adequacy*, 28 U. MICH. J.L. REF. 521 (1995).

local school boards to challenge the constitutionality of Oklahoma's school finance system. Grossman was one of the attorneys who represented the association in the case. The school boards initiated the litigation when they became fearful that the State Legislature was about to impose a package of costly educational reforms without providing additional funds. The school boards argued that the state had to support the substantive reforms with the money required to implement them in order to provide the state's children with adequate education. While the case never reached trial, Grossman concludes that the litigation achieved its basic goal in that the state fully funded its school reform legislation. Thus, the Article is a case study of a theme present throughout the Symposium—the interdependence of litigation, politics, and ongoing educational reform.

In *Accelerated Education as a Remedy for High-Poverty Schools*,[9] I argue that high-poverty schools should receive priority treatment in any adequacy remedy and suggest a remedy designed to bring students in such schools up to minimum state standards. The Article begins with an inventory of the unique problems of high-poverty schools. These problems include not only the large numbers of students who fall substantially below state minimum standards of achievement, but also a series of challenges to the delivery of high-quality education, such as high rates of teacher and student mobility. The remedy proposed to meet these problems includes: compensatory aid based on the cost of demonstrably effective programs, a statewide system of aid as the foundation for the compensatory aid, and a series of educational reforms aimed at increasing the likelihood that newly available funds will be used in such a way as to create genuinely adequate and effective education. Finally, the Article examines governance structures appropriate to these reforms.

II. JUDICIAL REMEDIES IN SCHOOL FINANCE LITIGATION

The design of judicial remedies is a theme shared by all of the Articles. To what extent are various kinds of relief adequate to

9. William H. Clune, *Accelerated Education as a Remedy for High-Poverty Schools*, 28 UNIV. MICH. J.L. REF. 655 (1995).

meet the needs of schoolchildren? The rest of this introduction highlights issues about remedies raised by the Articles in six areas: the theory of adequacy as it relates to remedies, resources, accountability, governance, politics, and educational change.

At its heart, adequacy refers to a shift in the emphasis of school finance from inputs to outcomes, e.g. from dollars to student achievement as measured by standardized tests and avoidance of dropping out.[10] Courts deciding school finance litigation cases are beginning to mirror the rest of society by seeing the present time as the age of information and efficiency.[11] As detailed in Dean Underwood's description of the waves of school finance litigation, earlier cases viewed the "opportunity" in "equality of educational opportunity" as referring to equal access to educational resources for all students—or for their school districts.[12] The central problem confronting courts and school finance plaintiffs was large variations in property tax bases and spending per pupil among districts within a state. Questions of how effectively and efficiently resources were used were left for local communities and educational experts to resolve. Courts deemed consideration of educational outcomes as "unmanageable," a virtual kiss of death for any case that required it.[13] In contrast, dollar equality of tax base or spending offered a measurable standard.

The United States Supreme Court expressed early concern about outcomes in *San Antonio Independent School District v. Rodriguez*.[14] Under the Equal Protection Clause of the United States Constitution, a guarantee of any level of resources would

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10. Adequacy sometimes may be measured in terms of inputs (i.e., instructional resources and programs) needed to produce better outcomes. *See* Morgan et al., *supra* note 6, at 564–81, 587–92.

11. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209–13 (Ky. 1989) (defining the characteristics of an efficient school system); Abbott v. Burke, 575 A.2d 359, 397–99, 411–12 (N.J. 1990) (noting that providing an education that is "[t]horough and efficient means more than teaching the skills needed to compete in the labor market"); *see also* Peter F. Drucker, *The Age of Social Transformation*, ATLANTIC MONTHLY, Nov. 1994, at 53–80 (discussing knowledge and its ongoing social significance as a key factor that will shape the emerging social and economic orders).

12. *See* Underwood, *supra* note 2, at 496, 498–99.

13. *See, e.g.*, JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION 304–09, 311–15 (1970) (discussing a trial court's reaction to a needs-based standard for school finance). The trial court declared that " 'there are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated.' " *Id.* at 308 (quoting McInnis v. Shapiro, 293 F. Supp. 327, 335 (N.D. Ill. 1968) (footnote omitted)).

14. 411 U.S. 1, 41 (1973).

be possible only if tied to a fundamental right.[15] This right would have to be a right to some minimum level of adequate education or, in other words, a right to minimum outcomes. Dean Underwood describes how school finance litigation then shifted to the states, because the "common school ideal" was reflected through both state equal protection requirements and so-called "education clauses" in state constitutions.[16] Some cases continued to find a guarantee of equal resources under state constitutions.[17] Many more recent cases, however, remarkably have invoked all types of clauses and constitutional language to speak—and speak at length—of a student's right to function fully in society.[18]

An emphasis on outcomes makes sense in terms of the purposes of education, and often makes for inspiring discussion. As a practical matter, however, such emphasis can lead in different directions. These differences can be analyzed in several important dimensions: resources, accountability as measured by the efficient and effective use of such resources,[19] governance, politics, and educational change. The first two dimensions are the two great issues of school finance. Their close connection with educational practice comes from the link between school finance and educational policy.

As for resources, adequacy arguments are chosen by school finance plaintiffs in three main circumstances: (1) when a claim by poor districts for equal resources is legally unavailable;[20] (2) when even a high level of equality within a poor state is not enough to provide adequate student achievement;[21] and (3) when districts with special needs—typically high-poverty districts with extraordinary numbers of low-achieving students—need more

15. *Id.* at 35.

16. *See* Underwood, *supra* note 2, at 500–02, 506–09, 511–13.

17. *Cf.* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 396 (Tex. 1989) (concluding that the manifest inequalities among Texas school districts were "directly contrary to the constitutional vision of efficiency"), *mandamus proceeding*, 804 S.W.2d 491 (Tex. 1991).

18. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (citing five Supreme Court cases to support the conclusion that "education has a fundamental role in maintaining the fabric of our society"); Abbott v. Burke, 575 A.2d 359, 368 (N.J. 1990) (noting that "today . . . schools [are] very much a part of 'the rights of all' ") (citation omitted); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150–51 (Tenn. 1993).

19. *See, e.g.*, Underwood, *supra* note 2, at 496 (describing accountability standards in terms of "efficiency" and "effectiveness," both of which terms have specific definitions in the school finance context).

20. *See* Grossman, *supra* note 8, at 522.

21. *See* Morgan et al., *supra* note 6, at 560.

than equal resources to meet minimum achievement standards.[22] In all three of these circumstances, the extra resources requested may take the form of dollars per student, a state-guaranteed tax base, or specific inputs, such as adequate physical facilities, a core academic curriculum, scientific laboratories, or computers.

Regarding accountability, courts that have recognized adequacy claims by definition have not accepted the "cost-quality" argument that extra resources are incapable of creating adequate levels of student achievement.[23] Such courts usually have been willing to play an active role in implementing policies that encourage such achievement.[24]

The most common and critical facet of these policies is a method of measuring student achievement against minimum state standards.[25] In Kentucky, despite the availability of existing standardized tests, the legislature was asked to create a new test to meet a new vision of education.[26] In other words, "adequate" might refer to minimum achievement either on an old-style test of educational basics or on a cutting-edge test aimed at world-class standards. The ramifications of a decision that effectively overhauls a state's curriculum are discussed in depth by Trimble and Forsaith in this Symposium.[27]

Accountability policies also typically include some kind of state monitoring and sanctions in the form of rewards and

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22. One example of this third circumstance is the high per-student spending ordered for the "special needs" districts in *Abbott*, 575 A.2d at 408–10. An analogous example is desegregation litigation based on the failure of students in segregated schools to meet minimum achievement standards. One such case, Sheff v. O'Neill, 609 A.2d 1072 (Conn. Super. Ct. 1992), involved a claim for relief from "the harms that flow from the . . . condition of racial and economic segregation that . . . deprives [certain] school children [sic] of their right to equality of educational opportunity. . . ." *Id.* at 1074. In other words, plaintiffs in *Sheff* had "alleged that they ha[d] been deprived of a 'minimally adequate education' and [were] therefore entitled to a judicial determination of whether the constitution require[d] a particular substantive level of education in the school districts in which they reside[d]." *Id.* at 1076.

23. The issue of whether, and to what extent, resources affect student performance has been debated. *Compare* Eric A. Hanushek, *Money Might Matter Somewhere: A Response to Hedges, Laine, and Greenwald*, EDUC. RESEARCHER, May 1994, at 5 (finding that "the vast majority of studies on the relationship between specific resources and student performance give no real confidence that there is any relationship") *with* Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, EDUC. RESEARCHER, Apr. 1994, at 5 (finding that "expenditures are positively related to school outcomes").

24. *See* Morgan et al., *supra* note 6, at 595–98; Trimble & Forsaith, *supra* note 3, at 605–09.

25. In addition to this method, the Alabama plaintiffs in *Harper v. Hunt*, *supra* note 7, also made extensive use of input standards. *See* Morgan et al., *supra* note 6, at 564–81, 587–92.

26. *See* Trimble & Forsaith, *supra* note 3, at 606–07, 610–11.

27. *Id.* at 613–53.

punishments for districts and schools that make acceptable or unacceptable progress. In other words, the state test is likely to be high stakes in some sense—potentially leading to important consequences for either the student's graduation, the school's independence, or the school's eligibility for cash rewards.[28]

The combination of state testing, with its implied guidance of curriculum in every school, and high-stakes monitoring means that adequacy litigation assumes a strong central role for government.[29] This strong accountability contrasts with the old equality-based litigation, which was indifferent to the ways in which extra resources were spent and thus tolerated unmonitored local control.

Besides the accountability measures of testing and sanctions, adequacy remedies usually entail some changes in educational governance, the most common and important of which is decentralization of power to the school level.[30] Decentralization is a logical aspect of accountability because there must be a specific locus of responsibility at the operating level, and the responsible decision maker must have discretion to meet system goals.

In addition, adequacy remedies explicitly or implicitly assume a protracted period of educational change. While equal resources, especially money, can be made available in a short period of time, improved student achievement assumes a learn-

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28. *See id.* at 649–50.

29. This central role often is combined with strong decentralizing elements, such as choice and site management. *See id.* at 611–12, 649–50; *infra* note 30.

30. *See generally* CHOICE AND CONTROL IN AMERICAN EDUCATION (William H. Clune & John F. Witte eds., 1990) (collecting articles about the organizational structures of various school districts); WILLIAM H. CLUNE & PAULA A. WHITE, CENTER FOR POL'Y RESEARCH IN EDUC., SCHOOL-BASED MANAGEMENT: INSTITUTIONAL VARIATION, IMPLEMENTATION, AND ISSUES FOR FURTHER RESEARCH (1988) (reporting on a study of more than thirty school-based management programs that involved increased authority at the school site); PRISCILLA WOHLSTETTER & SUSAN A. MOHRMAN, CONSORTIUM FOR POL'Y RESEARCH IN EDUC., SCHOOL-BASED MANAGEMENT: PROMISE AND PROCESS (1994) (discussing the value and nature of school-based management); Allan Odden & Eleanor Odden, *School-Based Management—The View from "Down Under," in* BRIEF TO POLICYMAKERS 1–5 (Center on Org. and Restructuring of Sch. ed., Summer 1994) (presenting impressions of school decentralization in Victoria, Australia); Peter J. Robertson et al., *Generating Curriculum and Instructional Innovations Through School-Based Management*, 31 EDUC. ADMIN. Q. 375 (1995) (discussing the ways in which governance at the school level creates curriculum change); Priscilla Wohlstetter, *Education by Charter, in* SCHOOL-BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE 139–64 (Susan A. Mohrman & Priscilla Wohlstetter eds., 1994) (examining self-governance in charter schools); Anita A. Summers & Amy W. Johnson, A Review of the Evidence on the Effects of School-Based Management Plans (Aug. 5, 1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*) (reviewing evidence on the effect of "increased school autonomy on the performance of schools").

ing process for teachers and students. For example, in a full cycle, students will need to begin and sustain higher levels of achievement from the early grades. Teachers must learn such skills as teaching new subjects and providing accelerated education for disadvantaged students.

When courts, legislatures, educational agencies, and schools enter into a process of educational change, it raises a multitude of new issues. The Alabama litigation currently is making the transition from the liability phase to the remedy phase.[31] As is typical in public law or institutional litigation, the remedy stage involves multiple policy choices and complex interactions between branches and agencies of the government.[32] Broadly speaking, the issues are how to guarantee an effective combination of inputs and accountability for results, teacher training, school improvement, and accelerated education.

The final aspects of adequacy remedies explored in the Articles are the politics of school finance and the process of educational change. Adequacy litigation initiates changes of breathtaking scope and great importance affecting practically every taxpayer, family, educator, and child in an entire state. It is not surprising, therefore, that an active and reactive political environment initiates and shapes the litigation and its remedies.

Political conflict over taxes and spending always has been in the background of school finance litigation. Tax limits enacted in California after the early *Serrano v. Priest*[33] decision have profoundly shaped the course of educational policy and finance in that state.[34] Many courts have faced standoffs with state legislatures over increased revenues for education.[35] Political careers associated with expensive school finance reform have prospered or, more often, suffered as a result. Within such

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31. Morgan et al., *supra* note 6, at 594–98.

32. *Cf.* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (finding that, in public law litigation, "the trial judge has increasingly become the creator and manager of complex forms of ongoing relief"); Symposium, *Judicially Managed Institutional Reform*, 32 ALA. L. REV. 267 (1981) (examining the role of the courts in designing complex remedies for institutional problems).

33. 487 P.2d 1241 (Cal. 1971).

34. *See* Lawrence O. Picus, Cadillacs or Chevrolets: Effects of State Control on School Finance in California 4–7 (Sept. 1991) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

35. *See Serrano*, 487 P.2d at 1266; Robinson v. Cahill, 303 A.2d 273, 298 (N.J.), *affirmed as modified*, 306 A.2d 65 (N.J.), *cert. denied*, 414 U.S. 976 (1973), *enforced*, 351 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 913 (1975); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 399 (Tex. 1989), *mandamus proceeding*, 804 S.W.2d 491 (Tex. 1991).

reactive environments, legal complaints and judicial decrees often become chips in a process of bargaining and political conflict. In his Article on school finance litigation in Oklahoma, Grossman tells the story of how adequacy plaintiffs eventually withdrew their complaint when faced with dwindling political support and the risk of losing the benefits of a substantial fiscal reform enacted after the filing of the complaint, thus bargaining away the uncertain promise of full adequacy for substantial equity typical of the earlier litigation.[36]

The accountability aspect of adequacy litigation also raises numerous issues for politics and public policy.[37] The first issue is how to select and weigh the sanctioned goals of education. This issue is especially important because, as a social institution, education is notorious for having multiple and conflicting goals. The second issue concerns public and professional anxiety about the shift from basic skills to complex reasoning. This area gives rise to disputes over the values embodied in critical thinking, such as how to analyze United States history. The third issues is accountability, which forces educators to ask how much progress toward adequate achievement levels can be expected for each unit of time. In Kentucky, a twenty-year period of educational revitalization began with less than ten percent of its students meeting the newly defined "proficient" levels on the test. Finally, a system of accountability raises the question of who should take responsibility for contingencies that negatively impact adequate achievement. These uncertainties include factors such as poverty, single-parent families, student mobility, and educational handicaps.[38]

III. ADEQUACY THEORY, REMEDIES, AND HIGH-POVERTY SCHOOLS

In the concluding Article of this Symposium,[39] I argue that a remedy specifically designed for the special needs of high-poverty schools is an unfulfilled promise of adequacy litigation. High-poverty schools are usually the only schools in any state

36. Grossman, *supra* note 8, at 522, 548–51.

37. For a discussion of novel issues raised by a newly implemented system of accountablity, see Trimble & Forsaith, *supra* note 3, at 613–52.

38. *See id.* at 646–48.

39. Clune, *supra* note 9, at 655.

with large percentages and numbers of children scoring far below state standards of minimum achievement.[40] Other indicators of academic success, such as dropout and graduation rates, are equally substandard. Courts have taken a few steps in responding to this problem: the New Jersey Supreme Court focused its relief on districts containing high-poverty schools[41] and Kentucky provided extra services for students with special needs.[42] No court, however, has developed a package of extra resources and appropriate accountability measures specifically designed to produce accelerated education on a large scale for the students who would benefit most from actually implementing the goals of adequacy. Perhaps the historical focus of school finance litigation on interdistrict inequities has obscured the special plight of the schools within districts that should be central to the new theory. A remedy for high-poverty schools would complete the transition from equity to adequacy in school finance.[43]

40. Although I am not aware of any comprehensive study, the data for New York and Connecticut are very persuasive. *See* Robert Berne, *Educational Input and Outcome Inequities in New York State*, *in* OUTCOME EQUITY IN EDUCATION 2–3, 12–13 (Robert Berne & Lawrence O. Picus eds., 1994); Gary Natriello, Four Perspectives on the Disparities Between the Educational Resources Available to Students in the Hartford Public Schools and Other Connecticut Communities (Apr. 1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

41. Abbott v. Burke, 575 A.2d 359, 408–10 (N.J. 1990).

42. *See* Trimble & Forsaith, *supra* note 3, at 611.

43. *See* Clune, *supra* note 1, at 391 (concluding that "true adequacy" is possible if increased resources are allocated to high-poverty schools).