HEALTHY SCHOOLS: A MAJOR FRONT IN THE FIGHT FOR ENVIRONMENTAL JUSTICE

BY

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Systemic housing discrimination has resulted in the creation of predominately African American communities located in the most environmentally toxic locations. Many African American communities are in areas zoned for mixed residential/industrial/commercial use, while predominately white communities tend to be zoned strictly for residential use. The result is that African Americans live in neighborhoods surrounded by pollution-creating industries. In the middle of these neighborhoods are schools.

Kindergarten through twelfth grade aged children spend approximately 80% of their time in school. Unfortunately, if their schools are near roads, facilities, or other polluting activities, these students will be exposed to a whole range of contaminants. Vermin, mold, pesticides, lead, and asbestos within school facilities are additional dangers to which many low-income and minority students are exposed. Furthermore, numerous schools are located on contaminated land.

The model of funding schools through local property taxes perpetuates disparities not only in the quality of teachers and learning materials, but also in the maintenance of school grounds and decisions as to where schools are sited. This Article analyzes how school equity laws may be used to effectuate the goals of the environmental justice movement to achieve environmentally healthy schools. The Article also discusses the need for federal mandates to ensure new schools are not constructed on or near hazardous sites as well as the need for aggressive enforcement of environmental laws as they apply to polluting facilities located near schools. In the movement to secure environmental justice for minority and low-income communities, the benefits resulting from increased protection of schools that serve minority and low-income students will also benefit the surrounding communities.

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I. INTRODUCTION

Public schools are under constant attack for "failing" America's children. Whether it is criticism of teachers, parents, or administrators, there seems to be a general malaise when it comes to the future of public schools. This can be attributed, in part, to the physical conditions of our schools. Many schools are in desperate need of repair, with lead paint, asbestos, pesticides, and poor ventilation systems prevalent in the nation's schools. Additionally, in an effort to build "better" schools in urban areas, new schools are often sited near polluting industrial facilities. Both scenarios negatively impact the health of children.

Environmental justice, at its very heart, is about the right of all people to live in environmentally healthy communities. Children spend the majority of their formative years in schools. If the schools are in poor condition or located near toxic facilities or on contaminated sites, the health and well being of their students are in jeopardy. A growing number of families are opting to send their children to private school for quality facilities as well as academics. Those that cannot afford the alternative are left to send their children to public schools that can and will make them sick. Because attending school is legally mandated, federal and state governments have a duty to ensure the environmental conditions in and surrounding schools do not negatively impact the health of students.

The environmental justice movement addresses a broad range of issues including transportation equity, fair housing, zoning regulations, and community planning. In the middle of each area of concern lies a school. Schools are located where people live, near roads, and near businesses, both industrial and commercial. The goal of environmental justice is to ensure equal protection of all people from environmental hazards and eliminate the

disproportionate burden low-income and minority communities presently bear. We must look at the environmental health of our schools and develop aggressive and creative ways to ensure our children are sent to learn in facilities that do not threaten their lives. Furthermore, in recognition of continued systemic housing segregation, guaranteeing clean schools will have a ripple effect on the surrounding community.

The issue of dilapidated schools has become increasingly persuasive in school equity and school adequacy litigation. In this Article, equity and adequacy litigation will be analyzed for their effectiveness as tools for environmental justice. Although schools throughout the country suffer from unsatisfactory environmental conditions, according to a 1996 General Accounting Office report the largest number of such schools are in cities "serving 50 percent or more minority or 70 percent or more poor students."[1] Furthermore:

> [O]ver 38 percent of schools in central cities reported at least one inadequate building, 9 percentage points higher than schools located in the urban fringe of large cities. Furthermore, 67 percent of central city schools (with almost 10 million students) reported at least one building feature needing repair or replacement compared with the overall average of 59 percent.[2]

II. HOUSING DISCRIMINATION SET THE FOUNDATION FOR TOXIC SCHOOLS

The United States' history of systemic *de jure* and *de facto* housing segregation, racist land use decisions, and discriminatory mortgage lending practices is long and ever-present today. Limited housing opportunities for African Americans resulted in the creation of predominately African American communities located in the most environmentally toxic locations. Many African American communities are located in areas zoned for mixed residential/industrial/commercial use, while predominately white communities tend to be zoned strictly for residential use.[3] The result is African Americans live in neighborhoods surrounded by pollution creating industries.

For example, in 1936, Newtown, a community in Gainesville, Georgia, suffered a devastating tornado that destroyed over 600 homes.[4] Approximately 300 "Negro families" were left homeless.[5] Through federal Reconstruction Finance Corporation loans, seventy-five housing units were constructed near the railroad tracks and made available to "colored

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1 U.S. GEN. ACCOUNTING OFFICE, SCHOOL FACILITIES: AMERICA'S SCHOOLS REPORT DIFFERING CONDITIONS 12 (1996), *available at* http://www.epa.gov/iaq/schools/pdfs/publications/gao_he96103.pdf.

2 *Id.* at 9.

3 *See generally* PHILIP RUTLEGE ET AL., U.S. ENVTL. PROT. AGENCY, NAT'L ACAD. OF PUB. ADMIN., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE AND ZONING (2003), *available at* http://www.epa.gov/enforcement/resources/publications/ej/annual-project-reports/napa-land-use-zoning-63003.pdf.

4 ELLEN GRIFFITH SPEARS, THE NEWTOWN STORY: ONE COMMUNITY'S FIGHT FOR ENVIRONMENTAL JUSTICE 8 (1998).

5 *Id.* at 10.

purchasers."[6] The twenty-eight by twenty-two foot houses were considerably smaller than the houses built in "white new town."[7] The new construction effectively established a separate and inferior community for African Americans. Over the years, the area surrounding the black community was zoned for commercial and industrial use. Today, the small community is nearly locked in by polluting industries, including a Cargill plant and a Ralston Purina Plant. Residents often leave their homes to discover their cars and community park covered with yellow grain dust from the plants.[8] The health impacts have been devastating. Long time residents observe an increase in asthma in children and an overall increase in cancer among the older residents.[9] The story of Newtown is not unique. Systemic housing discrimination and segregation has pushed blacks into the least desirable areas throughout the United States.

In December 2006, an Associated Press analysis of Census data, Environmental Protection Agency (EPA) risk scores, and a U.S. research study found "[m]inorities are 79 percent more likely than whites to live in neighborhoods where industrial pollution is suspected of posing the greatest health danger."[10] The analysis showed that in nineteen states, "blacks were more than twice as likely as whites to live in neighborhoods where air pollution seems to pose the greatest health danger."[11] The average income in the highest risk neighborhoods was $18,806—more than $3000 less than the nationwide average income.[12]

Of the forty-four states with hazardous waste facilities, forty of them "have disproportionately high percentages of people of color in circular host neighborhoods within 3 kilometers of the facilities."[13] Professor Bullard and his colleagues report that "[s]tates with the 10 largest differences in people of color percentages between host neighborhoods and non-host areas include (in descending order by the size of the differences): Michigan (66% vs. 19%), Nevada (79% vs. 33%), Kentucky (51% vs. 10%), Illinois (68% vs. 31%), Alabama (66% vs. 31%), Tennessee (44% vs. 20%), Washington (53% vs. 20%), Kansas (47% vs. 16%), Arkansas (52% vs. 21%), and California (81% vs. 51%)."[14]

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6 *Id.* at 11.

7 *Id.* at 11–12.

8 The author visited the Newtown community, interviewed residents, and observed these conditions.

9 *Id.*

10 David Pace, Minorities Suffer Most From Industrial Pollution: AP Analysis of EPA Database Shows Poor, Uneducated Breathe Worst Air, MSNBC.COM, Dec. 14, 2005, *available at* http://www.msnbc.msn.com/id/10452037/ (last visited Apr. 13, 2008).

11 *Id.*

12 *Id.*

13 ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987–2007, at xi (Mar. 2007), *available at* http://www.ucc.org/justice/pdfs/toxic20.pdf.

14 *Id.*

A. Toxic Neighborhoods Lead to Toxic Schools

Given the undisputable fact that minority communities are likely to be subjected to industrial pollution, schools located in these communities and their students are also subjected to such hazards. Approximately 80% of kindergarten through twelfth grade childrens' time is spent in school.[15] Although such a high percentage of their time is spent at school, "there is still no entity responsible for protecting children's health in the school environment."[16] Nevertheless, school districts persist in sending children to schools constructed on contaminated land and near environmentally hazardous facilities.

In Houston, Texas, Cesar Chavez High School is a large state-of-the-art facility serving approximately 3000 children.[17] Yet, three petrochemical plants are located within a quarter mile of the school.[18] In northeast Washington, D.C., River Terrace Elementary School is located just blocks from a major electrical power plant. In Los Angeles, California, Belmont Learning Complex, a state-of-the-art school intended to serve mostly Latino students, was constructed atop of a site that housed numerous hazardous chemicals.[19] In 1998, Barnet School, located in Vermont, closed due to an odor problem that was traced to severe rodent infestation.[20] Approximately 800 rodents were discovered in the school walls.[21] In July 2007, the *Washington Post* reported in its series on D.C. public schools that sixty-four year old Davis Elementary School suffered from peeling paint and improper ventilation.[22] In 2001, more than 600,000 students, largely African Americans and other children of color, in Massachusetts, New York, New Jersey, Michigan, and California were attending nearly 1200 public schools located within a half mile of federal Superfund or state-identified contaminated sites.[23]

Many school systems continue to turn a blind eye to protecting children's health in the school environment. After Hurricane Katrina hit the U.S. Gulf Coast, more than 30% of New Orleans schoolyards tested two years

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15 *Id.* at 99.

16 *Id.*

17 Dave Mann, *Separate But Toxic: The Houston Environmental Magnet School That's An Environmental Catastrophe*, TEX. OBSERVER, Mar. 23, 2007, *available at* http://www.texasobserver.org/article.php?aid=2451.

18 *Id.*

19 CHILD PROOFING OUR COMMUNITIES: POISONED SCHOOLS CAMPAIGN, POISONED SCHOOLS: INVISIBLE THREATS, VISIBLE ACTIONS 22–23 (Mar. 2001), *available at* http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED456628.

20 VT. PUB. INTEREST RES. GROUP, HEALTHY SCHOOLS AND HEALTHY KIDS: A PARENTS' GUIDE FOR IMPROVING SCHOOL ENVIRONMENTAL HEALTH 9 (2001), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/bd/e9.pdf.

21 *Id.*

22 Nikita Stewart, *Clouds Gather over D.C. Schools*, WASH. POST, July 31, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/30/AR2007073001710.html.

23 *See, e.g.*, CHILD PROOFING OUR COMMUNITIES CAMPAIGN, CREATING SAFE LEARNING ZONES: INVISIBLE THREATS, VISIBLE ACTIONS 6 (Jan. 2002), *available at* http://www.childproofing.org/reports.htm.

after the hurricane were found to be contaminated with arsenic in amounts two to three times the levels requiring cleanup under federal and state law.[24] Arsenic is a toxic "substance that can cause cancer, neurological damage, and other chronic health problems, and is particularly harmful to children."[25] Despite schools being in session, neither the Louisiana Department of Environmental Quality nor the U.S. EPA had taken measures to protect students.[26] In fact, "both agencies claim that the high arsenic levels existed before the hurricane, and therefore do not trigger any legal authority for them to clean up schoolyards and other contaminated areas."[27]

These findings are particularly disturbing because the affected areas are spaces children learn and play. Ad hoc protection threatens the health and safety of schoolchildren. Federal mandates are needed to combat this lack of concern and protection for a significant number of the nation's children.

III. HEALTH IMPACTS ON CHILDREN MUST BE A FACTOR IN SITING AND MAINTENANCE POLICIES

Vermin, mold, pesticides, lead, and asbestos are just some of the dangers to which students have been exposed while attending school. Furthermore, numerous schools are located on contaminated land,[28] near polluting facilities, landfills, brownfields and busy roadways.[29] Exposure to these elements is not without consequences. Health impacts of exposure can lead to asthma, leukemia, or developmental deficiencies.[30] Airborne toxins from hazardous waste sites can "cause gene mutations, or changes in gene structure which can leave one's offspring susceptible to cancer and other medical conditions."[31] Additionally, "[a]sthma severity remains higher among African American and Hispanic children, resulting in significantly reduced quality of life and potentially early death."[32] While policies addressing environmental exposures has sometimes treated children as little adults, there is now increasing evidence that children may have special vulnerabilities to environmental toxics and air quality:

> Children . . . breathe more rapidly than adults and can inhale more of an air pollutant per pound of body weight than adults. Children's skin and body tissue

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[24] LESLIE FIELDS ET AL., NAT. RESOURCES DEF. COUNCIL, ARSENIC-LACED SCHOOLS AND PLAYGROUNDS PUT NEW ORLEANS CHILDREN AT RISK 8–11 (2007), *available at* http://www.nrdc.org/health/effects/wake/contents.asp.

[25] *Id.* at 8.

[26] *Id.* at 10.

[27] *Id.*

[28] CHILDPROOFING OUR COMMUNITIES CAMPAIGN, *supra* note 23, at 22–26.

[29] Rochelle S. Green et al., *Proximity of California Public Schools to Busy Roads*, ENVTL. HEALTH PERSP., Jan. 2004, at 61, 61.

[30] ANTONIA MARTHALLER, INST. FOR CHILDREN'S ENVTL. HEALTH, ENVIRONMENTAL TOXINS AND HUMAN HEALTH, *available at* http://www.childproofing.org/documents/creating_safe_learning_zones_draft.pdf.

[31] JAMIE D. BROOKS & MEREDITH L. KING, CTR. FOR AM. PROGRESS, GENETICIZING DISEASE: IMPLICATIONS FOR RACIAL HEALTH DISPARITIES 18 (Jan. 2008), *available at* http://www.americanprogress.org/issues/2008/01/pdf/geneticizing_disease.pdf.

[32] BULLARD ET AL., *supra* note 13, at 99.

> may absorb some harmful substances more easily. Children's bodies are not yet fully developed, so exposure to toxic substances may affect their growth and development.[33]

The University of Texas School of Public Health released results from an eighteen-month study, funded by the Houston Department of Health and Human Services and the Centers for Disease Control, regarding the relationship between cancer incidence and proximity to the Houston Ship Channel.[34] The study found "that children living within 2 miles of the [Houston] Ship Channel had a 56 percent greater chance of developing lymphocytic leukemia, a form of cancer that attacks white blood cells."[35] The EPA's Toxic Release Inventory reported that three petrochemical plants within blocks of Houston's Cesar Chavez High School released 114,806 pounds of butadiene in 2005.[36] The plant nearest the school, Texas Petrochemicals, was the single largest contributor, discharging 104,540 pounds of butadiene.[37] Concentrations of butadiene above one part per billion (ppb) have consistently been observed by Houston's Bureau of Air Quality Control.[38] The EPA found in a 2002 study on mice that extended respiratory exposure to butadiene above 0.9 ppb can cause serious health problems.[39]

In 2006, Drs. Manuel Pastor Jr., Rachel Morello-Frosch, and James L. Sadd conducted an extensive study on schools, air pollution, and environmental justice in California.[40] The study found that in areas that suffer from increased respiratory hazards from air toxics, schools have larger percentages of low-income and minority students.[41] Furthermore, the authors discovered that even when they controlled for variables such as student socio-economic status, teacher quality, and parent education, as well as characteristics of the districts, counties, and air basins, there is a correlation between respiratory risk and lower academic performance.[42] The study's authors believe that, "[t]aken together, the results suggest that attention to environmental quality at and around schools may be important issues for regulators and policymakers who are concerned about educational achievement in public schools, environmental justice, and

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[33] ENVTL. PROT. AGENCY, POLICY ON EVALUATING HEALTH RISKS IN CHILDREN (1995), *available at* http://www.epa.gov/OSA/spc/pdfs/memo1020.pdf.

[34] HOUSTON DEP'T OF HEALTH & HUMAN SERVICES, PRELIMINARY EPIDEMIOLOGIC INVESTIGATION OF THE RELATIONSHIP BETWEEN THE PRESENCE OF AMBIENT HAZARDOUS AIR POLLUTANTS (HAPS) AND CANCER INCIDENCE IN HARRIS COUNTY (2005), *available at* http://www.houstontx.gov/health/UT.html.

[35] Mann, *supra* note 17.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id. See also* Control of Hazardous Air Pollutants From Mobile Sources, 72 Fed. Reg. 8427, 8438 (Feb. 26, 2007).

[40] Manuel Pastor Jr., Rachel Morello-Frosch & James L. Sadd, *Breathless: Schools, Air Toxics, & Environmental Justice in California*, POL'Y STUD. J. 337 (2006).

[41] *Id.* at 355.

[42] *Id.*

children's environmental health."[43] The logical consequence of environmental risks negatively impacting children's health and school performance is the challenges these setbacks pose to the formation of positive human capital and participation in future economic activity.

A. Use of State Education Mandates as a Tool to Achieve Environmentally Healthy School Facilities

The constitutions of all fifty states differ from the U.S. Constitution by expressly providing all children with free public education.[44] Most state constitutions include adjectives describing the quality of the education that is to be provided, including efficient, uniform, high quality, thorough, basic, and suitable, often in combination.[45] In fact, only "[f]ifteen states have education clauses without a qualifier, simply mandating the existence of a system of free public schools."[46] The model of funding schools through local property taxes inherently creates a two-tiered educational system: one that results not only in disparate quality in teachers and learning materials, but also in the maintenance of school grounds and decisions as to where schools are sited. The poor condition of schools in minority and low-income neighborhoods is indicative of this reality and of the need to challenge school funding systems that perpetuate this inequality. School districts "serving 50.5 percent or more minorities, and school serving 70 percent or more of students eligible for free or reduced-price lunch had the largest concentrations of schools requiring above average expenditures" to restore schools to good condition.[47] If schools are provided with the resources to properly maintain their grounds and facilities, the health risks associated with poor maintenance would be eliminated.

B. San Antonio Independent School District v. Rodriquez *Triggered State Constitutional Challenges to Property Tax Funding Schemes*

The use of property taxes for school funding has been challenged as a violation of the Equal Protection Clause of the U.S. Constitution[48] in an effort to eliminate discrimination and segregated learning within school systems. In *San Antonio Independent School District v. Rodriguez*,[49] the U.S. Supreme Court upheld the use of property taxes, despite the disparities created by them, as a nondiscriminatory means of funding schools and not a violation of the Equal Protection Clause.[50] The Court noted,

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43 *Id.*

44 KEVIN CAREY, CTR. ON BUDGET & POL'Y PRIORITIES, OVERVIEW OF K–12 EDUCATION FINANCE 13 (Nov. 2002), *available at* http://www.cbpp.org/11-7-02sfp2.pdf.

45 *Id.*

46 *Id.*

47 *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 1, at 14.

48 U.S. CONST. Amend. XIV, § 2.

49 411 U.S. 1 (1973).

50 *Id.* at 54–55.

> While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system.[51]

The Court further held that education is not a fundamental right protected by the U.S. Constitution, thereby requiring only that states have a rational basis for their school funding schemes despite their discriminatory effects.[52] Consequently, effective challenges to school financing have been based on state law.

Since *Rodriguez*, the majority of challenges to public school financing have been based on individual state constitutions, which often include explicit state guarantees of educational rights. Although early suits used state equal protection and education clauses to challenge funding inequality, recent suits have been brought under education clauses, focusing instead on the adequacy of students' educational experience.[53] As of 2004, school finance cases have been filed in forty-five states[54] and have been met with varying degrees of success. In total, eighteen states have affirmed the validity of their school systems while twenty-five states have determined their school financing systems were unconstitutional.[55] These cases can be divided into two sometimes overlapping categories: "adequacy" suits and "equity" suits. "Adequacy" cases seek to enforce a basic educational quality.[56] "Equity" cases assert that state constitutions require fiscally neutral school financing plans that ensure all districts in a state have access to the same amount of funding.[57]

Courts have upheld local financing systems and denied attempts by plaintiffs to force states to equalize opportunity in two categories of cases: when the court determines that 1) the financing system does not violate the state's education clause language[58] or 2) the state's financing system was substantially related to a legitimate government interest, satisfying the rational basis test.[59]

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[51] *Id.* at 50–51 (citing McGowan v. Maryland, 366 U.S. 420, 425–26 (1961)).

[52] *Id.* at 37.

[53] Myron Orfield, *The Region and Taxation: School Finance, Cities, and the Hope for Regional Reform*, 55 BUFF. L. REV. 91, 108–09 (2007).

[54] James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463, 464 (2004).

[55] Orfield, *supra* note 53, at 109.

[56] *Id.* at 108–09.

[57] *Id.* at 108.

[58] *See, e.g.*, Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1183–89 (Ill. 1996) (finding that the term "efficient" does not demand equality in educational funding); Skeen v. State, 505 N.W.2d 299, 312 (Minn. 1993) (finding that the "general and uniform" clause does not mean "identical" or "nearly identical" but simply requires the system to meet "basic educational needs of all districts"); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 776 (Md. 1983) (finding that the "thorough and efficient" clause does not require uniformity in funding per student or among different school districts); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) (finding that a uniformity provision does not require identical per-pupil expenditures among school districts).

[59] *See, e.g.*, City of Pawtucket v. Sundlun, 662 A.2d 40, 61–62 (R.I. 1995); Unified Sch. Dist.

Courts have struck down local financing systems and required states to remedy their educational systems in three types of cases: where the court determines that 1) the financing system violates "equality" language in the state's education clause,[60] 2) the state failed to meet the educational standard set by the state constitution,[61] or 3) the state financing system lacked a compelling interest for educational discrepancies arising from that system and the system therefore failed to pass the "strict scrutiny" test.[62] The probability of success for these type of cases is influenced by the racial composition of a school district, with white school districts enjoying a higher success rate than minority school districts.[63]

In the *Abbott* cases, the New Jersey Supreme Court found that "the level of education offered to students in some of the poorer urban districts is tragically inadequate."[64] The court noted disparities in inputs and opportunities such as the quality of teachers, access to computers, and science curricula.[65] In reviewing the Chancery Division's decision holding New Jersey's Quality Education Act unconstitutional, the court asserted, "[i]t is the State and only the State that is responsible for this educational disparity, and only the State can correct it."[66] The court ordered "substantially equivalent funding" of the state's school districts.[67] After ongoing litigation to enforce the court's order, in 2002 the court addressed the pressing problem of school building construction and renovation, among other issues, reiterating its earlier holding that the "constitutional educational obligation includes the provision of adequate school facilities."[68]

The Connecticut case *Sheff v. O'Neil*,[69] while not explicitly an educational financing case, is nonetheless notable for its use of state educational equity language.[70] The court found that because fourteen of Hartford's twenty-five public schools were composed almost entirely of minority students, de facto racial segregation deprived Hartford students of an education equal to that of students in other school districts and the

No. 229 v. State, 885 P.2d 1170, 1197 (Kan. 1994); McDaniel v. Thomas, 285 S.E.2d 156, 176 (Ga. 1981).

60 *See, e.g.*, Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 815–16 (Ariz. 1994); Opinion of the Justices No. 338, 624 So. 2d 107, 110 (Ala. 1993).

61 *See, e.g.*, Abbott by Abbott v. Burke, 693 A.2d 417, 421 (N.J. 1997); DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 189 (Ky. 1989).

62 *See, e.g.*, Horton v. Meskill, 486 A.2d 1099, 1104–10 (Conn. 1985); Serrano v. Priest, 557 P.2d 929, 951–53 (Cal. 1976); Robinson v. Cahill, 287 A.2d 187, 214–16 (N.J. 1972).

63 Orfield, *supra* note 53, at 109 (citing James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 455 (1999)).

64 Abbott v. Burke, 575 A.2d 359, 395 (N.J. 1990).

65 *Id.* at 395–99.

66 Abbott by Abbott v. Burke, 643 A.2d 575, 580 (N.J. 1994) (per curiam).

67 *Id.*

68 Abbott *ex rel.* Abbott v. Burke, 790 A.2d 842, 856 (N.J. 2002) (quoting Abbott V, 710 A.2d 450 (N.J. 1998)).

69 678 A.2d 1267, 1281 (Conn. 1996).

70 *Id.* at 1280–81 ("[I]t is common ground that the state has an affirmative constitutional obligation to provide all public schoolchildren with a substantially equal educational opportunity.").

legislature had failed to fulfill its constitutional obligation.[71] Here, the court read the Connecticut Constitution's education clause with its clause prohibiting segregation and concluded that the state was required to take remedial measures to end segregation in schools.[72]

In *Roosevelt Elementary School District No. 66 v. Bishop* (*Roosevelt I*),[73] school districts and parents brought a suit against the Superintendent of Public Instruction and the State of Arizona based on the funding of school facilities.[74] The "undisputed record showed enormous facility disparities among the various school districts and traced these disparities to the statutory [financing] scheme, which relie[d] in large part on local property taxation for public school capital requirements."[75] The court held that

> School financing systems which themselves create gross disparities are not general and uniform. . . . [T]he state knew of the profound differences in property value among the districts, yet selected a funding mechanism where 45% of the revenue depends upon property value. Thus, the state's financing scheme could do nothing but produce disparities.[76]

Legal scholar and regionalist Myron Orfield has advocated for a revenue sharing plan to mitigate the disparities between poor central cities and their wealthier suburbs and exurbs. In an examination of Connecticut's school financing system, Orfield finds that "[t]he state's fiscal system pits local governments against one another in a competition for tax base that needlessly undermines the character of local communities, wastes resources, discourages cooperation and increases fiscal disparities."[77] Orfield noted that "towns in Connecticut are replacing their old 'town dumps' with regional solid waste disposal systems," leading to "degrade[d] air quality in adjacent areas."[78] Additionally, Orfield noted that "rates of hospitalization and emergency room visits for children with asthma were disproportionately high in the state's five largest cities and low-income towns."[79] Orfield proposes that school disparities could improve by shifting a greater percentage of the cost of K–12 education "from local property taxes to the statewide revenue system, at least to the 50-50 cost-sharing level long identified as a goal in Connecticut."[80] Connecticut's most affluent cities spend approximately 20% more per student than their poorer counterparts, notwithstanding the fact that, after adjusting for income, residents of more affluent towns experience a lower tax burden.[81]

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71 *Id.* at 1270–73, 1280.

72 *Id.* at 1270–71.

73 877 P.2d 806 (Ariz. 1994).

74 *Id.* at 808.

75 *Id.*

76 *Id.* at 814–15.

77 MYRON ORFIELD & THOMAS LUCE, AMEREGIS, CONNECTICUT METROPATTERNS: A REGIONAL AGENDA FOR COMMUNITY AND PROSPERITY IN CONNECTICUT 1 (2003), *available at* http://www.metroresearch.org/maps/region_maps/Connecticut_Jan29.pdf.

78 *Id.* at 14.

79 *Id.* at 15.

80 *Id.* at 30.

81 *Id.*

C. Demonstrating Disparate Facility Conditions Heightens Success When Seeking to Enforce Equality and Adequacy Standards

Challenges based on a state's requirement that it provide adequate education have been successful, particularly when plaintiffs introduce evidence of poor school facilities. As a report from the Education Law Center notes, "facilities evidence has a concrete, illustrative, and therefore judicially-accessible quality unmatched by test score data and poverty statistics."[82] Even courts disinclined to reexamine precedent upholding school funding schemes or attempts to "define the elements of an 'adequate education'" find it difficult to ignore bleak testimony regarding "danger, squalor, overcrowding and disrepair in the state's public schools."[83]

In *Williams v. State of California*,[84] the plaintiffs, a class of children at inadequate schools, brought suit for injunctive and declaratory relief against the state for failure to provide basic educational opportunities.[85] The complaint describes the poor conditions of California schools in detail and identifies disparities in resources and quality of instruction between different demographic groups.[86] The complaint alleges that "[t]he growth of mold and fungus in many classrooms induces asthma attacks and leads to regular illness among children and teachers"[87] and "long deferred or neglected facilities maintenance resulting in unsanitary and unhealthful conditions—caused by, for example, the presence of vermin, mildew, or rotting organic material—that interferes with students' ability to obtain an education"[88] was prevalent in these schools. The plaintiffs also introduced reports of expert witnesses detailing the negative effects of the poor school conditions on the students' abilities to receive an adequate education.[89]

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[82] DAVID G. SCIARRA ET AL., EDUC. LAW CTR., SAFE AND ADEQUATE: USING LITIGATION TO ADDRESS INADEQUATE K–12 FACILITIES 28 (2006), *available at* http://www.edlawcenter.org/ELCPublic/Publications/PDF/Safe_and_Adequate.pdf.

[83] *Id.*

[84] First Amended Complaint at 74–75, Williams v. State, No. 312236 (Super. Ct. Cal. filed Aug. 14, 2000).

[85] *Id.*

[86] *Id.* at 6–7.

[87] *Id.* at 9.

[88] *Id.* at 22.

[89] *See* ROBERT CORLEY, EXPERT REPORT OF ROBERT CORLEY: THE CONDITION OF CALIFORNIA SCHOOL FACILITIES AND POLICIES RELATED TO THOSE CONDITIONS, *available at* http://www.decentschools.org/expert_reports/corley_report.pdf (discussing the existence of significant problems in California with schools that are in poor condition); GLEN EARTHMAN, EXPERT REPORT OF GLEN EARTHMAN: THE EFFECT OF THE CONDITION OF SCHOOL FACILITIES ON STUDENT ACADEMIC ACHIEVEMENT, *available at* http://www.decentschools.org/expert_reports/earthman_report.pdf (examining whether the poor condition of school facilities is detrimental to a student's academic achievement); Michelle Fine, Expert Report of Michelle Fine: The Psychological And Academic Effects On Children And Adolescents Of Structural Facilities' Problems, Exposure To High Levels Of Under-Credentialed Teachers, Substantial Teacher Turnover, And Inadequate Books And Materials, *available at* http://www.decentschools.org/expert_reports/fine_report.pdf (investigating the extent to which poor school conditions can produce adverse effects on

The plaintiffs alleged violations of the following laws: the state constitution's equal protection clause, the constitution's education clause requiring the state operate a "system of common schools," the state constitution's due process clause for students' protected property interest in obtaining a public education and graduating from high school and because of mandatory attendance laws that required students to attend unsafe schools, Title VI of the Civil Rights Act of 1964 for failing to ensure that federal resources were being equitably distributed, and the California Education Code § 51004 guaranteeing the citizens' right to an effective education regardless of socio-economic status.[90]

In August 2004,[91] the parties settled the case in a heavily facilities-oriented agreement. Specifically, the settlement provided $25 million for a one-time comprehensive assessment of school facilities' conditions and needs, $5 million for the new School Facilities Emergency Repair Account, and an additional $800 million over the following years in the account to reimburse districts for emergency facilities repair.[92]

In *DeRolph v. State of Ohio*,[93] the court held the state's financing system was unconstitutional because some school districts were receiving so little local and state revenue that the students were effectively being deprived of an educational opportunity.[94] Article VI, section 2 of the Ohio Constitution requires the general assembly to "make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State."[95] The court noted the delegates to the state's constitutional convention "stressed the importance of education and reaffirmed the policy that education shall be afforded to every child in the state regardless of race or economic standing" and that the delegates were "concerned that the education to be provided to our youth not be mediocre but be as perfect as could humanly be devised."[96]

The plaintiffs focused on the deplorable conditions of the school buildings and the lack of funding to repair the buildings. The court found the conditions remarkable, noting the Superintendent's declaration that some students were "making do in a decayed carcass from an era long passed."[97] Most notably, the court cited the following problems:

- Hospitalization of 300 students due to carbon monoxide leaks from heaters and furnaces in one locality.[98]

children and adolescents).

90 First Amended Complaint, *supra* note 84, at 74.

91 BROOKS M. ALLEN, THE WILLIAMS V. CALIFORNIA SETTLEMENT: THE FIRST YEAR OF IMPLEMENTATION, A REPORT BY COUNSEL FOR THE WILLIAMS PLAINTIFFS 5 (2005), *available at* http://www.aclu-sc.org/attach/w/williams_first_year_report.pdf.

92 *Id.* at 11.

93 677 N.E.2d 733 (Ohio 1997).

94 *Id.* at 745.

95 OHIO CONST. art. VI, § 2.

96 *DeRolph*, 677 N.E.2d at 740.

97 *Id.* at 743.

98 *Id.*

- Failure to remove asbestos from 68.6% of the school buildings in violation of a 1987 U.S. EPA mandate.[99]
- Use of a coal heating system in one school system that left coal dust on school desks overnight and subjected students to breathing coal dust emitted into the air.[100]
- Reliance on an outdated sewage system which caused raw sewage to flow onto one high school's baseball field.
- Failure to prevent plaster from falling[101] off the walls and to eliminate cockroaches crawling in school restrooms in one elementary school.[102]
- The court declared the finance system, which deprived districts of the ability to provide "a safe and healthy learning environment," unconstitutional and that it needed to be entirely restructured.[103]

The relative success of cases utilizing facilities evidence as a means for improving educational opportunity provides a strong path for environmental justice activists to use to remedy environmentally hazardous school facilities. These challenges were not limited to claims under the equity statutes and often incorporate federal and state constitutional as well as environmental claims. Additionally, the extensive network of environmental scientists and analysts within the environmental justice movement can provide detailed and expansive support by both identifying the blatantly poor conditions and providing additional evidence through the lens of existing federal environmental laws.

D. School Siting: Ensuring New Schools Have a Healthy Start

In March 2006, Rhode Island Legal Services published *Not in my Schoolyard: Avoiding Environmental Hazards at School Through Improved School Site Selection Policies*, a critical report to the U.S. EPA examining the state of school siting in the United States and providing a model policy for school siting.[104] The report found:

> [A] significant policy gap [exists] . . . with respect to siting schools on or near contaminated land or sources of pollution. Despite the health hazards that on-site and off-site environmental contaminants pose to children:
>
> - Twenty (20) states have no policies of any kind affecting the siting of schools in relation to environmental hazards, the investigation or

[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 743–44.
[103] *Id.* at 744, 747.
[104] R. I. LEGAL SERVICES, NOT IN MY SCHOOLYARD: AVOIDING ENVIRONMENTAL HAZARDS AT SCHOOL THROUGH IMPROVED SCHOOL SITE SELECTION POLICIES (2d ed. 2006), *available at* http://www.nylpi.org/pub/School_Siting_Final.pdf.

assessment of potential school sites for environmental hazards, the clean up of contaminated sites, making information available to the public about potential school sites or providing some role for members of the public in the school siting process.

- Only fourteen (14) states have policies that prohibit outright the siting of schools on or near sources of pollution or other hazards that pose a risk to children's safety; only five (5) of these fourteen (14) prohibit or severely restrict siting schools on or near hazardous or toxic waste sites.
- Twenty-one (21) states have school siting policies that direct or suggest school siting officials "avoid" siting schools on or near specified man-made or natural environmental hazards, or direct the school district to "consider" those hazards when selecting school sites. Fifteen (15) of these states have adopted siting factors that directs school districts to either consider the proximity of sources of pollution when selecting sites or to avoid siting schools near those sources; while eight (8) of these states have a vaguely worded factor relating to environmental factors or safety of a proposed site.
- Twenty-three (24) [sic] states have no policies that require sponsors of new school projects to investigate or assess environmental hazards at potential school sites.
- Only twelve (12) states require the sponsors of school projects to solicit public input on school sites through the use of public notices, public meetings or hearings.
- Only eight (8) states either require or authorize the creation of school-siting advisory committees.
- Of the thirty (30) states that have some policy regulating the siting of schools in relation to sources of man-made or natural environmental hazards, in twenty (20) states the policy is administered solely by the state education agency; in eight (8) the policy is administered by the state education agency and another agency, usually the state environmental agency or health department; in one (1) state by the state health department and in one (1) state by local officials.[105]

The concerns over health hazards and school siting in the report to the U.S. EPA were echoed in another study from California regarding school siting and exposure to traffic-related pollutants. That study reported that the overall percentage of nonwhite students in California schools with low exposure to high-traffic roads was 60%, whereas the number of nonwhite students rose to 78% at the schools located near high-traffic roads.[106] The study went on to show that increased school traffic exposure correlates with a substantial increase in the percentage of both non-Hispanic black and Hispanic students.[107] This correlation with traffic exposure also extended to

105 *Id.* at 4–5.

106 Rochelle S. Green et al., *Proximity of California Public Schools to Busy Roads*, 112 ENVTL. HEALTH PERSP. 61, 61 (2004).

107 *Id.*

English language learners and other school-based and census tract-based socioeconomic indicators.[108] Additionally, "[t]he median percentage of children enrolled in free or reduced price meal programs increased from 40.7% in the group with very low exposure to 60.5% in the highest exposure group."[109] The report emphasized the disproportionate percentage of nonwhite and economically disadvantaged youth among the high number of students exposed to pollutants from heavily-trafficked roadways near California schools.[110] Further, according to the San Francisco based organization Literacy for Environmental Justice (LEJ), "[a]t least 44 California schools sit within a half-mile of a superfund site, and hundreds more are located dangerously close."[111]

In *Lucero v. Detroit Public Schools*,[112] Detroit, Michigan parents took action to challenge the siting of two elementary schools on contaminated sites.[113] Parents sued the Detroit Public Schools for selecting a contaminated site to construct the new Beard Elementary School.[114] The new school would receive students from the old Beard Elementary School and McMillan Elementary School, both scheduled to close.[115] The old Beard school lacked proper facilities including an auditorium, cafeteria, gymnasium, and playground.[116] The McMillan school also lacked proper facilities and experienced a significant decline in enrollment.[117] At the time of the suit, the Beard student body was 61% Hispanic and 13% African American.[118] The McMillan student body was 58% African American and 21% Hispanic.[119] The site for the new school had been used for industrial manufacturing, storage, and maintenance operations for over fifty years.[120] "Based upon the previous alleged uses of the [s]ite, volatile organic chemicals (VOCs), semi-volatile organic chemicals, petroleum-related materials, polychlorinated biphenyls (PCBs), chlorinated solvents, various heavy metals, and radioactive paints were the recognized and potential environmental concerns."[121]

The parents' suit sought to enjoin the opening of the new school.[122] Although the court recognized "the public has an interest in protecting children from any potential environmental harm,"[123] the court denied the parents' motion for a preliminary injunction and ordered the new school to

108 *Id.*
109 *Id.*
110 *Id.*
111 Jennifer Liss, *Nonprofit News: Environmental Literacy*, COMMON GROUND, Nov. 2005, http://commongroundmag.com/2005/11/dob0511.html (last visited Apr. 13, 2008).
112 160 F.Supp.2d 767 (E.D. Mich. 2001).
113 *Id.* at 771.
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.* at 772.
122 *Id.* at 778.
123 *Id.* at 803.

open, finding that the parents failed to show that they are likely to suffer irreparable harm prior to the adjudication of the suit.[124]

In 2004, the parents and the school district reached a settlement and dismissed the case.[125] The settlement agreement created "a safety committee to check on the integrity of the engineering cap underneath the school and playground."[126] The Detroit Public Schools agreed to maintain readily accessible records, in English and in Spanish, of maintenance and testing of the barrier.[127] In addition, the agreement established "a system for parents to enforce compliance with the settlement, and created a protocol for making any repairs to the barrier."[128]

In 1999, the Hartford Park Tenants Association, a neighborhood resident, and two parents of children attending public schools in Providence, Rhode Island brought suit to "halt the construction and operation of certain public schools."[129] The complaint alleged the Rhode Island Department of Environmental Management (DEM) "violated the environmental equity requirement of the Industrial Property Remediation and Reuse Act," violated Title VI of the Civil Rights Act of 1964 by intentionally discriminating against the plaintiffs, and denied plaintiffs equal protection and due process of law in violation of the Fourteenth Amendment of the U.S. Constitution.[130]

In Providence, the majority of public school students come from "low-income households."[131] In the 1997–98 school year, "approximately 23% of [Providence's] . . . student body was white and 77% was non-white (consisting of approximately 23% African Americans, 11% Asians, 43% percent Latinos, and 1% Native American)."[132] The site selected for the construction of three schools was an illegal dump in the 1950s and eventually became an unauthorized municipal landfill.[133] Complaints of rats and odors led the City to stop accepting "waste at the dump by the mid-seventies.[134] In total, about 200,000 cubic yards (300,000 tons) of waste and fill material was disposed at the [s]ite, about 50% of which [was] located below the water table."[135]

In October 2005, the court ruled that the City and the Department of Environmental Management violated state environmental laws and regulations when they approved siting the schools on the former dump.[136] In January 2007, the city of Providence was ordered by the Superior Court to notify parents and

124 *Id.* at 805.

125 Am. Bar Assoc., The Law of Environmental Justice: Update Service, http://www.abanet.org/environ/committees/envtab/ejweb.html (citing Lucero v. Detroit Public Schools, Case No. 01-CV-72792-DT (E.D. Mich. Oct. 7, 2004)) (last visited Apr. 13, 2008).

126 *Id.*

127 *Id.*

128 *Id.*

129 Hartford Park Tenants Ass'n. v. R.I. Dept. of Envtl. Mgmt., 2005 RI Super. LEXIS 148, *1 (Oct. 3, 2005).

130 *Id.* at *2–*3.

131 *Id.* at *21.

132 *Id.* at *20.

133 *Id.* at *26–*27.

134 *Id.* at *27.

135 *Id.* at *27–*28.

136 *Id.* at *172–*76.

school employees about the contamination found at two public schools that were built on a former city dump.[137]

E. EPA Can Play an Effective Role By Aggressively Pursuing Enforcement Actions Against Regulated Facilities Near Schools

In 2001, EPA Region 9 executed a targeted "inspection sweep" of waste facilities near schools in low-income minority areas in Vernon, Los Angeles County, California.[138] The sweep sent inspectors to "facilities with the greatest potential risk to the largest, most vulnerable populations."[139] They used geographic information system (GIS) technology to analyze census data indicating income and ethnicity by zip codes to rank hazardous waste facilities' proximity to schools.[140] Inspectors from EPA, the state Department of Toxic Substances Control, and the city and county then inspected the facilities closest to schools.[141] At fourteen of those facilities, the inspectors found violations of state and federal hazardous waste regulations, which resulted in fines and operational changes at those facilities to ensure safe handling, storage, and transport of hazardous waste.[142]

The EPA has paid special attention to schools, operating numerous programs to address pesticides, lead, asbestos, and other environmental hazards.[143] While the EPA's efforts are laudable, they are meaningless if the clean school is nevertheless subjected to dangerous pollution from neighboring emitting facilities. EPA should implement a nationwide plan modeled after Region 9's 2001 effort to target facilities near schools. Heightened scrutiny of these facilities will not only lead to an overall environmentally healthy school environment, but will also improve the environmental quality of the minority and low-income communities where the schools are located.

F. Federal Action is Appropriate and Required

School environmental health is an issue of national concern. Federal school environmental health statutes must incorporate public health

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137 Press Release, Rhode Island Legal Services, Inc., Judge Orders City to Notify Parents, School Employees About Contamination at School Site (Jan. 30, 2007) (on file with author) [hereinafter RILS Press Release].

138 ENVTL. PROT. AGENCY, EPA PROGRESS REPORT 2002, PACIFIC SOUTHWEST REGION 32–33 (2002), *available at* http://www.epa.gov/region09//annualreport/02/completereport.pdf.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *See generally* EPA Region 9, Children's Health, http://www.epa.gov/region09/childhealth (last visited Apr. 13, 2008) (explaining EPA's efforts to protect children's health and providing links to more specific pages dealing with lead, asthma, pesticides, mercury, and emerging issues); EPA Region 9, Children's Health-Pesticides, http://www.epa.gov/region09/childhealth/pesticides.html (last visited Apr. 13, 2008) (referencing the importance of EPA's Integrated Pest Management Program in providing safe schools).

considerations into siting, remediation, and construction decisions as well as strengthen federal environmental protections for air, water, and land in and around existing schools to protect the health of children. Fortunately, the federal government has taken steps to address environmental impacts on children's health.

In 1994, the U.S. Congress passed the Education Infrastructure Act of 1994 and appropriated $100 million in grants to schools for repair, renovation, alteration, or construction.[144] In 1995, however, the funds were eliminated in an effort to balance the budget.[145] In 1997, President Clinton issued Executive Order 13,045 mandating that each Federal agency "(a) shall make it a high priority to identify and assess environmental health risks and safety risks that may disproportionately affect children; and (b) shall ensure that its policies, programs, activities, and standards address disproportionate risks to children that result from environmental health risks or safety risks."[146] In 2002, the Senate Environment and Public Works Committee held a hearing titled "Green Schools: Environmental Standards for Schools" and solicited testimony from various organizations committed to healthy schools to assess green school initiatives including: environmental standards for schools, school siting in relation to toxic waste sites, and "green" building codes.[147] In October 2006, the EPA awarded approximately $4 million in cooperative agreements to improve indoor air quality and reduce environmental health risks from asthma triggers, secondhand smoke, radon, and other contaminants.[148] In 2007, the EPA, in partnership with the U.S. Department of Education, implemented their Schools Chemical Cleanout Campaign.[149] EPA has published guidance for schools and child care facilities on reducing lead in drinking water.[150] Additionally, Section 5414 of the No Child Left Behind Act mandates "a study regarding the health and learning impacts of environmentally unhealthy public school buildings on students and teachers."[151]

144 Education Infrastructure Act of 1994, 20 U.S.C. §§ 8501–8513 (2000). Congress appropriated funds for fiscal year 1995 in a Department of Education appropriations act. H.R. 4606, 103rd Cong. (1994) (enacted).

145 Deb Riechmann, *Clinton Will Offer $5 Billion to Fix and Build Schools*, SEATTLE POST-INTELLIGENCER, July 11, 1996, at A6.

146 Exec. Order No. 13,045, 62 Fed. Reg. 19885 (Apr. 23, 1997), *available at* http://www.epa.gov/fedreg/eo/eo13045.htm.

147 *Green Schools: Environmental Standards for Schools*, 107th Cong. (2002). *See also* statements from Hearings, 107th Congress, *available at* http://epw.senate.gov/stm1_107.htm#10-01-02 (providing information on witnesses and copies of the statements submitted for the record).

148 Press Release, Envtl. Prot. Agency, Indoor Air Cooperative Agreements (Oct. 19, 2006), *available at* http://www.epa.gov/iaq/iaq_partners.html.

149 *See* EPA, School's Chemical Cleanout Campaign, http://www.epa.gov/sc3/ (last visited Apr. 13, 2008).

150 *See* EPA, Guidance and Tools, http://www.epa.gov/OGWDW/schools/guidance.html (last visited Apr. 13, 2008); *see also* EPA, LEAD AND COPPER RULE: A QUICK REFERENCE GUIDE FOR SCHOOLS AND CHILD CARE FACILITIES THAT ARE REGULATED UNDER THE SAFE WATER DRINKING ACT, *available at* http://www.epa.gov/OGWDW/schools/pdfs/lead/qrg_lcr_schools.pdf.

151 No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 5414(a), 115 Stat. 1425, 1813 (2002).

In a historic moment, the federal government committed to developing guidelines for states when making school siting decisions. The Energy Independence and Security Act of 2007 requires the Administrator of the EPA to issue guidelines for use by the states in developing and implementing an environmental health program for schools that take into account the vulnerability of children in low-income and minority communities to exposures from contaminants, hazardous substances, and pollutant emissions.[152] The statute further requires the guidelines take into account "with respect to school facilities . . . environmental problems, contaminants, hazardous substances, and pollutant emissions . . . [and] provide[] technical assistance on siting, design, management, and operation of school facilities."[153]

It is not beyond reality to expect comprehensive legislation mandating healthy schools. Numerous studies have been conducted. The list of guidelines and recommendations is extensive. Yet, so often guidelines for environmental protection are intentionally ambiguous and generally ineffective in protecting schools from environmental hazards. Substantial evidence exists for the federal government to impose mandates for protecting schools.

IV. POLICY RECOMMENDATIONS

The recommendations of the Rhode Island Legal Services report[154] should be implemented as mandatory acts. The recommendations include the creation of a school siting advisory board,[155] prohibition of siting schools on top of or within 1000 feet of a site where hazardous or garbage waste was landfilled,[156] and stricter clean up requirements for contaminated sites on which a school is to be sited.[157]

Additionally, the mandatory acts must include a private right of action with the right to recover attorney fees and costs so that individuals can enforce the law if the appropriate federal agency chooses not to litigate. The possible recovery of attorney's fees and costs will incentivize attorneys interested in working with these communities and will provide increased access to expert witnesses. A right to litigate is worth little if no attorney can afford to take the case.

Ongoing efforts to amend Title VI of the Civil Rights Act of 1964 to provide a private cause of action for the discriminatory impact of the use of federal funds have yet to take hold. After the Supreme Court decision in *Alexander v. Sandoval*,[158] disparate impact claims cannot be enforced by

152 Energy Independence and Security Act of 2007, H.R. 6, 110th Cong. § 432 (2007).
153 *Id.* § 504(a)(1).
154 RILS Press Release, *supra* note 137.
155 *Id.* at 33.
156 *Id.* at 37.
157 *Id.* at 45.
158 Alexander v. Sandoval, 532 U.S. 275 (2001).

individuals, only federal agencies.[159] As demonstrated in the school finance litigation, disparate expenditures result in disparate facilities with the worst facilities serving minority and low-income students. Should a private right to action for impact claims under Title VI come to fruition, the civil rights statute can be an additional tool to achieve environmentally healthy schools.

V. CONCLUSION

Nationwide support for improving school environmental conditions and indisputable evidence that minority and low-income students are disproportionately exposed to environmental hazards at school suggests the need and ability to aggressively pursue changes in how we site schools and maintain school facilities. Litigation utilizing state equity laws has demonstrated success in challenging finance systems that cause inequitable conditions of school facilities. Environmental justice advocates should include this tool along with environmental and civil rights statutes to further the goals of achieving healthy communities for all.

[159] *Id.* at 293.