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To: PUBLIC SCHOOL CAPITAL OUTLAY TASK FORCE
Re: Constitutionality of School Funding
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INTRODUCTION

The Constitution of the state of New Mexico guarantees a uniform system of free public schools for all children. To enact a capital-financing scheme that will satisfy this Constitutional guarantee, an accurate interpretation of "a uniform system" of schools is required. A survey of the historical background behind school finance reform provides some direction. First however, it is worthwhile to note that whereas the problem confronting the New Mexico legislature centers specifically upon funding for capital facilities, the majority of school finance litigation has approached the issue more broadly. That is, operational and capital funding are often considered together. For the purpose of determining compliance with state constitutional mandates, the distinction is irrelevant.

HISTORICAL CONTEXT

Challenges to the constitutionality of school finance schemes have progressed in three waves. William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model,* 35 B.C.L. Rev. 597, 598 n.4 (1994). The first two waves, beginning in the early 1970s, focused attention upon eliminating disparities in school spending. Proponents of reform during these periods sought equal protection in the form of equal funding for all students. The third wave has shifted the focus from equity in spending to adequacy of education. Perhaps in response to difficulties in the application of equity-based legislation, financing reformists and court decrees have recently emphasized constitutional compliance through the establishment of minimum standards. Rather than ensuring that each student receives equal funding, courts now hope to compel legislation that ensures each student will receive an adequate education.

Initial challenges to spending disparities among school districts were asserted under the Equal Protection Clause of the federal constitution. In Serrano v. Priest, 487 P.2d 1241 (Cal. 1971), cert. Denied, 432 U.S. 907 (1977), the California Supreme Court considered the constitutionality of a property-tax-based financing scheme. Essentially, plaintiffs claimed that the Constitution of the United States required equal funding for all students and that the system of school funding based upon local property taxes (a system that even today perpetuates disparities in district funding) violated that equity provision. The California Supreme Court agreed, holding the system to be unconstitutional. However, soon after, the United States Supreme Court narrowed the scope of debate by declaring that education was not among the fundamental rights afforded protection under the federal constitution. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 34 (1973). Although significant variations existed in district funding due to differences in property values, the Court found the Texas system of school funding was not so lacking in rationality to violate the rational basis standard of due process under the federal constitution. Thus, school finance reform became a state and local issue rather than a federal issue, and the second wave began by bringing challenges under state constitutions.

Proponents for change during this era continued to call for equity-based reform. Equal protection arguments persisted, but were now being made under the state, rather than federal, constitutions. Furthermore, the education articles of the various state constitutions served as primary mechanisms by which challenges were made. Plaintiffs asserted that proper interpretations of these articles required all school districts and/(or) students to be equally funded. Certain courts, like the New Jersey Supreme Court, agreed. The New Jersey Constitution provides for a "thorough and efficient" school system, Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy,* 68 Temp. L. Rev. 1151 (1995), quoting, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 279 (1973), and in Robinson v. Cahill, 303 A.2d at 279, the Court's interpretation of these words ushered in the second wave of school finance reform. By holding that this language made the state's disparate system of school funding unconstitutional, a new avenue for legal pursuit was open to education reformers.

For example, in its' discussion of the issue, the Supreme Court of Arkansas spoke of equity as the ideal. Dupree v. Alma School Dist. No. 30 of Crawford County, 279 Ark. 340, 351, 651 S.W.2d 90, 96. "Equality is, of course, mostly an ideal or goal, and hardly ever a reality in government. Reasons are always given for not requiring equality but they are usually no more than excuses, and I do not hesitate to point out that if the Arkansas legislature approaches its new task with anything less than the goal of equality in dispensing state funds, it risks repeating the same mistakes that brought about this situation." Id.

Courts however, were not always persuaded to accept absolute equity of funding across district lines, and many funding schemes were upheld despite the existence of funding disparities. One important reason was the desire to maintain local control. In the aftermath of Robinson, under very similar circumstances, the Oregon Supreme Court ruled that its Constitution, calling for a "uniform and general" system of schools, did not mandate equality in spending. Olsen v. State, 554 P.2d 139 (Or. 1976). Rather, such disparity furthered the state's interest in local control. In response, the latest wave in school finance reform surfaced, and adequacy, as opposed to equity, became the prominent strategic tool used to challenge school funding systems.

In 1989, the Kentucky Supreme Court decided that the state's entire educational system was unconstitutional in that even the more affluent school districts were "inadequately funded by comparison to 'acceptable national standards.'" Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy,* 68 Temp. L. Rev. 1151 (1995). In so doing, the legislature was forced to pass the "Kentucky Education Reform Act, described by many as among the nation's 'most far-reaching' state educational reform efforts." Id. The Court's holding required the legislature to set minimum adequacy standards for educational performance, and consequently raise the entire level of education funding to meet those standards. Since that decision, a few other states have followed. For instance, in 1998 the Supreme Court of Arizona established a two-prong test in response to the Governor's special action petition to determine if a legislative enactment complied with Arizona's constitutional obligation to fund a "general and uniform school system." Hull v. Albrecht, 192 Ariz. 34, 960 P.2d 634. The Court said that: "(1) the state must establish minimum adequate facility standards and provide funding to ensure that no district falls below them; and (2) the funding mechanism chosen by the state must not itself cause substantial disparities between districts." Id. Another example, in the state of New Jersey, served to overturn Robinson v. Cahill, the case discussed above. Whereas the court had previously espoused equity in funding, in Abbott v. Burke, 693 A.2d 417 (N.J. 1997), the focus is upon the resources necessary to provide adequate facilities in special needs districts (SNDs). The Court distances itself from its original equity principle by noting that those schools in the SNDs require more funding to achieve the same minimum standards of adequacy.

The historical progression of school finance has thus evolved from an emphasis on equalization of spending to, very recently, a consideration for the adequacy of the education being received. In attempting to comply with their constitutional education mandates, states must choose between the two funding principles. For states with little or no judicial guidance, a careful reading of the language of the Constitution is very important. Nonetheless, where states have interpreted similar language in conflicting manners, an accurate prediction of a court's interpretation is never certain. Therefore, a further comparison of the benefits and drawbacks of each theory is helpful.

EQUITY VS. ADEQUACY

Upon initial consideration, a school funding system that attempts to equalize spending seems to comport with our legal system's notions of fairness and justice. Yet practical application of such a system presents several limiting factors that would not otherwise be evident.

First, equity may be measured from various perspectives. "Total and minimum revenue equality plans focus on the student and typically seek to ensure outright equality or a minimal level of per-pupil spending, respectively. In contrast, fiscal neutrality plans focus on the taxpayer and seek greater school finance equity by forging a closer link between per-pupil spending and taxpayer effort. A fiscally neutral plan awards additional resources to property-poor school districts that tax themselves at a relatively high rate." Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy,* 68 Temp. L. Rev. 1151 (1995), citing, Gail F. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings,* 28 Harv. J. on Legis. 507, at 520-28 (1991). Thus, legislators must decide which type of plan best complies with their state's constitutional requirements and which would have the greatest educational impact.

Second, equal-per-student funding does not necessarily result in equal education. For instance, in Abbott the New Jersey Supreme Court recognized that those urban neighborhoods labeled "special need" would require more funding that non-special need districts to achieve substantially similar levels of education. Abbott v. Burke, 693 A.2d 417 (N.J. 1997). Reasons for the additional funding included socio-economic factors such as family life that are not recognized by average school funding formulas. Simply stated, the environments surrounding children in the special needs districts hampered their learning potential. Now, while such socio-economic factors do not impact the structural integrity of school facilities, a similar principle still applies. Prospective implementation of legislation that would equalize school capital funding in the state of New Mexico would not, in theory, take into account the increased necessity for new or additional facilities in certain districts over others. To speak in terms of fairness or "equity," these districts would require what you might call "head-start funding" just to put them on a level playing field. Such a plan would then begin to bridge the gap between equity and adequacy.

A third consideration for equity-based funding formulas is the impingement upon local control that would occur. New Mexico, as well as most other states, has delegated its educational responsibilities to local school districts. Such delegation indicates that local oversight of school processes is a valued state interest. This interest must be balanced with the disparities in available resources that inevitably result due to the differences in district property values. Consider the following three options: (1) the state could assume full responsibility for collecting and distributing revenues necessary for public education and eliminate local control altogether, Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy,* 68 Temp. L. Rev. 1151 (1995), citing, Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Sage,* 28 Harv. J. on Legis. 499, 499 (1991), (2) the state could consolidate school district tax bases to equalize per student spending, Id., thus still maintaining a degree of local control over the revenue produced, or (3) the state could require the wealthier districts to share property tax revenues with the poorer districts. Id. Such a plan might dampen the enthusiasm of the wealthier districts for raising revenues when they know that a good percentage of their money will flow to the poorer districts. All three approaches require states to sacrifice local control, at least to some extent, to achieve equalization.

Adequacy standards, on the contrary, seem to present fewer practical problems. As opposed to equalization of spending for the sake of fairness, the establishment of minimum standards of education defines what it takes to adequately educate students while identifying those districts that fail to comply. Schools that lack the ability to raise sufficient funds will receive state aid to ensure compliance with minimum standards.

Such a system seeks to ensure that everyone receives a good education, rather than an equal education, and can still allow for the retention of local control. Arizona's two-prong test best illustrates this point.

The first prong, you will recall, provides for legislatively proscribed sufficiency standards while the second prong ensures that the system itself is not the cause for funding disparities. Any differences between district funding that might result from a particular district's ability to exceed those standards would not be unconstitutional. The state's funding mechanism however, could not be the cause of that disparity. When applied to proposed legislation (the Students FIRST Act) the Court found that statewide sufficiency standards had been established. These included regulation of the basic physical infrastructure of school buildings, a mandate for compliance with local codes and a set of minimum gross square footage requirements. The Court's second prong however, invalidated the wrong prong, a scheme that provided for two local financing options on the grounds that the mechanism would preclude certain districts from accessing revenue sources available to other districts. The Court concluded a single funding mechanism had to be established.

New Mexico's Constitution, like Arizona's, provides for "a uniform system" of schools. The Arizona Supreme Court's determination that such language mandates minimum standards might lead one to conclude that New Mexico would reach a similar conclusion. Remembering that states have interpreted similar constitutional language to mean different things, one, on the other hand, cannot predict what meaning the New Mexico courts would give such language. It is safe to say, however, that the trend in school finance reform has shifted from equity to adequacy.