

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

FILED
DISTRICT COURT
MCKINLEY COUNTY
JAN 15 2002

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NO: CV-98014-II

THE ZUNI PUBLIC SCHOOL DISTRICT, et al.,

Plaintiffs,

THE GALLUP-MCKINLEY SCHOOL DISTRICT NO. 1, et al.

Plaintiff-Intervenors

v.

THE STATE OF NEW MEXICO, et al.

Defendants

REPORT of SPECIAL MASTER

Introduction and Summary

On October 14, 1999 this court, after considering the briefs and oral arguments of the parties, entered a Partial Summary Judgment, determining that, "[T]he current funding of capital improvements for New Mexico's school districts violates Article XII, Section 1 of the New Mexico Constitution". The court also found that the disparity in bonding capacity, and differing taxable land values among the school districts created a lack of uniformity for funding capital improvements. To remedy the constitutional violation and past inequities, the State was given until July 28, 2000 in which "to establish and implement a uniform system" for future capital improvements as required under

Article XII, Section 1 of the Constitution.¹ Finally, the court reserved jurisdiction to review any plan developed by the State, and to impose sanctions for failure to adopt “an adequate and constitutional funding system.”

Subsequently, the court convoked a Status Conference with counsel on December 19, 2000, and was presented with a report of the Public School Capital Outlay Task Force. A Memorandum commemorating the conference was filed on February 14, 2001 (State Exh. 2, last entry). Paragraphs 6 and 7 of the Memorandum signed by Judge Rich state as follows:

6. This court found this report and its recommendations as presented by Task Force Chairman Dean Robert Desiderio to reflect a substantial and good faith effort.
7. This court further recognizes that any ultimate solution requires further legislative consideration and enactment.

A copy of the Report of the Public School Task Force dated December 2000 is included with this filing as State Exh. 8.

In 2000 House Bills 31 and 32 (Pltfs.’ Exh. 5 and 6) were signed by the Governor and provided for the use of supplemental severance tax bonds for the funding of public school capital projects. On April 5, 2001, Senate Bill 167 was signed by the Governor which provides for considerable programmatic changes and very substantial additional revenues to help service the capital needs of the public schools (State Exh. 13) primarily through supplemental severance tax bonds.

On April 18, 2001, approximately two weeks after S.B. 167 became law, Judge Rich convoked another Status Conference which resulted in the court determining that a special master “be appointed to delineate and hear the remaining issues and to hold and conduct such evidentiary hearings

¹ This section provides as follows: A uniform system of free public schools sufficient for the education of, and open to, all children of school age in the state shall be established and maintained.

as are necessary" (State Exh. 2, first entry). On May 8, 2001 pursuant to Judge Rich's Order, the undersigned was appointed as special master.

On or about July 2, 2001 in a motion filed by the plaintiffs, the issue for decision was framed as follows:

The Plaintiffs and the Plaintiff-Intervenors now request the Special Master to hear testimony and other evidence as to whether the Defendants have complied with the court's order of developing and implementing a uniform system for funding capital improvements for New Mexico school districts.

However, as noted above, under paragraph 5 (p. 4) of the Partial Summary Judgment, the State was also required to have in place a uniform system by July 28, 2000, almost a year before the filing of the motion.

After a conference with counsel on June 14, 2001 at which time certain ground rules for a merits hearing were set, the hearing on the above issue was convoked in federal court in Albuquerque on October 24, 2001 which lasted for two and one-half days. During the hearing the following witnesses were heard by me:

Paul Cassidy, Dain Rauscher, financial analyst,

Margaret Garcia, Zuni School Board Member,

Janet Peacock, Chief Economist for the Legislative Council Services,

David Cockerham, Zuni Superintendent of Schools,

Robert J. Desiderio, Dean of the UNM Law School

and co-chair of the Public School Capital Outlay Task Force,

John Samford, Asst. Supt. of Business Services for the Gallup-McKinley Schools,

Kenneth Martinez, State Senator,

Larry Binkley, Financial Officer, City of Gallup,

Dr. Forbis Jordan, a School Financial Reform Expert Witness,
Steve Burrell, State Director, Public School Capital Outlay Unit, and
Paula Tackett, Director, State Legislative Council, and
Chair, Public School Capital Outlay Council

In addition, all exhibits offered by the parties were admitted in evidence and are included herewith for filing with the Clerk.

Based on my hearing the testimony of the witnesses, reviewing the transcript of most of the testimony, and reviewing the voluminous exhibits, I have concluded that for the reasons outlined in the accompanying Findings of Fact and Conclusions of Law, the state is to the extent possible under the circumstances, complying with the court's order requiring the development and implementation of a uniform system for funding capital improvements for New Mexico school districts. However, it is premature to completely judge the adequacy of the state's response to the court's Order. More time is needed to determine the efficacy of the state's deficiency corrections program, the adequacy standards for school facilities which must be adopted by September 2002, and the revenue streams for the funding of capital projects. What can be said at this point is that the state is engaging in a good faith attempt to rectify what all parties agree to have been a past failure to provide adequate resources for the funding of capital programs for the education of our children. Related to this failure is the inability of the plaintiffs to raise meaningful capital funds. Additionally, these poor school districts lack the political clout to fund needed capital projects with money generated by direct appropriations from the legislature, otherwise known as "pork". This practice conflicts with the constitutional principle requiring that a uniform system be in place for the education of our children.

The legislature will be meeting again in January. Notwithstanding the events of September 11th, it has the opportunity to address the issue of pork in order to insure a fair approach to the funding of our state's capital needs for its school-aged children. Nevertheless, based on the testimony of all of

those who are working within the system on the matters in issue, I find that the state is attempting in good faith to establish and implement a sufficient uniform system for the funding and development of capital projects in our school districts.

I recommend to Judge Rich adoption of the foregoing views, as well as the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

All parties agree that prior to the year 2000, the capital funding process for school districts was at least inadequate or non-existent for many, if not unfair and discriminatory (Tr. 92, 525-526).

II

Noting that a district court had ruled the system of funding capital improvements for New Mexico school districts to be unconstitutional, Senate Joint Memorial 21 was passed in 2000 during the second Special Session of the 44th Legislature (Pltfs'. Exh. 4). It essentially provided for the appointment of a Task Force (sometimes referred to as a "Blue Ribbon Commission") to analyze the state's capital funding process, and to study options for a continuing funding mechanism therefor. In addition, the Task Force was to analyze the financial impacts of those options, and consider the differing property values in the various districts.

III

The Work Plan adopted by the Task Force required it to review the current and future needs for public school outlay projects, to review issues relating to federal "impact aid" funds and other revenues

received by school districts, and to develop and analyze the funding options as stated above (State Exh. 8, App. B).

IV

Throughout 2000 the Task Force conducted over ten public meetings regarding the details of the Work Plan (Id., App. C).

V

In December 2000 the Task Force issued its Report to the legislature (State Exh. 8). In summary, it recommended immediate state action to correct health, safety, and code violations in New Mexico schools, make necessary maintenance and repairs, and provide funding for Critical Outlay (Id. App. D, Table 1). The total recommended for funding these projects was more than \$550 million over a four-year period. Commencing in FY 05 through FY 06, funding for maintenance and repairs would be \$89 million in supplemental severance tax bonds, and funding for Standards-based Capital Outlay would be at \$100 million per year by the utilization of supplemental severance tax bonds, and other sources.

VI

On April 5, 2001, in response to the Task Force Report, the legislature passed and the governor signed Senate Bill 167 which is one of the most dramatic actions ever taken by the state to remedy disparities of capital funding among New Mexico school districts (Pltfs'. Exh. 13; Tr. 466). Under its provisions outstanding, serious deficiencies affecting the health and safety of students is first addressed on a priority of need basis, financed entirely by the state over a three-year period through supplemental severance tax bonds. This source of funding should be permanent, without a cap, and generate \$65 to \$75 million a year for at least the next five years unless the statute is changed (Tr. 130-131). If not, this funding should continue indefinitely without the need to seek annual appropriations from the legislature, but subject to the market price of minerals sold (Tr. 469).

VII

Under S.B. 167 two hundred million dollars was appropriated to provide the initial funding for correcting health and safety deficiencies of facilities on a priority of need basis until the end of 2004 (Tr. 494-495). In addition under S.B. 9 another \$14 million a year will be available for other maintenance and repair needs (Id.). In summary, the State expects to spend \$70 million per year in Public Outlay for the next ten years and "two and \$300 million" in additional funding for correction of deficiencies (Tr. 530).

VIII

The following sums under the Capital Outlay Act were distributed or projected in the years indicated for the funding of capital projects in New Mexico School districts (Tr. 425-426):

1998 - \$17.5 million

1999 - \$33.5 million

2000 - \$33 million

2001 - \$103 million

2002 - \$118 million

IX

State Exh. 14, second entry, demonstrates the very substantial increases in capital funding since 1998 for the plaintiff school districts from the Public Outlay Fund. Since 1998, through August, 2001, the following sums were received by the plaintiff school districts:

Grants-Cibola - \$4,950,000

Gallup-McKinley - \$5,200,000

Zuni \$9,230,000

Total - \$19,380,000

In October, 2001 the following additional sums from the Public Outlay Fund were distributed to the plaintiff school districts (Tr. 430-431):

Grants-Cibola	\$6,000,000
Gallup-McKinley	\$8,100,000
Zuni	\$1,700,000
Total	\$15,800,000

Combining the two amounts results in a total amount of \$35,180,000 having been received by the plaintiff school districts from the Public School Capital Outlay Fund since 1998. It does not include significant matching funds under S.B. 9, and Impact Aid which are also shown on the exhibit.

X

Under S.B. 167 (Pltfs.' Exh. 13 at p. 16), the state must issue statewide adequacy Standards for facilities applicable to all school districts. The Standards must establish the minimum acceptable level for the physical construction and capacity of buildings, the educational suitability of facilities, and the need for technological infrastructure. During the hearing the latest draft of the Standards with revisions up to October 1, 2001 were admitted in evidence as S.M. Exh. 6.

XI

The Standards are too detailed and diverse to summarize the content, and plaintiffs' counsel did not have access to them until they were admitted. However, an attachment to the exhibit indicates that at least five public hearings have been held at various locations in the state, and numerous groups and individuals have been consulted on matters affecting the Standards. While the State Superintendent of Public Instruction believes that the Standards require a high level of quality in the facilities (Tr. 525), the Public School Capital Outlay Council may waive, supplement, or modify a Standard as needed (Tr. 505). The goal of the Standards is not to achieve uniformity; "our goal is to achieve a uniform system" (Tr. 231). The Standards have been developed by many technical experts working with a

subcommittee of the Council (Tr. 509-510). At this time, the Standards are a “work in process” (Tr. 157-158); however, the statute requires that they be issued no later than September 1, 2002 (Pltfs.’ Exh.13, p. 16).

XII

Once the Standards are adopted and issued, school districts may apply to the Capital Outlay Council for the funding of projects (Tr. 140-141, 415-416, 442). Using a computer model and data base the proposals will be ranked according to need based on a comparison of the condition of a facility as compared to the applicable Standard thereby establishing priorities in the funding process (Tr. 467, 484).

XIII

Over forty states have been litigating constitutional issues similar to ours regarding the requirement that New Mexico maintains a uniform system sufficient for the education of our children. While the wording of the constitutional provisions may vary from ours, it appears that there are basically two approaches for settling the constitutional debate: Equity v. Adequacy. From Dean Desiderio’s perspective, practically all of which I credit and endorse, the equity approach of providing equal-per-student funding does not result in equal education because of the disparities related to special needs throughout the school districts, and the adequacy approach presents the best method for the funding of projects (State Exh. 8, app. E at p.6). The equity approach also tends to sacrifice local control to some extent (Id. p.7).

In contrast, adequacy standards present fewer practical problems. As Dean Desiderio points out, the “establishment of minimum standards of education define(s) what it takes to adequately educate students while identifying those districts that fail to comply” (Id.). Funding for those districts lacking resources will be provided by the state in order to meet the Standards. He adds that our sister

state Arizona is also required to provide a uniform system for the education of students and highlights the two requirements that must be met in order to withstand a constitutional challenge: 1) there must be adequate facility standards coupled with state funding for the projects not in compliance therewith, and 2) the funding mechanism must not cause substantial disparities between districts. To Dean Desiderio, adequacy standards translate into quality education for every student (Tr. 212). Finally, he states that the "trend in school finance has shifted from equity to adequacy" (State Exh. 8, app. E, p.8).

XIV

It will take at least three to five years in order to bring all facilities in the state up to an adequate level. When this is accomplished, it is contemplated S.B. 9 funding will be at a sufficient level to provide maintenance and repair funding of the facilities for the indefinite future (Tr. 210-211).

XV

The state must continuously monitor to assure that whatever it takes must be done to provide a quality education (Tr. 212). Dean Desiderio believes the Standards when adopted will contain provisions affecting at-risk and special education students (Tr. 217). Also, a status report apparently was made to the legislature in December 2001 on the work of the Task Force.

XVI

In 2000 the legislature passed and the governor approved direct appropriations, also known as "pork", for the funding of capital projects in certain school districts having political clout. Similarly, in 2001 in excess of \$28 million of pork was passed by the legislature; however, the governor vetoed this legislation (Pltfs'. Exh. 17, p. 3; Exh.18, p. 2).

XVII

Direct legislative appropriations or "pork" conflict with the constitutional provision which requires that the state provide a sufficient uniform system of education. Dean Desiderio is troubled by

it to the extent that unless changes are made, there will be “more and more cases like this” one because the system won’t work (Tr. 241). Similarly, Dr. Forbis Jordan, the State’s expert witness, testified that from a finance reform perspective, the use of pork can not be defended because it contributes to non-uniformity (Tr. 386). Finally, State Senator Kenneth Martinez testified that “pork” should be a recognized equalization element in the capital funding formula and should be handled in a similar manner to that used in the operational budget (Tr. 301-302). I adopt and credit this cited testimony of Dean Desidorio, Dr. Jordan and Senator Martinez.

XVIII

As noted by Judge Rich in his Memorandum of February 14, 2001 (State Exh. 2, last entry), I also find that the Task Force Report and recommendations evidences a “substantial and good faith effort” to address his concerns and rulings. Similarly, the work of the legislature in enacting S.B. 167, which appropriates very substantial funds for the purposes described in these findings, is further and continuing evidence of good faith. To this extent, and since Judge Rich specifically noted that in his memorandum that “any ultimate solution” will require further “legislative consideration and enactment”, I find the July 28, 2000 deadline for correction of the unconstitutional deficiencies to be unrealistic given the vagaries of the legislative process. I further find that all parties are acting in good faith to obtain a sufficient uniform system of education aptly described herein.

XIX

At this point the parties must wait for the Standards to be promulgated so that they may be applied to school districts’ inventory of needs, and be addressed in some priority fashion (Tr. 380). In short, more time is needed to see how the process develops before Judge Rich should impose any sanctions.

XX

All parties to this suit believe that the state has made great strides and efforts in an attempt to remedy the lack of capital funding for the school districts, especially the poorer ones (Tr. 552-554, 556). As Mr. VanAmberg put it: “the current system and as proposed is not too far off” (Tr. 559).

XXI

The attorneys were not only well prepared, but also presented their positions competently and professionally, both at the hearing and in their submissions.

Conclusions of Law

I

At the time this litigation was commenced, the state’s method of financing the capital needs of the school districts violated Article XII, Section 1 of the Constitution in that it created substantial and impermissible disparities among the districts, thereby perpetuating a non-uniform system for the funding of capital projects in our school districts.

II

Since 1998 the state has made a substantial effort to rectify the disparities as outlined in the Findings. While many improvements in our school facilities are still in the planning state, I conclude that at this time the state is in good faith and with substantial resources attempting to comply with the requirements of Judge Rich’s previous directions.

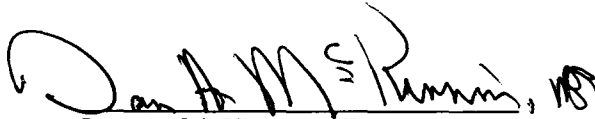
III

Because the use of direct appropriations necessarily removes substantial funds from the capital outlay process where merit and need on a priority basis dictate how funds are to be distributed, the state should take into account in its funding formula these appropriations as an element thereof.

IV

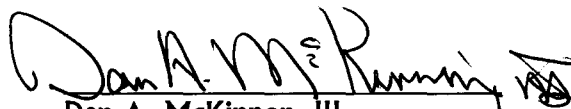
While the state has shown good faith, it should be required to account to this court in detail about the status of all of its efforts and programs to bring the state in compliance with our constitutional requirement. This should include a mechanism for periodic review of the adequacy Standards to insure that education needs are not judged by out of date Standards. The timing and frequency of such accountings is left to the court.

Respectfully submitted,


Dan A. McKinnon, III
January 14, 2002

Certificate of Service

I certify that on January 14, 2002 I mailed copies of this Report to the Honorable Joseph L. Rich, District Judge, and all counsel of record. I further certify that on the same date I mailed the original of this Report for filing together with a transcript of the hearing, and all exhibits introduced into evidence at the hearing to Ms. Francisca Palochak, Chief Deputy Clerk.


Dan A. McKinnon, III