No Cake for Zuni: The Constitutionality of New Mexico's Public School Capital Finance System

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[A]s a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts. Thus, the affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all.1

I. INTRODUCTION

Zuni Pueblo has a history of taking risks, at least in the modern period of its more than two thousand year existence. In 1980, after a fourteen-year community effort,2 Zuni Pueblo created the “first Indian-controlled independent public school system in the nation.”3 The vision of the Zuni Public School District is “to empower a community of learners who dare to dream, take risks and develop new realities.”4 Perhaps the Zuni Public School District envisioned itself taking on such a risk in 1998, when it challenged the State of New Mexico’s funding system for public school capital improvements and ultimately forced the New Mexico Legislature to develop a new reality for school financing.5

New Mexico, despite its relatively short history as a state, has also been known to take an occasional risk. In 1974, the New Mexico Legislature became one of the first in the nation to adopt a school financing system for operating expenses that funded public education according to an equalized formula rather than local property wealth.6 The financing system New Mexico created became a national model of equitable school finance. It was unique because the change in the funding structure was not the result of a lawsuit but instead was a studied, deliberate attempt to create an equitable system.

These two risk-taking and progressive bodies, the Zuni Public Schools and the State of New Mexico, collided head-on in the “Zuni lawsuit”7 challenging New Mexico’s school capital financing. In Part II, this Article presents a brief overview of school finance litigation, including the impact of school finance litigation on the struggle to integrate and equalize schools. In Part III, this Article will explore New Mexico’s constitutional guarantees for public education. This Article, in Part IV,

* J.D. 2005, University of New Mexico School of Law. Law Clerk for the Honorable Edward L. Chávez, New Mexico Supreme Court, 2006. Several of the sources cited in this article have been catalogued in our institutional repository. The abstract for this article as well as any sources we have digitized can be found at https://repository.unm.edu/dspace/handle/1928/3548.

5. See infra Parts V-VI.
6. See infra Part IV.C.
7. Throughout this Article I refer to the collection of pleadings, orders, and judgments relating to the Zuni claims as the Zuni lawsuit. When appropriate, I refer to specific documents filed in the lawsuit.
will then examine the methods New Mexico has chosen for financing public schools and the odd (or intentional) disparity in the New Mexico financing system between an equalized, equitable financing system for operational funding and an inequitable, primarily wealth-based financing system for capital needs. The details of the Zuni lawsuit, the inevitable result of the financing scheme described in Part IV, will be examined in Part V. In addition, Part VI of this Article critiques New Mexico’s efforts to create a new capital finance system. Part VII then considers the lessons learned from Arizona and Wyoming, two states with years of school finance litigation experience, and analyzes the New Mexico capital funding system as recreated by the legislature for its compliance with the requirements of New Mexico’s Constitution. This Article concludes with the author’s opinion that the new capital financing scheme does not comply with the requirements of the New Mexico Constitution. The New Mexico Legislature could, however, easily remedy the constitutional defects by apportioning the wealth of the State as a whole to finance both operating and capital school funding.

II. SCHOOL FINANCE LITIGATION—A SHORT OVERVIEW

The outcome of many years of school litigation in other states prior to the Zuni lawsuit is particularly instructive on what this court victory would in fact actually mean for education in New Mexico. School finance litigation has a long history, and many of the resulting decisions are closely intertwined with some of the most important developments in federal and state constitutional law. Two key developments include state constitutions as important and unique sources of fundamental rights above and beyond those provided by the U.S. Constitution and the role of the courts in determining whether legislative activity conforms with constitutional standards. While a full explanation of school finance litigation and its history is well beyond the scope of this Article, the following background provides context for New Mexico’s current struggle with school finance issues.

A. School Finance Litigation as a Legacy of Brown v. Board of Education

Any inquiry into school finance litigation must begin with Brown v. Board of Education. Some scholars assert that, in the fifty years since the Supreme Court decided Brown, the focus of school litigation has shifted from integration to equity, possibly even to a new form of “separate but equal.” The full body of rich scholarship on the history of Brown and the cases that preceded it, however, usually describe the goals of integration and equity as intertwined. As Judge Robert L. Carter, an attorney for the NAACP involved in the litigation of Brown, explained:

9. See generally id.
10. 347 U.S. 483 (1954) (holding that the doctrine of separate but equal had no place in public education).
"[T]he basic postulate of our... theory in Brown was that the elimination of enforced, segregated education would necessarily result in equal education."13 The school desegregation litigation strategy was designed to

bind[] the fate of poor and minority students to the fate of their advantaged white peers. School desegregation would create physical ties by placing black students in white schools and vice versa, such that minority students would necessarily benefit from the desire of white parents and legislators to provide for their "own" children.14

The hope was that seating the nation's children together in classrooms would tie their educational fates and opportunities together for the benefit of all. However, "[t]hings did not work out as planned."15 As Judge Carter wrote in a recent article, "With the 1954 declaration in Brown v. Board of Education, I believed the path was then clear for black children to receive an equal education. My confidence in the inevitability of this result now seems naive."16

Whether Judge Carter was naive or simply underestimated the resistance to desegregation,17 his distress at the results of Brown can perhaps be understood by looking at the results of desegregation litigation in the years following Brown. While the U.S. Supreme Court's "experimentation with integration" ended with Milliken v. Bradley (Milliken I),18 Milliken II set forth a new remedy involving court-ordered state funds for remedial education or reparations.19 "If the schools were going to be separate as a result of Milliken I, Milliken II seemed to hold out the possibility that they might at least be equal."20

Remedial funding became the goal; instead of achieving equality through integration, it would be achieved through additional funding.21 "Whereas school desegregation cases sought equality indirectly through integration, school finance cases directly attacked the apparent source of the inequality: the distribution of education resources."22 With school finance reform, the hope was that financial increases for advantaged students would mean financial increases for all students. While some of the original advocates for desegregation focused on integration as the long-term goal, even Judge Carter advocated a search for alternatives such as school finance reform:

15. Id. at 260.
17. Morgan, supra note 11, at 99 ("The first overwhelming realization I had upon reading the line of desegregation cases following Brown v. Board of Education was that white people really do not want to send their children to school with Black children." (footnotes omitted)).
18. 418 U.S. 717 (1974) (holding that a multi-district remedy for segregation was improper).
21. Id. at 262.
22. Id. at 259.
Thus, school finance litigation appears to be, at least in part, a response to the failure of Brown to create equal education through integration. Both strands of litigation—integration and financial reform—have always focused on the same goal: ensuring that the children of our nation receive the equal education to which they are entitled under Brown.

B. State Constitution-Based School Finance Litigation

At the time of this writing, lawsuits challenging state financing of public schools had been brought in forty-five of the fifty states. These school finance lawsuits usually were aimed at severing the tie between local property wealth and school funding. School finance litigation cases based on state constitutions have typically made a two-part state claim: first, that the state equal protection guarantees are violated by the wealth-based school finance system; and second, that the specific language of the education clause itself guarantees a certain level of educational services by the state. The arguments in state equal protection claims are based on education as a fundamental right because of the specific mention of education in the state constitution. While there is some debate over the extent to which the specific language of each state’s constitutional education clause affects the outcome of school finance litigation, it is clear that constitutional promises for “equal” or “uniform” or “general” school systems have required careful judicial consideration in the context of challenges to financing systems.

1. The “Equity” Model of School Finance Litigation

Most of the early school finance cases were based on the concept of equity of resources, demanding “substantial equality of educational funding for all schoolchildren.” Equity lawsuits were successful in many states in forcing a redesign of school financing structure based on the wealth of the state as a whole.

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23. Carter, supra note 13, at 621.
However, some of the earliest school finance litigation outcomes tend to demonstrate the truth of one commentator’s assertion that what successful school finance lawsuits have failed to do, however, is translate success in the courtroom into success in the classroom. Instead, often after prolonged and bruising legislative battles, a somewhat more equitable funding system is devised.

Ironically, it appears that the more plaintiffs succeed in weaning the school funding system from its dependence on local property taxes, the less money will be spent overall on education.29

In fact, one study released in 2004 found that the funding gap between districts in high-poverty and low-poverty areas was actually widening, "a striking reversal of progress made during the better economic times of the middle to late 1990s."30

2. The “Adequacy” Model of School Finance Litigation

The equity model’s failure to achieve results, despite courtroom victories, shifted the focus in school finance litigation. Instead of seeking equality in financing, some school finance reform advocates began to seek adequacy in financing to produce specific education results, such as statewide proficiency on standardized tests or increasing the percentages of students in the state who can read at grade level. Support for adequacy claims is found in state constitution education clauses that contain language guaranteeing an “adequate,” “complete,” or “sufficient” education, as well as in the general principle that states should provide enough funding for all students to be able to meet state standards.31 In addition, legislatures and courts are increasingly trying to determine the level of spending needed for a state to provide the education promised by the state constitution.32

While the movement toward “equity” in school financing following early school financing cases such as California’s Serrano v. Priest33 helped to define “substantially equal” as a low level of disparity in per-pupil funding among districts, the relatively new analysis of what it means to provide an “adequate” education has led to little consensus. For the past fifteen years, education finance experts have worked on research-based methods of quantifying the amount of money necessary to provide an adequate education.34 To date, thirty states have conducted “adequacy studies,” seeking to determine what it would cost to bring the majority of students up to a specified level of required performance.35

29. McUsic, supra note 27, at 105.
32. Olson, supra note 30, at 11.
33. Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); see also supra notes 8–9 and accompanying text.
35. Id.
There are four basic models for estimating the cost of state educational adequacy requirements: the "Professional Judgment" model, the "Successful Schools" model, the "Evidence Based" model, and the "Cost Function" model. The "Professional Judgment" model asks a group of educators to design model schools based on the best research available and to use those models to estimate the cost of actually creating such schools. The "Successful Schools" model employs experts to examine the expenditures of a state’s “most effective” schools, as defined by test scores, and assumes that school effectiveness could be replicated if similar expenditures were made in low-performing schools. The "Evidence Based" model looks at practices verified by research as effective, such as small class sizes, and estimates the cost of using those practices in all schools. The "Cost Function" model relies on statistical analyses created by economists to examine the relationship between current spending and student achievement as a means of determining what it would cost to bring all students to a particular level of performance.

Each of these models can result in an estimated cost of education per pupil that varies by thousands of dollars. In Maryland, for example, the Professional Judgment model estimated that annual per pupil expenditures would range from $7,461 to $9,313 depending on grade level, while the Successful Schools model estimated that the annual cost per pupil would range from only $5,910 to $5,969.

Just as educators and policy makers have learned through experience that educational “equity” is more complex than merely “equal,” the development of “adequacy” is also proving to mean much more than setting standards and assigning a dollar amount:

The concept of adequacy adds an additional complexity, requiring us to link cost calculations to decisions about minimally appropriate resource input levels and schooling outcomes. While defining equity is essentially a technical enterprise, moving to adequacy requires policy and value judgments about which achieving consensus, ultimately, may be more difficult.

In spite of this complexity, the myriad debates about equity or adequacy as a goal in school finance amount to a matter of perspective: what good is equalized funding across a state if funding alone is not enough to produce the education results the state desires for its children?

An example of this concern is evident in California, where the new education financing system adopted by the state after Serrano was designed to lower the disparity in per pupil spending among districts. Originally, the funding goal, after

36. Id. at 32.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Benigno Chavez, former principal of Washington Middle School, Albuquerque, New Mexico, in discussions with this author, frequently explained that “equal treatment of unequals is not equity.”
44. W. Norton Grubb & Laura Goe, The Unending Search for Equity: California Policy, the
the Serrano decision, was “to bring 95% of districts within $100 per pupil of the state average.”45 While the funding system has not achieved this goal, progress has been made and “about 97% of California students have attended schools in districts where the revenue limit funding per student was within about $350 of the other districts.”46 However, despite the passage of Proposition 13, which was intended to further rectify the disparity by “constraining the use of property taxes at the local and district levels,” Proposition 13 has had a negative effect “on both the overall quality of public education and on its equity.”47 Thus, in spite of a relatively low disparity between districts for education funding, the overall funding for education was inadequate to provide a basic education for every California student. The situation prompted Williams v. California, 48 an “adequacy” lawsuit filed in 1999 based on the guarantee in the California Constitution of a “free and appropriate education” for all California school children.49 The plaintiff in Williams asked the court to require the state to ensure a certain level of educational basics, including qualified teachers, safe facilities, and textbooks.50 The Williams case was settled by the State of California in 2004, with almost one billion dollars of new state money designated to benefit 2.3 million California public school students.51

Adequacy lawsuits create significant tension between state courts and legislatures, with state judges increasingly giving explicit instructions to legislatures on how much money the state must spend to bring education services to adequacy levels.52 In Wyoming, a state court decision has been interpreted to mean that the legislature must fund education as a priority over all other state needs.53 In Texas, a district court judge, later overruled by the Texas Supreme Court, ruled that the state school finance system was unconstitutional because it failed to provide enough funding “to close the achievement gap between white and minority students.”54

While legislators claim that court orders have been too generous to schools, advocates cite lean state budgets and intense political pressure to not raise taxes as...
the real problems. The hard, cold reality is that while our state constitutions may reflect what we would like for all children, current school funding systems reflect what we are actually willing to pay for. According to one lawyer representing school districts in Kansas, "Legislators are more inclined to uphold their oath to not raise taxes than to uphold their oath to uphold the state constitution."

III. THE NEW MEXICO CONSTITUTION AND ITS PROMISE FOR PUBLIC EDUCATION

Article XII, Section 1 of the New Mexico Constitution provides that "[a] uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." This short promise, made by the framers of the constitution to the people of the state, seems clear enough. The State will establish and maintain a free system of public schools, the schools will be "uniform," and they will be "sufficient" for the education of all school age children in the state. Yet upon further consideration, the provision appears less straightforward, raising more questions than answers. Perhaps the system will be uniform, but not the schools? And what exactly is a sufficient education, and how is it measured or reached?

New Mexico courts have not yet specifically construed the meaning of "uniform" or "sufficient" in the context of the education article of the state constitution. The only settled law relating to Article XII holds that "[i]f the districts are made so large that school children are unable to make the trip to school and back home each day, then they would be denied a free school just as effectively as if no school existed"; that Indian children have the right to attend state public schools; that only required courses must be free, while reasonable fees may be charged for electives; and that the New Mexico constitutional provisions for free public education do not give rise to a contractual relationship for which an individual may sue for breach of contract.

Long before the Zuni lawsuit was filed, other states and legal commentators spent years trying to interpret the education clauses of state constitutions during challenges to school financing systems. Every state constitution contains an education clause, and each state's clause offers its children some version of a promise for their education. Some of these state constitutional promises merely call...
for the establishment of public schools, while others emphasize the quality of education to be offered. In some cases, state courts in school finance litigation rely on a careful interpretation of the individual terms in the state constitution's education clause. The West Virginia Supreme Court, for example, defined the terms "thorough," "efficient," and "education" to require that students be prepared "mentally, physically, and morally for their future occupations and for productive citizenship," and that this should be done in a cost-effective manner. Similarly, the Texas Constitution provides: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." The Texas Supreme Court found that this education provision demanded substantial equality of educational opportunities by relying on statements made by the framers of the education provisions and the plain meaning of the text of the Texas constitution.

Many states share New Mexico's constitutional requirement of a "uniform" public school system. For example, Florida requires that "[a]dequate provision shall be made by law for a uniform system of free public schools"; Arizona instructs the legislature to "enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system," and Washington directs the legislature to "provide for a general and uniform system of public schools." When a state constitution's education clause uses the word "uniform," the issue in school finance litigation has not been a disagreement over whether uniformity means equality. Instead, the issue has been whether an equal or uniform school system requires equal spending. The California Supreme Court, for example, defined a uniform school system as "uniform in terms of the prescribed course of study and educational progression from grade to grade." The Arizona Supreme Court decided that "[f]unding mechanisms that provide sufficient funds to educate children on substantially equal terms tend to satisfy the general and uniform requirement," but that "[s]chool financing systems which themselves create gross disparities are not general and uniform." When a state constitution's education clause uses the word "uniform," the issue in school finance litigation has not been a disagreement over whether uniformity means equality. Instead, the issue has been whether an equal or uniform school system requires equal spending. The California Supreme Court, for example, defined a uniform school system as "uniform in terms of the prescribed course of study and educational progression from grade to grade." The Arizona Supreme Court decided that "[f]unding mechanisms that provide sufficient funds to educate children on substantially equal terms tend to satisfy the general and uniform requirement," but that "[s]chool financing systems which themselves create gross disparities are not general and uniform." While the meanings of the terms found in state constitution education clauses have been argued and discussed at length in school finance litigation throughout the United States, the issue has always focused on the same basic question: Does the

65. Id. at 340 n.4.
66. Banks, supra note 26, at 146 (citing Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979)).
67. TEX. CONST. art. VII, § 1.
68. Banks, supra note 26, at 147 (citing Edgewood Ind. Sch. Dist. v. Kirby, 777 S.W.2d 391, 395 (Tex. 1989)).
69. Edgewood Ind. Sch. Dist., 777 S.W.2d at 395 ("[The] meaning [of the word "efficient"] does not appear to have changed over time.").
70. FLA. CONST. art. IX, § 1(a).
71. ARIZ. CONST. art. XI, § 1(A).
72. WASH. CONST. art. IX, § 2.
73. McUsic, supra note 64, at 323. "Uniform" is defined both in the dictionary and by many state courts as something approximating identical or equal." Id. at 322.
74. Id. at 323.
75. Serrano v. Priest, 487 P.2d 1241, 1249 (Cal. 1971) (citing Piper v. Big Pine Sch. Dist., 226 P. 926, 928, 930 (Cal. 1924)).
state constitution require "some measure of equality that the state financing laws fail to provide, and perhaps cannot provide so long as they heavily rely on local property wealth"? This question lies at the heart of Zuni's challenge to New Mexico's school financing system.

IV. NEW MEXICO'S SCHOOL FINANCING SYSTEM
PRIOR TO THE ZUNI LAWSUIT

A. Overview of School Financing

The investment in public education in the United States is enormous—almost 500 billion dollars in combined federal, state, and local money was spent on public kindergarten through twelfth grade education in the 2003–2004 school year. The amount spent on education per child varies widely from state to state, district to district, and school to school. In 1998, the difference in funding per student between the state with the highest average level of school funding and the state with the lowest average was almost five thousand dollars. Even after adjustments for differences in the cost of living, New Jersey spent an average of $8,801 per student while Utah spent only $3,804 per student. In Vermont, district funding ranged from approximately $15,186 per student to only about $6,442 per student. This data shows that disparities in funding for education, while significant between states, may be even more unequal within a state.

The reasons for this disparity are rooted in the nature of American public schools, which historically have been considered local institutions. By the end of the nineteenth century, it was well established that public schools would be funded through local property taxes. Most states provided for school funding by dividing the state into a number of school districts with distinct boundaries and authorizing those districts to levy taxes on the real property located within the district. The amount generated for education funding depended on the assessed property valuation of the district and the rate of tax imposed. This process was examined in the foundational school finance case Serrano v. Priest, where the California Supreme Court discussed the school funding generated by two school districts, Baldwin Park and Beverly Hills, both located in Los Angeles County. In the 1968–1969 school year, Baldwin Park spent only $577.49 to educate each student.

77. See McUsic, supra note 27, at 104.
80. Id.
81. Id.
82. Id. at 6.
84. BIDDLE & BERLINER, supra note 79, at 12.
85. 487 P.2d 1241 (Cal. 1971).
86. Id. at 1248.
in the district, while Beverly Hills in the same year spent $1,232.72 per student.\textsuperscript{87} The difference in spending levels was rooted in the disparity in property wealth between the two districts. The assessed valuation per child in Baldwin Park was only $3,706 per child, while in Beverly Hills the assessed valuation per child was $50,885.\textsuperscript{88} Although the State in \textit{Serrano} argued that communities with less to spend on education had made a local choice reflecting the “desire for lower taxes rather than an expanded educational program,”\textsuperscript{89} the California Supreme Court rejected this argument, calling it a “cruel illusion” and finding that it was impossible for communities with less property wealth to make up the difference in spending by taxing at a higher level.\textsuperscript{90} The court noted:

> We cannot agree that Baldwin Park residents care less about education than those in Beverly Hills solely because Baldwin Park spends less than $600 per child while Beverly Hills spends over $1,200. As defendants themselves recognize, perhaps the most accurate reflection of a community’s commitment to education is the rate at which its citizens are willing to tax themselves to support their schools. Yet by that standard, Baldwin Park should be deemed far more devoted to learning than Beverly Hills, for Baldwin Park citizens levied a school tax of well over $5 per $100 of assessed valuation, while residents of Beverly Hills paid only slightly more than $2.\textsuperscript{91}

Thus, the historical method of funding schools through local property taxes has created widely disparate levels of funding for education based on variations in local property wealth.

Generally, public school funding consists of two separate expenditures: operational funds, which finance day-to-day operations including teacher salaries, electricity, and chalk, and capital funds, which provide for school buildings. Even as states began to take on more responsibility for financing educational operating expenses, most states, including New Mexico, considered the cost of school facilities to be a strictly local issue.\textsuperscript{92} Today, every state has its own unique statutory school financing system that sets out the rules for school operational and capital financing.\textsuperscript{93} These systems reflect each state’s commitment to public education, as well as state values related to statewide or local taxation, geographical determination of opportunities, and the power relationships between advocates for public education and all others seeking public funds. While some states have fought vigorously against all challenges to a local, property wealth based funding system, New Mexico’s choices have reflected a different approach.

\begin{itemize}
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id. at 1260 (internal quotation marks omitted).
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id.
\end{itemize}
B. New Mexico School Financing Before 1974

It is often said that none of the traditional rules apply in New Mexico, and this seems to be true with respect to New Mexico's history of school financing. While other states were relying primarily on local property taxes to fund their schools, early in its history, New Mexico shifted primary responsibility for school funding from local districts to the State.\(^4\) The territorial legislature established a school fund in 1891 to provide support for public schools, the newly established state legislature earmarked a substantial proportion of property taxes for schools in 1923, and state income and sales taxes were used to provide school support after property tax rates were cut in half during the Depression.\(^5\) All of these efforts demonstrate a willingness on the part of the State to shoulder a significant part of the burden of providing a free public education to its children.

Despite significant state participation in funding public schools, a complicated funding structure of shared mill levies by municipalities and school districts and the "ceding" of portions of the allowable levy to the schools resulted in differing levels of school support depending on assessed property valuation within each district.\(^6\) In the early 1960s the state legislature examined the wealth-based inequities among New Mexico's school districts and adopted a minimum support program to help the poorest districts.\(^7\) Even with this state intervention, the wealthier districts enjoyed large funding advantages.\(^8\)

One of the unique features of New Mexico school finance relates to the high acreage of federal lands located throughout New Mexico.\(^9\) Federal lands within the state include forest reserve land, military bases and other federal enclaves such as the Department of Energy's facility at Los Alamos, and tribal lands held in trust by the U.S. government. None of these properties can be taxed by the State.\(^10\) To compensate school districts that suffer a heavy impact from the presence of non-
taxable federal lands, the federal government provides those districts with funds under several different programs. Forest reserve funds are provided to twenty-two New Mexico counties; these funds consist of twenty-five percent of the net proceeds from operations on federal forest lands, usually from sales of timber. These proceeds are then split between the county road fund and the school district. The Department of Defense provides funds to some school districts to assist with increases in their student populations due to the heavy presence of military personnel, and Los Alamos Public Schools receives funding from the Department of Energy. The most significant federal program, in terms of both New Mexico school finance and the Zuni lawsuit, is usually called "impact aid" and is provided to school districts in lieu of property taxes for children living on tribal and federal lands and for children with parents working on federal property. Impact aid is also commonly referred to as "P.L. 874 funds."

By 1970, New Mexico's school districts were receiving only one-sixth of their operating funds from local property tax revenues, but these funds ranged from only $45 per student to $709 per student. Like other states, variations in local property wealth, rather than local tax effort, caused this wide range of difference in revenues. By the early 1970s, with school finance lawsuits moving through the courts in California and reaching the U.S. Supreme Court from Texas, New Mexico legislators began focusing their attention on school finance equity issues. In 1973, New Mexico Governor Bruce King directed the chief of public school finance and the state school superintendent to study the state's school funding system. Governor King also appointed a thirty-two member Advisory Committee on School Finance made up of legislators, including the Legislative School Study Committee (LSSC) members, and leaders and educators from all over the state. While other committees had previously studied the inequity in New Mexico's school financing, little action had followed. Commentators agree that an extraordinary confluence of factors, including the threat of a Serrano-type lawsuit, exceptional leadership by the governor and committee members, professional staff assistance with skills in technical policy making, legislative reapporitionment in 1972, and a thriving

101. BURRELL, supra note 100, at 11.
102. Id.
103. Id.
104. Id.
106. King, supra note 94, at 67 tbl. 1; see also Legislative Education Study Committee Minutes, June 28, 2004 (statement by Dr. Richard A. King, Professor and Director of the Division of Education Leadership and Policy Studies, University of Northern Colorado), available at http://legis.state.nm.us/lcs/lesc/lescdocs/June2004LESC Minutes.pdf.
107. See, e.g., BURRELL, supra note 100, at 3 ("The gap between rich and poor districts was enormous....").
109. Id. at 93.
110. Colton, supra note 97, at 28.
112. Id. at 93-94.
113. Colton, supra note 97, at 31.
state economy all led to the possibility that New Mexico would equalize its system of school financing.

C. New Mexico Equalizes Operational Funding

The Advisory Committee on School Finance was given two tasks: first, to define education needs in terms of costs and other factors; and second, to devise a school finance formula that would equitably fund this need throughout the state. The committee’s guiding philosophy was the equalization of educational opportunity for all children in New Mexico.

The ideas behind the goal of equalization of school financing were considered “radical” at the time. Perhaps most radical was the idea that the funds available to a school district should be based on need, rather than school district wealth and property tax effort. This concept, called “fiscal neutrality,” reduces the relationships between educational opportunities and school district abilities to fund programs. The Committee’s work was also guided by the idea that even though the state would be distributing most of the funds for education by using the funding formula as a distribution mechanism rather than as categorical funding, individual school districts could nevertheless maintain local control; once the State distributed the funds to the school districts, each district would have the discretion to decide how to spend the funds. In addition, the correlation between district property wealth and available education funding could be broken by implementing a uniform, statewide property tax levy and having the state “take credit” for most of the proceeds of the tax levy, as well as federal impact aid money.

One of the problems faced by the Committee was the “enormous” gap between rich and poor districts resulting from the existing difference in local property wealth. To enable the poorest districts to reach the spending levels of the richest districts would require huge amounts of money. Thus, while equalizing at the highest level appeared unreasonable and impracticable, the Committee members were concerned that equalizing at a lower level would require certain districts to lose revenue. Accordingly, the clear goal of the Committee’s work and ultimately the intent of the 1974 Public School Finance Act’s equalization guarantee was to “equalize financial opportunity at the highest possible revenue level” while minimizing loss to the richest districts “and to guarantee each New Mexico public school student equal access to programs and services appropriate to his or her educational needs regardless of geographic location or local economic conditions.”

The result of the Committee’s work was a funding formula that established a system of “program units” that were weighted to reflect the cost of providing

114. Id. at 34.
115. BURRELL, supra note 100, at 3.
116. Id.
117. Colton, supra note 97, at 32.
118. See id.
119. King, supra note 86, at 69-70.
120. Id. at 76.
121. Id.
122. BURRELL, supra note 100, at 3.
123. Id.
124. Id. at 5.
particular education services in New Mexico.\textsuperscript{125} Program units were made up of “memberships” reflecting the students in different grades, with more weight given to first graders than fourth graders,\textsuperscript{126} based on the different level of educational services needed in those grades such as smaller classes and primary reading instruction. Once the total number of program units needed in a district were calculated, the result was modified based on an index multiplier that recognized the training and experience of teachers in that district.\textsuperscript{127} Next, more modifications were made based on school size, district size, and other factors, such as the number of “at-risk” students and district enrollment growth.\textsuperscript{128} Eventually this formula produced a total program cost that determined the amount of the state equalization guarantee to that district.\textsuperscript{129}

The revenue side of this guarantee required the State to calculate the revenue coming into the district through a required half-mill property tax levy, plus any revenue generated by the district as impact aid and forest reserve funds.\textsuperscript{130} The State then took credit for seventy-five percent of the total revenue and subtracted the credit amount from the formula program cost.\textsuperscript{131} Each school district was guaranteed that its program cost would be funded.\textsuperscript{132}

Even with strong leadership, expert staff, and the support of key legislators, the Committee’s recommendation that the legislature adopt the new fiscally neutral funding formula was not instantly embraced by all. One basis of opposition was the inclusion of impact aid funds with the local tax contributions the state would take as credit toward the equalization guarantee.\textsuperscript{133} Districts heavily impacted by federal lands argued that this was a “supplanting” of federal funds prohibited by Congress.\textsuperscript{134} This was an issue on which the sponsors of the funding formula were not willing to compromise, and they went so far as to obtain approval from the U.S. Department of Education for including impact aid funds in the formula.\textsuperscript{135}

The general rule had been that states were prohibited from reducing the state aid they provided to school districts if those districts received impact aid.\textsuperscript{136} The 1974 amendment to the federal impact aid law included an exception that allowed states to be certified by the U.S. Department of Education as having a program of state aid that “equaliz[es] expenditures for free public education” among local districts, and states thus certified could consider impact aid in their education funding formulas.\textsuperscript{137} To determine whether a state is equalized, the current version of the impact aid

\begin{flushleft}
126. \textit{See id.} at 8.
127. \textit{See id.} at 5–6.
128. \textit{See id.}
129. \textit{Id.} at 6.
130. \textit{BURRELL, supra note 100, at 5.}
131. \textit{Id.}
132. \textit{See id.}
133. \textit{Krueger, supra note 108, at 94.}
134. \textit{See Colton, supra note 97, at 32.}
135. \textit{Krueger, supra note 108, at 94–95.}
\end{flushleft}
statute sets out a “general disparity test” that requires the spending between the state school district with the highest per-pupil expenditure and the state school district with the lowest per-pupil expenditure to be no more than a twenty-five percent difference.\textsuperscript{138}

The new school financing distribution formula became law in New Mexico in 1974.\textsuperscript{139} Since then, it has been considered “one of the most innovative of school finance plans in use across the country.”\textsuperscript{140} As one of the earliest attempts to equalize school financing, the New Mexico plan has received intense scrutiny for over thirty years. While the formula is considered a model of equalization, it is not without recognized shortcomings. The largest deficiency is that the formula is applied only to operating budgets—capital expenditures remain completely unequalized and dependent on local property wealth.\textsuperscript{141} Another shortcoming is the five percent of local and impact aid revenues not taken as credit by the state, which perpetuates some small wealth-based variations in local funds.\textsuperscript{142} The separate funding provision that creates a huge benefit for the Los Alamos school district has also been called an anomaly of the system.\textsuperscript{143}

There is no question that state legislation has substantially equalized school funding in New Mexico, with educational opportunities offered to New Mexico’s children through statewide taxation and operating funds distributed according to a formula rather than local wealth. The funding formula has been remarkably resilient, surviving thirty years of political maneuvering, legal challenges, and severe downturns in the state economy. At least one scholar attributes this resiliency to the policy choices incorporated into the 1974 legislation.\textsuperscript{144} These choices reflect the state’s values: in setting its goals of fiscal neutrality, full state assumption of school operational funding, and local control over the ultimate use of the funds, the state chose equity\textsuperscript{145} as a fundamental value.\textsuperscript{146} These fundamental policies are compatible with New Mexico cultural norms that “support[] equity, oppose[] property taxes, and celebrate[] local school board autonomy,” and therefore these fundamental

\textsuperscript{138} 20 U.S.C.A. § 7709(b)(2)(A); see also Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep’t of Educ., 393 F.3d 1158 (10th Cir. 2004), vacated, 437 F.3d 1289 (10th Cir. 2006), aff’d, 127 S. Ct. 1534 (2007) (challenging the measurement used by the State of New Mexico and the U.S. Department of Education to determine whether a state’s funding system is “equalized”). The U.S. Supreme Court held that, when determining whether the funding system is equalized, the Secretary has the authority “to identify the school districts that should be ‘disregarded’ by looking to the number of the district’s pupils as well as to the size of the district’s expenditures per pupil.” Zuni Pub. Sch. Dist. No. 89, 127 S. Ct. at 1537. While the outcome of this federal challenge does not directly impact the state Zuni lawsuit, it may be of great significance to the State of New Mexico, given the large amount of Impact Aid dollars currently used as part of the operating funding formula.

\textsuperscript{139} NMSA 1978, § 22-8-25 (1974).

\textsuperscript{140} Ball & Garcia, supra note 125, at 1.

\textsuperscript{141} Colton, supra note 97, at 33.

\textsuperscript{142} Id.

\textsuperscript{143} Id. Although Los Alamos was allowed to keep its special subsidy, its state entitlement was reduced. Id. at 33 n.19.

\textsuperscript{144} Id. at 53.

\textsuperscript{145} “Equity” in school finance litigation refers to the concept of equalization of resources, not to the legal term equity as in “law” or “equity.”

\textsuperscript{146} In fact, “Excellence and Equity in Education” is the vision statement of the New Mexico Public Education Department. N.M. Sch. Counselor Ass’n, New Mexico Comprehensive School Counseling Program Guide, http://www.nmsea.org/cpg/introduction.htm (last visited June 17, 2007).
choices have been largely unchallenged. In addition, the policy choice of including various weighted factors demonstrated that New Mexico's concept of equity would be more complex than equal dollars for each student and would embrace the idea that different students have different needs.

D. Capital Funding Ignored—New Mexico's Compromise?

New Mexico intentionally made a philosophical, fundamental commitment to equity with equalized operational funding, and yet left capital funding largely dependent on property wealth. While other avenues for capital funding exist, the primary method for capital funding on the local level is funding derived from taxes levied on property. This reliance on property taxes as a basis for capital funding creates a disparity between those districts with higher property values and those with lower values or those without property that can be taxed, such as property on Indian reservations.

Some commentators have stated that the Advisory Committee on School Finance intended that equalization of capital funding would be the next step after completion of the operational funding system. There is no definitive explanation as to why that next step was never taken. The result of the equalization of only operational financing had a very harsh effect on those districts with large tracts of federal land and therefore less taxable property. Prior to equalization of the operating funds, the federal impact aid funds given to school districts in lieu of property taxes on federal lands could be used by those districts for either operating or capital needs. When the equalization formula allowed the State to take credit for ninety-five percent of the impact aid funds, it meant that those funds, when returned to the districts as the state equalization guarantee, could only be used for operating expenses. That left the affected districts with only five percent of impact aid funds available for capital expenses; because impact aid funds are awarded to compensate for a lack of taxable property, these districts were also left with virtually no way to raise funds for capital expenses. As a result, the equalization of operating funds alone actually had an

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147. Colton, supra note 97, at 53-54.
148. See Burrell, supra note 100, at 10 (discussing the Public Schools Building Act, which provides for a tax on the "net taxable value of property").
149. See id. at 8-11 (listing the various funding methods available for capital outlay).
150. See, e.g., id. at 10 (noting that the Public Schools Building Act is "most useful for districts with high-assessed valuations and low bonded indebtedness").
151. Harry Wugalter, Director of Educational Finance in 1974, was reported to have said that "[t]he second phase of New Mexico's equalization efforts involves capital outlay, and we intend to provide to the 1976 New Mexico State Legislature a plan which will provide equity in this critical area of school support." Motion for Partial Summary Judgment, Gomez Affidavit at 1, Zuni Pub. Sch. Dist. v. State, No. CV-98-14-II (11th Jud. Dist. N.M. May 26, 1999) (on file with the New Mexico Law Review). David Colton also made a similar statement to this author, saying "capital funding was supposed to be next." Telephone Interview with David Colton (Feb. 14, 2004).
152. See U.S. Dep't of Educ., About Impact Aid, http://www.ed.gov/about/offices/list/oes/impactaid/whatisia.html (describing Impact Aid as general aid to recipient school districts that may be used for current operating expenditures or capital expenditures).
153. Motion for Partial Summary Judgment, supra note 151, at 4 (noting that impact aid funds are transferred to the state general fund) (citing Affidavit of Al Clemmons).
154. Id. at 5 ("Districts such as Zuni have virtually no assessable taxable property from which to raise capital improvement funds.") (citing Affidavit of Al Clemmons).
This scenario is especially curious in light of the fact that the most hotly contended aspect of the operating funding formula was the inclusion of ninety-five percent of federal impact aid with the local revenues. Clearly, this result was not unanticipated.

What is not clear is whether this result was intended. In describing the forces that converged to bring about New Mexico’s equalization of operating funds, one commentator mentioned legislative reapportionment in 1972, which gave new power to representatives from Albuquerque. Another commentator discussed the “losing districts” (those that would end up with less operating funds after equalization) as fighting hard against inclusion of P.L. 874 funds, indicating that the “losing districts” were recipients of a great deal of those funds. In addition, education funding in New Mexico prior to operating fund equalization was described as follows: “Additional operational revenue accrued in many districts which qualified for federal impact aid.” These statements tend to support the idea that the equalization scheme was intended to spread the benefits of the federal impact aid funds more widely throughout the state, even if that broad distribution was detrimental to those with little taxable property in their districts. Had capital funds been equalized, the property-rich districts would have been forced to spread their own wealth more widely throughout the state, just as the federally affected districts were required to do in the operating equalization.

This disparity between the statewide sharing of impact aid funds for the operating formula and the property-wealth-based system for capital funding became even more pronounced as a result of subsequent property tax cuts. When the operating formula was created, local contributions for operating funds consisted of property taxed at a rate of $8.925 per $1,000 of taxable property. With this level of local tax contribution, the contribution of impact aid revenue was only one-third of the entire revenue contributed to the general fund for distribution through the equalization guarantee.

After a succession of local property tax cuts, by 1999 New Mexico had decided the local tax rate could not exceed $0.50 per $1,000. This decision resulted in a significant reduction of local tax revenue. This reduction increased the proportion of impact aid funds to local tax revenue used for the

155. “A state funding formula that equalizes in part for the sole purpose of crediting Impact Aid against what a district would otherwise receive in state funding[,] is not in the spirit of what is good for children...” National Association of Federally Impacted Schools (NAFIS), Impact Aid Issue Brief #6, Section 8009—State Equalization, available at www.nafisdc.org/images/Impact%20Aid%20Issue%20Brief%206.pdf.
156. Colton, supra note 97, at 31.
158. King, supra note 94, at 68.
160. Id.
161. See id.
162. Id. For example, in 1976–1977 the local tax rate was 8.925%, and the resulting total tax revenue for the State was $36,064,952. Total impact aid funds directed to the impacted school districts for the same period were $19,960,965. By 1995–1996, the local tax rate was 0.5%, and the resulting local revenue was only $7,096,083. In contrast, the impact aid funds for the same period were $38,052,116. Motion for Partial Summary Judgment, supra note 151, Gomez Affidavit Exhibit E at 1.
operating system such that impact aid funds contributed almost eighty percent of the total "locally raised" operating funds for all districts statewide.\footnote{163}

It is unclear whether the two separate funding systems—an equalized system of operating funds and a property-wealth-based system for capital funds—were the result of bad intentions, legislative fatigue over funding issues, or a compromise that sacrificed capital needs at the expense of operating equalization. The end result is reflected in New Mexico's overall education system. While New Mexico prides itself on the equity of its public education, its children receive comparable education services for their educational needs in school facilities that are significantly unequal. By 1998, a study of the conditions of New Mexico's school facilities revealed statewide school capital outlay deficiencies of 1.5 billion dollars.\footnote{164} Further, the distribution of capital funding dollars varied considerably from district to district.\footnote{165}

In a system claiming to be equalized and equitable, this imbalance led inevitably to the challenge to New Mexico’s capital funding system by the Zuni Public School District.

\textbf{E. Funding School Capital Needs Before the Zuni Lawsuit}

Until the 1960s, the only method for financing school construction was through general obligation bonds as authorized through the New Mexico Constitution, which provides that school districts may borrow money for school buildings.\footnote{166} A few districts also received federal funds for federally impacted areas through P.L. 815.\footnote{167}

In 1963, some districts were experiencing such severe problems in raising funds to keep up with rising construction costs for school projects that the New Mexico Legislature attempted to provide assistance to districts for school facilities through the Public School Plant Facilities Commission.\footnote{168} By 1965, the Commission released new criteria for assistance eligibility that included future savings in state support for the district and feasibility of the project.\footnote{169} To apply, a district in need had to have an assessment ratio (tax effort) equal to or higher than the statewide average.\footnote{170} With even more rapidly rising construction costs, the legislature created the 

\textit{Memorandum Brief In Support of Motion For Partial Summary Judgment, supra note 159}, at 5–6.


\textit{See Motion for Partial Summary Judgment, supra note 151, Clemmons Affidavit at 3.}

\textit{N.M. PUB. SCH. OUTLAY COUNCIL, ANNUAL REPORT 2002, at 3 [hereinafter OUTLAY COUNCIL REPORT]; N.M. CONST. art. IX, § 11.}

\textit{OUTLAY COUNCIL REPORT, supra note 166, at 3.}

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id. at 4 (internal quotation marks omitted).}

\textit{Id. (internal quotation marks omitted).}
the Public School Capital Outlay Act in 1978, with the purpose of meeting “critical” school district capital outlay needs.\textsuperscript{173}

At the time the Zuni lawsuit was filed, New Mexico school districts used three methods to raise funds for capital improvements. First, the district could use different types of property taxes to raise funds: the district could issue a general obligation bond of up to six percent of the assessed property value of the district,\textsuperscript{174} or it could hold a district election to produce a two-mill levy on the assessed value.\textsuperscript{175} When bond elections were successful, the State would usually add matching funds out of the Public School Capital Improvements Act through the state general fund.\textsuperscript{176} In addition, the district could conduct an election for up to a ten-mill levy on taxable property.\textsuperscript{177} Second, if the district had critical needs and was already bonded up to a certain capacity, the district could compete with other critically needy districts for capital funds through the Public School Capital Outlay Fund.\textsuperscript{178} Third, a district could attempt to go outside the statutory provisions for capital funds by trying to convince a local legislator to sponsor a Direct Legislative Appropriation to benefit a specific capital outlay project.\textsuperscript{179} While these distributions of “pork” by legislators were not enough for a district to build an entire school, the total direct legislative appropriations to school districts from 1992 to 1998 amounted to $63,835,939 and were a significant source of funds for the receiving district.\textsuperscript{180}

These three methods for raising capital funds generated a total estimated capital outlay budget of $425,517,386 in the 1999–2000 school year alone.\textsuperscript{181} Eighty-four percent of capital outlay funds were raised through local tax efforts, with only fourteen percent coming from the state and just two percent from federal funds.\textsuperscript{182} In contrast, the percentage of local tax revenue raised in 1998 to 1999 for the operating funding system was only 0.64 percent of the total operating revenues.\textsuperscript{183} Thus, in 1998, New Mexico had in place two completely separate financing systems for its schools, with the capital system dependent on local property wealth and the operating system dependent on the combined wealth of the entire state, including federal impact aid funds. The question raised by the Zuni Public School District was whether the capital system, based on local property wealth, violated the promise for a uniform system for public schools found in the New Mexico Constitution.\textsuperscript{184}

\textsuperscript{173} Id. at 5 (internal quotation marks omitted).
\textsuperscript{175} Public School Capital Improvements Act, NMSA 1978, §§ 22-25-1 to -10 (2007).
\textsuperscript{176} Id. § 22-25-9.
\textsuperscript{177} Public School Buildings Act, NMSA 1978, §§ 22-26-1 to -8 (2007).
\textsuperscript{178} Public School Capital Outlay Act, NMSA 1978, §§ 22-24-1 to -11 (1975, as amended through 2007).
\textsuperscript{179} Burrell, supra note 100, at 10.
\textsuperscript{180} Motion For Partial Summary Judgment, supra note 151, Jackson Affidavit at 5.
\textsuperscript{182} Id.
\textsuperscript{183} Ball & Garcia, supra note 125, at 2.
V. ZUNI PUBLIC SCHOOL DISTRICT V. STATE OF NEW MEXICO:
THE ZUNI LAWSUIT

The Zuni Public School District sits entirely within the boundaries of the Zuni Pueblo, located in the western part of New Mexico in Cibola and McKinley Counties, approximately 150 miles west of Albuquerque. The school district serves more than 2,000 students through its schools, special programs, and Head Start. Ninety-nine percent of the district’s students are enrolled members of a Native American tribe.

Property within the Pueblos and other Indian reservations that is owned by Indians or held in trust by the federal government for Indians cannot be taxed by the State. Because the Zuni School District is located entirely within the boundaries of the Zuni Pueblo, there is very little property within the district subject to state taxation. At the time the lawsuit was filed, the assessed taxable property within the school district consisted of some transmission and utility lines and a few mobile homes owned by non-Indians, with a total assessed value of $2,028,590. At maximum bonding capacity under state law, Zuni Public Schools could generate $121,715 in capital funding. The assessed value per student in the Zuni school district was $1,198.

With ninety-five percent of the federal impact aid funds claimed by the State of New Mexico for use in the statewide funding formula for operating expenses, Zuni Public Schools was not able to pay for capital improvements and had limited options available for raising capital funds. The school district applied to the State for an appropriation through the critical capital outlay fund, but after several years the district had not received sufficient state appropriations for its capital improvement needs. The district might have tried to use its local legislator’s influence to obtain a “direct appropriation” from the legislature, but this was not a reliable source of capital funds and Zuni Public Schools had received no direct appropriations between 1992 and 2000. With old, crumbling, asbestos-laden facilities and a desperate need to build a new high school, Zuni Public School District was out of options. In 1998, the District filed a lawsuit in the New Mexico District Court of McKinley County challenging the State’s funding system for public school capital outlay.

The plaintiffs in the Zuni lawsuit originally included the Zuni Public School District and five students from the district. Their complaint alleged that New Mexico’s statutory scheme for financing public school capital outlay violated the plaintiffs’ rights under both the New Mexico Constitution and the U.S. Constitution.

185. Zuni Public School District, ZPSD Background, supra note 3.
186. See supra note 100 and accompanying text.
187. Motion for Partial Summary Judgment, supra note 151, Gomez Affidavit at 6; id. Clemmons Affidavit at 3.
188. Motion for Partial Summary Judgment, supra note 151, Gomez Affidavit at 6.
189. Id. Gomez Affidavit at 6.
190. See supra notes 152–154 and accompanying text.
191. Motion for Partial Summary Judgment, supra note 151, Gomez Affidavit at 5.
193. Complaint for Injunctive Relief, supra note 184.
due to the wide disparities in the ability of districts to obtain funds for capital improvements. The plaintiffs also claimed that the State had failed to offer sufficient educational opportunities as required by the New Mexico Constitution. Soon after the lawsuit was filed, District Court Judge Rich allowed two other nearby school districts, Gallup-McKinley and Grants-Cibola, to join the lawsuit as plaintiff-intervenors. Both of these school districts were also severely affected by non-taxable federal lands within their boundaries. Together, the plaintiffs moved for partial summary judgment, declaring that the capital funding system violated both the New Mexico Constitution and the U.S. Constitution.

Although the complaint targeted only the capital funding system, it was clear from the plaintiffs' arguments that they were frustrated by an equalized operating funding system that actually exacerbated the dis-equalization of the capital funding system. This frustration was due in large part to the fact that the affected districts contributed a disproportionate share to the operational costs of all districts but were then unable to raise funds necessary for capital improvements. The districts without significant federal lands, however, received the benefit of the federal contributions for their operating expenses yet still had an even greater capacity to raise local revenue through property taxes. According to the plaintiffs, the "constitutional mandate of uniformity" found in Article XII, Section 1 of the New Mexico Constitution was violated by this system, which caused a wide disparity in the ability of districts to raise funds for capital improvements. In their motion for partial summary judgment, the plaintiffs requested injunctive relief to prohibit the continuation of the current statutory scheme, as well as monetary assistance to bring the plaintiffs' districts up to an acceptable level of funding.

The State of New Mexico argued against partial summary judgment, claiming that the statutory scheme in question was moot because the legislature had recently amended the statute to reduce the withholding amount of the impact aid funds from ninety-five percent to seventy-five percent. According to the State, the amendment was significant because it resulted "in a 500% increase in money available for capital expenditures, under current law, when contrasted with the former law." The State also asserted that the statute and the system in question should be scrutinized using only rational basis review, apparently taking the position that

196. Id. at 8.
197. See id. at 1.
198. Id. at 4.
199. Motion for Partial Summary Judgment, supra note 151, at 2.
200. See Memorandum Brief in Support of Motion for Partial Summary Judgment, supra note 159, at 5-7 (discussing New Mexico's funding formula and its disparate impact on school districts).
201. Id. at 7.
202. Id.
203. Id. at 8.
204. Id.
206. Id.
education was not a fundamental right. Yet despite its recommendation for rational basis review, the State defendants failed to identify any state interest advanced by this system of capital funding. The State did, however, argue that "the current system is, when viewed as a whole, a fair and equitable system which has taken years of legislative effort to create, and which the relief requested by Plaintiffs would effectively dismantle." 208

In response, the school districts restated the issue before the court in the following terms: "Does the method provided by the legislature for funding educational capital improvements produce inequitable results to the point that the New Mexico Constitution, Article XII, Section 1, is violated?" 209 All they were seeking, argued the Zuni, Grants, and Gallup-McKinley school districts, was "a system which approaches equity in the funding of capital improvements." 210 This system was necessary, in part, because "Zuni, Grants and Gallup’s children are as important as the children in Albuquerque or in any other district. They are also no more important." 211

Judge Rich granted the school districts’ motion for partial summary judgment and held that "the current system for funding capital improvements within New Mexico’s school districts violates Article XII, Section 1 of the New Mexico Constitution." 212 The court then ordered the State to "establish and implement a uniform funding system for capital improvements," as well as to correct "existing past inequities." 213 The State, in completing this task, had to comply with the mandates of Article XII, Section 1 of the New Mexico Constitution by July 28, 2000. 214 Under the additional terms of the order, the court reserved jurisdiction over all remaining issues, noting that it would review the State’s plan and might "later impose further appropriate sanctions or conditions for failure to establish and implement an adequate and constitutional funding system." 215 Judge Rich also indicated that the State was entitled to an immediate appeal. 216

Although the Zuni Public School District and the other plaintiffs had ostensibly "won" their lawsuit, it was much too early to start celebrating. Once Judge Rich declared the system of funding capital improvements unconstitutional, the State of New Mexico had two choices: it could appeal the decision or set about the task of creating a constitutional system. New Mexico made a deliberate decision not to appeal, based on the fear that an appeal might result in a more specific order by a

207. Id. at 8-9 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)). San Antonio held that education was not a fundamental right under the U.S. Constitution. San Antonio, 411 U.S. at 37-38. The Zuni lawsuit, however, was brought under both the New Mexico Constitution and the U.S. Constitution.
208. Defendant’s Answer Brief, supra note 203, at 10.
210. Id. at 5.
211. Id.
213. Id. at 4.
214. Id.
215. Id.
higher court on what the constitutional system should contain.\(^{217}\) Instead, the state legislature created the Public School Capital Outlay Task Force and gave it the responsibility of designing a new capital financing system.\(^{218}\)

VI. NEW MEXICO’S EFFORTS TO CREATE A NEW CAPITAL FINANCE SYSTEM

A. The Goals: Equity or Adequacy?

In response to Judge Rich’s ruling, in 2000, the New Mexico Legislature created the Public School Capital Outlay Task Force, a short term, statutory entity, and appointed twenty-one university, legislative, executive, education, and public representatives to analyze the issues of public school capital outlay in New Mexico and help develop a remedy for the Zuni lawsuit.\(^{219}\) The Public School Capital Outlay Council (PSCOC) was also formed as a permanent statutory body.\(^{220}\)

There are significant similarities and differences between the efforts made in the 2000 effort to create the new capital system and the 1973 effort to equalize operational funding. The members of the 1973 Advisory Committee on School Finance and the 2000 Task Force had similar backgrounds, coming from leadership positions in business, government, and education.\(^{221}\) As described in Parts IV.B and IV.C of this Article, the 1973 Advisory Committee faced two tasks: to define education need in terms of costs and to devise a school finance formula that would equitably fund those costs throughout the state.\(^{222}\) The 2000 Task Force was also charged with two tasks: to remedy the unconstitutional funding system by designing a uniform system for capital improvements and to correct past inequalities.\(^{223}\) The biggest difference between the assignments of the two committees is in the different ideologies underlying the respective projects. In 1973, the Committee’s “guiding philosophy was the equalization of educational opportunity for all children in New Mexico.”\(^{224}\) In marked contrast, the 2000 Task Force purposefully rejected the concept of equalization and chose as its guiding philosophy the concept of “adequacy,” defined as “the minimum acceptable level for the physical condition and capacity of school buildings, the educational suitability of educational facilities and the need for technological infrastructure.”\(^{225}\) The concept of “uniformity,” as found in Judge Rich’s order to the State to “establish and implement a uniform funding system for capital improvements,”\(^{226}\) was absent from the 2000 Task Force’s


\(^{218}\) Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 3.

\(^{219}\) Id. at 2–3.

\(^{220}\) Id.; NMSA 1978, § 22-24-6 (1994).

\(^{221}\) Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 2; Krueger, supra note 108, at 91.

\(^{222}\) See supra note 115 and accompanying text.

\(^{223}\) Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 3.

\(^{224}\) BURRELL, supra note 100, at 3.

\(^{225}\) Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 1 (citation omitted) (internal quotation marks omitted).

\(^{226}\) See supra note 213 and accompanying text.
assessment of its task. Instead, the 2000 Task Force focused only on the second part of New Mexico’s constitutional promise for education, a uniform system of public schools, “sufficient” for the education of New Mexico’s children.227

The adequacy concept was introduced to the 2000 Task Force with the argument that the State of New Mexico should intentionally create a capital funding system based on adequacy rather than equity.228 While acknowledging that equity had often been used as the standard for school finance reform, the Task Force focused on the “practical problems” that states had experienced when trying to equalize school financing, particularly in terms of a lack of local control over those funds.229 Equity was described as a system that could “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.”230

Minimum standards of education and funding usually refer primarily to those operational funds necessary to ensure that each student has competent and well-trained teachers, books, supplies, and curriculum, rather than just the bricks and mortar of school buildings.231 Furthermore, the concept of adequacy or sufficiency in school finance measures the minimum level of funding necessary to ensure each student an adequate education, while the concept of equity measures the disparity between what is spent within a state on students in different districts.232

The concepts of equity and adequacy are not in conflict, as a state could find that its financing system was adequate but not equitable, or equitable but not adequate. Surprisingly, however, New Mexico’s Task Force decided that the new financing system required the legislature to decide between adequacy and equity.233 This choice improperly described the requirements of the New Mexico Constitution, which, by mandating a “uniform system of free public schools, sufficient for the education of, and open to, all the children of school age in the state,” explicitly requires both uniformity and sufficiency. The Task Force’s exclusive focus on adequacy failed to correctly inform the legislature that uniformity was also a constitutional requirement.

This improper choice between adequacy and equity ignored the fact that New Mexico already had almost twenty years of successful experience with equalization of school finance in the operating system.234 The “local control” argument used by the Task Force, while popular in states resistant to equalization, had been proven to be a non-issue in New Mexico’s experience with operating funds. The 1974 committee carefully considered local control and decided to use the equalized

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227. See Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 1.
228. See Memorandum from Bob Desiderio, Dean, UNM Law School, & James La Fata to Public School Capital Outlay Task Force (July 25, 2000) (on file with the New Mexico Law Review) (analyzing historical and current school finance reform and concluding that “the trend…has shifted from equity to adequacy”).
229. Id. at 7.
230. Id.
231. See McCusic, supra note 27, at 136 (noting that adequacy lawsuits seek to ensure a particular level of educational achievement).
232. See supra Part II.B.1–2.
233. Desiderio & La Fata, supra note 228, at 5–6 (discussing practical problems that put equity and adequacy plans in conflict).
234. N.M. CONST. art. XII, § 1.
235. See supra Part IV.C.
funding formula as a distribution mechanism for getting money to school districts without categorical limits on spending. The formula dictated the amount of funding a district would receive, but the district's use of such funding was subject to local preferences.\textsuperscript{236} With local control already a central feature of New Mexico's equalized operating funding formula design, it is troubling that the 2000 Task Force used this argument against designing an equity-based capital financing system.

One of the other arguments considered by the Task Force was that "equal-per-student funding does not necessarily result in equal education," based on the different needs of children with varying socio-economic backgrounds.\textsuperscript{237} This argument against an equitable capital financing system had no validity given New Mexico's experience with school financing: adequacy and equity are not mutually exclusive concepts, and New Mexico's operating funding formula had already successfully managed to accommodate financing for students with differing needs.\textsuperscript{238} In addition, this argument overlooked the New Mexico Constitution's education clause requirement of both uniformity and sufficiency.\textsuperscript{239} Nevertheless, the arguments against equity persuaded the 2000 Task Force, which decided to endorse the concept of adequacy and recommended that New Mexico's new capital funding program should be based on adequacy rather than equity standards.\textsuperscript{240} This choice of adequacy as the "guiding philosophy" affected the creation of the new capital funding system, just as the goal of equal educational opportunities had guided the 1973 Advisory Committee almost thirty years earlier.\textsuperscript{241}

**B. The Legislative Response**

Once the Task Force decided that adequacy would be the guiding principle of the new capital financing system, the framework of that system began to appear. First, in 2000, funds were made available through the use of supplemental severance taxes to address immediate capital needs as an interim solution.\textsuperscript{242} The New Mexico Department of Education, on behalf of the PSCOC, contracted with 3D/International to conduct an assessment of all schools in the state in order to create an "index" of school facility conditions.\textsuperscript{243} This index would be used to determine the baseline for adequacy as well as to identify those schools with serious health and safety deficiencies.\textsuperscript{244} A "deficiencies correction unit" was created to develop a system for ranking and allocating funds to districts to correct health and safety deficits.\textsuperscript{245} School districts were allowed to receive these deficiency correction funds regardless of their level of bonding; even if they were bonding themselves at much less than

\textsuperscript{236} See supra notes 118–120 and accompanying text.
\textsuperscript{237} Desiderio & La Fata, supra note 228, at 6.
\textsuperscript{238} See supra notes 144–147 and accompanying text.
\textsuperscript{239} See supra note 234 and accompanying text.
\textsuperscript{240} See Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 1.
\textsuperscript{241} See supra notes 224–225 and accompanying text.
\textsuperscript{244} 3D/International, supra note 242, at 2–3.
\textsuperscript{245} Id. at 3.
full capacity, the district could still use these supplemental state funds for basic needs.\textsuperscript{246}

In 2001, the legislature passed Senate Bill 167, the substantive legislation that defined New Mexico’s new capital financing system.\textsuperscript{247} The legislation “embraced the legal concept of adequacy, rather than equity, as the measure for interpreting the constitutional requirement of a uniform system of free public schools.”\textsuperscript{248} Senate Bill 167 covered both the short-term deficiencies correction program and the long-term “critical capital outlay” program, which was the new system for school districts to receive state funding for capital projects.\textsuperscript{249}

The capital outlay program is similar in many respects to the original, unconstitutional funding program; the primary differences are that the state funds available are vastly expanded,\textsuperscript{250} and school districts need not be bonded to a specific capacity in order to receive funds.\textsuperscript{251} Under the old system, districts were responsible for raising capital funds through local taxes. If the district could not raise sufficient funds after maximum tax effort, the district could apply to the State and compete with other property-poor districts for funds, which might be awarded if the State determined that the needs were “critical.”\textsuperscript{252} Under the new Senate Bill 167 program, school capital outlay projects would “be shared between the state and local districts on a formula basis” and awards would be granted to school districts based on statewide adequacy standards.\textsuperscript{253} Under this system, the State would fund capital construction if the need was identified by the Facilities Condition Index, and then only to the level of adequacy. Districts identified with the most critical need would be funded first.\textsuperscript{254} Districts requesting state funds would therefore continue to compete with each other for limited capital funding, although the total amount available would be more than under the old system. If a district wanted more than state-defined adequacy, it would have to pay for that portion of construction costs with its own locally generated funds.\textsuperscript{255} It was the goal of the PSCOC that the average share of funds contributed by the districts would be fifty percent, with the State contributing a minimum of ten percent.\textsuperscript{256}

\begin{thebibliography}{99}
\bibitem{248}Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 3–4 (citation omitted) (internal quotation marks omitted).
\bibitem{249}Id.
\bibitem{250}See \textit{Outlay Council Report}, supra note 166, at 8 (indicating that in 1999 to 2000, public school capital outlay appropriations by the State were only thirty-three million dollars, but jumped to $104,485,647 by 2002/2003).
\bibitem{251}Id. at 5–6.
\bibitem{252}See supra notes 171–173 and accompanying text.
\bibitem{253}Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 4 (discussing S.B. 167).
\bibitem{254}Burrell, supra note 100, at 8.
\bibitem{255}See NMSA 1978, § 22-24-5(B)(9)(e) (2007) (“[T]he school district [must be] willing and able to pay any portion of the total cost of the public school capital outlay project that, according to Paragraph (5), (6) or (8) of this subsection, is not funded with grant assistance from the fund....”).
\bibitem{256}See State of New Mexico, Legislative Education Study Committee Memorandum, at 3 (2006), available at legis.state.nm.us/lcs/lesc/lescdocs/briefs/october2006/Item%208.pdf.
\end{thebibliography}
While the New Mexico Legislature stated that its intention for Senate Bill 167 was to provide for a uniform capital funding system in conformity with New Mexico's constitutional requirements, the legislation focused primarily on providing a permanent revenue stream for capital funding, as well as a process for "sharing" responsibility between the State and local districts based on statewide adequacy standards. The legislation provides that all school districts will be eligible to apply for state funding regardless of their level of bonded indebtedness and that the amount of the state award will be based on the new formula, using the relative tax base and local effort as factors for determining the local share required. Although the legislation states that adequacy standards will be formulated, there is no indication of how these standards will be tied to actual educational outputs or educational needs.

The 2003-2004 report of 3D/I, the contractor chosen to conduct the facilities condition assessment, indicated that the "Facilities Conditions Index," based on a common standard in the building industry, had been modified to include the state's adequacy standards. The only adequacy standards explicitly mentioned in the report relate to facilities and space and equipment but do not discuss the level of educational attainment or educational adequacy to be achieved with these standards.

C. First Review by the Court of the New Capital Financing System

At the request of the Zuni lawsuit parties, Judge Rich appointed a Special Master to conduct a review of the State's progress in developing a new capital financing system. The Special Master, former New Mexico Supreme Court Justice Dan McKinnon, conducted an evidentiary hearing in late October 2001. Zuni Public Schools and the other plaintiffs informed the Special Master that, although "the legislature is to be commended for being committed to a substantial increase in funding for capital improvements,... this legislation does not comply with Judge Rich's mandate and will perpetuate and increase the disparity in the ability of districts to provide for capital improvements." The plaintiffs raised three primary concerns about the new capital financing system. The first issue concerned direct legislative appropriations, commonly known as "pork," which are appropriations brought by legislators to their districts to fund capital projects of the district's choice. While the funds available for school capital funding were expected to be about sixty-five million to seventy-five million dollars per year, "pork" appropriations during legislative sessions are usually much higher, with 270 million

257. NMSA 1978, § 22-24-5(B).
258. See generally Public School Capital Outlay Funding Events and Accomplishments, supra note 164 (discussing S.B. 167).
259. 3D/INTERNATIONAL, NEW MEXICO K-12 STATEWIDE FACILITIES CONDITION: FINAL REPORT FOR FISCAL YEAR 2003-2004, at 12-13 (2004). The concept of a "Facilities Conditions Index" was originally developed by the U.S. Navy and is now widely used in various forms by various building industry associations. Id. at 13. Although the report does not discuss educational goals, it does recognize that the purpose of facility funding is to "provide a quality education for New Mexico's students." Id. at 24.
260. Id. at 13. Although the report does not discuss educational goals, it does recognize that the purpose of facility funding is to "provide a quality education for New Mexico's students." Id. at 24.
262. Memorandum for Special Master, supra note 192, at 4.
263. Id.; see also supra notes 179-180 and accompanying text.
dollars appropriated in 2001.\textsuperscript{264} The plaintiffs argued that direct appropriations made to school districts would perpetuate the substantial disparities in capital facilities, particularly when the appropriations were made without regard to a district’s ability to pass bonds and provide for its own capital construction.\textsuperscript{265} According to the plaintiffs, “The magnitude and arbitrariness of this practice makes any system which does not take this into account or eliminate it by definition not uniform.”\textsuperscript{266}

Next, the plaintiffs addressed the question of whether “adequacy” of education was the sole requirement under the New Mexico Constitution and questioned how the new system would meet the uniformity requirement.\textsuperscript{267} In particular, the plaintiffs expressed their concern that, under the new system, property poor and property rich districts all competed for the same health and safety and adequacy funds, whereas under the old system, property rich districts took care of these needs with substantial local revenue.\textsuperscript{268} Now those districts with untapped bonding capacity could retain those funds to move beyond the adequacy level, while the Zuni Public School District and the other districts with little or no bonding capacity would remain at the same adequacy level indefinitely.\textsuperscript{269} Noting that Judge Rich’s order, after finding the funding system unconstitutional, directed the legislature to establish a “uniform” system,\textsuperscript{270} the plaintiffs reviewed a substantial number of school finance cases from other states, all of which illustrated that adequacy does not replace the demand for uniformity.\textsuperscript{271} In addition, the plaintiffs pointed to New Mexico’s own experience with operational funding, which included substantial equalization in its understanding of “uniform.”\textsuperscript{272}

Also of great concern to the plaintiffs was the issue of local control, which the Task Force used as one of the reasons to choose adequacy over equity.\textsuperscript{273} Given that the new system mandated costs, methodology, guidelines, particular construction contracts, design, and even construction materials, the plaintiffs called local control under the new system “a hoax.”\textsuperscript{274} Finally, the plaintiffs urged “judicial encouragement,” encouraging the legislature to create a thoughtful, uniform system that would last for generations.\textsuperscript{275}

The Special Master issued his report a few months later. Some of the significant findings of fact were his conclusions that the legislature had passed “one of the most dramatic actions ever taken by the state to remedy disparities of capital funding among New Mexico school districts”;\textsuperscript{276} that he endorsed practically all of the Task
Force's views on adequacy versus equity, particularly because equity "tends to sacrifice local control to some extent," and that "pork" appropriations were in conflict with the constitutional requirement of uniformity. The Special Master also found that the legislature was operating in good faith and that more time was needed to see how the process would develop.

The plaintiffs responded by requesting an order from the court addressing the findings of the Special Master. Referring again to the problems of the new system in terms of lack of local control, "pork," the ability of some districts to go beyond adequacy, and the lack of uniformity, the plaintiffs requested an order from the court that would give the legislature six months to establish a funding system that "eliminates the substantial disparities in bonding capacities between districts and provide[s] to all districts a roughly equivalent opportunity for funds...[when] adequacy issues are being addressed."

Judge Rich entered his response on May 30, 2002, and ordered that the report of the Special Master be approved and that the plaintiffs' objections be overruled. The Order also recognized that "[t]he Legislature has made some progress since this Court's Partial Summary Judgment but should continue its work in this area" and reserved the right to review subsequent legislative activity. Since May 2002 there has been no further review of Zuni Public School District v. State of New Mexico, but the parties have been working on negotiating a settlement agreement.

VII. IS THE NEW CAPITAL FINANCE SYSTEM UNIFORM AND SUFFICIENT?

A. Measuring "Uniform and Sufficient"

The district court's recognition that the New Mexico Legislature has made "some progress" in designing a new capital funding system is not a guarantee that this system will be found constitutional once it is fully developed. In order to meet the constitutional standard, the new capital funding system must be a "uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state," as required by the New Mexico Constitution.

When compared to the constitutional requirements for education articulated by other states, New Mexico is fortunate to have such a clear mandate. Other states, such as Massachusetts, must construe what it means to "cherish...the public schools." Similarly, Montana must divine the meaning of the requirement to

277. Id. at 9.
278. Id. at 11.
279. Id.
281. Id. at 12-13.
283. Id.
284. As explained to author by Ron Van Amberg, Zuni Plaintiff's Attorney.
285. N.M. CONST. art. XII, § 1.
286. MASS. CONST. pt. 2, ch. V, § II.
“establish a system of education which will develop the full educational potential of each person.”

New York litigation has struggled with the requirement that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”

The clarity of New Mexico’s constitutional requirement is only the starting point in evaluating the state’s school financing system. While litigation over the meaning of New Mexico’s constitutional requirement for education is in its infancy, other states with similar constitutional provisions have spent over thirty years litigating their school financing systems. The Arizona Constitution requires that the legislature “provide for the establishment and maintenance of a general and uniform public school system.” Wyoming’s constitution requires that the legislature “provide for the establishment and maintenance of a complete and uniform system of public instruction.” Not only do the Arizona and Wyoming constitutions have provisions similar to those found in New Mexico’s education clause, their litigation experience illustrates the most important factors to consider in determining whether a school financing system is “uniform” and “sufficient.”

The following case studies of the Arizona and Wyoming systems illuminate the options that may be considered by the New Mexico courts during their inquiry into the constitutionality of New Mexico’s new financing system.

1. Case Study: Arizona

Arizona’s extensive history of school finance litigation began in 1973, when the Arizona Supreme Court acknowledged that education was a fundamental right but upheld the state’s school financing system using a rational basis test. In spite of this decision, the Arizona Legislature responded in 1974 by changing the financing system from an unequalized system to an equalization system of operating funding. Much like New Mexico, Arizona left capital funding unchanged. The capital financing system was thus the focus of the challenge brought in Roosevelt Elementary School District No. 66 v. Bishop (Roosevelt I), based on the undisputed record showing “enormous facility disparities among the various school districts” because of the reliance on local property wealth for capital financing.

287. MONT. CONST. art. X, § 1(1).
289. ARIZ. CONST. art. XI, § 1.
290. WYO. CONST. art. VII, § 1.
291. See infra Part VII.A.1-2.
292. Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973) (deciding that a school financing system will be upheld if rational and reasonable).
293. See ARIZ. REV. STAT. ANN. §§ 15-901 to -1241 (2002); see also Clifford Altfeld, Arizona School Finance, Can Anybody Understand Title 157, 34 AZ. ATTORNEY 24 (Dec. 1997) (“Arizona has a very progressive system for half of the local school financing equation: its maintenance and operations funding.”).
294. See Altfeld, supra note 293 (“School facilities [in Arizona], however, are paid by local school bonds for which there is little equalization.”).
296. Id. at 808.
These disparities included schools that lacked basic libraries and science facilities while other schools enjoyed indoor swimming pools and domed stadiums.\textsuperscript{297} The court considered the education clause of the Arizona Constitution, which required the education system to be “general and uniform,” and attempted to articulate the constitutional requirements contained in the clause.\textsuperscript{298} The court determined that “general and uniform” did not mean exactly the same, identical, or equal.\textsuperscript{299} Instead, the court found that “[f]unding mechanisms that provide sufficient funds to educate children on substantially equal terms tend to satisfy the general and uniform requirement. School financing systems which themselves create gross disparities are not general and uniform.”\textsuperscript{300} Thus, the Arizona Supreme Court plurality opinion recognized the constitutional promise of both equity and adequacy, stating:

Even if every student in every district were getting an adequate education, gross facility disparities caused by the state’s chosen financing scheme would violate the uniformity clause. Satisfaction of the substantive education requirement does not necessarily satisfy the uniformity requirement, just as satisfaction of the uniformity requirement does not necessarily satisfy the substantive education requirement.\textsuperscript{301}

Although \textit{Roosevelt I} challenged the capital financing system, the court examined the entire funding structure for operating and capital needs, explaining that the “capital disparities are caused by the entire financing system, not just the capital side of the equation….We find that the capital disparities here are simply the first symptoms of a system-wide problem.”\textsuperscript{302} In holding that the property-wealth-based system of capital financing was unconstitutional because it was “itself the source of substantial nonuniformities,”\textsuperscript{303} the court offered this guidance to the legislature in developing a new system: “The system the legislature chooses to fund the public schools must not itself be the cause of substantial disparities.”\textsuperscript{304} However, “[a]s long as the statewide system provides an adequate education….local political subdivisions [school districts] can go above and beyond the statewide system.”\textsuperscript{305}

The road to reform was not easy. In 1996, the Arizona Legislature amended the financing system that the court held unconstitutional in \textit{Roosevelt I} but preserved the basic funding scheme.\textsuperscript{306} On review, the court found the amendments insufficient.\textsuperscript{307} In 1997, the legislature amended the capital financing system again with a program called “Assistance to Build Classrooms (ABC)” and the Governor immediately

\begin{notes}
\item[297] Id.
\item[298] See supra note 289 and accompanying text.
\item[299] \textit{Roosevelt I}, 877 P.2d at 814.
\item[300] Id.
\item[301] Id. at 814–15 n.7.
\item[302] Id. at 810 n.3.
\item[303] Id. at 816.
\item[304] Id. at 815.
\item[305] Id. at 814–15 (footnote omitted).
\item[307] Id.
\end{notes}
sought a declaration in the Arizona court that this system complied with the court’s mandate.\textsuperscript{308}

The ABC plan attempted to remedy the disparities in school districts by providing a stream of funding to low-wealth school districts through a gross allotment formula based on growth and number of students, reduced by the district’s ability to raise capital funds on its own.\textsuperscript{309} The plan also placed limits on the amount per pupil that high wealth districts could raise for capital projects.\textsuperscript{310} The State claimed that the disparity resulting from this system would be, at worst, a four-to-one difference in revenue-raising abilities among districts.\textsuperscript{311}

The court was not satisfied with this system, but its dissatisfaction was not confined to the possible 400 percent difference in revenue. The court reiterated the considerations in \textit{Roosevelt I}:

Because the presence of taxable property within each district bears no relationship to the capital needs of each district, it is difficult to create a general and uniform system with such heavy reliance upon district based property taxation. Such a system will inevitably lead to disparities unless full or substantial equalization occurs.\textsuperscript{312}

The ABC legislation did not attempt to equalize district tax revenue, but instead created “a very small fund, the amount of which bears no relationship to the capital needs of any district.”\textsuperscript{313} Furthermore, the ABC legislation failed to address basic adequacy standards for school facilities, which the court saw as the necessary element that would allow local control to exceed the adequacy offered by the state financing system without jeopardizing the possibility of an equalized system.\textsuperscript{314}

Thus, minimum adequacy standards were necessary to meet the “general and uniform” requirement of the constitution, and the funding to meet these standards had to be equalized fairly.\textsuperscript{315} According to the court, “The ABC legislation ignores the uniformity requirement because the dollar amount chosen to cure inadequacies in public school facilities is arbitrary and bears no relation to actual need.”\textsuperscript{316} The court went on to offer further guidance to the legislature: a constitutional funding system “must establish [a baseline] level of funds necessary to (1) bring existing facilities up to an adequate standard; (2) construct new and adequate facilities for growing districts; and (3) maintain all capital facilities at the adequacy level.”\textsuperscript{317} The court even made suggestions as to possible approaches for the legislature in creating a constitutional system that would no longer rely on local property taxes, such as equalization of districts by property value, dedicated sales or income taxes, and a

\textsuperscript{308} Id. at 1143.
\textsuperscript{309} Id.
\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{312} Id. at 1144.
\textsuperscript{313} Id.
\textsuperscript{314} See id. at 1145.
\textsuperscript{315} Id.
\textsuperscript{316} Id.
\textsuperscript{317} Id.
statewide property tax. Of course, the court acknowledged that the choice of
which approach to adopt would be left to the legislature.

The Arizona Legislature responded by passing the “Students FIRST” (Fair and
Immediate Resources for Students Today) Act in 1998. This system was also
declared unconstitutional by the court, even though it included minimum
adequacy standards for capital facilities and guaranteed state funding for all school
districts in an attempt to comply with the adequacy standards. According to the
court, the problem with Students FIRST was an “opt-out” provision that allowed
school districts to refuse state funding to pay for capital needs through local
taxation. Because this provision would not result in a general and uniform system
of public school financing, the Arizona Supreme Court rejected the legislature’s plan
once again.

The legislature embarked on its fourth attempt at designing a school financing
system by making amendments to Students FIRST. The new system contained
three components, including a fund that provided money for new schools where
student population was growing, another fund used to bring existing school
buildings up to minimum adequate standards, and a maintenance fund designed
to maintain schools at a minimum adequacy level. No request for a declaration of
compliance with the court’s mandate was made regarding this system, and the
amended financing system operated without challenge for the 1998–1999 fiscal
year. In the following year, the system required that data regarding facility needs
should be submitted to the “School Facilities Board,” the statutory body responsible
for distributing the capital funding to eligible school districts. Once the School
Facilities Board gathered the required data, the plan required the Board to apply
the new formula and advise the state treasurer of the amount to be transferred from the
state’s general fund to the capital finance fund. Instead of applying the formula
and requesting funding based on actual need, the Board simply increased the
previous year’s allocation by ten percent and requested that the state treasurer
transfer that amount to the capital finance fund. As a result of this failure to adhere
to the system, the capital fund received approximately twenty-five million dollars
less than the formula required. In 2001–2002, the legislature de-funded the
Building Renewal Fund (BRF)—the fund for bringing schools up to existing

318. Id. at 1145–46.
319. Id. at 1146.
322. Id. at 637.
323. Id. at 639.
324. Id. at 639–40.
326. Id. § 39 (current version at ARIZ. REV. STAT. ANN. § 15-2401 (Supp. 2006)).
327. Id. (repealed 2002).
328. Id. (current version at ARIZ. REV. STAT. ANN. § 15-2031 (2005 & Supp. 2006)).
330. Id.
331. Id.
332. Id.
333. Id.
standards—by seventy million dollars.\textsuperscript{334} In 2002–2003, the legislature under-funded the BRF by almost ninety million dollars.\textsuperscript{335} The legislature suspended the BRF formula entirely for the 2003–2004 school year.\textsuperscript{336}

Four Arizona school districts filed suit, requesting that the court “enforce [the State’s] funding obligations established by the Students FIRST legislation.”\textsuperscript{337} The school districts argued that the legislature’s failure to fully fund the capital financing system resulted in unconstitutional under-funding.\textsuperscript{338} Another suit was brought by six other districts on the same grounds.\textsuperscript{339} In both cases, the trial courts found for the districts.\textsuperscript{340} The Arizona Supreme Court consolidated the cases\textsuperscript{341} and reversed,\textsuperscript{342} finding that the failure to fund pursuant to the legislative requirement was not a constitutional violation per se, but that the districts would have to prove that the reduction in funding had “an impact on their students’ academic education.”\textsuperscript{343} Until the school districts could demonstrate that the legislature’s choice to redirect funding away from school capital budgets left the districts with insufficient resources to provide facilities “‘necessary and appropriate to enable students to master the educational goals set by the legislature,’”\textsuperscript{344} the court found the funding to be “a matter of legislative discretion.”\textsuperscript{345}

After years of litigation and detailed demands by the court to the legislature, the latest holding on the constitutionality of Arizona’s capital financing system renders the decision in Roosevelt I and the court’s careful constitutional interpretation merely an empty promise, as it moves away from the Roosevelt I concept that the funding system itself must not be the cause of disparities.\textsuperscript{346} It is unclear what evidence is needed to prove that the school facilities are not enabling students to master educational goals, whereas the proof required in other cases, such as teacher qualifications or operational funding adequacy, had clearly established standards. Interestingly, there is no mention of uniformity or equality in the latest Roosevelt decision, and this omission can be read to imply that this part of the original decision has been subsumed by the minimum standards of adequacy.

2. Case Study: Wyoming

The battle over the school finance system in Wyoming has been waged since the 1970s and continues today. Our collective inability to develop a solution to this legal, social, and political problem in a constitutionally satisfactory manner stems from the complexity of the issues, the importance of the education of our
children to all our citizens, and the historical dominance of local control over public education.\textsuperscript{347}

The Wyoming courts first considered school financing in \textit{Sweetwater County Planning Committee for the Organization of School Districts v. Hinkle},\textsuperscript{348} where two school districts fought over the inclusion of another district in order to enhance their tax bases.\textsuperscript{349} The Wyoming Supreme Court took judicial notice of the striking inequities in school funding between districts and recommended that the legislature equalize school taxes throughout the state, as required by the Wyoming Constitution.\textsuperscript{350} Nine years passed with no equalization, and the court declared the entire school finance system unconstitutional in \textit{Washakie County School District Number One v. Herschler}.\textsuperscript{351} In that case, the court expressly held that "whatever system is adopted by the legislature, it must not create a level of spending which is a function of wealth other than the wealth of the state as a whole."\textsuperscript{352} The legislature responded to \textit{Washakie} in 1983 by creating a transitional financing system that "recaptured" funds from wealthy districts and redistributed some of the excess to property-poor districts.\textsuperscript{353} This system was meant to be a temporary solution while the legislature studied the actual cost of providing an education, achieving equality, and recognizing special needs.\textsuperscript{354}

The inequities in Wyoming school funding continued for twelve more years, until a new lawsuit challenged the school financing structure.\textsuperscript{355} As summarized in a later case, the Wyoming Supreme Court held in \textit{Campbell I} that

1) discrepancies in the funding and distribution formulas were not based on differences in the cost of education and, therefore, violated the equal protection and education provisions of the Wyoming Constitution; 2) the strict scrutiny standard applied to a review of all components of the school financing system; and 3) lack of financial resources is not an acceptable reason for failure to provide a constitutionally sound education system.\textsuperscript{356}

The \textit{Campbell I} court directed the legislature to "design the best educational system by identifying the 'proper' educational package each Wyoming student is entitled to have whether she lives in Laramie or in Sundance. The cost of that educational package must then be determined and the legislature must then take the necessary action to fund that package."\textsuperscript{357} The court further mandated that education financing be one of the legislature's top priorities; because of the importance of education, "[a]ll other financial considerations must yield until education is funded."\textsuperscript{358}

\begin{thebibliography}{9}
\bibitem{347}State v. Campbell County Sch. Dist. (\textit{Campbell II}), 19 P.3d 518, 527 (Wyo. 2001).
\bibitem{348}491 P.2d 1234 (Wyo. 1971).
\bibitem{349}See \textit{id.} at 1235.
\bibitem{350}\textit{id.} at 1237.
\bibitem{351}606 P.2d 310 (Wyo. 1980).
\bibitem{352}\textit{id.} at 336.
\bibitem{353}See Campbell County Sch. Dist. v. State (\textit{Campbell I}), 907 P.2d 1238, 1247 (Wyo. 1995).
\bibitem{354}\textit{id.}
\bibitem{355}\textit{id.} at 1243.
\bibitem{356}State v. Campbell County Sch. Dist. (\textit{Campbell II}), 19 P.3d 518 (Wyo. 2001).
\bibitem{357}\textit{Campbell I}, 907 P.2d at 1279.
\bibitem{358}\textit{id.}
\end{thebibliography}
The legislature acted immediately by hiring a consulting firm to design a constitutional operating finance system and to make recommendations to the legislature regarding the cost of providing the whole educational “basket of goods and services” to each school district.\(^{359}\) This effort did not include any capital financing,\(^{360}\) even though no difference between capital and operating funding requirements had been recognized in *Campbell I* or *Washakie*:

We see no reason to give particular attention to the question of finances for the physical facilities with which to carry on the process of education. It is a part of the total educational package and tarred with the same brush of disparate tax resources…. Statewide availability from total state resources for building construction or contribution to school buildings on a parity for all school districts is required just as for other elements of the educational process.\(^{361}\)

The legislature did make some revisions to the capital funding scheme in 1999 by creating a financing scheme for deficient facilities.\(^{362}\) The legislature, however, failed to fund the program.\(^{363}\)

The newly designed operational and capital funding systems were soon challenged in *Campbell II*.\(^{364}\) The new operating system was based on the projected model “basket” of educational goods to be provided to each Wyoming student.\(^{365}\)

The new capital system required that school districts requesting state capital funds be bonded at ninety percent of their capacity and that the school districts demonstrate that a proposed capital construction project would remedy or replace facilities determined to be inadequate.\(^{366}\) The system charged the State’s Department of Education with adopting standards for determining adequacy and immediate needs and reporting to two legislative committees those districts with needs that met these standards.\(^{367}\) The two committees would in turn make recommendations for capital expenditures to the governor and the legislature “who then may or may not act to appropriate funds.”\(^{368}\) Districts with sufficient local wealth to finance construction projects were allowed to build school facilities without having to demonstrate inadequacy or immediate need.\(^{369}\)

The court began its analysis of the new school legislation with no presumption of constitutionality, stating that the system would “withstand[] the test of strict scrutiny only if, when a disparity in funding is proven, it can prove that a compelling state interest justifies the disparity and the methods chosen to protect that state interest result in the least possible limitation upon the constitutional right in

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359. *Campbell II*, 19 P.3d at 529 (internal quotation marks omitted).
363. *Id.*
364. *Id.* at 526.
365. *Id.* at 529-30.
366. *Id.* at 535.
367. *Id.*
368. *Id.* (citing WYO. STAT. ANN. § 21-15-107(h), (k) (1999)).
369. *Id.*
question." Furthermore, "[w]here the evidence establishes funding and spending disparities unjustified by educational cost differentials, the challengers are not burdened with proving disparity of educational quality or educational opportunity; those disparities are presumed." The Campbell II court stated that this test would apply to the complete system for distributing educational resources; it would apply to operating funds "as well as for construction of the necessary facilities in which to operate them." The court held that the capital system was still unconstitutionally based on disparate tax resources. The state argued that the legislature had interpreted the constitutional mandate as requiring "no deficient facilities" and that the new system, with its ranking and funding for deficient facilities, eliminated deficiencies while still providing for most capital needs to be met at the local level. The court responded: "Wyoming schools are the responsibility of the state as a whole and must be financed by the state as a whole." Finding the capital financing system "fundamentally unchanged, unconstitutionally wealth-based, and inadequate," the court made a particular note of the non-uniformity caused by disparities in local property wealth. In addition, the court stated that "imposing the burden on the local school districts to tax locally to provide 'local enhancement' denies the poorer districts the opportunity to fund 'local enhancement.'" The court explained that a constitutional system of capital financing would allow school districts to build beyond adequacy standards by raising local money or using property taxes not subject to equalization. This system, however, would also require the legislature to include safeguards in the funding system to ensure that local enhancement did not create disparities in equal educational opportunity. The court recognized that the efforts to correct facility deficiencies were a necessary first step after "[h]aving allowed the disparities and deficiencies to develop over half a century," but reminded all of the parties not to "lose sight of the constitutional mandate of equal opportunity" over the long term. Specifically, the court noted that simply categorizing and prioritizing unmet needs was an inadequate response by the State and that the financing scheme "has little relation to providing sufficient funds for what it actually costs to provide constitutionally adequate facilities." Finally, the court found it necessary to send a "stronger message" and issued a detailed order requiring the legislature to provide capital construction costs over six years.

370. Id. at 536 (citing Campbell County Sch. Dist. v. State (Campbell I), 907 P.2d 1238, 1266 (Wyo. 1995)).
371. Id. (quoting Campbell I, 907 P.2d at 1276).
372. Id. at 536-37.
373. Id. at 556.
374. Id.
375. Id.
376. Id. at 557.
377. Id. The court noted that the "disparities in local wealth will produce unconstitutional disparities in educational opportunity if...funding options are a function of assessed valuation." Id.
378. Id. at 560.
379. Id. (quoting Campbell County Sch. Dist. v. State (Campbell I), 907 P.2d 1238, 1274 (Wyo. 1995)).
380. Id. (quoting Campbell I, 907 P.2d at 1274).
381. Id. at 561.
382. Id.
383. Id. at 565.
Campbell II’s wide-ranging demands on the state legislature were sharply criticized as judicial encroachment inconsistent with the separation of powers in the Wyoming government.\textsuperscript{384} Shortly after the Campbell II decision, the court held a rehearing in order to clarify some of the parties’ questions but remained firm in its position that “it is our duty to declare void all legislation that is unconstitutional.”\textsuperscript{385} Citing Alexander Hamilton and the Federalist Papers, the Wyoming Supreme Court stated: “Where the will of the legislature declared in its school finance statutes stands in opposition to the will of the people declared in their Wyoming Constitution, we are, and must be, governed by the will of the people.”\textsuperscript{386} Thus, after witnessing the legislature’s thirty year struggle with capital finance issues, and after consistent but ineffective reiteration of the constitutional requirements, “[t]he legislature’s failure to create a timely remedy consistent with constitutional standards justifies the use of provisional remedies or other equitable powers intended to spur action.”\textsuperscript{387} The court reminded all Wyoming citizens and officials to remain focused on the constitutional mandate: “the adequate and equal opportunity for education of our children.”\textsuperscript{388}

B. Analysis of New Mexico’s New Capital Financing System

Several important principles emerge from the Arizona and Wyoming cases that illuminate the meaning of New Mexico’s “uniform and sufficient” requirement and guide the analysis of the constitutionality of New Mexico’s school financing system. In crafting their school financing systems, Arizona and Wyoming struggled with six main areas that provide valuable points of analysis for New Mexico to consider.\textsuperscript{389} These areas will be discussed more fully below and include the plain language requirements of the state constitutions, financing systems dependent on local property taxes, the meaning of an “adequate” education, the issue of “local enhancement” within a constitutional financing system, the concern with local control, and the fundamental value of education under the state constitution.

1. Plain Language and the Constitutional Requirement

The Arizona and Wyoming cases make it very clear that a constitutional requirement of “general and uniform,” “complete and uniform,” or, in New Mexico’s case, “uniform and sufficient” requires both a substantive level of education \textit{and} that the education be substantially equal or uniform. The Arizona Supreme Court recognized that the constitutional requirement that the education system be both general and uniform required both sufficient funding and funding on a substantially equal basis.\textsuperscript{390} The Wyoming Supreme Court determined that the “complete and uniform” requirement in its constitution required both an adequate education and equal

\textsuperscript{384} State v. Campbell County Sch. Dist., 32 P.3d 325, 331 (Wyo. 2001).
\textsuperscript{385} Id.
\textsuperscript{386} Id. at 332.
\textsuperscript{387} Id.
\textsuperscript{388} Id. at 337.
\textsuperscript{389} See supra Part VII.A.
New Mexico’s constitutional requirement for a “uniform and sufficient” education likely requires a capital financing system that provides a substantially equal and adequate education for New Mexico’s children.

New Mexico’s new financing system, as described in Senate Bill 167, “embraced the legal concept of adequacy, rather than equity, as the measure for interpreting the constitutional requirement of a uniform system of free public schools.” This concept is captured in the purpose of the Public School Capital Outlay Act, which is “to ensure that, through a standards-based process for all school districts, the physical condition and capacity, educational suitability and technology infrastructure of all public school facilities in New Mexico meet an adequate level statewide.” There is no mention of uniformity in the purpose of this Act, and the State could reasonably argue that the adequacy standard applies to all schools statewide and is therefore uniform, “[e]ven if every student in every district were getting an adequate education, gross facility disparities caused by the state’s chosen financing scheme would violate the uniformity clause. Satisfaction of the substantive education requirement does not necessarily satisfy the uniformity requirement.” The legislature cannot choose a measure for interpreting the constitution that is in conflict with the plain language of the constitution, and the New Mexico Constitution does not allow a choice between the requirements for uniformity and sufficiency. Furthermore, in New Mexico’s experience with financing of school operating expenses, uniformity has been synonymous with equity. The plain language of the New Mexico Constitution’s requirement for public education demands both uniformity and sufficiency and both equity and adequacy.

2. System Based on Local Property Taxes

A system based primarily on local wealth will not be found constitutional. Preservation of the basic funding scheme, based on taxable property within the district with no relationship to the capital needs of the district, will not meet the constitutional requirement of uniformity. The Arizona and Wyoming cases described above each illustrate that it is impossible to create a general and uniform system with heavy reliance on local property taxation: “The... legislation deals inadequately with the symptoms and does not address the core problem—heavy reliance on district property taxation with unequalized districts. The net effect is that the state imposes vastly different tax burdens on citizens in different districts to support a state obligation.”

391. Campbell, 32 P.3d at 331.
393. Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 3–4 (internal quotation marks omitted).
395. Roosevelt I, 877 P.2d at 815 n.7; see also supra note 301 and accompanying text.
396. See State v. Campbell County Sch. Dist. (Campbell I), 19 P.3d 518, 557 (Wyo. 2001) (finding that such a system violates Wyoming’s constitution).
397. See Hull v. Albrecht, 950 P.2d 1141, 1144 (Ariz. 1997) (finding that such a system violates Arizona’s constitution).
398. See id. at 1145.
Under New Mexico’s new capital financing system, “[l]ocal school districts are required to provide local funds for projects based on a sliding scale taking into account the relative tax base and the relative local funding effort of the school district.”399 Local property tax still forms the substantial basis of New Mexico’s new capital financing system.400

The new system is designed as a grant program to supplement, rather than replace, local tax efforts. New Mexico’s system does not attempt to equalize district tax revenue, but instead “create[d] a...fund, the amount of which bears no relationship to the capital needs of any district.”401 While New Mexico’s new capital outlay program feeds substantially more funding into school districts than the previous system, the basic structure is unchanged, with one perverse exception. Previously, only those districts bonded at maximum capacity—those without local resources—could apply for state capital funds, while in the new system, there is no bonding requirement and all districts can compete for the funds.402

Although the new system has been described as “equalizing,” proponents of the new financing system are only able to point to the dramatic increases in state funding over the past few years rather than any actual indications of equalization.403 The State has devoted an impressive level of funding to school capital construction, but these increases in state funding are not equalizing because they do not change a system that is still heavily dependent on local property wealth for capital construction projects. To meet the constitutional standard, the system must be based on a level of spending that is a function of the wealth of the state as a whole by means such as equalization of property taxes or local revenue sharing.404 If certain districts must continue to impose a higher tax rate than other districts in order to meet the adequacy standards, equalization has not occurred.

3. “Adequacy” Standard Inappropriate

An “adequate” education has to do with “outputs” in terms of student learning.405 Even though New Mexico may purport to use “adequacy” standards for its new capital financing system, standards for an “adequate facility” are not the equivalent of educational adequacy standards. An “adequate” education includes both those educational services paid for with operating funds, such as teachers, books, and supplies, and physical facilities paid for with capital funds.406 Capital needs must be considered as part of the total adequate education package, and “statewide availability from total state resources for building construction or contribution to

400. Id. at 4 (“Local property taxes are the largest revenue source contributing to this program.”).
401. See Hull, 950 P.2d at 1144; see also supra note 313 and accompanying text.
402. See supra Part IV.E.
403. See Rick Miera, Commentary: Be True to Your Schools, ALBUQUERQUE TRIB., Feb. 13, 2006, available at http://www.abqtrib.com/news/2006/feb/13/commentary-being-true-to-your-schools/ (describing the new financing system and the intense statewide effort to create it, but also explaining that it is a “constantly improving” plan).
405. See Campbell County Sch. Dist. v. State (Campbell I), 907 P.2d 1238, 1262 (Wyo. 1995) (describing core skills and knowledge a student must obtain as part of an adequate education).
406. Cf. Washakie, 606 P.2d at 337 (referring to “finances for the physical facilities” as one “part of the total educational package”).
school buildings on a parity for all school districts is required just as for other elements of the educational process."\(^{407}\)

The overall adequacy of the education New Mexico provides to its children has not yet been challenged in any New Mexico court. When such a challenge arises, it will focus on the low levels of educational achievement of New Mexico students, the achievement gaps between majority and minority students, the comparatively low amount of spending per student by the State, and the physical adequacy of the facilities to support adequate educational instruction. The fact that the State has chosen "facility adequacy standards"\(^{408}\) provides little support to an assertion that the new financing system is constitutionally sufficient or adequate.

Educational adequacy requires funding that is directly tied to educational needs. Thus, Arizona's plan to remedy disparities based on a dollar amount directed toward capital expenditures with no relation to actual need was not, in fact, a uniform system.\(^{409}\) Similarly, the Wyoming system that simply categorized and prioritized unmet needs was an insufficient response by the State, in part because the financing scheme had little relation to the actual cost of providing constitutionally adequate facilities.\(^{410}\) New Mexico's new capital funding system closely resembles the one found to be arbitrary and unconstitutional in *Campbell II*. The dollar amount chosen to fund the capital outlay program bears no relationship to the actual educational facility needs of the state's schools (estimated by the state's own contractor to be close to 2.3 billion dollars).\(^{411}\) Instead, the dollar amount reflects an amount that, while generous by New Mexico standards and a huge increase over past spending, is arbitrary in relation to actual need. An additional similarity with the unconstitutional *Campbell II* system is that the New Mexico Legislature responded to the Zuni lawsuit by initiating a system that ranked and funded deficient facilities, but nevertheless provided that most capital needs would be met on the local level.\(^{412}\) As *Campbell II* indicated, the constitutional mandate of uniformity and adequacy requires much more than no deficient facilities.\(^{413}\) Just as Wyoming recognized in *Campbell II*, New Mexico's efforts to correct deficiencies were a welcome and necessary first step, but the capital financing scheme "has little relation to providing sufficient funds for what it actually costs to provide constitutionally adequate facilities."\(^{414}\)

Educational adequacy, properly described as the educational attainment a state desires for its children,\(^{415}\) is only one half of New Mexico's constitutional

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\(^{407}\) *Id.*

\(^{408}\) See supra note 394 and accompanying text.

\(^{409}\) *Hall v. Albrecht*, 950 P.2d 1141, 1144 (Ariz. 1997). The court noted that it is difficult to create a uniform system based on property taxation and that disparities are almost inevitable. *Id.*

\(^{410}\) *State v. Campbell County Sch. Dist.* (Campbell II), 19 P.3d 518, 557 (Wyo. 2001); see also supra note 382 and accompanying text.

\(^{411}\) 3D/INTERNATIONAL, supra note 259, at 3.

\(^{412}\) See supra notes 250–257 and accompanying text.

\(^{413}\) *Campbell II*, 19 P.3d at 561 ("Although elimination of facilities deemed deficient according to state standards would go a long way toward meeting the constitutional mandate, equality of opportunity ultimately requires a rough measure of equality of facilities over time.").

\(^{414}\) *Id.*; see also supra note 381 and accompanying text.

\(^{415}\) See McUsic, supra note 27, at 91 (stating that an adequate education is based on "policy established by education experts and endorsed by the legislature or the state department of education").
requirement for its education system. The improper definition of "adequacy" and the false choice presented to the legislature between "adequacy" and "equity" have resulted in a financing system based on the incorrect assertion that minimum construction standards alone can meet New Mexico's requirements for a uniform and sufficient public education. Even if the adequacy concept were used correctly in a new financing system, adequacy alone will never be constitutionally sufficient, as the system must be both adequate and equitable. Thus, the use of "adequacy" as "the measure for interpreting the constitutional requirement of a uniform system of free public schools" inappropriately interprets the constitutional mandate.

4. "Local Enhancement"

A capital financing system designed to incorporate "local enhancement" through local taxes "denies the poorer districts the opportunity to fund 'local enhancement'" and results in a system that is not uniform and is unconstitutionally wealth-based. The funding system itself may not be the cause of the disparities.

In the Arizona cases, the court presented a delicate challenge to the state legislature: create a truly adequate system of education and ensure that it is equalized. Once this equalization is accomplished, through a system no longer reliant on local property taxes, local districts may then choose to make an extra effort to rise above the adequacy standard. This issue of "rising above" the adequacy standards through local enhancement seems to have created a great deal of confusion. The point is made clear by studying the Arizona court's suggestions as to how this might be accomplished; the court indicated that the best way to enable local enhancement was through equalization of property taxes, dedicated sales, income taxes, or a statewide sales tax. Stated another way, this is a two-step process. The State first provides an adequate education based on the wealth of the state as a whole, with everyone in the state sharing the wealth to accomplish this goal. If, after having shared their local wealth to reach statewide adequacy, local districts wish to devote even more resources to enhancing their local educational offerings, they may do so. This does not mean that local districts reserve all of their local wealth and taxing ability for their own use to rise above what the State provides to property-poor districts. Instead, "[i]f the legislature chooses to continue to rely on district-based property taxation, substantial equalization is required by the uniformity clause. Districts that choose to go beyond these standards may do so by further taxation." Thus, only after substantial equalization of property taxation has occurred can districts "rise above" adequacy standards through additional taxation and thereby meet the requirements of the uniformity clause.

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416. Public School Capital Outlay Funding Events and Accomplishments, supra note 164, at 3–4.
418. Roosevelt Elementary Sch. Dist. No. 66 v. Bishop (Roosevelt I), 877 P.2d 806, 814–15 (Ariz. 1994). It would be permissible, however, for "local political subdivisions [to] go above and beyond the statewide system," so long as the disparities are caused by local control. Id. at 815.
419. See id. at 814–15 (requiring the statewide system to "provide[] an adequate education," but allowing disparities so long as they are not created by the statewide system).
420. See supra note 318 and accompanying text.
Compare the proper balancing between uniformity and “rising above” with New Mexico’s new capital financing legislation:

It is the intent of the legislature that grant assistance made pursuant to this section allows every school district to meet the standards developed...; provided, however, that nothing in the Public School Capital Outlay Act or the development of standards pursuant to that act prohibits a school district from using local funds to exceed the statewide adequacy standards.422

New Mexico’s new capital financing system exemplifies a system that creates substantial disparities instead of remedying them. The capital funds and local district property taxes are not equalized because there is no mechanism for ensuring uniformity, and local districts may use their own local property wealth solely for their own purposes to rise above adequacy. As with the system described in Campbell II, New Mexico’s new capital financing system makes local enhancement possible only for those districts with untapped property wealth, and poorer districts are denied the opportunity for local enhancement altogether. Thus, New Mexico’s scheme for local enhancement is in direct opposition to the constitutional requirement of uniformity.

5. Local Control

Local control in these matters is an important part of our culture. Thus, school houses, school districts, and counties will not always be the same because some districts may either attach greater importance to education or have more wherewithal to fund it.423

These words from Roosevelt I have been used to support assertions that adequacy standards are more conducive to local control424 and that this “local control” allows those New Mexico school districts that do not need state capital funds to use their own local property wealth solely for their own needs. In fact, given that the state system for funding capital needs must satisfy both uniformity and adequacy425 and the need to equalize local district property taxes,426 the concept of local control as something only wealthy districts can exert is in direct conflict with New Mexico’s constitutional mandate. Furthermore, the reality of New Mexico’s new financing system explicitly details how little local control exists for those districts required to obtain state funding for capital needs due to lack of local resources: The State sets criteria for facility design, build, financing arrangement, and construction materials.427

This system stands in marked contrast to New Mexico’s operating financing, where the State distributes funding to districts based on a need-based formula but allows districts to control the spending.428 The argument that an “adequacy” standard

423. Roosevelt I, 877 P.2d at 815.
424. See Desiderio & La Fata, supra note 228, at 8.
426. See supra note 315 and accompanying text.
428. See supra Part IV.C.
offers more local control neither conforms to the constitutional mandate nor makes any sense in light of New Mexico's own experience. Instead, the "local control" argument seems intended to mislead or at least obfuscate the real issues of uniformity and true educational adequacy.

6. Burden: Is Education a Fundamental Right Under New Mexico's Constitution?

At this point, it is unclear whether New Mexico considers education to be a fundamental right; just as it is unclear what level of scrutiny is appropriate for school finance legislation. These two factors will significantly affect the determination of the constitutionality of New Mexico's new financing system. The Arizona and Wyoming courts diverged on this point. Arizona, in Roosevelt II, ultimately decided that the school district plaintiffs would have to demonstrate that the legislature's refusal to fund a portion of the capital-financing program detrimentally affected educational achievement.429 The Wyoming court took the opposite view in Campbell II, presuming disparities of educational quality or opportunity if funding and spending disparities are not justified by differences in educational cost.430

Arizona's most recent decision requires a plaintiff to submit evidence of actual educational detriment to the children in districts where capital facilities are not funded.431 On a constitutional level, this presumption of constitutionality seems to reflect the outcome of Shofstall, the first Arizona school financing challenge, where the court acknowledged education as a fundamental right yet upheld the state financing system using a rational basis test.432 In practical terms, this standard raises a problematic consideration: a student's educational progress will be determined by assessing the educational facilities instead of using other factors such as teacher experience or variations in curriculum. However, it is unclear how to measure the impact of the facilities on the student's educational progress. If the Arizona court actually considered education to be a fundamental right, the education financing statute would not be treated as economic legislation and subject to rational basis review. Instead, it would be subject to strict scrutiny, and the State would bear the burden of establishing a compelling interest justifying the law.433

The Wyoming presumption, on the other hand, indicates that education in Wyoming is a fundamental right and that the legislation will be subject to strict scrutiny.434 The State of Wyoming argued, however, that even though education was a fundamental right, the details of the school financing system "need only meet the

430. State v. Campbell County Sch. Dist. (Campbell II), 19 P.3d 518, 536 (Wyo. 2001) ("Where the evidence establishes funding and spending disparities unjustified by educational cost differentials, the challengers are not burdened with proving disparity of educational quality or educational opportunity; those disparities are presumed." (quoting Campbell County Sch. Dist. v. State (Campbell I), 907 P.2d 1238, 1276 (Wyo. 1995))).
431. Roosevelt II, 74 P.3d at 266.
432. See supra note 292 and accompanying text.
434. Campbell II, 19 P.3d at 535.
rational basis test requiring the challengers to prove harm. The Wyoming Court rejected this argument, citing Campbell I's recognition that "the interaction of the various finance components revealed the necessity that the system as a whole be reviewed under one level of scrutiny." Thus, Wyoming courts determined that it was the State's burden to provide a compelling reason for any disparities in the financing system and that where the evidence established disparities in funding the court would presume disparities in educational quality or opportunity.

New Mexico courts will soon have to decide whether education is a fundamental right with the financing system subject to strict scrutiny under the New Mexico Constitution. If education is a fundamental right, the burden will be on the State to justify its unequal, property-wealth-based capital financing system with some compelling interest. If, however, education is not a fundamental right in New Mexico, the plaintiffs will have the burden of demonstrating educational outcomes that are not uniform and sufficient as a result of the financing system.

C. Actual Results of New Capital Finance System

New Mexico now has several years of experience with capital financing under the new system. This experience illustrates what the system actually does, as opposed to what the legislature may have intended or what the constitution requires.

Many school districts have found that this "adequacy" based system is not in fact a model of local control as intended by the legislature and endorsed by the Special Master. One highly illustrative example comes from Albuquerque. Growth on the far west side of town created a need for new schools to relieve overcrowding. At the same time, enrollment in schools on the east side declined. In the fall of 2004, the Albuquerque Public Schools (APS) school board decided, by majority vote, to postpone a decision on a west side high school until all the capital needs of the district could be considered, including those of schools in the older communities. Unexpectedly, the State of New Mexico Land Office announced that it was going to donate a piece of land located at the far northwest edge of the city to be used for a high school, and almost simultaneously the Public School Capital Outlay Council maneuvered to move the "Facilities Deficiency Index" of Cibola High School, the existing far northwest side high school, to the top of the list in terms of deficiencies. In the fall of 2005, there remained some debate about the overall needs of the school district, but the donated site for the new northwest high school dominated the school board's discussions. By the fall of 2006, the ground had

435. Id. at 536.
436. Id. (quoting Campbell County Sch. Dist. v. State (Campbell I), 907 P.2d 1238, 1266-67 (Wyo. 1995)).
437. Id.
439. See 3D/INTERNATIONAL, supra note 259, app. 1, at 1 (Cibola High School ranked number 1).
440. During the September 7, 2005 meeting of the APS Board of Education, one board member expressed concern that the process for site selection was not followed and that other district projects would be put aside to "fast track" the west side high school. Board of Education of the City of Albuquerque, N.M., Minutes of the Regular Board Meeting (Sept. 7, 2005), available at http://www.boardbook.org/apps/bbv2/public/index.cfm?memberkey =1000056 (scroll down to "Regular Meeting—September 7, 2005 5:00 PM"; follow "Minutes" hyperlink).
already been broken on the new northwest side high school, with the State Land Commissioner estimating that the value of the donated land had "increased about 25 percent due to the rapid development of the surrounding area."441

This example illustrates several serious problems with the new capital financing system. First, state intervention entirely undermined local control. Rather than setting its priorities based on the wishes, needs, and compromises of the community, the school construction was a response to a "windfall" from the State.442 Second, this example illustrates that the prioritization of each school's needs is susceptible to tampering, which is problematic given the fact that objective prioritization is integral to any argument that the system is based on facility adequacy standards. Third, this example demonstrates the new ability of school districts not bonded to capacity to now receive state funds. Prior to the implementation of the new capital financing program, districts like Albuquerque with significant untapped bonding capacity were not able to apply for state funds.443 It is extremely difficult to see the "balance" that allows APS to retain its bonding capacity and utilize scarce state funds instead. APS will use some of its own bonding capacity to exceed the adequacy standards, as the State would only fund a high school valued at 60.8 million dollars, whereas APS wants a school requiring at least 70.9 million dollars to build.444 Thus, this "balanced" system allows a school district to use its unequalized property wealth for its own individual local enhancements.

Another example of the lack of uniformity in the new financing system is seen in the application of the formula enacted in response to the Special Master and Judge Rich's concerns about direct legislative appropriations. The formula does not subtract these direct appropriations to school districts dollar for dollar from any capital outlay awards, but instead subtracts only a percentage from capital outlay funds.445 The main concern expressed by the Zuni plaintiffs was that direct appropriations contributed to creating a system that was not uniform.446 In theory, the offset designed by the legislature was supposed to resolve this concern, but in practice,

[the benefits of accepting an appropriation will have to be reviewed on a case-by-case basis. It might be beneficial for school districts to accept all of the appropriations allocated to them if the districts' highest ranked PSCOC project will not be funded for the foreseeable future. It might also be beneficial for [school] districts to reject them all.447

442. Andrea Schoellkopf, Money Waiting for APS Projects, ALBUQUERQUE J., Sept. 22, 2004 (quoting Dr. Elizabeth Everitt, APS Superintendent, saying, "It's a windfall that we have support from the state....").
443. At the time the Zuni lawsuit was filed, according to the New Mexico Department of Education, the Albuquerque Public School District was bonded at only eighteen percent of capacity, as compared to Los Lunas at just over one hundred percent, Rio Rancho at eighty-seven percent, and Zuni at eighty-six percent. See Motion for Partial Summary Judgment, supra note 151, Clemmons Affidavit Exhibit A at 1-3; see also Schoellkopf, supra note 442 ("This is the first year APS qualified for state capital outlay funding. APS could apply this year because of changes to the state's equalization formula as a result of a lawsuit filed by the Zuni district seeking to make funding more balanced.").
444. Schoellkopf, supra note 442.
446. See supra notes 263-266 and accompanying text.
447. N.M. PUB. EDUC. DEP'T, BILL ANALYSIS 2005: HOUSE BILL #885, at 3 (2005), available at
Rather than adding to uniformity, this direct appropriation formula has created confusion among school districts and legislators trying to respond to community requests for capital needs. Although the lack of uniformity created by the direct appropriation formula is minimal as compared to the overall lack of uniformity in an unequalized financing system, it is nevertheless significant. The new “adequacy” capital financing system does not even meet basic, urgent capital needs, and parents, principals, and others are going directly to legislators seeking school capital funds.

D. New Mexico’s New Capital Finance System: Neither Uniform nor Sufficient

New Mexico’s new capital financing system falls short of the constitutional standard expressed by other states with similar constitutional language. New Mexico’s experience in applying the new system also reveals this failure. The continued reliance on local property wealth, an inappropriate adequacy standard, the arbitrary nature of the financing program, the lack of uniformity created by the method for local enhancement, and the continued practice of direct appropriations all fall short of the plain language of the New Mexico Constitution requiring that education be both adequate and equal. The new system is based on a false choice between equity and adequacy, when in fact the New Mexico Constitution requires both. Having chosen adequacy as its only standard, the legislature ignored uniformity of any kind. It is not constitutionally acceptable to satisfy, or attempt to satisfy, only one of the dual requirements.

Furthermore, this financing system essentially retains the basic structure of the previously unconstitutional system by simply adding increased funding to a local property tax and supplemental grant program. The new capital financing system remains a system primarily based on local property wealth instead of using the resources of the state as a whole. Under the constitutional requirement of a uniform system, a system based on local property taxation and supplemental funds for poor districts is not uniform. The ability of wealthier districts to bypass the program and create “local enhancements” using their own reserved property wealth is by definition not uniform. While there is a constitutionally acceptable method for allowing districts to rise above adequacy standards, it requires that the resources of the state be shared through equalization and that an adequate and uniform system be established before local districts can choose to make an extra tax effort toward enhancement. Regrettably, the new capital financing program is neither uniform nor sufficient and is therefore unconstitutional.


448. See Amy Miller, APS Says It Sought Funding Properly, ALBUQUERQUE J., Aug. 23, 2006, at A1 (illustrating confusion over the “pork-barrel political process” for school capital needs).

449. See, e.g., id. (describing request for drainage improvements at Sandia High that might have prevented significant flood damage).
VIII. CONCLUSION

The Zuni Public School District, a "community of learners who dare to dream, take risks, and develop new realities," tried to initiate a new reality for New Mexico's public school capital financing system. Years later, the new capital finance plan is still primarily based on local property wealth, it does not equalize available funding, and it is not tied to any "adequacy" level of educational achievement. The new capital financing system is still unconstitutional because it does not meet New Mexico's constitutional requirement of a "uniform" and "sufficient" system.

Based on the experience of other states with more extensive histories of school finance litigation, two points emerge and apply to New Mexico's short experience in this field: First, most initial legislative efforts to create new school finance systems do not pass constitutional muster; and second, litigation in this area can span several decades. Of course, the New Mexico Legislature could end the litigation with the creation of a uniform and adequate school financing system for both operating and capital needs. Most taxpayers and parents would prefer an expedient resolution so that lawmakers, educators, and judges can focus on issues that are difficult and intractable, as opposed to more seemingly straightforward issues like New Mexico's clear constitutional mandate for a uniform and sufficient system of public schools.

The New Mexico Constitution presents a very clear directive, remarkably beautiful in its simplicity, brevity, and inclusiveness, requiring only that "[a] uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." Even with this clear constitutional directive, the legal battle could continue for decades, or until the State has the political will to admit that New Mexico's much admired system of "equalized" operating funding shares the local wealth generated by federally affected districts for use throughout the state while capital funding fails to share the local property wealth of all the other districts. New Mexico's operating financing system maintains local control and seeks to "guarantee each New Mexico Public School student equal access to programs and services appropriate to his or her educational needs."

Although the system strives to be both uniform and adequate, it seems to have an ugly secret lurking behind its model exterior: Some school districts will share almost all they have to meet the operating needs of all the districts but will then have little left for capital; other districts, after sharing only a small amount for operating needs and without taxing themselves much for that purpose, will not be required to share any of their property wealth for the capital needs of those districts without such wealth. Even under the new capital financing system, created to bring "uniformity" to the capital system, there is no mandatory sharing of wealth. Instead, the State simply subsidizes the districts it deems to be most in need of capital funding. The fact that some of those districts have huge reserves of untaxed property wealth, while other needy districts have no untaxed property wealth available, suggests that

451. N.M. CONST. art. XII, § 1.
452. See supra note 124 and accompanying text.
the new system provides no uniformity. Rather, it offers windfalls to property-rich districts unwilling to ask the public to support unpopular property taxes.

New Mexico can do better than this. New Mexico knows how to create a model "uniform and sufficient" system that maintains local control, aims to provide an adequate education based on needs, and links the education system of the whole state so that all school districts rise or fall together. Rather than trying to preserve the advantages of local property wealth under the guise of preserving local control, New Mexico could easily create a single model financing system that truly equalizes the revenues available for both operating and capital funds. If the State can equalize locally generated funds in the form of the half-mill property tax levy and impact aid funds, surely the State can equalize locally generated capital funds raised through bond elections and mill levies as well. Of course, an entirely new financing model for both operating and capital needs can be constructed, using any number of suggestions made by other state courts to their legislatures, such as a statewide property tax, dedicated income or sales taxes, or full equalization of property taxes to fund the total, constitutionally required education package.

In 2005, New Mexico ranked thirty-seventh in per pupil spending out of the fifty states. Additionally, in 2005, only seventeen percent of New Mexico fourth graders were proficient or above in math performance and by eighth grade this performance dropped even further to only fifteen percent. New Mexico may choose to spend the next thirty years litigating the constitutionality of its school financing system while trying to preserve local privilege and avoiding taxation, continuing to fumble through explanations as to why most New Mexico schools did not make "Adequate Yearly Progress." Alternatively, New Mexico can equalize capital and operating funding, determine what it costs to provide an adequate education in New Mexico, and then provide that education. If this choice is made, the State can spend the next thirty years actually improving educational outcomes.

In the thirty years it might take to resolve litigation over school funding, the Zuni Public School District will have celebrated its fiftieth anniversary. Perhaps by then, Zuni, and all of New Mexico's school districts, will share some cake.

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