

BUILDING ON JUDICIAL INTERVENTION: THE REDESIGN OF SCHOOL FACILITIES FUNDING IN ARIZONA

by Molly A. Hunter¹

INTRODUCTION

In 1998, the State of Arizona completely revamped its education finance system for capital expenditures, shifting primary responsibility for funding school facilities and equipment away from local school districts, with their heavy reliance on local property taxes, to the state. While advocates for property-poor districts applauded this rare de-emphasis on property taxes, people in property-rich districts feared the potential loss of local control. Five years later, however, skepticism has evaporated as the state, through its centralized School Facilities Board, has funded many construction and renewal projects, as well as thousands of “deficiency correction” projects, in all types of school districts.

Arizona’s journey towards a comprehensive redesign of school capital funding began in 1991 when property-poor school districts and parents and students in those districts filed a lawsuit claiming that the state’s method of funding capital expenditures violated the education clause of the state constitution. In 1994, the Arizona Supreme Court agreed and held that the state’s capital funding laws did not provide a “general and uniform” system of common schools, as required by the state constitution.² Over the next four years, an iterative process of decision making, in which the legislature and governor enacted new laws and the state supreme court analyzed those laws in light of constitutional requirements, led to agreement on a new capital funding system for the schools. The court interpreted the state constitution to require a funding

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² *Roosevelt Elementary Sch. Dist. No. 66, et al. v. Bishop, et al.*, 877 P.2d 806 (Ariz. 1994); ARIZ. CONST. art. XI, §§ 1, 6, available from ALIS Online, <www.azleg.state.az.us> (1999).

system that would provide “adequate” school facilities and defined adequate facilities as those that would enable students to meet the state’s student competency standards.

The Arizona Supreme Court’s capital funding decision triggered an unusual and potentially highly significant form of public engagement. The State Department of Education, in 1995, convened a three-day Education Finance Summit, which included a broad representation of legislators and other stakeholders and helped propel the change to come. This Summit is a rare instance of state-initiated, in-depth public dialogue focused specifically on how to redesign a state’s education finance system. Nevertheless, public engagement since the Summit has been minimal.

Recently, the legislature has reduced funding to the School Facilities Board, which has led to compliance proceedings and additional court decisions. Meanwhile, new plaintiffs have filed separate lawsuits on behalf of English language learner (ELL) and “at-risk” students, seeking to extend the courts’ standards-based adequacy approach for capital funding to programs for these students.

I. SCHOOL FACILITY NEEDS AND THE EDUCATION FINANCE SYSTEM

For over a decade, Arizona’s population has been expanding dramatically, and that growth is expected to continue for the foreseeable future. Arizona ranks second in the nation in the rate of its population growth, which increased 40% from 3.7 million to 5.1 million residents between 1990 and 2000. In the Phoenix area alone, the general population is increasing by about 100,000 each year; one suburban school district had 13,000 residents in 1990 and nearly 140,000 by 2000. Statewide, public school enrollment increased 44%.³

³ U.S. Census Bureau, “State and County Quickfacts,” quickfacts.census.gov/qfd/index and “Population of Counties by Decennial Census,” www.census.gov/population/cencounts/az190090.txt (March 1995); Tom Rex, *Statewide Economic Study 2002, Projected Population Growth* (July 2002)(prepared for Arizona Dep’t

Although school construction increased significantly in the 1990s in response to these population pressures, it could not keep pace. Growth in student enrollment was highest in suburban school districts, but some urban and rural districts with low assessed property values also experienced growth that outstripped the capacity of their school facilities. Some districts were overwhelmed by the combination of explosive growth and up to a three-year lag in bringing new property onto the tax rolls, due to certain property tax regulations. Also, a number of schools in Arizona are charter schools, which received no capital funding. Moreover, many school districts needed to repair or replace schools that were inadequate or had deteriorated over time.⁴

In addition to capacity problems due to growth, the quality of Arizona's school facilities varied enormously. Some schools were unsafe, unhealthy, in violation of building, fire, and safety codes and had only dirt lots for playgrounds. There were schools with no libraries, science laboratories, computer rooms, gymnasiums or auditoriums. On the other hand, schools in a few districts with extraordinarily high property values due to, for instance, the presence of power generating plants, had indoor swimming pools, a domed stadium, television studios, well-stocked libraries, satellite dishes, and extensive computer systems.⁵ The state supreme court concluded in 1994 that the cumulative effect of the state's chosen methods of financing public education had, over many years,

of Commerce.); Michael Hunter and Mary Gifford, SCHOOL FINANCE PRIMER 4 (February 2000) (a project of the Goldwater Institute's Center for Market-Based Education); Interview with Jeff Groscost, former Speaker of the Arizona House of Representatives (May 14, 2002); Interview with Elaine McLean, Executive Director, League of Women Voters of Arizona (January 25, 2000).

⁴ ARIZONA DEPARTMENT OF EDUCATION, EDUCATION FINANCE SUMMIT, DATABASE ATTACHMENTS, at Attachment A (June 1995); ARIZONA TAX RESEARCH ASSOCIATION, EDUCATION FINANCE SUMMIT POSITION PAPER, EDUCATION FINANCE SUMMIT, Tab VIII (June 1995); Groscost Interview; Robbie Sherwood, *Many Issues, Shaky Hope, Lack of Funds and Infighting May Take Toll*, THE ARIZONA REPUBLIC, Jan. 9, 2000 at B5. In 1993, Arizona ranked third among the 50 states in the amount of outstanding debt per-pupil and fourth in per-pupil capital expenditures. ARIZONA TAX RESEARCH ASSOCIATION, POSITION PAPER, at 4.

⁵ Roosevelt, 877 P.2d at 808.

created and perpetuated these disparities in school facilities.⁶

Arizona, like many other states, used a complicated set of formulas to allocate state education funds to school districts. State funding was divided into M&O expenditures (“maintenance and operations”) and capital expenditures, which were calculated and distributed through two distinct and largely separate systems. The M&O funding calculations started with a state-designated per-pupil “base-level funding” amount -- \$2,489 in the 1994-1995 school year, for example. Each district’s total base-level funding amount was this per-pupil amount times the number of students in the district, weighted for certain needs.

An M&O formula then determined each district’s “share” of its base-level funding amount by multiplying the district’s total assessed property valuation by a “qualifying tax rate” – \$4.72 per \$100 of assessed value for 1994-1995 in K-12 districts. The district was responsible for raising its “share” from local property taxes. If, however, tax revenues at the designated rate were less than the district’s base-level funding amount, the state made up the difference. Under these formulas, 90% of Arizona’s school districts qualified for at least some state “equalization assistance,” which varied depending on per-pupil assessed property values.⁷

Even with state contributions, however, the base-level M&O funding amount was set so low that it was insufficient to cover the actual costs of educating students. In fact, it routinely fell short for all districts. Under the state’s education finance statutes, additional revenues that school districts needed to cover basic operating costs required property tax

⁶ *Id.* at 815.

⁷ *Id.* at 810; ARIZ. REV. STAT. ANN. §§ 15-943, 15-971 (West 1991 and 1997 Supp.). The number of students in the district was weighted by grade level and for disabilities; a few other factors, such as teacher experience level and sometimes legislatively set inflation rates, were included in the calculations. *Id.* Property values throughout the state were assessed at 25% of fair market value for commercial property and 10% of fair market value for residential property. ARIZONA TAX RESEARCH ASSOCIATION, *supra*, note 4. By school year 1999-00, the base support was \$2,578 per weighted student and the tax rate was \$4.33 for unified (K-12) districts. SCHOOL FINANCE PRIMER, *supra* note 3 at 6-8.

overrides, which had to be authorized periodically by local voters because they expired after a specified number of years.

A district's ability to propose and gain voter approval for these overrides depended on the assessed value of property in the district and the voters' willingness to tax themselves and local commercial property. Also, a district's assessed property value limited the total indebtedness it was allowed to incur. Assessed property values varied from about \$5.8 million per-pupil in the Ruth Fisher Elementary School District, where a nuclear power plant is located, to \$749 per-pupil in the San Carlos Unified District in Gila County, where there is almost no commercial property and 96% of the county's land is federal, state, or Indian land, that is, not subject to property tax.⁸

Deepening the dilemma for property-poor districts and high-growth districts, the state, although providing some direct aid for capital expenditures, delegated most of the responsibility to local school districts. To buy land, construct new schools, renovate existing schools, or purchase other capital items such as school buses, local districts had to propose and voters had to pass separate capital bond issues dedicated for these purposes. While some districts saw proposed capital bonds defeated at the polls, often because voters believed that their property taxes were already high, others were unable to even propose needed capital bonds because the bonds would have pushed them over their debt limit.⁹ Districts in sparsely populated areas, for example, had few students but also had insufficient

⁸ Roosevelt, 877 P.2d at 810; ARIZ. REV. STAT. ANN. § 15-1021 (West 1997); BUREAU OF EDUCATIONAL RESEARCH AND SERVICES, COLLEGE OF EDUCATION, ARIZONA STATE UNIVERSITY, SCHOOL MANAGEMENT INFORMATION DATA, 15 and 75 (1990).

⁹ Roosevelt, 877 P.2d at 810; ARIZ. REV. STAT. ANN. § 15-1021 (West 1994); Francie Noyes, *Lawsuit Derails Uneven School Funding - If Appeal Fails- Rich Schools, Poor Schools*, THE ARIZONA DAILY STAR, June 18, 1995 at 9A. Since the 1990-1991 school year, Arizona's formulas have resulted in state and local contributions to public school funding of approximately 45% each and a combined federal and county contribution of about 10%. Bucking the national trend, the state proportion of overall education funding decreased from 54% for the 1985-1986 school year to 45% five years later. ARIZONA DEP'T OF EDUCATION, *supra* note 4, at Attachment A (1995).

bonding capacity to build even the small schools that they needed.

The state used a set of formulas separate from the M&O formulas to calculate the relatively small amount of state assistance designated for capital outlays. The education finance laws also allowed districts whose M&O revenues were inadequate to reclassify most of their state capital outlay revenues to M&O, and districts routinely did so to compensate for M&O shortfalls. In the 1994-1995 fiscal year, for instance, state education funding included \$173 million designated for capital outlays, but school districts transferred 77%, or \$133 million, of these monies to maintenance and operations.¹⁰ In practice, this flexibility contributed to the deterioration of facilities in many districts, typically districts with low assessed property values.¹¹ Moreover, “capital funding” in Arizona must also be used to purchase a broad set of education essentials beyond buildings, such as laboratory equipment, computers, and even textbooks and library books.¹²

II. ENGAGING THE COURTS, THE LEGISLATURE, AND THE PUBLIC

Legal Strategies and Supreme Court Decisions Set the Stage

In the early 1970s, taxpayers and schoolchildren in a low-property-wealth school district, launched a broad legal challenge to the inequities in the Arizona education finance system, claiming that the system resulted

¹⁰ Robbie Sherwood, *Voters to get Hull’s plan for Schools*, THE ARIZONA REPUBLIC, June 29, 2000, at A1; Darcia Harris Bowman, *Arizona To Hold Referendum On Tax Increase for Schools*, EDUCATION WEEK, July 12, 2000 at 25; Education Commission of the States, 50-State Comparison of Expenditures and Revenues, Teacher Salaries, Teacher/Pupil Ratios (2000) (using 1996-97 school year data).

¹¹ Roosevelt, 877 P.2d at 810; ARIZ. REV. STAT. ANN. § 15-905(F) (West 1994). Tax rates varied from a high of \$13.61 per \$100 of assessed value to \$4.37 in the Roosevelt district to \$0.11 in the Ruth Fisher district. BUREAU OF EDUCATIONAL RESEARCH AND SERVICES, *supra* note 8 at 59, 68. ARIZONA DEP’T OF EDUCATION, *supra* note 4, at Attachment F (1995).

¹² ARIZ. REV. STAT. ANN. § 15-903, et seq (ALIS Online 1999); Arizona School Facilities Board, <www.sfb.state.az.us> (2000).

in lower quality education and higher tax burdens in property-poor districts. They asserted that this disparity violated the equal protection clauses of the state and federal constitutions. In a cryptic 1973 opinion, *Shofstall v. Hollins*, the Arizona Supreme Court rejected all of plaintiffs' claims.¹³

The court held that education is a “fundamental interest” under the Arizona Constitution, which would ordinarily result in the court using a “strict scrutiny” test to evaluate the finance system. Paradoxically, however, the *Shofstall* court applied the less rigorous “rational relationship” test and upheld the constitutionality of Arizona’s education finance system.¹⁴ With respect to the students’ alleged lower quality of education, the court turned to the education provisions of the Arizona constitution, which require the legislature to establish and maintain a “general and uniform public school system” of free common schools.¹⁵ Although the court held that these constitutional provisions “assure[] to every child a basic education,” it recognized these educational rights only for attributes of common schools expressly described in the constitution, such as providing services to students aged six to twenty-one free of charge and operating schools at least six months a year.¹⁶

Almost 20 years later, residents of the Roosevelt Elementary School District and other low-property-wealth districts asked the Arizona Center for Law in the Public Interest to initiate a new school funding case and ask the state courts to re-consider the inequities and inadequacy of the state’s education finance system.¹⁷ The Center was founded in 1974 and had a history of bringing consumer, environmental, and open-government

¹³ 515 P.2d 590 (Ariz. 1973).

¹⁴ 515 P.2d at 593. While this case was pending, the U.S. Supreme Court rejected an analogous federal equal protection claim brought by residents of a property-poor school district in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁵ ARIZ. CONST., art. XI, §§ 1, 6.

¹⁶ 515 P.2d at 591-93.

¹⁷ Noyes, *Lawsuit Derails*, *supra* note 9.

litigations. It had only three attorneys and an annual budget of about \$300,000.¹⁸ In May of 1991, when it filed *Roosevelt Elementary Sch. Dist. No. 66, et al. v. Bishop*,¹⁹ the Center represented over 40 poor or heavily taxed school districts; the number later grew to about 70 districts, almost one third of all the districts in the state.²⁰

Largely because of the 1973 *Shofstall* precedent, plaintiffs' attorneys chose not to challenge the state's entire education finance system. Instead, they filed a "capital case," that is, a case that challenged only the state's system for funding capital items. Also, even though most plaintiff lawyers in the 1990s were challenging the failure of state education finance systems to provide sufficient funding for all districts to offer a basic, adequate education to their students, the *Roosevelt* plaintiffs based their claims on the inequities of the facilities among Arizona school districts because they believed that an equity approach would more likely result in all districts, including higher-wealth districts, having a substantial stake in the capital finance system and that would ultimately bring greater benefits to the lower-wealth plaintiff districts. Plaintiffs submitted massive documentation in the form of affidavits and deposition testimony to demonstrate the disparities in school facilities between property-rich and property-poor districts and to attribute the cause of the disparities to the state's finance system. Plaintiffs argued that such a system violated the uniformity provision of the state constitution's education clause and moved for summary judgment.²¹

¹⁸ Interviews with Timothy M. Hogan, Executive Director, Arizona Center for Law in the Public Interest (November 18, 1998 and July 19, 1999). Mr. Hogan characterizes the Center's work as "trying to change some fundamental institutions and overcome some very stodgy thinking." Michael Kiefer, "Timely Tim," *phoenixnewtimes.com*, <<http://phoenixnewtimes.com/archives/1999/040998/feature1-1.html>> (April 9-15, 1998).

¹⁹ 877 P.2d 806 (Ariz. 1994).

²⁰ Kiefer, *supra* note 18; Hogan Interview.

²¹ Hogan Interview. Plaintiffs hoped to "improve the precedent and then maybe come back with an operations [M & O] case. We may come back with the other case some day." *Id.* For explanations of the shift from equity claims to adequacy claims in education finance litigation, see William E. Thro, *The Third Wave: The Implications of the Montana, Kentucky*

The state did not attempt to refute plaintiffs’ factual allegations, but rather argued that plaintiffs’ complaint failed even to state a legal claim. Defendants asked the court to resolve that question first, and, only if necessary, to allow them additional time to controvert plaintiffs’ “voluminous exhibits.”²² Defendants also argued that the capital funding system had been in place since territorial times and therefore must be deemed to comply with the state constitution, adopted for statehood in 1912, and relied on the *Shofstall* decision to argue that the plaintiffs should take their concerns to the legislative branch, not the courts.²³

The state defendants prevailed in the trial court, and the *Roosevelt* plaintiffs appealed to the Arizona Supreme Court. There, in a 1994 plurality decision, plaintiffs’ position was upheld. Without directly overruling *Shofstall*, the court indicated that the reasoning of the earlier case rendered most of the constitution’s uniformity clause “meaningless and redundant.”²⁴ After re-stating the constitutional standard to require the state to establish “funding mechanisms that provide sufficient funds to educate children on substantially equal terms” and to ensure that the “statewide system provides an adequate education,” the court held that the state’s school finance system did not comply with the constitution’s uniformity requirements.²⁵

and Texas Decisions on the Future of Public School Finance Reform Litigation, 19 J. L. & EDUC. 219 (1990); Michael A. Rebell, *Educational Adequacy, Democracy and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL*, 218 (Timothy Ready, et al., eds. 2002); *Roosevelt*, 877 P.2d at 808.

²² Defendant’s Response to Plaintiffs’ Motion for Summary Judgment, *Roosevelt v. Bishop*, No. CV91-13087, Superior Court for Maricopa County, June 12, 1992 at 2.

²³ Appellees’ Supplemental Brief, *Roosevelt v. Bishop*, No. 1 CA-CV 92-504 Arizona Supreme Court, Sept. 13, 1993.

²⁴ *Roosevelt*, 877 P.2d at 813.

²⁵ *Roosevelt*, 877 P.2d at 814; ARIZ. CONST., art. XI § 1: “The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include kindergarten schools, common schools, high schools, normal schools, industrial schools, [and] universities. . . .”

The court emphasized that the state’s finance system “directly caused substantial capital disparities among school districts.” Disparities per se were not unconstitutional, the court said, but a state system that caused disparities was unconstitutional. The court pointed to “heavy reliance on local property taxation, combined with arbitrary school district boundaries and the lack of meaningful equalization” as the features of the system that generated the disparities that made it unconstitutional.²⁶

Concurring in this result, the Chief Justice wrote a separate opinion that also spelled out the requirements for an adequate education. He looked to the state’s course-work requirements for high school graduation and student competency standards and concluded that the state’s financing scheme was unconstitutional because it did not enable all districts to provide the facilities and equipment necessary to give their students the opportunity to meet the state’s own minimum educational standards.²⁷ Chief Justice Feldman’s invocation of student competency standards as a measure of adequate educational resources was consistent with a national trend of courts in adequacy cases to utilize state content standards as a reference point for analyzing constitutional concepts of educational adequacy.²⁸

The court’s decision received a cynical reaction from many legislators. Then-Senate President John Greene apparently had no intention of complying with the court’s requirements and instead dismissed

²⁶ Roosevelt, 877 P.2d at 815; Hull v. Albrecht, 960 P.2d 634, 636 (Ariz. 1998).

²⁷ Roosevelt, 877 P.2d at 819-22 (Feldman, C.J., specially concurring).

²⁸ Rebell, *Educational Adequacy*, *supra* note 21 (explaining the standards-based reform movement and its provision of judicially manageable standards for the courts). *See also* CFE v. State, 719 N.Y.S.2d 475, 485-87 (Sup. Ct. New York County 2001), *aff’d*, CFE v. State, Slip Op. 15615, ___ N.E.2d ___ (N.Y. 2003); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989).

the decision, asking, “What are they going to do to us?”²⁹ Governor Fife Symington criticized the court’s decision as interference in state business but also pledged to resubmit to the legislature a \$120 million school facilities proposal to help needy districts, even though that proposal had garnered little support during the preceding legislative session.³⁰ A study of school district facility needs, which had been approved by the legislature and the governor prior to the court’s decision, proceeded.³¹

The media, on the other hand, tended to view the court’s decision favorably, and some tried to raise the level of public awareness. The Arizona Daily Star, for instance, published a series of five articles describing facility disparities among school districts, the underlying tax system, the supreme court decision, and various proposed solutions. While political columnists represented a variety of views, the editorial boards of the largest newspapers consistently cajoled or castigated the legislature on the school capital funding issue over the next few years.³²

²⁹ Kiefer, *supra* note 18; Hal Mattern, *Lawmakers Out of Time On Schools, Tax Cut Takes Back Seat to Solving Funding Issue*, THE ARIZONA REPUBLIC, Jan. 11, 1998.

³⁰ Lynn Schnaiberg, *Arizona Governor Signs Finance Bill; Legal Challenge Likely*, EDUCATION WEEK, Mar. 12, 1997; Peter West, *Arizona Finance System Is Ruled Unconstitutional*, EDUCATION WEEK, August 3, 1994; Mattern, *Lawmakers Out of Time*, *supra* note 29. The Governor claimed that old buildings can be fine for education, drawing an analogy to the buildings at his alma mater, Harvard University. Francie Noyes, *Means of Halting Deterioration Eludes Lawmaker- Rich Schools, Poor Schools*, THE ARIZONA DAILY STAR, June 19, 1995, at 1A.

³¹ Hal Mattern, *School Finances Hot Issue, 2 Meetings to ‘Focus on Funding Inequity*, THE ARIZONA REPUBLIC, June 12, 1995, at A1.

³² Senator John Greene, *Court Infringing on Legislature, Voters*, THE ARIZONA REPUBLIC, August 3, 1994 (writing that “[r]ecent editorials in newspapers across the state . . . reflect a wholesale acceptance of the recent Arizona Supreme Court opinion in *Roosevelt v. Bishop*”); Editorial, *Court Flunks School Funding Plan*, THE ARIZONA REPUBLIC, July 23, 1994; John Kolbe, *Unlovable School Bill May Fly Yet*, THE ARIZONA REPUBLIC, March 8, 1998; Editorial, *Education Summit Raising the Level of Debate*, THE ARIZONA REPUBLIC, June 12, 1995, at B4. See Francie Noyes, *Rich Schools, Poor Schools*, THE ARIZONA DAILY STAR, June 18 and 19, 1995, at 1A, 8A, 9A (two-day series of five articles).

The Education Finance Summit

In June 1995, after a year of relative inaction by legislators of both parties and the Governor,³³ the State Superintendent of Public Instruction (“Superintendent”), concerned about what she perceived as a developing impasse on capital funding, decided to rekindle the political debate by issuing a dramatic media announcement that she was unilaterally calling a statewide education summit to address the problem. She succeeded in bringing the school funding issue back into the limelight by convening a three-day Education Finance Summit, on behalf of the State Board of Education and the Arizona Department of Education (“ADE”).³⁴ The legislative leaders of the Superintendent’s own party privately called her to task because the summit put them on the spot. Nonetheless, they ultimately agreed to participate because the media and members of the minority party were planning to attend.³⁵

The summit drew significant media coverage, and organizations sent their highest level representatives. Fourteen legislators and a wide range of about 50 other major Arizona stakeholders, including over 20 educators and numerous business leaders, tax experts, and parents, participated in open small group and plenary discussions.³⁶ As initially designed, the summit would have limited input from the general public to 45 minutes on

³³ Mattern, *School Finances, Hot Issue*, *supra* note 31.

³⁴ Hal Mattern, *Education Summit Devises Ways to Fund State Schools*, THE ARIZONA REPUBLIC, June 22, 1995, at A1; Francie Noyes, *Summit to tackle school funding puzzle - Rich Schools, Poor Schools*, THE ARIZONA DAILY STAR, June 18, 1995, at 8A; Editorial, *Look at School Summit as an Opportunity*, THE PHOENIX GAZETTE, June 10, 1995, at B4.

³⁵ Interview with Jaime A. Molera, Governor Jane Dee Hull’s Policy Advisor for Legislative Affairs and Education at the time of the interview and formerly Director of Policy & Federal Relations at the Arizona Department of Education (May 15 and 16, 2000). Molera himself later served as State Superintendent of Public Instruction from May 2001 until January 2003.

³⁶ Editorial, *Look at School Summit*, *supra* note 34; Education Finance Summit Participants List (1995). Invitees included representatives from two of the *Roosevelt* plaintiff school districts. *Id.* Michael A. Rebell, Executive Director and Counsel of the Campaign for Fiscal Equity, Inc. attended the summit as an observer.

the final day. Responding to complaints of exclusion, however, conference organizers, in fact, opened all of the sessions to the public as observers.³⁷

Prior to the summit, the organizers surveyed invitees and requested position papers on issues ranging from an overarching question of how to “solve the capital inequities identified in the *Roosevelt* decision” to more specific concerns, such as how to “equaliz[e] access to capital funding without infringing on local control” and “what accountability mechanisms can be implemented . . . to ensure taxpayers’ money is used in the best interests of students?” In order to foster an informed debate, ADE also brought in leading experts to explain the intricacies of the state’s education finance system and national speakers to provide information about education finance systems in other states. ADE also disseminated extensive financial data on Arizona’s school districts to the participants.³⁸

Fourteen organizations responded to the request for position papers, including six education groups, five business groups, and two interfaith organizations. Over 50 distinct positions were articulated. Although no particular viewpoint predominated, several organizations asserted that property taxation should be more uniform and the state should increase its capital assistance to school districts. Moreover, several of the position papers called on the state to establish minimum facility and capital equipment standards. These papers were included in a summit resource binder compiled by ADE for all participants.³⁹

The wide range of options in the position papers served as the focus of small group discussions during the conference. ADE made its database of financial information on the state’s school districts available on-line to

³⁷ Hogan Interview.

³⁸ ARIZONA DEPARTMENT OF EDUCATION, EDUCATION FINANCE SUMMIT (June 1995).

³⁹ Anthony Sommer, *The Squeeze on Schools, State Effort to Equalize Fund Eyed*, THE ARIZONA REPUBLIC, June 14, 1995; Mattern, *Education Summit Devises Ways*, *supra* note 34; Mike McCloy, *School Funding Remedy Sought, Panel Wants Equal Aid for 200 Districts*, THE PHOENIX GAZETTE, June 6, 1995, at B1; Editorial, *Look at School Summit*, *supra* note 34; EDUCATION FINANCE SUMMIT, JUNE 1995.

the discussion groups and provided technical support to enable participants in each of the breakout rooms to calculate the financial consequences of proposed changes to the funding system. As the summit progressed, the organizers reviewed each day's discussions, provided summaries to participants, and adjusted the following day's agenda accordingly. Summit participants identified and considered about a dozen potential strategies for achieving more equitable capital funding, such as unifying school districts, developing a capital funding formula similar to the maintenance and operations formulas, and moving from local property taxes to an expanded state sales tax or increased income taxes for school construction. The approaches examined at the summit included the solutions ultimately adopted three years later.

The summit's organizers were pleased that it got people thinking "outside the box" and felt that it had raised expectations that the school finance issue would move beyond politics. After the summit, a special panel of legislators continued to hold meetings on the issue during the summer and fall in preparation for the next legislative session. Interestingly, the summit did not spawn significant public engagement follow ups, although Arizona Educational Television frequently featured school capital funding as a topic on *Horizon*, its local public affairs program.⁴⁰

III. A COLLOQUY BETWEEN THE LEGISLATURE AND THE COURTS

In 1996, the legislature established a \$20 million Capital Equity Fund to help schools meet emergency health and safety building needs and added another \$70 million to the fund in a later special session. However,

⁴⁰ Molera Interview; Editorial, *Education Summit Raising the Level of Debate*, *supra* note 32; Mattern, *Education Summit Devises Ways*, *supra* note 34; McCloy, *supra* note 39; McLean Interview (noting that public engagement may not have flourished due to Arizona's relatively transient population; its rapid growth is actually the net of enormous in migration and large out migration); David Majure, KAET, Channel 8, "Re: Have you Broadcast a Program about Arizona Public School Funding?" Personal e-mail (September 22, 1999).

the new legislation did not change the basic school finance system and its built-in disparities. Plaintiffs went back to court, and, in November, Superior Court Judge Rebecca Albrecht held that the system still failed to satisfy the constitutional requirements delineated by the supreme court in *Roosevelt*.⁴¹

Significantly, Judge Albrecht set a deadline of June 30, 1998 for the state to adopt an acceptable school finance system. If the state failed to do so, the court would prohibit the state from distributing money to school districts after that date—effectively shutting down the schools. Plaintiffs had requested tighter deadlines, and the state had argued against deadlines altogether.

On appeal, the Supreme Court summarily affirmed the lower court's decision, including the deadline and threat of statewide school closure.⁴² Although Governor Symington, in his petition to the supreme court, had asked for guidance on what the state needed to do to pass constitutional muster, the court provided no clarification or additional insight into what it would consider an acceptable capital funding system for the schools.⁴³

The on-going controversies engendered by the *Roosevelt* case had by this time ignited major dissension within the Arizona School Boards Association. In August 1997, the governing boards of the property-rich districts persuaded the School Boards Association to submit an *amicus* brief on behalf of the state and assist in paying legal fees to oppose the plaintiffs in *Roosevelt*. Even though the 70 districts backing the *Roosevelt* litigation were generally the less-wealthy districts, they paid a significant amount of dues to the School Boards Association, and some threatened to leave the organization. The School Boards Association backed down,

⁴¹ Hull v. Albrecht, 960 P.2d at 637-639; Kiefer, *supra* note 18; *State News in Brief: Ariz. Lawmakers Tackle Court's Facilities Order*, EDUCATION WEEK, Aug. 7, 1996.

⁴² Hull v. Albrecht, 960 P.2d at 636 (citing Symington v. Albrecht, No. CV-96-0614-SA (Ariz. Jan. 15, 1997) (Supreme Court Order)); Kiefer, *supra* note 18; *Judge Denies Arizona's Plan For School Capital Costs*, SCHOOL LAW NEWS, September 5, 1997, at 8.

⁴³ *Arizona High Court Upholds Finance Ruling*, EDUCATION WEEK, Jan. 29, 1997.

reversing its decision and, consequently, did not file a brief or pay any legal fees to oppose the plaintiffs.⁴⁴ Nonetheless, these conflicts within the education community complicated attempts to solve the problem.⁴⁵

Also in 1997, the legislature passed the Assistance to Build Classrooms Fund Act (“ABC legislation”), which was designed to significantly reduce the gap in capital funding capacity between property-rich and property-poor districts. The gap had been as much as 650 to 1 in some areas.⁴⁶ The ABC legislation provided a funding stream for low-property-wealth districts, but began with only \$32.5 million in the first year.⁴⁷ Although it provided some degree of equalization, it was not needs-based and did not address the Chief Justice’s concerns about reliance on local property taxes or the need to tie facilities and equipment to providing students with the opportunity to meet state standards.

The governor petitioned the Superior Court to declare the newly revised system constitutional, but the plaintiffs characterized these changes as merely “dribbling a little money out to them.”⁴⁸ In August, the court concluded that the ABC legislation did not enable the state to provide a uniform education for its students.⁴⁹ Only two months later “[i]n light of the urgency of the matter,” the Arizona Supreme Court issued an order “with opinion to follow” approving the trial court decision.⁵⁰ In

⁴⁴ Hogan Interview; Molera Interview.

⁴⁵ Hogan Interview.

⁴⁶ Robert C. Johnston, *Judge Dismisses Latest School Finance Plan in Arizona*, EDUCATION WEEK, Sept. 3, 1997.

⁴⁷ *Hull v. Albrecht*, 950 P.2d 1141, 1143-44 (Ariz. Dec. 23, 1997).

⁴⁸ Hogan Interview.

⁴⁹ Arizona Department of Education, Press Release, “Superintendent Keegan Applauds Ruling in Roosevelt School Finance Case,” Aug. 20, 1997; *Roosevelt Elem. Sch. v. Graham-Keegan*, Case No. 91-13087 (Maricopa County Superior Court Aug. 20, 1997) (cited as Minute Entry of Aug. 20, 1997 in *Hull v. Albrecht*, 950 P.2d at 1141).

⁵⁰ *Hull v. Albrecht*, 950 P.2d at 1142.

December, the court issued its opinion, which concluded that the amended funding scheme would institutionalize substantial capital facility disparities among the state's school districts.⁵¹ This time, the court spoke more specifically about the features of the school finance system it found unconstitutional and laid out a remedial framework for a system that would meet the state constitutional "uniformity" requirements. Interestingly, this framework was largely a standards-based, "adequacy" approach, even though plaintiffs had originally sought an equal-funding, "equity" remedy.⁵²

The court explained that the state must, first, "establish minimum adequate facility standards and provide [state] funding to ensure that no district falls below them." Second, the state's chosen funding mechanism "must not itself cause substantial disparities between districts." The court squarely confronted the issue of local control, defining it to include the power to go above, but not below, the facility standards, and directing the legislature to "[c]hoose a system that ensures adequate capital facilities statewide." Moreover, the court expected the facility standards to leverage financing sufficient, not only to improve and maintain existing facilities and construct new buildings for growing districts, but also to provide the facilities and equipment necessary "to enable students to master the [state's] educational goals."⁵³

By the time the court decision was issued, Arizona had a new Governor⁵⁴ and Speaker of the House, both of whom indicated their desire to solve the education finance dilemma. Governor Hull, a former school teacher indicated her desire for a comprehensive solution. Also, an unusual commonality of views emerged at this time among the low-

⁵¹ *Id.* at 1144-45.

⁵² *Id.* at 1144-46.

⁵³ *Id.* at 1145-46.

⁵⁴ Governor Jane Dee Hull replaced Governor Fife Symington, who was forced to resign after felony convictions. Lynn Schnaiberg, *Arizona Swears In New Education-Minded Governor*, EDUCATION WEEK, Sept. 17, 1997.

property-wealth school districts whose property taxes were not generating adequate capital funds, State Superintendent Lisa Graham who believed Arizona's level of education funding was too low in virtually all respects, and House Speaker Jeff Groscost who favored funding based on state sales taxes over local property taxes. Major opposition to these positions came primarily from certain high-property-wealth districts.⁵⁵

Building A Capital Funding System on the Court's Framework

The State Superintendent was "grateful for the court's decision" and optimistic that the parties would now "forge a meaningful solution."⁵⁶ Senate majority Leader Marc Spitzer, an outspoken critic of the courts' rulings in the past, said that the legislature should now "move forward" to a solution. In the next few months, the legislature and governor considered such core issues as whether to use the bulk of a projected budget surplus for schools instead of for tax cuts and whether to distribute capital funds on a per-pupil basis or based on district growth rates and the condition of existing buildings.⁵⁷

In the House, staff from the offices of Speaker Groscost, Superintendent Graham, and the minority leadership, as well as the *Roosevelt* plaintiffs' attorney, worked together to craft a legislative remedy that addressed the capital funding problems being experienced by the low property-wealth districts, the rapidly growing suburban districts and charter schools. The resulting bill, called Students FIRST (Fair and Immediate Resources for Students Today), applied equally to all school districts and replaced local property taxes with state funding for capital expenditures. In March 1998, the Arizona House passed Students FIRST.⁵⁸

⁵⁵ Molera Interview; Mattern, *Lawmakers Out of Time*, *supra* note 29.

⁵⁶ Arizona Department of Education, Press Release, *State Supreme Court Upholds Ruling on School Finance*, Oct. 24, 1997; Mattern, *Lawmakers Out of Time*, *supra* note 29.

⁵⁷ Mattern, *Lawmakers Out of Time*, *supra* note 29.

⁵⁸ Groscost Interview; Hogan Interview.

However, after the School Boards Association criticized the bill as “onerous” and “a stake through the heart of local control,”⁵⁹ the Senate responded by passing an alternative version that allowed districts to opt-out of the new state system, an option that would be advantageous to property-rich districts. In April, the House accepted the Senate version, and Governor Hull signed the bill; she immediately petitioned the supreme court to declare it constitutional.⁶⁰ About a month later, the state found that its current-year budget surplus was large enough to cut taxes by \$120 million and add \$435 million dollars to school spending, largely capital spending, in a \$5.9 billion total budget.⁶¹

In June 1998, the supreme court, in its fourth decision on this litigation, held that Students FIRST did not satisfy all of the requirements of a constitutional finance system, as set out in *Hull*. The Act met the first prong of the court’s test by establishing some minimum standards and creating a School Facilities Board to develop others and by providing state monies sufficient to fund every district’s compliance. However, the second prong of the *Hull* test required the state to avoid a funding scheme that itself caused substantial disparities between districts. The court concluded that the opt-out provision of the Act failed this test because it allowed the opt-out districts significant advantages over districts participating in the state’s system, advantages that would necessarily cause substantial disparities. Therefore, the court declared the Act unconstitutional.⁶²

By this time, the justices on the court were in unanimous agreement on the criteria they wanted the capital funding system to meet and

⁵⁹ Kolbe, *supra* note 32.

⁶⁰ Editorial, *Schools in Need, Governor Grabs Momentum*, THE ARIZONA REPUBLIC, Apr. 23, 1998.

⁶¹ Senate President Brenda Burns, Press Release, *Senate Approves \$120 Million Tax Cut; \$5.9 Billion Budget with \$435 Million more for K-12 Education*, May 8, 1998.

⁶² *Hull v. Albrecht*, 960 P.2d at 636-40.

rendered a unanimous decision.⁶³ The court gave the legislature only 60 days from the date of its June opinion until the schools would be shut down if the state failed to develop an acceptable finance system.⁶⁴ Moreover, the governor and entire legislature were up for re-election that year and media coverage spotlighted the school funding issue. This confluence of circumstances, along with the court's firm stance and its imminent deadline, were the key factors that led to a legislative compromise and a prompt resolution of this long-simmering issue.⁶⁵

In July, the legislature enacted and the governor signed a revised Students FIRST statute that contained no opt-out provisions.⁶⁶ The new statutes established minimum standards for adequate school facilities and assigned state revenues as the funding source. With all districts required to participate, the system itself did not cause disparities among school districts. Thus, the new system met both prongs of the court's requirements. Wealthy districts were somewhat appeased because district voters who choose to spend more on capital items were allowed to authorize additional local taxes, with no penalty or recapture.⁶⁷

The parties to the lawsuit agreed that the new law was "facially valid" and, therefore, no constitutional challenges remained.⁶⁸ Within days, the court issued an order ending the case.⁶⁹ The State Superintendent and others praised the new law, which guaranteed \$375

⁶³ *Id.* at 639-640; Hogan Interview.

⁶⁴ Hull v. Albrecht, 960 P.2d at 640.

⁶⁵ Groscost Interview; Hogan Interview; Kolbe, *supra* note 32.

⁶⁶ Senate and House Majority Staff, Press Release, *A Guide to Arizona's New School Capital Finance System*, July 8, 1998.

⁶⁷ ARIZ. REV. STAT. ANN. §§ 15-2001 *et seq.* (ALIS Online 1999).

⁶⁸ News Release, *Governor Asks Supreme Court to Approve Students FIRST*, July 15, 1998; Hull v. Albrecht, Supreme Court No. CV-98-0238-SA, Supreme Court Order of July 20, 1998.

⁶⁹ *Id.*

million of state funding annually for capital expenditures, including “soft” capital items, such as books and technology.⁷⁰

IV. IMPLEMENTATION: BRINGING SCHOOLS UP TO STANDARDS

The new finance system was so unusual that some described it as “a wonderful precedent,” “an innovative path,” and even “revolutionary.”⁷¹ Its near total elimination of local authority to issue bonds for capital expenditures raised expectations went further than any other state.⁷² Critics decried it as a major loss of local control and a “radical” experiment.⁷³ Nonetheless, the Arizona Senate President described the state’s action as getting rid of an “outdated property-tax system.”⁷⁴ Overall, the new law was criticized both for not authorizing enough money

⁷⁰ Hal Mattern, *Court OKs Students FIRST, Closes Case*, THE ARIZONA REPUBLIC, July 21, 1998; Tami Bickley, *Dodging the Crossfire: Stein Pursues Tough School Funding Choices*, JEWISH NEWS OF GREATER PHOENIX, Feb. 12, 1999; Arizona Department of Education, Press Release, *State Superintendent Applauds Supreme Court Ruling*, July 21, 1998.

⁷¹ Lynn Schnaiberg, *Arizona Ponders Making School Bond Issues History*, EDUCATION WEEK, Mar. 25, 1998.

⁷² Schnaiberg, *Arizona Ponders*, *supra* note 71. Education finance litigations in other states have also led to remedies that significantly altered tax structures that support education funding. *See, e.g.*, Drew Dunphy, MOVING MOUNTAINS IN THE GRANITE STATE: REFORMING SCHOOL FINANCE AND DEFINING ADEQUACY IN NEW HAMPSHIRE, STUDIES IN JUDICIAL REMEDIES AND PUBLIC ENGAGEMENT (Campaign for Fiscal Equity, Inc., March 2001); Michael A. Rebell and Jeffrey Metzler, RAPID RESPONSE, RADICAL REFORM: THE STORY OF SCHOOL FINANCE LITIGATION IN VERMONT, STUDIES IN JUDICIAL REMEDIES AND PUBLIC ENGAGEMENT (Campaign for Fiscal Equity, Inc., October 2000); J. Steven Farr and Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 Yale Law & Pol’y Rev. 607 (1999); Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J. Law & Educ. 485 (October 1999).

⁷³ Schnaiberg, *Arizona Ponders*, *supra* note 71; Editorial, *Schools in Need*, *supra* note 60.

⁷⁴ Arizona State Senate, News Release, *Revised Students FIRST School Finance Bill Passes Senate*, July 8, 1998.

and for authorizing so much that it would bankrupt the state.⁷⁵

The School Facilities Board

The Students FIRST statute set out the most basic specifications for school buildings: square footage and cost per square foot. It also established a School Facilities Board that was empowered, among other things, to develop more detailed adequacy guidelines—not only for school buildings but for other capital items, such as equipment for school science laboratories. The law created separate state funding mechanisms for “new school facilities,” “building renewal,” and “deficiencies corrections.” Students FIRST directed the new Board to include technology and “the facilities and equipment necessary and appropriate to enable pupils to achieve the [state’s] academic standards” in its guidelines.⁷⁶

The School Facilities Board consists of nine voting members appointed by the governor plus the State Superintendent as a non-voting member. Each member of the Board must bring to the process a specified expertise, such as that of a school architect, school engineer, demographer, school construction expert, or an elected member of a school board who is familiar with school finance. In addition to developing the adequacy guidelines, the Board’s responsibilities include issuing state bonds, assessing school facilities and equipment, approving the distribution of monies to school districts, and inspecting each school building at least once every five years.⁷⁷ Traditional public schools must meet the building standards set by the Board, but Arizona’s many charter schools are not held to these standards and do not receive funding through the Board. Instead, the state annually allocates to charter schools an additional \$400

⁷⁵ Sherwood, *Many Issues*, *supra* note 4.

⁷⁶ ARIZ. REV. STAT. ANN. §§ 15-2002, 2011 (ALIS Online 1999).

⁷⁷ ARIZ. REV. STAT. ANN. §§ 15-2001-2002 (ALIS Online 1999). Dr. Philip Geiger, Executive Director, Arizona School Facilities Board, Presentation at Educational Priorities Panel, New York, New York (April 10, 2002).

per-pupil which is intended to provide for their capital needs.⁷⁸

For the New Schools Fund, the Board reviews enrollment projections and authorizes expenditures based on those projections. The statute specifies the square footage per student and cost per square foot separately for elementary, middle, and high schools, at a number of different enrollment levels. The Board has the flexibility to modify prescribed square footage for factors such as local geography. The designated costs are subject to annual adjustment based on a construction market index identified by the joint legislative budget committee.⁷⁹

For the Building Renewal Fund, the Board developed and must maintain a database of all non-charter schools in the state and distribute monies based on the age and student capacity of each building. This fund supports major renovations and repairs and upgrades to building systems, such as electrical or plumbing systems, that maintain or extend the useful life of the buildings. The Deficiency Correction Fund addresses code violations and overcrowding, which is determined by available square footage per student. Students FIRST requires the Board to have all deficiency correction projects under contract by June 30, 2003—or lose the funding for those projects.⁸⁰

The governor appointed most School Facilities Board members in September 1998, and the Board was up and running in the fall of that year. Initially, there were struggles over development of the adequacy guidelines. Unable to agree on what students needed to meet the state academic standards, the Board turned the question around and set building guidelines at the level that would not impede students' opportunity to meet academic standards. The resulting building adequacy guidelines require

⁷⁸ Arizona Dep't. of Education, Press Release, *State Superintendent Applauds*, *supra* note 70.

⁷⁹ ARIZ. REV. STAT. ANN. §§ 15-2002, 2011, and 2041 (ALIS Online 1999). Costs per square foot are five percent higher for rural schools. *Id.*

⁸⁰ ARIZ. REV. STAT. ANN. §§ 15-2021-2031 (ALIS Online 1999).

facilities and equipment for the arts, science, and physical education, plus multipurpose rooms that can serve as auditoriums, but do not include football fields. The guidelines also require one computer for every eight students, Internet access in every classroom, microscopes, dictionaries and many other instrumentalities of learning.⁸¹

The Board adopted Building Adequacy Guidelines in November 1999, seven months after the statute's April 30, 1999 deadline. Similarly, the original December 1999 deadline for a statewide assessment of all 1,210 schools and 1,410 building sites, including the cost of bringing each up to the Adequacy Guidelines, proved overly optimistic. Nonetheless, when the assessments were finished in April 2001, there was broad agreement that they were thorough and comprehensive.⁸²

This detailed evaluation of the condition of each school building exposed some startling consequences of the lack of routine maintenance in many districts. For example, the failure to periodically clear roofs allowed trees to grow on several school roofs, including in one case a tree that was seven-feet tall. Also, numerous inoperative heating and cooling systems had to be replaced long before their expected useful lives had expired because inexpensive filters that would have protected them were never replaced. These costly oversights, and others like them, were attributed to fear of heights, regarding the roofs, and to not knowing that the filters existed or needed to be changed. In response to this unexpected set of problems, the School Facilities Board initially concluded that it would need to inspect the buildings frequently, but later decided to develop Preventative Maintenance Guidelines and training modules to improve the expertise of local personnel charged with maintaining the facilities. Recently, the legislature passed a bill giving the Board the

⁸¹ News Release, *Governor Appoints Members of School Facilities Board*, Sept. 10, 1998; Molera Interview; Arizona School Facilities Board Rules & Policies §§ R7-6-221-250, filed January 13, 2000 (Supp. 00-1), as amended.

⁸² Pat Flannery, *Suit Triggered Gigantic Spending, All Schools will meet Standards*, THE ARIZONA REPUBLIC, April 29, 2001; Arizona School Facilities Board, "Forms and Documents," <www.sfb.state.az.us/sfb/sfbpub/sfb_forms_docs.stm> (Sept. 14, 1999); Ed Boot, Interim Executive Director, Newsletter to School Superintendents (April 15, 2003).

authorization and responsibility to ensure compliance with these Guidelines. Superintendents have been receptive to these changes because preventative maintenance will mean more reliable systems and cost savings in the long run.⁸³

In its first year of actually disbursing funds, 1999, the Board distributed over \$313 million to school districts for new construction and emergency deficiency corrections. In the 2002-03 fiscal year, the Board's staff analyzed and approved 26 new schools totaling over 1.8 million square feet, at a cost of \$190 million. The Board and local school districts have also worked with developers to obtain over \$70 million worth of donated land for new school construction, which has been underwritten, in part, by a 30% state tax credit for such donations which took effect in January 2001.⁸⁴

The Board raced to meet its June 30, 2003 deadline for the 5,948 deficiency correction projects identified by the statewide facilities assessment, and issued contracts for most of these projects in the last year. Also, the legislature, during the 2002-03 budget negotiations, agreed to extend the deadline for almost 300 projects (about 5%) to 2005. The highest costs for bringing schools into compliance with the state's new building and equipment Adequacy Guidelines were in the 417 rural and remote schools, which were so dilapidated that they needed extensive renovation or had to be replaced with new construction.⁸⁵ In many rural areas, the new or renovated schools are the center of their communities and have generated so much enthusiasm that "it's energizing" just to visit

⁸³ The Board's first statewide assessment of schools found that 70% of school building "deficiencies" were due to neglect. Geiger Presentation, *supra* note 77. See ARIZ. REV. STAT. ANN. §§ 15-2002 and 15-2031 (LEXSTAT 2003). The Board approved the Guidelines on June 5, 2003. <www.sfb.state.az.us> (July 23, 2003).

⁸⁴ ARIZ. REV. STAT. ANN. §§ 43-1089.02 (ALIS Online 1999); Geiger, *supra* note 77; Molera Interview; Groscost Interview; Lori Baker, *Districts Demand Action, Schools Frustrated by Students First*, THE ARIZONA REPUBLIC, October 31, 1999.

⁸⁵ Boot, *supra* note 82 ; Geiger, *supra* note 77.

these communities.⁸⁶

Students FIRST allows a school district to exceed the Board's building guidelines by asking residents to vote for higher property taxes to underwrite local "excess," or Class B, bonds. Under the statute, the district must explain to the voters specifically what the bonds will finance and submit the proposal in a regular, bi-annual November election. In the elections held since the law went into effect, voters in 28 districts, a little over 10% of the state's school districts, have approved these bonds, often for auditoriums, more buses for growing districts, or high school athletic facilities.⁸⁷

Sales Tax Increase and Bond Issues

Anticipating potential budget pressures for education and other state commitments, Governor Hull in 1999 proposed a six-tenths of one percent increase in the state sales tax—from 5.0% to 5.6%—to generate an estimated \$450 million annually for education. The proposal called for the revenues to be allocated 85% to K-12 education for operating costs, including teacher bonuses and higher salaries, and 15% to higher education. Other key aspects of the proposal were a maintenance of effort provision and an annual \$70 million allotment for debt service on the revenue bonds issued to fund the School Facilities Board's deficiencies correction program.⁸⁸

⁸⁶ Interview with Christopher Thomas, Legal Counsel to the Arizona School Boards Association, June 13, 2003.

⁸⁷ ARIZ. REV. STAT. ANN. §§ 15-491 (ALIS Online 1999). Interview with Judy Richardson, Vice President, Public Finance, Stone & Youngberg (Aug. 19, 2003).

⁸⁸ Arizona Tax Research Association, Proposition 301 & Education 2000 (n.d. [2000]); Molera Interview; Michael R. Graham, *Educators Thank Voters for Bucks*, THE TUCSON CITIZEN, Nov. 10, 2000; Clara M. Lovett, *Op Ed: It's Up to All to Make Sure Prop. 301 Succeeds*, ARIZONA DAILY SUN, Dec. 8, 2000; Robbie Sherwood, *49 Lawmakers to Co-sponsor Education Plan*, THE ARIZONA REPUBLIC, June 7, 2000; Jessica L. Sandham, *State Voters OK More Spending For Education*, EDUCATION WEEK, Nov. 15, 2000, at 23-24.

In early 2000, polls showed that between 55% and 65% of the state's registered voters favored the education-dedicated tax increase. There was considerable uncertainty, however, as to whether the legislature would authorize its placement on the ballot. The governor called a special legislative session to deal with this single issue in May 2000. In June, the legislature battled internally and, eventually, through a coalition of moderate Republicans and Democrats, approved a bill that placed the tax increase, Proposition 301, before the voters in November. State business leaders, who emphasized the need for educated workers for the new knowledge-based economy, joined the Governor and State Superintendent to campaign in favor of the ballot measure. Prop. 301 passed with 53% of the vote.⁸⁹

School Facilities Board funding flowed, initially, from continued large state surpluses. By using state revenues instead of long-term bonds to finance school facilities, the state reduced the total dollars spent by about half because there were no interest payments. Even when the state did issue nearly \$800 million in revenue bonds to fund deficiency correction projects, in 2001 and 2002, the bonds were triple-A rated and issued at blended interest costs of about 4.55 to 4.65%.⁹⁰

IV. LITIGATIONS CONTINUE TO EMPHASIZE EDUCATION FINANCE

Budget pressures that began during fiscal year 2001-02 have in

⁸⁹ Sandham, *supra* note 88 at 24; Lovett, *supra* note 88; Darcia Harris Bowman, *Arizona To Hold Referendum On Tax Increase for Schools*, EDUCATION WEEK (July 12, 2000); "Arizona Partnership for the New Economy, An Economy that Works for Everyone, Final Report," <www.commerce.state.az.us> (January 2001) at 10.

⁹⁰ Arizona School Facilities Board, News Releases, *Board Issues \$500 Million in Triple-A Rated Bonds*, May 8, 2001; *State Saves \$4,000,000 in Bond Sale for Schools*, December 20, 2001; *Board Issues \$279 Million in Triple-A-Rated School Improvement Bonds*, July 25, 2002, available from <www.sfb.state.az.us>. A small portion of the revenue bonds, a \$6 million bond issue, was sold at a phenomenal 0.14% interest rate, under the federally sponsored "Qualified Zone Academy Bond" program. *Id.*

recent years affected the implementation of the new system. The former *Roosevelt* plaintiffs believed that the governor and legislature wanted Students FIRST to work, but also did not want it to cost too much.⁹¹ For fiscal year 2001-2002, the legislature transferred \$69 million from the Building Renewal Fund to the state's general fund to help balance the state budget. Consequently, several school districts asked the Maricopa County Superior Court to declare this action unconstitutional. In May 2002, the court concluded that the transfer was "a major devastation" of the fund and granted summary judgment to plaintiffs. Despite that decision, however, legislative leaders said, "The judge is wrong," and, less than three weeks later, the legislature cut \$90 million from the Building Renewal Fund allocation for the 2002-03 fiscal year to help balance that year's budget.⁹²

Plaintiffs went back to the same court with the same claims. At an evidentiary hearing, plaintiffs from Tucson and other districts presented evidence that this under-funding would result in the districts "being unable to provide the equipment and facilities necessary to enable their students to meet the State's academic standards." They contended that repairs and upgrades for roofs, lighting, air conditioning and other systems had been delayed due to the cuts. In October 2002, the court granted plaintiffs motion for a preliminary and permanent injunction and ordered the state to reinstate the \$90 million of funding by June 30, 2003. But that decision was stayed, and, in August 2003, the intermediate Court of Appeals reversed the lower court, finding that the legislature has the constitutional right to transfer funds from the Building Renewal Fund to the general

⁹¹ Hogan Interview. *See also* Jeffrey Metzler, *INEQUITABLE EQUILIBRIUM: SCHOOL FINANCE IN THE UNITED STATES, STUDIES IN JUDICIAL REMEDIES AND POLITICAL ENGAGEMENT* (Campaign for Fiscal Equity, Inc., June 2003) (arguing that improvements to school funding systems often prove to be temporary because the prior distribution of resources represented the balance of political power in a state and those interested in lasting reform must either find a way to change the political equilibrium or rely on courts to impose solutions on resistant legislatures).

⁹² Grant Smith, *Leaders Poised For Budget Clash*, *ARIZONA CAPITOL TIMES*, May 13, 2002; *Roosevelt Elementary Sch. Dist. No. 6 v. Hull*, CV 1999-019062, CV 2002-011568 (Superior Court, Maricopa County Oct. 17, 2002).

fund. Plaintiffs are appealing that decision to the Arizona Supreme Court.⁹³

In addition to the original *Roosevelt* case and the subsequent compliance proceedings concerning building renewal, the Arizona Center for Law in the Public Interest has initiated two other school funding lawsuits to ensure that adequate educational opportunities are provided for English language learner (ELL) students and “at-risk” students. In *Flores v. Arizona*, plaintiffs alleged that the state’s funding of programs for ELL students violated the federal Equal Educational Opportunities Act (EEOA) and the regulations implementing Title VI of the Civil Rights Act of 1964. The federal district court found in favor of plaintiffs on the EEOA claim and ordered the state to perform a “costing-out study” of ELL programs. The state’s study, released in May 2001, was inconclusive but formed the basis for legislative action in December of that year that increased funding from \$179 per ELL student to \$340. The same statute also appropriated funding for a further cost study. Subsequent court proceedings in 2002 were not determinative, and final resolution of the *Flores* case is still pending.⁹⁴

The litigation involving “at-risk” students, *Crane Elementary School District v. State*, was filed in state court in 2001 by seven school districts. Plaintiffs there are seeking a declaration that the state must “provide the programs and funding that are necessary for at-risk students to acquire the basic education” guaranteed by the education article of the Arizona Constitution. In this adequacy case, plaintiffs echo the *Roosevelt* precedent when they argue that funding for programs for at-risk students must be standards-based, that is, the state must fund programs that will

⁹³ *Id.*; *Roosevelt Elementary Sch. Dist. No. 6 v. Hull*, 1 CA-CV 02-0475, 1 CA-CV 02-0590, 1 CA-CV 03-0118 (Court of Appeals, Aug. 14, 2003).

⁹⁴ *Flores v. State of Arizona*, 48 F.Supp.2d 937 (D. Ariz. 1999); *Flores v. Arizona*, 172 F.Supp.2d 1225 (D. Ariz. 2000) (finding for plaintiffs); *Flores v. Arizona*, 160 F.Supp.2d 1043 (D. Ariz. 2000) (ordering a costing-out study); *Flores v. Arizona*, 2002 U.S. Dist. LEXIS 23177 and 2002 U.S. Dist. LEXIS 23178 (D. Ariz.); The Arizona Department of Education, *English Acquisition Program Cost Study—Phases I through IV* (May 2001). *See also* 20 U.S.C. § 1703 (1976).

provide these students the opportunity to meet the state's own academic standards. Approximately 23% of Arizona's 900,000 students are "at-risk" due to poverty, based on their eligibility for a free or reduced-price lunch. The trial in *Crane Elementary* is scheduled to begin in March 2004.⁹⁵

CONCLUSION

In summary, the Arizona experience provides an example of well-conceived court intervention and a dialogic process among the branches of state government which resulted in a successful and innovative redesign of school facilities funding. Because the court's remedial guidelines required the state to establish a capital funding system aligned with the state's student competency standards, Arizona has become one of the few states that has adopted a modern, standards-based capital finance system, that is, one built to ensure the capacity of school facilities and equipment to help students meet state academic standards. The unique state-sponsored public engagement summit also contributed to a successful remedy by refocusing a stalled process and encouraging participants to think outside the box.

The level of satisfaction with the new capital funding system and the School Facilities Board is remarkable⁹⁶ and is due, in part, to the fact that there were no losers. While rapid-growth districts and rural and remote communities are seeing dreams come true, all districts are receiving at least some state funds to improve their facilities.

⁹⁵ Complaint, *Crane Elementary Sch. Dist. v. State* (Sept. 20, 2001); "Quality Counts 2003," *Education Week*, <www.edweek.com/reports/qc00/tables/resources-t1.htm> (January 2003). Seeking to argue that more money would not help and that parents should receive vouchers instead, the Institute for Justice Arizona Chapter filed a motion to intervene in the suit. The motion was denied, and the denial was upheld on appeal. Institute for Justice, Web Release, "Arizona Court of Appeals Denies Parents' Right to Participate in Education Summit," <www.ij.org/media/index.html> (May 1, 2003).

⁹⁶ Flannery, *supra* note 82; Jessica L. Sandham, *Capitol Expenditures*, EDUCATION WEEK, June 6, 2001.

Despite this extraordinary achievement, however, it remains to be seen whether the Arizona courts and legislature will build on the foundation laid by the redesigned capital funding system by extending their standards-based approach to the programs that ELL and at-risk students need in order to meet the state's student competency standards. Revitalizing public engagement to help decision makers and education stakeholders think creatively about these issues could be the catalyst for another innovative solution. Further developments in Arizona will bear watching as pending litigations unfold in a time of state revenue shortfalls.