



CAMPAIGN FOR FISCAL EQUITY, INC.

**Studies in Judicial Remedies
and Public Engagement**

**WHO'S IN CONTROL?:
THE COURTS, THE LEGISLATURE AND THE PUBLIC
IN COLORADO'S SCHOOL FINANCE DEBATE**

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This paper is one in a series of case studies of education finance litigations in various states. Through these studies, we hope to understand how court-ordered remedies were implemented and to determine what role, if any, public engagement processes played in these events. Specifically, we aim to test the hypothesis that reform initiatives are most likely to succeed in states where citizens have been involved in the remedial policy-making process. For that reason, the studies will encompass a wide range of reform experiences, including those where there was much public engagement and those where there was none.

The term “public engagement” is currently used to describe a wide range of activities. CFE’s working definition of public engagement is a collaborative process in which a diverse range of individuals work together to arrive at solutions to complex social problems that a large majority of them can accept. Our hope is that this series of papers will help shape and refine our understanding of public engagement and its uses as a tool for change.

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Since the early 1980s, Colorado has seen three school funding lawsuits and three Public School Finance Acts (PSFAs) aimed at resolving the state's

appears to be at a critical juncture in its school finance debate. seeking to address the state's enormous capital construction needs, Colorado dramatically shaped the state's reform process. With a pending lawsuit amendments, and an unusually strong tradition of local control -- have conflict in the state constitution, a number of strict constitutional system. At the same time, certain factors particular to Colorado -- a seeming widespread dialogue on school finance given the complexity of the funding from equity to adequacy; and the difficulty of fostering an informed, supporting greater resources and those favoring lower taxes; a shift in focus familiar to students of school finance litigation: a struggle between those Colorado's school finance story touches on a number of themes

INTRODUCTION

by Christina Burnett
and Drew Dunphy¹

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education finance conflict. Although plaintiffs have yet to score a major victory and no court orders have been issued, this legal process has had a clear influence on legislative priorities and changes made to the funding system. Legislative hearings and other localized dialogues about funding reform have also had a subtle but important impact. Even before going to trial, the latest suit, *Giardino v. Colorado State Board of Education*, has already raised a sense of urgency among some legislators about solving the state's school funding problems.² In addition, advocates now perceive a pressing need for a broad statewide dialogue on school finance. Coupled with the pressure of litigation, this momentum for a truly informed and widespread dialogue may prove to be the missing link in Colorado's search for a funding remedy.

BACKGROUND

Constitutional Clauses and the Theme of Local Control

Many states would lay claim to a tradition of "local control," but this philosophy plays a particularly prominent role in Colorado politics, especially the politics of school finance. The strong orientation toward local political control has made questions about the state's obligation to fund educational adequacy even more complicated than in most states.³ The root of this tension can perhaps be found in the Colorado Constitution, which in fact contains two clauses relevant to these issues: an "education" clause and

² Addressing the inability of some districts to pay for construction, Senate President Tom Norton remarked, "If we don't address this, we're telling the courts to tell us to do our jobs, and that's wrong." *Needy Schools Seek a Lifeline from the State. Legislators Debate Involvement*, THE COLORADO SPRINGS GAZETTE, March 6, 1998 [hereafter *Needy Schools Seek a Lifeline*].

³ For more on the complexity of balancing local control and statewide adequacy, see Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 NYU REV. L. & SOC. CHANGE 691, 714-718 (1994-95).

an "instruction" clause.⁴ Article IX, § 2 of that document states that the General Assembly must "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state . . ."⁵ Article IX, § 15, however, vests control over instruction in district school boards:

The General Assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their districts.⁶

Parties on both sides of Colorado's school funding debate have cited the state constitution to defend their positions regarding how the public school system should be governed and who bears the primary responsibility for funding it.

Over five decades before *Lujan v. Colorado State Board of Education*, the state's first fiscal equity suit, the Colorado Supreme Court provided an explanation of the term "maintenance" in Article IX, § 2 that would seem to place responsibility for school funding squarely on the state: "The establishment and financial maintenance of the public schools . . ." said the Court, "is the carrying out of a state and not a local or municipal purpose." Despite this clear statement of state responsibility, however, this precedent has not been decisive in Colorado's fiscal equity lawsuits, and the tension between local control and greater state funding has persisted. In its amicus brief on behalf of the *Lujan* defendants, the state argued that "establishment

⁴ See Terry N. Whitney, *Voters and School Finance: The Impact of Public Opinion*, publication of the National Conference of State Legislatures (1993) at 29.

⁵ COLO. CONST., Art. IX, § 2.

⁶ COLO. CONST., Art. IX, § 15.

⁷ *Wilmore v. Annear*, 65 P.2d 1443, 1437 (1939).

and maintenance" -- in other words, funding -- would logically imply control. It attempted to reconcile the conflict between the two constitutional clauses by suggesting that while the state has an "interest" in public education, it is bound not to interfere with the clear mandate for local control of instruction.⁸ Others, however, have argued that the state has a duty, not a mere "interest," and thus must provide the funding to fulfill its obligation.

The value placed on local control by many Colorado leaders and voters cannot be overemphasized. In recent years, the Colorado legislature has debated measures such as home-school credits, tax credits for "stay-at-home moms," and vouchers,⁹ while in 1996 Coloradans considered but defeated a proposed constitutional amendment guaranteeing the right of parents to "direct and control the upbringing, education, values and discipline of their children."¹⁰ In sum, an analysis of a "thorough and uniform" education in Colorado remains incomplete without an evaluation of its relationship to "control of instruction" and funding. Both clauses play equally important roles in Colorado's fiscal equity litigation and in efforts to resolve the explicit tension between funding and control.

⁸ Brief of the General Assembly as Amicus Curiae, Addendum at 10, *Lujan v. Colorado State Board of Education*, 649 P.2d 1005. The notion of increased state funding clearly makes some legislators nervous about the loss of local control. In 1997, Representative Dave Owen remarked: "It's the Golden Rule: Them that got the gold makes the rules We like to micromanage up here [at the state capitol]. We'll tell them a lot more how to run their business [if we pick up the full cost]." *No Easy Answers on Tax Reform*, DENVER POST, April, 21, 1997 [hereafter *No Easy Answers*].

⁹ *Education Funding Divides State. GOP Meets to Chart Own Agenda*, DENVER POST, Monday, January 12, 1998.

¹⁰ NEW YORK TIMES, Thursday, November 7, 1996 at B7.

Colorado's Education Finance System

The state of Colorado made its first direct financial contribution to public education in 1935.¹¹ Other sources of funding for public education in the state include local property taxes and grants from federal, state, and local governments for the support of special programs.¹² By 1977, local sources accounted for 58% of school funding, while the state provided 42%. The gap between local and state funding has continued to shrink since then. Today, state income and sales taxes account for 46% of public school funding, local property taxes and ad valorem vehicle taxes provide 48%, and federal sources supply the remaining 6%.

In Colorado, the state and the districts share the funding of operating expenses in public schools, but the districts alone fund capital expenditures.¹³ This peculiar feature of the Colorado school finance system, combined with constitutional amendments capping taxes and spending, has made it difficult even for some wealthy districts to fund new building projects at a time when many districts are growing rapidly.¹⁴ The General Assembly has examined the problem of capital funding several times but has declined to make any major structural changes. In 1996, the Legislative Council concluded that it would take \$2.5 billion to address the capital

¹¹ A practice upheld in *Wilmore v. Annear*, *supra*, note 7.

¹² Interim Committee on School Finance, A Brief History of School Finance in Colorado, Staff Summary of Meeting, July 12-13, 1993, at 3. See also Richard A. King & Terry N. Whitney, *The Colorado School Finance Story: Traditional Values Shape Legislative Reforms and Initiatives*, 20 J. EDUC. FIN 372, 373 [hereafter *School Finance Story*]; Education Commission of the States website, www.ecs.org.

¹³ One exception is a "contingency reserve" fund, authorizing the state Board of Education to disburse funds to districts in emergencies. See Understanding Colorado School Finance 1996-97, Colorado Department of Education, www.cde.state.co.us/sfbroch.htm.

¹⁴ Interview with Lee Combs, defense attorney, *Hafer v. Colorado State Board of Education*, April 1996. Mr. Combs cited the example of Cherry Creek, where efforts to raise funds for capital expenditures were denied by the voters. See discussion of Taxpayer's Bill of Rights, *infra*.

development needs of Colorado's school districts.¹⁵

Over the past three decades, Colorado's General Assembly has sought to find a balance between equity interests and the pressure to maintain local control. The three PSFAs it has enacted have ostensibly been driven by this goal. In 1973, the state legislature enacted its first school finance act based on the principle of district power equalization (DPE). Under such a system, the state guarantees that for each mill a district levies, that district will have a particular amount of revenue per pupil.¹⁶ If a district cannot raise this amount through local tax effort, the state provides the remaining revenue. But while this provision raised per-pupil spending in Colorado districts that would not otherwise have met the guaranteed amount, it did not ensure either equality or equity, because property-rich districts could still raise far more than this amount on their own. For example, in 1977, South Conejos School District raised \$5.90 per pupil, and thus was eligible for \$26.02 per pupil in state equalization aid. Rangely School District, on the other hand, did not qualify for equalization aid but was able to raise \$326.27 per pupil on its own. Moreover, these two districts still bore inequitable tax burdens regardless of state action; each mill levied in Rangely produced nearly ten times what each mill South Conejos produced.¹⁷

The state also set a property tax revenue limit for each district called the authorized revenue base (ARB). However, as a consequence of efforts to gain the support of affluent districts, the limits were set in a way that

¹⁵ Interview with Pete Mirelez, lobbyist for various school districts, November, 1996.

¹⁶ In 1977, this component guaranteed each district would have at least \$31.92 per pupil for each mill levied. The districts that could raise this amount on their own were ineligible for the state equalization guarantee.

¹⁷ See *School Finance Story*, *supra* note 12, at 373-375; Kenny L. Ayers, *Colorado's Public School Financing: Constitutional Issues*, 59 U. COLO. L. REV. 149 (1988); Carol Huber, *The Constitutionality of Colorado's School Finance System*, 50 U. COLO. L. REV. 115 (1978).

mirrored existing inequalities in local property wealth.¹⁸ In addition, all districts regardless of wealth were provided with a minimum guarantee of \$10 per mill in state funds, an amount that increased each year. Research on the impact of Colorado's district power equalization system found that it did not significantly change the inequities in per-pupil spending or the effect of local property wealth on available resources.¹⁹

In short, the 1973 PSFA introduced into the public school finance system several mechanisms designed to reduce disparities in funding, but it did not eliminate others that worked directly against equalization. Parents and schoolchildren unhappy with this compromise brought suit.

LITIGATION AND SCHOOL FINANCE REFORM

Lujan v. Colorado State Board of Education

In August 1977, 68 schoolchildren from 16 districts brought a class action suit alleging violations of the federal and state equal protection guarantees and of the Colorado Constitution's guarantee of a "thorough and uniform education." Their complaint stated that:

Spending disparities among school districts, to the extent that they are caused by differences among districts in fiscal ability to raise revenue for education, are without any legitimate educational justification and result in unequal educational opportunities being afforded to Colorado schoolchildren.²⁰

¹⁸ Richard A. King & Terry N. Whitney, Colorado School Finance Policy Issues: Past and Current Reform Efforts 2. Paper presented at the American Education Finance Association Conference, March 1994.

¹⁹ *Id.*

²⁰ Complaint at ¶ 1, *Lujan v. Colorado State Board of Education*, 649 P.2d 1005.

The *Lujan* complaint described the ways in which the state finance system gave certain districts the ability to provide “more and better educational opportunities, material advantages and facilities to students in their jurisdictions than are provided by other school districts in the state.”²¹ The complaint also argued that certain districts “lack any meaningful local control over the amount of money being spent on their children’s educations.”²²

The *Lujan* plaintiffs succeeded at the trial level. In 1982, however, the Colorado Supreme Court reversed the trial court in a 3-3-1 ruling, with the swing vote provided by an explicitly reluctant special concurrence.²³ In its decision, the Colorado Supreme Court considered whether the state ought to provide equal educational opportunities and, if so, whether this meant that the PSFA must ensure equal amounts of funding among districts. The court answered both questions in the negative, holding instead that a “thorough and uniform” education was “available through ‘state action’ in each district.”²⁴ The court did acknowledge that the finance system was “not without fault,” but suggested that the job of fixing that system should fall to the General Assembly.²⁵ The court also held that the 1973 PSFA was rationally related to a state interest: fostering local control. Taxing local property, the court argued, provided not only funding for public education, but also a means of ensuring that “the local citizenry direct the business of providing public school education in their district.”²⁶

²¹ *Id.* at ¶ 42.

²² *Id.* at ¶ 40.

²³ By Justice Erickson. *Id.* at 1025. (Justice Quinn, who had been appointed to the Colorado Supreme Court by the time the *Lujan* appeal reached this court, did not participate in the case, having ruled on it at the trial level.)

²⁴ *Id.*

²⁵ *Id.* at 1018.

²⁶ *Id.* at 1021.

The concurrence and dissents in *Lujan* provided the seeds for a future legal challenge to Colorado's school finance system on the basis of inadequacy. In his special concurrence, Justice Erickson qualified his agreement with the majority's holdings by drawing attention to two ideas: first, that the principle of adequacy is a more appropriate basis for a school finance system than that of equity, and second, that the locus of responsibility for the financial maintenance of the public schools indeed resides in the legislature.²⁷ The dissents in *Lujan* noted several additional avenues that might be open to future plaintiffs. These included the idea that the plaintiffs had suffered an absolute deprivation of an important interest because of the inequities that arose from Colorado's levy and bond limitations, and the notion that low-wealth districts lack meaningful local control.²⁸

In sum, then, the Justices of the Colorado Supreme Court agreed on one thing: the Finance Act needed fixing. Deference to separation of powers principles and to the idea of local control stopped them short of ordering it fixed, but the opinion raised important questions about the extent to which inequity was permissible as a necessary consequence of local control. These questions would not go away.

Despite the plaintiffs' loss in *Lujan*, the case brought pressure on the General Assembly to address some of the persistent inequities in the school finance system. The subsequent revisions to the 1973 PSFA made some gestures toward greater equity, most significantly by lowering the minimum guarantee of funding for each district.²⁹ Nonetheless, this change failed to eliminate existing disparities, since the minimum guarantee continued to provide funding for all districts regardless of wealth. While the Assembly's changes clearly responded to some of the concerns expressed by the

²⁷ *Id.* at 1025-1028.

²⁸ Justice Dubofsky also agreed with Justice Lohr's assertion in his dissent that the entire public school finance system should be declared unconstitutional. *Id.* at 1030, note 1, 1039.

²⁹ Ayers, *supra* note 17, at 156.

plaintiffs in *Lujan*, none of them effectively addressed the problem of low-wealth districts' already high tax levy rates and widespread inability to provide funds for long term capital outlays.³⁰ In other words, these revisions did not fundamentally change the existing school finance system.

While these changes were being made, Colorado voters approved an amendment to the state constitution that had a subtle but pronounced effect on districts' ability to raise education funds locally. The Gallagher Amendment imposed a uniform mechanism for determining property tax revenues based on assessed valuation -- rather than market valuation -- of property in a district.³¹ Assessed valuation yields far lower revenues in districts with high growth and large amounts of residential property, a description that fits a great many Colorado districts. In addition, the Gallagher Amendment sets the proportions of residential and commercial property tax revenues statewide at 45% and 55%, respectively, and the General Assembly adjusts its formulas every two years to maintain this proportion. In the years since the passage of the amendment, the value of residential property in Colorado has soared, meaning that in order to retain that 45% share, residential assessment rates have dropped steadily, from 18% in 1986 to 10.4% in 1998.³²

Proponents of the amendment hailed it as a firm control on property taxes and government spending, and the strong support for these controls helped the amendment survive a legislative challenge in 1997.³³ While

³⁰ *Id.*

³¹ COLO. CONST., Art. X, § 15 (as amended in 1982).

³² Michelle Dally Johnston, *Property Tax Relief Proposed*, DENVER POST, February 5, 1998.

³³ See discussion of Norton-Anderson proposal, *infra*. Several persons interviewed for this article suggested that the complexity of school finance poses the greatest obstacle to a truly widespread dialogue on property taxes, spending limits and school finance. Combs Interview; Interview with Deborah Fallin, Colorado Education Association, July 1998; Interview with William Thro, Education Division, Office of the Attorney General, June 1996. See also Dean Damon, *Dueling Rules Hurt Schools*, DENVER POST, March 29, 1998.

