



CAMPAIGN FOR FISCAL EQUITY, INC.

**Studies in Judicial Remedies
and Public Engagement**

**MOVING MOUNTAINS IN
THE GRANITE STATE:**

**REFORMING SCHOOL FINANCE AND DEFINING
ADEQUACY IN NEW HAMPSHIRE**

Drew Dunphy

Volume 2, Number 4
March 2001

Campaign for Fiscal Equity, Inc.

Studies in Judicial Remedies and Public Engagement

Michael A. Rebell, Editor-in-Chief
Drew Dunphy, Executive Editor

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.

This series is made possible through the generous support of the Robin Hood Foundation and the Open Society Institute.

Campaign for Fiscal Equity, Inc.
6 East 43rd Street New York, NY 10017
(212) 867-8455 www.cfequity.org

**MOVING MOUNTAINS IN THE GRANITE STATE:
REFORMING SCHOOL FINANCE AND
DEFINING ADEQUACY IN NEW HAMPSHIRE**

by Drew Dunphy¹

INTRODUCTION

The *Claremont* decisions on school finance in New Hampshire have spurred sweeping change and heated debate in two separate but related areas: taxation and educational adequacy. In the wake of the state supreme court's invalidation of New Hampshire's school finance system, legislators were charged with devising a new way to pay for schools. They were also forced to confront their state's long tradition of strict local control and opposition to statewide taxes. At the same time, New Hampshire's leaders and citizens began to engage in one of the most extensive discussions ever conducted about what constitutes an adequate education for the children of a particular state. None of these processes is yet complete.

While New Hampshire has laid the foundation for lasting reform, the rapid implementation of new definitions, funding streams and formulas has been a bumpy ride. Discontent with the state's temporary solutions has risen from many corners, and the hard work of comprehensive reform is far from over. Opportunities for substantive public engagement on the issues have been few and far between, and often they have focused on only one half of the issue, taxes or adequacy. The New Hampshire story highlights some of

¹ Drew Dunphy is a freelance writer and editor, and teaches at New York University and John Jay College, CUNY. Previously, he served as Communications Director for the Campaign for Fiscal Equity. Thanks to Karen Miller, Ami Mehta and Shanti Crawford for their contributions to this paper.

the most difficult questions about finance reform, adequacy, accountability and economic justice. It also illustrates the difficult process of implementing reform principles, a process that may require a more comprehensive public policy dialogue and change in political will before New Hampshire sees a lasting solution to its school funding crisis.

BACKGROUND

Schools & School Finance

Prior to the *Claremont* litigation, New Hampshire ranked last in the nation in direct state support of public education: 8% of total K-12 funding came from state sources, while nearly 90% came from local property taxes. New Hampshire also suffered from widely varying property valuations, a problem that has not yet been fully addressed.²

Primarily because of differences in property values, tax rates and per-pupil spending varied greatly as well. At trial, *Claremont* plaintiffs submitted lengthy expert witness reports pairing school districts across the state to highlight differences in funding, tax burdens and student performance.³ To take one example, plaintiffs emphasized the disparities between Pittsfield, a plaintiff district, and Moultonborough. While the median incomes of residents in the two towns are similar, Moultonborough has many expensive vacation homes; thus, in 1995, Moultonborough's equalized property valuation per pupil was almost ten times that of Pittsfield. Accordingly, Moultonborough's tax rate of \$5.48 raised \$7,251 per pupil, while Pittsfield's rate of \$25.32 generated only \$3,555 per pupil.⁴

² See discussion, *infra.*, p. 29.

³ VAN D. MUELLER & TERRY H. SCHULTZ, OPPORTUNITY TO LEARN IN PAIRED NEW HAMPSHIRE SCHOOL DISTRICTS, June 1995.

⁴ CLAREMONT LAWSUIT INFORMATIONAL BOOK 3, available on line at <http://www.wissinst.org> [hereinafter CLAREMONT INFO. BOOK]. This document, prepared by the Claremont Lawsuit Coalition, was distributed in 1998 to state legislators, the State Board

The performance of students in the two towns showed a similar disparity. In 1995, only 53% of students in Pittsfield scored at the "basic" level or better on the statewide English test; 90% scored that high in Moultonborough. Only 24.5% of Pittsfield's high school graduates went on to a four-year college, compared with 52.8% in Moultonborough.⁵

Claremont plaintiffs would go on to charge that these two towns and others like them exemplified critical statewide problems. First, because of New Hampshire's heavy reliance on local sources for school funding, property-poor districts were forced to tax themselves at a much higher rate, yet they obtained far fewer dollars for the classroom. In 1993, the poorest third of districts in the state had less than half the property wealth of the richest third. The average tax rate of this poorest third was 76% higher than that of the wealthiest districts, and yet those poorest districts raised only 70% as much revenue per pupil.⁶ In 1995, 75% of students in the state lived in districts whose equalized property value was below the state average, and 73% lived in districts with equalized school tax rates above the statewide average of \$16.71.⁷ Similarly, plaintiffs charged that the funding system led to widespread inadequacy: 64% of New Hampshire's students lived in districts spending below the statewide per-pupil average of \$5,242.⁸ They presented evidence that in June 1996, over one-fifth of New Hampshire's schools did not meet the state's minimum standards.⁹

of Education, local school boards, libraries and chambers of commerce. It summarizes evidence presented and arguments made during the trial of *Claremont v. Merrill*.

⁵ *Id.* at 30 - 43. Only 23% did so in Franklin, where per-pupil spending was a meager \$3, 541.

⁶ MUELLER & SCHULTZ, *supra*, note 3 at 88.

⁷ CLAREMONT INFO. BOOK at 2-3.

⁸ *Id.* at 2.

⁹ *Id.* at 4.

Prior School Funding Reforms

New Hampshire has reformed its school finance system numerous times, though the effect of each reform has quickly faded.¹⁰ As early as 1789, New Hampshire set a minimum amount to be raised for public schools from local property taxes. A town's property tax rate was proportionate to its share of the overall property value in the state. In effect, then, this system functioned as a statewide property tax levied at an equalized rate (an idea that would be reborn in the wake of the *Claremont* decisions). In 1919, however, the state legislature overhauled the school finance system, setting both a minimum and a maximum local tax rate and pledging that if a district could not maintain its schools at the maximum tax rate, the state board of education would supply the necessary additional funds. A report by the House Education Committee accompanying the new legislation made clear that the new law's express purpose was to secure more equal educational opportunities for children across New Hampshire.¹¹

Laws passed in 1921 added another wrinkle to the finance system: if a district was able to raise more money than it needed for its schools at the minimum tax rate, those funds would be redistributed to districts that levied the maximum rate but still fell short. Within a few years, however, the new system began to fail because the legislature did not appropriate sufficient funds. In time, additional provisions were passed so that if the legislature's appropriation for education was insufficient to meet districts' claims for aid, those claims would be pro-rated, meaning districts would only receive a percentage of needed funds.

¹⁰ The following summary is adapted from DOUGLAS E. HALL, LESSONS FROM NEW HAMPSHIRE: WHAT WE CAN LEARN FROM THE HISTORY OF THE STATE'S ROLE IN SCHOOL FINANCE 1642-1998, New Hampshire Center for Public Policy Studies, April 1998. The report is also available on-line at www.unh.edu/ipsse/nhcpps/history.html.

¹¹ "Under this plan, those living in the poorer communities will receive new and greater privileges; the richer communities will contribute out of their prosperity for the benefit of the state as a whole." *Statement of Committee on Education To Accompany and Be Taken As a Part of Their Report on House Bill No. 262*, cited in Hall, *Id.*

This continued backsliding led to a second reform in 1947. The new law raised the maximum tax rate and still provided for equalization aid to help districts meet the costs of required programs. However, the maximum tax rate now became a threshold for equalization aid, meaning a district could not receive additional funds unless it taxed itself at the top rate. The legislature's Commission to Study the Educational System recommended phasing in state aid increases that would reach nearly 50% of the total cost of public education, but the legislature's actual appropriation in 1947 only brought the state share up to 17%. Over time, the threshold rate for equalization aid was raised considerably and the pro rating of state aid continued when the legislature refused to raise sufficient funds through state taxes.

This gradual erosion of aid led to further legislative reform, brought on in part by a threatened legal challenge from seven school districts.¹² In June 1985, the legislature passed a new foundation aid program known as the "Augenblick formula,"¹³ which committed the state of New Hampshire to at least eight percent of overall education expenditures and funneled a greater share of foundation aid to poorer districts.¹⁴ These changes, however, proved insufficient: not only was the 8% share inadequate help for poor districts, the legislature never fully funded the new formula. In the first year of the new system, Foundation Aid equaling an 8% state share would have cost \$42.4 million, but the legislature allocated only \$24.3 million, 57 percent. The state never funded more than 71% of the eight percent commitment.¹⁵ That legislative failing and the basic inadequacy of the Augenblick formula led to the filing of the *Claremont* suit in June 1991.

¹² The districts dropped the suit when the new legislation was passed. See CLAREMONT INFO. BOOK, *supra*, note 4 at 9.

¹³ N. H. REV. STAT. ANN. § 198:27-33 (1995). The bill was named after its creator, education finance consultant John Augenblick.

¹⁴ Between 1980 and 1982, the state's total share of education aid had dropped below 8%; its share of Foundation Aid had remained below 2%. Hall, *supra*, note 10 at 10.

¹⁵ *Formulaic faults*, CONCORD MONITOR, April 8, 1998; see also Hall at 10.

"Ax the Tax": New Hampshire's Anti-Tax Tradition

A critical element in New Hampshire's education debate is the state's long tradition of almost dogmatic opposition to taxes, particularly statewide taxes. New Hampshire is one of only two states without a sales or income tax; for many years, the state also had no statewide property tax. Many conservative political and business leaders refer to the state's tax structure as "the New Hampshire advantage," and some have suggested that broad-based taxes threaten to destroy "the New Hampshire way of life."¹⁶

Resistance to taxation in New Hampshire is perhaps most clearly embodied in "The Pledge," a phrase popularized in the state's political culture by William Loeb, former editor of the Manchester-based *Union Leader*, New Hampshire's largest newspaper. Starting in the early 1970s, the paper's editorial page railed against any statewide taxes and insisted that politicians publically promise to oppose sales and income taxes or risk their political futures.¹⁷ When Democratic Governor Jeanne Shaheen took office in 1996, she took the pledge, and while she and others have since backed off this hard-line stance, strident opposition to any broad-based tax among many state leaders has played a major role in efforts to implement a school funding remedy.

In fact, the debate over tax reform in New Hampshire has at times become so heated it has overshadowed the related debate about the adequacy of the education provided in the state's schools. In fairness, the argument about inadequacy may be a tougher sell: New Hampshire regularly ranks near the top of the nation on standardized tests such as the SAT, and these results, coupled with relatively low child poverty rates¹⁸ and the presence of

¹⁶ See, e.g., Scott Calvert, *Lucas: Amendment plan is not feasible*, CONCORD MONITOR, September 23, 1998.

¹⁷ Carey Goldberg, *School Crisis Chips Away at New Hampshire's Anti-Tax Stance*, NEW YORK TIMES, April 3, 1999 at A9.

¹⁸ According to the most recent Census Bureau estimates, ten percent of New Hampshire's children live in poverty, the lowest rate in the nation. U.S. CENSUS BUREAU,

many affluent Boston suburbs, may mask inadequacies in certain districts and give the impression that New Hampshire is a "well-educated" state. In any event, taxes have been by far the more inflammatory part of the state's school funding debate, though some have suggested that the anti-tax sentiment in New Hampshire is waning, largely because the *Claremont* rulings have highlighted the untenable nature of the state's tax structure. Calls for an income tax have grown more frequent,¹⁹ and the very fact that New Hampshire enacted a statewide property tax (albeit temporarily) in an effort to fund adequacy indicates a thaw in the state's historically icy response to taxes.

Opposition to statewide taxes also has roots in New Hampshire's strong tradition of local control. While many states could lay claim to such a tradition, a sense of local control and rugged individualism has long been at the heart of the state's political identity. Though a small state, New Hampshire's House of Representatives contains 400 members, making it the third largest parliamentary body in the English-speaking world. Certain other features of state government demonstrate a desire to make elected officials responsive and accountable to their constituents: New Hampshire's governor is elected every two years, while legislators are paid only a nominal salary of \$100 a year, creating what is sometimes called the "citizen legislature."²⁰ The state's motto, of course, is "Live Free or Die."

STATE ESTIMATES FOR PEOPLE UNDER AGE 18 FOR POVERTY IN U.S.: 1997. Available on-line at www.census.gov/hhes/www/saipe/stcty/d97_00.htm.

¹⁹ The *Concord Monitor*, for example, which has covered the school funding debate extensively, has repeatedly used its editorial page to call for an income tax. A number of Republican candidates for the 2000 governor's race indicated their acceptance of broad-based taxes, a sharp break from that party's traditional stance.

The *Monitor* maintains an extensive archive of articles on Claremont on its website, <http://www.concordmonitor.com/index/claremont.shtml>.

²⁰ Of course, one could argue that this salary prevents those without some other substantial source of income from serving their fellow citizens.

LITIGATION

Initial Filings and Motion to Dismiss

Claremont v. Merrill was filed in June 1991 by five property-poor school districts, along with one school child and one taxpayer from each district. Plaintiffs alleged that New Hampshire's school finance system violated the state constitution on six counts: the state failed to spread educational opportunities equitably and to adequately fund education statewide; the foundation aid statutes restrained state aid to education by capping aid at 8%; the school finance system denied plaintiffs equal protection; and the state's heavy reliance on local property taxes to fund schools resulted in an "unreasonable, disproportionate, and burdensome tax."²¹

State defendants filed a motion to dismiss the suit and, in August 1992, the Merrimack Superior Court granted the state's motion on all six counts. Much of the superior court's decision was based on its reading of Part II, article 83 of the state constitution, New Hampshire's "education clause." That clause reads in part:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government . . . it shall be the duty of the legislators and magistrates . . . to cherish the interest of literature and the sciences, and all seminaries and public schools . . .²²

Deeming this charge "amorphous," the superior court held that "the New Hampshire Constitution imposes no qualitative standard of education which must be met . . . [and] imposes no quantifiable financial duty regarding education; there is no mention of funding or even of 'providing'

²¹ 635 A.2d 1375, 1377 (1993). Plaintiffs' claims regarding the foundation aid statutes were voluntarily dropped prior to trial.

²² N.H. Const of 1783, Part II, Article 83.

or 'maintaining' education."²³

On appeal, however, the New Hampshire Supreme Court reversed the lower court's ruling and remanded the case for trial. In that December 1993 decision, the supreme court undertook a lengthy exegesis of New Hampshire's education clause and found that it expressly recognized that a free government "is dependent for its survival on citizens who are able to participate intelligently in the political, economic, and social functions of our system."²⁴ The court thus held that Part II, article 83 "imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding."²⁵ The court also ruled that plaintiffs deserved an opportunity to develop a factual record regarding the State's heavy reliance on local property taxes.

The supreme court's 1993 decision also sparked a statewide discussion on how to define an adequate education for New Hampshire's students. After establishing every student's right to an adequate education, the court wrote that the State's duty extended beyond preparing students in reading, writing and arithmetic and "also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas."²⁶ Noting that the responsibility for a detailed definition of adequacy fell squarely on the legislature and governor, the court called on those parties to "defin[e] the

²³ 635 A.2d at 1377. For a comparison of the language used in New Hampshire's and other states' education clauses, see William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989).

²⁴ 635 A.2d at 1831. In its analysis, the Supreme Court relied heavily on the decision of the Massachusetts Supreme Judicial Court in *McDuffy v. Secretary*, 615 N.E.2d 516 (1993), since New Hampshire shared much of its early history with Massachusetts and modeled much of its constitution on Massachusetts'. The two constitutions contain nearly identical clauses regarding education. *Id.* at 1378.

²⁵ *Id.* at 1376.

²⁶ *Id.* at 1831(citing *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978)).

specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government."²⁷

Trial

In 1996, during a seven-week trial, plaintiffs presented evidence regarding the inequity of New Hampshire's school funding and taxation system, and the inadequacies of educational opportunity available in many districts. Plaintiffs' presentation on the tax issue was short and straightforward; they devoted a great deal more time to demonstrating inadequacy, presenting vivid details about resource deprivation in certain school districts.²⁸ In the town of Claremont, one out of every three first graders was recommended for the Reading Recovery program, but the district could only provide the program to one-fourth of those students. At the district's Stevens High School, 70 out of 130 computers did not work properly and 35 of 45 classrooms did not meet state building codes for electrical wiring. In Allentown, children with special speech and language needs were tutored in a converted bathroom; the middle school building is a converted bowling alley. For four years the district was forced to go without an art or music teacher in violation of the state's minimum standards. In Pittsfield, the wiring in the Middle High School violated state building codes, and chronic water leaks in the building created puddles on the cafeteria floor.²⁹

Despite this evidence, the superior court ruled in favor of the State on all four counts. In determining whether or not the State failed to spread educational opportunities adequately and equitably throughout New

²⁷ *Id.*

²⁸ Interview with Andru Volinsky and Scott Johnson, attorneys for *Claremont* plaintiffs, December 19, 2000.

²⁹ CLAREMONT INFO. BOOK, *supra*, note 4 at 30-43.

Hampshire, the court first had to identify a constitutional standard of adequacy. As the State had not defined adequacy following the 1993 state supreme court decision, the trial court asked the parties in the case to submit definitions. Noting that the supreme court had laid responsibility for defining adequacy on the governor and legislature, the court accepted the State's definition over the one submitted by plaintiffs.³⁰ Using that definition as a yardstick, the court held that educational opportunities in plaintiff districts were adequate.

On funding, the trial court agreed with the State's argument that despite wide variances in per-pupil funding and tax rates, the State met its constitutional duty to fund education by granting local districts the power to levy taxes for schools. The court also rejected plaintiffs' claim that by relying so heavily on local property taxes, the state finance system violated Part II, article 5 of the state constitution, which held that all state taxes must be "proportional and reasonable." Plaintiffs argued that since local taxes served as the means to fulfill a state duty, they should legally be considered a state tax; thus the wildly different tax rates around the state would be unconstitutional. The court disagreed, deeming the local property tax a

³⁰ The definition presented by state attorneys was developed by the State Board of Education (part of New Hampshire's executive branch) and provided in part: "An adequate public elementary and secondary education in New Hampshire is one which provides each educable child with an opportunity to acquire the knowledge and learning necessary to participate intelligently in the American political, economic, and social systems of a free government." 703 A.2d 1353, 1357. Plaintiffs' definition, prepared by their expert Robert Fried, sets forward four cornerstones of adequacy: "1. An 'adequate education' . . . provides the physical, personnel and material resources necessary for children to acquire the skills, knowledge and values necessary to develop as responsible and productive citizens and to continue formal and informal learning as adults; 2. . . recognizes and responds appropriately to conditions that children possess when they enter school that relate to their ability to acquire the skills, knowledge and values necessary to develop as responsible and productive citizens and to continue formal and informal learning as adults; 3. . . is managed at the local level in such a way that the resources of the school district are effectively organized for the benefit of children's educational achievement; 4. . . results in student educational achievement that meets the standards necessary for children to acquire the skills, knowledge and values necessary to develop as responsible and productive citizens and to continue formal and informal learning as adults." EDUCATIONAL ADEQUACY: BUILDING AN ADEQUATE SCHOOL FINANCE SYSTEM, NATIONAL CONFERENCE OF STATE LEGISLATURES, 1998 at 32-33 [hereinafter EDUCATIONAL ADEQUACY].

municipal tax determined by local budgeting decisions that did not need to be proportional statewide.

On December 17, 1997, however, the New Hampshire Supreme Court reversed the trial court's ruling in a sweeping decision that declared the state's entire system of funding public schools unconstitutional. Contrary to the superior court's holding, the supreme court declared "the purpose of the school [property] tax to be overwhelmingly a State purpose."³¹ Writing for the majority, Chief Justice David Brock declared it unreasonable to expect taxpayers in poor districts to pay as much as four times the tax rate of those in wealthy districts: "This is precisely the kind of taxation and fiscal mischief from which the framers of our State Constitution took strong steps to protect our citizens."³² Ruling that it need not reach the plaintiffs' other claims, the court invalidated the finance system because its primary funding source was disproportionate and unreasonable. The court stayed proceedings in the case and gave the governor and the legislature until the end of the upcoming legislative session – April 1, 1999 – to craft a new funding system that would pass constitutional muster.

The supreme court's ruling also changed the state's discussion on educational adequacy, as the court rejected the definition of adequacy submitted by the State and accepted by the trial court. The court did not take specific issue with the details of that definition, but rather held that it "[did] not sufficiently reflect the letter or the spirit of the State Constitution's mandate" because it was created by members of the State Board of Education, not the legislature.

Holding that a constitutionally adequate education is a fundamental right in New Hampshire and stressing the enormous value placed on education in today's society, the court then provided some guidelines for a new definition of adequacy:

³¹ 703 A.2d 1353, 1356 (N.H. 1997).

³² *Id.* at 1354.

. . . even a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights Mere competence in the basics – reading, writing and arithmetic – is insufficient in the waning days of the twentieth century A broad exposure to the social, economic, scientific, technological, and political realities of today’s society is essential for our students to compete, contribute, and flourish in the twenty-first century.³³

As further benchmarks of an adequate education, the court cited the seven criteria set out by the Supreme Court of Kentucky in *Rose v. Council for Better Education, Inc.*,³⁴ principles that plaintiffs had proposed the court adopt in its filings with both the trial and supreme courts. The supreme court called on the legislative and executive branches to promptly adopt specific plans in accordance with these guidelines and, in doing so, to “appeal to a broad constituency.”

³³ *Id.* at 1358-1359.

³⁴ “. . . an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.” 790 S.W.2d at 212.

For a discussion of the Kentucky ruling, its implementation, and the implications of its adequacy definition, see Molly A. Hunter, *All Eyes Forward: Public Engagement and Fiscal Equity in Kentucky*, 28 J. L. & EDUC. 485 (October 1999).

IMPLEMENTATION AND REMEDY

Not surprisingly, such a forceful decision prompted an equally forceful reaction among the people of New Hampshire. Plaintiff attorneys and school officials were understandably enthusiastic, although some educators were concerned that the strong emphasis on tax reform would overshadow the work to be done on defining adequacy, a concern that has persisted. Some legislators saw the ruling as an opportunity for far-reaching and necessary reforms, while others were sharply critical of both the breadth of the court's order and the possible implications for the state's tax structure. Almost immediately, two Republican gubernatorial candidates, Jim Reubens and Jay Lucas, called for a constitutional amendment overturning the decisions and affirming the existing school finance system.³⁵ Governor Shaheen announced her opposition to a constitutional amendment to address the state's school funding crisis, a position she would later reverse. In the three years since then, a great many constitutional amendments regarding school finance have been proposed in the New Hampshire legislature. While none has passed (and thus been passed on to the voters for approval), the issue of such an amendment and whether the courts have any proper role in school finance has been a source of divisiveness in the school funding debate.³⁶ Within that climate, legislators and other leaders have struggled to find a lasting solution.

³⁵ See Scott Calvert, *Critics look to trump court*, CONCORD MONITOR, December 19, 1997.

³⁶ The sheer number of competing amendments puts any detailed discussion of them beyond the scope of this paper. Most reflect a desire to permanently block the courts' involvement in school funding decisions; many include specific funding mechanisms, specifically a return to some version of the system in place before *Claremont*. The *Concord Monitor*'s Claremont archive contains a great many articles on various proposed amendments.

Building a New Finance System

In January 1998, Governor Shaheen outlined her initial plans for school funding reform in her annual State of the State address. While the governor reaffirmed her opposition to new broad-based taxes, she did not rule out the possibility of a statewide property tax.³⁷ One week later, she unveiled an outline of a new school funding plan called Advancing Better Classrooms (ABC). Funding for the plan would come largely from local property taxes levied at a uniform rate. Poorer school districts that could not reach an adequacy floor at the uniform rate would receive additional funding from the state. Wealthier districts, however, would still be allowed to tax residents below the uniform rate if that would raise enough money to reach the adequacy level. The plan also included an increase in overall state education aid and a mix of tax increases. Governor Shaheen placed the cost of the increase at \$100 million (with a per-pupil adequacy amount estimated at \$4,500); others placed the cost closer to \$300 million.³⁸

From the start, a number of state officials questioned whether the plan would pass constitutional muster. And almost immediately, the debate shifted to how New Hampshire would raise the money to fund the new plan. Many doubted whether local property taxes and other existing funding sources could possibly raise sufficient revenue, and they worried that towns might seek to devalue their property in order to receive more state aid. In response, the governor quickly proposed two controversial new sources of revenue: a 23 cent raise in the cigarette tax, and video gambling at New Hampshire's four state-owned racetracks.³⁹

³⁷ Perhaps because the supreme court had essentially ruled that New Hampshire's system of local property taxes was already, effectively, a statewide tax. See Scott Calvert, *Parties urged to work on Claremont strategy*, CONCORD MONITOR, January 8, 1998

³⁸ Scott Calvert, *ABC Plan may spark old debates*, CONCORD MONITOR, January 17, 1998; Jim Graham, *Legislators react with caution*, CONCORD MONITOR, January 16, 1998.

³⁹ *Id.*; Scott Calvert, *Sytek may ask court for advice*, CONCORD MONITOR, January 21, 1998. House Democratic Leader Peter Burling eventually submitted a bill on the governor's behalf to raise the cigarette tax; the bill was defeated.

The state legislature reconvened in mid-January and kicked into high gear. Twenty-four different proposals -- many of which had been defeated in previous legislative sessions -- were introduced, including constitutional amendments, a statewide property tax, income tax, value-added tax and video gambling. At one point, the House was simultaneously considering 5 different proposed amendments and nine different tax plans.⁴⁰ While legislators hammered out the details of these proposals, a different group took up another essential reform: drafting a new definition of educational adequacy.

Redefining Adequacy in New Hampshire

With the announcement of her ABC plan, Governor Shaheen appointed a six-person Task Force on Educational Adequacy. The task force met seven times over a period of two months to develop recommendations for the successful implementation of the ABC plan, among them a new definition of educational adequacy. The task force was co-chaired by Paula Adriance, head of the New Hampshire School Boards Association, and John Crosier, President of the Business and Industry Association of New Hampshire.⁴¹

While Governor Shaheen had initially planned that her task force would meet in private, members of the press threatened court action if the meetings were not made public.⁴² The Governor and the task force agreed

⁴⁰ See Calvert, *Sytek may ask court for advice*; Scott Calvert, *24 proposals are thrown into the legislative hopper*, CONCORD MONITOR, Jan. 14, 1998.

⁴¹ The other members were: John Lewis, chair of the state Board of Education; Richard Ashooh, director of public affairs for Sanders, a Lockheed Martin Company; Kathy Fuller, a member of the Franklin School Board; and Bud Hawkins, vice president of National Aperture, Inc., a small business located in Salem. House Speaker Donna Sytek and Senate President Joe Delahunty declined offers to join the committee. Matthew T. Hall, *For new adequacy panel, a tall order*, CONCORD MONITOR, Friday, January 16, 1998.

⁴² Interview with John Crosier, August 15, 2000.

to open the meetings. With the help of representatives of the State Department of Education, the task force reviewed articles and laws from other states implementing education reform, as well as New Hampshire's existing standards and assessment methods.⁴³ The task force aimed to take the best practices from other states and adapt them to New Hampshire's school system.⁴⁴

At the same time, other discussions on adequacy were taking place elsewhere. In the wake of the *Claremont* ruling, the Speaker of the New Hampshire House charged the House Education Committee with defining adequacy. The committee brought in national experts, attended town meetings and symposia, and held hearings with advocacy and interest groups, teachers and administrators.⁴⁵ According to then-committee chair Jane O'Hearn, stakeholders expressed considerable consensus about the elements of adequacy; the question of how to fund the definition elicited far less agreement. In February 1998, the Education Committee held a public legislative hearing on adequacy, where parents, school administrators, school board members and legislators suggested a variety of ways to construe adequacy. Some cautioned against a bare-bones definition, while others stressed that local and parental control of the schools be maintained.⁴⁶ Definitions of adequacy were also developed by the New Hampshire School Boards Association, the New Hampshire School Administrators Association, and a group of state representatives.⁴⁷

⁴³ The other states were Kentucky, Massachusetts, Michigan, Mississippi, North Carolina, Tennessee and Vermont. Letter from Governor's Task Force on Educational Adequacy to Governor Jeanne Shaheen, February 9, 1998 (cover letter to Task Force Final Report, on file with author).

⁴⁴ Crosier Interview.

⁴⁵ Interview with Senator Jane O'Hearn, Chair, Senate Education Committee and former Chair, House Education Committee, January 29, 2001. Senator O'Hearn is also a member of the legislature's Adequate Education and Education Funding Commission, discussed below.

⁴⁶ Matthew T. Hall, *Ideas abound on an adequate education*, CONCORD MONITOR, February 6, 1998.

⁴⁷ These definitions, along with those submitted by the parties in *Claremont*, are collected in EDUCATIONAL ADEQUACY, *supra* note 30.

The adequacy definitions developed by the legislature and the governor's task force were quite similar, and the definition adopted into law in October reflects a combination of the two.⁴⁸ After a brief introductory statement,⁴⁹ the definition lists eight general principles that draw heavily from a definition adopted in North Carolina and the guidelines set out in Kentucky's *Rose* decision and cited by the New Hampshire Supreme Court. They emphasize the opportunity for all students to acquire skills in basic curriculum areas and preparation for responsible citizenship and the contemporary workplace.⁵⁰

The task force also worked to develop effective accountability proposals, and in its recommendations attempted to balance intervention measures with New Hampshire's strong tradition of local control.⁵¹ Their

⁴⁸ O'Hearn Interview.

⁴⁹ That statement reads: "It is the policy of the State of New Hampshire that public K-12 education shall provide all students with the opportunity to acquire the education necessary to prepare them for successful participation in the social, economic, scientific, technological, and civic realities of society, now and in the years to come; an education that is consistent with the curriculum and student proficiency standards specified in state school approval rules and New Hampshire curriculum frameworks." N.H. REV. STAT. ANN. § 193-E:1 (1998).

⁵⁰ "An adequate education shall provide all students with the opportunity to acquire: I. Skill in reading, writing, and speaking English to enable them to communicate effectively and think creatively and critically; II. Skill in mathematics and familiarity with methods of science to enable them to analyze information, solve problems, and make rational decisions; III. Knowledge of the biological, physical, and earth sciences to enable them to understand and appreciate the world around them; IV. Knowledge of civics and government, economics, geography, and history to enable them to participate in the democratic process and to make informed choices as responsible citizens; V. Grounding in the arts, languages, and literature to enable them to appreciate our cultural heritage and develop lifelong interests and involvement in these areas; VI. Sound wellness and environmental practices to enable them to enhance their own well-being, as well as that of others; VII. Skills for lifelong learning, including interpersonal and technological skills, to enable them to learn, work, and participate effectively in a changing society." N. H. REV. STAT. ANN. § 193-E:2 (1998).

⁵¹ Crosier Interview. ". . . [T]he appropriate means to provide an adequate education is through an integrated system of shared responsibility between state and local government. In this system, the state established, though school approval and proficiency standards, the framework for the delivery of educational services at the local level and school districts have flexibility in implementing diverse educational approaches tailored to meet student needs."

proposal set out detailed quality standards for all districts; in districts which failed to meet the quality standards, the State Education Commissioner would appoint a quality assurance team to work with the district toward improvement. Districts that failed repeatedly might be subject to greater state intervention. The proposal also included recommendations to give more powers to the Department of Education and the State Board of Education, and to improve their effectiveness.⁵²

These proposals did not fare well with the state legislature. Almost immediately the accountability provisions came under sharp criticism from those who feared a state “takeover” of failing schools. Governor Shaheen quickly announced her opposition to the intervention options presented by the task force.⁵³ While the statutes passed in 1998 contained the task force’s general policy statements regarding local control, they only stipulated that by April 1, 2000, each school district was required to file a report with the state education department containing data related to four performance indicators.⁵⁴

While the task force was not charged with putting a dollar amount on adequacy or with determining a funding source, it did debate ways to determine the cost of an adequate education. In the end, the task force’s report contained three alternate methods from which the governor and the

FINAL REPORT, GOVERNOR’S TASK FORCE ON EDUCATIONAL ADEQUACY I [hereinafter GOV’S TASK FORCE REPORT].

⁵² The task force proposed a five-year cycle to review school approval and curriculum frameworks, as well as a statewide education improvement plan based on input from parents, business people, educators and other citizens. *Id.* at 2-4.

⁵³ Matthew T. Hall, *Shaheen opposes school takeovers*, CONCORD MONITOR, February 12, 1998.

⁵⁴ Attendance and drop-out rates; environmental factors such as school safety; rates of graduates going on to post-secondary education, military service and work; performance on state tests. Districts were also required to report on any locally-developed performance indicators. N. H. REV. STAT. ANN. § 193-E:3 (1998).

The law also required the state education department to produce a statewide report on the condition of education by district and by school. These report cards were made available on the Internet in December 2000.

legislature might choose.⁵⁵ The task force's hesitancy about a solid position on funding adequacy may have been a harbinger of the heated debate over funding sources that lay immediately ahead.

Put to the Test: The Supreme Court Reviews ABC

In May 1998, after an angry debate in the statehouse, New Hampshire's Republican-controlled Senate took advantage of an unusual feature of New Hampshire's legal system and sent ABC and a competing school funding plan to the State Supreme Court for an advisory opinion on their constitutionality.⁵⁶ Before ruling on the funding plans, the court invited input from the public. The court received nearly sixty written responses from elected officials, gubernatorial candidates, attorneys, educators and parents. Governor Shaheen and a number of other Democrats asked the court to return the Senate's questions unanswered, since the bills under consideration had not been finalized. Others opposed ABC in an effort to preserve the current tax system and perhaps have a better chance of passing a constitutional amendment. Plaintiff attorney Andru Volinsky, focusing on the "special abatement" provisions in the plans, urged the court to reject

⁵⁵ They suggested that the cost of an adequate education could be based on: a) the average annual per-pupil cost for all schools meeting state standards, b) the average annual statewide expenditures of all school districts, or c) the average costs of five districts that meet state standards and that have a higher percentage of students than the statewide average achieving at the 'proficient' and 'advanced' levels on state tests. GOV'S TASK FORCE REPORT *supra* note 51 at 6. See also Matthew T. Hall, *Adequacy group has a 'menu' of offerings*, CONCORD MONITOR, February 7, 1998.

⁵⁶ Along with ABC, the Senate submitted the 'A' plan crafted by Republican Senator and then gubernatorial candidate Jim Reubens. The 'A' plan contained no new taxes but proposed to increase education spending by \$32 per year, targeting the additional aid to the state's neediest districts. The plan would have required a constitutional amendment, earmarking a percentage of room and meal taxes for education, to become legal. See Scott Calvert, *'A' plan garners support*, CONCORD MONITOR, April 24, 1998. In its advisory opinion, the supreme court ruled that the plan would simply continue the state's reliance on "unreasonable and disproportionate" local property taxes, and thus would continue to violate the law. Opinion of the Justices, 712 A.2d 1080, 1086 (N.H. 1998).

both.⁵⁷ Under these provisions, a town could drop its property tax rate below the statewide rate provided it could still raise enough money to fund the cost of an adequate education.

While the New Hampshire Supreme Court often invites written comments before issuing an advisory opinion, in this instance the court took the unusual step of scheduling oral arguments. Even more remarkably, the court invited parties other than the litigating attorneys to make arguments, including the chairman of the state school board, the commissioner of the Department of Revenue Administration Commissioner, and the House Democratic Leader.⁵⁸ On the court's advice, advocates on both sides coordinated their testimony to avoid repetition. Andru Volinsky suggests that the court may have invited oral arguments in order to create greater public confidence in the court's eventual ruling, "especially as the court was being caricatured as having wildly overstepped its bounds in its earlier rulings."⁵⁹ Opening up the arguments to a wider than usual range of stakeholders may have enhanced the court's stature and reestablished the legitimacy of the court's role in the funding reform process.⁶⁰

After hearing oral arguments from eight state leaders, the State Supreme Court ruled in June that ABC would violate the state constitution because the special abatement would effectively create different local rates for a statewide tax.⁶¹ The court went on to emphasize again that both

⁵⁷ Jim Graham, *Court wanted, gets state's two cents*, CONCORD MONITOR, June 3, 1998.

⁵⁸ Jim Graham, *Court to hear 11 on education*, CONCORD MONITOR, June 4, 1998.

⁵⁹ Volinsky & Johnson Interview.

⁶⁰ Andru Volinsky suggests that this step may also have hindered the momentum for a constitutional amendment blocking the courts from a role in school funding. *Id.*

For a discussion of proposals suggesting that courts regularly use such mechanisms for broad public input and related forms of public engagement in the remedy phase of institutional reform litigations, see Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill - and a Proposed Solution*, 29 CONN. L. REV. 1115 (1997).

⁶¹ "Essentially, the proponents [of ABC] seek to measure proportionality and fairness on a municipality-by-municipality or district-by-district basis, rather than statewide. But, to the

educational adequacy and the burden for funding it are statewide responsibilities:

The benefits of adequately educated children are shared statewide We live in a highly mobile society such that a child may be educated in Pittsfield and, as an adult, reside in Moultonborough. That adult may serve the town or State as an elected or appointed official, a business or civic leader The benefits of that citizen's public education and contributions to community may be felt far beyond the boundaries of the educating town or district. Therefore, it is basic to our collective well-being that all citizens of the State share in the common burden of educating our children.⁶²

Funding Adequacy

The defeat of ABC brought a new round of calls for a constitutional amendment, some approving the phase-in provision despite the supreme court's holding, others seeking to permanently remove the court from all school finance decisions. Even the governor, formerly a staunch opponent of an amendment, said in the fall that she would support a bipartisan amendment effectively writing most of ABC into the state constitution.⁶³ Nevertheless, efforts to determine the cost of adequacy went forward. In June 1998, prior to the Supreme Court's advisory opinion, the New Hampshire legislature had appointed a twelve-member Adequate Education Costs and Municipal Grant Distribution Commission.⁶⁴ One of the

extent that a property tax is used to raise revenue to satisfy the State's obligation to provide an adequate education, it must be proportional across the state." Opinion of the Justices, 712 A.2d 1080, 1086 (N.H. 1998).

⁶² *Id.* at 1087.

⁶³ See Calvert, *Lucas: Amendment plan is not feasible*, *supra* note 16.

⁶⁴ The commission consisted of three state senators, three state representatives, two school board members, the State Commissioner of Revenue, the governor's legal counsel, and the director of the Department of Education (who served in a non-voting capacity). See THE

legislative commission's first actions was to hire the Denver-based consulting firm of Augenblick & Myers to submit recommendations for determining the cost of an adequate education.

In their report to the commission, Augenblick and Myers provided New Hampshire's lawmakers with four alternative approaches to reach a base adequacy amount, all of which involved identifying districts across the state that met certain criteria, then averaging the basic operating expenditures of those districts as calculated by the New Hampshire Department of Education. Of these four methodologies, three used a combination of input and output variables, while the fourth relied exclusively on student performance. After being adjusted for factors such as special education and parents' income levels, these four options yielded a range of estimated per-pupil figures: from \$4,108 to \$4,700 per elementary student and \$4,793 to \$5,461 per high school student.⁶⁵ The methodology based solely on student outputs yielded the lowest per-pupil figure.⁶⁶

The commission soon found itself split over how to calculate the adequacy amount, and at one point it appeared possible that they would issue two separate reports. In November, with a December 1 deadline for the committee's report fast approaching, state leaders filed a motion with the State Supreme Court requesting a two-year extension on the April 1, 1999 deadline for a new funding system. The governor and certain legislators had expressed interest in possibly presenting two funding options to voters and letting them choose one as part of a special referendum in the state's 2000 presidential primary.⁶⁷ In response, *Claremont* plaintiffs filed a motion with

ADEQUATE EDUCATION COSTS AND MUNICIPAL GRANT DISTRIBUTION COMMISSION, FINAL REPORT [hereinafter EDUCATION COSTS REPORT].

⁶⁵ JOHN AUGENBLICK, JOHN MYERS & JUSTIN SILVERSTEIN, ALTERNATIVE APPROACHES FOR DETERMINING A BASE FIGURE AND PUPIL-WEIGHTED ADJUSTMENTS FOR USE IN A SCHOOL FINANCE SYSTEM IN NEW HAMPSHIRE, November 30, 1998.

⁶⁶ In their report, Augenblick & Myers specifically noted that "the greater the emphasis on input factors in selecting districts, the higher the base cost figure that results." *Id.* at 10.

⁶⁷ Matthew T. Hall, *Voters could break school impasse*, CONCORD MONITOR, November 13, 1998. This proposal was soundly criticized by many other legislators.

the court requesting, among other things, that a mediator be appointed to resolve the dispute and that the definition of adequacy adopted by the state be declared insufficient. Plaintiffs expressed concern that the state had not bound itself to change its adequacy definition in accordance with the findings of the funding committee. They also criticized the legislation adopted for not requiring the state to determine whether or not schools were providing an adequate education.⁶⁸

But in mid-December the commission issued a final report recommending that for the biennium starting July 1, 1999, New Hampshire adopt the Augenblick & Myers methodology and base the per-pupil figure strictly on educational outputs, with considerable adjustments.⁶⁹ Specifically, the commission relied on the New Hampshire Education and Improvement and Assessment Program (NHEIAP), the only statewide measure of student performance. The commission looked at those districts where 40 to 60 percent of students scored above the “novice” level on the statewide exams, and then selected the districts whose per-pupil base cost fell in the lower half of the range.⁷⁰ They averaged this per-pupil figure and then reduced it by 25%, arguing that a quarter of that cost was “not required to provide the curriculum, programs and services essential for an adequate education.”⁷¹ The report estimated the total cost to the state of New Hampshire of providing a constitutionally adequate education at \$630.6 million, or roughly \$3,300 per pupil, a figure which did not include capital

⁶⁸ Matthew T. Hall, *Volinsky tight-lipped until report released*, CONCORD MONITOR, November 16, 1998.

⁶⁹ In a dissenting opinion, Commission member and Senator Edward M. Gordon charged that the commission had “manipulated” the Augenblick & Myers model “to produce an outcome which substantiates their predisposition regarding the cost of adequacy.” Senator Gordon proposed an alternative means of figuring the cost of adequacy that included a call for a clearer definition of educational adequacy that included “a clear delineation of the elements of educational cost for which the state is responsible.” EDUCATION COSTS REPORT, *supra* note 64, Appendix E.

⁷⁰ The commission aimed to select those districts “able to provide an adequate education in the most cost-effective manner.” *Id.* at 4.

⁷¹ *Id.* at 5. The commission did suggest using a system of pupil weighting to account for the higher costs of high school and special education.

or transportation costs and was \$1,200 lower than the figure proposed by the governor when announcing her ABC plan.

A New Compromise

With the commission's report in hand, the governor and the legislature set about devising the state's new school finance system. But as the April 1, 1999 deadline for a new funding system neared and then passed without new legislation, the situation grew more urgent. Without assurances of funding for the coming year, many schools sent dismissal notices to their teachers, while two investment companies put New Hampshire on a bond watch, threatening the state's credit rating.⁷² Finally, at the end of the month, the state legislature passed a new school finance bill, HB 117, that committed the state to \$825 million for education in fiscal year 2000, an average of \$4,220 per-pupil and a total of 62% of overall school expenses. More than half of the new funding, \$460 million, would come from a new statewide property tax;⁷³ other sources of revenue included increased taxes on cigarettes, real estate transfers and business. Governor Shaheen signed the bill on the same day it was passed.

The new legislation⁷⁴ incorporates many of the recommendations of the Adequate Education Costs and Municipal Grant Distribution Commission. The new funding system bases the adequacy amount on the lowest-spending districts where 40-60% of students are scoring at the "basic" level or above on the NHEIAP and then reduces this number by 10% to account for resources beyond the level of adequacy. A district's per-pupil adequacy amount is then determined according to a formula including pupil weights for factors such as those receiving free or reduced-price lunches and

⁷² Mary Ann Zehr, *N.H. Lawmakers Come Close to Accord on Aid*, EDUC. WEEK, April 28, 1999.

⁷³ Ralph Jimenez, *Who'll give, who'll get? Here's the rundown*, BOSTON GLOBE, May 9, 1999, New Hampshire Weekly Section at 1.

⁷⁴ N. H. REV. STAT. ANN. § 198:38-48 (1999).

those with disabilities. School districts are still allowed to raise additional funds through local property taxes for additional programs.

In accordance with the supreme court's *Claremont* rulings, the new statewide education property tax is levied at a uniform rate of \$6.60 per \$1,000 of property valuation. If a district cannot fund its adequacy amount at this rate, the state pays the difference from a newly-established Education Trust Fund. If a district raises more than its adequacy amount, that excess money is paid into the trust fund and redistributed to those districts that fall short.⁷⁵

For most districts, HB 117 resulted in a net decrease in their overall tax rate, as the new statewide property tax was offset by large reductions in local property taxes. In a number of property-rich districts – which came to be known as “donor towns” – the total tax burden rose by several dollars per \$1,000 of property value.⁷⁶ Legislators attempted to offset the impact of these tax increases by including a “phase-in” provision in the law. Under this provision, districts that raised funds above the adequacy amount would only be required to remit a certain percentage of the excess to the state; this percentage would rise gradually to 100% over a six-year period. In effect, then, the full education property tax rate of \$6.60 per \$1,000 would be imposed gradually on fifty property-rich towns, while the remaining towns would have to pay the full rate right away.⁷⁷

⁷⁵ Funds from the donor towns account for only 6% of total grants made from the Education Trust Fund. Stanley R. Arnold, Commissioner, New Hampshire Department of Revenue Administration, *Let's get the facts straight on property tax*, CONCORD MONITOR, December 4, 1999. The remaining funds in the trust come from a number of other new or increased taxes, as well as the state's share of funds from the federal tobacco settlement.

⁷⁶ Jimenez, *supra*, note 73.

⁷⁷ 744 A.2d 1107, 1109 (N.H. 1999).

David Hess, a state representative and sponsor of HB 117, has suggested that the inclusion of the phase-in provision may have in part been an effort to forestall the kind of social and political upheaval caused by the enactment of sweeping fiscal equity reform in neighboring Vermont. David Hess, *HB 117: It Will Pass Constitutional Muster*, N. H. LAW BULLETIN, Volume 2, Issue 3, June 1999 at 1. While, as discussed below at p.28, there has been considerable criticism of New Hampshire's new school finance system, there does not appear

This “phase-in” provision, however, led to another legal challenge from plaintiffs and another ruling from the New Hampshire Supreme Court.⁷⁸ In an October 15, 1999 decision, the court struck down this provision and again declared the state’s school funding system unconstitutional. Arguing that the provision created “two distinct classes of taxpayers,” the court ruled that “it is neither reasonable nor fair to award automatic tax exemptions to a majority of taxpayers in affected ‘property rich’ communities who do not need them in order to assist those who would surely qualify.”⁷⁹ By effectively creating different tax rates for the next five years, the court said, the legislature had violated the court’s earlier holding that any tax used for a state purpose must be levied at a uniform rate. The court did rule, however, that invalidation of the phase-in provision did not require the entire piece of legislation to be invalidated.

Once again, New Hampshire’s lawmakers scrambled for a school finance solution. A number of legislators reacted sharply to the court’s ruling, stating that they would not have supported the bill if not for the phase-in provision, and calls for both an income tax and a ‘constitutional amendment were renewed.⁸⁰ Nevertheless, as some districts threatened to shut down schools without guarantees of funding, the legislature passed a bill reinstating the statewide education property tax. Instead of the phase-in

to have been nearly the same level of vitriol as in Vermont. For more on the Vermont reform and backlash, see MICHAEL A. REBELL AND JEFFREY METZLER, *RAPID RESPONSE, RADICAL REFORM: THE STORY OF SCHOOL FINANCE LITIGATION IN VERMONT* (Campaign for Fiscal Equity, Inc., October 2000).

⁷⁸ Plaintiffs also challenged a number of other aspects of the new funding bill and asked the court to appoint a master to conduct fact-finding on the definition and cost of a constitutionally adequate education. The state supreme court chose to rule only on challenge to the phase-in provision. 744 A.2d 1107, 1108.

⁷⁹ *Id.* at 1110, 1111.

⁸⁰ Sarah Koenig, *Element favoring property-rich towns cited in ruling*, CONCORD MONITOR, October 16, 1999. In fact, shortly before the final bill was passed, the Democratically-controlled Senate did pass a finance bill that included a 4% income tax; the bill was soundly defeated by the Republican-controlled House, which was considering a constitutional amendment. Debra Viadero, *Under Threat of Closings, N.H. Revives Property Tax*, EDUC. WEEK, November 10, 1999.

provision, the new law provided tax rebates only for poorer property owners in those property-rich towns that would be paying surplus funds into the Education Trust Fund.⁸¹ The rest of the funding system signed into law in April remained intact.

Reactions and Further Challenges

Even as the new funding legislation was being signed by Governor Shaheen, legislators acknowledged that the bill was a “stopgap” measure and not a permanent solution; HB 117 as passed will sunset in 2004. The level of dissatisfaction with this stopgap measure has been high in many corners. First, many have criticized the legislature sharply for failing to fully fund the new bill at \$825 million. Initial estimates of the projected budgetary shortfall ranged from \$75 million to \$120 million over the biennium; more recent estimates put the figure at \$200 million.⁸²

Attorneys for the *Claremont* plaintiffs have also charged that the new funding plan does not meet the state’s constitutional obligation and is not a “good faith effort” to fund adequacy.⁸³ Even fully funded at \$825 million, the plan would only cover half of total current statewide expenditures, and plaintiffs argue that per-pupil spending is based on figures from some of the state’s largest districts, creating an economy of scale other districts cannot replicate.⁸⁴ Plaintiffs further charge that the funding plan does not reflect the state’s own adequacy definition and that the student performance

⁸¹ Viadero, *supra*, note 80.

⁸² See Scott F. Johnson, *HB 117: The State’s Plan to Fund Educational Adequacy is Too Little, Too Late*, N. H. LAW BULLETIN, Volume 2, Issue 3, June 1999 at 1; DOUGLAS E. HALL, SCHOOL FINANCE REFORM: SHORTFALL FORECAST FOR EDUCATION TRUST FUND (New Hampshire Center for Public Policy Studies, August 1999); Amy McConnell & Lisa Wangsness, *State’s new Senate may stall some options*, CONCORD MONITOR, November 9, 2000.

⁸³ Johnson, *supra*, note 82 at 6.

⁸⁴ Volinsky & Johnson Interview.

standard being used -- 40 to 60 % of students scoring at or above the "basic" level -- is "certainly not the standard we want our children to attain."⁸⁵ They suggest that rather than base adequacy on just one measure of performance, the state should craft a far more detailed definition of adequacy, then determine the actual costs of providing those elements of an adequate education to every student in the state.⁸⁶

Resistance to the new plan has also come from the so-called "donor towns" who have seen their tax burdens increase considerably in the past year. Shortly after passage of HB 117, a group of 27 donor towns filed a lawsuit challenging the constitutionality of the new statewide property tax on two grounds: first, that while the tax is uniform, New Hampshire's system of property valuation is not, and that leads to unequal tax burdens; second, that the new law addresses the collection of money but not its distribution.⁸⁷ According to attorney Tom Closson, who represents the donor towns, the "real inflammatory issue" has been evidence that some receiver towns are using money from the Education Trust Fund for other municipal purposes, including tax relief.⁸⁸ In a sense, then, this claim is

⁸⁵ ". . . the \$825 million in HB 117 is based solely upon political compromise and expediency. The amount is not based upon sound educational methodology or analysis and appears to have no relationship to the definition of educational adequacy passed into law just last year." Johnson at 6. Plaintiffs note that while Augenblick & Myers, in their work with the Adequate Education Cost Commission, pegged the cost of adequacy at least \$983 million, the initial Senate bill reduced that figure to \$960 million, and legislative compromises brought the figure all the way down to \$825 million. The plan also does not provide any money for buildings or technology. Volinsky & Johnson Interview; Johnson at 6.

⁸⁶ Andru Volinsky suggested that New Hampshire still does not have a real definition of adequacy: "The legislature passed a statute containing criteria for adequacy that was just a restatement of the court's guidelines; these have not been made into regulations or practical mechanisms by the legislature. . . . If the legislature had taken the logical steps first, we wouldn't have needed this stop-gap funding system." Volinsky & Johnson Interview.

⁸⁷ *Sirrell, et al. v. State of New Hampshire*. The named plaintiffs in the suit were the mayor of Portsmouth and elected officials from two other donor towns. Plaintiff attorneys suggested that the prominence of the named plaintiffs helped make the suit more effective politically. Interview with Tom Closson, Flygare Schwartz & Closson, January 3, 2001.

⁸⁸ Closson Interview; Annmarie Timmins, *Tempers flare over tax bills*, CONCORD MONITOR, December 3, 1999. Commissioner of the State Department of Revenue Stanley

about accountability, and Mr. Closson has suggested that a real, effective accountability system would “go a long way” toward lessening resistance to the redistribution of funds. In January 2001, the Rockingham Superior Court ruled in the donor towns’ favor, and ordered the state to reimburse towns the tax dollars they had paid since the implementation of the tax, a total of roughly \$880 million dollars.⁸⁹ The State has appealed this ruling to the New Hampshire Supreme Court. The state legislature’s efforts to forge a more permanent funding system with stable revenue sources have not yet borne fruit. A variety of funding packages including income, property and other taxes have all gone down to defeat while the state’s projected budget gap has grown. School funding was of course a major issue in New Hampshire’s 2000 elections. Breaking with their party’s tradition of taking “the pledge,” three of the four candidates for the Republican nomination announced at least some support for the statewide property tax; Gordon Humphrey, the eventual nominee, said he would keep the statewide property tax in place temporarily while simultaneously fighting to overturn the *Claremont* ruling with a constitutional amendment. After a bitter campaign, Governor Shaheen was reelected in November by a 49% to 44% margin. However, the election also returned control of the Senate to the Republicans, and a number of legislators from both parties who had indicated support for an income tax were defeated,⁹⁰ making the prospect of an income tax in the next few years unlikely.

Two new task forces have contributed to the policy discussions on lasting reform. This past January, Governor Shaheen’s blue ribbon Commission on Education Funding released a report on the pros and cons of potential revenue streams to fund the state’s \$825 million adequacy figure. While the report does not advocate a particular source of revenue, it does note the advantages of a property tax in terms of stability and

Arnold argues that this redirection of funds during the first year of the new system arose from the fact most communities had already passed their school budgets before the school finance legislation was passed. Arnold, *supra* note 75.

⁸⁹ *Sirrell, et al. v. State of New Hampshire* (Rockingham Superior Court, 99-E-0692, January 2001).

⁹⁰ Volinsky & Johnson Interview.

potential for growth, and a number of legislators now see the continued reliance on some form of statewide property tax as largely inevitable.⁹¹ Later that month, the legislature's Adequate Education and Education Funding Commission issued proposals on adequacy, funding and accountability.⁹² Representative Neal Kurk, House Finance Chairman and head of the commission, said the recommendations are designed to be "a series of steps that go toward defining and costing an adequate education."⁹³ The commission has also studied targeting funds to students with high educational needs based on factors such as family income or parents' educational levels.⁹⁴

Accountability continues to be a major stumbling block in the reform process. At the heart of the debate, again, is the issue of local control and what sort of intervention should take place in failing districts. During the 2000 session, the legislature debated competing accountability bills: one supported by Democrats would have authorized the state education commissioner to appoint a team of state advisors to intervene in districts not meeting state standards and their own local performance plans.⁹⁵ The Republican-sponsored bill did not call for one specific intervention measure, but rather allowed a period of time to determine why a district was failing

⁹¹ "The property tax will be the cornerstone [of school funding] no matter what combination of taxes we adopt." O'Hearn Interview.

⁹² Among them, spending additional funds on failing schools, professional development and early childhood programs. The commission also recommends changing the adequacy formula to use schools where 50 - 70% of students score at the 'basic' or above level on the NHELAP, not 40 - 60%. FIRST REPORT, ADEQUATE EDUCATION AND EDUCATION FINANCING COMMISSION 13 (January 29, 2001).

⁹³ Norma Love, *Adequacy commission issues report on schools*, CONCORD MONITOR, January 30, 2001.

⁹⁴ The commission studied national statistics and found that these factors are among those that most closely correlate with student achievement. The commission has also examined targeting aid to those districts whose property base prohibits them from raising sufficient funds for education. O'Hearn Interview.

⁹⁵ Alec MacGillis, *Split vote in Senate stalls school bill*, CONCORD MONITOR, February 4, 2000.

before recommending a course of action.⁹⁶ Legislators could not reach a compromise. This session, the Adequate Education and Education Funding Commission is proposing a bill under which a legislative oversight committee would approve any state intervention. Complicating the accountability debate is the fact that New Hampshire does not yet have a comprehensive system for measuring whether or not its schools are providing an adequate education.⁹⁷

The New Hampshire Supreme Court has also recently re-entered the school funding debate. In December 2000, the Court issued another advisory opinion, this time on a funding proposal sponsored by Senator Fred King.⁹⁸ The plan would have raised funds through a uniform statewide property and other state taxes, and would have distributed \$200 million according to a needs-based formula. Nevertheless, the bill left over \$161 million of the statewide adequacy amount to be funded by school districts through local property taxes, thus effectively leading to variable tax rates, and on this basis the court rejected the plan.⁹⁹

The court went on, however, to reiterate certain core holdings from earlier *Claremont* decisions. Most interesting among these was a statement that, in the court's opinion, constitutional adequacy in New Hampshire had "yet to be defined," and that the content of an adequate education must still be detailed by the legislature before an adequate funding mechanism can be

⁹⁶ O'Hearn Interview.

⁹⁷ "I don't know if we actually have any districts that are failing. We're still working on a process to see where our schools really are." *Id.*

⁹⁸ SB 462-FN-A-LOCAL. Senator King did not run for re-election in 2000 and now serves as a consultant to the Republican Senate leadership.

⁹⁹ Opinion of the Justices, December 7, 2000, available on-line at www.state.nh.us/courts/supreme/opinions/0012/ojschool.htm. The court was quite clear about the state's "exclusive obligation" to fund an adequate education: "The State may not shift any of this constitutional responsibility to local communities. . . ."

developed.¹⁰⁰ As attorneys for plaintiffs have pointed out, the principles adopted into law by the state are just that, principles, and this latest decision seems to indicate that the court requires a far more detailed discussion on the elements of adequacy and what those elements cost. In an effort to catalyze that discussion, plaintiff attorneys are now working with consultants to prepare a study to measure the actual total costs of those schools the state has identified as successful.¹⁰¹

PUBLIC ENGAGEMENT

Like other New England states, New Hampshire prides itself on a certain participatory, “small town” approach to democratic government. In the wake of the *Claremont* rulings, there has been a deluge of public discussion about school funding and education: well-attended debates at school board meetings; abundant letters to the editors of the state’s newspapers; radio call-in programs; Internet message boards and chat rooms. Organized, in-depth dialogues on the complex issues, however, particularly those bringing a wide range of stakeholders to the table, have been few, while opportunities for direct public participation in the decision-making process have been even fewer.

In March 1998, four months after the New Hampshire Supreme Court invalidated the school finance system, the University of New Hampshire conducted an in-depth series of public engagement forums known as the

¹⁰⁰ “It is not possible to determine the level of funding required to provide the children of this State with a constitutionally adequate education until its essential elements have been identified and defined. . . . Once this critical task has been completed, it is for the legislature to adopt a funding mechanism to ensure that a constitutionally adequate education is provided. *Id.*”

¹⁰¹ Volinsky & Johnson Interview. Andru Volinsky said this recent ruling may demonstrate that the court is “running out of patience.” He also suggested that some legislators may be reluctant to sign any detailed definition of adequacy into law, “since then they’d have to pay for it”; as it stands now the relatively general definition allows legislators greater latitude in setting the statewide adequacy amount.

“Claremont Roundtables.” The forums were organized by Bruce Mallory, Director of the University’s Public Conversations Project, which had conducted similar discussions on public policy issues across the state in years past. Roundtable discussions were held in ten towns, each involving 12-20 people. The Project strove to include participants of various ages, political persuasions, and occupations, including teachers, parents, school board members, elected officials, business people, and representatives of social service, religious and taxpayer organizations.¹⁰²

Using a model developed by the Study Circles Resource Center in Connecticut, each roundtable group met for a total of eight hours over a four-week period to discuss how to define an adequate education and approaches to funding educational adequacy. In addition to trained facilitators, the Conversation Project provided participants with copies of the Supreme Court’s *Claremont* decision and position statements from various groups. At the end of the four weeks, the roundtables met and reported on their discussions at a “Roundtable Wrap-Up” in Concord.

The summary report issued after the wrap-up session indicated considerable common ground among participants. Independently, each discussion group focused primarily on defining adequacy and shied away from funding issues, in part because many participants believed a definition of adequacy was a prerequisite for a funding solution.¹⁰³ Among the areas of consensus were: basing state policy on a higher goal than mere “adequacy”; the need to focus on specific educational outcomes such as critical thinking and communication skills, and economic success later in life; a shared system of responsibility and accountability among all parties in the educational process; high standards for students, teachers and administrations; and meeting the educational needs of all students, from the disabled to the gifted. While the groups specifically declined to go into

¹⁰² THE CLAREMONT ROUNDTABLES: SUMMARY REPORT, UNIVERSITY OF NEW HAMPSHIRE PUBLIC CONVERSATIONS PROJECT (April 28, 1999) 1 [hereinafter ROUNDTABLES REPORT]; Interview with Bruce Mallory, Dean of the Graduate School, University of New Hampshire and Director, University of New Hampshire Public Conversations Project, September 12, 2000.

¹⁰³ Mallory Interview.

detail on funding mechanisms, many did oppose a constitutional amendment that would leave the current funding system in place.¹⁰⁴ The summary report was distributed to all participants, members of the state legislature, the governor, the state board of education, and other key stakeholders.

Following the distribution of the report, the Conversation Project teamed up with New Hampshire Public Television to air a one-hour live program on school funding reform and educational adequacy. The program included a discussion among representatives from the 10 conversation groups around the state, and a section in which viewers could call in with questions. After the program, the co-hosts of the show hosted an on-line chat room, allowing for further discussion of the issues.

While one aim of the Claremont Roundtables was to generate recommendations for state policy leaders, project director Bruce Mallory said that the impact of the roundtables was “less than we’d hoped for.”¹⁰⁵ One reason for this limited impact may be the discussion groups’ near total focus on educational adequacy. Mr. Mallory suggested that the education question “has become a proxy for much more basic questions about New Hampshire’s tax structure, which is essentially inadequate for doing anything.”¹⁰⁶ Mr. Mallory does believe, however, that the summary report from the roundtables influenced the adequacy definition passed into law and definitions developed by other organizations. The roundtables served as one of many perspectives and sources for specific language for those groups working of defining adequacy.¹⁰⁷

During the 1998-99 school year, New Hampshire Public Radio conducted a somewhat different series of public forums across the state as part of the “New Hampshire Tax Challenge,” a program designed to raise public awareness about school funding in New Hampshire and to foster

¹⁰⁴ ROUNDTABLES REPORT, *supra*, note 102 at 2-4.

¹⁰⁵ Mallory Interview.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

public discussion about responses to the Claremont ruling.¹⁰⁸ Working with local chambers of commerce, colleges, rotary clubs and chapters of the League of Women Voters, NHPR held 10 meetings across New Hampshire. While the meetings typically attracted 30 - 35 participants, attendance at some meetings rose as high as 125 as the April 1 deadline for a new funding system drew near. In connection with the forums, NHPR made extensive use of its website to encourage greater public discussion. The station's site featured an on-line "tax calculator" that allowed people to see the implications of various tax proposals, as well as a "feedback zone" where users could post comments on school funding and tax issues. Given its prominence as a statewide media outlet, NHPR hoped lawmakers would pay attention to the considerable public input on these issues.¹⁰⁹

According to Jon Greenberg, a Senior Editor at NHPR who oversaw the forums, the meetings were primarily designed to educate the public about New Hampshire's fiscal structure, the problems inherent in such heavy reliance on local property taxes, and the difficulty of funding adequacy under the state's current tax structure. NHPR distributed information on the current tax system, reform proposals, and the Claremont ruling and its implications. While the meetings followed a flexible format, the local co-sponsor usually provided a moderator, and representatives from a number of organizations made presentations on the tax structure, potential funding solutions, and issues raised by the supreme court ruling.

While participants responded to the forums with enthusiasm -- Mr. Greenberg referred to the frank discussion of tax issues as "a breath of fresh air" -- the complexity of the issues sometimes prevented the discussion from reaching a deep level.¹¹⁰ The discussion was also keenly focused on school funding and taxation, meaning that the related issue of educational adequacy was rarely addressed. NHPR hopes this issue receives further attention

¹⁰⁸ Interview with Jon Greenberg, Senior Editor and Director of New Media, New Hampshire Public Radio, August 10, 2000.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

during its “Tax Challenge II,” which is currently being planned. In addition to further discussions on taxation and finance, Mr. Greenberg hopes the forums will address issues about what goes on in the classroom, how education dollars can best be spent, how to best measure school performance and what students should be learning in school. In this second round of public engagement, NHPR intends to use a model developed by Leadership New Hampshire, a statewide public service training institute, to engage constituents in a series of meetings over time. The station also hopes to engage a broad range of stakeholders – including those not directly involved in the educational or school funding systems – in the process.

CONCLUSION

In the three years since the New Hampshire Supreme Court’s landmark ruling in *Claremont*, New Hampshire has seen sweeping changes in its school funding system and its discussions about the kind of education to which children in the state are entitled. These reforms, however, have not been without serious flaws, and the state may still be very far from a lasting, workable and constitutional solution to its school funding crisis. New Hampshire has witnessed an extensive policy debate about educational adequacy, and its highest court has adopted broader adequacy principles than all but a handful of states. Translating those principles into effective policies – providing sufficient funding for each element of adequacy, holding schools and the state accountable for adequacy – has been the stumbling block. Not only has the state failed to identify a lasting funding stream and a sufficient method for funding adequacy, there is considerable disagreement among the state’s leadership as to whether or not adequacy has really been defined in the first place.

Many in New Hampshire have expressed concern that the tax issue has often overshadowed discussions about adequacy and the kind of education going on in the state’s classrooms. The New Hampshire story, though, demonstrates that the two issues are inextricably tied. One cannot have a meaningful discussion of educational adequacy without addressing the issue

of economic justice – that is, who will pay the bill and how. Otherwise the goal of adequacy, providing for those who cannot provide for themselves, is lost, and finely-tuned principles of adequacy will only remain principles, not practices. Similarly, it seems nearly impossible to craft a lasting and adequate funding system without a detailed definition of what resources an adequate education requires. The dual focus of the *Claremont* ruling makes this relationship clear.

Joining these two issues will require a change in the state's political culture, both in terms of the state's leadership and the public at-large. Here, more sophisticated and far-reaching public engagement efforts may play a key role, for underlying these two pivotal issues is a basic question of responsibility. Meaningful interchange between stakeholders of all stripes may begin to forge the political will to take to heart the words of the New Hampshire Supreme Court, that "it is basic to our collective well-being that all citizens of the State share in the common burden of educating our children." Putting that common responsibility into practice may lie at the heart of a lasting school funding remedy for the state of New Hampshire.