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Educational Jujitsu: How School Finance Lawyers Learned to Turn Standards and Accountability Into Dollars

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How school finance lawyers learned to turn standards and accountability into dollars by MICHAEL HEISE

IN THEIR CONTINUING EFFORTS TO EXTRACT MORE school spending from state legislatures through the courts, advocacy groups recently acquired a powerful new weapon: the standards movement. Their success provides yet another example of the law of unintended consequences.

Recently, plaintiffs in two prominent cases, in New York and North Carolina, successfully used the states' standards and performance expectations as evidence of the states' failure to provide an adequate education to all students, especially poor and minority students. Judges in both states ordered the legislatures to rework the formulas used to distribute state funds to local school districts. The New York case is currently in limbo after a state appeals court reversed the trial court's decision in June 2002.

This development marks the latest, and perhaps the most ingenious, turn in a run of litigation that spans almost three decades. Ever since the U.S. Supreme Court, in the 1973 *San Antonio Independent School District v. Rodriguez* case, declared that funding disparities among local school districts were of no federal concern, plaintiffs have pinned their hopes on the education clauses in state constitutions. State constitutions usually require the states to provide their residents with a "thorough and efficient" or "sound basic" education. What this language means—whether it mandates equal funding or simply a minimum level of funding necessary for a "sound basic education"—has been the central issue in the past 12 years in 28 major lawsuits, of which the plaintiffs have won 18.

The chief target of this litigation is the long-standing practice of funding schools mainly with local property taxes. This practice contributes to per-pupil spending differences among school districts that are sometimes stark. Well-to-do neighborhoods with high property values can afford top-notch facilities and

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salaries high enough to attract good teachers. Low-income areas, meanwhile, often struggle just to put a certified teacher in every classroom. Early state-level lawsuits—the so-called “equity” wave of litigation—asked state courts to mandate that all children have a right to the same level of education, as measured by per-pupil spending. Such lawsuits met with limited success, however. For every lawsuit that succeeded, another failed. Moreover, even successful litigants were rarely able to win substantial increases in spending equity.

In addition, equity lawsuits began to lose support from many of the nation’s large urban school districts, even as they continued to struggle mightily with delivering basic educational services. Many urban districts realized that, despite the obvious challenges they confront in serving children, gaps in educational spending between urban and nonurban districts are not the key problem. Indeed, in most states urban school systems benefit from spending levels that exceed state averages. As a result, in successful equity-based school finance lawsuits, urban schools stood to lose or, at best, not to gain additional resources.

The Emergence of Adequacy

In 1989 the world of school finance litigation changed in a way that welcomed urban districts back into the fold. Many observers point to a 1989 decision by the Kentucky Supreme Court, *Rose v. Council for Basic Education*, as ushering in the “adequacy” theory of school finance litigation. Unlike suits based on equity, which sought to close spending gaps between high- and low-income districts, lawsuits based on adequacy challenge state school finance systems not because some districts benefit more than others, but because some districts provide education of miserable quality. The question for the courts then became how to define adequacy.

A new wave of litigation may be upon us, one that enables school districts to gain financially from their inability to perform.

Enter the standards movement. The states themselves have established the levels at which they expect schools and students to perform. Persistently underperforming schools in some states are identified as “low performing” and are subject to additional external supervision. Students who fail to achieve minimum scores on state tests are prevented from graduating from high school with full academic diplomas. Such policy changes seek to shift school regulation away from the traditional focus on inputs—teacher-to-student ratios, per-pupil spend-



ing, number of certified teachers—and toward a focus on performance as the basic metric of education quality. However, in an ironic twist, this output-driven movement has made it much easier for activists to appeal to the courts for more inputs. The standards movement enables activists to define adequacy as that level of funding necessary for a school district and its students to meet state education standards.

Thus a new wave of litigation may be upon us, one that turns the states’ efforts to

improve achievement through standards against the state and enables school districts to gain financially from their inability to perform at desired levels. These failures are used in court to bolster legal claims that such schools underachieve because their resources are inadequate and, therefore, unconstitutional. Judicial participation in this race to new money uncovers old and new problems that arise when courts are asked to set education policy.

New York

New York’s constitution guarantees its citizens a “sound basic education.” After more than a decade of development and debate, New York adopted the Regents Learning Standards in 1996. The standards articulate expectations at three educational stages (elementary, intermediate, and graduation) in such core subjects as English, math, and science. The standards are aligned with the Regents exams, which, for many New York students, especially the college-bound, have become a familiar rite of passage. Presently, passing the Regents exams is necessary only to earn a special Regents diploma. By 2004, however, the Regents exams will be a graduation requirement for all.

Unlike other urban districts nationwide, New York City’s public school spending falls just below the state average (New York City spent \$9,623 per pupil in 1998–99, versus a state

average of \$10,317). Frustrated with unsuccessful appeals to lawmakers for increased resources, school finance advocates, joined by 14 of New York City’s 32 school districts and numerous New York City public school students and their parents, turned to the courts. In *Campaign for Fiscal Equity v. State of New York*, a widely covered case decided in 2001, the plaintiffs sought an increased share of the state’s education spending. They argued that the state funding formula worked in a manner that denied city schoolchildren the opportunity to receive a sound basic education.

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In defending its school finance system, the state of New York argued that New York City spent enough to provide an adequate education and that the state's share met constitutional requirements. The city's poor performance on state tests was a result of mismanagement and a bloated bureaucracy, the state argued, not a lack of resources. Implicit in the state's argument is the idea that the constitutional command for educational "adequacy" requires only that the state lift all students to a minimal floor. From the state's perspective, this "floor" meant that it must equip students with the basic tools necessary for active, productive citizenship.

New York City construed educational adequacy differently and drew on the state's own Regents Learning Standards as a definitional guide. The plaintiffs cited the failure of many city students to earn Regents diplomas as evidence that they are not receiving an adequate education. In 2000, for example, only 27 percent of New York City high-school graduates earned Regents diplomas, versus 49 percent statewide. New York City's claim pivots partly on the assumption that adequate funding is the amount necessary to ensure that New York City's students meet the state standards at a level comparable with their counterparts statewide.

Trial court judge Leland DeGrasse bought most of the plaintiffs' argument and concluded that city students are not receiving a "minimally adequate" education. The trial court construed adequate education as that which would enable city students to compete for jobs with their counterparts statewide. However, the state appeals court reversed the decision in June 2002, holding that the trial court's understanding of what the New York constitution requires in terms of education was flawed. The appeals court concluded that the state is only required to provide students with a basic education that will enable them to participate in the economy. Equally significant is that the appeals court refused to conflate educational opportunity and student achievement, especially as measured by the Regents exams. That is, the appeals court held that a failure to earn Regents diplomas is no evidence of a constitutionally inadequate education. Indeed, the appeals court went on to note that New York's Regents Learning Standards exceed any notion of a sound basic education. The plaintiffs have promised to appeal and, consequently, New York State's highest court will be called upon to resolve the matter.

North Carolina

North Carolina's constitution requires that the state provide a "general and uniform" education system. To discharge its constitutional obligations, North Carolina lawmakers rewrote the state's Basic Education Program in 1985. Shortly thereafter, the state board of education developed a Standard Course of Study designed to help all North Carolina students navigate successfully as adults and citizens. North Carolina lawmakers

also implemented end-of-grade and end-of-course exams that seek to chart student progress towards mastering the state's academic goals and to help increase school accountability. High-school graduates in North Carolina must also pass the North Carolina High School Competency test, which is set at approximately an 8th-grade skill level.

In 1994 both low- and high-spending school districts challenged the constitutionality of the state's school finance system. All plaintiff districts wanted greater resources, but for different reasons. The low-spending (largely rural) districts wanted more funding to close the resource gap. High-spending districts, principally in urban areas, sought increased funding to offset the peculiar challenges incident to the production and delivery of educational services in low-income areas.

In a 1997 decision, *Leandro v. State of North Carolina*, the North Carolina Supreme Court considered various challenges to the state's school funding system. While not deciding the substantive claims, the court held that, in construing whether a sound and basic education was being provided, courts could properly consider results from student assessments.

Following the state supreme court's guidance, a North Carolina trial court, in a series of opinions, decided to prompt a restructuring of the state's pre-kindergarten education system. The court, noting a yawning gap between the performance of at-risk and not-at-risk students on statewide assessments, concluded that greater attention to the special needs of at-risk students was constitutionally required. Like its counterpart in New York, the North Carolina court implicitly assumed that providing schools with more resources would help close the achievement gap, though researchers have found no such direct link between increased spending and increased performance. Also linking the New York and North Carolina decisions is the key role played in the litigation by results from high-stakes testing. That is, in construing whether North Carolina lawmakers were providing constitutionally adequate educational services, the court looked to student progress on the state's learning standards.

Perhaps mindful of the magnitude of the burden its decision placed on the legislative branch, the North Carolina court ordered lawmakers to change the state funding formula "at a reasoned and deliberate pace." While the court's language was no doubt intended to allay fears about judicial overreach, the obvious reference to the *Brown v. Board of Education* opinion ("all deliberate speed") may have achieved the opposite effect. This legal battle is far from over as North Carolina governor Mike Easley recently urged the state attorney general to appeal the trial court's final order to the state's supreme court.

The recent state court decisions in New York and North Carolina portend an emerging trend in school finance litigation. Indeed, these court decisions are already beginning to influence school finance activists nationwide. Litigants in Florida appear poised to join that state's standards and assess-

ments program with its recently amended constitution in an effort to boost education funding. Recent federal legislation will further fuel this trend. The mandates of the federal No Child Left Behind Act, which requires testing in grades 3 through 8 and further labeling of schools as “failing” for not achieving adequate progress on state tests, will only accelerate the states’ development of standards-based accountability systems. The early successes of standards-based lawsuits ensure that the present efforts to improve achievement will have the unintended consequence of stimulating litigation against the states.

Many observers assumed that the educational standards movement would provoke a wave of lawsuits. High stakes of any kind—students being denied diplomas as a result of failing to pass state tests, schools denied funding for failing to improve performance—were certain to trigger litigation. But careful policy design and implementation along with an almost unlimited supply of second chances for students blunted such legal challenges. Now the worry is that lawsuits will derail the standards movement by taking advantage of its most promising attributes: its setting of clear academic standards and its expectation that schools and students will meet them.

Lessons and Predictions

The New York and North Carolina cases illustrate three critical issues that litigants and lawmakers would be wise to consider as standards-based litigation moves forward.

1) *Courts are not particularly good at governing schools.* Despite the integral role that the Supreme Court’s *Brown v. Board of Education* decision played in ensuring equal educational opportunity, courts are notoriously bad at developing and implementing education policy. They are structurally ill-equipped to make the sometimes delicate policy trade-offs incident to the

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school finance enterprise. Formal litigation, designed to resolve disputes in an adversarial manner, was never meant to serve as a dispassionate, thoughtful, deliberate forum for considering and weighing competing policy and funding objectives and goals. The adversarial setting is not conducive to generating the political consensus necessary to carry out policy decisions. This is not to say that the legislative process is perfect. Clearly, it is not. But despite its defects, the political process remains



comparatively better structured than courts to set school finance policy.

Consider New Jersey’s three-decade-long saga with school finance litigation. Despite many judicial victories and an increase in school spending to among the nation’s highest, student achievement in urban areas continues to lag. The main by-product has been to breed resentment in the many suburbs that must endure the higher property taxes needed to finance the judges’ orders. This resentment boiled

over when voters denied Governor Jim Florio a second term in office after he pushed for a tax increase incident to the court decisions.

The most enforceable thing a court can do is order a state to spend more money. What courts cannot do is ensure that the money is spent effectively. Courts cannot make a district improve its teacher training, step up its recruitment efforts, or eliminate waste and mismanagement in the central office. Many judges assume that extra funding alone will result in higher achievement. But giving more money to a system rife with patronage, corruption, and mediocrity is unlikely to stimulate meaningful change. The research literature is clear that money can improve achievement only if it is used well. And there is the rub.

The overwhelming majority of judges (and their clerks) are not trained as policy analysts, and school finance litigation frequently forces them into unfamiliar technical and policy terrain. For example, in the latest chapter of the decade-long *DeRolph* litigation, the Ohio Supreme Court all but admitted that its understanding of the state’s complicated school funding formula in a recent decision was flawed.

Another worrisome aspect of courts’ involvement in education policymaking is their seeming inability to disengage from judicial supervision once begun. The nation’s experience with school desegregation aptly illustrates this point. Almost 50 years have passed since the *Brown* decision, yet federal

courts remain embroiled in many desegregation plans. As litigants continue to squabble over what it means for a school district to be “unitary” or “fully integrated,” the direct and indirect costs associated with school desegregation plans mount. Analogous battles over school finance issues will likely become just as contentious and prolonged.

2) *Litigation lets legislators and policymakers off the hook.* School

finance litigation buffers elected officials and lawmakers from their responsibility to improve schools. By deploying standards and assessments in a manner that recasts school finance questions as legal questions, litigants seek to extract from courts and judges what they cannot get from legislators and governors. In the process, they threaten to cost state governments dearly and further erode lawmakers' discretion over education policymaking and budgets. Many governors and lawmakers are displeased to find that a school finance court decision has blown a multimillion-dollar hole in a state's carefully crafted, long-negotiated budget.

Paradoxically, some lawmakers welcome the judicial intrusion and seize upon a chance to point to judges and courts as the culprits when taxes must be increased to comply with school finance decisions. Some lawmakers—especially those who believe that schools merit more funding but are wary of a potential antitax backlash—relish judges' taking the political heat, even at the cost of giving up some of their own legislative authority. However, such a consequence raises the twin specter of an increasingly politicized judiciary and an increasingly legalized legislature. Both results place additional stress on our traditional notions of separation of powers and the proper structure of government.

3) *Vested interests adapt quickly to a changing policy milieu.* The initial resistance of school boards and teacher unions toward standards and accountability was easy to predict. Less predictable was their ability to conscript the standards movement in the service of school finance litigation. Bolder still is the way activists managed to transform classroom "failure" into courtroom success and additional taxpayer dollars. Education is a highly labor-intensive activity and, as a result, labor costs consume the bulk of most school district budgets. Thus, victories in court for increased spending on education invariably inure to the benefit of school administrators and teacher unions. Of course, the carcasses of past reform endeavors coopted by the education establishment litter the landscape of education policy. During the past few decades alone, efforts to reform teacher training and selection, to introduce "site-based management" and merit-based compensation programs have largely succumbed to inertia (and worse) and failed to achieve their goals. Such a landscape is a testimonial to the phenomenal ability of organized interest groups to transform well-meaning reforms into vehicles for little more than additional resources, control, and retention of the status quo.

Those seeking more funding for schools that struggle to deliver acceptable educational services find many judges far more receptive than lawmakers to their claims. Reflexive pleas to lawmakers for increased resources are beginning to wear thin on legislators and governors attuned to a constituency anxious to see some reliable, clear returns on their investment. Taxpayer

revolts flare up with increasing regularity across the country. Big-city school districts such as New York and Chicago do not dare try to increase education spending through appeals to the ballot box. Instead, they must turn to the more expensive capital markets by floating school bonds. In such a political environment, it is understandable why those seeking additional resources for public schools are eager to steer clear of legislatures and the political process. Courts provide school finance activists an alternative to increasingly skeptical lawmakers and a more demanding political marketplace.

Risks and Rewards

Despite notable successes, school finance activists committed to such a judicial strategy should recall a history replete with profound resistance to judicial intrusions into core education policymaking. Just as various interest groups within the education field have demonstrated, once again, their instincts for self-preservation and further entrenchment within an ever-changing policy environment, competing institutions are capable of similar adaptability. Even successful lawsuits typically fail to achieve litigants' goals unless they are backed by substantial public and political support.

Recent history evidences this point. With all due respect to the *Brown* litigation's seminal accomplishments (and they are both real and plentiful), after almost 50 years of school desegregation litigation, public schools today remain largely segregated by income and race. Moreover, litigation seeking to close gaps in per-pupil spending levels has achieved only marginal success nationwide. One clear consequence has been a shift of funding and control from the local level to the state level. This degree of centralization makes it easier to redistribute school resources from wealthy to poor districts. However, to the extent that this shift in control degrades the bond between local communities and their public schools, it is possible that net public support for public schools might decline. This, of course, will reduce the amount of funding available for redistribution.

The taxpayer revolt in California, prompted partly by that state supreme court's school finance decision in the famous *Serrano* case, illustrates how resistance to court decisions can severely blunt the effectiveness of a judicial strategy. Before the successful school finance lawsuit, per-pupil spending in California was among the nation's highest. Following the *Serrano* decision, per-pupil spending in California fell to among the nation's lowest. Among the many factors contributing to this decline were a dramatic shift from local to state resources for school funding and a revolt among California taxpayers. Clearly, a judicial strategy that cleverly seeks to leverage education standards and assessments to bolster school finance lawsuits presents risks of its own.

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