

NOTES

ALL STUDENTS ARE NOT CREATED EQUAL: THE INEQUITABLE COMBINATION OF PROPERTY-TAX-BASED SCHOOL FINANCE SYSTEMS AND LOCAL CONTROL

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INTRODUCTION

“The nation is hardly ‘indivisible’ where education is concerned. It is at least two nations, quite methodically divided, with . . . liberty for some . . . and justice . . . only for the kids whose parents can afford to purchase it.”¹

Although every state constitution has an education clause that requires legislatures to educate their children,² most states have adopted school finance schemes that disregard the rights of poor children who desperately need educational benefits. By relying principally on property taxes to generate money for education,³ the majority of school funding schemes impermissibly create wealth-based disparities in educational opportunities. Wealthy school districts raise a large amount of revenue from low tax rates, whereas poor school districts levy a much higher tax rate but generate less revenue.⁴ Thus, these school finance schemes enable wealthy students to attain educational luxuries while poor districts lack basic necessities.⁵ The inadequate education that poor stu-

1. JONATHAN KOZOL, *Savage Inequalities: Children in America's Schools* 212 (1991).

2. William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 572-73 (1994).

3. Most states generate a substantial portion of their educational budgets from local property taxes. See William E. Thro, *The Significance of the Tennessee School Finance Decision*, 85 EDUC. L. REP. 11, 11 n.2 (1993).

4. Ron Renchler, *Financial Equity in the Schools*, ERIC DIGEST, Dec. 1992, at 1. In some states, the unequal ability among districts to raise revenue for schools varies by a factor as high as ten to one. ALLAN ODDEN, U.S. DEP'T OF EDUC., *THE CHANGING CONTOURS OF SCHOOL FINANCE* 3 (1991). In this Note, “wealthy” refers to districts with a high socioeconomic status and “poor” refers to school districts with a low socioeconomic status.

5. Thro, *supra* note 3, at 13. See generally KOZOL, *supra* note 1 (describing the

dents receive perpetuates and exacerbates their disadvantaged status.

State legislatures, recognizing the blatant injustice of property-tax educational funding, have made a token attempt to alleviate some of the spending disparities by guaranteeing districts a minimum amount of state aid per pupil.⁶ The guaranteed minimums, however, do not adequately educate poor students. Property-tax systems also fail to alleviate fiscal inequality because wealthy districts can raise funds above the guaranteed minimums.⁷ The educational disparities that these school finance systems create have prompted legal challenges against the schemes on both federal and state constitutional grounds.⁸

Legislatures have responded to successful constitutional challenges by providing additional revenue to poor schools. Through increased funding, legislatures have attempted both to reduce spending variations among districts and to enrich the educational programs of poor schools. However, the revised funding formulas still fail to eliminate expenditure disparities. Moreover, although each of the revised funding schemes gives poor schools additional aid, not all of the systems have the same potential to substantively improve poor districts' educational programs. The local impact of school finance reform in Kentucky, Massachusetts, New Jersey, Tennessee, and Texas illustrates that the most effective reform measures are not limited to merely an increase in funding to poor

bleak conditions in underfunded schools).

6. Renschler, *supra* note 4, at 1. The three basic types of equalization programs are flat grants, foundation aid, and percentage equalizing. Thro, *supra* note 3, at 13 n.19; NATIONAL EDUC. ASS'N, U.S. DEP'T OF EDUC., UNDERSTANDING STATE SCHOOL FINANCE FORMULAS 9-11 (1987). Flat grants provide a district with an equal number of dollars per student and faculty member. *Id.* at 9. Under a foundation program, the state sets a foundation amount, which is the minimum amount of money that will adequately educate each pupil. The state requires local school districts to tax at a minimum rate. The state pays the district foundation aid, which is the difference between the amount of money per student that the district raises through the mandated tax rate and the foundation amount. *Id.* at 9-10. In a percentage equalizing system, the state reimburses a proportion of local educational expenditures in inverse proportion to a district's wealth. The state calculates an aid ratio by combining wealth per pupil and the nominal state percentage of expenditures. The state applies the aid ratio to each district to determine the amount of the state contribution. *Id.* at 10-11. The majority of states, before and after reform, have distributed aid pursuant to foundation programs. *Id.* at 16.

7. Renschler, *supra* note 4, at 1.

8. Plaintiffs in 45 states have challenged the state constitutionality of school funding schemes. See Joshua S. Wyner, *Toward a Common Law Theory of Minimal Adequacy in Public Education*, 1992/1993 ANN. SURV. AM. L. 389, 397-98 (1994).

schools. States' revised funding systems also must encourage poor districts to improve and expand upon their core curricula and implement accountability mechanisms.

Part I of this Note describes the federal and state constitutional challenges that plaintiffs have advanced against state school funding schemes. Part II then discusses the state supreme court decisions in Kentucky, Massachusetts, New Jersey, Tennessee, and Texas that invalidated school funding systems relying principally on local property taxes to fund education. This Part also examines the legislatures' responses to these decisions and the local effects of their revised formulas. Although the new funding plans can provide poor schools with additional revenue, the revised schemes still fail to give poor districts equal access to state aid. This Note concludes that in order to effectively improve the quality of education in poor districts, school finance systems must include incentives for poor districts to expand and enrich upon their core curricula and must contain accountability mechanisms.

I. BASES FOR CONSTITUTIONAL CHALLENGES TO PROPERTY-TAX SCHOOL FUNDING SYSTEMS

In the late 1960s and early 1970s, plaintiffs challenged funding disparities primarily under the Equal Protection Clause of the Constitution.⁹ Plaintiffs contended that because education is a fundamental right, the Fourteenth Amendment guaranteed students equality of educational funding. States allegedly violated the Fourteenth Amendment because they failed to ensure that poor schools were as adequately funded as those in wealthy districts.

In *San Antonio Independent School District v. Rodriguez*,¹⁰ the United States Supreme Court foreclosed the use of the Equal Protection Clause to challenge funding disparities. The *Rodriguez* plaintiffs contended that because Texas relied on property taxes to fund education, the system unconstitutionally created wealth-based disparities in educational opportunities and denied poor students their fundamental right to an education.¹¹ However, the *Rodriguez* Court held that wealth was not a suspect classification and that education was not a fundamental right.¹² Wealth was not a

9. Thro, *supra* note 3, at 14; see U.S. CONST. amend. XIV, § 1.

10. 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1973).

11. *Id.* at 16-17.

12. *Id.* at 18.

suspect classification because the Court found no basis for believing that poor students lived only in school districts with low property values.¹³ The Court further held that there was

no . . . interference with fundamental rights where only relative differences in spending levels are involved and where . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.¹⁴

The Court therefore applied a rational basis test to the Texas finance system and ruled that the state's reliance on property taxes was a rational and constitutional means of promoting local control over schools.¹⁵

Although *Rodriguez* denies plaintiffs a federal constitutional claim, the New Jersey Supreme Court's decision in *Robinson v. Cahill*¹⁶ demonstrates that plaintiffs can successfully attack discriminatory funding schemes on the state level. The New Jersey Supreme Court held that New Jersey's finance scheme violated the state constitution's education clause because the system's reliance on property taxes to fund education created educational disparities.¹⁷ Since *Robinson*, other state high courts have struck down funding schemes on either state equal protection or education clause grounds.¹⁸

State equal protection claims parallel those made pursuant to the Fourteenth Amendment of the Constitution. Plaintiffs bringing

13. *Id.* at 22-23.

14. *Id.* at 37 (quoted in *Wyner*, *supra* note 8, at 393).

15. *Id.* at 44, 54-55.

16. 303 A.2d 273 (N.J.), *aff'd*, 306 A.2d 65 (per curiam), *cert. denied*, 414 U.S. 976 (1973), *aff'd on reh'g*, 351 A.2d 713, 724 (N.J.), *cert. denied*, 423 U.S. 913 (1975).

17. *Robinson*, 303 A.2d at 295.

18. Eleven state supreme courts have invalidated inequitable funding schemes on state equal protection and/or education clause grounds. See *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 189 (Ky. 1989); *McDuffy v. Secretary of Exec. Office of Educ.*, 615 N.E.2d 516, 553-54 (Mass. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989), *amended*, 784 P.2d 412, 413-14 (Mont. 1990); *Robinson*, 303 A.2d at 295; *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 104 (Wash. 1978) (en banc); *Pauley v. Kelly*, 255 S.E.2d 859, 878, 884 (W. Va. 1979); *Washakie County Sch. Dist. No. 1 v. Hershler*, 606 P.2d 310, 333-34 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).

state constitutional challenges contend that education is a fundamental right that the state impermissibly infringes by maintaining a funding scheme that allocates educational benefits according to wealth. To prevail under this rationale, plaintiffs must demonstrate that education is a fundamental right and that wealth is a suspect classification or, in the alternative, that the state's funding scheme is irrational.¹⁹

Challenges based on a state's equal protection clause rarely succeed, largely because many state high courts have followed the *Rodriguez* holding that education is not a fundamental right and wealth is not a suspect class. Although state courts can give broader protection to individual rights than the Constitution provides, courts have infrequently done so in school funding cases. Of twenty-three state equal protection clause challenges, only six have prevailed.²⁰

Plaintiffs have had more recent success, however, with state education clause challenges. Every state constitution has an education clause that imposes a duty on legislatures to provide each child with a public education.²¹ Since 1989, the high courts of Montana, Kentucky, Texas, and Massachusetts have invalidated property-tax funding schemes on education clause grounds.²² In addition to emphasizing spending inequity, education clause challenges focus on the disparate quality of education that students in poor districts receive. High courts thus appropriately invalidate property-tax funding systems because these schemes provide dis-

19. Thro, *supra* note 3, at 15.

20. The six prevailing state equal protection clause challenges are *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

21. Sparkman, *supra* note 2, at 573.

22. Thro, *supra* note 3, at 19; *see also* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle Sch. Dist. No. 1 of King County v. State*, 585 P.2d 71 (Wash. 1978). The Tennessee Supreme Court held that the education clause mandates a minimum level of education, but ultimately found that the school finance system was unconstitutional under the state equal protection clause because the property-tax scheme was irrational. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152, 156 (Tenn. 1993); Thro, *supra* note 3, at 22.

tricts with unequal revenues and do not give poor districts a constitutionally mandated level of quality.

II. LEGISLATIVE RESPONSES TO THE INVALIDATION OF PROPERTY-TAX FUNDING SCHEMES AND THE LOCAL EFFECTS OF REVISED SYSTEMS

State high courts that invalidated property-tax finance systems properly held that expenditure disparities create wealth-based differences in educational opportunities. The legislative responses to these decisions have given poor districts more revenue in order to reduce spending variations and enrich the educational programs of poor districts. Some of the modified funding formulas, however, do not ensure that substantive change will occur because they do not induce curriculum improvement.

A study of local school districts' expenditures shows that although many factors influence the effectiveness of a school funding system, there are some general ways of assessing the local ramifications of revised schemes. The first factor is the equity of the modified school finance systems, which can be measured through three components: horizontal equity, vertical equity, and fiscal neutrality.²³ The degree of a formula's horizontal equity can be observed by comparing the per pupil expenditures of the wealthiest and poorest districts. Even though absolute equality of expenditures is not possible, these new systems must substantially narrow revenue gaps to eliminate wealth-based allocations of benefits. A scheme with vertical equity takes into account the different costs associated with educating particular kinds of students, such as bilingual, special education, or gifted pupils. Finally, fiscal neutrality requires similar tax efforts and burdens among districts.²⁴

The second factor is whether legislative reforms encourage poor districts to improve and expand upon their core educational curricula.²⁵ For example, new finance schemes that have separate

23. LAWRENCE O. PICUS & LINDA HERTERT, U.S. DEP'T OF EDUC., A SCHOOL FINANCE DILEMMA FOR TEXAS: ACHIEVING EQUITY IN A TIME OF FISCAL CONSTRAINT 3 (Working Paper No. 33, Jan. 1993).

24. NATIONAL EDUC. ASS'N, *supra* note 6, at 5.

25. Some reform opponents have argued that school aid has overwhelmingly flowed to teacher and administrative salaries rather than to new educational services for students. See, e.g., D.P. Moynihan, *Equalizing Education: In Whose Benefit?*, 29 THE PUB. INTEREST 69, 74-75 (1972). However, salary increases have value because they could improve employees' morale and encourage more qualified teachers to seek employment in low in-

capital-outlay and maintenance-aid components can save poor districts from investing all of their new money in crumbling buildings instead of in new educational programs. Formulas that ensure funding stability also can prompt districts to adopt new, innovative programs. Moreover, state prerequisites to aid, such as outcome-based assessment or long-range planning, promote curriculum expansion.

The third factor is whether the revised school finance schemes have accountability mechanisms, such as standardized testing and oversight committees, to ensure that districts use money effectively. Accountability mechanisms can encourage a district to bolster its curriculum in tested subject areas. In addition, they can help a district to identify areas of mismanagement and to understand how additional aid impacts student performance.

Courts' methods of invalidating funding schemes, whether on the basis of state equal protection or education clause grounds, have not appeared to influence the legislative responses to the invalidation of funding schemes. All of the new legislative schemes attempt to give poor districts more money. Although these new systems increase the amount of state aid available to poor districts, an examination of the schemes' horizontal equity, vertical equity, and fiscal neutrality reveals that they do not all significantly narrow the revenue gap between poor and wealthy districts. Despite the modification of the formulas, wealthy districts still can raise more revenue than the state provides to poor districts.

State legislatures undoubtedly intend for poor districts to use increases in state funding to improve their educational programs. However, a study of the local effects of revised funding formulas in Kentucky, Massachusetts, New Jersey, Tennessee, and Texas shows that states cannot give local districts total discretion as to how to use new aid. Rather, revised schemes must condition new funding on substantive educational improvements to rectify the educational inadequacies in historically poor districts.

A. *Kentucky*

When invalidating Kentucky's school finance plan, the Kentucky Supreme Court focused on the degree of fiscal inequity

come districts. Michael W. Kirst, *What Happens at the Local Level After School Finance Reform?*, 3 POL'Y ANALYSIS 301, 303 n.4 (1977).

among districts and on the inferior quality of education that poor districts received. In *Rose v. Council for Better Education Inc.*,²⁶ the Kentucky Supreme Court declared that not only the state's funding formula, but the entire school system violated the education clause of the Kentucky Constitution. The court held that the legislature had not fulfilled the education clause's mandate of providing an "efficient system of common schools" throughout the state.²⁷

At the time *Rose* was decided, the state contributed funds for education under a Minimum Foundation Program (MFP) and a Percentage Equalizing Program (PEP). To receive MFP funding, districts needed to levy a minimum property tax rate.²⁸ Each district also had to operate its schools and pay its teachers for 185 days per year.²⁹ If districts qualified for MFP funds, the state would give districts a grant based on the district's average daily student attendance in each grade.³⁰ The PEP element of the formula attempted to minimize disparities in wealthy and poor districts' educational expenditures.³¹ After determining the maximum tax rate that its PEP fund could match, the state gave poor districts the difference between what the PEP rate would produce and the amount of money that the district actually generated.³² The Kentucky Supreme Court found that the PEP rate was too low to minimize disparities.³³

The court correctly found that Kentucky's system offered its poor students few educational opportunities.³⁴ On the national level, 80% of Kentucky's school districts were "poor" in terms of taxable property, and the other 20% were below the national average.³⁵ The poor districts had fewer course offerings, lower achievement test scores, and higher student-teacher ratios than wealthy districts.³⁶ Thus, the court correctly reasoned that the

26. 790 S.W.2d 186, 215 (Ky. 1989).

27. *Id.* at 215.

28. *Id.* at 194.

29. *Id.* at 196.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* The PEP rate was a mere 13 cents for every \$100 of property valuation. *Id.* at 196 n.10.

34. *Id.* at 213.

35. *Id.* at 197.

36. *Id.*

scheme did not provide students with an "efficient" educational system. Unlike most other high courts, the Kentucky court enumerated the characteristics that would fulfill the constitutionally mandated standard of an "efficient" school system,³⁷ but emphasized that the General Assembly had to decide how to achieve a constitutional education plan.³⁸

Within eleven months of *Rose*, the Kentucky General Assembly enacted the Kentucky Education Reform Act of 1990 (KERA).³⁹ KERA has three elements of reform: finance, curriculum, and governance.⁴⁰ KERA's finance reform component consists of a base funding level, Tier I, and Tier II.⁴¹ The base funding level is a per pupil sum adjusted by several factors that influence educational costs.⁴² The new system requires districts to raise a minimum Equivalent Tax Rate (ETR) of 30 cents per \$100 of assessed property value⁴³ before districts can receive aid. The

37. The characteristics include whether the school system is 1) free to all; 2) provides equal educational opportunities for all students; 3) state controlled and administered; 4) "substantially uniform"; and 5) equal to and for all students. *Id.* at 212. An efficient system must aim to provide students with the following seven capabilities: 1) "oral and written communication skills" that enable them to function in a complex and changing society; 2) "knowledge of economic, social, and political systems" that will permit them to make informed choices; 3) understanding of the governmental process; 4) knowledge of "mental and physical wellness"; 5) knowledge of the arts; 6) sufficient training in vocational or educational fields to enable students to choose and pursue life work; and 7) a level of educational or vocational skills that will allow students to compete favorably with students in other states, academia, and in the job market. *Id.* The obligation to maintain an efficient system cannot be shifted to local districts. *Id.*

38. *Id.*

39. Kentucky Education Reform Act of 1990, ch. 476, 1990 Ky. Acts 1208 (codified as amended in scattered sections of KY. REV. STAT. ANN. §§ 156.005-446.260 (Baldwin 1995)).

40. Jacob E. Adams, Jr., *Spending School Reform Dollars in Kentucky: Familiar Patterns and New Programs, But Is This Reform?*, 16 EDUC. EVALUATION & POL'Y ANALYSIS 375, 377 (Winter 1994).

41. KY. REV. STAT. ANN. §§ 157.330-440 (Baldwin 1995).

42. KY. REV. STAT. ANN. §§ 157.320(2), 157.360 (Baldwin 1995). The state adjusts the base funding level for inflation. BETTY E. STEFFY, *THE KENTUCKY EDUCATION REFORM* 289 (1993). The additional cost factors are for exceptional children, transportation, and at-risk students. KY. REV. STAT. ANN. § 157.360(2) (Baldwin 1995). The average base contribution, including the additional cost factors, was \$3,084 per pupil in 1992-1993. KENTUCKY OFFICE OF EDUCATION ACCOUNTABILITY, 1993 ANNUAL REPORT 41 (1993) [hereinafter KY OFFICE OF ACCOUNTABILITY].

43. KY OFFICE OF ACCOUNTABILITY, *supra* note 42, at 27; see also KY. REV. STAT. ANN. § 160.470(12)(a) (Baldwin 1995). KERA also provides that all real property subject to taxation must be assessed at 100% of fair cash value. MIKE D. RICHARDSON ET AL., U.S. DEP'T OF EDUC., AN ANALYSIS OF KERA: KENTUCKY'S ANSWER TO EDUCATION-

state's contribution to the district is the difference between the amount of revenue the district raises through the ETR and the base funding level.⁴⁴

The Tier I element of the revised system enables districts to tax at a rate that generates additional revenue of up to 15% of the base funding level.⁴⁵ Tier I funds equalize the tax increase at 150% of the statewide average.⁴⁶ Tier II sets a tax ceiling at a levy that will raise up to 30% of the base funding level and Tier I funds.⁴⁷ Tier II funds are not equalized by the state.⁴⁸ No district, however, is required to tax at a rate lower than the one levied before KERA reform in 1989-90.⁴⁹ Thus, the districts that raised revenue above the Tier II cap in 1989-90 can continue to do so.

Despite the fact that some of the wealthiest districts appear to be exempt from KERA's revenue cap, the revised scheme has reduced expenditure disparities. The Tier II revenue cap lowered expenditure disparities between the average of the highest and the lowest wealth districts from 35.87% to 16.72%.⁵⁰ However, because the wealthiest districts are exempt from the cap, the new system cannot narrow the gap at the ends of the expenditure spectrum. Although the scheme has a vertical equity component because it gives districts extra aid for educating special students, the amounts of the additional allotments are arbitrary. The legislature has not shown that the allotments accurately reflect the costs of educating special students.

Moreover, poor districts' immediate revenue increases may be short-lived because the new formula still impermissibly conditions revenue on a district's ability to tax. Poor districts can only "catch up" to wealthy ones by levying additional taxes to receive Tier I and Tier II aid. Tier I does not consider poor districts' unequal ability to generate revenue because it only equalizes up to 15% of

AL EQUITY 5 (1991). If a district fails to provide the minimum level of support, school board members may be removed from office. KY. REV. STAT. ANN. § 160.470(12)(b) (Baldwin 1995).

44. KY OFFICE OF ACCOUNTABILITY, *supra* note 42, at 28.

45. KY. REV. STAT. ANN. § 157.440(1)(a) (Baldwin 1995).

46. *Id.*

47. KY. REV. STAT. ANN. § 157.440(2) (Baldwin 1995).

48. *Id.*; KY OFFICE OF ACCOUNTABILITY, *supra* note 42, at 29.

49. KY. REV. STAT. ANN. § 157.440(1)(d) (Baldwin 1995); KY OFFICE OF ACCOUNTABILITY, *supra* note 42, at 29-30.

50. KY OFFICE OF ACCOUNTABILITY, *supra* note 42, at 39.

the base funding level regardless of wealth.⁵¹ Moreover, the Tier II 30% cap generally directly affects only wealthy districts and is not equalized by the state.⁵² Because Kentucky's finance scheme conditions educational aid on a district's wealth, the new system continues to deny poor districts an equal access to revenue.

Notwithstanding the new system's fiscal pitfalls, the broad-based focus of KERA's reform has encouraged districts to invest their new funding in curriculum enrichment. KERA established the Facilities Support Program of Kentucky (FSPK), which gives districts additional aid to improve all of their educational facilities.⁵³ In addition, KERA compels districts to spend money on new programs that have a long-term impact on educational progress, such as early childhood education,⁵⁴ professional development,⁵⁵ and family resources and youth services.⁵⁶ Under these mandates, districts must establish curriculum frameworks, nongraded primary classes, and new teaching and learning goals. To implement these objectives, KERA has provided \$17 per pupil for staff development.⁵⁷

A study of local level expenditures for two high and low wealth Kentucky school districts shows that these KERA mandates created the desired curriculum expansion. The poor districts invested in additional personnel, instruction, facilities, and programs.⁵⁸ Even though all four districts increased spending on staff development, most of the funding went toward programming instead of salary increases.⁵⁹ For example, District 3 instituted a pre-school

51. KY. REV. STAT. ANN. § 157.440(1)(a) (Baldwin 1995).

52. KY. REV. STAT. ANN. § 157.440(2) (Baldwin 1995).

53. KY. REV. STAT. ANN. § 157.440(1)(b) (Baldwin 1995). Like the Tier I component, the FSPK provides that if school districts levy an additional tax of 5 cents over the ETR rate, the state will equalize the tax at 150% of the average per pupil property wealth. KY OFFICE OF ACCOUNTABILITY, *supra* note 42, at 46. During 1992-1993, Kentucky appropriated \$13.5 million of FSPK funds under a pro rata formula. *Id.*

54. KY. REV. STAT. ANN. § 157.317 (Baldwin 1995).

55. *See* KY. REV. STAT. ANN. § 156.095 (Baldwin 1995).

56. KY. REV. STAT. ANN. § 156.497 (Baldwin 1995).

57. Adams, *supra* note 40, at 384.

58. District 1 is a high wealth suburban district located in the northern region of the state with a per pupil expenditure of \$3,183. *Id.* at 378. District 2 is a high wealth urban district located in the central part of Kentucky with a per pupil expenditure of \$4,388. *Id.* District 3 is a low wealth rural district with a per pupil expenditure of \$2,685 and is located in the western part of the state. *Id.* District 4 is also a low wealth rural district, has a per pupil expenditure of \$2,708, and is in the eastern part of Kentucky. *Id.*

59. *Id.* at 383-84.

for at-risk children. District 4 started summer school and after-school tutoring programs.⁶⁰

In addition, the creation of the FSPK channeled aid into instructional materials and technology. Districts operated additional afterschool buses, purchased computer equipment, and constructed new facilities.⁶¹ The current formula, however, may discourage long-term investments in programs and facilities because KERA does not guarantee districts funding stability. The legislature, at its discretion, can lower a district's aid allocation from that of the prior year.

However, KERA appropriately includes two accountability mechanisms that encourage substantive change. First, KERA requires statewide curriculum assessment.⁶² Schools must achieve threshold standardized test scores on an annual basis and will receive cash awards if, on a biennial average, they score 1% over the threshold.⁶³ If schools score below the threshold, they are subject to sanctions that include the creation of a school improvement plan, probation of staff, or student transfer.⁶⁴ This method of accountability is effective because, although standardized test scores may not define precisely what a student learns, comparing scores with other districts can both help poor districts to identify problem areas and prompt districts to bolster curricula in the tested subject areas. In addition, Kentucky monitors districts through superintendent screening committees, a task force on high school restructuring, an early childhood advisory council, and a higher education review commission.⁶⁵

To fulfill the constitutional mandate set forth in *Rose*, the Kentucky legislature created an entirely new educational system. In addition to state aid calculation changes, KERA provides for substantial educational reform.⁶⁶ These changes properly shift control away from local school boards and give the state legislature more oversight of districts' educational programs. One might

60. *Id.* at 385-86.

61. *Id.* at 385.

62. KY. REV. STAT. ANN. § 158.6453 (Baldwin 1995). For a detailed discussion of assessment procedures, see STEFFY, *supra* note 42, at 47-74.

63. KY. REV. STAT. ANN. § 158.6455(1) (Baldwin 1995); KY OFFICE OF ACCOUNTABILITY, *supra* note 42, at 78.

64. KY OFFICE OF ACCOUNTABILITY, *supra* note 42, at 78-79.

65. *Id.* at 217, 291, 294, 296.

66. *See supra* notes 53-57 and accompanying text.

argue that Kentucky's increase of state legislative oversight will prompt an inefficient use of funds because local school boards have a greater knowledge of their schools' needs. However, the *Rose* court,⁶⁷ like other courts that have invalidated funding schemes, emphasized that the state constitution gives the legislature the responsibility of maintaining a constitutional educational system. Legislative oversight is thus a prerequisite to a permissible finance system. The Kentucky legislature would be remiss in fulfilling its obligation if it gave local districts a free rein on how to spend education funds, especially in light of the *Rose* court's mandate that the new finance scheme must provide each student with seven specific capabilities.⁶⁸ Moreover, state control and accountability is necessary for taxpayer support of additional aid.⁶⁹

Furthermore, state officials who defend constitutional challenges to property-tax funding systems on the ground that local control promotes efficiency ironically fail to recognize that they have consistently instituted policies that undermine local discretion.⁷⁰ For example, state guidelines establish uniform curriculum requirements for every public school.⁷¹ States also certify teachers on a statewide basis, and some states even standardize the use of textbooks.⁷² In addition, student testing has been nationalized and failing districts are generally subject to state takeovers.⁷³ Therefore, "[t]he liberty of local districts . . . is willingly infringed on grounds of inefficiency. It is only when equal funding is the issue that the sanctity of district borders becomes absolute."⁷⁴ To ensure that additional revenue makes substantive improvements in poor school districts, state legislatures must continue to oversee educational programming.

67. 790 S.W.2d 186, 215-16 (Ky. 1989).

68. See *supra* note 37.

69. For example, the lack of an accountability component in California's system prompted voters to pass Proposition 98, which mandates school accountability report cards. LAWRENCE O. PICUS, U.S. DEP'T OF EDUC., AN UPDATE ON CALIFORNIA SCHOOL FINANCE 1992-1993: WHAT DOES THE FUTURE HOLD? 4-5 (1992). School report cards have made voters more receptive to reform. KRISTEN J. AMUNDSON & CRAIG RICHARDSON, NAT'L SCHOOL BDS. ASSOC., STRAIGHT A'S: ACCOUNTABILITY, ASSESSMENT, ACHIEVEMENT 16 (1991).

70. KOZOL, *supra* note 1, at 211.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

B. Massachusetts

The Massachusetts Supreme Court, like Kentucky's *Rose* court, invalidated its education funding scheme on education clause grounds. In *McDuffy v. Secretary of the Executive Office of Education*,⁷⁵ the court held that the Commonwealth has a constitutional obligation to "cherish . . . the public schools"⁷⁶ by providing all students with an education.⁷⁷ The Massachusetts legislature failed to fulfill that duty by implementing a finance scheme that offered students in poor school districts fewer educational opportunities than children in wealthy districts had.⁷⁸

Like many other states' systems, the unconstitutional Massachusetts system primarily relied on local property taxes to fund education.⁷⁹ Although the state was supposed to contribute aid pursuant to a funding formula, it lacked funds to do so and instead distributed money for schools through an appropriations process.⁸⁰ Because this process provided only minimal state aid, the court held that the system did not fulfill poor students' constitutional right to an education.⁸¹

The *McDuffy* plaintiffs asked the court for a declaratory judgment, not for a particular remedy.⁸² This fact allowed the court to give the legislature discretion to determine what kind of system would be appropriate. The court did hold that, at a minimum, the new system must enable students to possess the seven capabilities set forth by the Kentucky Supreme Court in *Rose*.⁸³

Three days after the *McDuffy* decision, the legislature passed the Massachusetts Education Reform Act of 1993 (MERA),⁸⁴

75. 615 N.E.2d 516 (Mass. 1993).

76. *Id.* at 527.

77. *Id.* at 553-54. See generally Michael D. Weisman & Mark A. Simonoff, *McDuffy v. Secretary of the Executive Office of Education: A New Era for Public School Children in Massachusetts*, BOSTON B.J., Jan.-Feb. 1994, at 13 (discussing the court's analysis of the Massachusetts education clause).

78. *McDuffy*, 615 N.E.2d at 553-54. The defendants conceded that plaintiffs in poor districts suffered from, among other things, "inadequate teaching of basic subjects . . . ; neglected libraries; inability to attract and retain high quality teachers; lack of teacher training; lack of curriculum development; lack of predictable funding; administrative reductions; and inadequate guidance counseling." *Id.* at 553.

79. *Id.* at 550.

80. *Id.* at 551.

81. *Id.*

82. *Id.* at 522.

83. See *supra* note 37.

84. Act of June 18, 1993, ch. 71, 1993 Mass. Acts 159, amended by Act of June 21,

which will not be fully funded until the year 2000. MERA instituted a new foundation budget for each district.⁸⁵ The foundation budget is the total amount of money that the legislature believes a district needs in order to fund its educational programs. The state calculates each district's budget according to the same formula.⁸⁶

MERA, like Kentucky's scheme, requires a minimum local contribution to the foundation budget to receive state aid.⁸⁷ The required contribution accounts for a municipality's property wealth and income level.⁸⁸ Once the state determines the local municipality's required contribution, the state subtracts that

1995, ch. 38, 1995 Mass. Adv. Legis. Serv. 160 (Law. Co-op.).

85. See MASS. ANN. LAWS ch. 70, §§ 1, 2 (Law. Co-op. Supp. 1995).

86. The formula for determining a district's foundation budget is complex. The basic elements are as follows: Fiscal year 1995 budget = foundation payroll + foundation nonsalary expenses + expanded allotment program + professional development allotment + extraordinary maintenance allotment + book and equipment allotment (BEA). MASS. ANN. LAWS ch. 70, § 2 (Law. Co-op. Supp. 1995). The base year for calculating the foundation budget is 1993, and the foundation budget for the present year cannot exceed that of the prior year by more than 4.5%. Ch. 70, §§ 2, 3. No district that is spending above the foundation budget can reduce its spending below that level. MASS. DEP'T OF EDUC., FUNDING FORMULA RESOURCE MATERIALS 19 (May 1994) [hereinafter MASS. FUNDING FORMULA RESOURCE].

The state determines each element of the foundation budget by multiplying statutory fractions by the foundation enrollment. See ch. 70, § 2. The formula bases the foundation enrollment for fiscal year 1995 on the enrollment on October 1st of 1993. MASS. FUNDING FORMULA RESOURCE, *supra*, at 1, 20. The state breaks the foundation enrollment down into categories by grade and program (e.g., 1 teacher per 22 elementary students, 1 teacher per 15 bilingual students). See ch. 70, § 2. The formula assumes that 3.5% of a district's pupils are special education students. Ch. 70, § 2.

The foundation payroll (FP) is the amount of money for teacher and support staff salaries. The FP assumes specific salaries for all school personnel. For example, the FP for teachers is \$38,000 multiplied by a wage adjustment factor. Ch. 70, § 2.

87. MASS. ANN. LAWS ch. 70, § 2 (Law. Co-op. Supp. 1995).

88. The minimum required local contribution = preliminary local contribution - overburden aid amount - excess debt service amount. MASS. ANN. LAWS ch. 70, § 2 (Law. Co-op. Supp. 1995).

A school district's required preliminary local contribution takes into account the district's prior local contribution, a municipal revenue growth factor, and an excess debt service amount if it was used to lower a district's minimum contribution in the prior year. Act of June 21, 1995, ch. 38, § 92, 1995 Mass. Adv. Legis. Serv. 160, 508 (Law. Co-op.) (to be codified at MASS. ANN. LAWS ch. 70, § 2). The gross standard of effort for fiscal year 1994 was the amount that would have been raised by applying a tax rate of \$9.40 to the adjusted valuation of the district's property. MASS. FUNDING FORMULA RESOURCE, *supra* note 86, at 13. Districts with property values in the bottom fifth percentile and districts with a below average per capita income are allocated an overburden aid amount that equals the district's standard of effort gap. MASS. ANN. LAWS ch. 70, § 2 (Law. Co-op. Supp. 1995).

amount from the foundation budget and funds the difference. The state pays its share through a combination of aid allocations.⁸⁹

MERA's new finance system, however, fails to equalize expenditures among districts because it lacks horizontal equity, vertical equity, and fiscal neutrality. Although MERA provides that a district's foundation budget cannot grow by more than 4.5% over the preceding year, it does not cap the dollar amount of revenue that wealthy districts can raise.⁹⁰ MERA's foundation plan thus fails to provide horizontal equity because it establishes a floor of revenue for poor districts without creating a ceiling for wealthy ones. Because the state will not fully fund the system until the year 2000, current horizontal spending inequities will increase.

MERA also lacks vertical equity. The formula fails to account for differences among districts when determining the districts' foundation budgets.⁹¹ For example, the formula assumes specific salaries for all personnel and that each district has a 3.5% special education enrollment.⁹² The state also calculates the book and equipment allotment (BEA) regardless of a district's wealth.⁹³ Thus, the current scheme does not give a greater priority for BEA assistance to poor districts with the most need for educational resources. MERA attempts, although unsuccessfully, to create fiscal neutrality by accounting for a district's income level when determining the district's required local contribution. However, districts subject to the flat gross standard of effort rate do not have the same ability as wealthy districts to tax at this rate.

Although not a perfectly equitable system, MERA's broad substantive educational reforms appear capable of improving the quality of education in poor districts. MERA encourages districts to use new funds for curriculum enrichment through MERA's

89. The different types of state aid include 1) base aid; 2) regional bonus aid; 3) foundation aid; 4) equity aid; and 5) minimum/professional development aid. MASS. ANN. LAWS ch. 70, § 2 (Law. Co-op. Supp. 1995); MASS. FUNDING FORMULA RESOURCE, *supra* note 86, at 4. Each school district is guaranteed funding of \$25 per student, irrespective of wealth. Act of June 21, 1995, ch. 38, § 264, 1995 Mass. Adv. Legis. Serv. 160, 576 (Law. Co-op.) (to be codified at MASS. ANN. LAWS ch. 70, § 2).

90. MASS. ANN. LAWS ch. 70, § 3 (Law. Co-op. Supp. 1995).

91. See generally Thomas A. Downes & Thomas F. Pogue, *Adjusting School Aid Formulas For The Higher Cost Of Educating Disadvantaged Students*, NAT'L TAX J., Mar. 1994, at 89 (discussing how a formula's failure to compensate for cost differentials among districts leads to inadequate state aid).

92. See MASS. ANN. LAWS ch. 70, § 2 (Law. Co-op. Supp. 1995).

93. See *id.*

creation of curriculum framework committees and a new student assessment program.⁹⁴ MERA also established a new governance structure, which provides for school-based management and academic achievement profiles.⁹⁵ Schools that do not perform according to state guidelines are subject to sanctions, which include the appointment of a state "receiver" to manage the school district.⁹⁶

On the local level, Massachusetts districts have devoted a large portion of new aid to curriculum enrichment. Several poor districts spent the bulk of their new funding to hire professional staff in order to expand their course selection.⁹⁷ Districts also purchased textbooks, new equipment, and supplies.⁹⁸ For example, the Brockton school district, which received approximately \$5.7 million in funding, spent over \$4 million of the aid to hire professional staff.⁹⁹ The Lowell school district used over \$4 million to add personnel¹⁰⁰ and also filled seventy-seven new staff positions for five new and renovated schools.¹⁰¹

MERA's stability of state aid gives districts somewhat of an incentive to invest in long-term curriculum improvements. The formula provides that a district's base aid will, at a minimum, equal the amount of the prior year.¹⁰² Because foundation enrollment for fiscal year 1995 is based on 1993 attendance figures,¹⁰³ however, poor districts with rising enrollment may be deterred from making long-term investments because their per-pupil aid receipts will continually decrease.

94. MASS. DEP'T OF EDUC., EDUCATION REFORM 3RD QUARTERLY IMPLEMENTATION REPORT 2 (Spring 1994) [hereinafter 3RD QUARTERLY IMPLEMENTATION REPORT].

95. *Id.* at 9.

96. *Id.*

97. See generally MASS. DEP'T OF EDUC., THE REFORM ACT—USE OF FUNDS SUMMARY OF SCHOOL EXPENDITURES FOR FISCAL YEARS 1993 AND 1994 (1994) [hereinafter MASS. FUNDS 1994] (describing how districts used state funding); MASS. DEP'T OF EDUC., THE REFORM ACT—USE OF FUNDS SUMMARY OF SCHOOL EXPENDITURES FOR FISCAL YEARS 1993–1994 (1993) [hereinafter MASS. FUNDS 1993] (same).

98. See generally MASS. FUNDS 1994, *supra* note 97; MASS. FUNDS 1993, *supra* note 97.

99. MASS. FUNDS 1994, *supra* note 97, at 1; MASS. FUNDS 1993, *supra* note 97, at 1.

100. MASS. FUNDS 1994, *supra* note 97, at 2; MASS. FUNDS 1993, *supra* note 97, at 2.

101. Mass. Dep't of Educ., *Education Reform Funds Making a Difference*, EDUC. TODAY, Aug. 1, 1994, at 1, 2.

102. Act of June 21, 1995, ch. 38, § 89, 1995 Mass. Adv. Legis. Serv. 160, 507 (Law. Co-op.) (to be codified at MASS. ANN. LAWS ch. 70, § 2).

103. See *supra* note 86.

MERA appropriately provides for accountability components to ensure that districts use aid to improve the quality of education that students receive. For example, all schools must participate in a new certification process and in professional development programs.¹⁰⁴ The state also created an education reform implementation task force and review commission.¹⁰⁵ It will be difficult, however, for some districts to fulfill these new mandates in light of the assumptions that the funding formula makes about the characteristics of school districts. In addition, although Massachusetts adopted numerous incentives to upgrade education in poor districts, the state has not yet enacted the majority of its reform programs.

Arguably, the substantive educational improvements that MERA's state oversight provides render the system's lack of fiscal equity between poor and wealthy districts immaterial. Under this rationale, as long as the system gives poor districts a sufficient "minimum," it does not matter how much wealthy districts spend, especially when the *McDuffy* court did not explicitly require all districts to receive equal funding. However, due to the "dynamics of state politics," the amount of state aid allotments typically are determined by what wealthy school districts believe poor districts need.¹⁰⁶ Unfortunately, legislatures have not been inclined to set the minimum aid level at an amount that would enable poor students to compete on a level with wealthy students.¹⁰⁷ Instead, aid allotments have been geared towards enabling a poor student to hold a less-skilled job.¹⁰⁸ Although "[t]here is a deep-seated reverence for fair play in the United States . . . and a genuine distaste for loaded dice,"¹⁰⁹ legislatures have not truly committed themselves to leveling the educational playing field.

C. *New Jersey*

The New Jersey Supreme Court, unlike most other state high courts, has ruled on the constitutionality of both initial and revised funding schemes. In 1975, the New Jersey Supreme Court held

104. 3RD QUARTERLY IMPLEMENTATION REPORT, *supra* note 94, at 12.

105. *Id.* at 15.

106. KOZOL, *supra* note 1, at 209.

107. *Id.*

108. *See id.*

109. *Id.* at 223.

that the New Jersey Public School Education Act of 1975 (the Act)¹¹⁰ was facially constitutional and that the state's education clause imposed a duty on the legislature to provide students with a "thorough and efficient" education.¹¹¹ Plaintiffs successfully challenged the Act as applied in *Abbott v. Burke (Abbott I)*.¹¹² The *Abbott I* court held that the Act's finance provisions were unconstitutional because they failed to ensure that poor school districts had a "thorough and efficient" education.¹¹³ The court emphasized that the Act was only unconstitutional as applied to poor districts.¹¹⁴ If the finance system granted poor students a sufficient level of revenue, then the Act would be constitutional even if some districts spent beyond that level.¹¹⁵ Thus, the ground for unconstitutionality was not funding disparity, but that the level of education in poor districts did not meet a certain threshold of quality.¹¹⁶ The court found that poor districts, unlike their wealthy counterparts, lacked adequate computer training, suitable facilities, science education, and foreign language programs.¹¹⁷ In Jersey City, for example, computer courses were taught in storage closets.¹¹⁸ In an East Orange middle school, teachers taught science class in a three-foot by six-foot science area that lacked water, gas, and electrical lines.¹¹⁹

The Act's funding scheme provided each district with a guaranteed tax base (GTB) of at least 134% of the state average.¹²⁰ The state set a tax rate for each district at the GTB amount.¹²¹ If the districts generated revenue below the GTB level, the state

110. Act of Sept. 29, 1975, ch. 212, 1975 N.J. Laws 871. The New Jersey legislature subsequently modified the Act's funding provisions when the legislature adopted the Quality Education Act of 1990. Act of July 3, 1990, ch. 52, 1990 N.J. Laws 587 (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to 18A:66-66 (West Supp. 1995)). See *infra* notes 132-140 and accompanying text.

111. *Robinson v. Cahill (Robinson V)*, 355 A.2d 129, 132 (N.J. 1976). The *Robinson V* court held that New Jersey's Public School Education Act of 1975 was facially constitutional, assuming that it would be fully funded. *Id.* at 139.

112. 575 A.2d 359 (N.J. 1990).

113. *Id.* at 384.

114. *Id.* at 368.

115. *Id.*

116. *Id.*

117. *Id.* at 395-97.

118. *Id.* at 395.

119. *Id.*

120. *Id.* at 377.

121. *Id.*

funded the difference.¹²² The state's share was called "equalization aid."¹²³ The court noted that the Act did not require or assure a particular level of expenditure in any school district.¹²⁴ The level of equalization aid depended completely on the GTB level and discretionary budget decisions.

Although the court recognized that equalization aid gave poor districts more money than they would have received otherwise, there were several problems with the way that the state calculated equalization aid. The flaw that most seriously hampered poor school districts was the state's reliance on districts' budgets from the previous year as a basis for calculating the amount of equalization aid. The court held that failing to provide current-year funding created a disincentive for districts to enrich their educational programs.¹²⁵ To achieve the constitutional standard, "the totality of the [poor] districts' educational offering must contain elements over and above those found in the affluent suburban district."¹²⁶ The record showed that the need of poor urban students exceeded that of wealthy students because poor districts had higher dropout rates and lower standardized test scores.¹²⁷

The *Abbott I* court, unlike those previously discussed, did prescribe a remedy for the legislature. First, the court held that funding must be certain every year and cannot depend on the budgeting and taxing decisions of local school boards.¹²⁸ The level of funding must be enough to provide for the special needs of the poor districts.¹²⁹ Although the court left the legislature discretion to create the funding mechanism itself, the court emphasized that the new system could not depend on how much a poor urban district was willing to tax.¹³⁰ Second, the poor districts must have a budget per pupil that is approximately equal to the average of wealthy districts plus the amount necessary to meet their special needs.¹³¹

122. *Id.*

123. *Id.*

124. *Id.* at 378.

125. *Id.* at 379.

126. *Id.* at 402.

127. *Id.* at 400-02.

128. *Id.* at 408.

129. *Id.*

130. *Id.* at 409.

131. *Id.*

Shortly after *Abbott I*, the New Jersey legislature passed the Quality of Education Act (QEA) of 1990.¹³² The QEA failed to pass constitutional muster in *Abbott v. Burke (Abbott II)*.¹³³ The QEA sought to reduce expenditure disparities between the thirty poorest "special needs districts" and the 108 wealthiest districts by the 1995-1996 school year.¹³⁴ According to *Abbott II*, the QEA failed to reduce per pupil spending disparities between wealthy and poor districts because the QEA did not guarantee enough funding to pay for its authorized level of spending.¹³⁵

The QEA adopted a foundation funding formula in an attempt to comply with the *Abbott I* court's mandate that aid cannot be based on a district's fiscal capacity. The QEA established a Maximum Foundation Budget (MB) for each district. The computation of the MB gave poor districts an amount above the average per pupil expenditure in the wealthiest districts with additions for categories such as special education and vocational school.¹³⁶ Since 1992, special needs districts have been able to increase their MBs through an additional special needs weight of 1.05 for each grade category.¹³⁷ To qualify for state aid, a district must contrib-

132. Act of July 3, 1990, ch. 52, 1990 N.J. Laws 587 (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to 18A:66-66 (West Supp. 1995)).

133. 643 A.2d 575, 576 (N.J. 1994).

134. William A. Firestone et al., *New Jersey's Quality Education Act: Fiscal, Programmatic, Curricular and Intergovernmental Effects 2* (Apr. 1994) (symposium presentation at the annual meeting of the American Educational Research Association) (on file with author). The legislature denominated the poorest 30 districts as special need districts (SNDs). *Abbott II*, 643 A.2d at 576.

135. The *Abbott II* court noted that while the QEA contains a commitment to parity, special needs districts were only spending 84% of wealthy district expenditures. *Abbott II*, 643 A.2d at 576-77. Before the QEA, this figure was at least 70%. *Id.* Although the QEA raised an additional \$800 million for education through income and sales tax increases, poor districts received only \$257 million. Firestone et al., *supra* note 134, at 5-6. The state primarily directed the remainder at property tax relief. William A. Firestone et al., *Where Did the \$800 Million Go? The First Year of New Jersey's Quality Education Act*, 16 EDUC. EVALUATION & POL'Y ANALYSIS 359, 360 (1994).

136. The formula for a district's MB = (F x U) + C. N.J. STAT. ANN. § 18A:7D-6 (West Supp. 1995). F = the state foundation amount; U = the number of foundation aid units for pupils in the district; and C = the facilities component. § 18A:7D-6. Since the 1991-92 school year, F has equalled \$6,640 per pupil, and C has equalled \$107.00 per pupil. § 18A:7D-6(b). U is determined by adding the products obtained by multiplying the number of students in particular grade and program categories by set foundation weights ranging from .5 to 1.33. § 18A:7D-6(a). The *Abbott II* court emphasized that the state calculated these weights ineffectively because the state had not studied the actual costs of providing services for at-risk pupils. *Abbott II*, 643 A.2d at 578-79.

137. N.J. STAT. ANN. § 18A:7D-6(a) (West Supp. 1995).

ute its "fair share," which is determined by using equalized property valuations and personal income.¹³⁸ The amount of state foundation aid to a district is the difference between a district's MB and its local fair share.¹³⁹

To promote equity, the QEA instituted yearly spending caps on budget increases that were separate from the MB. The permissible annual cap increases for special needs districts were higher than the ones for wealthy districts.¹⁴⁰ Equity was not guaranteed, however, because the state did not require poor districts to spend up to the cap.¹⁴¹ The *Abbott II* court held that another flaw in the QEA's design was the absence of a link between the spending cap and the MB.¹⁴² Without a nexus between the cap and the MB, the calculation of the cap yielded a different budget amount than the computation of the MB. Thus, a gap existed between what was needed to achieve parity between poor and wealthy districts and the amount of money that the state provided through the foundation budget.¹⁴³

Due to problems with the QEA's spending cap design, the court determined that the only way to achieve equity under the current formula was to increase the special needs weight under the MB. However, the legislature had total discretion when determining the special needs weight. Because the mode of achieving parity under the QEA was discretionary, the QEA did not comply with *Abbott I's* mandate of funding certainty.¹⁴⁴ The *Abbott II* court held that equal funding does not guarantee equality of education, "[b]ut it is nonetheless clear that there is a significant connection between the sums expended and the quality of the educational opportunity."¹⁴⁵ Although the court in *Abbott I* held that the legislature only had to provide poor districts with a sufficient floor of

138. N.J. STAT. ANN. § 18A:7D-7 (West Supp. 1995); BETH D. BADER, U.S. DEP'T OF EDUC., *ABBOTT V. BURKE VS. NEW JERSEY: POLICY, POLITICS AND POLITICAL ECONOMY* 22 (1991).

139. N.J. STAT. ANN. § 18A:7D-4 (West Supp. 1995).

140. Firestone et al., *supra* note 134, at 6.

141. *Abbott II*, 643 A.2d at 577-78.

142. The court noted that the Department of Education did not even calculate what the equity spending caps were for the 1993-94 school year. *Id.* at 578.

143. *Id.*

144. *Id.*

145. *Id.* at 580 (quoting *Robinson v. Cahill (Robinson I)*, 303 A.2d 273, 277 (N.J. 1973)).

revenue, the *Abbott II* court switched gears and primarily focused on spending disparities between poor and wealthy districts.

The *Abbott II* court properly held that the QEA is not an equitable finance system. Although the QEA improves the degree of horizontal equity among students by reducing disparities from 30% to 16%, the QEA falls short of the court's mandate to provide "substantially equal" educational funding.¹⁴⁶ Because the QEA's budget spending cap is not linked to the foundation formula, it cannot equalize expenditures. Nor does the scheme provide for vertical equity. The court appropriately noted that the legislature determined the amounts of the additional weightings without empirical data about the actual costs of educating students.¹⁴⁷

New Jersey's QEA formula, however, does promote fiscal neutrality. The fair share component accounts for each district's income level so that the tax burdens will be equitably distributed. Although the fair share element promotes neutrality, a district's ability to raise revenue for education is still heavily dependent on its property wealth because the QEA inadequately funds necessary reform.

Despite the formula's failure to provide equity, a study of ten local school districts' use of additional funding during the QEA's first year illustrates that the QEA does encourage poor districts to expand their core curricula.¹⁴⁸ The QEA requires each special needs district (SND) to develop and submit an Education Improvement Plan (EIP) to the state that incorporates recommendations made by external review teams.¹⁴⁹ "The EIPs identified educational goals for each district, strategies for achieving these

146. *Id.* A study of the QEA's horizontal equity showed that it closed the spending gap among special needs districts to a greater degree than it closed the disparity between wealthy and special needs districts. See Firestone, et al., *supra* note 135, at 363.

147. The element of arbitrariness that exists for the additional weights is not unique to New Jersey's scheme. None of the states with foundation formulas appear to have formulated them pursuant to empirical data.

148. The districts in the study were divided into three categories: five special-needs districts, two foundation-aid districts, and three transition-aid districts. Firestone et al., *supra* note 135, at 363-64. Special-needs districts received the most state aid under the new finance system. *Id.* Foundation-aid districts received a moderate amount of additional aid. *Id.* at 365. Transition-aid districts were generally wealthy districts that received the smallest state-aid increase. *Id.*

149. *Id.* at 360; N.J. STAT. ANN. § 18A:7D-32 (West Supp. 1995).

goals, and ways new QEA dollars would be used to implement the strategies."¹⁵⁰

The school district study revealed that the SNDs received an additional \$534 to \$1,549 per pupil.¹⁵¹ They spent nearly half of the new revenue on instruction and student services.¹⁵² Three of the five SNDs used aid to increase their staff or reinstate programs that the SNDs previously cut.¹⁵³ Although SNDs did not spend money on additional materials and resources, QEA funds helped to equalize their availability.¹⁵⁴ Four of the SNDs invested in facilities by building new structures, refurbishing buildings, and installing laboratories.¹⁵⁵

Moreover, the QEA's long-range planning requirement encouraged poor districts to improve and expand course offerings. Districts created health and social service programs, weekend and summer school programs, extracurricular activities, and early childhood education programs.¹⁵⁶ The districts also added elective course offerings such as home economics, industrial education, and Advanced Placement classes.¹⁵⁷ Special needs districts have reported that the QEA's oversight influenced their decisions about how to use resources.¹⁵⁸

In addition to initiating curriculum expansion, the QEA system has an accountability component that encourages districts to use QEA funding responsibly and to invest in curriculum improvements. Each district's EIP plan has to "identify, price, and justify" expenditures to the state.¹⁵⁹ The QEA, however, lacks a mechanism that can measure how additional funds given to SNDs improve educational quality. Although test scores may provide an indirect measurement of the quality of education in poor districts, the tests are not given at each grade level and have a narrow scope.¹⁶⁰

150. Firestone et al., *supra* note 135, at 360.

151. *Id.* at 363.

152. *Id.* at 365.

153. *Id.* at 366.

154. *Id.*

155. *Id.* at 367.

156. *Id.*

157. *Id.*

158. Firestone et al., *supra* note 134, at 37-38.

159. Firestone et al., *supra* note 135, at 370; N.J. STAT. ANN. § 18A:7D-32 (West Supp. 1995).

160. The state only tests students in grades three, six, and nine. Firestone et al., *supra* note 135, at 370.

Curriculum expansion in poor districts could be hampered by the uncertainty of the QEA's status and funding. The *Abbott II* court's invalidation of the QEA will force the legislature to revise its fiscal system. In addition, political haggling has prevented the New Jersey legislature from setting state aid figures for forthcoming years.¹⁶¹ Until these issues are resolved, districts may be reluctant to invest in programs that have long-term expenses.

School reform critics argue that revised systems only marginally improve the quality of education in poor districts while impermissibly making drastic cuts in wealthy districts' programs. Thus, critics contend that the net effect of reform is an overall "leveling down" of educational quality throughout the state. However, the local effects of QEA reform demonstrate that this fear did not materialize. Wealthy districts did not make any substantial curriculum reductions. They only had to make minor cuts in educational services, "which resulted as much from residents' unwillingness to tax themselves to the level allowed by the state as from reduced state funds."¹⁶² Furthermore, the QEA actually gave wealthy districts increases in state aid ranging from 5% to 27%.¹⁶³ Thus, in the QEA's first year, the finance reforms did not appear to denigrate educational programs in wealthy districts.

Although the New Jersey legislature has not yet responded to the *Abbott II* decision, *Abbott II's* impact undoubtedly will be a funding increase to poor districts to remedy the QEA's improper preservation of expenditure disparities. If the new system retains the QEA's curriculum expansion and improvement initiatives, New Jersey's poor schools will make additional strides toward educational equality.

D. Tennessee

The Tennessee Supreme Court, unlike the Kentucky, Massachusetts, and New Jersey courts, used state equal protection grounds to invalidate Tennessee's school funding scheme. In *Tennessee Small School Systems v. McWhorter*,¹⁶⁴ the Tennessee Supreme Court held that the state's school finance system, which

161. *Id.*

162. *Id.* at 359.

163. *Id.* at 364, 368.

164. 851 S.W.2d 139 (Tenn. 1993).

relied heavily on local property taxes, created spending disparities among school districts.¹⁶⁵ The court found that the state's funding scheme created a wealth-based classification of similarly situated students and was unconstitutional because the system lacked even a rational basis.¹⁶⁶

At the time of *McWherter*, the largest source of state funding was the Tennessee Foundation Program (TFP).¹⁶⁷ The TFP was a standard foundation formula that allocated aid based on the number of students in average daily attendance, weighted by additional cost factors such as grade level, vocational courses, and special education.¹⁶⁸ Districts that were unable to raise the foundation amount received equalization aid to make up the difference.¹⁶⁹ The court found, however, that the TFP's equalization element comprised only a small portion of total state aid and was inadequately funded.¹⁷⁰

The record established that the TFP did not provide poor districts with enough funding to maintain an adequate educational system. Schools in poor districts lacked adequate facilities, textbooks, functioning libraries, and the funds to implement state-mandated art and music classes.¹⁷¹ Poor districts had substantially fewer educational opportunities than wealthy districts.¹⁷² For example, in a Hancock County school, a so-called "library" consisted of "only one bookcase nestled in a room containing empty boxes, surplus furniture, a desktop copier, kitchen supplies, a bottle of mouthwash, and a popcorn machine."¹⁷³

The *McWherter* court rejected the state's contention that the system was rationally related to a legitimate state purpose of promoting local control over schools.¹⁷⁴ The court noted that the

165. *Id.* at 143-147. The court noted that in 1988-89, per classroom spending varied from \$110,727 in Kingsport to \$49,167 in Lewis County. *Id.* at 143. Per pupil spending among districts ranged from \$3,669 to \$1,823. *Id.*

166. *Id.* at 152-57.

167. *Id.* at 143. The other sources of state funding were categorical grants that the state distributed irrespective of a district's wealth. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* Tennessee had less than \$60 million available for equalization aid out of a \$2.5 billion education budget. *Id.* The court also noted that the equalization element of the TFP benefited wealthier districts because it made upward adjustments in aid for those with highly experienced and trained teachers. *Id.*

171. *Id.* at 145.

172. *Id.* at 154.

173. *Id.* at 145.

174. The Tennessee court thus did not adopt the U.S. Supreme Court's rationale in

goal of local management did not justify disparities in educational opportunities.¹⁷⁵ The court emphasized that a system that provides for greater equalization of funds actually promotes local control because equalization gives poor districts more educational choices.¹⁷⁶

Unlike the New Jersey court, the *McWherter* court did not suggest a legislative remedy. The *McWherter* court's only mandate was that the legislature establish a public school system that provides substantially equal educational opportunities to all Tennessee students.¹⁷⁷ The court emphasized that the key issues were quality and equality of education, not merely equality of funding.¹⁷⁸

After the *McWherter* decision, the Tennessee General Assembly enacted the Education Improvement Act of 1991 (EIA).¹⁷⁹ Like Kentucky's KERA program, Tennessee's EIA makes broad revisions in the state's entire educational system. The EIA devotes more than half of Tennessee's general fund budget to education.¹⁸⁰ The state distributes the majority of these funds through a new percentage equalizing scheme called the Basic Education Program (BEP).¹⁸¹ Under this system, the Tennessee Department of Education establishes a budget for each district by organizing the educational costs of students into classroom and nonclassroom components.¹⁸² The BEP creates a funding level for each component based on the number and type of students (e.g., students on free/reduced lunch) in each district. The state's share of the costs of the BEP, which is expected to be fully funded by July of 1997, is 75% of the classroom components and 50% of the non-class-

Rodriguez that a system that relies heavily on local property taxes to fund education is rationally related to a legitimate state purpose of promoting local control over schools. See *supra* note 15 and accompanying text.

175. *McWherter*, 851 S.W.2d at 154.

176. *Id.*

177. *Id.* at 156.

178. *Id.*

179. Act of Mar. 11, 1992, ch. 535, 1992 Tenn. Pub. Acts 19 (codified as amended at TENN. CODE ANN. Titles 8, 49 (Supp. 1995)).

180. TENN. STATE DEP'T OF EDUC., STATE FINANCE OF PUBLIC SCHOOLS IN TENNESSEE 1 (no date) (on file with author).

181. TENN. CODE ANN. § 49-3-351(a) (Supp. 1995).

182. TENN. STATE DEP'T OF EDUC., *supra* note 180, at app. C. Classroom components include regular, special, and vocational education, art and music courses, principals, nurses, librarians, and substitute teachers. *Id.* at app. E. Nonclassroom components consist of, among other things, staff benefits and insurance, noninstructional equipment, transportation, secretarial support, and maintenance. *Id.* at app. C.

room components.¹⁸³ The counties collectively fund the remaining 25% of the classroom components and 50% of the non-classroom components.¹⁸⁴ The state determines a district's individual share through a fiscal capacity index that represents a district's ability to fund education from its own taxable sources.¹⁸⁵ To receive state aid, each county must fund its fiscal capacity index for both the classroom and nonclassroom components.¹⁸⁶

Unlike the Massachusetts court, the *McWherter* court focused on districts' expenditure disparities in holding that the Tennessee scheme was unconstitutional. The finance element of the new BEP, however, fails to equalize spending among districts. If the BEP is fully funded by 1997, there still will be an estimated 36% disparity between the wealthy and poor districts in the 95th and 5th percentiles.¹⁸⁷ This disparity is twice as great as the one that exists under the New Jersey and Kentucky schemes.

Because the BEP recognizes the costs of educating different types of students, it has a degree of vertical equity. In addition, the BEP is more fiscally neutral than the New Jersey, Massachusetts, and Kentucky schemes. When determining a county's individual share of education costs, the BEP not only provides for income differences among districts but also accounts for a county's resident tax burdens.¹⁸⁸ The state also bases the calculation of a

183. TENN. CODE ANN. §§ 49-3-354(i), 49-3-356 (Supp. 1995). The state funds EIA reforms through a half-cent increase in the state sales tax. GOVERNOR NED MCWHERTER, TENN. DEP'T OF EDUC., TENNESSEE: THE TICKET TO TOMORROW 2 (July 1993).

184. TENN. CODE ANN. §49-3-356 (Supp. 1995); HARRY A. GREEN, TENN. ADVISORY COMM'N ON INTERGOVERNMENTAL REL., FISCAL EQUALIZATION OF THE BASIC EDUCATION PROGRAM 1 (Apr. 1994).

185. TENN. ADVISORY COMM'N ON INTERGOVERNMENTAL REL., LOCAL FISCAL CAPACITY FOR FUNDING EDUCATION IN TENNESSEE 9 (July 1994). Fiscal capacity is determined by five measurements: "fiscal effort, tax capacity based on property and sales, ability to pay based on per capita income, [resident] tax burden, and service responsibility based on school population as a percent of total population." *Id.* The formula is based on a three-year moving average of the data used, which means that the oldest year of data is dropped and the current year of data is added. *Id.* at 10.

186. For example, if total statewide BEP classroom funding is \$500 million, then a district with a fiscal capacity index of 1.25% would have a required local share of \$6.25 million ($\$500,000,000 \times 1.25\% = \$6,250,000$). *Id.* at 47. If total statewide BEP nonclassroom funding is \$400 million, then the county would have a required local share of \$5 million ($\$400,000,000 \times 1.25\% = \$5,000,000$). *Id.* Fiscal capacity indexes in fiscal year 1995 ranged from .03% to 20.83%. *Id.* at 32-34.

187. GREEN, *supra* note 184, at 3.

188. TENN. ADVISORY COMM'N ON INTERGOVERNMENTAL REL., *supra* note 185, at 9.

county's minimum contribution on a three-year moving average to help ensure accuracy.¹⁸⁹ However, the BEP has drawbacks for local districts. Unlike the foundation formula schemes in other states, the BEP requires local districts to fund a portion of the state's total education costs, not just a part of the district's own needs.¹⁹⁰ Districts thus have to pay for the expenses of other school systems. As the state moves toward full funding of the BEP, the districts' share of costs also will increase, even if districts are not adding new services or experiencing enrollment growth.

Tennessee's EIA, like Kentucky and New Jersey's systems, appropriately requires local districts to expand and enrich curriculum offerings. Every new dollar generated by the EIA must be earmarked for education; none of it can be used to increase salaries.¹⁹¹ Districts must spend at least 76 cents of each dollar on classroom improvements such as new teachers, textbooks, and instructional technology.¹⁹² Districts can spend the remaining 24 cents on items such as utilities, transportation, and maintenance.¹⁹³ Although the EIA gives local districts much less discretion than any other state, a high level of state oversight can increase the public's acceptance of the plan and create a closer nexus between new aid and educational equality.¹⁹⁴

Because the BEP is a percentage equalizing system, Tennessee provides districts with a greater amount of funding stability than states with foundation funding programs. Foundation funding schemes have placed a legislative "ceiling" on the amount of per pupil aid based on the number of students in attendance during prior years. In contrast, a percentage equalizing system bases the state contribution on a percentage of a districts' total costs. This system gives districts a greater incentive to expand upon their programs because they may be able to recoup a greater portion of their expenses.

The curriculum enrichment effects of the new funding system can be observed at the local school district level. In Carter Coun-

189. *Id.* at 10.

190. *See id.* at 24.

191. MCWHERTER, *supra* note 183, at 4. Banning salary increases for teachers can be problematic, however, because offering a lucrative salary can be an effective means of recruitment.

192. *Id.*

193. *Id.*

194. *See* discussion *supra* note 69 and accompanying text.

ty, schools spent \$250,000 to update textbooks for each grade.¹⁹⁵ One high school built a fully equipped computer lab.¹⁹⁶ The addition of the lab prompted new courses in word processing, databases, and spreadsheets.¹⁹⁷ In Warren County, schools added Japanese, Spanish, French, and Latin courses.¹⁹⁸ Jefferson County schools added twelve new teachers to reduce class sizes.¹⁹⁹ They also purchased computer equipment and supplies for vocational courses.²⁰⁰ Under the new funding system, the amount of money spent on new textbooks, materials, and supplies increased by more than 200% from 1992 levels to a total of nearly \$30 million.²⁰¹ Through additional capital outlay and technology allotments, school systems spent over \$6.5 million on capital improvements and more than \$86 million on new technologies in 1993-94.²⁰²

Furthermore, the EIA properly has raised academic standards by increasing core curriculum requirements and mandating the availability of kindergarten.²⁰³ All high schools must implement a two-track curriculum: one for college bound students and one for those entering the work force.²⁰⁴ The state also requires high schools to create objectives for each student that include communication, critical thinking, and problem-solving goals.²⁰⁵ These new requirements will stimulate expansion of schools' core curricula and diversify elective offerings.

The EIA also has new accountability initiatives that promote curriculum additions. The Tennessee Department of Education established a new standardized testing program called the Tennessee Value-Added Assessment System (TVAAS).²⁰⁶ The TVAAS ascertains how much Tennessee students are learning in each subject area in comparison to national averages.²⁰⁷ In addition,

195. MCWHERTER, *supra* note 183, at 5.

196. *Id.*

197. *Id.*

198. *Id.* at 6.

199. *Id.* at 7.

200. *Id.*

201. WAYNE QUALLS, TENN. STATE DEP'T OF EDUC., STATUS REPORT ON THE IMPLEMENTATION OF THE 21ST CENTURY SCHOOLS PROGRAM 3 (Apr. 1994).

202. *Id.*

203. TENN. CODE ANN. § 49-6-201(c) (Supp. 1995).

204. TENN. CODE ANN. § 49-1-212(a) (Supp. 1995).

205. TENN. STATE BD. OF EDUC., HIGH SCHOOL POLICY: A NEW VISION FOR TENNESSEE HIGH SCHOOLS 4, 6 (Nov. 1993).

206. TENN. CODE ANN. §§ 49-1-601-10 (Supp. 1995).

207. TENN. CODE ANN. § 49-1-601(b) (Supp. 1995); WILLIAM A. SANDERS & SAN-

schools must meet five different performance goals by the year 2000.²⁰⁸ The state distributes annual report cards summarizing the progress that districts make toward these goals.²⁰⁹ Districts can use TVAAS scores and report card data to assess how new programs influence student achievement. Thus, although the Tennessee system does not substantially narrow the gap between wealthy and poor districts' expenditures, the system's emphasis on improving the quality of poor districts' curricula will help poor districts attain educational equality.

E. Texas

Texas, like New Jersey, has endured extensive school finance litigation. The original Texas system operated under a foundation funding program. The foundation program had a two-tiered level of funding.²¹⁰ The first tier guaranteed districts a base level of funding per student in average daily attendance.²¹¹ The state encouraged districts but did not require them to generate a minimum "fair share" before receiving tier I funds.²¹² The second tier had an equalization component designed to supplement a district's basic tier I allotment.²¹³ At the second tier, the state guaranteed districts a certain amount of revenue for each cent of tax effort over tier I's encouraged fair share.²¹⁴ The state funded the difference between the guaranteed amount and the revenue that the tax effort collected.²¹⁵

The Texas legislature responded to a constitutional challenge to the system by passing House Bill 72 (HB 72), which contributed

DRA HORN, THE UNIV. OF TENN., AN OVERVIEW OF THE TENNESSEE VALUE-ADDED ASSESSMENT SYSTEM (TVAAS) (no date) (on file with author).

208. For example, schools should have a 95% attendance rate in grades K-6, and a 93% attendance rate in grades 7-12 by the year 2000. NED MCWHERTER & WAYNE QUALLS, TENN. STATE DEPT OF EDUC., 21ST CENTURY SCHOOLS REPORT CARD 1 (Oct. 1994).

209. NED MCWHERTER & WAYNE QUALLS, TENN. STATE DEPT OF EDUC., STATE OF THE ART CLASSROOMS THAT DEMAND ACCOUNTABILITY 1 (Oct. 1994).

210. *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 495 (Tex. 1991).

211. *Id.*

212. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489, 498 (Tex. 1992).

213. *Edgewood II*, 804 S.W.2d at 495.

214. *Id.*

215. *Id.*

more money to the foundation funding formula and entitled districts that met certain wealth and effort criteria to an additional enrichment equalization allotment.²¹⁶ Although HB 72 increased funding for poor districts, the Texas Supreme Court invalidated this scheme in *Edgewood Independent School District v. Kirby (Edgewood I)*.²¹⁷ The *Edgewood I* court found that a substantial disparity existed in districts' ability to raise revenue.²¹⁸ The court noted that although the foundation program attempted to ensure that all districts had a minimum floor of revenue, the state inadequately funded the program and did not even cover the costs of meeting state-mandated educational requirements.²¹⁹

The Texas legislature subsequently passed Senate Bill 1 (SB 1) in 1990.²²⁰ SB 1 required local districts to tax at a minimum rate before receiving tier I aid.²²¹ SB 1 also contained incentives for districts to set tax rates above the minimum level to maximize funding under tiers I and II.²²² Despite these changes, in *Edgewood II*, the Texas Supreme Court held that SB 1 was unconstitutional because it distributed funds under essentially the same inefficient foundation system that existed in *Edgewood I*.²²³ The *Edgewood II* court found that merely producing a more equitable system did not correct the educational "opportunity gaps" that still existed between wealthy and poor districts.²²⁴

The Texas legislature's third attempt at creating a permissible system resulted in the passage of Senate Bill 351 (SB 351) in 1991.²²⁵ SB 351 redefined the two-tiered structure of the founda-

216. Act of July 13, 1984, ch. 28, 1984 Tex. Gen. Laws 117, amended by Act of May 30, 1995, ch. 260, 1995 Tex. Sess. Law Serv. 2207 (Vernon); UNIV. OF TEXAS & TEXAS CENTER FOR EDUC. RES., A DECADE OF CHANGE: PUBLIC EDUCATION ACTION REFORM IN TEXAS 1981-1992, at 65-66 (Feb. 1993) [hereinafter A DECADE OF CHANGE].

217. 777 S.W.2d 391, 397 (Tex. 1989).

218. The amount of property wealth per student in the wealthiest and poorest districts showed a disparity as high as 700 to 1. *Id.* at 392. Spending per student ranged from \$19,333 to \$2,112. *Id.*

219. *Id.*

220. Act of June 7, 1990, ch. 1, 1990 Tex. Gen. Laws 1, amended by Act of May 30, 1995, ch. 260, 1995 Tex. Sess. Law Serv. 2207 (Vernon); TERRY WHITNEY & AMY HIGHTOWER, U.S. DEP'T OF EDUC., STATE LEGISLATIVE REPORT: LESSONS IN SCHOOL FUNDING 1, at 4 (Feb. 1992).

221. *Edgewood II*, 804 S.W.2d 491, 495 (Tex. 1991).

222. *Id.*

223. *Id.*

224. *Id.* at 496.

225. Act of Apr. 15, 1991, ch. 20, 1991 Tex. Gen. Laws 381, amended by Act of June 7, 1991, ch. 391, 1991 Tex. Gen. Laws 1475, amended by Act of May 30, 1995, ch. 260,

tion program.²²⁶ In an attempt to equalize taxation efforts within each county,²²⁷ SB 351 created County Education Districts (CEDs) that levied and collected taxes.²²⁸ The school finance system also set a cap on the rate that districts could tax.²²⁹ However, the Texas Supreme Court held that SB 351 was unconstitutional in *Edgewood III*. The court found that the CED tax system impermissibly created a statewide income tax.²³⁰

The Texas Supreme Court recently ruled that the Texas legislature, on its fourth attempt, successfully created a constitutional system²³¹ with the passage of Senate Bill 7 (SB 7).²³² SB 7 set a cap of \$280,000 on the amount of taxable property value a district may have per student.²³³ Districts that have wealth per student in excess of \$280,000 can choose from among five options to reduce their wealth.²³⁴ Options that do not require voter approv-

1995 Tex. Sess. Law Serv. 2207 (Vernon).

226. A DECADE OF CHANGE, *supra* note 216, at 72.

227. WHITNEY & HIGHTOWER, *supra* note 220, at 2.

228. PICUS & HERTERT, *supra* note 23, at 2.

229. *Edgewood III*, 826 S.W.2d 489, 499 (Tex. 1992).

230. Texas is one of only seven states that prohibits a state income tax. WHITNEY & HIGHTOWER, *supra* note 220, at 2; TEX. CONST. art. VIII, § 1-e. The court noted that the legislature set a de facto tax rate for the CEDs when it mandated a minimum local share for tier I funding. *Edgewood III*, 826 S.W.2d at 501. Taxpayers had a right to vote on local tax rates for schools. By consolidating taxpayers into large CEDs, SB 351 made citizens pay a state mandated tax rate for schools over which they had no control. *Id.* at 509-10, 514.

231. *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 893 S.W.2d 450, 484 (Tex. 1995).

232. Act of May 31, 1993, ch. 347, 1993 Tex. Gen. Laws 1479, amended by Act of May 30, 1995, ch. 260, 1995 Tex. Sess. Law Serv. 2207 (Vernon). The Texas legislature has recently recodified portions of SB 7's provisions under different section numbers. See Act of May 30, 1995, ch. 260, 1995 Tex. Sess. Law Serv. 2207 (Vernon). For clarity, this Note continues to refer to the new Texas scheme as SB 7 because the Texas legislature retained many of SB 7's provisions.

233. *SB 7 Summarized*, TEXAS EDUC. NEWS, May 31, 1993, at 1, 2. The \$280,000 cap is referred to as the equalized wealth level. Act of May 30, 1995, ch. 260, sec. 1, § 41.002(a), 1995 Tex. Sess. Law Serv. 2207, 2384 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 41.002(a)). SB 7 eliminated SB 351's property tax rate cap. *Edgewood IV*, 893 S.W.2d at 481-82.

234. *SB 7 Summarized*, *supra* note 233, at 1; Act of May 30, 1995, ch. 260, sec. 1, § 41.003, 1995 Tex. Sess. Law Serv. 2207, 2385 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 41.003). When SB 7 was adopted, 109 school districts had property wealth per student in excess of \$280,000. *SB 7 Summarized*, *supra* note 233, at 1. The state penalizes wealthy districts that refuse to choose one of the five options. *Id.* at 2. SB 7 provides that districts that are unable to maintain their 1992-93 level of spending without raising taxes over a specified amount may retain wealth in excess of \$280,000 per student during a three-year phase-in period. *Id.*

al are 1) voluntary consolidation with another district²³⁵ and 2) detachment and annexation by agreement.²³⁶ The remaining three choices, which require voter approval, are 1) the purchase of attendance credits;²³⁷ 2) the creation of nonresident student education contracts;²³⁸ and 3) tax base consolidation.²³⁹ With one exception, all of the high wealth districts have sent excess funds to the state or other school districts, even though doing so required voter approval.²⁴⁰

In addition to capping the amount of wealth per student that a district may have, SB 7 slightly revised tiers I and II of the foundation program. SB 7 lowered SB 351's basic allotment under tier I to \$2,300 per student each year, adjusted by a cost of education index.²⁴¹ To receive tier I funds, a district still must provide

235. Act of May 30, 1995, ch. 260, sec. 1, §§ 41.031-.034, 1995 Tex. Sess. Law Serv. 2207, 2387 (Vernon) (to be codified at TEX. EDUC. CODE ANN. §§ 41.031-.034). Under this option, the governing boards of two or more districts may consolidate the districts into one with a per pupil wealth of less than \$280,000. For the first two years after consolidation, the state will provide the consolidated district with the same amount of state funding to which each district would have been separately entitled. *Id.*

236. Act of May 30, 1995, ch. 260, sec. 1, §§ 41.061-.065, 1995 Tex. Sess. Law Serv. 2207, 2387-88 (Vernon) (to be codified at TEX. EDUC. CODE ANN. §§ 41.061-.065). Under this option, the governing boards of two or more districts may agree that territory may be detached from one district and added to another district if, after the action, each district has a per pupil wealth equal to or less than the equalized wealth level. *Id.*

237. Act of May 30, 1995, ch. 260, sec. 1, §§ 41.091-.099, 1995 Tex. Sess. Law Serv. 2207, 2388-89 (Vernon) (to be codified at TEX. EDUC. CODE ANN. §§ 41.091-.099). A district may purchase attendance credits from the state to lower its per pupil wealth. Each credit would reduce a district's average daily attendance by one student per year. Average daily attendance for the 1995-96 school year is determined by dividing the sum of each day's attendance by the minimum number of school days. Act of May 30, 1995, ch. 260, sec. 1, § 42.005(a-1), 1995 Tex. Sess. Law Serv. 2207, 2397 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 42.005(a-1)).

238. Act of May 30, 1995, ch. 260, sec. 1, §§ 41.121-.123, 1995 Tex. Sess. Law Serv. 2207, 2389-90 (Vernon) (to be codified at TEX. EDUC. CODE ANN. §§ 41.121-.123). Under this plan, a district may contract with another district to educate additional out-of-district students. *SB 7 Summarized, supra* note 233, at 2.

239. Act of May 30, 1995, ch. 260, sec. 1, §§ 41.151-.160, 1995 Tex. Sess. Law Serv. 2207, 2390-91 (Vernon) (to be codified at TEX. EDUC. CODE ANN. §§ 41.151-.160). Two or more districts may agree, with voter approval, to consolidate tax bases as long as the consolidated district has a per student wealth below the equalized wealth level. *SB 7 Summarized, supra* note 233, at 2.

240. Lawrence O. Picus, *The Local Impact of School Finance Reform in Four Texas School Districts*, 16 EDUC. EVALUATION AND POL'Y ANALYSIS 391, 392 (Winter 1994).

241. TEXAS EDUC. CODE ANN. §§ 16.101-2 (West Supp. 1995), *amended by* Act of May 30, 1995, ch. 260, sec. 1, § 42.101, 1995 Tex. Sess. Law Serv. 2207, 2398 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 42.101). The Texas legislature has subsequently increased the basic allotment to \$2,387. Act of May 30, 1995, ch. 260, sec. 1, §

its "minimum local fund assignment" (LFA) of costs.²⁴² The minimum tax rate a district must levy under the LFA for the 1994-95 school year was \$.86 per \$100 of property value for the prior tax year.²⁴³ Tier II of the formula, like the older programs, guarantees each district an additional amount for up to \$.64 of tax effort above the LFA.²⁴⁴ The revised scheme, however, has lowered the SB 351 guaranteed yield amount to \$20.55 per student for every cent of taxation over the LFA.²⁴⁵

The *Edgewood IV* court properly noted that although SB 7 lowered the amount of revenue to which poor districts were entitled under SB 351, the SB 7 cap improved the degree of horizontal equity among districts.²⁴⁶ The margin, however, remains a wide \$600 per pupil when districts tax at the full tier II equalization rate.²⁴⁷ Like every other revised scheme, SB 7 also promotes vertical equity among districts. Its tier I component provides for add-on weights to account for the additional costs of educating special, gifted, and bilingual students.²⁴⁸ The concept of fiscal neutrality, however, is not fully embodied in SB 7's modifications. Because the LFA is a flat rate per \$100 of taxable property value, the formula does not equalize the tax burden of receiving aid.

Unlike the other states mentioned, Texas improperly failed to require poor districts to spend new aid on curriculum enrichment programs. A study of the local effects of school finance reform under the older SB 351 system shows that absent a nexus between

42.101, 1995 Tex. Sess. Law Serv. 2207, 2398 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 42.101). Under SB 351, however, this amount was \$2,400 per student. *SB 7 Summarized*, *supra* note 233, at 3. Tier I provides for additional funding for special education, gifted students, compensatory, bilingual and vocational education, technology, and transportation. Act of May 30, 1995, ch. 260, sec. 1, §§ 42.151-156, 1995 Tex. Sess. Law Serv. 2207, 2399-405 (Vernon) (to be codified at TEX. EDUC. CODE ANN. §§ 42.151-156).

242. Act of May 30, 1995, ch. 260, sec. 1, § 42.252, 1995 Tex. Sess. Law Serv. 2207, 2406-07 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 42.252).

243. Act of May 30, 1995, ch. 260, sec. 1, § 42.252(a), 1995 Tex. Sess. Law Serv. 2207, 2406 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 42.252(a)); *Edgewood IV*, 893 S.W.2d 450, 461 (Tex. 1995).

244. Act of May 30, 1995, ch. 260, sec. 1, §§ 42.302-303, 1995 Tex. Sess. Law Serv. 2207, 2411 (Vernon) (to be codified at TEX. EDUC. CODE ANN. §§ 42.302-303).

245. Act of May 30, 1995, ch. 260, sec. 1, § 42.302(a), 1995 Tex. Sess. Law Serv. 2207, 2411 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 42.302(a)); *Edgewood IV*, 893 S.W.2d at 467.

246. *Edgewood IV*, 893 S.W.2d at 464.

247. *Id.* at 464-65.

248. See discussion *supra* note 241.

additional aid and substantive educational improvement, poor districts may not use revenue effectively to improve educational quality.²⁴⁹ Out of an \$11 million aid increase, District LM only invested approximately \$2 million in new educational programs.²⁵⁰ District LH, the other poor district, received \$10 million of new funds.²⁵¹ LH put over \$6 million of its money in a discretionary program for each school. None of the schools used these discretionary funds to make substantive changes to their curricula.²⁵² Furthermore, none of the districts used the additional revenue to supplement the textbooks that the Texas Education Agency distributes.²⁵³

The old SB 351 system also failed to promote curriculum development because it did not require districts to adopt long-range plans for the use of new state aid. In the local district expenditure study, the poor districts that received the greatest amount of funding invested little of their new aid into programs requiring continuing funding commitments. Poor districts spent most of their money on one-time expenditures for facilities instead of improving core academic programs.²⁵⁴ Although buildings and facilities enable schools to offer programs, they are not, in and of themselves, elements of a school's core educational agenda. The SB 7 scheme attempts to rectify this shortcoming by requiring each school district to create a long-term district curricula improvement plan.²⁵⁵ This change is beneficial because without any state guidance as to how districts should spend aid or a requirement of long-range planning, one cannot predict whether in the future a district will use an aid increase to supplement educational pro-

249. The districts in the study were identified as HH (high property wealth of \$240,000 per student, high enrollment of nearly 200,000 students), HM (high property wealth of over \$300,000 per pupil, medium enrollment of 7,740 students), LH (low property wealth of \$77,031 per student, high enrollment of 50,036 students), and LM (low property wealth of \$40,871 per pupil, medium enrollment of 12,970 students). Picus, *supra* note 240, at 394.

250. *Id.* at 398. LM spent most of its new funding, \$8 million, on constructing a new middle school and upgrading older schools' facilities. *Id.* District LM also instituted an Instructional Monitoring Program that was designed to improve educational personnel's teaching skills and a parent involvement program. *Id.*

251. *Id.*

252. *Id.* at 403.

253. *Id.* at 399.

254. *Id.* at 403.

255. Act of May 30, 1995, ch. 260, sec. 1, § 11.252, 1995 Tex. Sess. Law Serv. 2207, 2232-33 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 11.252).

grams. However, unlike New Jersey's system, SB 7 does not appear to make districts justify expenditures to the state.

Moreover, despite new long-range planning requirements, poor districts could refrain from expanding their curricula because of the Texas schemes' historical lack of funding stability. For example, in May of 1992, former Governor Richards and the legislative leadership informed schools that there would be no new education revenue for fiscal year 1992-93.²⁵⁶ A perceived lack of state commitment to funding education would cause districts to refrain from making educational improvements, such as the creation of new courses or remedial programs, that would involve long-term costs.²⁵⁷

Although the SB 7 formula lacks several elements that could encourage curriculum enrichment, it appropriately provides for extensive accountability mechanisms. For example, districts must develop end-of-course exams²⁵⁸ and publish an annual campus report card that describes students' performance.²⁵⁹ In addition, the Texas Board of Education must adopt a set of academic excellence indicators that measure the quality of learning.²⁶⁰ Although these accountability methods may help districts assess students' overall achievement, the mechanisms cannot ascertain which additional aid programs effectively enhance students' educations. The accountability mechanisms also fail to require educational development as a condition to receiving aid. Because the Texas scheme lacks the requisite state oversight of districts' expenditures, the revised formula cannot maximize educational improvement in poor school districts.

256. Picus, *supra* note 240, at 397.

257. Students in poor districts are not the only ones to suffer under a system without funding stability. Wealthy districts, which typically have been the most innovative in educational offerings, may make cuts because of instability and decreasing aid receipts. For example, District HH had to scale back and defer several educational enhancement programs, including a plan to develop partnerships with businesses and other social service agencies. *Id.* at 398.

258. Act of May 30, 1995, ch. 260, sec. 1, § 39.023, 1995 Tex. Sess. Law. Serv. 2207, 2370-71 (Vernon) (to be codified at TEX. EDUC. CODE ANN. § 39.023).

259. Act of May 30, 1995, ch. 260, sec. 1, §§ 39.051-.053, 1995 Tex. Sess. Law Serv. 2207, 2374-75 (Vernon) (to be codified at TEX. EDUC. CODE ANN. §§ 39.051-.053).

260. Act of May 30, 1995, ch. 260, sec. 1, § 39.051.

CONCLUSION

Finance schemes that rely primarily on property taxes to fund education create wealth-based disparities in educational opportunities. The high courts of Kentucky, Massachusetts, New Jersey, Tennessee, and Texas recently have used state constitutional grounds to invalidate property-tax funding systems. Although legislative responses to these decisions have given poor schools additional funding, the new systems still fail to provide poor schools with equal access to state aid.

An analysis of revised funding formulas reveals that the most effective elements in ensuring educational equality are horizontal equity, vertical equity, and fiscal neutrality. Spending caps are one way that states have created horizontal equity. For example, within four years of Kentucky's institution of a spending cap, expenditure disparities decreased from almost 69% to less than 17%. Similarly, Texas has progressed towards equalization of school districts' revenues by limiting a school district's taxable property value.

Fiscal neutrality is also a necessary component. Each revised system appropriately includes fiscal neutrality because the new formulas account for the extra costs of educating special students. However, none of the states in this study appear to base special student funding on empirical data that reflect the actual costs of educating them. Because poor districts typically have the greatest concentration of special-needs students, the revised funding schemes continue to leave poor districts short-changed. To be fiscally neutral, states must account for income differences among districts when determining how much money a poor district must raise to qualify for state aid. Systems that have a flat minimum contribution irrespective of wealth still impermissibly condition aid on a district's ability to tax.

To enrich the quality of education for poor students, states' funding schemes must also induce districts to improve and expand upon their core curricula and implement accountability mechanisms. Empirical evidence illustrates that withholding total local discretion and creating incentives such as broad-based assessment, long-range planning requirements, and specific program mandates successfully encourage curriculum improvement. On the other hand, experience shows that states that do not implement such

measures fail to improve the quality of education. To ensure equal educational opportunity, states must take on a more regulatory role in education and school districts need to relinquish a degree of local academic control.