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# Challenges to Funding School Facilities in Colorado

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## I. INTRODUCTION

Imagine attending school in a building where sewage runs down the halls, and in the middle of winter there is no hot water for showers in the gyms. The locker rooms are so dismal that opposing teams refuse to use them. There is no heat in the middle of winter, nor air conditioning in rooms where the temperatures exceed ninety degrees. Imagine teaching in such a facility, compounded by the fact that you cannot plug in both the copier and the coffee pot at the same time, because the electrical system cannot handle the load. The conditions inside the school physically make you sick.

These conditions, amongst many other appalling conditions, have existed in Colorado schools for many years. Yet, Colorado, like many other states, has shifted its priority from adequately funding schools (as well as other social services) to tax refunds. Over the past fourteen years, despite overwhelming evidence that its school facilities are crumbling, unsafe, and unhealthy, Colorado's political leaders have chosen tax refunds over providing a safe and healthy environment for the state's children. Further, while outside the scope of this Article, it is clear that this attitude has permeated not only school facilities but also the provision of services to many of Colorado's neediest children. This Article will give an overview of Colorado facilities-funding challenges, followed by an account of the *Giardino*[1] litigation, my involvement in it, and the aftermath of the settlement reached.

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1. Giardino v. Colorado State Bd. of Educ., No. 98-CV-0246 (Denver Dist. Ct. 1998).

## II. BACKGROUND

In the early 1980s, Colorado passed significant property tax reform/reductions known as the Gallagher Amendment.[2] *Gallagher* has resulted in dramatic reductions in residential property taxes, most noticeably in the 1990s. From 1991 to 2001, the average home value in Denver increased 179%, while the residential assessment rate fell 36%. This resulted in average property taxes as a percent of personal income declining by 20%.[3] In 1992, Colorado passed and incorporated into its constitution the Taxpayer's Bill of Rights ("TABOR").[4] TABOR's stated purpose was to limit growth in government and to require voter approval for any new or increased taxes. TABOR is the strictest tax and expenditure law in the country.[5] It requires that any surplus over the constitutional limit of growth and inflation be refunded to taxpayers. Because growth and inflation are not accurate limits on growth of government, TABOR has resulted in enormous refunds, tax reductions, and reductions in services to citizens. As in other parts of the country, during the 1990s, many areas in Colorado experienced times of unprecedented growth and prosperity. From 1996 to 2000, the combination of this prosperity and the TABOR amendment resulted in the State generating approximately $3.25 billion in TABOR surplus revenue, which was refunded to taxpayers and businesses.[6] Rather than seek approval to invest in Colorado's future by asking the voters to keep surplus revenue, Colorado's legislature chose to pass permanent tax and fee reductions, totaling at least $450 million in 1999 and 2000 alone.[7]

At the same time, Colorado's spending on public education fell precipitously. In fact, in 1999, the report *Quality Counts*,[8] gave Colorado an "F" in adequacy of resources. During this time of unprecedented prosperity and tax refunds and reductions, aside from a small

2. COLO. CONST. art. X, § 3(1) (Gallagher Amendment).
3. STAFF OF COLO. LEGIS. COUNCIL, PUBL'N NO. 518, HOUSE JOINT RESOLUTION 03-1033 STUDY: TABOR, AMENDMENT 23, THE GALLAGHER AMENDMENT, AND OTHER FISCAL ISSUES 64 (Sept. 2003), *available at* http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2003/research/03TaborFinalReport.pdf.
4. COLO. CONST. art. X, § 20.
5. BELL POLICY CTR., TEN YEARS OF TABOR: A STUDY OF COLORADO'S TAXPAYER'S BILL OF RIGHTS (2003); STAFF OF COLO. LEGIS. COUNCIL, *supra* note 3, at 20.
6. STAFF OF COLO. LEGIS. COUNCIL, *supra* note 3, at 29.
7. STAFF OF COLO. LEGIS. COUNCIL, PUBL'N NO. 00-06, ISSUE BRIEF: TAX REDUCTION MEASURE PASSED IN 2000, (Aug. 2, 2000), *available at* http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2000/research/issuebrf-00-6.PDF. Due to the structure of the state funding for capital construction, Colorado spent an unpredicted $1.3 billion on capital construction projects around the state, but none of that was for capital construction for public K–12 schools.
8. STAFF OF COLO. LEGIS. COUNCIL, PUBL'N NO. 03-06, ISSUE BRIEF: HOW COLORADO COMPARES IN K–12 FUNDING, (Jan. 22, 1999), *available at* http://www.state.co.us/gov_dir/leg_dir/lcssraff/2003/research/Issuebrief03-06.pdf.

amount distributed through the School Finance Act,[9] Colorado spent no general fund dollars on K–12 capital construction. A study in the mid-1990s estimated the outstanding capital construction need for K–12 at approximately $2.1 billion.[10] The Colorado State Auditor recently updated that number to $4.7 billion.[11] A group of school districts and professional organizations in Colorado undertook a study of their own to examine the decline in school funding in Colorado during the 1990s. They hired school finance experts John Augenblick and John Myers to study how much school funding had declined in Colorado, using 1988 as a base year. There was no magic to choosing 1988 as the base year, other than that Augenblick and Myers felt that they had reasonable data in that year from which to compare subsequent years. Their report, which is still being published annually, is known as the "gap analysis." This study measured funding against increases in inflation and student enrollment. The largest gap found during the study was the 1995–1996 period, during which Colorado underfunded its schools by at least $543 per pupil. This amounted to a $341 million minimum shortfall for public education for one year alone, and that did not even include the lack of support for capital construction.[12]

The Colorado Constitution's Education Clause requires that "the general assembly provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously . . ."[13]

Colorado was one of the first states to have its school finance system challenged as unconstitutional, basing the analysis on the equity of the school finance system. *Lujan v. State Board of Education*[14] is a critical piece of background, because after the decision it provided a sense of protection to Colorado's government representatives—they felt they did not need to take steps to provide equitable or adequate financial resources to Colorado's children. In *Lujan*, the plaintiffs challenged the system of financing as violative of the state constitutional provisions ensuring thorough and uniform, equal protection and due process. The plaintiffs essentially argued that equal expenditures were required under the constitution. In finding for the State, the Colorado Supreme Court held that

9. COLO. REV. STAT. §§ 22-54-101 to -125 (2004).

10. John Augenblick & John Myers, Capital Construction Study (1998) (unpublished report) (on file with author).

11. COLO. STATE AUDITOR, PUBLIC SCHOOL CAPITAL CONSTRUCTION PROGRAM, COLORADO DEPARTMENT OF EDUCATION, PERFORMANCE AUDIT (May 2003).

12. JOHN AUGENBLICK & JOHN MYERS, FUNDING IN COLORADO, 1995–1996 (on file with author).

13. COLO. CONST. art. XI, § 2.

14. 649 P.2d 1005 (Colo. 1982).

> [a] heartfelt recognition and endorsement of the importance of an education does not elevate a public education to a fundamental interest. . . . The constitutional mandate which requires the General Assembly to establish a "thorough and uniform system of free public schools," is not a mandate for absolute equality in educational services or expenditures. Rather, it mandates the General Assembly to provide to each school age child the opportunity to receive a free education, and to establish guidelines for a thorough and uniform system of public schools.[15]

Since the school finance system in *Lujan* was found to be constitutional, lawmakers came to believe that any system of finance that the State implemented was beyond review or criticism.

## III. LITIGATING *GIARDINO*

Against this backdrop, the decision was made to begin exploring what could be done in the area of school capital construction finance. Steve Kaufmann, an attorney at Morrison & Foerrester, had been thinking about and researching the issue of school finance in Colorado and was ready to challenge capital construction financing. I started this journey when I found myself on a panel with the superintendent Peg Portscheller, from Leadville, a small mountain town situated high in the Colorado Rockies, and listened to the descriptions of obstacles that faced both her and her students. Leadville sits nearly equidistant between two of the wealthiest counties in Colorado: Eagle (where Vail ski area is located) and Summit County (where the Keystone and Breckenridge ski areas are located). The total assessed value in Summit County is approximately $1.1 billion with an assessed value per pupil of $454,000.[16] In Eagle County, the total assessed value is $1.9 billion with an assessed value per pupil of $411,000.[17] Leadville's total assessed value is $79 million with assessed value per pupil of approximately $66,000.[18] The cost of living in Leadville is much lower than the ski area towns, and the population in Leadville is largely Hispanic and transitory. Leadville provides the source of inexpensive labor that is essential to the ski/tourist industry which is vital to both Eagle and Summit Counties. The conditions in Leadville's schools were deplorable. Amongst the many conditions Superintendent Portscheller faced, she didn't have a roof that didn't leak, she had asbestos in her buildings, she had ancient, failing boilers that could not heat her schools, and faulty construction left her with poor insulation and construction defects that made heating and improving her building conditions exceptionally challenging. Its capital construction needs far outnumbered the amount of resources available to it, even had it

15. *Id.* at 1022.
16. DEP'T OF EDUC., STATE OF COLO., RANKING OF ASSESSED VALUE PER PUPIL FY 2002–2003.
17. *Id.*
18. *Id.*

been able to bond to its fullest capacity. For a very small increase in their mill, the taxpayers in Summit County had recently built a new high school, valued in excess of $20 million, and several new elementary schools. The contrast between the three counties—Lake, Summit, and Eagle—was dramatic and provided a clear illustration of the fundamental problem with capital construction funding in Colorado.

It was clear that parents from the Leadville school district would make the ideal plaintiffs in our suit. I met Dr. John and Erin Giardino and their son Alec and knew that I had the perfect representatives. Alec was a sophomore in high school with dreams of being an actor. He was smart, witty, self-assured, and handsome. Erin had been a school board member and was very committed to both public education and the community of Leadville. In fact, she still volunteered at the school district as time would allow. She had raised three older children who had all attended school in Leadville. John Giardino was one of the only dentists in town. He was also very civic-minded, served on the board of the community college, and was an ardent supporter of public schools. We also represented several other similarly strong families from Leadville. We wanted to ensure that we had a geographic representation for Colorado as well as children and parents from both rural and urban schools. So, we represented parents and children from schools in Sanford and Centennial (both located in the San Luis Valley), Las Animas (located in the eastern plains), Aguilar (located in southern Colorado), and Pueblo (a city south of Colorado Springs with a population of approximately 100,000 people). Each and every parent who participated in this case recognized that he or she would receive no financial benefit, regardless of the outcome. Further, chances were that the suit could take long enough that the facilities would never be improved while their children were in attendance. We were representing the parents *pro bono*.

Further, while the school districts were not part of the litigation, each superintendent and school board in these districts was very supportive. As the litigation proceeded, these relationships would prove to be vital to the case. It proved to be a very brave superintendent who had the courage to step forward and admit that the quality of his or her facilities were below acceptable standards. These brave superintendents and school boards also served as spokespersons for the issues related to capital construction and were helpful in building support for the litigation even when their own professional organizations were not supportive. In fact, due primarily to the hard work of these superintendents, we did not have any dissenting voices among the superintendents during our litigation. While I am certain that there were a few administrators who disagreed with our suit, they were certainly in the minority and were quiet in their dissent.

Capital construction in Colorado at the time of filing the *Giardino*[19] suit was a matter left almost entirely to the local districts. The State provided minimal support through the school finance formula for capital. That support was also to finance buses, insurance, and maintenance, along with the demands of already underfunded schools, and was not a means for schools to either maintain or build new facilities. The only other method available to schools was to raise money through local bond elections. Schools were limited in their bond elections to a percent of their total assessed value. This situation resulted in a high-property-wealth district's ability to raise significant amounts of capital to build and improve its facilities with minimal increases in its mill rates. The property-poor districts, in contrast, were rarely even able to sufficiently maintain their facilities. The total discrepancy in assessed value was between Sanford with a total assessed value around $3 million and Aspen with an assessed value in excess of $1 billion. At the time of filing, capital expenditures were funded in part pursuant to an annual allocation of $216 per pupil from the general fund to each district's capital reserve fund.[20] School districts funded the vast majority of their capital expenditures by contracting for bonded indebtedness following voter approval.[21] Such indebtedness is repaid through property taxes levied against and paid by district taxpayers.

Significant to this discussion is that TABOR's limit on school districts imposes a limit on property taxes equal to inflation in the prior calendar year plus a measure of growth, defined as a change in student enrollment. TABOR prevents a school district from imposing a mill levy above that from the prior year without voter approval. Prior to TABOR, the General Assembly set property taxes for school finance. With the adoption of TABOR, the General Assembly became less involved in determining property taxes. School districts levy the same number of mills from year to year, unless the mill levy would raise property taxes more than TABOR allows. To avoid this TABOR tax revenue limit, a school district must reduce its mill levy. Under TABOR, an increase in assessed value greater than inflation and the percent change in enrollment permanently reduces a school district's mill levy. As a result of varied growth in assessed value, Colorado's school districts now impose a wide range of mill levies. Prior to TABOR, the majority of the school districts imposed the same mill levy, forty mills. Now, the statewide average is approximately twenty-four mills and many rural districts are still carrying mill levies in the high thirties or forty mills.[22] This makes passage of bond elec-

19. Giardino v. Colorado State Bd. of Educ., No. 98-CV-0246 (Denver Dist. Ct. 1998).
20. COLO. REV. STAT. § 22-54-105(2) (2004).
21. *Id.* § 22-42-101 to 22-42-129.
22. STAFF OF COLO. LEGIS. COUNCIL, *supra* note 3, at 90–91.

tions even more challenging in districts with high mill levies as these citizens are paying higher-than-average property taxes and generally are earning less than those individuals living in higher property-wealth districts such as Denver and other front-range districts.[23]

In our lawsuit, we raised four claims: a claim under the Thorough and Uniform Clause of the Colorado Constitution,[24] equal protection and due process claims under the Colorado Constitution, and a taxpayer claim similar to that raised in New Hampshire under the *Claremont* decision.[25] We also sought to overturn *Lujan* to have education declared a fundamental right in Colorado. We did not seek any monetary damages, but rather, sought a declaration that the then-current funding system for capital construction in Colorado was unconstitutional. We also filed for class certification. We had initially hoped to file our case in Leadville, where the trial court judge would have been intimately familiar with the discrepancies in funding. However, under Colorado law, any constitutional challenges must be brought in Denver,[26] so we filed our case in Denver District Court. In our Complaint, we wanted to educate the judge about the generally dismal conditions facing school districts throughout Colorado, so we provided the following introductory paragraph:

> From 1988–1996, the number of students enrolled in Colorado's public schools increased by more than 91,000 or 17%. In the same period, the number of students requiring special education programs grew by 36.8%. The number of students considered "at risk" increased by 42.3%. In the same period, the number of teachers per 1,000 students has decreased 2.5%. The number of certified staff other than teachers has dropped 11.7% and the number of non-certified staff has decreased 6.5%. Per pupil expenditures have increased since 1988 from just over $4,000 to $4,679 in 1995–96. Inflation has increased 29.9% since 1988 based on the Denver–Boulder Consumer Price Index. When adjusted for inflation, per pupil spending has actually decreased by slightly more than 10% or $543 per student. Although these factors relate to operational expenditures which are not at issue in this Complaint, any such expenditures place enormous financial pressure on the School Districts and diminish their ability to meaningfully address issues related to their respective capital requirements.[27]

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23. H.R.J. Res. 03-033, 64th Gen. Assem., Reg. Sess. (Colo. 2003), *available at* http://www.leg.state.co.us/2003a/inetcbill.nsf/billcontainers/FA655EF8E0B9652387256CDF0074F014/$FILE/HJR1033_enr.pdf.
24. COLO. CONST. art. IX, § 2.
25. Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997). *Claremont* held, "taxes shall be laid, not merely proportionally, but in due proportion, so that each individual's just share, and no more, shall fall upon him . . . . The residents of one municipality should not be compelled to bear greater burdens than are borne by others." *Id.* at 1357. For more on the *Claremont* case, see Andru H. Volinsky, *New Hampshire's Education-Funding Litigation:* Claremont School District v. Governor, *635 A.2d 1375 (N.H. 1993)*, modified, *703 A.2d 1353 (N.H. 1997)*, 83 NEB. L. REV. 836 (2005).
26. Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs, 528 P.2d 1305, 1307 (Colo. 1974); *see also* COLO. REV. STAT. §§ 24-4-101 to 24-4-108 (2004).
27. Plaintiff's Complaint at para. 33, *Giardino* (No. 98-CV-0246).

The Colorado Attorney General at the time was Gale Norton, who is now U.S. Secretary of the Interior. The Attorney General's office immediately filed a Motion to Dismiss, relying principally on *Lujan* and arguing *stare decisis*. Our response argued that *Lujan* stood for the narrow proposition that the thorough and uniform and equal protection provisions of the Colorado Constitution did not require equal expenditures per student. Our Complaint was based on adequacy which was not addressed in *Lujan*. We further asserted that each school finance case was *sui generis* and should be decided on its own merits. I remember one telling moment at oral argument when the Denver District Court judge at the time, Judge Herbert Stern, stated to Steve Kaufmann that he was no more than a "legal speed bump" on the way to the Supreme Court. The trial court denied Defendants' Motion to Dismiss on three of the four claims, stating:

> It is the province and duty of the judiciary to determine what the law *is*, and it is the function of the court to rule on the constitutionality of the *maintenance* of the state system of education. *This* determination of the law does not involve the quagmire of social policy that 'courts are ill-suited to determine' . . . .[28]

The court was persuaded by the reasoning that school finance cases must be decided individually and held that "plaintiffs must be afforded an opportunity to prove beyond a reasonable doubt that the current system is not constitutional as rationally related to a legitimate state purpose."[29] The court granted Defendants' Motion to Dismiss on the taxpayer claim. The State also opposed our class certification. The details of this were uneventful, but we were eventually granted class status.

Once the State filed its answer, its defense became more defined: blame the school districts. This message was disguised as affirmative defenses based on financial mismanagement and local control. There was a pervasive attitude amongst many of Colorado's officials that the condition of the public schools simply was not their problem. The State's defenses failed for several reasons. First, they were unable to prove any financial mismanagement by any of the districts. Primarily, their attack was based on differing opinions as to how limited resources should be spent. These opinions surfaced during discovery. For example: was it reasonable to spend money on a lunch program during the summer for kids for whom that was their only hot meal of the day; was it cheaper to drive Suburbans or Subarus; should money be spent on full-day kindergarten or preschool programs for at-risk children? Questions such as these consumed many days of depositions

28. Order on Motion to Dismiss at 5, *Giardino* (Denver Dist. Ct. 1998) (No. 98-CV-0246).

29. *Id.* at 6.

and clearly did not amount to financial mismanagement, but, rather, well-intentioned superintendents trying to do right by their students.

Second, the issue of local control failed for several reasons. It is difficult to argue local control when there simply is insufficient money for a district to be able to meet its obligations. In the property-poor districts, these superintendents, even if they were at their debt capacity, could not come close to meeting their outstanding need. Moreover, Colorado had just finished adopting standards for a statewide curriculum. These standards were established after a lengthy series of meetings with professionals statewide and resulted in standards of learning for everything from music to math.[30] The only area in which there were no standards was for buildings, where the State asserted that local control prevented them from establishing such standards. There were absolutely no standards in Colorado to which any school had to comply. There were no personnel in the Colorado Department of Education, nor anyone in state government, who had any idea as to the condition of any K–12 facility in the state. There was only one person in the state who reviewed any building plans related to K–12 schools for all 176 school districts, and he was located in the Department of Labor. His job was to single-handedly review architectural plans for new construction or significant renovation of all K–12 schools. This gentleman had no resources other than an antique computer. He didn't even have a state car so that if he wanted to visit a site, he had to wait for a "pool car" to become available.

Discovery was long and generally uneventful, with the State taking multitudes of depositions. Remember that the State had virtually unlimited funds with which to defend the case, and we were working *pro bono,* with no budget for expert witnesses, court reporters or other costs of litigation. Our best guess was that the State spent nearly $1 million in defending this case, prior to trial. The State hired Jim Guthrie and his colleagues[31] to testify that all was well in the schools in the State of Colorado. They also retained Eric Hanushek to testify that "money doesn't matter," the theme for which Dr. Hanushek has become somewhat famous in school finance litigation. We were overwhelmed by the support of many volunteer architects and engineers who each adopted a district and performed evaluations of the facilities in each district and provided expert witness reports for trial. We were also very fortunate to have both the former Commissioner of Education for Colorado, Dr. Cal Frazier, and his deputy assistant, Dr. Ed Steinbrecher, volunteer to testify for us as experts as well. Two professors/architects from Colorado State University also volunteered their time and resources as experts for us. These two professors, Drs.

30. COLO. REV. STAT. § 22-7-407 (2004).

31. Dr. Guthrie and Dr. Smith are experts who generally testify for the States in matters relating to school finance.

Hill and Dunn, ran the Rural Education Assistance Program ("REAP"), which performed analyses of various rural school district facilities to assist these districts with their bond elections. Drs. Hill and Dunn assisted with the expert testimony establishing the standards to which all schools should conform. We retained Dr. Richard Salmon to assist us with Dr. Guthrie, et al. The State only deposed two class representatives, Dr. Giardino and Michael Vallejo. These two depositions went very well, with both providing testimony of decreased opportunities for their children solely as a consequence of where they attended school.

Finally, it was time for trial. We had the good luck of trying this case during the last week of the legislative session. We also had a sympathetic reporter who put our case on the front page of the Denver paper every day with stories of failing facilities and disabled plaintiffs unable to attend schools because of inadequate facilities. After three days of this type of newspaper coverage, we were asked to discuss settlement. Prior to these discussions, the only amount that had been discussed had been $5 million dollars: an amount that was easily rejected. However, this time the Colorado Legislature was willing to discuss more significant amounts to contribute towards settlement. After several days of agonizing discussions, a tentative settlement was reached at $190 million. While this number paled in the face of the overwhelming need, there were immediate health and safety hazards that could be addressed by an immediate infusion of money into the system. Thus, after this offer, we had to meet with our clients to discuss the settlement offer with each of them to ascertain their position on the settlement. After a road trip to meet with our clients and gaining their approval, sometimes reluctantly, we went back to the Legislature. Because we had only sought declaratory relief, the Legislature's involvement in the settlement was essential, given their promise of the infusion of dollars into K–12 capital construction. I made sure that the Legislature understood that $190 million was not the amount necessary to meet the outstanding need of school facilities in Colorado. Several legislators read into the legislative record prior to the vote on the settlement statements about the total need and the fact that the settlement did not come close to meeting that need.

In structuring the language of the statute that was the vehicle for providing the revenue stream for the settlement, we requested that several elements be included. First, we requested that health and safety needs be the first requirement for an award of funds. We also insisted that the wealth of the district be considered prior to any award. Another of our requests was that the State provide what the State called "technical assistance" to districts in determining the na-

ture and extent of the capital construction deficiencies.[32] It was essential to me to have this in the settlement, as many of the rural districts did not have the capacity to either hire or retain the experts necessary to perform the construction evaluations to determine what the extent of their need was, whether it was more cost-efficient to remodel or build a new facility and other related questions. After a court hearing approving the settlement, the case was settled.

## IV. POSTLITIGATION: FUNDING THE SETTLEMENT

Subsequent to the settlement, two other events occurred, which, fleetingly, improved the capital construction landscape in Colorado. In 2000, the voters of Colorado passed an initiative that required the State to allocate excess lotto funds to K–12 capital construction.[33] The federal government even passed legislation giving capital construction dollars to the states for K–12 facilities. It was beginning to look like we might start to make a dent in some of the health and safety needs in schools in Colorado.

However, after 2000, enforcement of the settlement became exceptionally challenging. As with most states, Colorado's economy began a very steep and precipitous decline in 2000–2001. Thus, the State began cutting programs and budgets, including the settlement. Nearly every year, we have had to appear in front of the Joint Budget Committee and explain why the State should fund the settlement only to hear complaints about how broke the State was and how they couldn't afford the paltry $20 million the settlement requires. Yet, the State passed legislation requiring that a matching amount be set aside for charter school capital construction,[34] despite the fact that charter schools provide services to a small percentage of children and generally these children attend schools in facilities in much better conditions than those schools requesting funding from the State. Our settlement specifically allowed charter schools to apply for funding along with all other schools in the state.

With the exception of the first few years, the Colorado Legislature has failed to meet its obligations under the settlement agreement. This year, the State only funded $5 million of the $20 million required under the settlement. This $5 million was received only because charter schools received $5 million in funding. There will also be an additional $2 million in lotto funds distributed to the schools. Throughout the entire session, the threat of no funding loomed over us. The majority of the $5 million will be allocated to finishing a project in Agui-

32. COLO. REV. STAT. §§ 22-43.7-101, 22-54-117 (2004).
33. Referendum E. *See* Colorado Secrtary of State Elections Center website *at* http://www.sos.state.co.us/pubs/elections/2000_ballot_initiatives.htm (last visited Feb. 1, 2005).
34. COLO. REV. STAT. § 22-43.7-105 (2004).

lar, one of the districts represented in the original suit. The remaining dollars were allocated to replacing failing boilers. There were over 178 applications totaling more than $35 million in projects. The budget projections for the next few years show $0 for the settlement, despite the State being required to refund hundreds of millions of dollars under TABOR.

## V. CONCLUSION

Looking back, prior to our filing of *Giardino*, the issue of poor facilities and the inability to meet those needs was not on many people's radar screens in Colorado, unless of course you happened to live in a district where one of these dilapidated school buildings was located. The process of educating the public and politicians is a long, complicated one. However, there is now one foundation in Colorado, the Donnell–Kay Foundation, that is studying this issue with its eye towards a ballot measure to remedy those schools facing the most dire circumstances. The local Denver paper recently ran a front page story and an editorial about the abysmal school conditions facing children in rural Colorado and called on the legislature and other leaders to solve the problem.[35] As in many other states, the challenge to adequately fund schools is a difficult one that takes place over many years. However, as long as children in Colorado are forced to attend school where sewage is running down the halls, where ceilings are leaking or falling in, where a fire escape is a ladder leaning against a second-story window, and where there is no adequate heating in the winter, the battle to gain adequate funding will continue.

The State has always had a variety of excuses as to why it cannot provide an appropriate learning environment for its children. The State denies that going to school in completely inadequate facilities affects a child's learning. Just ask a child how he or she feels about the State's commitment to him or her after traveling to a sporting event in a more affluent district. School districts are creatures of the State and were created "for the equalization of the benefits of education throughout the state."[36] Until these disparate conditions are no longer allowed to exist, Colorado will continue to be in violation of its constitutional obligation to its students. Further, what has been lacking is leadership at either the executive or legislative level to seriously evaluate and remedy the problem. None of the roadblocks or obstacles I have described in this Article is insurmountable. However, as long as tax refunds remain a higher priority than a safe and healthy environment for all of Colorado's children, despite the fact that the Consti-

35. Editorial, DENV. POST, Aug. 3, 2004; *School Repairs Languish*, DENV. POST, Aug. 1, 2004.

36. COLO. REV. STAT. § 22-30-102(1) (2004).

tution requires no less, no legislative solution appears imminent. Thus, it appears that it must be up to the courts to uphold those rights of the children whose rights legislators have ignored.