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Separate But Unequal: One School District's Struggle for Fair Educational Facilities Funding in New Mexico

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I. INTRODUCTION

The following are my personal thoughts as attorney for the Zuni School District on the ongoing litigation over capital improvement funding in New Mexico. Zuni initiated the litigation. It was subsequently joined by the Grants-Cibola School District represented by Bruce Boynton and the Gallup-McKinley Independent School District represented by George Kozeliski. The litigation has been truly collaborative. This Article contains only key thoughts and opinions and should not reflect on either Bruce or George.

II. *ZUNI* LITIGATION AND FUNDING REQUESTS

The Zuni Public School District is the first Native-American-controlled independent public school district in the nation, established by the Zuni tribal members to meet the needs of their children. Following a fourteen-year community effort, the District was formed on July 1, 1980.

In the 1970s, New Mexico tackled the critical and divisive issue of the wide disparity in the abilities of school districts to raise operational funding. Funding for school operations at this time was based upon local revenues. Districts with healthy bonding capacities had a

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clear advantage over those without. Around this time, the case of *Natanobah v. Board of Education of the Gallup-McKinley School District*¹ was filed, which raised an equal protection argument because facility expenditures within the school district were apparently not equitably distributed between the schools within the districts. This litigation may have had some effect on expediting the New Mexico Legislature's efforts to statutorily restructure operational funding.

The New Mexico Legislature eventually developed an "equalization formula" for operational funding.² Local bonding was now minimized as a vehicle for operational funds. Instead, a variety of funding sources were pooled through deposits into the State's general fund. Distributions to school districts were made based on district student counts, with a variety of statutory adjustments for factors that increased operational costs, such as small student populations, large rural areas, and the like.³

Following this effort, the State declared that the similar inequity in capital improvement funding would be the next funding issue addressed. However, nothing happened. Over the ensuing decades, as in the previous years, most school districts financed their capital improvements using their local bonding capacities. Those that had little bonding capacity went hat-in-hand to the State's capital outlay committee and literally begged for funding. Money from that legislative committee was distributed to districts without reference to any recognizable standard. The annual distribution event had a Christmas party atmosphere, with awards being announced, followed by applause for the beneficent committee members. The usual pattern was to partially fund district requests. Any substantial project which relied upon this process would usually require repeated annual visits to the committee. Meanwhile, districts with appreciable bonding capacities built state-of-the-art facilities. Over the next two decades, the gap between the wealthy and the poor school districts widened. Zuni was one of the poor school districts.

Zuni's facilities for the most part were old, deteriorating, and in deplorable condition. Most electrical wiring was from fifty to eighty years old, wearing thin, short-circuiting, and unable to support modern technology. Gas lines were of a similar condition, with gas leaks constantly plaguing the district. A disaster nearly occurred in a classroom where a serious short-circuit developed contemporaneously with an undiscovered gas leak in the same room. A 1914 cast iron water pipe, with lead patchings, was discovered and replaced. Water was not potable in most facilities. The heating was generally a jerry-

1. 355 F. Supp. 716 (D. N.M. 1973).

2. N.M. STAT. ANN. §§ 22-8-1 to -45 (Michie 2003).

3. The legislature has tinkered with the formula over the years, and it is generally lauded as an important pioneering effort.

rigged combination of old boilers, water heaters and space heaters, none of which were adequate and all of which presented risks. Air conditioning was either inadequate or nonexistent. Most roofs needed replacement. Some facility walls were split open, forcing abandonment of some classrooms. The Zuni facilities were worlds apart from those enjoyed by many other districts.

The Zuni district is contained within the confines of the Zuni Reservation which consists almost entirely of land held in trust by the United States for the Pueblo of Zuni. There is no ability to tax such federal trust property.⁴ Zuni was limited to taxing some mobile homes and electric transmission lines, which produced little revenue. Efforts to work with the State Department of Education and the legislature to develop a source for reliable capital improvement funding were fruitless. In January 1998, Zuni filed suit in the district court in McKinley County, New Mexico.⁵

The local district judge assigned to the case was a retired FBI agent in his sixties suffering from some health problems and having to deal with everything from domestic relations and criminal matters to now a challenge to the constitutionality of the State's system for funding capital improvements for school districts. The judge was clearly concerned about the issue even though the litigation had the potential to overwhelm an already bulging docket.

In October 1998, the Gallup and Grants school districts joined as plaintiffs. The Gallup school district is large and sprawling and includes a large area of land within the Navajo Nation. Not only is Gallup's tax base also compromised, it is faced with the daunting task of having to build educational facilities to service remote pockets of populations. The Grants school district is comprised of several substantial Indian Pueblos. The reactions statewide to this new alliance were swift. Lobbyists and representatives of the wealthier districts mobilized a majority of the other districts in the state to fight the efforts of the plaintiff districts to restructure capital funding. The tactic was to distort the position of the plaintiff districts and claim that we were attempting to dismantle the equalization formula which applied to the operational side of school finance. Operational funding was not even involved.

The three districts were a collective pariah. Some school districts supported this effort, but hesitated to do so publicly because of feared retribution by the State and its various agencies. Attempts were made by the legislature to have Zuni drop the litigation in exchange

4. FELIX COHEN, *FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 218-22 (1982 ed.).

5. *Zuni Pub. Sch. Dist. v. New Mexico*, No. CV-98-14-11 (11th Jud. Dist. of N.M. 1998). McKinley County is in the western part of the state and includes portions of the Navajo and Zuni Reservations.

for funding certain of Zuni's facility needs. Zuni refused the offer. Implied threats also surfaced—to the effect that if Zuni did not cooperate, it would suffer retaliation from the legislature and from the State Department of Education. Similar approaches were made to the other plaintiff districts. None of the three districts broke rank. Subsequently, the legislature appropriated funds to allow Zuni to substantially complete a protracted high school construction project, apparently convinced that Zuni, despite its demonstrated resolve, would drop the litigation.⁶ When Zuni accepted the funding and reconfirmed that the litigation had to proceed, the legislature and the State Department of Education were outraged. Zuni was excoriated by some legislators and state officials for not capitulating to the bribe. One woman board member of the Grants district was assaulted with profanities by a high state official. This event almost erupted into a brawl when another Grants board member expressed outrage and demanded apologies—which, fortunately, were forthcoming.

Meanwhile, the litigation was continuing. The State was represented by the Attorney General's office. The Attorney General's approach to the litigation was to attack the districts on procedural issues. Defending the merits of the challenge was difficult, because the problem was so apparent. Motions to dismiss claiming a failure to join indispensable parties, a lack of standing, and other procedural matters were filed. These were successfully resisted without much difficulty. After the court required that the State Superintendent of Public Education be joined, the State attempted to disqualify the judge. The district judge refused to step down. An application to the New Mexico Supreme Court for a writ of prohibition was unsuccessful. An attempt to remove the case to Federal Court because of a § 1983⁷ civil rights injunctive relief claim was also unsuccessful.

On May 26, 1999, the districts filed a Motion for Summary Judgment. No discovery was taken. Our objective was to reach the merits as quickly and cost-effectively as possible. The financial and statistical information from the State Department of Education was used to support the motion, along with several affidavits. New Mexico's Constitution requires a "uniform system of free public schools sufficient . . ." to educate students.⁸

In June of 1999, forty-one school districts which were opposing the efforts of the plaintiff districts attempted to intervene in the proceedings. All forty-one districts were represented by the same law firm that represented the Albuquerque Public School District. The district

6. PUBLIC SCHOOL CAPITAL OUTLAY COUNCIL, PSCOC AWARD HISTORY, 10 YEAR SUMMARY (94-03), at 2 (2004) (available in the Schmid Law Library at the University of Nebraska College of Law).

7. 42 U.S.C. § 1983 (2000).

8. N.M. CONST. art XII, § 1.

court did not allow the intervention and an appeal was taken by the forty-one school districts. Finally, after discussions with their attorneys, all forty-one school districts decided to dismiss the appeal and disappeared from the proceedings.

In October 1999, the District Court granted the motion for summary judgment.⁹ As the complaint included a count for a § 1983 civil rights action, there was still a portion of the case left unresolved. The Attorney General applied for an interlocutory appeal to the Court of Appeals. Again, this effort was unsuccessful. The case remained in District Court.

The representatives of the State appeared neither surprised by nor resentful of the final summary judgment. In fact, most of the State's attorneys and staff members who were involved recognized fully that the capital improvement funding system was in dire need of correction. The politicians had other thoughts. The court properly gave the legislature an opportunity to "fix" the problem, realizing that the court did not have the jurisdiction to craft legislation.

New Mexico survives economically on oil and gas production, federal research facilities, tourism and government employment. The main cities are Santa Fe, Albuquerque, and Las Cruces, located along the Rio Grande corridor. The bulk of the middle and upper-middle classes and the major political leaders of the legislature are focused here. These communities, and smaller communities which are able to tax oil and gas interests, would feel most threatened by the Zuni litigation because of their current access to local revenues. I surmise that there are many from these communities who feel, whether consciously or unconsciously, that if there is equalization in the relative abilities of school districts to fund capital improvements, this will adversely impact those districts that are the beneficiaries of the current system, and any new benefits bestowed on the poorer districts would be only lost on those students who do not traditionally benefit from educational opportunities.

I believe it was with this attitude that the New Mexico Legislature then went to work in the 2000 session and subsequent sessions. To its credit, it was able to divert between sixty and one hundred million dollars of state oil and gas revenues to school capital improvement funding on an annual basis, a substantial increase from past years.¹⁰ Oversimplifying, the legislation is now as follows. A deficiency-corrections unit was established that coordinated visits to all school districts to identify deficiencies (essentially building code violations). These deficiencies would be corrected for every school within every district at the State's expense. Next, the State would create "adequacy" stan-

9. See *Zuni Pub. Sch. Dist.*, No. CV-98-14-11.

10. N.M. STAT. ANN. § 22-24-2 (Michie 2003).

dards which would standardize classroom sizes, athletic field needs, parking needs, facility needs, and so on. Following the correction of deficiencies, schools would then be brought up to a level of "adequacy." Funding to bring schools up to a level of adequacy would be distributed on a sliding scale, depending upon a district's bonding capacity. Districts such as the Zuni with little bonding capacity would have approved projects paid for entirely by the State. Districts with greater bonding capacities would only have a percentage of their projects covered. The wealthiest district would be entitled to only ten percent funding from the State. Bonding capacities, however, were left untouched.

All eighty-nine New Mexico school districts would stand in line for both the deficiency and the adequacy funding. Priorities were based upon the particular project and not upon a district's wealth or lack thereof. Initially, it was identified that there were \$3 billion worth of school construction needs in the state. The sliding scale that applied to the adequacy funding was developed so that approximately fifty percent of the total statewide adequacy need would be funded with state funds, with the balance to be covered by local funds.¹¹

Zuni had problems with this legislation. First, the State would not fund any improvement that exceeded the level of adequacy if *only* state funding were used. However, other school districts could still tap into their bonding capacities, and as before, add their local revenues to the funds provided by the State and exceed adequacy standards to the extent local finances permitted. Zuni, which has no bonding capacity, was condemned to the level of adequacy. Under the new legislation, the vast majority of the districts can well exceed that level. The adequacy standards are mostly minimal, and it is anticipated that district projects will, for the most part, far exceed those standards if local funding is available, as has been the history thus far with this relatively new legislation.

Second, Zuni projected that funding \$1.5 billion in needs (assuming the other half is funded by local revenues) at the rate of \$100 million per year would take time, even assuming that, over the years, no new needs arise. Zuni anticipated standing in line for years with its needs unfulfilled while other districts forged ahead relying on their bonding capacities and special legislative appropriations.

At the end of several legislative sessions, Zuni had caused a dramatic improvement in educational funding in New Mexico, but Zuni's status in relation to the wealthier districts was probably worse. The wealthier districts now had their major building deficiencies paid for entirely by the State, preserving their bonding capacities for other im-

11. N.M. LEGIS. COUNCIL SERV., REPORT OF THE PUBLIC SCHOOL TASK FORCE (Dec. 2000).

provements. While the wealthier districts in the past paid for capital improvements with their bonding capacities, these bonding capacities were now supplemented at least to some extent with state funding. While in the past Zuni could apply annually for funding before the State's capital outlay committee, once Zuni is ranked and given a place in line, its only option is to wait. Zuni's Superintendent, Dr. David Cockerham, felt a palpable disdain from legislators and state officials over these years of the litigation. If the current resentment continued, Zuni feared that it would be ranked near the bottom in priority.

The background as to how this legislation was developed, I believe, reveals that the legislation's shortcomings were not inadvertent, but were political responses to Zuni's unwelcomed efforts. In developing this legislation, a blue ribbon panel was created, headed by Robert Desiderio, the Dean of the law school at the University of New Mexico. The Dean did then and continues to enjoy a good reputation. He was an Albuquerque resident and closely tied to several legislative leaders. He has subsequently retired from the law school and is in a law partnership with the former speaker of the House of Representatives, also from Albuquerque.

The Dean, being well-respected and knowledgeable, led the blue ribbon commission in its appointed task. The Dean gave his advice on the direction that the legislation should take. Taking his cue from selected language from several Arizona decisions,¹² the Dean opined that the standard to be observed in developing legislation was one of "adequacy." Neither equity nor equality should be a concern. Constitutionally, he claimed, school districts were only entitled to adequate facilities. If other districts could raise money through local bonds and far exceed adequacy, that was simply a testament to local control, a hallowed and valued concept in education. How local control played any role at Zuni was not explained. With no local money to spend, there was no discretion to exercise. With adequacy standards and the State literally controlling all aspects of adequacy construction, Zuni was not much more than an observer of its own projects.

Zuni saw the future as soon as the Dean announced his opinion. Attempts were made to convince the Dean and the panel that something had to be done about the disparities between the bonding capacities of the school districts. Strenuous arguments were made that a system where all districts are adequate, except some districts are more adequate than others, harkened back to the cruel days of separate but equal, except we now were regressing to separate but une-

12. See, e.g., *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994). For more on Arizona litigation, see Timothy M. Hogan, *Arizona School Finance: A Primer on Strategy and Enforcement*, 83 NEB. L. REV. 869 (2005).

qual. Zuni's appeals were ignored. No one appeared to understand. Zuni tried rephrasing its concerns, wondering if perhaps it was not making itself clear. Zuni's efforts in this regard had no effect.

Several years later, Bruce Boynton and I were invited to address a class of University of New Mexico law students who were studying educational funding. We explained our problem with the system. The students understood immediately. In fact, we were informed that the Dean had previously addressed the class on this same topic, and the students attempted, without success, to discuss these problems with the new system. The message to the students was clear. The status quo would not change without a fight with those who enjoy a favored position. While reforms were needed to bolster capital improvement funding, the ability of the wealthy and politically favored districts to rely upon local wealth would not be touched. The concept of adequacy would be fine for Zuni and the other unfortunate districts (never mind that there is not sufficient funding to even get to the adequacy level in the near future), yet it would not be suitable for the privileged.

The plaintiff districts then returned to court and requested that the court analyze the most recent legislative efforts and determine whether they met the directives of the courts' judgment.¹³ The court decided to appoint a special master, which was suggested by the parties. The parties all agreed on a retired Justice of the New Mexico Supreme Court from Albuquerque. The special master had a background in education law. He had been on the Albuquerque school board. He also had represented some smaller school districts.

The hearing on the legislation was then held before the special master. The same arguments were made as before, and an additional argument was made that special legislative appropriations were also skewing the system. The Dean testified for the State. He opined that adequacy, was the only standard that needed to be followed. If a district were brought up to a level of adequacy, that was the extent of its entitlement. Other districts exercising their bonding capacities and exceeding adequacy did not present a problem. That was just the exercise of local control.

The special master ruled that the State's approach was appropriate, except that special legislative appropriations needed to be taken into account. The district court signed off on the special master's report. In response, the legislature did provide that adequacy funding would be proportionately reduced by any direct legislative appropriations.

Zuni was obviously disappointed. The adjustments for direct legislative appropriations had little effect on the problem. Districts that received direct legislative appropriations and had healthy bonding ca-

13. See *Zuni Pub. Sch. Dist.*, No. CV-98-14-11.

capacities simply did not need any further contributions from the State. Ten- and fifteen-percent state contributions meant little—the districts could probably save that much by avoiding the extra construction costs caused by the state bureaucracy. There were no lines in which to wait. Since deficiencies were already cured by the State, bonding capacities were preserved. These districts would not be restricted by adequacy standards.

In the meantime, the State has employed a divide-and-conquer approach. During the deficiency-corrections phase of the recent legislation, the State decided that renovating a Grants district high school was not cost-effective. Instead, the State built for Grants an extraordinary new high school. The State also built impressive new facilities for the Gallup school district. Zuni was not included in these acts of generosity. Grants was given in excess of \$23 million in deficiency correction funding. Gallup received in excess of \$13 million. Zuni received in excess of \$5 million in deficiency corrections. The amount of funds received by Grants and Gallup was wholly disproportionate when compared to the amounts received by most other districts. The message to Grants and Gallup was clear. The system is working wonderfully. The message to Zuni was less encouraging. Zuni recently heard from other school districts that they had been informed that Grants, Gallup, and Zuni had received, in the aggregate, a disproportionate percentage of the deficiency-corrections funds. The implication was that Grants, Gallup, and Zuni were exercising whatever leverage they had through the litigation to obtain more funding than otherwise appropriate. While Zuni should not have been lumped together with Grants and Gallup in this instance, doing so was clearly intended again to divide the school districts. Funding Grants and Gallup at one level and Zuni at another was clearly done to further divide the plaintiff districts. How this will play out remains to be seen.

While Zuni did receive some \$5 million for deficiency corrections, this barely began to address many of the basic deficiencies. The State's Deficiencies Corrections Unit has its own list as to what qualifies as a deficiency and what does not. Roofs were not considered essential and still remain deficient at Zuni. Many gas, electrical, and water line problems remain unaddressed. The list could go on. The Zuni facilities director estimates about one-third of the problems have been addressed. This does not even involve the adequacy of the facilities once they are repaired to some acceptable condition. As will be discussed further, because of the current structure of the system, the current rankings and the lack of adequate funding, these problems will in all likelihood remain unaddressed for many years, unless Zuni dips into its operational funding or finds another source.

The adequacy funding begins after the deficiency-corrections phase is completed in September 2005. During the deficiency-corrections phase, the old system of going before the capital outlay committee remains. Zuni recently went before the capital outlay committee with some facility funding requests. The requests were denied in their entirety.

Recent events concerning the functioning of the system have proven to support Zuni's original prognosis. A 2003 study¹⁴ prepared by a State contractor assessing the conditions and needs of the state's schools was most revealing. During this process, a formula was developed, known as the NMCI, which attempts to quantify the condition of buildings. A low NMCI percentage (0%–5%) would reflect a relatively good condition in the building. Anything greater would reflect an increasingly poor condition, with a 10% NMCI traditionally regarded as poor. However, apparently realizing that the cost of bringing schools within the 0–5% NMCI range would be prohibitive, the study stated that the contractor “routinely finds existing average K–12 conditions throughout the United States to fall within the range of 25%–35%”¹⁵ and therefore districts such as Zuni, which have no option but to rely upon state funding, should be satisfied with that NMCI range. In other words, Zuni would not be relegated to a position of adequacy, but to a position of approximate adequacy, at best.

Even with this, the study showed that over a ten-year period, bringing schools to a level of approximate adequacy with a 20% NMCI condition would cost approximately \$253 million per year. Even if New Mexico is able to maintain a funding level of \$100 million per year and can rely upon payment of \$100 million dollars from local funding, the result for Zuni and others that rely exclusively upon state funding obviously will be problematic.

Adding to this situation is a newly devised state ranking system for projects and school districts, which weight certain areas of need greater than other areas. A growth factor is then applied and rankings developed. It is this most recent ranking system that propelled an Albuquerque high school located in a relatively affluent neighborhood into first position for receiving state funding in the approximate amount of \$20 million out of the \$100 million annual budget.¹⁶

This new process ranks Zuni seventy-fifth out of eighty-nine districts, sitting behind over \$3 billion in identified repair costs, replacement costs and other related expenditures. It is this ranking process

14. PUBLIC SCHOOL CAPITAL OUTLAY COUNCIL, No. 3D/I, NEW MEXICO K–12 STATE-WIDE FACILITIES CONDITION: FINAL REPORT FOR FISCAL YEAR 2003–2004 (May 18, 2004).

15. *Id.* at 13.

16. PUB. EDUC. DEP'T, STATE OF N.M., SCHOOL RANK REPORT BY WEIGHTED NMCI (2004); PUB. EDUC. DEP'T, STATE OF N.M., GROWTH REPORT (2004).

that has specific Zuni facilities ranked 103, 131, 394, 552, 559, and 657 out of a total of 729 projects.¹⁷

Between July 1, 2002 and June 30, 2003, other school districts were able to sell \$223,659 in bonds. Albuquerque is bonded at nineteen-percent capacity with \$148 million in outstanding bonds.

III. CONCLUSION

The Zuni Board of Education is comprised of extraordinary, determined, and courageous individuals. They could have capitulated, sold out and been heroes of the moment. But they understand that their calling is to provide a permanent system for the Zuni district and other similarly situated districts that guarantees an educational infrastructure conducive to learning that is not second-class. It took Zuni fourteen years to create its own public school district. It is prepared to spend this and more to develop a funding system that is fair and constitutional. Working with these community leaders whose commitment and self-sacrifice is unwavering has been truly a privileged and humbling experience.

17. Zuni's high school ranked at number 103 with an NMCI rating of 92.62%; Zuni's intermediate school ranked at 131 has an NMCI rating of 84.30%, and Zuni's elementary school ranked at 394 has an NMCI rating of 40.62%. *See supra* note 16.