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OKLAHOMA SCHOOL FINANCE LITIGATION: SHIFTING FROM EQUITY TO ADEQUACY

Mark S. Grossman*

This Article traces the history of Oklahoma school finance litigation from the initial challenge based on funding inequity to a recent lawsuit founded on alleged constitutional inadequacies in the state system. Although the legal challenge based on funding inequity was unsuccessful in the courts, the pendency of the suit helped push the state legislature toward some reforms. The threat of a new lawsuit based on alleged inadequacies in the state school system, together with a serious funding shortfall, propelled a comprehensive education reform plan through the state legislature in 1990. The association of local school boards that led the equity challenge nevertheless remained dissatisfied with the lack of sufficient funds and funding reform and again sued the state, claiming that, despite reforms, the school system was and would remain constitutionally inadequate. The author, one of the attorneys for the association, looks back at the genesis of the association and the impact of the equity lawsuit in Oklahoma and explains how this group of local school boards came to challenge the state school system as constitutionally inadequate. The author also explains how the association became sidetracked and ultimately was pulled apart before trial by political factors and tensions between its original goal of funding equity and the demands of an adequacy-based constitutional challenge.

INTRODUCTION

In September 1990, a group of forty local school boards in Oklahoma filed suit to challenge the constitutionality of the state's common school funding system.¹ This group called itself the Fair School Finance Council of Oklahoma (FSFC).² The FSFC contended that the state's funding system delivered funds insufficient to enable school districts to offer an adequate

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1. Petition for Declaratory Judgment and Injunctive Relief ¶¶ 1-2, Fair Sch. Fin. Council of Okla., Inc. v. State (Okla. Dist. Ct. filed Sept. 6, 1990) (No. CJ-90-7165) [hereinafter *Fair Sch. Fin. Council II*] (on file with the *University of Michigan Journal of Law Reform*).

2. *Id.* ¶ 1.

education to all schoolchildren in the state, as guaranteed by the state constitution.³ I was a principal attorney for the FSFC, responsible for drafting the petition and subsequent briefing, arguing motions before the district court, and leading the discovery effort. I was intimately involved in the decision to proceed with the lawsuit and helped to shape the strategy that this group pursued in Oklahoma. This Article outlines the events leading up to this lawsuit, explains the FSFC's approach and purposes, and explores the impact of the FSFC's suit on school finance in Oklahoma.

The lawsuit was noteworthy in several respects. First, the FSFC originally was formed to pursue funding equity among local school districts, but it turned to the theme of adequacy after the state supreme court rejected its earlier equity challenge in *Fair School Finance Council I*.⁴ In general terms, the "equity" argument was that students in school districts with funding below state norms were being denied their right to equal educational opportunity implicit in the state constitution.⁵ The "adequacy" argument proceeded from the proposition that students in underfunded districts were denied the right to an adequate education as guaranteed by the state constitution.⁶ Second, the lawsuit was commenced despite approval, by the Oklahoma House of Representatives, of sweeping education reform legislation that promised to generate millions of additional dollars for the common school system.⁷ Finally, the suit was premised largely on prospective effects, rather than on past results from inadequate funding.⁸

While *Fair School Finance Council II* had a promising beginning, political factors combined to stall the litigation. Many school districts stepped back from the campaign for fear of losing those reforms instituted prior to the adequacy litigation.⁹ The attention of the media, the State Legislature, and the public was diverted to other services that also complained

3. *Id.* ¶ 2.

4. *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1137 (Okla. 1987) [hereinafter *Fair Sch. Fin. Council I*].

5. *Id.* at 1141.

6. *Id.* at 1149.

7. H.B. 1017, 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 167 (codified as amended in scattered sections of OKLA. STAT. tit. 70). As will be discussed, *infra* text accompanying notes 62-69, not all of H.B. 1017 was enacted into law. Thus, the entire piece of legislation will be referred to hereinafter as H.B. 1017.

8. *See infra* Part II.A-II.B.

9. *See infra* Part III.

of underfunding: welfare, prisons, mental health, and higher education. As a result, common school education slipped from the center stage in Oklahoma, and the lawsuit has never been pursued to a judgment.

I. BACKGROUND

A. *The Oklahoma School Finance System Circa 1980*

The FSFC was incorporated in 1980 by local school board members and superintendents long frustrated with the school funding system.¹⁰ As in most states, public schools initially were funded with ad valorem property taxes assessed by school districts and counties.¹¹ The Oklahoma Constitution set limits on the millage rates allowed to support schools, and the millages became insufficient within a few years.¹² Although the constitutional limitations were adjusted several times,¹³ the adjustments could not keep pace with financial need. Amending the Oklahoma Constitution to increase any taxing authority was a laborious process, particularly in a state with strong agrarian,

10. Articles of Incorporation, Fair Sch. Fin. Council of Oklahoma, Inc., art. 4 (filed Mar. 11, 1980) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter FSFC Articles of Incorporation]; cf. Minutes of a Meeting of the Fair School Finance Council, Aug. 11, 1979 (documenting that participating schools voted unanimously to continue the Fair School Finance Council and noting that the Council had been meeting prior to incorporation) (on file with the *University of Michigan Journal of Law Reform*).

11. R.L. WILLIAMS, THE CONSTITUTION AND ENABLING ACT OF THE STATE OF OKLAHOMA ANNOTATED 137-38, 150 (1912) (reporting OKLA. CONST. art. X, §§ 9, 10, 26). Ad valorem taxes are taxes levied on property based on its assessed value. *Id.* at 137, § 9 note. Generally, ad valorem taxes are levied by local government authorities, based on local government valuations, and are the traditional source for local school district revenue. JACK PARKER & GENE PINGLETON, FINANCING EDUCATION IN OKLAHOMA 1981-1982, at 6 (1981). Certain state revenues were dedicated to support common schools in Oklahoma, but these revenues were largely derived from ad valorem-type taxes and returned to the county from which they were generated. *Id.* In Oklahoma, 10% of the gross production tax on oil and gas produced in a county, most of the revenue from motor vehicle licenses and registrations, and revenue from the rural electric cooperative tax were all sent back to the county of origin to be apportioned among the school districts within that county. *Id.* at 7. Only revenue and interest from dedicated school lands were centrally distributed to school districts in Oklahoma based on average daily attendance. *Id.* at 7-8.

12. As evidence of these insufficiencies, the millage limitations were amended to provide more funding, and the State Legislature appropriated aid for so-called "weak" school districts. See *infra* text accompanying notes 27-28.

13. OKLA. CONST. art. X, §§ 9, 10, 26 and historical notes.

fiscally conservative roots. Common schools also had to compete with other social services, such as libraries and county health departments, for shares of the local ad valorem tax base.¹⁴

Consistent with its populist roots, Oklahoma exalted local control over the potential efficiencies of state control. Early in its history, the state was divided into several thousand school districts.¹⁵ In the school year of 1980–1981, the year in which the FSFC had commenced its original lawsuit, 618 school districts still existed, with a total average daily membership of only 565,000.¹⁶ Thus, the average district served less than 1000 students. Local tax assessors imposed their own classification and valuation practices within their jurisdictions so long as assessment percentages were within constitutional limitations.¹⁷ As early as 1924, the Tax Code Revision Commission complained, “it is a notorious fact that in scarcely any two counties is the property assessed in a uniform manner or at the same value.”¹⁸ The first report of the Oklahoma Tax Commission in 1932 noted similarly that “monstrous disparities have been shown to exist in the assessment of properties of the same kind and class in the several counties of the state for ad valorem taxation.”¹⁹

Traditionally, public utilities have been assessed at the highest rates.²⁰ In recent years the construction and operation

14. Alexander Holmes, *Oklahoma's Property Tax System: Theory and Practice* 7, 38–39 (1991) (finding that while originally only schools were allowed to receive ad valorem taxes, the county departments of health and cooperative joint library systems, vocational and technical schools, and emergency medical services were later given a share of the property tax) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*); see, e.g., OKLA. CONST. art. X, § 9A (county health department), § 9B (area vocational and technical schools), § 9C (emergency medical services), § 9D (solid waste management), § 10A (county libraries).

15. PARKER & PINGLETON, *supra* note 11, at 37.

16. 1980–1981 OKLA. STATE DEP'T OF EDUC. ANN. REP. 129.

17. See Holmes, *supra* note 14, at 3, 12–13. For discussions of the assessment disparities between counties and the State Board of Equalization's failure to comply with court orders to equalize the valuation of property across counties, see *State ex rel. Poulos v. State Bd. of Equalization*, 646 P.2d 1269, 1273 (Okla. 1982) [hereinafter *Poulos III*]; *Cantrell v. Sanders*, 610 P.2d 227, 231 (Okla. 1980); *State ex rel. Poulos v. State Bd. of Equalization*, 552 P.2d 1138, 1139 (Okla. 1976) [hereinafter *Poulos II*]; and *State ex rel. Poulos v. State Bd. of Equalization*, 552 P.2d 1134, 1137 (Okla. 1975) [hereinafter *Poulos I*].

18. Holmes, *supra* note 14, at 1.

19. *Id.* (citing 1932 OKLA. TAX COMM'N ANN. REP.).

20. Public utility property has been assessed at more than twice the average rates for commercial or industrial property. *Id.* at 33–34. The Oklahoma Tax Commission appraises public utility property because it generally is scattered throughout a large area and valuation is complex. *Id.* at 32. In 1976, the federal government prohibited

of an electrical power generating station within a particular rural school district in Oklahoma has been a tremendous boon to that school district, enabling it to collect revenues far in excess of relative need while keeping assessments on individual property owners low.²¹ Such assessment inequities and abuses generated a spate of lawsuits in the 1970s and 1980s.²² When the Oklahoma Supreme Court, in a series of rulings, ordered the State Board of Equalization to make assessments more uniform,²³ many of the locally elected assessors appeared in effect to thumb their noses at the court, either by carrying on as before or by making few substantive changes.²⁴

As a result of the assessment abuses, Oklahoma turned to a foundation aid system of state funding.²⁵ This system was intended to supplement the ad valorem system and to enable all school districts to fund "full educational opportunities for all children."²⁶ The state funding formula, however, should have been designed to encourage districts to levy the maximum allowable ad valorem millages and thus discourage any district from freeloading on state funds. A second category designated "Incentive Aid" was included in the state aid formula, and this additional money was offered if the school districts voted for

states from assessing railroad property at a greater rate than the state average for commercial or industrial property. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 306, 90 Stat. 31, 54 (codified as amended at 49 U.S.C. § 11,503 (1988)). The federal government extended similar protections to airline property in 1982. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 532, 96 Stat. 324, 701 (codified as amended at 49 U.S.C. § 1513(d) (Supp. V 1993)). As a result, owners of electric or gas utilities face the highest assessment rates of commercial or industrial property owners, and therefore school districts with power generating facilities typically have the most available revenue. See Holmes, *supra* note 14, at 32-34.

21. The Red Rock school district had a \$6.7 million general fund surplus in the 1984-1985 school year, which was nearly 190% greater than the revenues received that year by the district. Statistics compiled by Dr. William Anderson, consultant and former Superintendent of Schools for Norman, Oklahoma school district from the State Department of Education (Mar. 7, 1986) [hereinafter Statistics of Dr. Anderson] (on file with the *University of Michigan Journal of Law Reform*).

22. See, e.g., *Poulos III*, 646 P.2d 1269 (Okla. 1982); *Cantrell v. Sanders*, 610 P.2d 227 (Okla. 1980); *Poulos II*, 552 P.2d 1138 (Okla. 1976), *modified*, 646 P.2d 1269 (Okla. 1982); *Poulos I*, 552 P.2d 1134 (Okla. 1975).

23. See *supra* note 17.

24. See *Poulos III*, 646 P.2d at 1271-72 ("[T]he wide diversity of assessment percentages applied by the various county assessors to real property assessments within the counties has . . . continued to proliferate.").

25. Public School Foundation Act of 1965, 1965 Okla. Sess. Laws 742 (repealed 1971).

26. *Id.* § 2, 1965 Okla. Sess. Laws at 742.

additional allowed millages.²⁷ Nevertheless, this state aid system did little to equalize funding among rich and poor districts, despite legislative pledges to improve the inequities.²⁸ The disparities were perpetuated by the distribution of other state funds outside of the foundation aid formula, in the form of flat grants for statewide teacher and staff raises.²⁹

Many school districts also faced problems with constitutional limitations on capital expenditures. The Oklahoma Constitution

27. *Id.* § 8, 1965 Okla. Sess. Laws at 745. Equalization was perhaps impossible to achieve through state aid because the state constitution requires that local ad valorem levies for school purposes be approved each year by the local voters. OKLA. CONST. art. X, § 9. By the time the FSFC was formed in 1979, the constitution had been amended to provide for: (1) 5 mills of a regular county levy of 15 mills apportioned among school districts in the county; (2) an automatic, county-wide 4 mill levy, distributed among the school districts of the county; (3) a 15 mill school district levy imposed upon certification of need by the local school board; (4) an emergency 5 mill levy, if approved each year by a majority of voters in the school district; and (5) a "local support" levy of 10 mills, if approved each year by a majority of voters in the school district. *Id.* The amounts generated by 75% of the county levy and the 15 mill school district levy were subtracted from the foundation aid calculation, which effectively forced the school district to levy the 15 mills each year. Incentive Aid was conditioned on the school district voting an additional levy of up to 5 mills above the 15 mill levy. See 1971 Okla. Sess. Laws 763, § 9 (repealed 1981). As a practical matter, although all districts, wealthy and poor, might be levying the constitutional maximum, the impact might be reduced in most wealthy districts by low valuations and assessments. See Holmes, *supra* note 14, at 40-43 (finding that because Oklahoma counties had varying assessment practices, a wealthier school district might shoulder less of a burden if its property was undervalued).

28. As early as 1919, the State Legislature directed state appropriations to rural school districts to provide "adequate school facilities." OKLA. COMP. STAT. § 10,666 (appropriation 1921). In 1923, 1924, and 1925, the State set aside appropriations for "weak" schools for the same purpose; the State only released funds if the local school district levied the 15 mills then permitted by Article X, § 9 of the Oklahoma Constitution. 1923 Okla. Sess. Laws 265; 1924 Okla. Sess. Laws 121; 1925 Okla. Sess. Laws 2. In 1927, the idea that state aid should equalize funding among school districts became manifest with the creation of the "Special Common School Equalization Fund," from which the State Board of Education distributed state aid based on relative need and average daily attendance. 1927 Okla. Sess. Laws 141 (repealed 1949). In 1941, the concept of the "Minimum Program," to be financed by "Minimum Program Income" from the state, was introduced. 1941 Okla. Sess. Laws 402-03 (repealed 1943). In 1949, this aid was redesignated as "State Equalization Aid," which included "Basic Aid," a base-level state appropriation provided regardless of need. 1941 Okla. Sess. Laws 595-97 (repealed 1951). In introducing the term "Foundation Program Aid" in 1965, the State Legislature declared that "[s]tate support should, to assure equal educational opportunity, provide for as large a measure of equalization as possible among districts." 1965 Okla. Sess. Laws at 743-45.

29. PARKER & PINGLETON, *supra* note 11, at 49-50. Of the \$517 million appropriated to common schools in the 1980-1981 school year, \$276 million (53%) was distributed in flat grants for teacher and staff salary increases, while only \$211 million (40%) was distributed through the state aid formula. Brief in Chief of Appellant at 15-16, *Fair Sch. Fin. Council I*, 746 P.2d 1135 (Okla. 1987) (No. 56,577) (on file with the *University of Michigan Journal of Law Reform*).

allowed districts to vote to levy only up to five mills for "erecting, remodeling or repairing school buildings, and for purchasing furniture . . .".³⁰ In addition, the Oklahoma Constitution permitted school districts with an "absolute need" to incur further bonded indebtedness upon approval of three-fifths of the district voters, but limited total debt to ten percent of the assessed valuation of the district.³¹ This effectively handicapped districts that lacked higher-valued property. From these limitations developed the so-called "palace to shack" comparison of facilities between wealthy and poor districts.³² The FSFC's suburban school district members had been surrounding their schools with "temporary" metal buildings to deal with rapidly growing student populations, while rural district members had been forced to manage with antiquated and unsafe facilities. By the late 1970s, wealthier districts received as much as \$6200 per pupil annually and carried over large budget surpluses, while poorer districts had as little as \$1200 per pupil annually to spend.³³ A natural constituency thus had developed to pursue equity litigation.

B. Funding Equity Litigation

The goal of the FSFC upon its incorporation in 1980 was to pursue equity in common school funding.³⁴ Although the FSFC had only forty member school districts, a small percentage of the 620 school districts then existing in Oklahoma, the member districts represented a large proportion of the state's schoolchildren.³⁵ The FSFC group included the Tulsa school district, with the state's largest average daily attendance, most of the suburban school districts near Tulsa and Oklahoma City, and a number of the school districts in smaller cities.³⁶ Some poorer,

30. OKLA. CONST. art. X, § 10.

31. OKLA. CONST. art. X, § 26.

32. PARKER & PINGLETON, *supra* note 11, at 52-53.

33. Brief in Chief of Appellant at 18-19, *Fair Sch. Fin. Council I* (No. 56,577).

34. FSFC Articles of Incorporation, *supra* note 10, art. 4.

35. SANDY GARRETT, OKLA. SECRETARY OF EDUC., RESULTS 1990: OKLAHOMA REPORT (1990) [hereinafter RESULTS 1990] (reporting that the average daily membership (ADM) for all school districts in the school year prior to 1990, when the FSFC filed its adequacy suit, was 574,116.7, while total ADM for all school districts in the FSFC for that year was over 190,000) (on file with the *University of Michigan Journal of Law Reform*).

36. Petition for Declaratory Judgment and Injunctive Relief at 2, ¶ 1, *Fair Sch. Fin. Council II* (Okla. Dist. Ct. filed Sept. 6, 1990) (CJ-90-7165) (on file with the

rural districts, the smallest of which with a student population of less than 100, also joined the FSFC.³⁷

In 1980, the FSFC filed a lawsuit in state district court, alleging that the common school funding system violated the constitutions of both the Oklahoma and the United States.³⁸ The state responded by moving to dismiss for failure to state any constitutional claim, and the state district court granted the motion,³⁹ forcing FSFC to appeal to the Oklahoma Supreme Court. Briefing was completed in 1982, but the Oklahoma Supreme Court did not decide the appeal for over five years.⁴⁰

Although the State Legislature in the interim passed limited reforms to the financing system, progress toward funding equity was minimal. The Legislature instituted "hold harmless" provisions, which guaranteed that wealthier districts would not suffer any sudden loss of state aid.⁴¹ Although intended to be temporary, these provisions were repeatedly extended.⁴² The State Legislature also continued to appropriate money outside of the state aid formula for statewide teacher and staff salary raises,⁴³ irrespective of a school district's needs. Moreover, the Legislature removed transportation supplements from the foundation aid formula and instead distributed aid in the form of flat grants.⁴⁴ Thus, state money distributed outside of the formula continued to increase, exacerbating the funding level disparities between school districts. Oklahoma's wealthiest

University of Michigan Journal of Law Reform); see also RESULTS 1990, *supra* note 35, app. The Tulsa school district ADM for the 1989-1990 school year was 41,044.54. *Id.*

37. Petition for Declaratory Judgment and Injunctive Relief ¶ 1, *Fair Sch. Fin. Council II* (No. CJ-90-7165) (on file with the *University of Michigan Journal of Law Reform*); see also RESULTS 1990, *supra* note 35, app. The Nobletown school district was the smallest member of the FSFC, with an ADM of 47.65 in the 1989-1990 school year. *Id.*

38. Petition for Declaratory Judgment ¶ 1, *Fair Sch. Fin. Council I* (Okla. Dist. Ct. 1987) (No. CJ-80-3294) (on file with the *University of Michigan Journal of Law Reform*).

39. *Fair Sch. Fin. Council I*, No. CJ-80-3294 (Okla. Dist. Ct. 1987) (on file with the *University of Michigan Journal of Law Reform*), *aff'd*, 746 P.2d 1135 (Okla. 1987).

40. See *Fair Sch. Fin. Council I*, 746 P.2d 1135 (Okla. 1987).

41. OKLA. STAT. tit. 70, § 18-112 (repealed 1989).

42. The Oklahoma Legislature amended the "hold harmless" provision in OKLA. STAT. tit. 70, § 18-112 almost annually in the following session laws: Act effective July 1, 1986, ch. 259, § 20, 1986 Okla. Sess. Laws 1052, 1068; Act of July 30, 1985, § 15, 1985 Okla. Sess. Laws 1409, 1417; Act effective July 1, 1984, § 11, 1984 Okla. Sess. Laws 1112, 1121; Act effective July 1, 1983, § 16, 1983 Okla. Sess. Laws, 1085, 1095; Act effective July 1, 1982, § 12, 1982 Okla. Sess. Laws, 709, 720; see also Act effective Aug. 1, 1987, § 83, 1987 Okla. Sess. Laws 980, 1016 (reducing the "hold harmless" guarantee to 67% of any prior amount provided for the 1987-1988 school year).

43. See *supra* note 29.

44. PARKER & PINGLETON, *supra* note 11, at 11-12, 26-27.

school district, Red Rock, received revenue of \$21,553.55 per pupil for the 1984–1985 school year and carried over a general fund surplus of \$6.7 million, 190% of its annual budget,⁴⁵ yet it received nearly \$280,000 from the State as a “hold harmless” payment.⁴⁶

When the Oklahoma Supreme Court finally ruled in November 1987, it upheld the dismissal of the FSFC suit.⁴⁷ As anticipated, the court rejected the federal constitutional claim under the United States Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez*.⁴⁸ The court also dismissed the state constitutional claim, holding that the Oklahoma Constitution does not guarantee equal educational opportunity in the sense of equal educational expenditures.⁴⁹ Drawing on the *Rodriguez* decision, however, the court suggested that the Oklahoma Constitution does create a right to an “adequate” education.⁵⁰ The court did not expound on the meaning of adequacy under the constitution,⁵¹ so the FSFC was thus free to argue its own interpretation of adequacy in subsequent litigation.

45. Motion to Remand Case for Amendment of Petition and Reconsideration at ex. A, *Fair Sch. Fin. Council I*, 746 P.2d 1135 (Okla. 1987) (No. 56,577) (on file with the *University of Michigan Journal of Law Reform*); Statistics of Dr. Anderson, *supra* note 21.

46. Motion to Remand Case for Amendment of Petition and Reconsideration at ex. A, *Fair Sch. Fin. Council I* (No. 56,577) (on file with the *University of Michigan Journal of Law Reform*). In an effort to provoke the Oklahoma Supreme Court to act, the FSFC’s attorneys presented this information to the court, asking that the case be remanded to the trial court for re-examination of its decision in light of the worsening funding disparities. Brief in Support of Motion to Remand Case for Amendment of Petition and Reconsideration at 15 n.4, *Fair Sch. Fin. Council I* (No. 56,577) (on file with the *University of Michigan Journal of Law Reform*). The state supreme court, however, never acted on the motion.

47. *Fair School Finance Council I*, 746 P.2d at 1151.

48. *Id.* at 1145–46 (citing *Rodriguez*, 411 U.S. 1, 40 (1973)).

49. *Id.* at 1149.

50. *Id.* at 1149–50 (“The plaintiffs also argue that compulsory school attendance requires that schools be equally funded. . . . Whatever merit such argument may have, it is of no avail where a charge fairly cannot be made that a child is not receiving at least a basic adequate education.”).

51. *Id.* at 1150.

C. Task Force 2000 and House Bill 1017

The Oklahoma Supreme Court left the FSFC with an opening on the adequacy issue, but the FSFC was understandably hesitant to change its focus from equity to adequacy. Funding inequity was an appealing theme because the disparities were obviously unfair and more readily quantifiable than adequacy. The fact that a number of school districts in Oklahoma were able to carry over large budget surpluses from year to year, while many others struggled, was difficult to defend. By contrast, adequacy was much less defined, and potentially divisive along different lines from the equity issue. For example, if adequacy is measured solely by student performance on standardized tests, then many rural districts, even comparatively wealthy ones, that have student test scores below those of suburban students from more affluent, better-educated families, could argue for an entitlement to an even greater share of state funds to raise student performance.

In the aftermath of *Fair School Finance Council I*, the FSFC initially adopted a wait-and-see approach, hopeful that the State Legislature would act on reform measures to forestall an adequacy lawsuit. The Legislature did little, however, until a funding crisis developed.

That crisis arose in mid-summer 1989, when it became apparent that a number of school districts lacked sufficient funds to purchase textbooks for all schoolchildren in the district for the coming school year.⁵² Teachers already were reportedly spending an average of \$359 each year from their own funds on textbooks and supplies, and the Oklahoma Education Association threatened a teacher boycott if educational needs were not addressed.⁵³ Governor Henry Bellmon called the State Legislature into emergency session in August 1989 to address this crisis.⁵⁴ The Legislature quickly became bogged down in a generalized debate over education reform.⁵⁵ To avoid a protracted

52. Exec. Order No. 89-08, reprinted in 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 141; Paul English, *Bellmon Calls Special Session on Education, Taxes*, DAILY OKLAHOMAN, July 12, 1989, at 1.

53. English, *supra* note 52, at 1; Memorandum in Response to Legislative Request from Gerald E. Hoeltzel, State Superintendent of Public Instruction 1 (Aug. 11, 1989) (on file with the *University of Michigan Journal of Law Reform*).

54. English, *supra* note 52, at 1.

55. Chris Casteel, *Session Focuses Attention on School Needs*, SUNDAY OKLAHOMAN, Aug. 27, 1989, at 1.

session, the Legislature called upon a recently created citizen advisory committee, Task Force 2000, to prepare, by November 1989, a comprehensive education reform plan, including proposals on financing the reforms.⁵⁶ The Legislature then adjourned until the plan was due to be submitted.

The Legislature had authorized and created Task Force 2000 earlier that year in order to study and report on educational reform at a much more leisurely pace.⁵⁷ The task force's membership had not even been fully determined when the Legislature abruptly ordered it to produce a report by November 1989.⁵⁸ Task Force 2000 was led by George Singer, a longtime public school reform supporter from Tulsa.⁵⁹ The Task Force held a number of public meetings within a relatively short period, and Singer drafted the Task Force's report.⁶⁰ The report's recommendations fell into three general categories: (1) reform of the ad valorem-based funding system; (2) creation of new funding sources for common school education, with all new funding distributed through the state aid formula; and (3) a shift to accountability and an outcome-based policy, whereby the state would set broad objectives and permit local school districts to decide on and implement the means to achieve the desired outcomes.⁶¹

When the Legislature reconvened, the Task Force 2000 recommendations were incorporated in a bill known as House Bill 1017.⁶² Most of the recommended policy reforms were included, to be implemented generally along the five-year timetable recommended by Task Force 2000. House Bill 1017 provided funds for education from certain new tax increases,⁶³ but not to the levels recommended by Task Force 2000.⁶⁴ In addition, some

56. H. Con. Res. 1002, 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 279.

57. H.J. Res. 1033, 42d Leg., 1st Reg. Sess., 1989 Okla. Sess. Laws 1661.

58. H. Con. Res. 1002, *supra* note 56, at 279.

59. Affidavit of George A. Singer ¶ 1, *Fair Sch. Fin. Council II* (Okla. Dist. Ct. filed Sept. 6, 1990) (No. CJ-90-7165) (on file with the *University of Michigan Journal of Law Reform*).

60. *Id.* ¶¶ 6, 9.

61. TASK FORCE 2000, OKLAHOMA'S PUBLIC EDUCATION: A BLUEPRINT FOR EXCELLENCE at ii-iii, 50-55 (1989) [hereinafter TASK FORCE 2000 REPORT].

62. H.B. 1017, 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 167 (codified in scattered sections of OKLA. STAT. tit. 70 (1991)). For a discussion of the differences between House Bill 1017 and the Task Force 2000 recommendations, see *infra* text accompanying notes 104-08.

63. H.B. 1017, § 98, 1989 Okla. Sess. Laws at 236 (codified at OKLA. STAT. tit. 62, § 41.29a (1991 & Supp. 1994)).

64. See, e.g., H.B. 1017, § 99, 1989 Okla. Sess. Laws at 236 (codified at OKLA. STAT. tit. 68, § 2355) (1991 & Supp. 1994) (adjusting the state income tax brackets for

of the funding reforms were dependent on the passage of proposed constitutional amendments designed to make the level of ad valorem funding more uniform and dependable.⁶⁵ These constitutional amendments, which were less extensive than those recommended by Task Force 2000, were scheduled for a state-wide vote in June 1990.⁶⁶

Passage of House Bill 1017 seemed to exhaust its proponents' political capital. Although the proposed constitutional amendments did not actually raise ad valorem taxes, anti-tax groups organized a campaign against the amendments, and in June 1990, the electorate rejected the amendments.⁶⁷ The members of the FSFC perceived that they were then left to the task of implementing a comprehensive education reform plan without any hope of receiving sufficient funds.⁶⁸ Because the districts

individuals and raising the corporate income tax rate); H.B. 1017, § 100, 1989 Okla. Sess. Laws at 239 (codified at OKLA. STAT. tit. 68, § 2370 (1991)) (raising the privilege tax rate imposed on banks and credit unions and increasing state sales and use taxes). For a discussion of Task Force 2000's funding recommendations, see *infra* text accompanying notes 91-101.

65. See H.J. Res. 1005, 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 267. This resolution proposed that Article X, § 9 of the Oklahoma Constitution be amended to provide for an automatic annual school district levy of 44 mills. *Id.* § 2, 1989 Okla. Sess. Laws at 270. This would have replaced the 5 mills from the regular county levy dedicated to the schools, the additional 4 mill county levy, the 15 mill school district levy, the 5 mill emergency levy, and the 10 mill "local support" levy authorized under the constitution. *Id.* § 2, 1989 Okla. Sess. Laws at 268-70; see also OKLA. CONST. art. X, § 9 (setting ad valorem millage limits). Any millage over 39 mills would have been dedicated to a school building fund. H.J. Res. 1005, § 2, 1989 Okla. Sess. Laws at 270. Annual elections on the 5 mill emergency levy and the 10 mill "local support" levy would have been discarded, although an election would have been permitted to lower the millage or increase it to the 44 mill maximum. *Id.* § 2, 1989 Okla. Sess. Laws at 268-70. The constitution would have been amended to redirect the 5 mill school district building fund levy to vocational and technical schools. *Id.* § 2, 1989 Okla. Sess. Laws at 270; see also OKLA. CONST. art. X, § 10 (permitting optional higher millage rate for erecting public buildings). H.J. Res. 1005 also would have amended the constitution to provide that ad valorem revenue attributable to any portion of each railroad, airline, public service corporation, or commercial or industrial property's fair cash value in excess of \$500,000 would be deposited in a central fund and distributed to school districts through the State Aid Formula, along with all revenue from gross production taxes, vehicle license and registration fees, and rural electric cooperative taxes dedicated to support common schools. H.J. Res. 1005, § 2, 1989 Okla. Sess. Laws at 270-72; see also OKLA. CONST. art. X, § 12a. Finally, the constitution also would have been amended to direct revenues from school lands for distribution through the State Aid Formula. H.J. Res. 1005, § 3, 1989 Okla. Sess. Laws at 272; see also OKLA. CONST. art. XI, § 3. These amendments were apparently intended to establish greater equity, rather than increase ad valorem taxes.

66. H.J. Res. 1005, *supra* note 65, at 267.

67. *Id.*

68. See Sue Briante, *State School-Funding Suit Likely*, TULSA TRIB., July 24, 1990, at 3A; Jim Killackey, *Superintendents' Lawsuit to Seek Funding Change*, DAILY OKLAHO-

were faced with state aid funding penalties if they failed to implement reforms,⁶⁹ the FSFC turned once again to litigation.

II. THE CHALLENGE BASED ON ADEQUACY

The potential funding problems faced by school districts in the summer of 1990 were formidable, yet the FSFC's decision to pursue litigation was not easy.⁷⁰ Local school boards risked political embarrassment for asserting that they had not provided an "adequate" education to students. Thus, the FSFC had to argue that the substantive reforms recommended by Task Force 2000 and embodied in part in House Bill 1017 were necessary to provide an "adequate" education in the future but that revenues were insufficient to implement those reforms.

The fear remained that the public would perceive the plaintiff school boards as greedy and ungrateful for the tax increases contained in House Bill 1017. To combat this possible perception, a second theme was developed: that Oklahoma schools lagged behind schools in surrounding states and the nation generally and could not catch up with other states even with the new revenue from House Bill 1017. The idea was borrowed from the successful Kentucky school finance litigation, in which Kentucky was shown to rank near the bottom nationally and last among surrounding states in various categories of educational spending and performance.⁷¹ In past years, Oklahoma has ranked near the bottom, in the same categories, and in

MAN, June 28, 1990, at 1 (reporting that after "defeat . . . of a state question that would have redistributed school revenues more equally through a common state fund," members of the FSFC announced they would file a lawsuit to "force a more equitable distribution of education funds"); Lou A. Wolfe, *Lawsuit Expected After Questions Fail*, J. REC. June 28, 1990, at 2, 5.

69. See OKLA. STAT. tit. 70, §§ 18-113.1 to -113.2 (1991 & Supp. 1994) (providing for the loss of state aid for each child in excess of class-size limitations established under H.B. 1017).

70. As noted in the Introduction, I was one of the attorneys who represented the FSFC in this litigation. References in the text to the difficulties faced in the litigation are based on my knowledge and experiences in the litigation. I have attempted to explain what was known or understood generally in the litigation, without disclosing any confidential matters subject to attorney-client privilege.

71. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 197 (Ky. 1989). For a more thorough discussion of the *Council for Better Education* litigation, see C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J.L. REF. 599 (1995).

some instances, below Kentucky.⁷² The argument that Oklahoma, as a state, lagged behind national levels helped to deflect criticism of individual school boards that admitted their inability to provide an "adequate" education, because the argument suggested that this was true of other school boards within the state.

The members of the FSFC agreed to go forward on the strength of these two themes, although some were reluctant. In September 1990, the FSFC commenced the suit against the Governor, the majority leaders of the State House and Senate, the Superintendent of Public Instruction and State School Board, and the State Treasurer.⁷³ The suit initially received positive publicity, although the question most frequently raised by the media with FSFC representatives was whether a successful suit would result in more new taxes. In prior speeches, Oklahoma Attorney General Robert Henry had expressed disagreement with the decision in *Fair School Finance Council I*⁷⁴ and was expected to be sympathetic to the new suit. After meetings between counsel for the FSFC and the Attorney General's office, Attorney General Henry decided not to move to dismiss the case for failure to state a constitutional claim, as had been done in response to the prior lawsuit based on the equity theory. This decision meant that the FSFC would have the opportunity to make an evidentiary record in the trial court before the case reached the Oklahoma Supreme Court. Accordingly, the FSFC retained experts and organized for discovery, in expectation of a trial on the merits of its claims.

The FSFC was further heartened by an answer to the lawsuit that Governor Bellmon filed separately. Bellmon admitted that the right to a basic, adequate education, as guaranteed by the Oklahoma Constitution, was and would continue to be denied under the existing school financing system.⁷⁵ He further

72. See U.S. Dep't of Educ., *State Education Performance Chart, 1982 and 1989*, EDUC. WK., May 9, 1990, at 28-30 [hereinafter *Education Performance Chart*].

73. Petition for Declaratory Judgment and Injunctive Relief at 1, *Fair Sch. Fin. Council II* (Okla. Dist. Ct.) (No. CJ-90-7165) (on file with the *University of Michigan Journal of Law Reform*).

74. Bill Johnson, *Henry Claims Financing of Public Schools Illegal*, J. REC., Oct. 20, 1989, at 1 ("I do not think the present system is defensible," and "I don't know how I would defend it"); Chris Brawley, *Unfair School Funding Ripe for Challenge, Henry Says*, DAILY OKLAHOMAN, Oct. 20, 1989, at 1 ("I'd love to try to bring the lawsuit myself").

75. Answer of Defendant Henry Bellmon ¶ 5, *Fair Sch. Fin. Council II* (No. CJ-90-7165) (on file with the *University of Michigan Journal of Law Reform*). Governor Bellmon seemed frustrated with the State Legislature over school finance reform and

admitted that revenues were insufficient to enable school districts to comply with the standards and requirements set by House Bill 1017, as the FSFC had alleged in its petition.⁷⁶ Moreover, Bellmon conceded that the FSFC was entitled to the injunctive and declaratory relief requested.⁷⁷ One of the defendant State Board of Education members, who was also a member of Task Force 2000, announced his support for the lawsuit, stating: "I hope the attorney general's office won't vigorously oppose the lawsuit. I want to lose."⁷⁸

A. Defining Adequacy Standards

One of the principal tasks in the lawsuit was to define a constitutionally adequate education. The relevant state constitutional provisions offered little assistance:

Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state⁷⁹

and:

The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.⁸⁰

The term "adequate" does not appear, nor even the term "efficient," as found in some other state constitutions.⁸¹

perhaps was less inhibited in his answer than he might otherwise have been had his term not been coming to an end. The only claim he opposed was the FSFC's request for attorney's fees. *Id.* ¶ 12.

76. *Id.* ¶ 6.

77. *Id.*

78. Jim Killackey, *Education Board Member Supports Funding Lawsuit*, DAILY OKLAHOMAN, Sept. 28, 1990, at 4.

79. OKLA. CONST. art. I, § 5.

80. OKLA. CONST. art. XIII, § 1.

81. See, e.g., KY. CONST. § 183 (requiring the General Assembly to "provide for an efficient system of common schools throughout the State"); N.J. CONST. art. VIII, § 4, ¶ 1 (commanding the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools"); TEX. CONST. art. VII, § 1 (requiring the Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools").

Nevertheless, the Oklahoma Supreme Court in *Fair School Finance Council I*⁸² was willing to read the term "adequate" into the state constitution.⁸³ Use of this term was also consistent with the 1924 Oklahoma Supreme Court decision *Miller v. Childers*,⁸⁴ in which a citizen asserted that state aid to so-called "weak" schools violated the state constitution.⁸⁵ In rejecting this challenge, the court construed the state constitution to require "an *efficient* and *sufficient* system . . . with some degree of uniformity and equality of opportunity."⁸⁶ Without any Oklahoma case law defining the term "adequate," however, the FSFC was left largely free to establish a definition of adequacy.

The FSFC turned first to the State Legislature's previous pronouncements. Several minor pieces of reform legislation that preceded House Bill 1017 had set out lofty general state goals for education.⁸⁷ House Bill 1017 added the following language:

The Legislature, recognizing its *obligation* to the children of this state to ensure their opportunity to receive an *excellent* education, and recognizing its obligation to the taxpayers of this state to ensure that schooling is accomplished in an *efficient* manner, hereby establishes requirements for compliance with quality standards⁸⁸

For the purposes of this litigation, this language was seen as an admission that the state was obligated to provide an "excellent" education in an "efficient" manner. Thus, the state could not leave education, and the financing thereof, solely to the local school boards. In fact, this principle was well-supported in the

82. 746 P.2d 1135 (Okla. 1987).

83. *Id.* at 1149-51.

84. 238 P. 204 (Okla. 1924).

85. *Id.* at 205.

86. *Id.* at 206 (emphasis added); see also OKLA. CONST. art. XIII, § 1 (establishing a system of public schools).

87. One example is the Oklahoma 2000 Education Challenge Act, 1st Reg. Sess., 1989 Okla. Sess. Laws 1210 (codified at scattered sections of OKLA. STAT. tit. 70). This Act set requirements to "ensure that by the year 2000" all children in Oklahoma shall be ready for first grade school work when they start first grade; at least 90% of all first graders should eventually graduate from high school; 50% of all high school graduates should score above national averages in standardized testing; and 80% of high school graduates should be fully prepared for college-level work. *Id.* § 2, 1989 Okla. Sess. Laws at 1211.

88. H.B. 1017, § 1, 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 167, 173 (codified at OKLA. STAT. tit. 70, § 3-104.3 (1991)) (emphasis added).

language of legislation dating back to the Legislature's first efforts to supplement local ad valorem-based school financing.⁸⁹

Next, the FSFC turned to the report of Task Force 2000,⁹⁰ the most recent appraisal of the state's educational objectives. The FSFC was prepared to argue that the Task Force 2000 recommendations, although not adopted in full in House Bill 1017, constituted the appropriate criteria for an "adequate" education in the present and near future. The recommendations, broadly stated, were as follows:

1. that all school districts be required to develop a curriculum consistent with state goals to teach state-mandated competencies and to prepare all students for post-secondary education;⁹¹
2. that mandatory half-day kindergarten, optional full-day kindergarten, and early childhood education programs be provided, with instructors trained in early childhood development;⁹²
3. that class sizes in all grades be reduced to a maximum of twenty students;⁹³
4. that existing plans to administer a criterion-based test to all twelfth graders and to withhold diplomas until attainment of state-mandated competencies be executed, that the existing norm-referenced testing administered in every other grade be supplemented and reviewed to assure attainment of age-appropriate competencies, that school districts formulate programs to use test data to prescribe skill reinforcement and remediation, and that schools that fail to perform be subject to Oklahoma State Department of Education takeover, or involuntary consolidation;⁹⁴

89. In creating the "Special Common School Equalization Fund" in 1927, for example, the legislature effectively conceded that the state constitution guaranteed equality of educational opportunity "to all children . . . of all people . . . in the State." § 1, 1927 Okla. Sess. Laws 141, 141 (repealed 1949).

90. TASK FORCE 2000 REPORT, *supra* note 61.

91. *Id.* at 9.

92. *Id.* at 7.

93. *Id.* at 23.

94. *Id.* at 12-14.

5. that all schools be required to meet or exceed accreditation standard levels of the North Central Association of Schools and Colleges;⁹⁵
6. that local school district programs be instituted to educate parents about child development and to encourage parental involvement in schools;⁹⁶
7. that teacher tenure be abolished and that school districts provide for merit-based raises and establish staff development requirements and evaluation programs;⁹⁷
8. that the school year be lengthened to accommodate more staff development and parent-teacher conferences;⁹⁸
9. that the state's focus shift toward outcomes, leaving local school districts with discretion to implement programs to achieve mandated outcomes;⁹⁹
10. that an Office of Accountability be established to monitor efficiency and compliance with mandates,¹⁰⁰ and
11. that funding be increased substantially for computers and newer technology to be used in classrooms and school administration.¹⁰¹

Task Force 2000 proposed implementation of this plan over a five-year period and provided budget projections for these reforms totaling over \$2.8 billion.¹⁰² The report also projected that an additional \$400 million was needed to pay for mandates that prior legislatures had enacted but never funded.¹⁰³

Although the subsequent legislative debate over particular reforms in House Bill 1017 was heated in many areas, money was the primary issue. The substantive policy recommendations were accepted, but some were adopted only in the form of

95. *Id.* at 19.

96. *Id.* at 26-27.

97. *Id.* at 17-18.

98. *Id.* at 24.

99. *Id.* at 1-2, 27-28.

100. *Id.* at 32-33.

101. *Id.* at 30-32.

102. *Id.* app. at B-2.

103. *Id.* app. at B-1.

vague, general exhortations rather than mandates, without providing the necessary funding suggested by the Task Force 2000 report. The principal differences between House Bill 1017 and the Task Force 2000 recommendations were:

1. School districts were not required by House Bill 1017 to make full-day kindergarten available as an option; pre-school programs were encouraged, but no new funding was specifically provided;¹⁰⁴
2. Under House Bill 1017, the school year was not lengthened, although funding was set aside for a small pilot program to enable several districts to experiment with a longer school year;¹⁰⁵
3. Task Force 2000 recommended spending \$20 million more per year on new technology and computers for both school administration and classroom applications;¹⁰⁶ House Bill 1017 set aside a relatively small amount for school administration, and only endorsed increased use of new technology in classrooms without specifically allocating funds to that use;¹⁰⁷
4. Parental involvement programs were similarly encouraged in House Bill 1017 without any specific provision for new funding.¹⁰⁸

The FSFC would argue that the Task Force 2000 recommendations defined what would be necessary for a constitutionally "adequate" education. To the extent that the Legislature diluted these recommendations, the FSFC would contend that the House Bill 1017 provisions merely outlined an absolute minimum adequacy standard. Because it expected to demonstrate that school districts could not afford to implement House Bill 1017, the FSFC would thus be able to prove violation of the adequacy requirement.

104. H.B. 1017, 42d Leg., 1st Ex. Sess., §§ 14, 15, 16, 1989 Okla. Sess. Laws 167, 181, 183, 184 (amending OKLA. STAT. tit. 70, §§ 1-114, 10-105, 11-103.7 (1991 & Supp. 1994)).

105. *Id.* § 18, 1989 Okla. Sess. Laws at 185 (codified at OKLA. STAT. tit. 70, § 1-109.1 (1991)).

106. TASK FORCE 2000 REPORT, *supra* note 61, at 30.

107. H.B. 1017, § 17, 1989 Okla. Sess. Laws at 185.

108. *Id.* §§ 34, 35, 1989 Okla. Sess. Laws at 197, 198 (codified at OKLA. STAT. tit. 70, §§ 10-105.2 to -105.3 (1991 & Supp. 1994)).

B. Implementing the Strategy

Task Force 2000's report provided a blueprint for demonstrating the insufficiencies of new funding. The Legislature had charged the group with the dual responsibility of projecting what funds would be needed each year to implement needed reforms and recommending the means for generating the funds needed.¹⁰⁹ The report projected first-year needs at over \$283 million, gradually increasing to a total of over \$810 million in new funding in the fifth year of the plan.¹¹⁰ House Bill 1017 was projected to generate \$235 million in its first year,¹¹¹ leaving a nearly \$50 million shortfall according to Task Force 2000's projection. It became obvious with the controversy engendered by the House Bill 1017 tax increases that the Legislature would not attempt to augment the funding any further in future years, as would be required to meet the needs projected by Task Force 2000. Assuming that Task Force 2000 was correct in its projections, the FSFC could compare Task Force 2000's report with House Bill 1017 and predict what needed reforms would lack funding.

The FSFC retained Dr. Alexander Holmes of the University of Oklahoma to assist in its case. Dr. Holmes had completed tenure as State Budget Director under Governor Bellmon and was thus intimately familiar with the budget process and personalities at the state level. Dr. Holmes was retained, in part, to develop projections of tax revenues and the amounts that would be available for common education, assuming that House Bill 1017 remained in place without change. The projections would then be compared to the projections of funds needed to implement Task Force 2000's recommendations and House Bill 1017's mandates. The projections would also be compared to projections of spending on common education in other states—assuming that there were no tax increases in those states—to demonstrate that Oklahoma would remain mired near the bottom of state rankings on educational spending.

109. H.J. Res. 1033, *supra* note 57.

110. TASK FORCE 2000 REPORT, *supra* note 61, app. at B-2.

111. General Revenue Fund Projections Prepared by Dr. Alexander Holmes for the Fair School Finance Council, Mar. 10, 1992 [hereinafter General Revenue Fund Projections] (on file with the *University of Michigan Journal of Law Reform*).

Prior to his recruitment as State Budget Director, Dr. Holmes also had studied the ad valorem tax system in detail. As State Budget Director, Dr. Holmes had been directly involved in the passage and implementation of the Ad Valorem Tax Code of 1988, designed to improve and regulate the ad valorem tax system.¹¹² These reforms were intended to cure many of the abuses and equitable disparities in property assessments for ad valorem purposes. Dr. Holmes nevertheless could testify about the historical impact of these abuses and disparities on local school funding. He would also be able to testify about the progress in implementing reforms at the local levels, as well as the reforms that still needed to be enacted.

To demonstrate the Oklahoma system's comparative failings at the national and regional levels, the FSFC retained John Augenblick, of Augenblick, Vandewater & Associates in Denver, Colorado, to provide statistical analyses of Oklahoma's spending on education and student performance in relation to national averages and statistics from neighboring states. This strategy was helped considerably by the publication of the United States Department of Education's annual "wall chart," which compared student performance and education spending state-by-state for the years 1982 and 1989.¹¹³ This report showed Oklahoma in the lowest tier of most rankings.¹¹⁴

To analyze the historical impact of funding disparities and inadequacies on the local school districts, together with future impacts on school districts from House Bill 1017 mandates, the FSFC retained Dr. David Thompson, of Thompson, Wood & Associates and Kansas State University, to analyze the Oklahoma State Department of Education's budget data, broken down by school district, and to confirm that many school districts had suffered from insufficient funding for a number of years. He also examined the sufficiency of funds to implement effectively the reforms contained in House Bill 1017. The FSFC hoped that the school districts themselves would assist the FSFC considerably in this task. House Bill 1017 required the school districts to submit to the Oklahoma State Department of Education their own projections on the costs of implementing House Bill 1017.¹¹⁵

112. See Ad Valorem Tax Code, 41st Leg., 2d Reg. Sess., 1988 Okla. Sess. Laws 577 (codified as amended in scattered sections of OKLA. STAT. tit. 68).

113. See *Education Performance Chart*, *supra* note 72, at 28-29.

114. *Id.* For example, Oklahoma ranked 24th out of 28 states in students' scores on the ACT college entrance examination. *Id.* at 28, 30.

115. H.B. 1017, 42d Leg., 1st Ex. Sess., ch. 2, § 13, 1989 Okla. Sess. Laws 167, 181 (codified at OKLA. STAT. tit. 70, § 3-104.5 (1991)).

Finally, the FSFC asked George Singer, the principal author of the Task Force 2000 report and chairman of Task Force 2000,¹¹⁶ to validate the Task Force 2000 recommendations and to help prove the insufficiency of revenues under House Bill 1017. Singer directed the FSFC to the independent sources upon which Task Force 2000 relied when it formulated the substantive policy recommendations in the report. These sources were supposed to link increased spending on the types of reforms recommended by Task Force 2000 with improved schools and student performance. The FSFC was still in search of expert testimony and evidence in this area as the lawsuit slowly came to a halt in the summer of 1992.¹¹⁷

Although the FSFC had retained experts to document funding insufficiencies, it also counted on those insufficiencies becoming self-evident with the passage of time. The FSFC recognized that a trial court determination would be one or two years away and that the inevitable appeal could take several more years. School districts would thus have evidence of actual experience in reducing class sizes, obtaining accreditation, testing competencies, and meeting the other mandates of House Bill 1017. The FSFC expected that school districts would fail to meet class size mandates and then would be penalized as provided in House Bill 1017 with a loss of state funds or loss of accreditation.¹¹⁸ As it became clear that funds were inadequate to meet other mandates, the FSFC also anticipated that compliance with the mandates would be postponed to spare further embarrassment. These predictions proved to be accurate as discovery proceeded in the lawsuit.

C. The Problems of Proof

To show that revenues would be insufficient to allow local school boards to implement the requirements of House Bill 1017, the FSFC's attorneys sought substantial discovery from the Oklahoma State Department of Education. Unfortunately, the Oklahoma State Department of Education was still trying to

116. See *supra* text accompanying notes 59-60.

117. For further discussion, see *infra* Part IV.

118. H.B. 1017, §§ 2, 28, 1989 Okla. Sess. Laws at 174, 192 (codified at OKLA. STAT. tit. 70, §§ 18-113.1, 3-104.4 (1991 & Supp. 1994)).

determine how House Bill 1017 could be implemented. The confusion was compounded when the newly elected State Superintendent of Public Instruction, Sandy Garrett, ordered a large reduction in the work force at the state level after she took office in January 1991.¹¹⁹ The political wisdom of this move was beyond question, given heavy public criticism of the size of state educational bureaucracy, but the result was that few department employees were left to respond to the FSFC's discovery requests.

Ultimately, the FSFC's attorneys were allowed direct access to department files and personnel. Profound difficulties still existed, however, because of a lack of coordination between different divisions and a lack of uniform data. The FSFC's attorneys found that different divisions of the department had used different data processing systems over the years. Sometimes employees within divisions used different personal computers and different software to do their work. In some instances, when a particular employee left, the data that the employee had gathered or analyzed would be left locked inside that employee's database because the other employees did not know how to retrieve it. Much of the data that the FSFC sought was not in any electronic data medium and had to be compiled by hand.

As the FSFC's attorneys learned further during document discovery, these difficulties were compounded by the changes in data compilations from year to year. State legislators apparently would tinker with state aid formulas and various state mandates each year, forcing accounting changes which made it difficult to compare figures from year to year.¹²⁰ In addition, the school districts were in the midst of converting to a single standardized accounting system.¹²¹ The FSFC found that many figures computed by school districts according to their own accounting systems were of doubtful reliability for comparative purposes.

119. Bill Johnson, *State Education Departments to Eliminate up to 46 Jobs*, J. REC., Feb. 1, 1991, at 1; Bill Johnson, *Week in Review*, SUNDAY OKLAHOMAN, Feb. 3, 1991, at 7.

120. These data retrieval and comparison problems were disclosed to us in various meetings with data management personnel in different divisions at the Oklahoma State Department of Education.

121. Office of Accountability, Oklahoma State Dep't of Educ., Oklahoma Cost Accounting System Implementation Survey 1 (Jan. 1991) (unpublished survey, on file with the *University of Michigan Journal of Law Reform*) (indicating that 142 districts had converted and 281 districts would complete conversion by July 1, 1991, and that other 169 districts had not responded).

The FSFC's attorneys also were conducting this discovery as school district consolidation finally picked up momentum. In 1989, the year preceding the lawsuit, the state legislature had enacted legislation intended to encourage voluntary consolidation.¹²² In House Bill 1017 the State Legislature added to the power of the State Board of Education to force consolidation or annexation of school districts which were not meeting state mandates.¹²³ In discussions with the Oklahoma State Department of Education personnel during document discovery, the FSFC's attorneys found that the frequency of consolidations and annexations had increased, which accordingly increased the variability of district data from one year to the next.

As noted above, the FSFC's attorneys hoped that the reports required and received from the school districts regarding the costs of implementing House Bill 1017 would prove to be a critical source of information. The local school districts presumably would have the best information about how they would fall short in achieving the objectives. Nevertheless, the numbers given were not necessarily trustworthy because the Oklahoma State Department of Education did not impose many reporting standards upon the school districts. For example, the FSFC's attorneys found that one suburban school district had reported that a 900% increase in funding would be required for that district to comply with House Bill 1017.

Although these problems caused considerable delay in gathering and analyzing data, the department employees were sympathetic and helpful to the FSFC. Gradually, evidence supporting the FSFC's contentions began to emerge. Because House Bill 1017 provided that accreditation could be revoked and state funds could be withheld from districts that failed to reduce class sizes as mandated, Department of Education personnel told the FSFC's attorneys that decreasing class sizes became the number one priority of school districts.¹²⁴ This mandate in effect required most districts to hire more teachers and build more classrooms.¹²⁵ FSFC members were spending most, if not all, new

122. See Oklahoma Voluntary School Consolidation Act, 42d Leg., 1st Reg. Sess., 1989 Okla. Sess. Laws 1159 (codified at OKLA. STAT. tit. 70, §§ 7-201 to -206 (1991 & Supp. 1994)).

123. See H.B. 1017, § 12, 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 167, 181 (codified at OKLA. STAT. tit. 70, § 7-101.1 (1991)).

124. See *supra* text accompanying note 118.

125. See H.B. 1017, § 28, 1989 Okla. Sess. Laws at 192 (amending OKLA. STAT. tit. 70, § 18.113.1 (1991 & Supp. 1994)).

money available to the school districts on trying to reduce class size and paying mandatory teacher raises. Despite their best efforts, some school districts failed to meet the mandates over the next several years, and the Oklahoma State Department of Education penalized them by withholding state money.¹²⁶

Because most new money went to teachers and class-size reduction, school districts were faced with a variety of problems in meeting other House Bill 1017 mandates and state requirements.¹²⁷ School districts forced to deal with aging and inadequate buildings for many years saw no relief and arguably sustained even greater strain.¹²⁸ Language and humanities

126. Jim Killackey, *98 State Districts Penalized for Exceeding Class Sizes*, DAILY OKLAHOMAN, Apr. 26, 1991, at 1 (reporting that in April 1991, the State Department of Education penalized 98 school districts a total of \$2.9 million for class size violations). The total amount of penalties was reduced in the following year by approximately 50% due to successful objections by districts or additions of new teachers. Jim Killackey, *83 School Districts Penalized for Large Classes*, DAILY OKLAHOMAN, Feb. 8, 1992, at 1 (reporting that in 1992, 83 school districts were penalized a total of \$1.6 million).

127. For example, the Putnam City school district, a rapidly growing suburban district in northwest Oklahoma City, projected a need for a 50% budget increase over five years to cover items such as record storage space and new courses in languages, geography, and the humanities. Robert Medley, *Putnam Wants \$26 Million for 1017 Plan*, DAILY OKLAHOMAN, Apr. 26, 1991, at 1. The Edmond school district, a suburban area north of Oklahoma City, estimated that an additional \$12.7 million was required over five years to hire new foreign language teachers and counselors and to bring school media centers up to standards. *Almost \$13 Million Needed by Edmond Schools*, DAILY OKLAHOMAN, Apr. 29, 1991, at 6. The Fairview school district, a rural district in northwest Oklahoma with declining enrollment, was one of a group of districts that lost state aid after House Bill 1017; it had to drop course offerings and reduce counselors, librarians, and music teachers to part-time employees, even after teachers volunteered to donate their mandated raises to keep some courses on the school schedule. Michael McNutt, *Fairview Schools Face Cuts to Meet HB 1017 Standards*, DAILY OKLAHOMAN, Mar. 21, 1992, at 9.

Although the problems of many rural districts with even smaller enrollments could be attributed in part to a need to consolidate, the budget shortfall stories from these districts were sobering. For example, while the Leon school district in southern Oklahoma awaited annexation by a neighboring district, the district's five teachers were forced to cook breakfast and lunch for their students each day, and the district superintendent washed the dishes. Lillie-Beth Sanger, *Leon School Abandons Vote, Eyes Annexation*, DAILY OKLAHOMAN, Feb. 17, 1994, at 1. The Langston school district, an all-black district in northcentral Oklahoma, was forced to deal with infamously dilapidated buildings—21% of the school budget was devoted to building maintenance compared with a state average of 12%. Jim Killackey, *Political Fight Surrounds Poor School District*, DAILY OKLAHOMAN, May 3, 1993, at 1.

128. See OKLAHOMA STATE DEPT OF EDUC., CAPITAL IMPROVEMENT PLANNING AND NEEDS ASSESSMENT OF THE PUBLIC SCHOOLS OF OKLAHOMA 74 (1989) [hereinafter PLANNING AND NEEDS ASSESSMENT] (showing that 55 counties had school districts requiring a total of almost \$79 million more for capital expenditures beyond available revenues and local bonding capacities, while school districts in 22 counties would be able to meet capital needs within available resource levels) (on file with the *University of Michigan Journal of Law Reform*). For many districts, problems were exacerbated by the passage of

offerings and library, media, and counseling services were cut back or could not be improved to meet accreditation standards.¹²⁹ FSFC members and Department of Education personnel indicated that early childhood development and parental involvement programs received minimal attention. Moreover, no state money was set aside in House Bill 1017 for new computer and technological education,¹³⁰ and the school districts had no money left to pursue improvements in that area.

Legislative and Department of Education leaders had predicted that the new money would at least boost Oklahoma in national and regional rankings.¹³¹ In actuality, House Bill 1017 revenue only enabled Oklahoma to keep pace with other states. In the first year, Oklahoma rose from forty-sixth to forty-third in per pupil spending, and from forty-eighth to forty-seventh in teacher salaries.¹³² In the following year, however, Oklahoma dropped back to its previous rankings in per pupil spending and teacher salaries.¹³³ For the 1992–1993 school year, the per pupil spending rank edged up to forty-fifth, yet Oklahoma remained forty-eighth in the nation and last in its region in teacher salaries.¹³⁴ Dr. Holmes' budget projections, based on prior state revenue growth and the tax increases under House Bill 1017, were far below the amounts Task Force 2000 had concluded

amendments aimed at strictly limiting districts from using general fund revenues on capital expenditures. See, e.g., Act of May 22, 1992, § 6, 1992 Okla. Sess. Laws 1472, 1476 (amending OKLA. STAT. tit. 70, § 1-117(A) (Supp. 1994)). According to Department of Education personnel, the theory behind this limitation was that it would force wealthy districts to utilize more of their bonding capacities instead of using surplus general revenues for capital expenditures. During discovery, the FSFC's attorneys learned that many districts had been employing creative accounting for years in order to evade prior limitations, but that some poorer districts also had been relying on general revenue to support capital needs and were hurt by this limitation.

129. For example, one of the most serious deficiencies was in counseling services. While House Bill 1017 required at least one counselor for every 450 students, the Oklahoma State Department of Education reported that, in May 1992, the state average was one counselor for every 560 students, that roughly 30% of schools had no counselor, and that 50% of counselors spent part of their time on non-counseling duties. See Jim Killackey, *Report Calls for Additional School Counselors*, DAILY OKLAHOMAN, May 22, 1992, at 13.

130. H.B. 1017, § 17, 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 167, 185 (encouraging school districts to use increased state funds for technological education, without earmarking any funds for such purposes).

131. Ron Jenkins, *State Officials Expect Schools to Soar in U.S. Rankings*, J. REC., June 11, 1991, at 5.

132. *State Salary Rank Drops*, DAILY OKLAHOMAN, Apr. 10, 1992, at 15.

133. *Id.*

134. Jim Killackey, *State Teachers Rank 48th in Pay*, DAILY OKLAHOMAN, Apr. 22, 1993, at 7.

were necessary to fund its recommended reforms.¹³⁵ Thus, to the extent that the Task Force 2000 projections were correct, Oklahoma would remain fixed near the bottom among states in per pupil spending, teacher salaries, and other spending and performance categories.

Despite mounting evidence that existing funds were not sufficient to achieve the goals set out in House Bill 1017 and in the Task Force 2000 report, one problem persisted stubbornly in the development of proof for the lawsuit: establishing that funding adequacy corresponded with educational performance. Many FSFC-member suburban school districts had been for many years at or near the bottom of all the districts in terms of per pupil spending, yet student test score averages from those districts were quite high relative to other districts.¹³⁶ By contrast, some school districts with large Native American populations had been receiving large amounts of federal aid for many years, yet had persistently low student test score averages.¹³⁷ These kinds of facts undoubtedly call into question the premise that more school spending would invariably lead to better-educated students.

The FSFC's attorneys were still in pursuit of the appropriate experts to testify about the relationship between increased spending and educational performance when political factors ultimately pulled apart the FSFC and derailed the adequacy lawsuit.

135. Compare General Revenue Fund Projections, *supra* note 111 (showing that House Bill 1017 tax increases should generate an additional \$304 million by the fifth year of implementation) with TASK FORCE 2000 REPORT, *supra* note 61, app. at B-2 (estimating that approximately \$810 million would be needed in the fifth year of implementation of its plan).

136. See, e.g., OFFICE OF ACCOUNTABILITY, OKLAHOMA STATE DEPT OF EDUC., OKLAHOMA SCHOOL INDICATORS REPORT 1990-1991 app. C at 42 (1992) [hereinafter SCHOOL INDICATORS REPORT] (finding that in the suburban Edmond school district in the 1990-1991 school year, average fifth-grade achievement test scores in different subjects ranged from a low in the 53rd percentile nationally to a high in the 79th percentile) (on file with the *University of Michigan Journal of Law Reform*).

137. For example, Adair County, which is known as one of the poorest counties in Oklahoma in terms of ad valorem taxable wealth, has had most of its school districts in the upper tier of districts per pupil spending because its proportionately large Native American student enrollment brings with it a higher proportion of federal dollars. RESULTS 1990, *supra* note 35, app. at 1. In the 1984-1985 school year, Cave Springs district was the poorest district in Adair County in terms of ad valorem wealth, yet it ranked in the top 20 districts in per pupil spending thanks to state and federal aid. Statistics of Dr. Anderson, *supra* note 21. Despite the district's higher level of total spending, twelfth graders at Cave Springs High School—which had a Native American enrollment of 74.2% in the 1990-1991 school year—had only a mean ACT score of 14.5, more than five points below the state mean. SCHOOL INDICATORS REPORT, *supra* note 136, app. C at 234.

III. LOSING MOMENTUM

The time and money that the FSFC had expended on discovery of data at the State Department of Education was a considerable drag on the litigation, but these problems were not fatal to the lawsuit. Other considerations arrested the progress of the suit. The first of these was the continuing controversy over House Bill 1017's new taxes.

A. House Bill 1017 Revisited

Opponents of the new taxes were not satisfied with the defeat in June 1990 of the constitutional amendments that were part of the House Bill 1017 package.¹³⁸ Although he did not aim his attack directly at House Bill 1017, David Walters rode to victory in the gubernatorial election in November 1990 on a pledge of "no new taxes . . . without a vote of the people . . ." ¹³⁹ Through the initiative petition and referendum process, anti-tax groups later managed to pass a constitutional amendment providing that new taxes could not be enacted except by a vote of a three-fourths majority in both chambers of the State Legislature or by a popular vote.¹⁴⁰ Because the Republican minorities in the State House and Senate typically constituted more than one-fourth, this amendment virtually guaranteed that new tax proposals would fail, given the Republicans' general anti-tax stance.

An initiative petition and referendum campaign also was commenced to bring House Bill 1017 as a whole to a vote of the people.¹⁴¹ Although the entire bill was challenged, its main opponents were citizen groups organized to oppose new taxes and to roll back tax rates.¹⁴² The members of the FSFC, while

138. See *supra* notes 65–68 and accompanying text.

139. Mick Hinton, *Walters Calling for Fresh Faces, Agency Reforms*, SATURDAY OKLAHOMAN, Nov. 10, 1990, at 1.

140. OKLA. CONST. art. V, § 33 (amended 1992).

141. State Question No. 639 and Initiative Petition No. 347, submitted to the voters of Oklahoma during a Special Election on Oct. 15, 1991 (on file with the *University of Michigan Journal of Law Reform*).

142. *Friends, Foes of 1017 Face Off*, TULSA TRIB., Sept. 27, 1991, at 3A; Chuck Ervin, *Creators of 1017 Watch and Wait*, TULSA WORLD, Oct. 16, 1991, at A1. The groups leading the fight to repeal House Bill 1017 were called STOP New Taxes and the Oklahoma Taxpayers' Union.

convinced that they could not pay for House Bill 1017 reforms, were still supportive of them. The members also wanted to retain the additional money generated under House Bill 1017, even if it was insufficient to implement the reforms mandated.

The referendum on House Bill 1017 was scheduled for October 1991,¹⁴³ and the consensus within the FSFC was that the lawsuit should not detract from the pro-House Bill 1017 campaign. Discovery continued at the Oklahoma State Department of Education, but the FSFC's attorneys shunned publicity, in contrast to the first few months after the lawsuit was commenced. The FSFC did not want the evidence that the new funding was insufficient to create the public impression that House Bill 1017 was a failure overall.

In the end, House Bill 1017 survived the referendum.¹⁴⁴ As with many divisive public debates, however, the political costs of victory manifested themselves in other contests. The subsequent passage of the constitutional amendment requiring a vote of a three-fourths majority of the legislature or a vote of the people to enact any new taxes was probably influenced by the House Bill 1017 referendum.¹⁴⁵ Perhaps in deciding the fate of House Bill 1017, voters saw themselves as capable of weighing the public debate and making the "right" decision. The majority thus saw no harm in requiring lawmakers to request their approval on similar measures in the future.

More importantly for the FSFC, the campaign for House Bill 1017 in the referendum apparently strained the political capital of elected school board members. In subsequent school board elections, the president of the FSFC, along with various other members of school boards who were members of the FSFC, were turned out of office. As a result, many school boards had new majorities or entirely new memberships which had no knowledge of the pending lawsuit or the past history of the FSFC. For these new school board members, gaining familiarity with their jobs and dealing with the immediate demands of House Bill 1017 seemed to take precedence over the lawsuit.

House Bill 1017, together with other reform initiatives enacted after the FSFC had filed its original lawsuit, also helped to improve the inequitable conditions that originally had driven the

143. State Question No. 639 and Initiative Petition No. 347, *supra* note 141.

144. *Voters Set State Record with HB 1017 Election*, SATURDAY OKLAHOMAN, Oct. 19, 1991, at 10.

145. See *supra* note 140 and accompanying text.

FSFC members to resort to litigation.¹⁴⁶ The implementation of House Bill 1750, which largely reformed the ad valorem assessment process, further resolved some of the inequities in the financing system.¹⁴⁷ Although some smaller rural school districts still enjoyed a disproportionate advantage in wealth, the total number of students who were receiving an inequitable proportion of funds was steadily reduced.¹⁴⁸

House Bill 1017 reformed the state aid formula to require more money to be distributed through it.¹⁴⁹ House Bill 1017 did not end the "hold harmless" payments, but the modified "hold harmless" provision enacted in 1987 required "hold harmless" payments to be reduced by thirty-three percent and to be reduced further in succeeding years if state aid to a district otherwise increased over the prior year.¹⁵⁰ The total amount of money going into "hold harmless" payments thus decreased each year, particularly after House Bill 1017 increased the amount of money flowing generally through the state aid formula. House Bill 1017 further provided that, beginning in the 1992-1993 school year, state aid would be reduced, notwithstanding the "hold harmless" provision, if a district carried over a large general fund surplus each year.¹⁵¹

House Bill 1017 also caused an increasing number of school district consolidations and annexations in rural areas by giving to the Oklahoma State Board of Education the power to order mandatory annexation or consolidation if a school district was not able to meet the requirements of the new law.¹⁵² To encourage voluntary consolidation, House Bill 1017 offered financial

146. See Letter from Thomas L. Spencer, Assistant Attorney General of Oklahoma, to Mark S. Grossman, Attorney for FSFC 1 (Oct. 8, 1990) ("We also feel that HB 1017, with its substantial additional revenue, has made any alleged inequities even more minimal.") (on file with the *University of Michigan Journal of Law Reform*).

147. Holmes, *supra* note 14, at 13-16.

148. See Letter from Thomas L. Spencer to Mark S. Grossman, *supra* note 146, at 1-4 (noting that 26 "wealthy" districts were no longer receiving state foundation aid or incentive aid in 1990, that the total amount of money which these districts received from local sources in excess of "foundation need" was only \$2.5 million, and that if redistributed through the formula, this amount would produce only an additional \$3.14 per student). In this letter, the Attorney General's office was attempting to dissuade the FSFC from pursuing the lawsuit by showing that equity was no longer a significant issue. *Id.* at 1.

149. H.B. 1017, §§ 107, 108, 42d Leg., 1st Ex. Sess., 1989 Okla. Sess. Laws 167, 244, 247 (codified at OKLA. STAT. tit. 70, §§ 18-200 to -201 (1991 & Supp. 1994)).

150. OKLA. STAT. tit. 70, § 18-112.2 (1991).

151. H.B. 1017, § 107(E), 1989 Okla. Sess. Laws at 247 (codified at OKLA. STAT. tit. 70, § 18-200(E) (1991 & Supp. 1994)).

152. H.B. 1017, § 12, 1989 Okla. Sess. Laws at 181 (codified at OKLA. STAT. tit. 70, § 7-101.1 (1991)).

assistance, but set a deadline of July 1, 1991, for any districts to apply for the funds.¹⁵³ Armed with the power to mandate consolidation or annexation, the Oklahoma State Board of Education enthusiastically proposed to withhold accreditation from various poor, rural school districts and to suggest consolidation or annexation.¹⁵⁴ Some of the wealthier rural districts, recognizing the difficulties in meeting House Bill 1017 requirements, chose to consolidate or absorb neighboring districts to avoid the risk of forced consolidation or annexation.¹⁵⁵ This consolidation helped to remove some of the most egregious disparities in wealth.

Within the same period, a number of member school district superintendents who had provided leadership to the FSFC chose to leave their positions or retire. The FSFC's attorneys found that the new superintendents, like the new school board members, understandably had questions about continuing the lawsuit, which was seen as somewhat ancillary to their perceived responsibilities. The funding disparities and assessment abuses which had originally motivated school board members and superintendents to form the FSFC had been ameliorated, and the new school board members and superintendents were not necessarily familiar with the frustrations that had given birth to the FSFC.

B. Distinguishing Friends from Foes in the Adequacy Debate

Theoretically, all school districts should have been sympathetic to the adequacy litigation because it could ultimately benefit them all. In the equity-based legal challenge, the wealthy districts had good reason to fear that money might be taken from them. In contrast, under the FSFC's adequacy argument, every school district, wealthy and poor, needed more

153. H.B. 1017, § 10, 1989 Okla. Session Laws at 179 (amending OKLA. STAT. tit. 70, § 7-203 (1991 & Supp. 1994)).

154. Minutes of the Meeting of the Oklahoma State Board of Education, June 28, 1990, at 24-27 (on file with the *University of Michigan Journal of Law Reform*); Minutes of the Special Meeting of the Oklahoma State Board of Education, July 10, 1990, at 8-18 (on file with the *University of Michigan Journal of Law Reform*).

155. This information is based on reports of consolidations I received from State Department of Education personnel and discussions with attorneys for the Organization for Adequate School Finance, *infra*, at 33-34.

funding to comply with House Bill 1017 mandates. Wealthy school districts, which were predominantly small in population and rural, were faced with possibly severe diseconomies of scale in meeting demands for broader curriculum offerings and expanded library, media, and counseling services. The potential cure would in theory be more money for all. At a minimum, the wealthy school districts would not be threatened with the loss of any funds.

Equity, however, was not gone or forgotten for the FSFC members, despite the reduction of funding disparities over the ten years of the FSFC's existence. The impact of these historical disparities could still be seen in comparisons of the physical facilities of wealthy and poor school districts.¹⁵⁶

The fact that a few school districts had the advantage of a substantial public utility property base particularly offended many FSFC members. This inequity had been felt and measured early in Oklahoma's statehood. Voters had approved a constitutional amendment back in 1913, providing that all local ad valorem taxes collected on public utility property for the support of schools be deposited in a "Common School Fund" and distributed among school districts "as are other Common School Funds of this State."¹⁵⁷ The obvious intent was to provide for an equitable distribution of these revenues. Yet, the actual practice of retaining these revenues locally did not change and litigation ensued with *Linthicum v. School District No. 4 of Choctaw County*.¹⁵⁸ In *Linthicum*, despite the express directive of the 1913 constitutional amendment, the Oklahoma Supreme Court ruled that county treasurers need not give up these revenues to the state.¹⁵⁹ The court's rationale was that the amendment was not self-executing, so the State Legislature needed to create a "Common School Fund" and provide for distribution from the fund before counties could be compelled to give up the public utility ad valorem tax revenues.¹⁶⁰ Over the succeeding seventy-five years, the Legislature had never created a "Common School Fund," and school districts with public utility property had kept their public utility ad valorem tax revenues.

156. See PLANNING AND NEEDS ASSESSMENT, *supra* note 128, at 74.

157. OKLA. CONST. art. X, § 12a.

158. 149 P. 898 (Okla. 1915).

159. *Id.* at 900.

160. *Id.*

This practice, seemingly in defiance of the state constitution, was one of the subjects of the original FSFC lawsuit.¹⁶¹ Although the State Legislature, as part of the House Bill 1017 reforms, had proposed amendment of Article X, section 12a of the Oklahoma Constitution to provide that all revenue from ad valorem taxes on any portion of public utility or commercial or industrial property valued in excess of \$500,000 would go into the Common School Fund and be distributed through the state aid formula, this amendment was among those rejected by the electorate in June 1990.¹⁶² As a result, the FSFC wanted to address the issue again in the second lawsuit. The FSFC's petition therefore included a second cause of action, in which the trial court was asked to order the Legislature to enact legislation to make Section 12a of Article X effective.¹⁶³ Given the *Linthicum* decision, the FSFC did not expect to prevail at the trial level, but hoped that the state supreme court would ultimately review the issue.

School districts which had long enjoyed the public utility property advantage were alarmed by this second cause of action, and they formed a new group, curiously named the Organization for Adequate School Finance (OASF),¹⁶⁴ to intervene in the lawsuit in opposition to the FSFC's second cause of action.¹⁶⁵ The OASF then moved for summary judgment on the second cause of action, and the trial court granted the motion.¹⁶⁶

Discussions thereafter ensued among counsel for the FSFC and for the OASF about whether the parties should ask the court to render final judgment on the second cause of action, which would permit an immediate appeal, or whether the decision should be treated as interlocutory, in which case it would be appealed along with the decision made on the

161. Petition for Declaratory Judgment ¶ 48, *Fair Sch. Fin. Council I* (Okla. Dist. Ct. 1987) (No. CJ-80-3294) (on file with the *University of Michigan Journal of Law Reform*), *aff'd*, 746 P.2d 1135 (Okla. 1987).

162. H.J. Res. 1005, *supra* note 65.

163. Petition for Declaratory Judgment and Injunctive Relief ¶¶ 18-19, *Fair Sch. Fin. Council II* (Okla. Dist. Ct. filed Sept. 6, 1990) (No. CJ-90-7165) (on file with the *University of Michigan Journal of Law Reform*).

164. Certificate of Incorporation, Organization for Adequate School Financing, Inc. (filed Nov. 19, 1990) (on file with the *University of Michigan Journal of Law Reform*).

165. See Motion to Intervene and Brief in Support by Organization for Adequate School Financing, Inc. at 1, *Fair Sch. Fin. Council II* (No. CJ-90-7165) (on file with the *University of Michigan Journal of Law Reform*).

166. Order Sustaining Intervenor's Motion for Partial Summary Judgment at 2-3, *Fair Sch. Fin. Council II* (No. CJ-90-7165) (on file with the *University of Michigan Journal of Law Reform*).

adequacy cause of action. During these discussions, counsel for the OASF raised the possibility of *joining* in the adequacy lawsuit if the FSFC would drop its second cause of action.

For the FSFC, this proposal was intriguing. Joining with the OASF would add roughly seventy school districts to the cause and would indicate that the adequacy issue cut across divisions of relative wealth among school districts. The joinder would help prove the FSFC's assertion that *all* school districts, wealthy and poor, were at risk of being unable to provide a constitutionally "adequate" education. As a practical matter, Article X, Section 12a would probably need to be reformed anyway, along with other provisions dealing with school finance, if the adequacy suit was successful.

Distrust between the two groups persisted nevertheless. The FSFC did not want the OASF to have any control over the litigation, for fear that the OASF would alter the course of the litigation if its goals and the FSFC's goals later diverged. For its part, the OASF was happy with a fairly passive role, but wanted to be able to opt out of the lawsuit at any time it might choose, which was unacceptable to the FSFC.

Communications between the groups were difficult and time-consuming. Formal action on any proposals required the groups to convene meetings with their respective members. The debates in FSFC meetings over the OASF's role were also occasions for reluctant members to raise doubts again about pursuing the adequacy lawsuit, especially given the threat that House Bill 1017 might be repealed by the electorate.

After months of intermittent negotiation, the OASF abruptly withdrew its proposal. The OASF's members were, no doubt, unable to resolve their own concerns about joining with the FSFC. In the end, the proposed joinder had served only to distract, divide, and delay the FSFC.

IV. THE ADEQUACY CHALLENGE ON HIATUS

The spring of 1992 saw much of the changeover in school board membership and superintendents discussed above.¹⁶⁷ Because of the unexpected difficulties with discovery from the State Department of Education, the FSFC's litigation fund was

167. See *supra* Part III.A.

nearly exhausted, and the FSFC's members had to consider imposing new dues on themselves at the same time that they were struggling to meet House Bill 1017 mandates. Because of these changes, some school boards were ready to drop out of the FSFC, and others were expected to follow, if faced with any further dues obligations.

Decisions on the FSFC's future were deferred until the fall of 1992, but that fall, the members still were not able to reach any consensus. Some members wanted to continue and possibly form a new organization to carry on the lawsuit, but other members were non-committal. In the interim, public, legislative, and media attention was diverted to other issues.¹⁶⁸ Education issues had been resolved in many minds with the voting majority's approval of House Bill 1017.

The budgetary strains which the reforms had caused were relieved somewhat because, as the FSFC had predicted, the Legislature and the Oklahoma State Department of Education started releasing districts from implementation deadlines and mandates.¹⁶⁹ House Bill 1017 reforms also became bogged down in the development of state curricular standards and objectives. The Oklahoma State Department of Education had initially produced a thick binder filled with hundreds of proposed

168. During the 1992 legislative session, for example, budget problems at the State Department of Human Services took center stage. Mick Hinton, *House Restores DHS Funding Cuts for Year*, DAILY OKLAHOMAN, Mar. 13, 1992, at 8. The Department of Human Services received emergency funding of \$10.7 million, while the State Department of Education, which customarily received so-called "mid-term adjustment" funds in the spring of each year to distribute to districts with unexpected increases in enrollment, received only \$6.9 million, which was 59% of what was needed. *Schools Get Only 59 Percent of Supplementary Funds*, DAILY OKLAHOMAN, Mar. 20, 1992, at 5.

169. For example, high schools could avoid the class size reduction requirements for the 1993-1994 school year if average test scores were above the 50th percentile and the dropout rate was below the state average. Act of June 11, 1993, 44th Leg., 1st Reg. Sess., § 7, 1993 Okla. Sess. Laws 2139, 2150 (amending OKLA. STAT. tit. 70, § 18-113.3 (Supp. 1994)). The plan to withhold diplomas until all parts of the graduation test were passed was abandoned in favor of awarding an "Advanced Diploma" to those who passed and a "Regular Diploma" to those who could not. H.B. 1271, § 15, 43d Leg., 1st Reg. Sess., 1991 Okla. Sess. Laws 2854, 2874. The inclusion of geography, culture, and the arts in the graduation test was also postponed. *Id.* In 1991, however, the Oklahoma Supreme Court ruled that this legislation had failed to become law because of procedural infirmities unrelated to its substance. *Johnson v. Walters*, 819 P.2d 694, 699 (Okla. 1991). The following year, the legislature again delayed inclusion of certain subjects in the graduation test, and it also eliminated the requirement that twelfth-graders pass all parts of a criterion-referenced test in order to graduate. Oklahoma School Testing Program Act, § 1, 1992 Okla. Sess. Laws 1173, 1173 (amending OKLA. STAT. tit. 70, § 1210.508 (Supp. 1994)). This action probably reflected fear of embarrassing failure rates in the initial years.

standards and objectives that local curricula would have to meet; these standards were called "learner outcomes."¹⁷⁰ The learner outcomes sparked criticism from many quarters.¹⁷¹ If nothing else, they were contrary to the goal of deregulating local schools which had been proposed by Task Force 2000.¹⁷² The learner outcomes were so detailed that school districts would have little discretion as to the means of achieving these standards and objectives. The State Board of Education finally sent the Department back to redraft the standards and objectives.¹⁷³ In the interim, many school districts have been spared the immediate need to expand and reform curriculum.

CONCLUSION

Various factors combined to stop adequacy litigation in Oklahoma before trial or judgment. At some point in the next several years, however, the timing may be ripe again for challenging the adequacy of Oklahoma's public school financing on constitutional grounds. House Bill 1017 unquestionably did not do enough to reform public school finance, and funding is currently insufficient to assure that school districts can meet the various mandates of House Bill 1017. As House Bill 1017 objectives are postponed and Oklahoma remains near last among the states in the different categories pertaining to funding and student achievement, school districts and parents may be moved once again to resort to the courts.

The next plaintiffs in Oklahoma adequacy litigation will perhaps come only from those districts characterized by both below-average funding and below-average student achievement. Although the case certainly can be made that suburban school districts with students from more affluent families remain underfunded, the reality is that historically disadvantaged students from historically disadvantaged districts would make the best plaintiffs in adequacy litigation. Much of the leadership

170. Jim Killackey, *School Leaders Adopt Leaner Curriculum Plan*, DAILY OKLAHOMAN, Apr. 16, 1993, at 1.

171. *Id.* ("[C]ritics have said that the learner outcomes, along with an educational style known as 'outcomes-based education,' are humanistic, socialistic and even satanistic.")

172. See TASK FORCE 2000 REPORT, *supra* note 61, at 27-29.

173. Killackey, *supra* note 170, at 1.

and driving force in the Fair School Finance Council came from suburban school districts, caught in the squeeze between low ad valorem revenues and rising enrollments and resentful of school districts that carried huge budget surpluses year after year. The leading Fair School Finance Council members were initially committed to the adequacy theme, but as the suit dragged on and the leadership changed, the group lost its momentum.

To label the adequacy lawsuit a failure would be inaccurate. Litigation and the threat of litigation was viewed as a last resort and a means of urging the Legislature toward action. The threat of an adequacy lawsuit pushed the Legislature to form Task Force 2000 and to enact House Bill 1017. Once filed, the adequacy lawsuit helped to galvanize public opinion in support of retaining House Bill 1017 with its reforms and new taxes when the bill was threatened with repeal. The state legislative leadership and the Governor were also pressured, in part by the lawsuit, to commit on the record in support of full funding for House Bill 1017 reforms. While the meaning of this commitment was unclear in view of the postponements and delays in implementing some reforms, state leaders might not have been influenced otherwise if the lawsuit had not been pursued.

The lawsuit suffered because the plaintiff group was large, diffuse, and perhaps not fully committed to the adequacy theme. Many of the insufficiencies of the existing system made it difficult and expensive for the group to assemble proof that would be satisfactory to a court. A new group may yet form to carry on the adequacy argument in Oklahoma. For now, the FSFC's experience should be instructive for plaintiffs pursuing adequacy litigation in other states.

