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I. INTRODUCTION

The State of Utah was the focus of a national education debate in 2007 after the legislature passed a universal voucher program, House Bill 148,[1] by the slim margin of one vote.[2] The voucher would have allowed any public school student who left public schools after January 2007 to use public funds at virtually any private school. Although a public referendum later struck down the statute by a significant sixty-two to thirty-eight percent margin on November 6, 2007,[3] voucher opponents fear that Utah legislators intend to introduce more voucher legislation in coming sessions,[4] and national proponents of voucher plans remain committed to passing such legislation.

The authors of this Article have witnessed and been involved in Utah's public debates regarding House Bill 148 and its predecessor bills and conclude that several key issues confronting a voucher plan

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1. H.B. 148, 2007 Gen. Sess. (Utah 2007), *available at* http://le.utah.gov/~2007/bills/hbillenr/hb0148.htm.

2. Jennifer Toomer-Cook, *House OKs School Vouchers*, DESERET MORNING NEWS, Feb. 3, 2007, at A1.

3. Tiffany Erickson & Bob Bernick, Jr., *Vouchers Killed: 38% For, 63% Against*, DESERET MORNING NEWS, Nov. 7, 2007, at A1.

4. Wayne Holland, *Curtis Refuses To Listen to the People*, DESERET MORNING NEWS, June 11, 2007, at A8.

in Utah have been inadequately considered in the current legislative and political climate.

Firsr, the bill and its proponents attempt to minimize the potential for indoctrination of inappropriate values and messages by requiring voucher recipients to comply with federal discrimination laws. Unfortunately, this requirement does not provide a significant filter for ensuring that private schools do not use public funds to inculcate students with inappropriate values, messages, and ideas. Second, the bill's proponents have assumed that there are no significant Establishment Clause threats to House Bill 148's universal funding of any religious school. A review of key cases and constitutional provisions makes the authors less sanguine regarding federal and state Establishment Clause concerns. Third, voucher proponents have stated regularly that one of the main groups benefitted by the bill will be low-income and minority students who are currently locked into public schools that fail them. We argue that attention to educational adequacy in public schools has greater potential to serve the needs of such students.

Part II of this Article posits that mere compliance with one federal civil rights statute alone may be insufficient to assuage concerns that the bill fails to provide a significant barrier to the direction of public monies toward schools that may inculcate messages inimical to the purposes of public education. Part III asserts that a Utah voucher proposal may not be proper under the Utah Constitution nor under *Zelman*'s "failing school" rationale. Part IV submits that, even if a voucher proposal withstands constitutional and legal scrutiny, alternative programs embodying school finance equity considerations may provide a more helpful means to voucher programs' intended ends—at least those ends referenced regularly in debate thar deal with serving low-income and minority students. Part V discusses school finance litigation trends and concludes that attention to educational and financial adequacy in public education will have a greater porential to serve the needs of low-income, minority, and language minority students than vouchers.

II. FEDERAL ANTI-DISCRIMINATION LEGISLATION: AN INAPPROPRIATE STANDARD FOR PREVENTING INDOCTRINATION IN VOUCHER PROGRAMS

Development of House Bill 148 has been an iterative process involving give and take between advocates, legislators, and others with reference to earlier bills. Opponents criticized the Utah bill's lack of significant controls over the types of schools that could receive public funds, raising the specter of schools whose message and curriculum might be far removed from the inculcative mission and values of public schools.[5] The authors of the bill attempted to quiet such fears by including a provision requiring private schools seeking voucher funds to apply months in advance of the school year and by requiring compliance with federal anti-discrimination law.[6] This should have given time for the applicants to be vetted as to their compliance with the protections in the proposed statute. However, it is probable that such provisions do not impact the curricular message of the school; they only require a lack of discrimination in student admission and participation.

In *Runyon v. McCrary*,[7] the Supreme Court held that civil rights statutes governing contracts prohibited a private school from refusing admission to African-Americans.[8] However, the Court noted that there may be a free association right to attend such a school that teaches in favor of racial segregation in admission and other racial

5. Such concerns have included fears of the establishment of a system or group of alternative quasi-Mormon schools, established by lay members of the Church of Jesus Christ of Latter-day Saints, but not sponsored by the church; the possible use of public funds in polygamist fundamentalist groups' religious schools; and the development of Neo-Nazi-backed schools and other institutions that might teach intolerance or violence. *See, e.g.*, Bob Bernick Jr., *There's A Lot Riding on Next Week's Voucher Vote*, DESERET MORNING NEWS, Nov. 2, 2007, at A15 ("Now, leaders of The Church of Jesus Christ of Latter-day Saints have, over time, wisely refused to operate such a K-12 system themselves. And there is no indication that church leaders would start up such a system should vouchers become law. But [who's] to say that, over decades, LDS-based elementary, junior and high schools would not grow up outside of official church operations? Utah society is unique among the states. Nowhere is one religious denomination so dominant. And, at least for now, few other states also have such a large majority of one political party.").

6. 42 U.S.C. § 2000d (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

7. 427 U.S. 160 (1976).

8. *Id.* at 172.

messages, so long as the school does not actually practice the message in admissions or participation restrictions of African-American students.[9] For this and other reasons, use of federal anti-discrimination statutes as a threshold for participation by private schools does not necessarily quiet all the fears of opponents regarding the inculcation of offensive messages with public monies.

III. THE UTAH STATE CONSTITUTION AND A "UNIVERSAL" VOUCHER

Zelman v. Simmons-Harris held that a voucher program for private schools, including religious schools, was constitutional.[10] However, it leaves nagging doubts regarding whether a universal voucher would be constitutional absent a record of school failure or of failure at establishing educational adequacy for at-risk students. Arguably, the Establishment Clause question is not at complete repose for Utah's type of universal voucher. That said, it appears that the most interesting Establishment Clause questions *vis-a-vis* a universal voucher such as Utah's must include a discussion of state level constitutional analysis.

Of course, the Florida Supreme Court recently struck down a type of voucher system in *Bush v. Holmes*[11] by relying solely upon the court's interpretation of the Florida Constitution. The determination of unconstitutionality was not on federal Establishment Clause grounds per se; rather, the case illustrates the potential power of state constitutions that surrounds vouchers and other choice programs in this policy and legal arena.[12] The court held that the state's voucher program, titled the Opportunity Scholarship Program (OSP), violated the state constitution's guarantee of a free education through a free system of uniform public schools.[13] The court did not directly reach the question of whether the program also violated Establishment Clause-like restrictions in the Florida Constitution.[14]

9. *Id.* at 176.
10. Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).
11. 919 So. 2d 392 (Fla. 2006).
12. *Id.* at 412–13.
13. *Id.*
14. *Id.* at 399.

The U.S. Supreme Court decided *Zelman* during the pendency of the Florida case.[15] As a result, the plaintiffs at the trial level voluntarily dropped their Establishment Clause question under the U.S. Constitution and asked the court to restrict itself to the Florida Constitution's establishment clause or "no aid" provisions.[16] Thus, the language of the Florida Constitution was essential to the decision. In relevant "establishment clause" portions it states:

> **Religious freedom.**—There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.[17]

Based upon the trial court's interpretation of this clause, the appellate court found that the OSP voucher violated Article I, section 3, or the "no aid" to religious schools provision.[18] This decision may arguably still have referential power, at least since the Florida Supreme Court, in deciding that the OSP violated other provisions of the state constitution, specifically declined to reach the trial court decision on the religious "no aid" provisions:

> Because we conclude that section 1002.38 violates article IX, section 1(a) of the Florida Constitution, we disapprove the First District's decision in Holmes I. We affirm the First District's decision finding section 1002.38 unconstitutional in Holmes II, but neither approve nor disapprove the First District's determination that the OSP violates the "no aid" provision in article I, section 3 of the Florida Constitution, an issue we decline to reach.[19]

Most commentators in Utah who have paid attention to *Bush v. Holmes*—which has been all but ignored in the current policy debate—have not noted that the religious objections of the trial court may still be relevant. Certainly, the Florida Supreme Court had

15. *Id.*
16. *Id.* at 399, 413.
17. FLA. CONST. art. I, § 3.
18. *Bush*, 919 So. 2d at 399.
19. *Id.* at 413.

other strong grounds on which to strike down the OSP, including the state constitution's "uniformity" promise. The court noted:

> Article XII, section 1[of the] constitution [the predecessor to article IX, section 1] commands that the Legislature shall provide for a uniform system of public free schools and for the liberal maintenance of such system of free schools. This means that a system of public free schools . . . shall be established upon principles that are of uniform operation throughout the State and that such system shall be liberally maintained."[20]

Although the court relied on this provision, and especially the "uniformity provision," noting the vast differences between private schools *inter alia*, the court specifically left untouched the district court's findings of a state "establishment clause" violation.

So what does the Utah Constitution have to say regarding public funds being provided in a universal voucher program to any and all religious schools? The question has been dismissed in the policy debate by lobbyists and advocates who have confidently declared that Utah's establishment clause jurisprudence and state decisions are coterminous with, and exactly mirror, the U.S. Supreme Court's analysis based upon the U.S. Constitution. However, the lead counsel in *Bush v. Holmes*, Ronald G. Meyer, opined in his keynote address at the Utah Education Law Institute in June of 2006 that there was room to conclude that a voucher plan may possibly be subject to a successful challenge based on his analysis of the religion provisions of the Utah Constitution.[21]

Although certainly *Bush v. Holmes* would not be controlling analysis in Utah, it is a recent decision upon which the Utah Supreme Court has not yet had occasion to directly opine. It would certainly be briefed and may potentially be persuasive. Voucher advocates are quick to note that the Utah Constitution differs from Florida's, which specifically prohibits both direct and indirect aid to religious groups, in that the plain language of Utah's Constitution seems to only prohibit direct aid to religious entities. Nevertheless, this could leave open the question of the Utah Supreme Court's interpretation of the "directness" of a *Zelman*-like transfer of a paper to a parent to sign over to a religious school to transfer payment.

20. *Id.* at 405 (quoting State *ex rel.* Clark v. Henderson, 188 So. 351, 352 (1939)).

21. Ronald G. Meyer, Fla. Educ. Ass'n, Keynote Address at the Utah Education Law Institute (June 9, 2006) (notes on file with author).

The Utah Constitution states: "Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization."[22] However, the Utah Constitution also states: "The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control."[23] It is possible that even if a voucher bill like Utah's is not facially unconstitutional on state constitutional grounds, it might become unconstitutional as applied if it resulted in what could be found to be "sectarian control," there being a religious majority in Utah.[24]

State constitutions have become increasingly important in educational law and policy generally and specifically in the jurisprudence of fundamental rights, in the equalization of funding in education, and in the declaration and adjudication of First Amendment rights, many of which are implicated in a universal voucher provision that benefits religious schools. The seminal *Serrano v. Priest*[25] decision focused attention on state constitutions and began an interesting dialectic about whether education is a fundamental right under the federal Constitution. In *Serrano*, decided in August of 1971, the California Supreme Court confidently opined that under the U.S. Constitution, education was a fundamental right.[26] Analyzing that right, the court found that the state's inequality in funding the state's public education system—which was funded by heavy reliance on local property taxes—caused invidious discrimination against the poor and violated the Equal Protection Clause of the Fourteenth Amendment.[27]

A few months later, a three-judge federal district court held that Texas's system for funding public education similarly violated the

22. UTAH CONST art. X, § 9.

23. *Id.* § 1.

24. Bernick, *supra* note 5.

25. 487 P.2d 1241 (Cal. 1971).

26. *Id.* at 1258 ("We are convinced that the distinctive and priceless function of education in our society warrants, indeed, compels, our treating it as a 'fundamental interest.'").

27. *Id.* at 1263.

Fourteenth Amendment.[28] The federal district court also found, as did the California Supreme Court, that education was a "fundamental right" under the U.S. Constitution.[29] Interestingly, the federal district court held that the U.S. Constitution's guarantee of equal protection was denied by a provision of the Texas state constitution regarding funding.[30] The "fundamentality" of the right was important because it raised the court's level of scrutiny above mere rational basis analysis and most, if not all, school-financing plans will be upheld under rational-basis analysis.[31]

However, the U.S. Supreme Court halted such analysis, and the press of multiple plaintiffs in various states eager to test such federal constitutional analysis in their courts, when it declared in *San Antonio Independent School District v. Rodriguez*[32] that education was not a fundamental right under the U.S. Constitution and that financing claims under the U.S. Constitution were not appropriately analyzed under strict scrutiny, but rather under rational basis.[33] Under that lower standard, the Supreme Court found Texas's system rational, and thus constitutional. The Court did hint in dicta that while education was not a fundamental right in the U.S. Constitution, it might be a fundamental right under the Texas Constitution.[34] In 1989, the Texas Supreme Court applied its state constitution in *Edgewood Independent School District v. Kirby* and found that the Texas education financing system's resulting wide disparities in funding were a violation of the Texas Constitution's guarantee of an "efficient" public education. These cases show the general deference given to educational funding provisions by courts unless some scrutiny other than rational basis is triggered; and they highlight the potential influence of state constitutions in educational issues such as the development of universal vouchers.[35]

28. Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1, 6 (1972).

29. *Id.* at 283 ("Today, education is perhaps the most important function of state and local governments.") (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

30. *Id.* at 285 (citing TEX. CONST. art. VII, § 3).

31. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1972).

32. 411 U.S. 1 (1972).

33. *Id.* at 36–39.

34. *Id.* at 54–55; Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1, 6 (1972).

35. *See* Brock Vergakis, *Do Vouchers = Segregation?*, DESERET MORNING NEWS, June 4, 2007, at B1 ("Leah Barker, spokeswoman for Salt Lake City pro-voucher group Parents for

In dealing with funding issues, proponents of a universal voucher cite the need to allow poor and minority students to flee failing schools. This, they claim would be made possible by a universal voucher. As a policy or legal matter, this argument may be a graft from *Zelman v. Simmons-Harris*,[36] which referred to the Cleveland public school district as a failed school district[37] and specifically noted that the voucher program would allow inner-city students to flee these failed inner-city schools. The U.S. Supreme Court recounted the magnitude of the failure as follows:

> For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only one in ten ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.[38]

The Rehnquist Court, at the very least, noted this failure of the system as background to its decision that the voucher program did not violate the Establishment Clause.[39] This finding may or may not have been central to the Court's decision; however, in its analysis the Court noted that, in part because of this factual background, there

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Choice in Education, said it's minorities and low-income families who will benefit the most from the voucher program. . . . 'If you're trapped because you can't afford a better neighborhood or you can't afford a private school, this is going to be a ticket out,' she said. 'How much more segregated can we possibly be? All the low-income families live in the west side (of the Salt Lake Valley) and attend failing schools. We are segregated right now based on income.'").

36. 536 U.S. 639 (2002).

37. *Id.* at 653.

38. *Id.* at 644 (citations omitted).

39. *Id.*

did not appear to be any financial incentives that skewed the program towards religious schools.[40] This was an argument, in Rehnquist's opinion, explaining why the stature effected no Establishment Clause violation and why there could be no reasonable public perception of endorsement of religion from the program.[41] In fact, the Court found that there were even apparent disincentives in the program *vis-a-vis* religious schools since private schools received only half the assistance under the program that community schools received and only one-third of the assistance offered to magnet schools.[42]

Whether or not the failing nature of the school district was central to the Court's decision, voucher advocates have tended to act as if preserving a component, or even a colorable argument, of assistance to low-income students is an important element of future proposals' constitutionality. The recent Utah voucher bill and its predecessor each offered some slight differences in voucher scale by parental income, and the political rhetoric and legislative history invoked arguments that these bills were designed to allow low-income and minority students to leave failing schools.[43] Unfortunately, both as to the political and perhaps constitutional ramifications, there was no factual basis for wholesale failure of the Utah public education system of a magnitude even slightly similar to the damning statistics noted by the *Zelman* Court regarding Cleveland's public schools.

Recognizing this deficiency in Utah, it is probable that one of the most fruitful avenues to increasing educational attainment for minority, low Socio-economic Status (SES), and language minority students would be more attention to equalization of funding and "adequacy" of public educational agencies in Utah and other states. Adequacy may be defined as "the provision of adequate resources to enable all children to meet a state's proficiency standards."[44]

40. *Id.* at 653 (quoting Witters v. Wash. Dep't of Servs. for Blind, 474 U.S. 481, 487–88 (1986)).

41. *Id.* at 654–55.

42. *Id.* at 654.

43. H.B. 148, 2007 Gen. Sess. (Utah 2007), *available at* http://le.utah.gov/~2007/bills/hbillenr/hb0148.htm.

44. Lawrence O. Picus & Leslie Blair, *School Finance Adequacy: The State Role*, 16 INSIGHTS ON EDUC. POL'Y, PRAC. & RES. 1–12 (Mar. 2004), *available at* http://www.sedl.org/policy/insights/n16/insights16.pdf.

Generally, "choice" parents—those who opt for choice programs, such as open enrollment within a district, magnet schools, or vouchers—tend to exhibit meaningful differences from "non-choice" parents, whether it be areas of knowledge, resources, or desire to exercise choice. For example, a higher percentage of minority, low SES, and language-minority students are likely to have parents who do not exercise choice under most programs.[45]

Thus, atrention to "adequacy" and adequacy litigation seems a more realistic avenue to improving education for such students as a legal matter, and perhaps as a policy and political matter as well. Certainly, the rhetoric in Utah against vouchers seemed to be about the inadvisability of removing funding from an already underfunded public school system, since that public school system served ninety-six percent of Utah's students.[46] This underscores the fact that focusing on the adequacy of education choice programs might actually provide the key ro success in these types of initiatives.

IV. ADEQUACY AND EQUITY IN SCHOOL FUNDING

As school administrators, parents, and students across the country struggle with the realistic implications of Supreme Court school-funding precedent and the problems of failing education systems, school-finance policy offers the potential solution of an adequacy approach to school funding. Traditionally, school-finance policy has focused on fiscal equity—fairness in the expenditures per pupil and fairness in the treatment of taxpayers.[47] However, "this cannot and should not be done with complete equality because of the many differences in the abilities and needs of students."[48] In addition, the key problem is that the differences in revenues per pupil across school district lines are usually, but not always, caused

45. BRUCE FULLER & RICHARD F. ELMORE, WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (1996); Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs*, 17 J. POL'Y ANALYSIS & MGMT. 373, 373–92 (1998).

46. Kim R. Burningham, *Rebuttal: Pro-voucher Arguments Employing Flawed Logic*, DESERET MORNING NEWS, Oct. 28, 2007, at G3.

47. VERN BRIMLEY, JR. & RULON R. GARFIELD, FINANCING EDUCATION IN A CLIMATE OF CHANGE 60 (Pearson A & B 2008) (1974).

48. *Id.* at 61.

by differences in property wealth per pupil.[49] Since the 1960s, these two dilemmas have spawned considerable funding formulas for financing education, as well as court challenges around the issue of disparities in per-pupil spending.[50]

While the goal of achieving school-finance equity remains elusive, the aim of improving the quality of public education continues to be a high priority. The nature of the debate has evolved over the last two decades. Reschovsky and Imazeki cite two reasons for this change: 1) "a broad consensus that economic success in our increasingly globalized economy requires substantial improvements in the overall quality of education"; and 2) "the quality of education received by children growing up in poor families must be dramatically improved if these children are to have any hope of escaping poverty."[51]

A more precise definition has been created, even though the goals of education have changed as the political environment has evolved.[52] Augenblick, Sharp, Silverstein, and Palaich note:

> [S]chool finance objectives . . . have moved from very simple concepts of equity to more sophisticated ones that are sensitive to the needs of individual students, schools, and school districts. The education system itself has been transformed from a highly regulated, "input" driven one to a standards-based system focused on performance and accountability. Finally, the political environment has changed so that, at the local level, tax and spending limitations now play an important role in controlling school district fiscal decisions, while at the state level, term limits have led to greater legislative turnover and a perceived loss of political leadership.[53]

49. ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 11 (4th ed. 2008).

50. *See id.* at 29–30.

51. Andrew Reschovsky & Jennifer Imazeki, *Achieving Educational Adequacy Through School Finance Reform*, 26 J. EDUC. FIN. 373, 373 (2001).

52. John Augenblick et al., *Politics and the Meaning of Adequacy: States Work To Integrate the Concept into K to 12 School Finance*, *in* MONEY, POLITICS, AND LAW: INTERSECTIONS AND CONFLICTS IN THE PROVISION OF EDUCATIONAL OPPORTUNITY 17, 17 (Karen DeMoss & Kenneth K. Wong eds., 2004).

53. *Id.* at 17–18 (citations omitted).

A. Adequacy in School Finance

These and other factors have fueled the debate over how to technically determine an adequate level of funding for schools, including the passing of the federal No Child Left Behind Act (NCLB) in 2001.[54] This act mandates annual testing of all students in grades three through eight and requires that schools make Adequate Yearly Progress (AYP) in reaching performance goals for all students and for separate groups disaggregated by race, ethnicity, poverty, disability, and limited English proficiency (LEP).[55] As a result, most states, including Utah, are implementing "standards-based" reforms to improve the educational system. The standards-based approach to school improvement includes four processes: 1) setting student performance standards; 2) creating assessments and data collection procedures to measure how well students are meeting those standards; 3) establishing accountability systems to determine how closely both schools and districts are performing; and 4) developing consequences for schools and districts that fail to meet the predetermined performance standards.[56] Unfortunately, "most states—and the federal government—do not know whether school districts have the resources necessary for them to fulfill state/federal expectations."[57]

The emergence of the concept of "adequacy" is changing the nature of the education finance policy debate. "'Adequacy' is not simply about finance; it is about virtually all facets of education."[58] Odden and Picus explain:

> [A]dequacy involves the provision of a set of strategies, programs, curriculum, and instruction, with appropriate adjustments for special-needs students, districts, and schools, and their full

54. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

55. *Id.* at 1446–50.

56. *See* AUGENBLICK, PALAICH & ASSOCS., INC., CALCULATION OF THE COST OF AN ADEQUATE EDUCATION IN TENNESSEE IN 2001–02 USING THE PROFESSIONAL JUDGMENT APPROACH AND THE SUCCESSFUL SCHOOL DISTRICT APPROACH, at ES-1 (2003), *available at* http://www.tsba.net/capitolwatch/pdf/Adequacy%20Study.pdf.

57. *See id.* at I-2.

58. James W. Guthrie, *Twenty-First Century Education Finance: Equity, Adequacy, and the Emerging Challenge of Linking Resources to Performance*, *in* MONEY, POLITICS, AND LAW, *supra* note 52, at 1.

> financing, that is sufficient to provide all students an equal opportunity to learn to high performance standards.[59]

Some scholars define adequacy as the provision of learning services sufficient to meet a goal. Of course, these are definitions of adequate outcomes; however, determining adequate levels of funding in relation to ourcomes is a far more difficult endeavor.

Berne and Stiefel believe the concept of adequacy is rooted in the 1983 *Nation at Risk* report, which "added excellence" to decades of focusing solely on the issue of equity.[60] Thus, as Odden and Picus report: "The education excellence reforms of the 1980s transformed into the systematic and standards-based education reform of the 1990s, [where] the concept of educational adequacy matured. It continued with the Clinton administration's Goals 2000 programs and the Bush administration's [NCLB] legislation."[61]

Adequacy, Odden and Picus argue, "could be viewed as having both an inputs and an outputs orientation—the inputs being the programs, curriculum, and instruction that are sufficienr to teach students to high standards, and the outputs being the measurement of the results that ate achieved."[62] State standards-based education reform, the federal NCLB Act, and school-finance adequacy court mandates are "all focused on . . . designing, funding, and implementing an education system that is effective in educating students to proficiency standards, and above those levels for some students."[63]

B. Determining Adequacy

There has been both conceptual and empirical research about educational adequacy, including how to set the adequacy spending level—"how high the foundation expenditure level should be, whether at a minimum, basic level, as was discussed years ago, or at an adequate level, as is discussed today."[64] The school-finance community has developed four methodologies to determine an adequate foundation expenditure level: 1) the input or professional-

59. ODDEN & PICUS, *supra* note 49, at 75.
60. *Id.*
61. *Id.* (citations omitted).
62. *Id.*
63. *Id.* at 86.
64. *Id.* at 77.

judgment approach; 2) the successful-district approach; 3) the cost-function approach; and 4) the evidence-based approach.[65] These four models have been valuable in providing courts and policy makers with practical approaches to determine the cost of an adequate education. The following descriptions of such models are drawn from Odden and Picus' synthesis of the school-finance community's contributions to these four promising models for addressing adequacy in financing.[66]

1. The input or professional-judgment approach

In the 1970s, plaintiffs claimed that discrepancies in funding resulted in a system that was not "thorough," "efficient," "uniform," or of "high quality."[67] The constitutionality of such systems was challenged in seventeen states, and seven of those states (including the state of Washington) declared their systems unconstitutional.[68] The input method was first implemented in Washington when the state's top court required the state to identify and fund a "general and uniform" education program.[69] The state essentially identified the average staffing (teachers, professional support staff, administration, etc.) in a typical district and, using statewide average costs, determined a spending level.[70] In 2005, the new governor commissioned an updated study of adequacy.[71] "That study, completed in 2006, found that substantial new resources were needed to fund schools at an adequate level for the needs of the more demanding global economy of the twenty-first century."[72]

65. *See* James Guthrie & Richard Rothstein, *Enabling "Adequacy" To Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangement*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 209, 216–18 (Helen Ladd, Rosemary Chalk & Janet Hansen eds., 1999).

66. *See generally* ODDEN & PICUS, *supra* note 49.

67. Jane McDonald et al., *School Finance Reform: The Role of U.S. Courts from 1968–1998*, *in* 23 NATIONAL FORUM OF EDUCATIONAL ADMINISTRATION AND SUPERVISION JOURNAL-ELECTRONIC 1–13 (2006), *available at* http://www.nationalforum.com/Electronic%20Journal%20Volumes/McDonald,%20Jane%20School%20Finance%20The%20Role%20of%20US%20Courts%201968-1998.pdf.

68. *Id.*

69. ODDEN & PICUS, *supra* note 49, at 78.

70. *Id.*

71. *Id.*

72. *Id.* (citations omitted).

Jay Chambers and Thomas Parrish created another input approach called the Professional Judgment Model (PJM). This method was used in two major studies in Illinois (1982) and Alaska (1984).[73] A modified version of the PJM was used in the state of New York in 2004.[74] Using groups of professional educators, the PJM first identifies base staffing levels for the regular education program.[75] These experts also identify effective program practices and their staffing and resource needs for students with disabilities, English language learners and orher compensatory programs.[76] All ingredients are priced using average price figures, but in derermining the foundation-base dollar amount for each district, the totals are adjusted by an education-price index.[77]

According to Odden and Picus, "[t]he advantage of all these input approaches is that they identify a set of elements that a certain amount of dollars would be able to purchase in each school district, including additional resources for three categories of special-needs students, all adjusted by a price factor."[78] The fact that the resulting estimates are based on the judgments of professional educators adds credibility and reliabiliry. Guthrie and Rothstein explained: "We prefer the professional judgment approach, not because we believe it is more precise than statistical or inferential methods (it may not be more precise), but rather because its imprecision is more transparent."[79] The disadvantage is that "the resource levels are connected to student achievement results only indirectly through professional judgment and not directly to actual measures of student performance."[80] Moreover, expert judgment has the potential for subjectiveness of the process and the results can vary dramatically both across and within states.[81]

73. *See generally* Jay G. Chambers et al., *Examining the Relationship Between Educational Outcomes and Gaps in Funding: An Extension of the New York Adequacy Study*, 81(2) PEABODY J. EDUC. 1 (2006).

74. *See id.*

75. Picus & Blair, *supra* note 44, at 3.

76. *Id.*

77. ODDEN & PICUS, *supra* note 49, at 78.

78. *Id.*

79. Guthrie & Rothstein, *supra* note 65, at 231.

80. ODDEN & PICUS, *supra* note 49, at 78.

81. Picus & Blair, *supra* note 44, at 1–12.

2. The successful-district approach

The successful-district approach first determines a desired level of performance using state tests of student performance and then identifies districts that produce that level of performance.[82] From that group, the approach selects those districts with characteristics comparable or close to the state average and then calculates average spending per pupil.[83] The underlying assumption is that any district should be able to accomplish what some districts do accomplish.[84] Such studies have been conducted in several states including Kentucky, Maine, Maryland, Montana, Nebraska, Oregon, South Carolina, Wisconsin, and Wyoming.[85] Interestingly, in most of these studies, "the level of spending identified was approximately the median spending per pupil in the states."[86] A major advantage of this approach is that it identifies the spending level linked to a specified student performance level. In addition, this approach is easy to justify and makes sense to the general public. However, problems can arise in setting the criteria for the sample of districts identified as successful. Another disadvantage is that the method does not indicate how the funds should be spent to produce the student achievement results. Further, as Odden and Picus state, "atypical districts are often eliminated from successful-district analyses, which usually include the highest- and lowest-spending and highest- and lowest-wealth districts, as well as large urban districts."[87] Critics maintain that this technique takes too little notice of the difficulties faced by some districts and assumes that the variation in performance is correlated with variation in funding.[88]

3. The cost-function approach

The cost-function approach relies on statistical analysis to determine a per-pupil amount "necessary to achieve various

82. ODDEN & PICUS, *supra* note 49, at 78–79.

83. *Id.*

84. *See* AUGENBLICK, PALAICH & ASSOCS., INC., *supra* note 56, at II-4 ("The successful school district approach is based on the simple premise that the base cost of all districts can be determined by the basic spending of districts that meet state standards.").

85. Picus & Blair, *supra* note 44, at 4.

86. ODDEN & PICUS, *supra* note 49, at 79.

87. *Id.*

88. Guthrie & Rothstein, *supra* note 65, at 220–23.

educational performance goals given the characteristics of a school district and its student body, and the prices it must pay for *inputs* used to provide education."[89] According to Odden and Picus, this method can also be used to calculate "how much more money is required to produce the specified level of performance by factors such as special needs of students, scale economies or diseconomies, input prices, and even efficiency."[90] These factors allow the calculation of an adequate expenditure per pupil for an average district, and an adjusted figure for all other districts depending on the characteristics of the district and its students.[91]

The advantage to this approach is its appeal to education economists, but the disadvantage is that "it [is] difficult ro explain to policymakers and the general public, and it becomes very complex mathematically due to the number of inputs."[92] No state currently uses this approach, though cost function research has been conducted for several states. Guthrie and Rothstein assert that while the resulting statistical analysis seems scientific and precise, "in reality, the precision implied by statistical modeling may be misleading because each of the definitions of data used in these equations, and rationales for their use, requires assumptions and judgments that are not necessarily more precise than those of professionals operating without statistical models."[93] Regardless, many scholars insist "a number of important insights about relationships between inputs and outputs may be gleaned from cost function analysis."[94]

4. The evidence-based approach

The evidence-based approach developed by Odden and Picus[95] seeks to identify the resources needed for a prototypical school to meet the state's student performance standards. According to the developers, this method "is to identify research- or other evidence-based educational strategies, price them out, and then aggregate

89. Reschovsky & Imazeki, *supra* note 51, at 379.
90. ODDEN & PICUS, *supra* note 49, at 79.
91. *Id.*
92. Picus & Blair, *supra* note 44, at 4.
93. Guthrie & Rothstein, *supra* note 65, at 222.
94. Picus & Blair, *supra* note 44, at 4.
95. *See generally* ODDEN & PICUS, *supra* note 49.

them to identify adequate school site, district, and state expenditure levels."[96] This approach also identifies educational strategies that produce desired results.[97] When this method was first implemented it used the ingredients of "high performance" or "whole school" designs created by the New American Schools to determine overall cost levels.[98]

The evidence-based approach has been used to calculate adequate spending levels in several states. As a result, a list of resources for a school of 500 students has been developed with the goal of increasing the overall level of student performance.[99] "This level of funding would allow schools to deploy just about every strategy research has shown to have statistically significant impacts on studenr learning . . . ."[100] This "model" level of funding is adequate for the education system to provide the kind of school restructuring that is intended to result in a doubling of student performance, particularly for low-income and minority students.[101]

Additional work and research are needed to identify "adequate" expenditure levels.[102] However, as Guthrie and Rothstein stated: "[I]t may now or soon [will] be possible to specify adequate resource levels based on a distillation of national empirical research about effective schools and judgments of professional researchers regarding effective practices."[103] One of the advantages of the evidence-based approach is "the reliance on the growing research base about what programs and models have been successful in improving student learning."[104] On the other hand, it is difficult to develop a one-size-fits-all model that will work in all the districts and schools in a state.

The four methods of determining adequacy outlined above have strengths and weaknesses, but "at their core, these new approaches to school finance seek to link spending with student achievement

96. *Id.* at 80.

97. *Id.*

98. *Id.*

99. *Id.* at 80–81.

100. *Id.* at 81.

101. *Id.*

102. *See* Lori L. Taylor et al., *Measuring Educational Adequacy in Public Schools* 3 (Bush Sch. of Gov't & Pub. Serv., Working Paper No. 580, 2005).

103. Guthrie & Rothstein, *supra* note 65, at 230.

104. Picus & Blair, *supra* note 44, at 6.

results."[105] As states wrestle with the issue of whether or not to provide school vouchers as a way to meet the needs of "individual" students, perhaps those discussions should focus on what inputs are necessary to achieve the desired outputs for "all" students. Picus and Blair note: "The connection between accountability and adequacy is clear: If states are holding districts and schools accountable for what students should know and be able to do, then states must provide the resources to enable schools and districts to meet the state-set standards."[106]

V. CONCLUSION

Litigation has been used as a way to equalize educational funding patterns and thereby more equitably provide for maximized learning opportunities for all students. As scholars and policy makers investigate various approaches to adequacy, education jurisprudence has been quick to catch up. "School finance litigation is moving away from the traditional cases involving fiscal disparities and toward the more complicated educational adequacy cases."[107] Odden and Picus note: "Challenging the state school finance structures under the state education clause opened the way for legal strategies beyond those used in equal protection litigation . . . . [T]he most important use of the education clause consisted of arguing that it requires the state to provide a certain quality of education to children."[108]

According to Odden and Picus, there are three important points that a court must consider when ruling on a challenge to the school finance system on the basis of the state education clause: 1) "[w]hether the education clause requires not just an education system but some level of quality;"[109] 2) "[t]he historical meaning of the education clause;"[110] and 3) "[t]he substantive demands of the education clause—adequacy arguments."[111] Interestingly, there are mixed results among the finance lawsuit decisions appearing throughout the country. "Education finance scholars have noted the

105. ODDEN & PICUS, *supra* note 49, at 81.
106. Picus & Blair, *supra* note 44, at 2.
107. ODDEN & PICUS, *supra* note 49, at 49.
108. *Id.* at 39.
109. *Id.*
110. *Id.*
111. *Id.*

striking similarity of case facts among sets of cases, yet the outcomes in different states vary widely."[112]

The most important factors in education finance cases are first, what constitutes an adequate education, and second, what is the appropriate amount of money needed to achieve the desired results. If the goal of the state is to treat students equally, then as Vriesenga asserts, the fundamental question becomes

> whether funding at the level designated by the legislature meets the constitutional standard, or if it requires a bit more than what the legislature provided. Can a constitutional standard like "efficient" be reasonably read to determine that it requires some percentage higher than the current level, or does a reasonable reading of the constitution preclude such fine tuning?[113]

Vriesenga referenced the writings of Judge L. Ralph Smith as he grappled with the abstract question of adequate funding. Judge Smith believed that in order for the courts to determine adequacy they would have to

> subjectively evaluate the Legislature's value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. In short, the Court would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by Plaintiffs.[114]

It appears that given the complexity of the adequacy issues, some judges may be reluctant to delve into the decisions made by state legislatures.

Questions of providing both equitable and adequate funding are also relevant to compliance with NCLB, and what are likely to be its amendments. Although most of the school finance litigation is now based on issues of adequacy, Minorini and Sugarman concluded:

> [T]he prominence of the adequacy cases does not mean courts have shifted away from the equity argument entirely. It means only that the courts have turned from equity defined only in dollar terms to

112. Karen DeMoss, *Who's Accountable to the Constitution? Thirty Years of Judicial Politics in State Education Finance Litigation*, 78(4) PEABODY J. EDUC. 44, 46 (2003).

113. Michael P. Vriesenga, Judicial Beliefs and Education Finance Adequacy Remedies 224 (Dec. 2005) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with author).

114. *Id.* (quoting Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 407 (Fla. 1996)).

> equity defined in terms of programs and services to which a dollar figure can be attached. Though this is clearly an advance, it also harkens back to the "education needs" cases in the early days of school finance litigation. Indeed, it could be argued that the adequacy approach, together with standards-based education reform and the implied comprehensive set of school strategies needed to deliver those standards, is simply an updated version of the old education needs argument.[115]

It seems far more likely that attention to educational and financial adequacy in public education will have greater potential to serve the needs of low-income, minority, language-minority, and other students whether the focus is on equity, a basic floor of adequacy, or standards-based outcomes. This method would be more effective than vouchers that rely on loosely coupled economic incentives and the vagaries of the private schools of a state like Utah, one presently without a mature or large system of private schools. The question remains whether voucher advocates in Utah and other states are including arguments and some types of at least minimal structures to serve low-income and at-risk students in a real desire to serve such students, or as an element to ensure passage of their desired legislation while paying the closest attention to other ends and constituencies served.

As discussed above, there may be reasons to question the continued sanguinity of proponents of universal vouchers that there are no significant legal Establishment Clause and other hurdles left. Such broad statutes' constitutionality, both at the federal level and the state level, may not be as unassailable as proponents assume. Possibly, rhetoric in *Zelman* regarding the overwhelming failure of the school districts involved raises questions regarding universal vouchers in less extreme cases, especially in states that have been dealing with "adequacy" claims in state courts. In addition, it seems that, with *Bush v. Holmes* as a referent heretofore not available in briefs to the United States and the Utah Supreme Court, and based on the language of the Utah Constitution, it is conceivable that a universal voucher system could be found to violate the religion provisions of the Utah Constitution, even in the absence of a

115. ODDEN & PICUS, *supra* note 49, at 49 (citing Paul A. Minorini and Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact and Future*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 65, at 175).

smoking gun of "direct" aid prohibition. The possibility of state constitutional infirmity has apparently been dismissed by advocates of Utah's voucher bill. Such a dismissal of the potential unconstitutionality of such a sweeping bill seems somewhat misplaced—especially in light of the completely open nature of Utah's proposed universal voucher. At the very least, it seems an expensive experiment, especially in light of the authors' opinion that atrention to adequacy of education has far greater potential to improve educational opportunities for all Utah's schoolchildren—including those of low socio-economic status.