Interim Report #1 to AUSD Board of Trustees on Viability of Litigation to Improve State Funding of AUSD

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I. Background/Origin of Investigation into Viability of Litigation

In February 2007, the Alameda Unified School District ("AUSD") faced yet another in a recent series of painful rounds of budget cuts caused, in part, by the fact that AUSD receives below average funding per student from the state. [1]

Prompted by the pain and frustration of several consecutive years of budget cuts, in February 2007, Alamedans for Better Schools and the Alameda Education Foundation held a series of "community meetings" to consider how we might work together proactively to improve the financial resources available for Alameda's schools. One result of those "community meetings" was the formation of community "subgroups" to look into (1) increased local private fundraising (e.g., expanding the AEF Legacy Fund), (2) legislative lobbying (e.g., on AB 1638 (narrowing the gap between low funded districts and others)), and (3) a group formed to investigate the viability of litigation.

Ann Casper and I agreed to lead/coordinate/facilitate "subgroup" (3), the group investigating litigation as one approach (among many) that we might pursue to improve the financial condition of AUSD. Both Ann and I are (1) lawyers, (2) parents of AUSD students, and (3) teachers at Alameda High. Over the past three and a half months, we have spent a significant amount of time and energy researching and seeking advice about the prospects for litigation from the best minds we have been able to find.

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[1] Specifically, AUSD has a lower Base Revenue Limit ("BRL") than both the Alameda County average (we're 15th our of 16 school districts in Alameda County in our BRL) and the state average, even though (a) the cost of living in this county is approximately 118% of the statewide average and is among the very highest in the entire state and (b) the percentage of English language learners here is higher than average.

II. Process and Progress of Investigation into Viability of Litigation

Over the past few months, in addition to extensive research of our own, we have managed to talk with some of the very most experienced, expert people in the field of California school finance. As a result, we have managed to obtain what amounts to thousands of dollars of (free) legal analysis and advice on whether (and if so, when and how) litigation might be viable. All of the people with whom we talked were extremely generous with their time and spoke with us without compensation. In reverse chronological order, here are the "top 10" contacts and/or consultations we've made:

(1) Goodwin Liu, Professor of Law at Boalt Hall (U.C. Berkeley).

(2) Scott Plotkin, Holly Jacobson, and Abe Hajela. Mr. Plotkin is the Executive Director of the California School Board Association. Ms. Jacobson is CSBA's Assistant Executive Director for Policy Analysis and Board Development. Mr. Hajela is special counsel who works with CSBA on school finance/adequacy, among many other things. He was also involved in the Williams case.

(3) Bill Koski, Professor of Law at Stanford Law School.

(4) Jon Sonstelie, a Professor of Economics at U.C.S.B. and the author of one of the main "Stanford Studies" on school finance. (Aligning School Finance with Academic Standards: A Weighted-Student Formula Based on a Survey of Practitioners, Sonstelie, Jon (2007), Public Policy Institute of California.) He has developed (and is refining) a model/simulation to use a weighted-student formula for defining adequacy for school finance.

(5) Mike Kirst, the author of another of the main "Stanford Studies" on school finance. (Evolution of California State School Finance with Implications from Other States, Kirst, Michael, Goertz, Margaret, and Odden, Allan. (2007), Consortium for Policy Research In Education (CPRE).) Professor Kirst has truly unparalleled knowledge and experience in this area. He has been Professor of Education and Business Administration at Stanford University since 1969. He is a faculty affiliate with the Department of Political Science, and has a courtesy appointment with the Graduate School of Business. He was a member of the California State Board of Education (1975 -1982) and its president from 1977 to 1981, as Prop 13 was "hitting."

(6) Kathy Dunlop, who performed data analysis in support of the Williams case.

(7) David Long, an attorney who has been involved heavily with school finance litigation in other states.

(8) Jack Londen of Morrison & Foerster, who was one of the lead attorneys in the Williams case

(9) Richard (Dick) Rothschild, Director of Litigation for the Western Center on Law and Poverty in L.A. (Dick represented the plaintiffs in the Serrano case, including the

"compliance hearing" in the case in 1983 (on the opposite side of the case from Robin Johansen)).

(10) Robin Johansen, founding Partner at Remcho, Johansen & Purcell (Robin and her firm represented California in the Serrano case, also including the "compliance hearing" in the case in 1983 (on the opposite side of the case from Dick Rothschild)).

III. Analysis and Recommendations of Investigation into Viability of Litigation

A. The Political Context: Auspicious for Legislative Rather Than Legal Action?

The Governor and various legislative leaders have announced that 2008 will be the "year of education reform" in California. As a result, there is always a chance the legislature could take action that would make moot the litigation we're contemplating. Accordingly, whatever decision we do or do not make regarding litigation, we should expand lobbying efforts directed at the legislature and the Governor.

There is a case to be made that the stars might be aligned just right next year for the legislature actually to enact meaningful school finance reform, thus obviating the need for litigation. In particular, in addition to the Governor's pledge to take action next year those "stars" that might be aligned include:

(1) the March 2007 release of "the Stanford Studies" (by the Institute for Research on Education Policy & Practice at Stanford University) and the resulting media coverage and public awareness and support for change

(2) the expected fall 2007 release of recommendations by the Governor's "Committee on Education Excellence" (http://www.everychildprepared.org), a non-partisan, privately funded group chaired by Ted Mitchell charged with examining K-12 education in California and recommending steps to the Governor to improve the performance of public schools.

(3) the growing activism of the state's "Education Coalition"

(4) a relatively healthy state economy

(5) the projected leveling off (or decline) of statewide school enrollment in California over the next five years, which may have the effect of increasing somewhat the pool of funds available per student statewide.

On the other hand, the "assumptive world of policymakers" (as Professor Kirst puts it in his study cited above) suggests broad reform is unlikely. If the past 30 years are any indication, despite the political rhetoric about the upcoming "year of education reform," it is quite likely that no significant changes will occur in California school finance for the foreseeable future. Rather, the "assumptive world of policymakers" tends to prevent significant reform so that incremental change might be the best we could hope for. Of course, incrementalism (e.g., more equalization funding for below average BRL districts such as AUSD) would still be very helpful. As the painful budget cuts in Alameda have shown, every marginal dollar is valuable.

B. Non-Legislative Remedies Other Than Litigation?

If the legislature cannot or will not act next year, are there any other remedies available aside from litigation? Perhaps.

If the legislature fails to act in 2008, some in the Education Coalition are considering launching an initiative in 2008 to bypass the legislature.

Locally, though the required 2/3 public support is uncertain, there is a possibility of another campaign to raise the school parcel tax in Alameda, perhaps to a level equal to the hospital parcel tax ($298, I believe).

Some Alameda officials have also offered other suggestions for additional city support of AUSD.

C. Litigation: General Considerations

At the end of the day, though, it may be that litigation is the only course of action left. Perhaps the best argument for litigation is the fact that legislatures in several other states have been prodded into reforming school financing systems only after a credible threat of a lawsuit. On the other hand, a lawsuit of the sort we are contemplating may take 8-10-12 years, cost millions of dollars, and still not succeed. Given these costs and risks, the more faith one has that the legislature will, eventually, make better public policy in this area, the less appealing litigation appears. (The corollary, of course, is that the less faith one has in the legislature being willing and able to enact reform, the more likely one is to favor litigation.)

This Litigation Would Be a Political Undertaking

As a practical matter, any litigation of the sort we are contemplating would necessarily be highly "political" and would have to include a thoughtful political strategy and political support to work in concert with any legal strategy. In the absence of a strong, broadly based political coalition in support of the litigation and of the particular remedy sought, courts are generally reluctant to invade the province of the legislature, especially where (as here) the language of the Constitutional clauses at issue is relatively general and open-ended.

Given the designation of 2008 as the "year of education reform," most of the experts with whom I have talked believe the political climate is not yet "ripe" for an adequacy suit. As one person put it, if we don't appear to have exhausted every other possible remedy (e.g., aggressively lobbying the legislature, the Governor, the Governor's Commission and anyone else we can think of), any case we might bring would have a much harder time in the courts. If nothing happens in the legislature by the spring of 2008, the climate might be ripe.

If we do pursue litigation as part of a "litigation is politics by other means" sort of approach, we should seek legislators to "carry" bills simultaneously that seek the

remedies/reforms we would be seeking through the courts so that a legislative solution also remains available.

Some Considerations in the Choice of a Remedy

I argued above that having a broad political coalition supporting our litigation would increase the likelihood that we would prevail on any legal claim. At the same time, however, the broader the coalition, the more difficult it will be to agree among the coalition partners on a particular remedy or desired outcome.

Whatever legal theory we might build a case upon (equal protection or adequacy – See III.D. below), the question of what remedy we should seek would be a critical piece of our legal and political strategy. To minimize political opposition and judicial reluctance, an ideal remedy would be implemented with a slow transition from the present system and, if at all possible, would not actually reduce funds to any "losing" school districts but would instead "hold harmless" those districts (i.e. in contrast to the 1970's post-Serrano "equalizing down" of high spending districts).

One possible ultimate remedy we should consider would be a redefinition of equalization or adequacy based on a formula that would include some sort of weighting of (1) regional cost differences around the state and (2) student characteristics (e.g., poverty, ELL status). This approach would include building and using a formula similarly to the approach discussed in Professor Sonstelie's recent "Stanford Study." (Aligning School Finance with Academic Standards: A Weighted-Student Formula Based on a Survey of Practitioners, Sonstelie, Jon (2007), Public Policy Institute of California.)

Ultimately, if we were to prevail in litigation, the legislature would still have to implement whatever remedy the courts would impose, as was the case in Serrano and as has been the case in other states where there has been successful litigation. Accordingly, it is important to keep in mind that any judicial remedy we would pursue would have to be enacted by the legislature.

D. Legal Bases for Litigation: Equal Protection? Adequacy?

1. a. Equal Protection: A Broad Claim?

Alameda's below average BRL is certainly unequal. The legal question is whether it is so unequal that it is an unconstitutional violation of "equal protection" under the U.S. and/or California Constitutions.

If a "fundamental right" is involved, courts look at unequal treatment much more closely using "strict scrutiny" and require the government to show a "compelling state interest" rather than using a much more deferential standard of review only requiring the government to show a "rational basis" for the unequal treatment (a much lower standard of proof).

In terms of U.S. Constitution "equal protection" arguments, it is important to note that in 1973 in Rodriguez the US Supreme Court appeared to hold that education is not a "fundamental right" under the US Constitution. However, the Court decided the

Rodriguez case in the context of a school finance system based on local property taxes. Since California's system is no longer based substantially on local property taxes, Rodriguez may not apply to California so that there may still be a federal Constitutional basis for an equal protection claim (Cf. Papasan v. Allain, 478 U.S. 265 (1986) (distinguishing Rodriguez on the grounds that Rodriguez only applied to protect the state interest in a local property tax based system.))

In terms of the California Constitution, the California Supreme Court seems to have held in the second Serrano decision that education is a "fundamental right" under the California Constitution which requires California courts to look at unequal treatment much more closely using "strict scrutiny." But the court's "fundamental right" analysis may have been tied specifically to differences in wealth and may not help us greatly in the lawsuit we're contemplating.

Moreover, in the 1983 trial determining whether California's post-Prop 13 school financing system (and for the most part, the current system) complied with Serrano and the California Constitution, the court suggested courts should give a lot of deference to the state. Specifically, in deciding that the $100 "bands" of BRL's established in the first Serrano case could widen, the judge reasoned that "[u]ndue emphasis on the $100 figure would be inappropriate. Rather, both fact and law lead this court to interpret the judgment to require the elimination of all but 'insignificant differences'." The "Serrano bands" are now $300. Alameda appears to be within the currently "acceptable band" of $300 variation.

In sum, it is possible that we could prevail on an equal protection claim, though it is far from certain and might require an effort to modify Serrano.

1. b. Equal Protection: A Narrow Claim?

An alternative equal protection approach would be a more narrow claim centered on the allegedly discriminatory/unequal treatment of districts that have lower BRL's due to military base closures. (The Alameda Naval Air Station closed in 1997. The closure led to a multi-million dollar reduction in federal aid to our school district.)

Advantages of this approach include (1) the possibility of avoiding the political and legal barriers presented by a broad challenge to the validity of the post-Serrano $300 bands and (2) the possibility that, other things being equal, narrower and simpler legal claims may have a better chance to prevail than broad, complex claims.

Disadvantages of this approach include (1) the fact that it may depend upon difficult to prove counterfactual historic analysis (i.e., we would have to show that, in the absence of federal aid based on the Naval Air Station, in the 1970's Alameda would have had a higher property tax base (even without the population of Navy students) and so would have received a higher initial base revenue limit under SB 90 in the 1970's) and (2) perhaps more significantly, the greatly increased probability that we would have more difficulty building a political coalition to support and/or help fund the lawsuit (i.e., there is much less chance of getting allies or pro bono representation for a narrow claim benefiting only Alameda or a few other similarly situated districts).

It is not inconceivable that we could find political and financial allies (and counsel) for a narrower equal protection claim, but that may depend on whether such a case is viewed as (1) a defense of the whole system (i.e., if our argument were that the current system is acceptable except for the few outliers such as districts impacted by base closures) or (2) another example of a fundamentally flawed, unjust system so that our narrow case would be one step towards another broader case. The greater the perception is (1), the more likely we are to prevail, but the less likely we are to get political support or find counsel. The greater the perception is (2), the more challenging it will be for us to prevail on our claim, but the more likely we are to get political support or find counsel. The litigation strategy of the NAACP Legal Defense Fund (i.e., forcing the integration of state law schools from the 1930's until 1950 as a means of setting the stage for integration of all public schools in Brown v. Board of Education in 1954) might be an instructive example to examine here.

2. a. Adequacy: A Broad Claim?

The view of several of the experts with whom I talked is that the most promising legal theory upon which to bring a case is not an equal protection case. Rather, it would be an argument that California has failed to fulfill its obligation under the state Constitution to provide an adequate education. This would a so-called adequacy challenge.

In the past 10-15 years, adequacy challenges have been the bases of successful school finance litigation in Kansas, Montana, New York, North Carolina, and Texas. An adequacy suit in California would build on the momentum of these relatively recent plaintiffs' victories.

Since state Constitutions tend not to have identical language, there is a fair amount of uncertainty over whether the California Constitution would lend itself to an adequacy challenge. Not surprisingly, there is a significant split of opinion among the lawyers/law professors with whom we spoke regarding whether or not the California Constitution would lend itself to an adequacy challenge. The conclusion I've drawn from these split opinions is that, at a minimum, an adequacy challenge is plausible and would be ethical to pursue (i.e., we wouldn't be bringing a baseless suit).

2. b. Adequacy: A Narrow Claim?

If adequacy is the favored theory, we could also pursue a more narrow adequacy case focused on Alameda rather than the whole system of school finance in California. This approach would involve the same general set of tradeoffs as with the narrower equal protection case discussed above in D.1.b.

E. Logistical/Practical Challenges of Litigation

Funding litigation will be prohibitively expensive unless we are able to secure pro bono representation or allies with deep pockets.

Depending on the legal theory we would employ, the breadth or narrowness of the claim we would make and the remedy we would seek, we may find there are many other districts and groups in a similar situation to Alameda. Obviously, the broader the case, the greater chance there is for sharing litigation costs.

As mentioned above, a lawsuit of the sort contemplated may take 8-10-12 years.

F. Where to Go from Here?

Subject to many caveats, it is my view that, litigation *is* potentially viable, though the barriers to success through litigation are truly massive and may prove ultimately to be insurmountable.

In light of the uncertainties we still face, I recommend that for the next six to eight months we continue working on this "litigation project," including (1) making expanded efforts to find political (and financial) allies and (2) investigating whether we could secure appropriate counsel for such an undertaking. During this period of continued investigation into litigation, we should of course see if the stars aligned for legislative action do lead to a change in Sacramento in 2008. By February or March 2008 at the latest (and probably much sooner), we will have a good idea of what is likely to happen or not happen with our Governor and the so-called year of education reform.