The Education Article of the 1970 Illinois Constitution: Selected Policy Issues for Consideration and Debate at the Next Constitutional Convention

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I. INTRODUCTION

The Education Article of the Illinois State Constitution, Article X, is one of the briefest in the document. Yet it deals with a subject which is of paramount importance to our society: the development of future generations of citizens—those who will be responsible for our democratic way of life, our culture in all its diversity, and the preservation and evolution of those values which underpin our society. The record of proceedings of the Sixth Illinois Constitutional Convention,¹ the convention of 1969 which drafted the present Constitution, demonstrates that the education of our youth is a topic which engenders caring, concern, and conflict among people who must articulate the principles which will provide the framework for the government of our state. If there is to be a constitutional convention at the end of this decade, then the language articulating the purposes, governance, and financing of public education merits reconsideration. We must be certain those principles reflect what we really mean to say, what we believe and are committed to, for they will shape the new generations not only in and for the complex world we at present vaguely comprehend, but also for the unknown dimensions of the twenty-first century.

The Constitution of 1870 contained its article on public education at Article VIII and contained additional relevant provisions at Articles

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IV, V, and IX. Article X of the present Constitution has three

2. Ill. Const. of 1870 art. VIII:
   § 1. The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.
   § 2. All lands, moneys, or other property, donated, granted or received for school, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made.
   § 3. Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian domination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose.
   § 4. No teacher, state, county, township or district school officer shall be interested in the sale, proceeds or profits of any book, apparatus or furniture used or to be used in any school in this state, with which such officer or teacher may be connected, under such penalties as may be provided by the general assembly.

Ill. Const. of 1870 art. IV:
   § 22. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for . . . Providing for the management of common schools; . . . Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted.

Ill. Const. of 1870 art. V:
   § 1. The executive department shall consist of a . . . superintendent of public instruction . . . who shall . . . hold his office for the term of four years from the second Monday of January next after his election and until his successor is elected and qualified. They shall . . . reside at the seat of government during their term of office, and keep the public records, books and papers there, and shall perform such duties as may be prescribed by law.

Ill. Const. of 1870 art. IX:
   § 3. The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for . . . school . . . purposes, may be exempted from taxation; but such exemption shall be only by general law.
   § 12. No county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five percentum on the value of the taxable property therein, to be
sections. Section 1 articulates general principles on the goals and purposes of the state system of public education; the analogous provisions were at Section 1 of Article VIII of 1870. Additionally, the current Section 1 says the state has the primary responsibility for funding public education. Section 2 provides for the election of a State Board of Education with the duty to appoint a chief state educational officer; the prior mechanism was found at Section 1 of Article V of 1870. Formerly the Superintendent of Public Instruction had been elected since an act of 1845; the elective position was terminated at the conclusion of the term of office of the last elected state superintendent on January 1, 1975. Section 3 prohibits the use of public funds for sectarian purposes; the identical provision was at Section 3 of Article VIII of 1870.

At the last constitutional convention, the Education Committee proposed the following changes to Article VIII of the 1870 Constitution:

1. that Section #1 be reworded;
2. that a new Section #2 creating a State Board of Education be inserted and that the Superintendent of Public Instruction be eliminated as an elected office;
3. that section #3, prohibiting the use of public funds for sectarian purposes be retained; and
4. the elimination of Section #2, 3, and 4.\footnote{3}

This paper will only briefly touch on Section 2 of Article X, which provides for the election of a State Board of Education and its appointment of the chief state educational officer, or Section 3 of Article X, which repeats the language of the 1870 Constitution prohibiting the use of public funds for sectarian purposes.\footnote{4} These are ascertainment by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay and discharge the principal thereof within twenty years from the time of contracting the same.

\footnote{3} RECORD OF PROCEEDINGS, supra note 1, vol. VI at 225.
\footnote{4} ILL. CONST. art. X, § 2(a):

2.(a) There is created a State Board of Education to be elected or selected on a regional basis. The number of members, their qualifications, terms of office and manner of election or selection shall be provided by law. The board, except as limited by law, may establish goals, determine policies, provide for planning and evaluating education programs and recommend financing. The Board shall have such other duties and powers as provided
important topics but beyond the primary scope of this article.

The main question under Section 2 would be whether the system of electing a State Board of Education, rather than appointing the Board, and appointing the Superintendent of Public Instruction, rather than electing that officeholder, has functioned as the delegates expected it to. That would be a lengthy study which merits attention but which is not possible to fully address here.5

Section 3 was retained without change partly because delegates felt it would be too controversial to tamper with the language. Obviously the topic of separation of church and state remains at the center of controversy. Witness the recent spate of litigation across the country brought by the religious right and the rise of political activism of such groups, as well as suits brought to challenge alleged funding of sectarian related activities.6 Some might argue that Section 3 is superfluous in light of the Establishment Clause of the First Amendment, that federal cases applying that language adequately prevent the use of public monies for religious purposes. However, others could argue that the Illinois language is more specific and more restrictive than the First Amendment's prohibition. Undoubtedly, should there be a constitutional convention, debate on the church-state issue will engender intense feelings. An adequate treatment of

by law.

Ill. Const. art. X, § 3:

3. Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose.

5. It is interesting to note that at the time of the 1969-70 convention election of state school boards was definitely the minority position; thirty-five states had boards appointed by the governor and seventeen had boards elected by the people or representatives of the people. U.S. Office of Education, State Boards of Education 60-61 (1974), cited in W. Valente, Law in the Schools, (2d ed. 1987).

6. Articles and law suits readily attest to the continuation of widespread disputation. See, e.g., Mozart v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987); Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987). See also generally, Lawsuit Challenges Chapter 1 and 2 Aid to Church Schools, VII Education Week 14, (Dec. 19, 1987); Prayer at Sports Events is Challenged, VII Education Week 13, (Dec. 2, 1987); Americans United Moves to Stop Iowa Tax Break for Parents, 15 School Law News 22, (Oct. 29, 1987); and the list could continue for pages.
the issues would require a lengthy treatise and is also beyond the scope of this article.

II. **Policy Language of Section One**

This essay will devote its attention to Section 1, for statements of purpose and policy are often those most subject to ambiguity (deliberate or otherwise), to potential misinterpretation, and to the continued need for debate on public policy.

Section 1 of Article X provides as follows:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The state shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.7

The *Record of Proceedings: Sixth Illinois Constitutional Convention* shows that the Committee on Education wanted to emphasize "that education is the most important function of state and local government."8 The language submitted by the Committee on Education was different than that finally adopted by the delegates to the convention. The Committee had proposed the following language:

The paramount goal of the people of the State shall be educational development of all persons to the limits of their capacities.

To achieve this goal, it shall be the duty of the State to provide for an efficient system of high quality public education institutions and services.

Education in the public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides.9

This was quite a change from the existing language of the 1870 Constitution.10

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7. ILL. CONST. art. X, §1.
8. RECORD OF PROCEEDINGS, supra note 1, Vol. VI at 231.
9. Id. at 227.
10. For the language of the 1870 Constitution, see supra note 2.
The Convention debated the merit of making education a "paramount" goal. Delegates questioned whether such a statement indicated a priority of the state and would impose a mandate on the Executive branch and the General Assembly to provide for education, perhaps at the expense of everything else. Testimony indicated it was the intention of the Committee to give a mandate to carry out this goal. Although the delegates debated such niceties as whether education was to be "a paramount goal" or "the paramount goal," neither phrase was adopted. The Committee's language was rejected and education became merely "a fundamental goal" of the state.

One can speculate that had education been labeled a paramount goal, which as noted in the constitution debates means "first" or "foremost," perhaps litigation requiring its funding, or requiring budget cuts in other areas before cutting public education, would have ensued. As enacted, though, Section 1, which provides that a fundamental goal of the state is the educational development of all persons to the limits of their capacities, has been held by the courts to be a statement of general philosophy rather than a mandate that certain means be provided in any specific form. Thus, this portion of the Illinois Constitution appears to be interpreted as being an expression of general philosophical aspiration, not as creating any duty on the government. However, as will be suggested infra, perhaps this language needs to be discussed again in light of other legal developments.

The Committee found Section 1 of Article VIII of the 1870 Constitution faulty because some terms used were imprecise in meaning, e.g., "children," "good," and "common school." The Committee noted that the terms had been frequently tested in court due to their ambiguity and cited Braden and Cohn's *The Illinois Constitution: An Annotated and Comparative Analysis* as evidence of such.

The current provision avoids the problem of having the courts define "children" or "common schools," but it opens the door for litigation to clarify "persons" and "to the limits of their capacities."

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12. *Id.* at 766.
13. This is not the same issue as requiring the state to be primarily responsible for funding public education, which will be discussed infra.
"Persons" obviously includes adults—not just individuals over the age of eighteen, but also, for example, those over the age of twenty-one and over the age of forty. Could an adult who has not completed public schooling lay claim to a right to attend public secondary schools in order to complete his or her education? The constitutional right to an education "to the limits of one's capacity" raises not simply technical questions of assessment but also complex questions of policy in the area of special education.

III. "To the Limits of Their Capacities"

Intentionally or not, the Committee anticipated a development in the area of special education, and the language of Section 1 opens the door for policy and legal debate which remain to be resolved. The question is: "To what extent are handicapped persons entitled to educational services and what are the applicable standards for educational services?" Prior to 1970, the Illinois courts had held that state schools for the mentally incompetent were charitable and hospitable institutions and were not part of the common school system, and thus there was no obligation to provide free school training for the mentally incompetent. The Committee stated specifically that it was seeking to expand the scope of coverage to include the handicapped:

[T]he objective that all persons be educated to the limits of their capacities would require expansion beyond the traditional public school programs. It recognizes the need of the person with a physical handicap or mental deficiency who nevertheless is educable. Adults, too, may profit from further formal education. The objective is to provide each person an opportunity to progress to the limit of his ability.

In order to provide education to handicapped children, Congress enacted the Education of All Handicapped Children Act (EHA), still often referred to as Public Law 94-0142. The EHA requires states and local educational agencies (i.e., school districts) which receive

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18. RECORD OF PROCEEDINGS, supra note 1, Vol. VI at 234. Adults would appear to be entitled to education through the secondary level under the literal terms of Sec. 1 and according to the Committee's recommendation. Arguably, new residents from foreign shores, migrants, functional illiterates, drop-outs, or any adult with less than a high school diploma could enjoy, not the mere privilege of night classes, but the right to a free secondary-level public education.
federal monies to provide a free appropriate public education to every identified handicapped child. The potential interrelationship of this federal law and Section 1 of Article X of the Illinois Constitution merits consideration.

In Pierce v. Board of Education, Section 1 was found not to impose a duty on boards of education to place students in special education classes since the article was not self-executing. However, in addition to the federal requirements under the EHA, Illinois has state legislation providing for special education. Thus, there are federal and state statutes which execute the provision and give bases for implementing a duty to provide special education.

Special education litigation raises the recurring question: "What is the free education to which one is entitled?" The open question for special education under Section 1 is whether the phrase, "to the limits of their capacities" imposes an actual standard for public educational institutions to meet or whether it is merely a "philosophical" statement.

The EHA requires for each handicapped child the development of an "individualized education program" (IEP). The IEP sets forth the instructional goals and objectives as well as the educational and related services which will constitute the "free appropriate public education." In litigation under the EHA, there is frequently a dispute between the parents of a handicapped child and the educational agency as to whether an appropriate educational plan is being offered. Generally the parents are seeking the best possible educational services for their child, perhaps a high-cost residential placement, while the school district is proposing a plan with more modest components which it argues is, nonetheless, an "appropriate" education. For example, a school district may offer instruction in a self-contained class in an elementary school with support services while the parents may desire placement in a private residential facility. According to the Supreme Court in Board of Education of Hendrick Hudson v.

23. Id. at 92, 370 N.E.2d at 536.
Rowley,27 Congress intended the EHA to create a basic floor of educational opportunity for disabled children but did not require the child be provided the best possible education:

In explaining the need for federal legislation, the House Report noted that 'no congressional legislation has required a precise guarantee for handicapped children, *i.e.*, a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children.' [Cite omitted.] . . . Assuming that the Act was designed to fill the need identified in the House Report - that is, to provide a 'basic floor of opportunity' consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of 'equality,' cannot be read as imposing any particular substantive educational standard upon the States.

[Thus the lower courts] . . . erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children.28

IV. A Higher Standard

The interesting question is whether Illinois has imposed upon itself a duty to provide a higher level of services (more than a basic floor of opportunity) by virtue of the constitutional provision which sets forth as a goal "the educational development of all persons to the limits of their capacities."29

A "free appropriate public education" is defined in the EHA in relevant part:

The term "appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State education agency, . . . 30

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28. *Id.* at 200.
29. ILL. CONST. art. X, §1.
One could argue that Section 1 of Article X establishes the standard for education as the limits of a child's capacities. The Court in *Rowley* found that the EHA did not establish a standard of maximizing the potential of each handicapped child. However, the holding does not preclude a state from imposing a higher standard on itself.

In *David D. v. Dartmouth School Committee* the federal appellate court held that state standards requiring special education programs to assure maximum possible development would be incorporated into the federal EHA. Specifically the court accepted the district court's reasoning that:

"Since Massachusetts law mandated a level of substantive benefits superior to that of the federal Act [EHA], the state standard would be utilized as determinative of what was an 'appropriate' education for the child."

In Illinois, the two-stage argument would be: first, that Section 1 of Article X sets the standard for educational services to be provided; and second, such a higher standard is enforceable under the federal EHA. It does not appear that this specific argument has been addressed by the state or federal courts in Illinois.

The United States District Court for the Northern District of Illinois has considered the "free education" provision of Article X as applied to the handicapped child under the EHA, but was not presented with the "limits of their capacities" question. In a subsequent case involving the same parties, the court found that the state regulations enacted pursuant to the EHA do not confer greater rights for a particular type of service than those mandated directly by the EHA. However, the court was presented only the question of the state regulations as drafted; it was not presented the issue of whether Article X of the Illinois Constitution itself imposes a higher standard than that of the EHA. Subsequent litigation between the parties dealt with reimbursement for services unilaterally incurred by the

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33. *Id.* at 423.
36. To a great extent the state regulations merely mirror the federal requirements and impose no higher standards or obligations.
parent under the Burlington School Committee v. Dept. of Education\textsuperscript{37} doctrine, but the issue of a state constitutional standard for services was not addressed.\textsuperscript{38}

V. "MERE PHILOSOPHY" OR AN ENFORCEABLE PRINCIPLE

Although O'Connor v. Board of Education of School District No. 23\textsuperscript{39} is cited for the proposition that Section 1 of Article X, providing that a fundamental goal of the state is the educational development of all persons to the limits of their capacity, is a statement of general philosophy rather than a mandate, the case was actually a school athletics sex discrimination case and was citing to Pierce v. Board of Education of the City of Chicago\textsuperscript{40} for authority.\textsuperscript{41} However, Pierce was a 1977 special education case which was not decided under the EHA, in which the court held that Article X, Section 1 is not "self-executing."\textsuperscript{42} Its articulation that Section 1 is only a statement of general philosophy is, at best, dictum. Pierce, in turn relied upon Sullivan v. Midlothian Park Dist.,\textsuperscript{43} which had absolutely nothing to do with any constitutional provisions pertaining to public education. Sullivan was a public immunity and liability insurance case, and contains no opinion on any Education Article of

\textsuperscript{37} 471 U.S. 359 (1985). In Burlington, the Court found a unilateral change of placement by parents did not constitute a waiver of the parents' right to reimbursement for expenses of private placement. Otherwise parents would be forced to leave their child in what may be an inappropriate educational placement or to obtain appropriate placement only by sacrificing any claim for reimbursement. \textit{Id.} at 372.

\textsuperscript{38} Max M., 629 F. Supp. 1504 (N.D. Ill. 1986).

\textsuperscript{39} 645 F.2d 578 (7th Cir.), \textit{cert. denied}, 454 U.S. 1084 (1981).

\textsuperscript{40} 69 Ill. 2d 89, 370 N.E.2d 535 (1977).

\textsuperscript{41} O'Connor, 645 F.2d at 582.

\textsuperscript{42} Pierce, 69 Ill.2d at 92, 370 N.E.2d at 536. The court stated that: The article is not self-executing. Its pronouncement of the laudable goal of "the educational development of all persons to the limits of their capacities" is a statement of general philosophy, rather than a mandate that certain means be provided in any specific form. Similar provisions of both the 1970 Illinois Constitution and its predecessor, the 1870 Constitution, have been so interpreted. (See Sullivan v. Midlothian Park Dist. (1972) 51 Ill. 2d 274, 277, 281 N.E.2d 659). Whether the Board had the duty to place the plaintiff in a special education class, therefore, can only be ascertained by examining the applicable statutes and regulations governing the administrations of special education facilities in this State.

\textit{Id.}

\textsuperscript{43} 51 Ill. 2d 274, 281 N.E.2d 659 (1972).
the Illinois Constitution establishing purposes or standards of education, past or present.\textsuperscript{44}

Thus the federal courts in \textit{Pierce} and \textit{O'Connor} misconstrued Illinois law regarding the Education Article. Moreover the question of the "self-execution" of the provision is no longer relevant now that both federal and state statutes impose duties regarding the provision of educational services to handicapped children. Therefore, the "limits of their capacities" as a standard for the provision of services for education development of all citizens remains one which could well be relitigated.

The possibility that Section 1 of Article X imposes a standard for services which may be litigated is being raised for discussion in the context of providing educational services to handicapped children because the EHA provides an administrative and judicial review process for disputes regarding the provision of such services. Thus, there is a ready forum which has been and is frequently used for the protection of the rights of handicapped children. It is conceivable that the "to the limits of their capacities" language could be raised in contexts in addition to special education.

For example, there is attention being paid to the educational needs of "gifted" students.\textsuperscript{45} The parents or guardians of educationally gifted children could argue that school districts are failing in their constitutional responsibilities if a sufficiently enriched and stimulating education, at least through the secondary level, is not provided to academically talented children. Finally, what is the appropriate remedy if the state fails to educate one to the limits of one's capacity? Mandatory remediation? Provision of services to adults? Damage actions?

\textbf{VI. Do Constitutional Duties Create New Torts?}

This raises a related issue upon which to speculate: whether setting the goal of educational development of all persons to the limits of their capacities opens the door for establishing the as yet unrecognized tort of "educational malpractice." In the seminal case, \textit{Peter W. v. San Francisco Unified School District},\textsuperscript{46} a high school graduate

\textsuperscript{44} \textit{Id.} The case addressed remedies for damage in light of immunities. It considered § 19 of art. II and § 22 of art. IV of the Constitution of 1870, and referred to art. VIII, Sec. 12 of the 1818 Constitution and art. XIII, Sec. 12, of the 1848 Constitution, but \textit{not} art. VIII of the 1870 Constitution. \textit{Id.}

\textsuperscript{45} Witness, for example, the creation of the state Math/Science Academy and the rise of "gifted" education programs.

\textsuperscript{46} 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).
sued the school district from which he graduated on a theory of educational malpractice because his functional educational level was far below that of the twelfth grade. The court refused to recognize educational malpractice as a cause of action, in part, because there was no standard of care owed.47 Other courts have followed the reasoning of Peter W. and have refused to recognize educational malpractice as an actionable claim.48

However, a plaintiff's attorney in Illinois might argue not only that the Illinois Constitution establishes a right to an education,49 but also that Section 1 sets a standard to be attained against which a school district's execution of the duty owed can be measured. On its face such an argument at least merits debate.50 Complicating the problem in Illinois, and adding additional bricks to buttress an educational malpractice claim, is the fact that educational reform is resulting in express criteria and educational objectives.51 Schematically, the argument would be that there is a duty to educate grounded in both the state constitution and statutes, and that there are both constitutional standards, i.e., the limit of one's capacity, and standards defined by the State Board of Education. Thus, Illinois may have opened the door to educational malpractice claims, as the policy considerations upon which other states refused to recognize such a claim may have been eliminated by an express articulation of the duty and standard.52

It appears, then, that Section 1 of Article X merits reconsideration and debate because the phrase "to the limits of their capacities" may establish a constitutional standard requiring the recognition of edu-

47. Id.
50. Even courts which have not found a cause of action in educational malpractice have reserved a possible exception for gross violations of defined public policy. See e.g., Donohue, 47 N.Y.2d at 445, 391 N.E.2d at 1354.
51. See, for example, the reforms initiated in the Education Reform Package of 1985 as embodied in S.B. 730, H.B. 1070 and 1985 Ill. Laws 1351.
52. This discussion does not raise or consider the complex problem that arises in special education where there may be allegations of malpractice based on misdiagnosis or misplacement. See, e.g., Zirkel, Educational Malpractice: Cracks in the Door? 23 EDUC. L. REP. 453 (1986).
cational malpractice claims in Illinois, and also may establish a higher standard for the provision of services to handicapped children to be incorporated and enforced under the federal EHA. It was the stated intent of the framers that this language would necessitate expansion of services beyond the customary school programs. Given such an expansive goal, the courts should be open to creative claims for new and diverse high-quality service:

[T]he language of Section 1 be in harmony with the rising expectations of the people of Illinois for the maximum development of persons of every level of competence, highest to lowest, and be consistent with the expansion of educational experiences that may occur in the decades ahead.

Given the expansive language and noble intent, it is surprising that the provisions have not been subject to more frequent and more vigorous litigation over almost two decades by the handicapped, the gifted, those who feel the school systems have failed to provide adequate education, and adults who lack twelfth-grade academic and vocational skills. Whatever form such claims might take, they all would entail additional expense to the system of public education.

VII. FINANCING THE GOALS

The financing of any state function tends to be controversial, and the financing of public education has not been immune from debate. The financing of public education was a matter of debate at the Sixth Constitutional Convention which resulted in paragraph 3 of Section 1 of Article X, viz., "The State has the primary responsibility for financing the system of public education."

At the convention, the Education Committee originally introduced language which dealt with the financing of public education in much more specific terms:

53. "[T]he second paragraph of the proposed revision includes authorization for educational services which are not necessarily school, or institutionally related." RECORD OF PROCEEDINGS, supra note 1, vol. VI at 235.

54. Id. at 233.

55. "Adults, too, may profit from further formal education. The objective is to provide each person an opportunity to progress to the limit of his ability." Id. at 234.

56. The Illinois General State Aid formula was subject to sunset provisions to be effective August 1, 1987, by Public Act 84-126. However, the failure to create a new formula or the means for funding one has resulted in the postponement of such termination 1987 Ill. Legis. Serv. 85-132 (West).

57. ILL. CONST. art. X, §1.
To meet the goals of Section 1, substantially all funds for the operational costs of the free public schools shall be appropriated by the General Assembly for the benefit of the local school districts. No local governmental unit or school district may levy taxes or appropriate funds for the purposes of such educational operation except to the extent of ten percent (10%) of the amount received by that district from the General Assembly in that year.58

Re-occurring elements in any policy debate on financing public education include consideration of the burden on local taxpayers, particularly property holders; inequality of resources at local levels, resulting in inequality of education between richer and poor communities; and the balancing of state versus local control, the fear on the local level that if financing is from the state then the state will impose its wishes on the local communities.59 The majority report of the Education Committee recognized the problem of inequality inherent in local financing:

A salient fact of Illinois school finance is the enormous inequality among the districts with respect to their resources from local tax receipts.60

Throughout the 1960's, social critics, educators and economists challenged local property tax financing of public education as being anti-democratic because it made educational opportunity unequally dependent upon the accident of one's place of residence.61 The Education Committee showed cognizance of these arguments in its report:

Thus, the quality of education received by any student in the State is largely a product of the accident of the wealth of his district. In poorer districts, the citizens must impose a greater tax burden upon themselves in order to achieve the same level of spending as wealthier districts.62

58. The Illinois General State Aid formula was subject to sunset provisions to be effective August 1, 1987, by Public Act 84-126. However, the failure to create a new formula or the means for funding one has resulted in the postponement of such termination. 1987 Ill. Legis. Serv. 85-132 (West).
59. Record of Proceedings, supra note 1, Vol. VI at 295.
60. Id. at 296-97.
The majority of the Education Committee advocated a shift to state-wide financing as the means of relief from property tax escalation. The majority argued its proposed language would address the problem of balancing local control and equality of resources:

In conclusion, the committee is convinced that this proposal maximizes the attainment of two objectives which otherwise seems [sic.] to be mutually self-contradictory—the equalization of educational opportunity statewide and the maintenance of local control.

A minority of the Education Committee dissented from the proposal that substantially all funds for the operational cost of the free public schools be appropriated by the General Assembly. The minority favored increased state support for free public schools and acknowledged the inequalities which exist in the resources of local school districts and the burden on property taxpayers but thought it both unnecessary and unwise to include such language in the Constitution. The minority feared that such language would lead to increased state control and would result in a leveling of schools. A limitation on local support to 10% of the appropriations of the General Assembly would decrease educational services in those schools where districts were funding special programs; in short, it might improve inferior schools but would lower education in better schools.

The debate continued and various amendments were proposed. Ultimately, after substantial debate, the language of the majority report was defeated. The constitutional debate embodied all the

63. "If the State should take over most of the cost of operating the elementary and secondary schools, the tax burden would be shifted to state tax revenues, probably to the income tax." RECORD OF PROCEEDINGS, supra note 1, vol. VI at 298.
64. Id. at 299.
65. Id. at 300.
66. Id. at 301-02.
67. Id. at 302.
68. See, e.g., the Bottin Amendment, which would have limited funding by local taxation to not exceed 50% of total funding (introduced RECORD OF PROCEEDINGS, supra note 1, vol. IV at 3550, defeated RECORD OF PROCEEDINGS, supra note 1, vol. IV at 3552) and the Parker Amendment which would have provided that the "General Assembly shall raise and distribute revenue from sources other than ad valorem property taxes to the extent of 90 percent of the average total cost of public education as determined by the state board of education." (introduced RECORD OF PROCEEDINGS, supra note 1, Vol. IV, at 3547, defeated RECORD OF PROCEEDINGS, supra note 1, Vol. IV, at 3550).
policy considerations which raged at that time and which, arguably, are still before us. Equitable and effective financing of public education remains a matter of deep concern nationwide and merits renewed debate. At this time however, the debate must include additional factors.

In the two decades since the Sixth Constitutional Convention rural property values have plummeted, America's worldwide leadership in education has been challenged and the schools have absorbed even more functions than they had before. Therefore, education as the means to personal and national survival and progress is even more crucial. Also, the courts have expressed themselves on the financing of public education so that the public may need to reconsider how it wishes to articulate its principles regarding financing K-12 education.

In 1971, a decision of the California Supreme Court was hailed by educators nationwide as resolving the issue of the inherent inequality in local financing of education. In *Serrano v. Priest* the state supreme court held that a public school financing system which relied heavily on local property taxes and caused substantial disparities among individual school districts in the amount of revenue available per pupil insidiously discriminated against the poor and violated the equal protection clause of the fourteenth amendment. The right to an education in public schools is a fundamental interest which cannot be conditioned on wealth; discrimination in school financing based on the wealth of the districts because of the fortuitous presence of commercial and industrial establishments is invalid. This decision remains worthwhile reading because of the court's summation of the opposing positions which are still currently debated. Although the decision was greeted as a landmark which would result in nationwide revision of school funding schemes and initiate equal educational opportunity, it had little impact because of a subsequent 1973 United States Supreme Court decision.

In *San Antonio Indep. School Dist. v. Rodriguez*, Mexican-American parents of school children who were poor or resided in school districts having a low property tax base brought suit alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court found sizable differences in the value of assessable property between local school districts and opined that growing disparities in population and taxable property between districts were

70. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
responsible in part for increasingly notable differences in levels of expenditure for education.\textsuperscript{73} The Court found education is not among the rights afforded explicit protection under the Federal Constitution, that poverty is not a suspect classification, and left the problem of inequities in school finance to the individual states to address.\textsuperscript{74}

Once again Illinois needs to debate these positions regarding financing public education and especially to address the deepening inequities between local school districts, which the current school aid formula—which demise is on hold—has not effectively ameliorated. If there is a 1989-90 constitutional convention, then a provision on this topic must be considered.

The present language in paragraph three of Section 1 of Article X, provides only that, "The State has the primary responsibility for financing the system of public education."\textsuperscript{75} At the time of the adoption of this provision the State’s contribution to finance public education was approximately 30.74\%.\textsuperscript{76} Shortly after the adoption of the 1970 Constitution, taxpayers brought an action to declare invalid provisions of the school code pertaining to furnishing state funds to local school district. In Blase \textit{v. State},\textsuperscript{77} the plaintiff’s position was that the constitutional phrase, "the primary responsibility for financing," required the state to provide at least 51\% of the funds for public education.\textsuperscript{78} The opinion of the court indicates that it considered portions of the \textit{Record of Proceedings of the Sixth Illinois Constitutional Convention} to determine the intent of the delegates in drafting this language.\textsuperscript{79} The court relied on statements introducing

\begin{center}
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{YEAR} & \textbf{STATE} & \textbf{LOCAL} & \textbf{FEDERAL} \\
\hline
1972-1973 & 36.72\% & 57.23\% & 6.05\% \\
1971-1972 & 37.42\% & 56.70\% & 5.88\% \\
1970-1971 & 39.61\% & 54.00\% & 6.39\% \\
1969-1970 & 30.74\% & 64.51\% & 4.75\% \\
1968-1969 & 27.94\% & 66.42\% & 5.64\% \\
1967-1968 & 27.13\% & 67.84\% & 5.03\% \\
1966-1967 & 25.04\% & 68.89\% & 6.07\% \\
\hline
\end{tabular}
\end{center}

73. \textit{Id.} at 7-9, 15-16.
74. \textit{Id.} at 28, 54-59.
75. \textit{ILL. CONST.} art. X, § 1.
76. \textit{ILLINOIS STATE BOARD OF EDUCATION, STATE, LOCAL, AND FEDERAL FINANCING FOR ILLINOIS PUBLIC SCHOOLS} 3 (1985-86) shows the state, local, and federal percents of funding at that time as:
77. 55 Ill. 2d 94, 302 N.E.2d 46 (1973).
78. \textit{Id.} at 96, 98-100, 302 N.E.2d at 47-49.
79. \textit{Id.} at 98, 302 N.E.2d at 48.
this amended language in which the delegate proposing it described it as:

\[
\ldots \text{in the Convention's usual fashion, horatory. I do not believe that it states a legally enforceable duty on the part of the state through the General Assembly, or otherwise.}^80
\]

The court concluded:

In view of the history of the proposal and the repeated explanations of its principal sponsor, it cannot be said that the sentence in question was intended to impose a specific obligation on the General Assembly. Rather its purpose was to state a commitment, a purpose, a goal.81

Thus "primary responsibility for financing" has been deemed to be merely horatory in nature—a goal not a duty.

Although there is not a constitutional duty on the General Assembly to provide 51% of the financing of public schooling there are recent developments which indicate the concern is not dead. In the present session of the General Assembly there is a bill pending, SB-1530, which requires the state to fund 51% of the cost of elementary and secondary education beginning with the 1988-89 school year.82

The reality is that if the trend of the past two decades continues the state will be picking up 50% of the tab for education. From 1966 to 1986 the state's percentage of financing increased form 25.04% to 40.97% while the local communities percentage decreased from 68.89% to 51.71%.83

VIII. ARE INEQUITIES INHERENTLY INEFFICIENT?

Although Blase appears to have disposed of the state's primary responsibility by calling it a goal, one could suggest that the issue is not dead. If it is a goal as determined by the Illinois Supreme Court, one may ask, "How long can a goal go unrealized before there arises a duty to achieve it?" There is an interesting argument which would relate the requirement on the state to "provide for an efficient system of high quality public educational institutions and services," with its "primary responsibility" to finance education.

80. Id. at 99, 302 N.E.2d at 49 quoting RECORD OF PROCEEDINGS, supra note 1, Vol. V, at 4145-49.
83. State, Local, and Federal Financing for Illinois Public Schools, supra note 76, at 3.
One could argue that a state system which does not correct wide discrepancies in local funding so as to provide equality of educational opportunity is failing to meet its obligation to provide an efficient system of public education. In a New Jersey case attacking funding statutes and considering New Jersey’s constitutional requirement of a “thorough and efficient system of free public schools,” the court found the statutory scheme had no relation to equal educational opportunity because of the discrepancies in dollars spent per pupil. Even if there is not a federal constitutional right to education, there is an equal protection entitlement for those rights granted under the state law. Where the state’s constitution (1) provides for a fundamental goal of the educational development of all persons to the limits of their capacities, (2) requires an efficient system of high quality public educational institutions and services, and (3) imposes on the state the primary responsibility for financing the system of public education, it should be possible to find that a state funding mechanism which allows disparate funding so that not all persons are receiving services that promote educational development to the limits of their capacities is an inefficient system and violative of Section 1 of Article X of the 1970 Illinois Constitution and the equal protection clause of the fourteenth amendment.

IX. Summary

This article has limited itself to discussing policy questions raised by a review of Section 1 of Article X, which establishes the goals, purposes of, and financial responsibility for, public education. Litigation subsequent to the enactment of the 1970 Constitution requires that there be some consideration of whether to modify certain provisions of Article X. Specifically the phrases “to the limits of their capacities” and “primary responsibility for funding” in Section 1 need to be pondered. Do they mean what they appear to say? Are they mere horatory values to guide but neither goals to be attained nor standards against which to judge performance? Would a new convention choose to state that they should be taken literally or choose to abrogate them entirely? Should the courts have viewed any constitutional principle as merely “philosophical” and not as imposing duties and responsibilities upon the government and investing rights

in the governed? Statements at a convention could address Pierce's misconstruction. Rhetorically and by contrast, one might ask if those principles of the Bill of Rights, which underlie our way of life, were viewed as mere philosophical goals and not rights of the people to be protected by the courts, how different would our social system be.

Black's Law Dictionary defines "constitution" as follows:

In American law. The written instrument agreed upon by the people of the Union or of a particular state, as the absolute rule of action and decision for all departments and officers of the government in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or ordinance of any such department or officer is null and void.86

At any future constitutional convention, in any debate on the goals, purposes and financing of public education, the delegates should make it clear that whatever language is agreed upon that language establishes rights and obligations, not mere "pie-in-the-sky" phrases to be dismissed by the courts as philosophical.

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