



¶1 The School Districts appeal from the superior court's summary judgment dismissal of their complaint alleging that Arizona's school finance system violates Article 11, Section 1, of the Arizona Constitution, which requires the Legislature to "enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system . . . ." We conclude that the State established that it is entitled to judgment as a matter of law. Therefore, we affirm.

#### BACKGROUND

¶2 The relevant procedural history of this litigation is as follows. On September 20, 2001, the School Districts<sup>1</sup> filed a three-count complaint against the State of Arizona<sup>2</sup> alleging that Arizona's school financing system was unconstitutional. In Count 1, the School Districts asserted that a constitutionally adequate school finance system is "one in which the state provides students with the programs that are necessary and appropriate in order for students to achieve the state's prescribed academic standards" as

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<sup>1</sup> Originally, seven districts filed suit. However, Tolleson Elementary School District and Tolleson Union High School District were dismissed pursuant to stipulation, leaving five districts to pursue the claims set forth in the complaint.

<sup>2</sup> The Arizona State Board of Education (Board) and the Superintendent of Public Instruction were also named as defendants in the complaint but were later dismissed by stipulation of the parties.

measured by the AIMS test.<sup>3</sup> The School Districts then asserted that the State "failed to provide the programs that are necessary in order for at-risk students to achieve the state's prescribed academic standards."<sup>4</sup> As a result, according to the Districts, "the school finance system is not general and uniform as required by Article 11, § 1." In Count 2, the School Districts contended that education is a fundamental right under the Arizona Constitution and that the above-described failure results in "at-risk students [being] denied their fundamental right to the basic education that is guaranteed to them under the Arizona Constitution." In Count 3, the School Districts alleged that the inadequacy of the school finance system forced them to divert resources from other students to at-risk students to enable them to meet the State's prescribed academic standards. The Districts asserted that this resulted in their having less than the minimum base level of funding with which to educate students without special needs, thereby also violating Article 11, Section 1. The

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<sup>3</sup> AIMS, an acronym for the Arizona Instrument to Measure Standards, is the test used to measure pupil achievement of the Board-adopted academic standards as prescribed by Arizona Revised Statutes (A.R.S.) section 15-741 (2002). Effective for the graduating class of 2006, pupils must receive a passing score on the reading, mathematics, and writing portions of the AIMS assessment to receive a high school diploma. Ariz. Admin. Code R7-2-302.

<sup>4</sup> The complaint classified at-risk students as those with family incomes below 185% of the federal poverty level who are eligible for free or reduced-price school lunches; the percentage of students who qualified for the lunch programs in the Districts allegedly ranged from 27% to 91% of the student body.

School Districts asked the superior court to declare the school finance system unconstitutional for failing to adequately address the needs of at-risk students and direct the State, that is, the Arizona Legislature, to provide programs and funding necessary to permit at-risk children to acquire a basic education.

¶3 The State filed a motion for summary judgment asserting that addressing the academic needs of at-risk students was a complicated problem that the state and federal governments had been trying to solve through a variety of programs, that such determinations were policy decisions for the Legislature, and that the judiciary was ill-equipped to resolve questions concerning the "adequacy" of education or minimum standards under the constitution. Accordingly, the State claimed that the relief sought by the School Districts violated the principle of separation of powers and was therefore nonjusticiable. The State also contended that Arizona's school financing system satisfies the general and uniform clause because, unlike the capital funding scheme declared unconstitutional by *Roosevelt Elementary School District No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994) (*Roosevelt I*), it allocates approximately the same amount of funds per student for each school district. See *id.* at 241, 877 P.2d at 814 ("Funding mechanisms that provide sufficient funds to educate children on substantially equal terms tend to satisfy the general

and uniform requirement. School financing systems which themselves create gross disparities are not general and uniform." ).<sup>5</sup>

¶4 The School Districts filed a cross-motion for partial summary judgment. They contended that as a matter of law the State's academic funding system violated the general and uniform clause because it is based on a statutory formula that is arbitrary and is unrelated to the cost of providing a basic education. The School Districts asked the superior court to order the State to adopt standards of "adequate school operations" and determine the cost of those operations, including programs to recruit and retain teachers, the proper number of students per classroom, and proper levels of administrative support, leaving it to the Legislature "in the first instance" to determine any methodology to identify and measure costs. Finally, the School Districts asked the court to hold a trial on whether they lacked resources "to provide at-risk students a meaningful opportunity to achieve the state's academic standards."

¶5 The superior court denied the School Districts' motion for partial summary judgment and granted summary judgment to the State on the basis that the complaint raised nonjusticiable issues. The

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<sup>5</sup> Concurrently, the State moved to suspend the trial date because programs to improve academic performance of at-risk students (e.g., No Child Left Behind Act, Arizona LEARNS, Arizona READS, programs for English Language Learners, Proposition 301 funding, and Early Childhood Block Grants) had been adopted but results could not yet be evaluated.

School Districts appeal from those rulings. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

#### DISCUSSION

¶6 On appeal, the School Districts claim that the superior court erred in finding nonjusticiable their claim that the school finance system violates Article 11, Section 1, by failing to provide at-risk students with programs and funding necessary and appropriate to provide a meaningful opportunity to achieve the State's prescribed academic standards. The School Districts also assert that they were entitled to partial summary judgment on their claim that the school finance system is per se unconstitutional because the manner in which it allocates funding per student is arbitrary and unrelated to the actual cost of educating the student.<sup>6</sup>

¶7 A motion for summary judgment should be granted when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c). As with a directed verdict, summary judgment is appropriate "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the proposition advanced by the proponent of the claim or defense."

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<sup>6</sup> The School Districts do not raise as issues on appeal their claims in Counts 2 and 3 that education is a fundamental right in Arizona and that the inadequacies of the school finance system caused them to divert resources to address the needs of at-risk students.

*Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review orders granting summary judgments de novo, viewing the evidence in the light most favorable to the party against whom summary judgment was entered. *Kosman v. State*, 199 Ariz. 184, 185, ¶ 5, 16 P.3d 211, 212 (App. 2000). We also review the validity of a statutory scheme de novo. *Id.*

#### I.

¶8 We first determine whether the superior court properly granted summary judgment to the State on the basis that the School Districts' complaint raised a nonjusticiable political question because it "asks for this Court to assume a role that belongs to the legislature and its designees." Minute Entry Ruling at 4. "'Political questions,' broadly defined, involve decisions that the constitution commits to one of the political branches of government and raise issues not susceptible to judicial resolution according to discoverable and manageable standards." *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 485, ¶ 7, 143 P.3d 1023, 1026 (2006) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Thus, "[t]he non-justiciability of a political question is primarily a function of the separation of powers." *Baker*, 369 U.S. at 210.

¶9 The superior court relied primarily on *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996), in which the Illinois Supreme Court affirmed the dismissal of a similar claim by an association of school districts that Illinois' statutory school finance system violated its constitutional

education article.<sup>7</sup> According to the court, such a claim was "outside the sphere of the judicial function," 672 N.E.2d at 1193, because "[w]hat constitutes a 'high quality' education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards. *Id.* at 1191 (citing *Baker*, 369 U.S. 217). Instead, the court concluded that a "judicial role" would be unwise because "the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion." *Id.*

¶10 We believe that the superior court erred by granting summary judgment to the State on the basis that the School Districts' claims were nonjusticiable. We acknowledge that, in addition to the Illinois Supreme Court in *Edgar*, the supreme courts in several other states have refused to consider constitutional challenges to public school financing schemes on the ground that such challenges pose nonjusticiable political questions. See *Ex Parte James*, 836 So.2d 813 (Ala. 2002); *Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So.2d 400 (Fla. 1996); *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995). However, as noted by the Supreme Court of Texas, many other state supreme courts have rejected the notion that

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<sup>7</sup> "The State shall provide for an efficient system of high quality public educational institutions and services." Ill. Const. art. X, § 1.

challenges to their state's statutory system of public school finance are nonjusticiable. See *Neeley v. West Orange-Cove Consol. Sch. Dist.*, 176 S.W.3d 746, 780 n.183 (Tex. 2005) (listing cases from fifteen states).

¶11 The explanations given by these courts in rejecting the application of the political question doctrine when confronted with such constitutional challenges are similar to the reasons recently given by our supreme court in *Forty-Seventh Legislature* for declining Governor Napolitano's request that the court refrain from deciding the Legislature's claim that she exceeded her item veto authority under Article 5, Section 7, of the Arizona Constitution:

We agree with the Legislature that this petition presents purely legal questions. To determine whether a branch of state government has exceeded the powers granted by the Arizona Constitution requires that we construe the language of the constitution and declare what the constitution requires. Such questions traditionally fall to the courts to resolve. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) (recognizing that "[i]t is emphatically the province and duty of the judicial department to say what the law is"). Although each branch of government must apply and uphold the constitution, our courts bear ultimate responsibility for interpreting its provisions. See *State v. Casey*, 205 Ariz. 359, 362 ¶ 8, 71 P.3d 351, 354 (2003) (stating that interpretation of the state constitution is the courts' province).

213 Ariz. at 485, ¶ 8, 143 P.3d at 1026. Likewise, the determination whether the Legislature's statutory scheme for funding school districts' maintenance and operations budgets violates Article 11, § 1 "is of the very essence of judicial

duty." *Marbury*, 5 U.S. at 178. Although we should act with restraint in discharging our duty to review the constitutionality of the statutory scheme, we would undermine the concept of separation of powers were we to abdicate our responsibility to declare what the law is. We therefore reject the State's claim, and the superior court's finding, that the School Districts' arguments raise nonjusticiable political questions.

¶12 Our determination that we should not follow the *Edgar* line of cases is supported by *Roosevelt I* and its progeny,<sup>8</sup> in which our supreme court has determined that the capital financing scheme violated Section 1's general and uniform requirement and repeatedly rebuffed legislative efforts to correct the inequities identified in *Roosevelt I*. The State apparently did not raise a nonjusticiability argument in *Roosevelt I*.<sup>9</sup> However, the two dissenting justices would nonetheless have upheld the statutory

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<sup>8</sup> *Symington v. Albrecht*, No. CV-96-0614-SA (Ariz. Jan. 15, 1997) (Supreme Court Order) (finding unconstitutional 1996 legislation based on the same overall system rejected in *Roosevelt I*); *Hull v. Albrecht*, 190 Ariz. 520, 950 P.2d 1141 (1997) (*Albrecht I*) (finding unconstitutional 1997 Assistance to Build Classrooms Fund legislation); *Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998) (*Albrecht II*) (finding unconstitutional Students FIRST Act of 1998); see also *Roosevelt Elem. Sch. Dist. No. 66 v. State of Arizona*, 205 Ariz. 584, 74 P.3d 258 (App. 2003) (*Roosevelt II*).

<sup>9</sup> The plurality opinion characterizes the State's arguments as being: (1) Arizona's public schools are not "State educational institutions" within the scope of Article 11, Section 10, of the Arizona Constitution, and that the State therefore has no responsibility to fund a general and uniform school system, and (2) even if the state is responsible for such a system, "general and uniform" is formal and not substantive. *Roosevelt I*, 179 Ariz. at

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scheme because they "believe[d] the legislature is better suited to address and solve the substantial and pervasive problems in today's public school system." 179 Ariz. at 254, 877 P.2d at 827 (Moeller, J., dissenting; joined by Corcoran, J.) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58-59 (1973)).

¶13 The "hands-off" approach of the *Roosevelt I* dissenters was again rejected in *Albrecht I* when the court found the Legislature's efforts to address capital funding disparities unconstitutional and declined Justice Moeller's suggestion in the dissent that the court permit the legislation "to operate for some period of time . . . . [g]iven the deference properly due to legislation," 190 Ariz. at 526, 950 P.2d at 1147, with the observation that "the 'wait and see' approach advanced by the dissent . . . will not work here." *Id.* at 523 n.6, 950 P.2d at 1144 n.6. See also *Albrecht II*, 192 Ariz. at 39, 960 P.2d 639 (invalidating Students FIRST Act) (per curiam). We believe it unlikely that our supreme court would have repeatedly found that the various capital funding schemes devised by the Legislature violated Article 11, Section 1, had it entertained any notion that the School Districts' claims presented a nonjusticiable political question. Even assuming that a greater degree of judicial deference should be given to legislative prerogatives in assessing the constitutional adequacy of educational programs than in assessing the constitutional adequacy of the "bricks and mortar"

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240, 877 P.2d at 813.

capital funding scheme, we see no reason to distinguish one from the other in terms of their justiciability.

¶14 Although we disagree with the superior court's rationale for granting summary judgment to the State, in the remaining portion of our decision we consider whether it nonetheless reached the correct result. See *Mutschler v. City of Phoenix*, 212 Ariz. 160, 162, 129 P.3d 71, 73 (App. 2006) ("We will affirm the trial court's ruling if the court was correct for any reason.").

## II.

¶15 In their cross-motion for partial summary judgment, the School Districts asserted that the school finance system is per se unconstitutional in violation of Article 11, Section 1 because "it relies on [a] funding formula that is arbitrary and unrelated to the cost of providing a basic education."

¶16 To evaluate the School Districts' arbitrariness claim, we begin with a brief explanation of Arizona's statutory funding formula for financing the maintenance and operations of public schools. Fortunately, as in *Roosevelt I*, "the parties share a common understanding of how Arizona's public schools are financed." *Id.* at 237, 877 P.2d at 810. State law prescribes the amount of money that school districts must spend on each student within the district. That amount is then funded through a combination of local property taxes and state funding assistance. Each school district's maintenance and operations budget, which supports salaries and benefits of employees, supplies, utilities, and other noncapital miscellaneous expenditures, consists of three

components, including a "base support level," which is calculated on a weighted per student basis and is intended to fund nearly all the programmatic and operational functions of a school district. For each school district, the base support level is computed by multiplying a "weighted student count" by a "base level amount" by a "teacher experience index." A.R.S. § 15-943 (2002).<sup>10</sup> School districts are then authorized to impose the qualifying tax rate on the primary assessed valuation within the school district to generate the local funds necessary to fund the maintenance and operations budget. To the extent that the qualifying tax rate does not generate sufficient funds, the State provides the difference through equalization assistance. A.R.S. § 15-971 (Supp. 2005). Pursuant to the equalization formula, and all other things being equal, school districts with lower assessed valuations receive a greater amount of equalization assistance from the State.

¶17 The School Districts claim that this formula is unconstitutionally arbitrary because the statutorily fixed "base level amount" is derived from the base level amount of funding per student that existed when the current school finance system was established in 1980 as adjusted to reflect inflation and

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<sup>10</sup> The student count in each district is "weighted" to take into consideration relative costs associated with educating students in smaller districts, English language learners, and those with various emotional or cognitive impairments. § 15-943; see also A.R.S. § 15-901 (Supp. 2005) (definition of terms).

retirement costs<sup>11</sup> and bears no correlation to the actual cost of meeting currently mandated education standards. See *Roosevelt I*, 179 Ariz. at 237, 877 P.2d at 810 ("The per-pupil amount appears to be unrelated to any minimum amount necessary for a basic education.").

¶18 According to the School Districts, the funding mechanism's reliance on the base level amount is analogous to the ABC legislation that was found unconstitutional in *Albrecht I* because "the dollar amount chosen to cure inadequacies in public school facilities is arbitrary and bears no relation to actual need." *Albrecht I*, 190 Ariz. at 524, 950 P.2d at 1145. Assuming a finding of arbitrariness, the appropriate remedy for the resulting funding inadequacy would be for the court to require the State to adopt standards of "adequate school operations" and determine the cost of those operations. Finally, a trial would be needed to resolve the School Districts' claims that they lacked sufficient resources to provide their students, including those at-risk, with a meaningful opportunity to achieve the State's newly created academic standards.

¶19 In response, the State asserts that the School Districts cannot meet their burden of demonstrating constitutional inadequacy simply by pointing out that the baseline figure used by the Legislature in developing the current formula was the actual

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<sup>11</sup> For fiscal year 2005-2006, the base level is \$3,001, an increase of \$107.82 from 2004-2005.

per-pupil expenditure for education in 1979-1980 and that they have not otherwise shown that the current school finance system "provides inadequate funding for them to generally provide a basic education to their students." The State also argues that, in any event, the base per-student support level was not pulled from "thin air" because it was derived from actual educational expenditures.<sup>12</sup>

¶20 In considering the School Districts' claim that the statutory finance scheme is unconstitutionally arbitrary, we are guided by "a strong presumption that it is constitutional." *State v. Kaiser*, 204 Ariz. 514, 517, ¶ 8, 65 P.3d 463, 466 (App. 2003). The School Districts must establish beyond a reasonable doubt that the statutory scheme violates Article 11, Section 1. See *Bird v. State*, 184 Ariz. 198, 203, 908 P.2d 12, 17 (1995). "Every intendment and every presumption is in favor of the law, and if on any reasonable theory we can hold it constitutional, statutory construction requires us to do so." *State v. Gastelum*, 75 Ariz.

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<sup>12</sup> The State also asserts that the School Districts' arbitrariness argument is outside the scope of the pleadings because their complaint alleged that the finance scheme violated the rights of at-risk students by not providing sufficient funds and programs for those students to obtain an adequate education and not that it is per se unconstitutional because it is unrelated to the cost of providing a basic education for all students. We disagree. At-risk students comprise a substantial portion of the overall student population, and if the finance system violates the right of students in general to a meaningful opportunity for an adequate education, it necessarily would do so for at-risk students.

271, 273, 255 P.2d 203, 204 (1953) (quoting *State v. Davey*, 27 Ariz. 254, 258, 232 P. 884, 885 (1925)).

¶21 As we understand the School Districts' position, they claim that Article 11, Section 1 requires the State to establish "minimum operational parameters"<sup>13</sup> that are necessary and appropriate to enable students to achieve the educational standards that have been adopted by the Board pursuant to the power delegated by the Legislature. See A.R.S. § 15-203(A) (Supp. 2005). Then, once these operational parameters have been established, the State must determine the costs of such programs and fund them.

¶22 We do not believe that the supreme court's trilogy of capital funding cases supports a finding that the school finance system is per se unconstitutional when examined in the context of maintenance and operations. In *Roosevelt I*, the superintendent of education conceded that "the existence of substantial disparities among the districts and a causal relationship between these disparities and the statutory scheme," 179 Ariz. at 243, 877 P.2d at 816,<sup>14</sup> a concession that was substantiated by the supreme

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<sup>13</sup> As examples of such parameters, the School Districts refer to programs to recruit and retain qualified teachers, specifications regarding appropriate classroom size, determinations regarding appropriate administrative support levels, and "any other qualitative measure associated with providing a basic education."

<sup>14</sup> Diane Bishop, then the Superintendent of Public Instruction, admitted in her deposition that there was a "sense of . . . bareness about some of the facilities in the poorer districts, that they are minimal . . . . It is basically four walls, a roof, and classroom inside, and that's about the extent of it." *Id.* at 236,

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court's review of the statutory funding scheme for capital facilities. Although the court commented that the capital funding scheme appeared arbitrary and did not address the actual cost of providing a basic education, it did not declare that equal but arbitrarily determined funding was itself unconstitutional. Rather, it struck down the capital funding scheme because it "is itself the source of substantial nonuniformities." *Id.* Accordingly, the court declared that Article 11, Section 1 "requires the legislature to enact appropriate laws to finance education in the public schools in a way that does not itself create substantial disparities among schools, communities or districts." *Id.*

¶23 Thus, there is a significant distinction between the capital funding scheme in *Roosevelt I* and the statutory method for calculating a public school's maintenance and operations budget—the capital funding scheme caused substantial disparities between school districts whereas the maintenance and operations statutory finance scheme produces substantial uniformity between districts.<sup>15</sup> We acknowledge that uniformity does not ensure

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877 P.2d at 809.

<sup>15</sup> The capital funding scheme overturned in *Roosevelt I* is similar to the maintenance and operations budgetary scheme in that both schemes begin with a calculation of a base support level per pupil under A.R.S. § 15-943 (2002). 179 Ariz. at 237, 877 P.2d at 810. Inter-district disparities were inevitably introduced into the capital funding scheme then in effect, however, because—unlike the maintenance and operations financing scheme—districts were permitted to raise additional funds beyond the equalized level through bonded indebtedness to the extent that such indebtedness

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constitutional adequacy, but, as noted in *Roosevelt I*, "[f]unding mechanisms that provide sufficient funds to educate children on substantially equal terms tend to satisfy the general and uniform requirement." 179 Ariz. at 241, 877 P.2d at 814. Clearly, Arizona's statutory financing system for public school maintenance and operations budgets is not itself the cause of any funding disparities. Therefore, we conclude that *Roosevelt I* does not support the School Districts' per se argument.

¶24 The School Districts' additional reliance on *Albrecht I* is also misplaced. In *Albrecht I*, the court held that the Legislature's attempt to remedy the constitutional inadequacies previously identified in *Roosevelt I* by legislation that arguably reduced the disparity in revenue-raising ability to a four-to-one ratio was insufficient. The majority rejected the dissent's argument that the ABC legislation should be presumed constitutional by reasoning that "[t]his was a post-judgment enforcement proceeding, and thus the burden was on the state to show compliance." 190 Ariz. at 522, n.2, 950 P.2d at 1143, n.2. We do not perceive anything in these two cases that would relieve the School Districts from proving that the statutory scheme for financing maintenance and operations budgets deprived students of a meaningful opportunity to receive an adequate education.

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did not exceed a certain percentage of the district's total assessed property valuation. *Id.* The bonds were subject to voter approval because they had to be repaid through an increase in property taxes. *Id.* Thus, "the true amount of funding [was] based upon the value of a district's property and its ability and

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¶25 Finally, in *Albrecht II*, the supreme court held the Students FIRST funding plan unconstitutional because, by restricting the bonding capacity of some school districts and allowing districts to opt out of the funding plan, it created systemic differences between districts in their abilities to exceed state minimums through local funding. 192 Ariz. at 39, ¶ 19, 960 P.2d at 639. The resulting disparities, perpetuated by the financing system itself, were unconstitutional. *Id.* Nothing in the court's holding, however, supports the School Districts' contention that because the base support level was an arbitrary number, it was therefore unconstitutional.

¶26 Reduced to its essence, the School Districts' claim is that Article 11, Section 1 requires the State to identify and fund the operational programs necessary to enable public school students to meet achievement standards. Although this may be an effective strategy to fulfill the constitutional requirement that the State provide an adequate education, our constitution does not require such a cost-based approach in determining whether the State has met its obligation to "enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system." Further, we cannot say that the statutory scheme's reliance on a base funding level, which was originally pegged to statewide educational expenditures for the year in which it was adopted, is arbitrary in the constitutional sense of the

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willingness to tax it." *Id.*

word. See *Neeley*, 176 S.W.3d at 784 (defining an action as "arbitrary when it is taken without reference to guiding rules or principles").

¶27 Therefore, the School Districts were not entitled to partial summary judgment that the statutory system used to calculate maintenance and operations budgets is per se constitutionally deficient.

### III.

¶28 We next address whether the State was entitled to summary judgment that the operations and management budget financing scheme did not violate the rights of at-risk students under Article 11, Section 1. In addition to asserting that the School Districts' claim was nonjusticiable, the State also maintained that it is not required by Article 11, Section 1 to remedy educational disparities for at-risk students caused by socioeconomic factors rather than by the financing scheme. See *Roosevelt I*, 179 Ariz. at 242, 877 P.2d at 815 ("The critical issue is whether [any] disparities are the result of the financing scheme the state chooses."); *id.* at 243, 877 P.2d at 816 ("We also emphasize that disparities that are not the result of the state's own financing scheme do not implicate the interests sought to be served by art. XI, § 1.").

¶29 The group of students labeled "at-risk" by the School Districts is more likely to fail the AIMS test than other students who do not come from economically disadvantaged backgrounds. As

already mentioned, ¶ 2, n.4, *infra*, the complaint classified at-risk students as those who are eligible for free or reduced-price school lunches, that is, those with family incomes below 185% of the federal poverty level. In response to the State's motion for summary judgment, the School Districts asserted that there are a variety of programs and strategies (including, e.g., preschool, all-day kindergarten, smaller class sizes, tutoring, and parental involvement) that can offer lower socioeconomic class students a meaningful opportunity to achieve the State's academic standards.

¶30 Based on the record in this case, we agree with the State that the School Districts have not produced evidence that the maintenance and operations component of the public school finance system deprives at-risk students of an opportunity to meet academic standards. Unlike the capital funding scheme declared unconstitutional in *Roosevelt I*, the scheme for funding maintenance and operations allocates approximately the same amount of funds per "weighted" student for each school district. Thus, in contrast to the capital funding scheme that was struck down, the scheme for funding maintenance and operations is constitutionally "uniform" in terms of funding.

¶31 We recognize that an educational system that is uniform is not necessarily adequate in terms of providing a basic education. *Id.* at 242 n.7, 877 P.2d at 815 n.3 (stating that "satisfaction of the uniformity requirement does not necessarily satisfy the substantive education requirement"). Thus, an

educational system that did not establish minimum educational standards and provide sufficient funds to implement them would probably be deemed inadequate. But the School Districts have not alleged that the Legislature, acting through the Board, has failed to establish appropriate academic standards. Indeed, as they concede on appeal, the State has adopted "educational achievement standards" and prescribed "in great detail the curriculum that must be taught in the schools." Opening Brief at 34-35.

¶32 For example, A.R.S. § 15-203(A)(13) (Supp. 2005) requires the Board to "[p]rescribe minimum course of study and competency requirements for the graduation of pupils from high school." As noted by Justice Feldman in his concurring opinion in *Roosevelt I*, "[t]he Board regularly sets and updates the minimum courses of study and competency requirements for Arizona's schoolchildren." 179 Ariz. at 248, 877 P.2d at 821. The Arizona Administrative Code sets forth twenty credit hours as the minimum number of credits necessary for high school graduation as prescribed by the Board and local governing boards. A.A.C. R7-2-302. (There is a similar regulation that applies to common schools.) The Board has promulgated detailed content standards for required high school subject areas by grade. See <http://www.ade.state.az.us/standards/contentstandards.asp> (last visited November 17, 2006). For instance, the current reading standard

is divided into three strands: Reading Process, Comprehending Literary Text, and Comprehending Informational Text. Each strand

is divided into concepts that broadly define the skills and knowledge that students are expected to know and be able to do. Under each concept are performance objectives that more specifically delineate the tasks to be taught and learned.

[Http://www.ade.state.az.us/standards/language-](http://www.ade.state.az.us/standards/language-arts/ReadingStandardIntro.doc)

[arts/ReadingStandardIntro.doc](http://www.ade.state.az.us/standards/language-arts/ReadingStandardIntro.doc) (last visited November 17, 2006).

Teachers must satisfy rigorous certification requirements, including passing a proficiency assessment exam and completing a teacher preparation program in their subject area(s) and must demonstrate the ability to design lessons that teach Arizona's academic standards. A.A.C. R7-2-601 *et seq.*

¶33 The burden was on the School Districts to present evidence that would support a finding beyond a reasonable doubt that the current statutory financing scheme is not constitutionally adequate. See *Bird*, 184 Ariz. at 203, 908 P.2d at 17. They chose to try to meet this burden by showing that a disproportionate number of students from lower income families perform poorly on the AIMS test. This approach is premised on the School Districts' mistaken belief that Article 11, Section 1, which requires the Legislature to "enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system," mandates the Legislature to target the needs of and focus additional resources on at-risk students in order for them to attain a particular achievement level, rather than structure an efficient system that provides a meaningful opportunity for all students to receive a basic education.

¶134 We assume that, as contended by the School Districts, focusing additional resources on at-risk students might very well be an effective method to improve the test scores of this category of underperforming students. But, regardless of the wisdom of doing so, our constitution, which does not speak in terms of cost-based "inputs" or achievement "outputs," does not require the Legislature to formulate and fund educational plans designed to overcome disparities that it had no role in creating and are not caused by inadequacies in the educational system. Here, the underlying circumstances common to at-risk students that are predictors of poor performance, e.g., low parent participation and low self-esteem, are not caused by the State's educational funding system but are attributable to a dysfunctional home environment that, unlike deteriorating capital facilities, cannot easily be remedied by an influx of money.<sup>16</sup> As noted by the superior court, "the causal relation with respect to operations is murky at best." Because the School Districts did not present proof that the current statutory scheme does not provide sufficient funds for

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<sup>16</sup> According to a 1991 report on Arizona's at-risk students prepared by the Morrison Institute for Public Policy on behalf of the Arizona Department of Education, at-risk indicators vary by age group. For K-3 students, the six at-risk indicators that correlated most closely with low achievement included few reading materials at home, low self-esteem, substance abuse by parents, abusive home environment, emotional/behavioral problems and low parent support. Morrison Report at 6. For 7-12 students, the six leading characteristics of low achievers were: lack of involvement in school/community activities, retention in at least one elementary grade, having a sibling who dropped out of school, having dropped out themselves, having been suspended or expelled, and having been convicted of a crime. *Id.*

public schools' maintenance and operations budgets, the State was entitled to summary judgment.

#### THE DISSENT

¶35 The dissent makes some good points. For example, we agree with the dissent's assertion, ¶ 62, *infra*, that the rationale of the capital finance cases also requires the State to adopt minimum standards for maintenance and operations so as to ensure an adequate educational opportunity for all students. However, unlike the dissent, we do not accept the School Districts' premise that the constitutional adequacy of the State's educational system hinges solely on how well at-risk students perform on the AIMS test. As a tool used to measure academic achievement, it is simply one component of the State's overall educational system; that a certain subgroup of students performs more poorly on the test than another subgroup does not, by itself, support a conclusion that the educational system is constitutionally inadequate.

¶36 The dissent also claims that our analysis "could be applied to leave [homeless and disabled] students out in the cold." ¶ 52 n.22, *infra*. We disagree. First, notwithstanding the dissent's parade of horrors, the application of Article 11, Section 1 to such students is not an issue in this case and there is no claim before us that Arizona's statutory scheme for homeless and disabled students does not comply with all applicable legal requirements. See, e.g., A.R.S. § 15-943 (student count

"weighted" to take into consideration students with emotional or cognitive impairments). Second, and more importantly, the constitutional rationale underlying the various federal and state statutes and regulations applicable to both homeless and disabled student-age populations was not that such students have a constitutional right to a particular level of education; rather it was that treating these students differently from other students violated due process and equal protection guarantees by denying them access to equal educational opportunities. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 192, (1982) (discussing the constitutional basis of lower court decisions and describing "the intent of the [Education for All Handicapped Children Act<sup>17</sup>] was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."); No Child Left Behind Act of 2001 § 721(1) (2001) (requiring state educational agencies to ensure that homeless children have equal access to the same free, appropriate public education as provided to other children). Because Arizona's financing scheme for maintenance and operations budgets is structured to provide equal access to the same basic educational opportunities for all students, it satisfies federal constitutional requirements. And,

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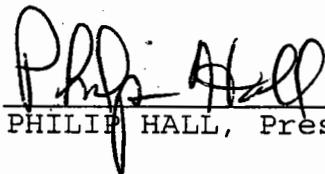
<sup>17</sup> This Act was a predecessor to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C.A. § 1400,

(continued . . .)

as we have already explained, Article 11, Section 1 does not impose a constitutional requirement that the State provide supplemental programs to at-risk students to improve their chances of passing the AIMS test.

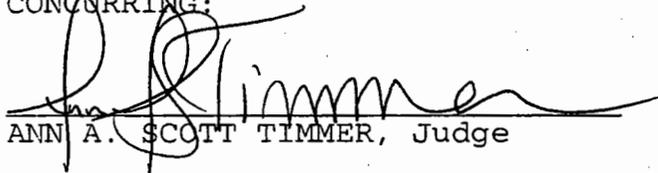
#### CONCLUSION

¶37 Based on the foregoing, we affirm the superior court's denial of the School Districts' motion for partial summary judgment and its grant of summary judgment to the State.



PHILIP HALL, Presiding Judge

CONCURRING:



ANN A. SCOTT TIMMER, Judge

K E S S L E R, Judge, concurring in part and dissenting in part:

¶38 I concur with the majority that the superior court erred in finding this case nonjusticiable and correctly denied the Districts' motion for partial summary judgment. I dissent, however, from the majority's holding that the superior court correctly granted summary judgment for the State. I would hold that: (1) Article 11, Section 1 of the Arizona Constitution ("Section 1") requires the State to provide an adequate education to all Arizona school children; (2) the conduct claimed by the

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et seq. (2004).

Districts can amount to a violation of Section 1; and (3) there is sufficient evidence in the record to preclude summary judgment for the State on this claim.

### I. Justiciability

¶39 The Districts' complaint alleges Arizona's school finance system is unconstitutional because it failed to provide adequate programs and funding to enable students from lower socioeconomic backgrounds ("at-risk" students) to have an equal opportunity to meet state-prescribed academic standards. The State contends that these issues are nonjusticiable because they would require courts to dictate what an adequate education is, infringing on the powers of the Legislature and the Executive, in violation of separation of powers.

¶40 The Districts expressly disavowed any attempt to have the courts fashion school operational programs or finances, explaining they only sought declaratory relief on the constitutionality of the current financing scheme and academic programs.<sup>18</sup> I take the Districts at their word and interpret the Districts' complaint

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<sup>18</sup> The Districts told the superior court that they were seeking "a declaration from this Court that the school finance system is unconstitutional, nothing more and nothing less. The Plaintiffs do not ask and have never asked the Court to establish standards, provide funding or 'create a new system.'" [I.80 at 4]

The superior court also implied that the determination of what students were "at-risk" was sufficiently subjective as not to be justiciable. However, the Districts defined in their complaint what they mean as "at-risk" by objective criteria: students whose family incomes are below 185% of the federal poverty level and who are eligible for free or reduced-price school lunches.

more narrowly than did the superior court.<sup>19</sup> As I read the complaint, the Districts seek (1) a declaration that the financing scheme for operations and management does not produce a general and uniform, i.e., adequate, school system and (2) an order that the State must develop standards for adequate school "operations" and provide funding to meet those standards.

¶41 As such, the claim is justiciable. Not only is the majority's conclusion consistent with the school capital financing cases, but it is the approach favored by current commentators on the role of the judiciary on the issue of a constitutional right to an education. E.g., Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 Harv. J.L. & Pub. Pol'y 569, 588-89 n.123 (Spring 2004) ("Obhof")

¶42 The State also contends the Districts have asked the court to make policy decisions without judicially manageable standards. The State cites cases in which other state courts have dismissed challenges to school financing plans as nonjusticiable.<sup>20</sup>

As our supreme court observed in *Roosevelt I*, however, decisions interpreting the differing language of other states' constitutions

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<sup>19</sup> *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994) (*Roosevelt I*); *Hull v. Albrecht*, 190 Ariz. 520, 950 P.2d 1141 (1997) (*Albrecht I*); *Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998) (*Albrecht II*); *Roosevelt Elem. Sch. Dist. No. 66 v. State of Arizona*, 205 Ariz. 584, 74 P.3d 258 (App. 2004) (*Roosevelt II*).

<sup>20</sup> See, e.g., *Marrero v. Commonwealth*, 739 A.2d 110, 111, 113-14 (Pa. 1999) (court cannot define what is adequate education or what funding is required for such education; constitution has committed these exclusively to legislature).

do not provide much guidance regarding our constitution. 179 Ariz. at 241, 877 P.2d at 814. Our conclusion is consistent with those courts which have not hesitated to determine whether academic programs and financing were sufficiently adequate to meet their constitutional provisions dealing with education, a position one commentator has described as the majority view.<sup>21</sup> E.g., *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 90-105 (1978); *Neeley v. West Orange-Cove Consol. Indep. Sch.*, 176 S.W.3d 746, 777-80, n.183 (Tx. 2005) (collecting cases). It will be up to the Districts, assuming the supreme court grants review and reverses the superior court's summary judgment for the State, to produce sufficient evidence to permit a court to determine if the current state programs are inadequate.

¶43 I emphasize, however, that the role of the judiciary at this point is not to determine for the Legislature and the Department of Education what programs and resources are needed to meet the requirements of Section 1. The approach taken here and by the supreme court and this Court in the capital financing cases is to review whether the decisions made by the two other branches meet the requirements of Section 1. Except under extraordinary

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<sup>21</sup> John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War*, 57 Van.L.Rev.2351, 2393, 2400-01 (Nov. 2004) ("Dayton").

Indeed, the complaint, based upon adequacy of education, represents a shift used by many plaintiffs to further define constitutional guarantees of an equal education. Dayton, 57 Van.L.Rev. at 2393, 2400-01;; Patricia First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of Derolph*, 32

(continued . . .)

circumstances not present here, the judicial branch must exercise restraint and recognize it is not the appropriate branch of government to formulate an educational system that addresses social inequalities, but only to determine if the legislative attempts comport with constitutional requirements.

## II. The Districts' Motion for Partial Summary Judgment

¶44 I concur with the majority that the Districts' claim that the statutory education funding scheme is per se unconstitutional fails as a matter of law. I add two points to clarify the meaning and effect of this conclusion.

¶45 First, the Districts assert that base level funding must be linked to achievement of academic standards, that the only way to do that is to determine what each of the elements of a basic education costs, and that without cost-based funding, the financing system is per se unconstitutional. The majority points out that "cost-based" funding is only one means to determine whether the funding scheme is adequate. In this context, "cost-based" funding assumes that increased funding per se will assist in improving education. While sufficient funding is a necessary base for an adequate education, that does not necessarily mean that increased funding per se will improve education. Equally plausible is that districts and the State can create programs which improve adequacy of education for at-risk students without simply throwing more money at the problem. See e.g. Eric A.

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J.L.&Educ. 185, 190-202 (Apr. 2003).

*When School Finance "Reform" May Not Be Good Policy*, 28 Harv.J.on Legis. 423, 425 (1991). I find no authority in our constitution or supreme court cases to require the State to adopt a cost-based strategy as a matter of law.

¶46 Second, the Districts do not argue they have evidence that the current funding scheme as applied is arbitrary and capricious. If the supreme court ultimately determines that the State was not entitled to summary judgment, nothing in our holding today precludes the Districts from arguing that the funding scheme as applied is constitutionally inadequate. That, however, will require evidence linking the funding scheme to the alleged inadequacy of operation budgets and programs for at-risk students. See *Dayton*, 57 Van.L.Rev. at 2378 ("plaintiffs must link expenditures to educational opportunity . . . no plaintiff has ultimately prevailed without convincing the court of the existence of a positive correlation between expenditures and educational opportunity").

### III. The State's Motion for Summary Judgment

¶47 I part company from the majority in its holding that the State is entitled to judgment as a matter of law on the Districts' claim that the State has failed to provide an adequate education to enable at-risk students to have an equal opportunity to meet State-mandated academic achievement standards. First, I disagree on the majority's theoretical foundation. Second, I conclude that Section 1 provides a constitutional right to an adequate education in the sense of an equal opportunity to meet State-mandated

academic standards. Third, the State programs could have "caused" this inadequacy in the meaning of the school capital financing cases. Finally, the State has not shown that the evidence precludes the Districts as a matter of law from proving that constitutional inadequacy.

A. *Foundational Basis*

¶48 As I understand the majority's theoretical foundation, it holds that Section 1 only requires that the State provide an overall adequate education. Thus, if the educational system is adequate on some undefined overall basis statewide, the fact it might be inadequate to provide subsets of students an equal opportunity to meet mandated academic achievement standards is of no constitutional matter.

¶49 I can find nothing in Section 1 which provides such a limitation on Section 1's requirement for an adequate education. As discussed below, our constitutional framers required the State to provide an adequate education for *all* Arizona's children, not just certain types of children. There is nothing in the records of the constitutional convention or in any Arizona case law which supports the view that if the State provides students on an average with an adequate education, it need not worry about those students who fall below that average.

¶50 The majority's foundational base is at least in tension, if not in conflict with the supreme court's holding in *Albrecht I*. While the court there was dealing with capital financing rather than operations, it held that once a standard is set, the State

may not avoid its constitutional duty to ensure that no school district falls below that standard:

[S]tatewide substantial equalization and local option to go above and beyond the standard are irreconcilable unless the legislature establishes standards for *adequate* capital facilities. Once a standard is set, the legislature must choose a funding mechanism that does not cause substantial disparities and that *ensures that no school in Arizona falls below the standard.* . . . The general and uniform requirement applies only to the state's constitutional obligation to fund a public school system that is *adequate*.

190 Ariz. at 524, 950 P.2d at 1145 (emphasis supplied). The court concluded that,

in addition to providing a minimum quality and quantity standard for buildings, a constitutionally *adequate* system will make available to *all* districts financing sufficient to provide facilities and equipment *necessary and appropriate* to enable students to master the educational goals set by the legislature or by the Board of Education.

*Id.* (Emphasis supplied).

¶51 As I understand the Districts' theory, they do not insist that the State is constitutionally mandated to provide every student with an "adequate education," defining "adequate education" as passing the standard which the State has mandated for academic advancement and graduation - the AIMS test. Rather, I understand the Districts to contend that the adequate education it seeks is sufficient programs and funding to give "at-risk" students an *equal opportunity* to pass the AIMS test.

¶152 The majority's theoretical base does not sufficiently address the Districts' concern: can the State base the adequacy of its academic operations and resources at some theoretical "overall level" and simply ignore whether that definition of "adequacy" gives subsets of students an equal opportunity to meet that academic standard? Could, hypothetically, the State say it has found that its programs and budgets for operations are adequate to permit students in Paradise Valley and North Scottsdale a fair chance to pass the AIMS test and say that if it is adequate for those students, it is adequate for the entire State? Could the State set a standard for adequacy and simply ignore or underfund the needs of homeless or disabled students? I think that is the issue presented and where I find the majority's theoretical concept wanting.<sup>22</sup>

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<sup>22</sup> This is not to say that the Districts are contending Section 1 requires every student to have an equal opportunity to pass the AIMS test or that their argument is based on equality of funding between districts as opposed to adequacy of funding. When, however, a plaintiff can identify a subset of the student population in various districts or schools for whom the budget and resources are inadequate, the State cannot ignore that subset's needs.

I do not imply that the majority or the State is intending to say that the State has no obligation to care for disabled students at all. My point is that, taken to its logical conclusion (and absent federal or statutory requirements), the majority's theory could be applied to leave these subsets of students out in the cold or defend providing Section 1 inadequate resources to those students.

*B. Arizona children have a constitutional right to an adequate education that goes beyond capital financing and beyond bricks and mortar.*

¶53 The State contends that this case is unlike the school capital financing cases because those cases dealt with a scheme that directly caused large funding differences among districts regardless of the Districts' needs for capital facilities. This case, it argues, deals with adequacy of educational programs. Thus, the State appears to contend Section 1 does not create a constitutional right to an adequate education and appears to limit the capital financing cases to addressing gross disparities in capital funding.<sup>23</sup>

¶54 While we do not need to reach the issue of whether Section 1 creates a fundamental right to an adequate education, I disagree with any implication that Section 1 does not require the State to provide sufficient funds and programs to provide all Arizona's school children with an equal opportunity to meet State-mandated academic standards. Based on language and reasoning in prior supreme court decisions and the records of the Arizona Constitutional Convention, Section 1, at a minimum, creates a constitutional right of Arizona school children to an equal opportunity to meet State-mandated academic goals. Consistent

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<sup>23</sup> The State, however, also seems to assume throughout its brief on appeal that Section 1 obligates it to provide an adequate education.

with the views of the drafters of our state constitution, "A system of general education, which shall reach every description of our citizens from the richest to the poorest, as it was the earliest, so will it be the latest of all the public concerns . .

. . .<sup>24</sup>

#### 1. Precedential Authority

¶55 While Section 1 only refers to a "general and uniform" education, the supreme court has made it clear that such terms were intended to require the State to provide an adequate education. In *Shofstall v. Hollins*, 110 Ariz. 88, 90-91, 515 P.2d 590, 592-93 (1973), a school district and taxpayers challenged the system of public school financing as a violation of equal protection. In reversing the superior court's grant of summary judgment to the plaintiffs, the court expressly held that "the constitution does establish education as a fundamental right . . . The constitution, by its provisions, assures to every child a basic education." *Id.*, 110 Ariz. at 90, 515 P.2d at 592.<sup>25</sup>

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<sup>24</sup> Thomas Jefferson to J.C. Cabell, 1818, <http://www.monticello.org/reports/education.html> (last visited Nov. 9, 2006).

<sup>25</sup> The supreme court later questioned whether that "right" was "fundamental" in nature because the court in *Shofstall* applied a rational basis test to the school financing scheme. *Roosevelt I*, 179 Ariz. at 238, 877 P.2d at 811. The court, however, has never overruled or disapproved the holding in *Shofstall* that the constitution at least requires the State to provide a basic education. See *Magyar v. Tucson Unif. Sch. Dist.*, 958 F. Supp. 1423, 1442-43 (D. Ariz. 1997) (noting that supreme court in *Roosevelt I* rejected the use of a rational basis test for

(continued . . .)

¶156 The school capital financing cases also uniformly hold that Section 1 requires an adequate education, at least in the form of capital financing. In *Roosevelt I*, our supreme court held that because capital funding for public schools was heavily dependent on local property taxation, the funding scheme inevitably caused substantial disparities in school facilities and did not comply with our constitution's mandate for a general and uniform school system. 179 Ariz. at 242-43, 877 P.2d at 815-16. The court continued that capital disparities were "simply the first symptoms of a system-wide problem." 179 Ariz. at 237 n.3, 877 P.2d at 810 n.3. While the court explained that the "contours of sufficiency" were not before it, it recognized a substantive educational requirement independent, but related to the uniformity requirement:

Satisfaction of the substantive education requirement does not necessarily satisfy the uniformity requirement, just as satisfaction of the uniformity requirement does not necessarily satisfy the substantive education requirement.

*Id.*, 179 Ariz. at 241 n.7, 877 P.2d at 814 n.7. There can be no other meaning to the court's language but that it was referring to the substantive academic education offered to students.

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fundamental rights and holding that an adequate education is a fundamental right in Arizona).

¶157 In a concurring opinion,<sup>26</sup> Justice Feldman noted that the Board of Education already had adopted minimum courses of study and minimum competency requirements for promotion of students. *Id.* at 248, 877 P.2d at 821 (Feldman, J., specially concurring). In light of those standards, he concluded the Legislature could not create disparities that would prevent some districts from being able to provide the facilities, books, and equipment "needed to give students an equal opportunity to attain the Board's prescribed minimum course of study." *Id.* at 248-49, 877 P.2d at 821-22.

¶158 The Legislature responded to *Roosevelt I* and adopted a capital funding scheme called the Assistance to Build Classrooms Fund ("ABC" Fund). In *Albrecht I*, the supreme court held that the ABC plan not only "result[ed] in disparities in revenue-raising abilities among districts," *id.* at 522, 950 P.2d at 1143, but perpetuated the core problem of substantial reliance on property taxation. Because the value of property within the districts varied widely, and the presence of taxable property in a particular district might bear no relationship to the district's

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<sup>26</sup> Justice Feldman disagreed with the majority's holding that the state must provide "funds to educate children on substantially equal terms" and instead concluded the constitution requires "an equal opportunity" to obtain "the basic, minimum education" prescribed by the state. *Id.* at 246, 877 P.2d at 819. He also disagreed with the majority, which found the complaint did not raise the issue of whether Section 1 required the state to provide an adequate education, and would have addressed that issue. *Id.* at 249-50, 877 P.2d at 822-23.

capital needs, the funding plan was unconstitutional. *Id.* at 523-24, 950 P.2d at 1144-45. Importantly, as noted above, ¶ 50, *supra*, the supreme court added that the Legislature had to establish a standard for adequate facilities and ensure no school fell below that standard so that all districts could have the facilities to enable students to meet state-mandated educational goals to ensure that the public school system is adequate. *Id.* at 524, 950 P.2d at 1145.

¶59 The supreme court in *Albrecht I* used language supporting the conclusion that an adequate education requires sufficient funding of maintenance and operations. As explained in *Albrecht I*, the State has an obligation to: (1) set standards for an adequate education; (2) "choose a funding mechanism that does not cause substantial disparities and that ensures that no school in Arizona falls below the standard;" and (3) provide sufficient funding to enable students to master the set standards. 190 Ariz. at 524, 950 P.2d at 1145. (Emphasis supplied). I see no reason to limit these requirements to capital financing.

¶60 The Legislature's next attempt to fix the capital funding problem came before the court in *Albrecht II*, in which the court considered the Students FIRST plan. The court noted that *Albrecht I* had held "that legislatively established standards for adequate capital facilities are a core component of a general and uniform public school financing system." 192 Ariz. at 36-37, ¶ 8, 960

P.2d at 636-37. (Emphasis supplied). Thus, in addition to setting standards, a funding scheme (1) must provide funding to ensure that no district falls below these standards; and (2) must not cause substantial disparities among districts. *Id.* at 37, ¶ 8, 960 P.2d at 637. Thus, the State's obligation is not just to avoid causing disparity, but to also set standards and ensure that the schools have sufficient funding and resources to give students an equal opportunity to meet those standards.

¶61 More recently, some school districts challenged an amended version of Students FIRST, which adopted building adequacy standards and provided money for new school facilities, correction of deficient facilities, and maintenance of existing facilities. *Roosevelt II*, 205 Ariz. at 586, ¶¶ 5-7, 74 P.3d at 260. The districts argued that failure to fully fund the building renewal fund violated the constitution. *Id.* at 589, ¶ 21, 74 P.3d at 263. This Court held that because the districts did not show that lack of funds for building renewal impaired their ability to meet academic standards, they did not prove a constitutional violation. *Id.* at 591, ¶ 32, 74 P.3d at 265. Implicit in the decision is the recognition that adequacy of facilities is a constitutional requirement because without such adequacy, it would be impossible to determine whether the fund unconstitutionally interfered with the students' ability to meet academic standards.

¶62 Thus, the school capital financial case support the conclusion that the "general and uniform" public school system guaranteed by Section 1 requires the State to adopt a minimum standard for both capital financing and maintenance and operations for an adequate education for all students.

2. *An adequate education requires more than adequate facilities.*

¶63 In its motion for summary judgment, the State argued that while our courts have found the Arizona Constitution guarantees a minimal level of measurable adequacy for capital facilities, these cases do not guarantee a minimal level of measurable adequacy for management and operation of schools. On appeal, the State continues to urge that it should not be required to set and fund adequate standards for the management and operation of education because "students from different backgrounds, in different communities, are not like the roof, laboratories, and gymnasiums addressed by the capital facilities cases. They cannot be reduced to square footage terms."

¶64 Thus, we are confronted with the issue which Justice Feldman addressed in his concurrence in *Roosevelt I*, but which the supreme court concluded it did not have to address - whether Section 1 obligates the State to provide an equal opportunity to achieve an adequate education. 179 Ariz. at 246, 249-51, 877 P.2d at 819, 822-23. I agree in part with the State that different districts may need different programs to meet State-mandated

academic standards. Those differences, however, do not relieve the State from its constitutional obligation to provide sufficient funding and programs needed by each district to offer an adequate and equal opportunity to all students to meet the uniform academic standards measured by the AIMS test.

¶65 Indeed, to hold otherwise would make adequate capital financing to ensure an adequate education a hollow gesture. The purpose of Section 1, according to the capital financing cases, was not simply to create equal or even merely adequate buildings, but to provide for an adequate education for Arizona's school children. The need for adequate capital financing would be meaningless if at the same time the State could refuse to provide funds to provide an adequate education. Without a floor of adequacy, Section 1 would mean that the Legislature could provide insufficient or no funding for educational programs, books or teachers, even though the buildings for teaching were constitutionally adequate. Adequate capital facilities without adequate programs and teaching cannot constitute an adequate education and would make a mockery of the intent of our constitution's drafters.

### 3. *Intent of the Constitutional Drafters.*

¶66 My conclusion is consistent with the intent of the drafters of our constitution. As the supreme court made clear, those drafters understood the importance of an adequate education

to a republic and intended to ensure that such an education was provided for in Section 1:

The conventioners believed that an educated citizenry was extraordinarily important to the new state. Early drafts of the education article began with "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people . . . ," and "[t]he stability of a Republican form of Government depending mainly on the intelligence of the people . . . ." The conventioners believed these were more than mere words. By 1910, they had witnessed the most intense immigration in the history of America. They were keenly aware that education was responsible for preserving America's unity while wave after wave of peoples arrived from other countries. As the heated debates about education as a requirement for voting show, the conventioners believed that a free society could not exist without educated participants.

Roosevelt I, 179 Ariz. at 239, 877 P.2d at 812. (Citations omitted).

As the supreme court further emphasized:

As the conventioners who drafted Arizona's constitution foresaw, public education has been a key to America's success. The education provisions of the constitution acknowledge that an enlightened citizenry is critical to the existence of free institutions, limited government, and individual responsibility. Financing a general and uniform public school system is in our collective self-interest.

179 Ariz. at 243, 877 P.2d at 816.

¶67 This recognition of the importance of an adequate public education is not limited to Arizona. See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (citing Thomas Jefferson: "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we

are to preserve freedom and independence."); Elizabeth Reilly, *Education and the Constitution: Shaping Each Other and the Next Century*, 34 Akron L.Rev. 1, 2 (2000) (A basic education is essential to both American ideals and our economic system because "it is not only our political system that is dependent upon a viable and successful educational system. Our economic system also proclaims its reliance upon well-trained and educated workers."'). As one commentator has phrased it,

Educated citizens are also better able to choose - and serve as - responsible and knowledgeable public officials, and citizens who are informed of their rights and responsibilities serve as a check against governmental abuse . . . . Perhaps most importantly, though, the American social system rested on two goals that require access to education: the 'melting pot' that absorbs diverse populations into a pluralistic society and the upward mobility that allows us to overcome class barriers.

Obhof, 27 Harv. J.L & Pub. Pol'y at 570-71.

C. *While the constitution does not guarantee an equal education, the State has an obligation to provide sufficient programs and funds so that all students have an adequate and equal opportunity to meet uniform State-mandated academic standards.*

¶168 The State contends it has no duty to remedy disparities among students, such as family income, that the financing system has not caused. Thus, even if it knows some students tend to have lower academic achievement levels based in part on those socio-economic factors, the State argues it has no obligation to cure that situation.

¶69 I am not persuaded the State has no constitutional obligation to offer sufficient funding and programs for students in different districts who are having difficulty in meeting State-mandated uniform academic standards. The State's adoption of such uniform academic standards is no less a cause of disparity than the funding scheme disapproved in *Roosevelt I*. This is because the academic achievement standards are uniformly applied to all districts and different districts have varying needs to offer adequate opportunities to at-risk students to meet those standards.

¶70 The State relies on the capital financing cases for the proposition that to be constitutionally deficient, the financial scheme must itself cause the deficiencies. *Roosevelt I* held that "a general and uniform school system does not require perfect equality or identity." 179 Ariz. at 243, 877 P.2d at 816. The court conceded that differences in facilities between districts are not unconstitutional as long as the financing system is not the cause of the disparities. *Id.* at 241-42, 877 P.2d at 815-16.

Thus, school houses, [and] school districts . . . will not always be the same because some districts may either attach greater importance to education or have more wherewithal to fund it. Nothing in our constitution prohibits this. Factors such as parental influence, family involvement, a free market economy, and housing patterns are beyond the reach of the 'uniformity' required by art. XI, § 1.

*Id.* at 242. 877 P.2d at 815.

¶71 Accordingly, "disparities that are not the result of the state's own financing scheme do not implicate the interests sought to be served by art. XI, § 1." *Id.* at 243, 877 P.2d at 816. See also *Albrecht I*, 190 Ariz. at 525, 950 P.2d at 1146 (ABC legislation violated Section 1 because "it is itself the cause of continued substantial disparities among districts"); *Albrecht II*, 192 Ariz. at 37 & 39, ¶¶ 8 & 20, 960 P.2d at 637 & 639 ("the funding mechanism chosen by the state must not itself cause substantial disparities between districts"; *Students FIRST* was unconstitutional because the funding scheme itself caused the disparities, rather than the disparities being the result of "parental influence, family involvement, voter willingness to incur debt for public schools, a free market economy, or housing patterns.").

¶72 I discern no viable distinction, however, between the State's arguments here and the financial scheme rejected in *Roosevelt I*. There, the financing scheme for capital facilities was the cause of disparities between districts because a uniform formula was used for all districts based in part on property taxes, but different districts had different property values. The supreme court reasoned that use of the uniform financing system applied to the "profound differences in property value among the districts . . . [that] could do nothing but produce disparities." *Id.*, 179 Ariz. at 242, 877 P.2d at 815.

¶73 In both cases, the State has used a uniform system for all districts - one to finance capital facilities and the AIMS test to permit students to show they have sufficiently met uniform standards to graduate. In both cases, districts had different needs to achieve that goal as a result of the application of a uniform standard to varying socio-economic situations. One uniform standard applied to districts with varying property values. The other uniform standard applied to districts with varying socio-economic factors allegedly impeding the districts' ability to give at-risk students an equal opportunity to meet those academic standards.<sup>27</sup> In both cases, the disparities and inadequacies are caused by the application of a uniform standard to varying socio-economic conditions.

¶74 As in *Roosevelt I*, 179 Ariz. at 243, 877 P.2d at 816, my conclusion does not mean the State has an obligation to correct or account for all the socio-economic factors which cause students to be at-risk.<sup>28</sup> Nor does it mean that measuring students' academic

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<sup>27</sup> The State's own evidence, in the form of the Morrison Report, confirms that different districts, based on different populations of at-risk students, have different needs for programs and funding to meet State-mandated academic standards. See *Judith A. Vandegrift and Louann Bierlein, Powerful Stories, Positive Results - Arizona At-Risk Policy Report FY 1990-91* (Morrison Report) at 31.

<sup>28</sup> See also *Dayton*, 57 Van.L.Rev. at 2378 ("Constitutional guarantees of public education are guarantees of educational opportunity and not guarantees of equal dollar amounts per pupil . . .").

performance and finding some students do not meet academic standards proves the State has failed to provide an equal adequate opportunity for students to obtain a basic education as defined by uniform, State-mandated tests. Rather, it only means that given students are at-risk, the State must provide sufficient programs and funding to provide them with an equal and adequate opportunity to meet State-mandated academic standards. See, e.g., *Roosevelt I*, 179 Ariz. at 246, 877 P.2d at 819 (Feldman, J., concurring) (Section 1 does not guarantee an "unattainable result-equal education--but an equal opportunity for each child to obtain the *basic, minimum education*" the state prescribes).

¶175 The achievement standards do not exist in isolation without any concern for whether students can meet them. Arizona's constitution requires the State to be accountable for implementing adequate education and giving all students a fair opportunity to meet uniform academic standards imposed by the State. For, "[i]f the State cannot be held accountable for fulfilling its duty, the duty creates no obligation and is no longer a duty." *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 751 (N.H. 2002). If the State imposes a uniform standard for all students in all districts and some districts have sufficient numbers of at-risk students to require additional programs or funding to offer an adequate opportunity for those students to meet those standards, the State must provide sufficient funds and programs to provide an equal

opportunity for an adequate substantive education under Section 1.<sup>29</sup>

D. *The record does not support summary judgment on whether the State is violating its constitutional obligation to provide an adequate educational opportunity to Arizona children.*

¶76 Summary judgment should be granted only when, viewed in the light most favorable to the party against whom judgment was ordered, there is no genuine dispute as to any material fact. *Doe v. Roe*, 191 Ariz. 313, 324, ¶ 34, 955 P.2d 951, 962 (1998); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review orders granting summary judgments de novo, both as to the issue of law and whether there are undisputed material facts. *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Loc. No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002); *Citizens Telecomm. Co. v. Arizona Dep't. of Revenue*, 206 Ariz. 33, 38, ¶ 20, 75 P.3d 123, 128 (App. 2003). We view the evidence and all reasonable inferences in the light most favorable to the party opposing the motion. *Citizens, id.*

¶77 In this case, summary judgment was erroneous on whether the State provided sufficient funding or resources to give at-risk

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<sup>29</sup> This conclusion that additional programs or funding may be needed for some districts does not itself cause unconstitutional disparities among districts. In *Roosevelt I*, the supreme court held that "a general and uniform school system does not require perfect equality or identity. For example, a system that acknowledges special needs would not run afoul of the uniformity clause." 179 Ariz. at 243, 877 P.2d 816 (emphasis supplied).

students an equal and adequate opportunity to meet its mandated academic standards. The superior court never reached the merits of the State's motion for summary judgment, but only ruled the claim was not justiciable. Besides the justiciability issue, the State's motion was based on its argument that the Districts could not identify any school unable to offer a basic education because of state programs and the evidence did not show significantly higher numbers of at-risk students in the Districts were failing the AIMS test.

¶78 The record does not support the State's contentions. First, the State contends that in answers to interrogatories, the Districts failed to identify any school within the Districts which failed to provide a basic education. Interrogatory 13 asked each District to identify any school within that district that it contended fails to provide either a minimum basic education for students or opportunities for at-risk students to meet State academic standards. It also asked for evidence to support that contention, specific ways in which programs are deficient, and a description of efforts now underway or proposed to address the deficiencies.

¶79 Each district's answer essentially was identical. Each response said that the State failed to prescribe elements of a minimum basic education. It then said that the failure of the State to provide all or some of the programs identified in response to interrogatory 3 denies at-risk students a meaningful opportunity to meet the standards. Each response also stated that

data regarding the AIMS performance of at-risk students as well as the most recent school improvement plans, if required, were attached. The State did not provide those attachments to the superior court.

¶180 Moreover, interrogatory 3 asked each District to identify the programs and funding necessary to provide at-risk students with an opportunity to obtain a basic education. While the Districts' responses all stated that identifying such programs is the State's obligation, they then listed a number of programs which should be considered.

¶181 Other discovery requests asked the Districts what evidence their experts relied upon to form any opinion they would offer in the case. The Districts responded that the experts named in attached resumes had not yet been provided any documents, but would rely on their previous research referenced in their attached resumes. The State again failed to place those attachments in the record.

¶182 The State also contended that the Districts' statement of facts in opposition to the State's summary judgment motion showed that many students in the Districts were passing the AIMS test. In fact, exhibit 2 to that statement of facts shows the 2000 Crane School District passage rate for both at-risk and non-at-risk students. While some at-risk students are passing at the grade

levels indicated, the at-risk students are failing at 1.5-3 times the rate of non-at-risk students.<sup>30</sup>

¶83 Finally, the State contended that the record shows that twenty-three schools in the Districts are performing or highly performing in AIMS test passage. The problem with that is that the document the State relied upon only deals with overall success rate, not performance of at-risk students.

¶84 In conclusion, the Districts presented sufficient evidence to preclude summary judgment. They have shown that at-risk students were failing the AIMS test at a rate higher than non-at-risk students, that the poverty factor affects the ability to succeed academically, and identified programs which are missing and would offer an adequate education. Presumably, they identified the schools impacted based on the passage rate of the AIMS test for at-risk students and named their experts with the research the experts would rely upon in attachments to the discovery responses that the State failed to provide to the superior court.

¶85 This does not mean the Districts can simply rely on a tautology that the higher failure rate for at-risk students proves the State's current operations and funding affect the ability of the Districts to provide an adequate opportunity for at-risk students to pass the AIMS test. The Districts will have to

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<sup>30</sup> The Morrison report shows that numerous factors, including poverty, affect at-risk students' ability to succeed academically.

(continued . . .)

provide other evidence, presumably expert testimony, to prove a causal relationship between the State's programs and resources and the failure rate. However, the State does not argue there is no such expert evidence. Accordingly, summary judgment was inappropriate.

#### V. Conclusion

¶186 For the reasons stated above and in the majority's decision, I concur that this case was justiciable and that the superior court did not err in denying the Districts' motion for summary judgment. However, I dissent from the remainder of the majority decision, would reverse the summary judgment granted to the State, and remand this case for further proceedings consistent with my dissent.

  
DONN KESSLER, Judge

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The Morrison Report was in the record and supported that answer.