

Testimony on Arizona's Desegregation Funding Mechanism Prepared for Presentation to the  
Sunset Review Committee of the Arizona Legislature

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**Note: This narrative is substantively the same as the official transcript but is not the official transcript. The questions from legislators and the responses are from the official transcript.**

My name is Alex Molnar. I am a Professor of Education Policy at ASU, and I direct the Education Policies Laboratory there. I have been asked by my Dean, Eugene Garcia, to review documents relevant to Arizona's desegregation funding mechanism. My presence here reflects ASU President Crow's intention to have ASU constructively engaged in matters of consequence to the community.

To assess Arizona's desegregation funding mechanism I reviewed, the statutes, the Auditor General's 1990 report, school district desegregation expenditures relative to their regular M&O spending for fiscal year 2001-2002, and the submissions of the school districts to this committee. Based on my review I conclude that the current funding mechanism works reasonably well and that the problems associated with changing it outweigh the benefits.

The Auditor General's 1990 report was in response to a legislative charge to consider many of the issues that I surmise gave rise to the 2002 legislation subjecting the desegregation funding mechanism to sunset review.

In 1990 the legislature wanted to know if participating districts were raising and spending desegregation funds wisely, efficiently, and appropriately. In 2002 the legislature

seems to have capped desegregation spending and made the desegregation funding mechanism subject to sunset review in order to once again consider how much desegregation money school districts raise and how well they are spending it.

The legislature was then, and I suspect still is, concerned that desegregation funds were being used by school districts to supplant regular funding. Unfortunately, the questions the legislature was and is most interested in could not and can not be answered because the desegregation funding statute lacks the necessary definitions. As a result, in 1990 the Auditor General was forced to make assumptions and draw inferences in order to come up with a way to interpret the available information. Based on the assumptions made and the inferences drawn the Auditor General found that around 1% or less of the desegregation money being spent by these school districts could be in some way be considered spending that didn't conform to legislative intent.

At the time of the 1990 report, there were, by my reading, 29 Office of Civil Rights (OCR) agreements and 4 court ordered agreements. Currently, there are 17 OCR agreements and 2 court ordered agreements. That is, there are slightly fewer desegregation agreements now than there were in 1990.

As I understand it, another reason for the 2002 legislation was legislative concern that the desegregation funding mechanism had given school districts a blank check. Districts don't have to go the override mechanism. Instead, they can, on their own authority, raise the local tax money they deemed necessary to implement and maintain their desegregation agreements. Therefore, the legislature enacted a funding cap in 2002 subjected the funding mechanism sunset review, and required that districts submit information on their desegregation spending to the sunset review committee. The districts have now submitted their information.

Given the information available, the reality of a well established funding mechanism, and the nature of desegregation orders I would urge the legislature to proceed with caution. Desegregation dollars now make up a significant percentage of M & O spending in some of Arizona's larger districts. If the legislature were to make changes in the desegregation funding mechanism without clearly understanding the impact of those changes on these districts it would risk creating fiscal turmoil that would serve no one's interests.

There is also a need for the legislature to carefully consider what information it wishes to collect from school districts. What, for example, is the statutory basis defining terms such as "supplant?" What is the appropriate executive entity to collect the information, establish the format for reporting it, develop the methods for analyzing it, and then provide an interpretation of the results? To what legislative body should this executive entity report? At the moment, given the existing statutes, it is unlikely that any report is likely to satisfactorily address the legislature's concerns.

In the short term I would, therefore, advocate that the legislature lift temporary cap on desegregation spending. If it so wishes, the legislature could then focus writing legislation that offered definitions that could be used to collect the sort of information and do the kind of analyses some members of the legislature want.

If this were the end of it the matter would be relatively easily addressed. There are, however, larger more fundamental problems associated with re-crafting Arizona's desegregation funding mechanism.

Perhaps the largest problem facing the legislature is that desegregation orders are constitutional matters and it is not possible to both be involved and uninvolved in a constitutional issue that is currently between the Federal Government and local school districts. Just as it is not possible to be a little bit pregnant the state can not make itself "sort

of' a party to these desegregation agreements. If the state takes action that makes it a party in this matter the state will incur the obligations that come with being a party. This is the risk if the state involves itself in deciding what a district may or may not spend to comply with its desegregation order.

I realize that some members of the legislature are uncomfortable with the mechanism that has been legislatively provided for funding desegregation agreements. In order to address those concerns, however, it is likely that the legislature will have to get the state involved in a constitutional matter that, to this point, has been between school districts and the federal government. I would strongly caution the legislature against getting involved.

There are further problems and complications associated with changing the current funding mechanism. Several matters are coming to a head that are going to have a significant bearing not only on the desegregation funding issue but on the overall fiscal obligations of the state government. One such matter is the Flores case settlement. The Flores case is going to have significant impact on the OCR agreements because most of them have to do with English Language Learners. What that impact is going to be can't be known exactly at this moment. A second matter is the adequacy lawsuit on the horizon. We don't know what impact that is going to have and how it might have an affect the OCR agreements and court ordered desegregation settlements. Finally, there is the rapid growth of Arizona's population of English language learners. How these demographic changes will affect the cost of the various OCR agreements, the cost of the Flores settlement, or the outcome of the adequacy case can not presently be known. We can all see, however, that the potential costs to the state are enormous.

Taken together, these various factors convince me that the potential fiscal risks of changing the desegregation funding mechanism are very high and the potential benefits from

doing so are quite small. I worry, therefore, that the legislature may be tempted to act hastily, create a state liability whose costs are unknowable, and thus make matters much worse.

At some point perhaps, five or six years hence, the legislature is going to have to step back and address all of these various issues together within a broader consideration of Arizona's overall approach to funding of public education. The issues I have discussed are, I believe, of a piece.

In conclusion, my advice to you is to raise the caps so school districts can continue to meet the obligations outlined in their OCR or court ordered desegregation agreements, sharpen the reporting requirements if you wish, and find an executive entity that can help you collate and understand the information provided. Take care, however, not to get caught in a constitutional issue that is now between the Federal Government and local school districts. Wait to see the Flores settlement agreement and the outcome of the adequacy law suit. Take the time to factor these developments into an assessment of the impact of Arizona's changing student population. Then take a comprehensive look at Arizona's education funding.

Thank you.

**Questions:**

**Representative Gray:**

What are some of the requirements that you think should come forth on reporting and how much should they stick to what the violation was as opposed to - if you read Glendale Union they are using the money to pay for retirement and insurance costs?

**Response:**

This is a really difficult question, Madame Chairman, and you raise a very good point. Let me back into the response to that. What your question points out, at least in my mind, is the need for an executive entity to take a look at these agreements with considerable care because they are all over the place. You can't say that an Office of Civil Rights agreement stipulates this, that, or the other thing. It may stipulate any number of things. Then comes into play - What are the dates on the OCR agreement? For example, when you read the Auditor General's report from 1990 what you find is this whole idea of supplanting funds is open to definition. It seems so commonsensical on its face. Well you are using this as a mechanism to get this money and spend it on something else that you would have had to go to referendum for otherwise as an example. It is not that clear, because a district for example make the case and they did at time of this Auditor General's report that in fact they had been burdened with expenditures which disadvantaged other students in order to try and address the very civil rights concerns that led t to this successful filing. So I think you can't answer it on this committee. I think what you can answer on this committee is who is going to gather this information, recommend to us the relevant questions, provide the format for reporting to these

school districts, collate the information when it comes back and give us a clear picture. Even here you have to step gingerly because you don't control the constitutional issues in play. If you can be perceived to be creating a state mechanism which withdraws funds to accomplish a constitutional purpose you will go into court, and although I am not an attorney - I don't even play one on TV - I believe you will not prevail.

**Representative Cajero Bedford:**

Would you go back and explain a little bit - when you talked about the 1990 report you said it appeared as though it were a blank check. Can you give me some idea how a system is put in place for a school district to set their budget because there is still that perception out there? So is there a formula or is it just sort of picked out of the sky?

**Response:**

You see I don't think it is a blank check, but I do think there is the perception that it is a blank check. I mean my surmise about the Auditor General's report the questions that were asked, the charge it was given was that there was a legislative suspicion that this mechanism was being used inappropriately to supplant funds that should be properly raised through voter initiative or through legislative action and that the money, then there is a good government issue, that money wasn't being well spent. I don't think that the Auditor General's report confirms that suspicion. Hence my statement about their finding even using generous definitions, perhaps more generous than I would have used, by their estimation 1% of the funds that were in play couldn't be directly tied to the OCR agreement or the court order. If you get into tampering with that then you fall out of compliance and you have a problem. If the court says this is what it is and the OCR agreement says this is what it is and the state says

but you can't spend money on it, you have a constitutional problem at which you are on the losing side of the argument.

**Representative Downing:**

You raised the core part of your argument is that we have to be cautious at the legislature about possible, and I put it in business terms, unspecified liabilities. Let's specify liabilities by we are not permitted for banks or other organizations because you don't know what happened. Is there any way - this is a two-part question. First is there any way that we can put more meat, more numbers on what those unspecified liabilities could be? How we could avoid more specifically? Maybe you can provide a description to us in a paragraph or so. Very specifically what those would be and how much they could be if we take the wrong policy action.

**Response:**

They are as you correctly identified them unspecified. If you take the lid off this - if the State legislature says this isn't a matter between this local school district and the federal government - we interject ourselves into this and we accept the responsibility directly for funding this. Therefore, the fiscal obligation to see that it is funded I don't think, I know I can't and I don't believe anybody can tell you where the end would be of state liability.

**Representative Downing:**

On the second half of that question does the state from your perspective have any responsibilities to delay the conditions so that we don't see these desegregation orders occurring in the first place in our schools? I mean there is another way to read this story. You could turn around and say since 1978 the state hasn't stepped up to the plate and told the school districts clearly behave yourself these are the conditions to protect civil rights. Because



of that our school districts have been hit over and over again by specific actions. So help me on that one.

**Response:**

The Auditor General's report in 1990 points to an example of states like Minnesota for example - I believe it's Minnesota but don't hold me to that - it just comes to my mind - where the state action has been to encourage voluntary desegregation efforts and fund at least partially those efforts. So different states have different models for addressing the question of the constitutional requirement that there not be discrimination on the basis of ethnic origin, which goes to the question of the English language learners by and large, or racial discrimination, which goes to segregation in school districts and school assignment. and so on. So there are mechanisms available to the state and there are states that have chosen to deploy those mechanisms. Arizona appears to have taken the action that this was not a matter of state concern, that this was a matter between the local school district and the federal government. The state wanted an arms-length relationship with this. I surmise because they didn't want to incur - the legislature at that time - did not want to incur the cost associated with the remedies either in a proactive or in a sense of which you are facing a judicial ruling.

**Representative Boone:**

If the caps are removed what kind of mechanisms are there or should there be in place to make sure that the school districts implements the most cost effective way of satisfying the problem?

**Response:**

I don't think you have a mechanism available to you. The reason, and I'm grateful for the question, because the reason that I recommended removing the caps is that you can tread

water fiscally for a couple of years in almost any - as you know - I'm sure you are better acquainted than I am - you know you can tread water for a couple of years. If you, and again I'm not an attorney, but it seems to me that if you cap it you have taken actions which could materially affect the ability of the school district to implement the required activities associated with the OCR agreement or the court order. If you do that then it seems to me again that what you have is a direct line back into court and another finding of liability. This time potentially with the state involved because the state action has prevented the school district from acting on the agreement with the federal government in light of its constitutional responsibility.

**Representative Boone:**

I guess also what I was thinking though is in those negotiations for the agreement, in other words specifically what is going to be done, I guess that's the point at which I am wondering what mechanisms we could put in place so that negotiations are one where it seems to me - If there are no caps whatsoever, what is the incentive on a school districts part to negotiate the most cost effective way of solving the problem?

**Response:**

I don't see a mechanism available to you because from the standpoint of the Office of Civil Rights or the court that issue is not the issue. The remedy is the issue. The cost is left to the offending entity, and therefore while you might disagree, or I might disagree, and say that's not the most cost effective way to do it, I don't see the vehicle by which you can interject yourself into that. I don't see it having reviewed these documents and the statutes and the materials available to me.

**Representative Boone:**

You are saying that a school district has no opportunity to negotiate?

**Response:**

They do indeed, but what I was speaking to, and forgive me if I misunderstood, I was speaking to the ability of the state to intercede in that negotiation and say this option, not that option. That's what I mean.

**Representative Boone:**

I guess what I was looking for it seems like the cap is about the only incentive, and granted maybe a poor one, I don't know we can debate that but where is the incentive that is in the public's best interest or school district because we are spending taxpayer money to solve the problem? What is the incentive of the school district to settle the case, to settle the issue to settle the lawsuit, etc in the most cost-effective manner? I say that because with all other lawsuits that I am aware of that school districts are involved with including OCR's, involving hiring practices, etc. it's always within their budget so that incentive is built in that you are there to negotiate an agreement that is the cost effective as what you can. This one is outside the budget limit. That's where I am having a difficulty is that I don't see an incentive. I guess what you are saying is maybe just by the nature of the way it was set up there isn't one.

**Response:**

That is what I am saying Representative Boone. It is in the nature of the way it was set up and it really goes to the heart of the matter of what is the legislative understanding of local control. Do we vest this decision-making authority and believe that indeed the folks are going to negotiate in a good faith manner using fiscally prudent and legally sound ideas or don't we. The problem is as those of us who are parents know that when a child becomes an adult they do the darnest things but you can't really control it. Darn it.

**Representative Gray**

What is the federal incentive for school districts to come into compliance.

**Response:**

Well, the Office of Civil Rights of course is pursuant to the Supreme Court decisions and the federal incentive for districts to come into compliance is that we live under the constitution of the United States, and school districts are required to behave toward their students in a constitutional manner. Therefore, they are very concerned that school districts do in fact do that and that we don't have discriminatory school practices.

**Representative Gray**

Isn't there a requirement that you follow, what you're suppose to be doing for children is that either do that or you are not going to receive federal money. Whereas with the state they say we will give you this to come into compliance. Which is the more motivating to come into compliance?

**Response:**

You know what, I didn't build this box. I will do my best to see your way out of this box, but it is a legislatively constructed box. The example that you gave isn't exactly the same situation because in the example you gave the feds are the funding source. It's a very straight and direct line. We will give you money to do this. If you don't do it we won't give you the money. In Arizona's case it's not that kind of a line. A school district has been found to be unconstitutionally engaged in practices which discriminate. They have been ordered a remedy. The State of Arizona through its legislature said we will give you this mechanism for paying what is required because education is a state responsibility under our constitution. So we will give you this mechanism but the state says it's a hands-off from there. To come back

to my original conundrum you can't be present - the state can't be present - and not present at the same time. You want to take charge - you have to put your money on the table. If you don't want to take charge and maintain this mechanism then the local districts have to be able to negotiate these agreements with the federal government..

**Representative Gray:**

Have you noticed here in any of the reading - have any districts had money withheld?

**Response:**

No I haven't. I mean don't hold me to that because I wasn't looking through these for that purpose.

**Representative Gray:**

I guess I could also assume that they have not had federal money withheld and therefore they must be in compliance.

**Response:**

Well, but we talking about I think two different matters. One has to do with these OCR agreements and the fiscal mechanism has to come from the state. Even if a district for example had monies withheld for this, that, or the other federal programs for compliance it would be in a parallel tract to this it wouldn't necessarily connect. We couldn't infer anything from one to the other is what I conclude.

**Senator Mead:**

Thank you very much Professor Molnar.