CURRENT DEVELOPMENTS IN THE LAW

A Survey of Cases Affecting Public Education

This section presents a selection of issues currently being litigated and resolved by courts at various levels of the state and federal systems and is not intended to be a comprehensive collection of cases.

McDuffy v. Secretary of the Executive Office of Education, 615 N.E.2d 516 (Mass. June 15, 1993). PUBLIC SCHOOL FUNDING SCHEME BASED ON LOCAL PROPERTY TAXES DECLARED INSUFFICIENT TO MEET THE DUTY IMPOSED BY THE STATE[1] CONSTITUTION ON THE LEGISLATURE.

I. BACKGROUND

A. Procedural History

Sixteen students attending public schools, each in different communities, sued various state education officials in Massachusetts, seeking a declaration that the State had failed to provide an education as mandated by the state constitution. The entire statewide school financing scheme, based primarily on local property taxes, was challenged as being insufficient to provide an "adequate" education.[2]

The action was commenced in 1978 under a different caption[3] but held in abeyance after a legislative response to the need for state assistance in funding public schools was enacted that same year.[4] Litigation resumed in 1983 when the parties commenced discovery. In 1985 the legislature again acted to meet local school funding needs[5] and proceedings were again suspended. In 1991 the parties filed a stipulation of agreed facts and, in 1992, an amended filing of agreed facts. No trial was conducted. The complaint was filed in the state's court of last resort, and a single justice reported the case without decision to the full court on the stipulated record. Briefs were filed and oral argument made before the full court.[6]

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[1] In this opinion the Massachusetts Supreme Judicial Court refers to the "Commonwealth" throughout rather than the "State," and refers frequently to the legislature as the "General Court." This case summary shall generally refer to the state as the political subdivision and the legislature as its elected representative legislative body.

[2] McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).

[3] The original caption was *Webby v. Dukakis*.

[4] MASS. GEN. L. ch. 70 (1978).

[5] MASS. GEN. L. ch. 70A (1985).

[6] This opinion results from a restated complaint filed by plaintiffs in 1990. A separate suit, captioned *Levy v. Dukakis*, was filed in Superior Court in 1989. In May 1990

B. *The Stipulated Record*

The stipulated record comprised six volumes and included 546 stipulations. Included in the record was a report by defendant State Board of Education that "schools in the [state] are in a state of emergency due to grossly inadequate financial support."[7] Also included were statements by education professionals that education offered in the poorer towns of the state was inadequate.[8] Other stipulations concerned crowded classes, reductions in staff, inadequate teaching of basic subjects, neglected libraries, poor teacher training, inability to attract and retain high quality teachers, unpredictable funding from year to year, and inadequate guidance counseling.[9]

Plaintiffs sought to bolster their argument with stipulations concerning the conditions in public schools in several of the state's wealthier communities. Students in these districts have computer instruction, extensive writing instruction, extensive teacher training and development, and a wide variety of course offerings in the visual and performing arts.[10]

Plaintiffs argued that the record supported their assertion of the inadequacy of the public education available to them and that this inadequacy was the result of insufficient funding of education through the property tax revenues generated by their communities. The financial resources were claimed to be so low as to render their schools unable to provide an opportunity for plaintiffs to receive an adequate education.[11]

Plaintiffs characterized the funding system as "a conglomeration of statutes, occasional emergency legislation, local appropriations, and ad hoc practices not codified by statute."[12] It was this system, plaintiffs claimed, that was responsible for the wide disparity in school funding among towns, and the insufficiency within their own towns of the resources available for public education. Furthermore, what little state aid was provided varied from year to year and was insufficient to compensate for the shortfall of locally raised revenues.[13]

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the single justice in the present case ordered the first seven counts of *Levy* transferred to the Supreme Judicial Court for disposition. Both cases were reported to the full court without decision.

[7] *McDuffy*, 615 N.E.2d 516, 520.

[8] *Id.*

[9] *Id.* at 521.

[10] *Id.* at 553.

[11] *Id.* at 521.

[12] *Id.*

[13] Though it is mentioned, but not emphasized, in the court's opinion, the reader should be aware that local tax rates are constrained by state law to two and one-half percent of the total property tax valuation for the town. The limit was determined by the voters in a statewide referendum.

C. *Plaintiffs' Legal Claims*

The plaintiffs' complaint was grounded in Part II, Chapter 5, Section 2 of the Massachusetts Constitution which states:

> *Wisdom and knowledge*, as well as virtue, diffused generally among the body of the people, *being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education* in the various parts of the country, and among the different orders of the people, *it shall be the duty of legislatures and magistrates*, in all future periods of this Commonwealth, *to cherish the interest of literature and the sciences*, and all seminaries of them; *especially the* university at Cambridge, *public schools and grammar schools in the towns* . . . .[14]

Plaintiffs asserted a duty incumbent upon the legislature to ensure sufficient funding for individual communities and school districts to ensure an adequate education, in accordance with the mandate of the constitution. Plaintiffs also advanced equal protection claims, though these were not addressed by the court.[15]

In a footnote, the court declined to enter the debate about "adequacy" of education, noting that the words "adequate" and "education" may be viewed as redundant and contradictory.[16] To illustrate that belief, the court quoted a noted state businessman, E. H. Filene, as saying, "When a man's education is finished, he is finished."[17] The court apparently believed that an individual's education could not be delimited by being adjudged "adequate." The court's references to "adequacy" throughout the opinion were used only in reference to the parties' arguments.

D. *Relief Sought*

Plaintiffs sought two forms of relief. First, plaintiffs sought a declaration that the state constitution requires the legislature to provide "every public school child with the opportunity to receive an adequate education," and that this duty had been violated by the State's failure to ensure that such an opportunity was provided.[18] The court pointed out that plaintiffs did not seek a judgment obligating the State to equalize education funding among communities.[19] Instead, plaintiffs prayed for a declaration that the constitution requires "equal access to an adequate education, not absolute equality."[20]

Secondly, plaintiffs sought an injunction to prevent the State from continu-

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[14] *McDuffy*, 615 N.E.2d at 523 (quoting MASS. CONST. part II, ch. 5, § 2) (alteration in original).

[15] *Id.* at 522.

[16] *Id.* at 519 n.8.

[17] *Id.*

[18] *Id.* at 522.

[19] *Id.*

[20] *Id.*

ing to implement the current unconstitutional scheme of school financing. However, because plaintiffs did not identify with particularity the financing schemes alleged to be unconstitutional, the court did not address this issue.[21]

II. ANALYSIS

The bulk of the court's analysis consisted of construing part II, chapter 5, section 2 of the state constitution, in historical context, to determine the existence and nature of the duty incumbent upon the legislature with regard to funding public education. The contextual analysis considered the history of debate about the constitution and its ratification and the response of the early legislative sessions following its enactment. The court found that such a duty existed and, on the basis of the stipulated record, concluded that the legislature had not met this duty.[22]

A. *Scope and Construction of the Constitution*

The court characterized the constitution as a declaration of "fundamental principles as to the form of government and the mode in which it shall be exercised."[23] Its drafters intended it to be understood with the common intelligence possessed by the voters of the day for whose ratification it was submitted.[24] In construing its language, the words were to be given their natural sense according to their meaning as of the time the constitution was adopted.[25]

While the plaintiffs characterized the language of part II, chapter 5, section 2 as conferring a duty on the state legislature, defendants argued that it was merely "aspirational," a "noble expression of the high esteem in which the framers held education", and an ideal not to be understood as a "mandatory" duty.[26]

The court agreed with the plaintiffs' interpretation. It observed that the two opening declarations, "Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties," and, "as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people," are followed by an express duty "of legislatures to cherish interests of literature and the sciences . . . especially public schools and grammar schools." The court found a causal connection

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[21] *Id.* The issue was waived by the court under MASS. R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

[22] *Id.* at 555.

[23] *Id.* at 523 (citing Cohen v. Attorney Gen., 259 N.E.2d 539 (Mass. 1970) (quoting Tax Comm'r v. Putnam, 116 N.E. 904 (Mass. 1917)).

[24] *Id.* (citing Buckley v. Secretary of the Commonwealth, 355 N.E.2d 806 (Mass. 1976) (quoting Yont v. Secretary of the Commonwealth, 176 N.E. 1 (Mass. 1931)).

[25] *Id.* (citing Opinion of the Justices, 32 N.E.2d 298 (Mass. 1941) (quoting Gen. Outdoor Advertising Co. v. Dep't of Pub. Works, 193 N.E. 799 (Mass. 1935)).

[26] *Id.* at 524.

between these two stated declarations and the express duty which follows them.[27] The premise of the duty is the necessity of education to preserve the rights and liberties of the people, as well as the entire constitutional plan.[28]

Turning to the language establishing the duty, the court sought to determine its meaning as of the time of its drafting. Referring to an English dictionary of 1780, the court found "duty" to mean "that which a man is by any natural or legal obligation bound."[29] The court had difficulty discerning the usage of "cherish" contemporaneous with the framing of the Massachusetts constitution, a usage no longer in vogue today.[30] The court referred to the writings of one framer, John Adams, who declared that "none of the means of information are more sacred, or have been *cherished* with more tenderness and care by the settlers of America, than the press . . . . Let us tenderly and kindly *cherish*, therefore, the means of knowledge."[31]

Together with the dictionary definitions, these historical references led the court to find the meaning of "cherish" to be "to support," "to nourish," and "to nurture."[32] The entire phrase, "duty to cherish" thus connoted to the court an obligation to support or nurture, encompassing the duty to provide an education to the people.[33]

The court found further support for plaintiffs' argument for a constitutionally mandated duty in the placement of this section within the structure of the constitution. Located in Part Two, which prescribes the structure and powers of the government of the state, the duty is found in chapter six, a chapter devoted entirely to education.[34] The court concluded that the language of the section and its placement within the constitutional structure indicated that education is a duty of the government, not merely an object within the power of government.[35]

Defendants contended that the "duty to cherish" could not be mandatory because it extended to other objects including "the interests of literature and the sciences, and all seminaries of them."[36] The court did not read the framers' intent to require the legislature to cherish each of these institutions in the same manner, but rather to require that each object be cherished in accor-

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 525 (citing T. Sheridan, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (Scolar Press 1967) (1780)).

[30] *Id.*

[31] *Id.* (citing JOHN ADAMS, *Dissertation on the Canon and Feudal Law* (1765), *reprinted in* 3 WORKS OF JOHN ADAMS 457, 462 (C.F. Adams ed. 1851)).

[32] *Id.* at 526.

[33] *Id.*

[34] The section at issue is the second of two in the chapter. The first section concerns the "university at Cambridge," at the time a public institution, in existence for 144 years prior to the adoption of the constitution, having been founded by the General Court of the Massachusetts Bay Colony. *Id.* at 526 n.22.

[35] *Id.* at 526-27.

[36] *Id.* at 527.

dance with its nature.[37] Thus, the fact that some objects of the "duty to cherish" are so vague as to render that duty aspirational, does not imply that the duty as a whole is not mandatory.

Defendants also pointed out that the legislature's duty extends to the encouragement of various private societies and to "countenance and inculcate" various habits and virtues. Because these duties are so vague that they cannot be mandatory and enforceable, they argued, none of the enumerated duties must be mandatory. The court also rejected that argument, having no occasion to consider the nature of the other various duties.[38]

B. *History of Public Education: Circumstances of the Constitution's Adoption*

The court buttressed its conclusion that a duty existed to support education by examining the history of public education in Massachusetts prior to the constitution's adoption. The court observed that early colonial laws promoted public education. For example, in 1647 the colonial legislature passed a law requiring all towns of fifty or more households to appoint a schoolmaster.[39] This law is credited as being the genesis of public education in America.[40] Fines were levied on towns that refused to comply with the law, and they were increased in 1671 and again in 1718.[41] The poor laws of the colonial government also evidenced further concern for education of youth. Children whose families were poor and unable to maintain them were "bound out" for work by the town selectmen, in accordance with a statute requiring "the instruct[ion] of children so bound out; to wit, males, to read and write; females to read, as they respectively may be capable."[42]

Education was so highly regarded by the colonists that illiteracy, John Adams observed, was "as rare an appearance as . . . a comet or an earthquake."[43] Adams, the principle draftsman of the constitution, had previously espoused that a system of government should make provision for widely dispersed public education.[44] His cousin and fellow draftsman Samuel Adams expressed regret in 1775 that the cost of prosecuting the Revolutionary War was taking resources away from the public schools, the system of education being so "essentially necessary to the Preservation of publick Liberty."[45] Leg-

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[37] *McDuffy*, 615 N.E.2d at 528.

[38] *Id.*

[39] *Id.* at 529.

[40] *Id.* (citing ELLWOOD PATTERSON CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 18 (1947)).

[41] *Id.* at 530-31.

[42] *Id.* at 532 n.33 (citing 1 ACTS AND RESOLVES OF THE MASSACHUSETTS BAY PROVINCE 654 (1711)).

[43] *Id.* at 535 (citing 3 WORKS OF JOHN ADAMS 456 (C.F. Adams ed. 1851)).

[44] *Id.* (citing 3 WORKS OF JOHN ADAMS 447, 448 (C.F. Adams ed. 1851)).

[45] *Id.* at 537 (citing 3 WRITINGS OF SAMUEL ADAMS 232, 235 (H.A. Cushing ed. 1968)).

islative history from the first session convened after the constitution's adoption reflects the legislators' eagerness to meet the duty imposed on them by part II, chapter 5, section 2.

> Nor can the schools throughout this Commonwealth be permitted to continue under such inattention and discouragement as they have for many years suffered, to the irreparable injury of the present and future generation, and to the indelible disgrace of a free government. We shall therefore hold ourselves obliged to form proper establishments for restoring them to their primitive dignity and usefulness.[46]

The first and subsequent governors exhorted the legislators to meet their constitutionally mandated duty to cherish the schools.[47] In 1801 the legislature agreed that it had to assist those towns that could not provide instruction: "[i]f any of the towns in the Commonwealth are unable to provide the means of instruction for their children, we conceive that the public good requires that they should have such assistance as may be required for this purpose."[48]

In addition to requiring that towns establish public schools, penalizing those which did not, and allowing towns to divide into districts for school funding, the state legislature enacted statutory measures on several occasions to supplement the local financing of public schools. For instance, in 1834 the legislature created a "permanent fund for the aid and encouragement of common schools."[49] And in 1919, a Special Commission on Education reported on wide disparities in the education opportunities available to students across the state, recommending the establishment of a general school fund supported by income taxes.[50] The history of public education and legislative action to address inequality in educational opportunity prompted the establishment of a present-day obligation to fund education.

C. *A Case of First Impression for the Supreme Judicial Court*

The Massachusetts high court had not previously addressed whether the constitution imposed a duty on the legislature to provide supplemental funding for local public schools, though the court cited prior cases consistent with such

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[46] *Id.* (citing Answer of a Committee of both Houses of Assembly of Massachusetts to the Speech of His Excellency the Governor at the Opening of the Session (Nov. 7, 1780), *reprinted in* MASSACHUSETTS, COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS COMMONWEALTH 163 (R. Taylor ed. 1961)).

[47] *Id.* at 538-39.

[48] *Id.* at 539-40 (citing Answer of the House of Representatives (June 4, 1801), *reprinted in* RESOLVES OF THE GENERAL COURT 9-10 (1801)).

[49] *Id.* at 544 (citing MASS. GEN L. ch. 169, § 1 (1834)). A West Virginia statute requiring public school students to salute the United States flag was held to violate the First Amendment in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[50] *Id.* at 545 (citing REPORT OF THE SPECIAL COMMISSION ON EDUCATION 27 (1919)).

a duty. In 1937, the court characterized the legislature's duty with regard to public education as "a public obligation to provide for general education," finding it within the legislature's competency to require a flag salute and pledge of allegiance in the public schools.[51] The court had also upheld a legislative act requiring private street railway systems to transport schoolchildren to and from school at one-half the regular fare, against constitutional challenge.[52] There, the court found a duty "specifically declared" by part II, chapter 5, section 2 upon the legislature "to be diligent in the promotion of education, among all the people."[53] More recently, in a 1987 decision addressing the right of parents to home-school their children, the court held that part II, chapter 5, section 2 "proclaims the State's interest in ensuring that its citizens are educated."[54]

Defendants relied upon an 1846 case addressing whether a town could raise funds to support more than the minimum number of schools required by the legislature.[55] There, the Supreme Judicial Court held that a town may provide more than the minimum number of schools at taxpayer expense, but all such additional schools must be accessible to all of the town's children. Defendants argued that this holding militated against a legislative duty to provide funds for local public schools. The court rejected this argument and instead relied on its requirement that *all* children be permitted to attend the additional schools as support for a constitutional mandate that the legislature ensure the education of *all* the people.[56]

D. *Summary of the Court's Analysis*

To gain an understanding of the constitutional provision in question, the court examined the history of public education in Massachusetts, the intent of the constitution's framers, the ratification process and comments regarding the section at issue, and the actions of earlier state legislatures and governors. It construed the language of the provision in the context provided by that examination. From that analysis, the court found a duty to provide an education for all the children of the state. While a state may delegate that duty to its political subdivisions, the court noted that power to so delegate does not include a right to abdicate its constitutional obligation.[57]

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[51] *McDuffy*, 615 N.E.2d at 545-46 (citing Nicholls v. Mayor and Sch. Comm. of Lynn, 7 N.E.2d 577 (Mass. 1937)).

[52] *Id.* at 546 (citing Commonwealth v. Interstate Consol. St. Ry., 73 N.E. 530 (Mass. 1905), *aff'd*, 207 U.S. 79 (1907)).

[53] *Id.* (citing Commonwealth v. Interstate Consol. St. Ry., 73 N.E. 530 (Mass. 1905)).

[54] *Id.* (citing Care and Protection of Charles, 504 N.E.2d 592 (Mass. 1987)).

[55] *Id.* at 547 (citing Cushing v. Newburyport, 51 Mass. (10 Met.) 508 (1846)).

[56] *Id.*

[57] *Id.* at 548.

III. CONCLUSION

A. *Is the Mandate Being Met?*

Having found that the state constitution established a duty incumbent upon the legislature to ensure that all children receive an education, the court sought to determine whether it was being met. The opinion outlined the many state statutes addressing education. The legislature assigned "general charge" of the public schools to locally elected school committees.[58] To oversee education, the legislature created several administrative structures, including a Board of Education, a Department of Education, and an advisory council on education.[59] The legislature enacted statutes mandating basic curriculum, compulsory school attendance, addressing transitional bilingual education and special needs programs.[60] Though primary funding for public schools is provided by local property taxes, the legislature appropriated funds in 1985 to supplement local budgets which accounted for less than 85% of the statewide average expenditure. The amount of that state aid was reduced in 1991 and again in 1992.[61]

The court concluded that these measures, *in toto*, evidenced the legislature's own recognition that it has a "constitutional duty to provide for the education of the populace."[62] Having so recognized a duty, the court reiterated that the duty could not be abdicated. Citing *Marbury v. Madison*,[63] it found that the legislature's measures were not consonant with its constitutional mandate.[64]

On the basis of the stipulated record, the court concluded that the constitutional mandate was not being met. Defendants' own statements were characterized as painting a "bleak portrait of the plaintiffs' schools" leading the court "to conclude that the Commonwealth has failed to fulfill its obligation."[65]

B. *Dissent*

A single justice dissented from the finding that the constitutional mandate was not fulfilled by the present educational funding system. The dissent disagreed with the majority's characterization of the stipulated record as having been agreed to by all parties. The various opinions of school superintendants

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[58] *Id.* at 549 (citing MASS. GEN. L. ch. 71, § 37).

[59] *Id.* at 549-50 (citing MASS. GEN. L. ch. 15, §§ 1-1H).

[60] *Id.* at 550 (citing MASS. GEN. L. ch. 71, §§ 1-2 (basic curriculum requirements in schools); MASS. GEN. L. ch. 76, § 1 (compulsory school requirements); MASS. GEN. L. ch. 71A (transitional bilingual education); MASS. GEN. L. ch. 71B (special education for children with special needs); MASS. GEN. L. ch. 74 (vocational education)).

[61] *Id.* at 522.

[62] *Id.* at 550.

[63] 5 U.S. 137 (1803) (the essence of judicial duty entails evaluating the constitutionality of legislative acts).

[64] *McDuffy*, 615 N.E.2d at 550.

[65] *Id.* at 553-54.

regarding the condition of plaintiffs' schools, for example, are stipulated only to be the opinions of those officials.[66] No agreement by the parties concerning their merit or correctness could be inferred from the record.[67] Noting that all parties expressly agreed that "there is no consensus among education experts as to what constitutes an adequate education," the dissenting justice found the record inadequate to support a conclusion that the constitutional mandate, with which he agreed, was not being met.[68]

C. *Remedy*

The court declined to fashion a particularized remedy in this case, and instead articulated broad guidelines for an appropriate legislative response. The court cited a decision by the Supreme Court of Kentucky as providing an exemplary list of capabilities an education program should seek to provide children: oral and written communication; knowledge of economic, social, and political systems and governmental processes; grounding in the arts; and preparation for advanced training and competition with students from other states.[69] The court left to the legislature the responsibility of "defin[ing] the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future,"[70] confident that, having pointed out that duty and described its contours, the legislature would respond to meet it.*

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[66] *Id.* at 557 (O'Connor, J., dissenting).

[67] *Id.*

[68] *Id.*

[69] *Id.* (citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

[70] *Id.* at 555.

* *In June 1993, just a few days prior to the Supreme Judicial Court's decision in* McDuffy, *the Massachusetts Legislature passed the Education Reform Act. The Act seeks to remedy inequities in education financing by changing the amount of state aid to school districts. Schools will receive an increasing amount of state funds over seven years, provided that communities increase their spending on education. By the year 2000, the cost of education will be divided evenly between the state and the school districts. At the time of the* McDuffy *decision, communities paid approximately 70% of education costs and the state 30%. See Laura Pappano, School Officials Looking for Windfall in Reform $2B in Additional Funds Would Go to Classroom,* THE BOSTON GLOBE, *June 20, 1993, at West Weekly 1. [-ED.]*

Gould v. Orr, 506 N.W.2d 349 (Neb. Sept. 17, 1993). UNEQUAL FUNDING OF SCHOOLS DOES NOT VIOLATE EQUAL PROTECTION IN THE ABSENCE OF ALLEGATION THAT QUALITY OF EDUCATION WAS AFFECTED.

I. BACKGROUND

Plaintiffs resided within the Raymond Central School District, also known as Lancaster County School District 161.[1] In Nebraska, public schools receive their funding from two sources: local tax revenues and funds from the School Foundation and Equalization Fund, a state organization.[2] Local tax revenues comprise seventy-five percent of the budget for each Nebraska public school district. The state Fund accounts for the remaining twenty-five percent.[3] The plaintiffs alleged that "this system resulted in substantial disparity among districts"[4] because different school districts had different tax bases. The larger the local tax base, the more money the local school district received. Since seventy-five percent of a school's budget was funded by of local taxes, the size of that budget varied significantly with the size of the district's tax base.[5] Disparities in wealth between the various counties thus have led to disparities in funding for local school districts.

Although the contribution from the Fund was intended to offset local tax revenue disparities between districts, the plaintiffs alleged that the final budgets still showed great inequalities. For example, the ten poorest school districts had tax bases valued at an average of $46,814 per student, while the ten wealthiest districts possessed tax bases with an average of over $2.7 million per pupil. The plaintiffs alleged that these differentials in tax bases also resulted in assessments of higher educational tax levies against property owners in poorer districts. The poorest districts had the highest property tax levies in Nebraska.[6]

The plaintiffs, two property owners and two students[7] in one of the poorer districts, filed a lawsuit claiming that these inequities violated the Nebraska Constitution. The plaintiffs claimed that the Nebraska scheme for funding

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[1] Gould v. Orr, 506 N.W.2d 349, 351 (Neb. 1993).

[2] *Id.* It should be noted that the facts are presented as alleged by the plaintiffs and must be accepted as true given the Supreme Court of Nebraska's decision to focus its review on the dismissal of the defendants' demurrers, discussed *infra*. *Id.* at 354 (Lanphier, J., dissenting). *See also* LaPan v. Myers, 491 N.W.2d 46 (Neb. 1992); Ames v. Hehner, 435 N.W.2d 869 (Neb. 1989); Moore v. Grammer, 442 N.W.2d 861 (Neb. 1989); Hebard v. American Tel. & Tel. Co., Inc., 421 N.W.2d 10 (Neb. 1988); S.I.D. No. 272 v. Marquardt, 443 N.W.2d 877 (Neb. 1989)).

[3] *Gould*, 506 N.W.2d at 351.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] The two students are the children of one of the plaintiffs.

public schools denied them "equal protection of the law, equal and adequate educational opportunity, and uniform and proportionate taxation."[8] They sued the Governor of Nebraska, the State Treasurer, the commissioner of the State Department of Education, the director of the Department of Administrative Services, the State Department of Education, the State Board of Education, and Lancaster County School District 161.[9] The plaintiffs sought various declaratory judgments and injunctions to have the current statutory scheme declared unconstitutional and prevent its implementation.[10]

It is important to note that the plaintiffs' petition was grounded exclusively in alleged financial inequities. They failed to allege that this unequal funding resulted in unequal education. This failure proved to be fatal to the plaintiffs' case.

II. PROCEEDINGS BELOW

Upon commencement of the suit, the defendants (with the exception of Lancaster County School District 161) filed demurrers seeking to dismiss the plaintiffs' claims, arguing that the petition failed to state a cause of action and that the plaintiffs' claims were improperly joined.[11] The district court held that the plaintiffs' petition did allege sufficient facts to withstand the demurrers. The court also held that although the plaintiffs' petition contained more than a single cause of action, joinder of the cases was permitted because all defendants were affected by the causes of action and, therefore, shared a common interest in their disposition.[12]

The defendants moved for summary judgment. The district court concluded that there was no issue of material fact and granted the defendants' motions on the ground that the plaintiffs failed to state a cause of action. Special attention should be paid to the curious result here: the trial court determined that the plaintiffs' petition stated a cause of action sufficient to withstand the defendants' demurrers, but not sufficient to withstand summary judgment. This puzzling inconsistency was not lost on the Nebraska Supreme Court when it reviewed the plaintiffs' appeal.[13]

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[8] *Gould*, 506 N.W.2d at 350.

[9] *Id.* at 350.

[10] *Id.*

[11] *Id.* at 351.

[12] *Id.*

[13] It should be noted that before addressing the merits of the plaintiffs' appeal, the court disposed of a "threshold challenge" made by the defendants. The defendants argued that the plaintiffs' claims were improperly joined. However, the Nebraska Supreme Court agreed with the trial court and held that the joinder was proper, stating that plaintiffs are permitted to "unite several causes of action in the same petition" if the claims arise out of the "same transaction or transactions connected with the same subject of action." In this case each defendant was affected by each of the plaintiffs' claims. *Id.* at 352 (citing NEB. REV. STAT. § 25-702 (Reissue 1989)).

III. ANALYSIS: SUMMARY JUDGMENT

The Nebraska Supreme Court began its analysis of the district court's summary judgment decision by agreeing that the plaintiffs had failed to state a cause of action. The court, sua sponte, found that the trial court's error lay not in granting the summary judgment motions, but in allowing the lawsuit to proceed to that stage in the first place. The court pointed out that summary judgment is improper when based on the petitioner's failure to state a cause of action.[14] Rather, summary judgment is permitted only when there is no issue of material fact and "the moving party is entitled to judgment as a matter of law."[15] These principles of law presume a case where a valid claim to be adjudicated exists. In other words, summary judgment requires the law to be applied to undisputed facts in order to resolve a legal question; however, law and logic dictate that to do so there must first be a legal question to resolve. Where the plaintiff fails to state a cause of action, there is no legal question. In short, the plaintiffs' failure to state a cause of action was grounds for granting the defendants' demurrers, not their motions for summary judgment. The court found that it was plain error for the district court not to have sustained the defendants' demurrers.[16]

The court next explained the deficiency in the plaintiffs' petition. Simply put, although the plaintiffs clearly alleged disparities in funding, they failed to allege how those disparities resulted in inadequate education.[17] In other words, it was not enough to allege disparate school budgets; the plaintiffs must also have alleged some harm as a result. Consequently, the trial court should have sustained the defendants' demurrers.

IV. ANALYSIS: LEAVE TO AMEND

When a court sustains a demurrer it is ordinary practice to also allow plaintiffs leave to amend their petition to correct the defect.[18] However, Nebraska courts recognize an exception where there is no "reasonable possibility" that the amendment will cure the deficiency. Where amendment will not correct the petition, the trial court may deny the plaintiff leave to amend.[19]

In this case, the court concluded that the defect in the plaintiffs' petition could not be corrected through an amendment and, therefore, it would be proper to dismiss their petition without the customary leave to amend.[20] It is important to note that the court did not explain why the plaintiffs' petition could not be corrected. Rather than provide an explanation, the Nebraska

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[14] *Id.* (citing Ruwe v. Farmers Mut. United Ins. Co., 469 N.W.2d 129 (Neb. 1991); Workman v. Workman, 95 N.W.2d 186 (Neb. 1959)).

[15] *Id.* (citing Economy Preferred Ins. Co. v. Mass, 497 N.W.2d 6 (Neb. 1993)).

[16] *Id.*

[17] *Id.* at 353.

[18] *Id.*

[19] *Id.* (citing Fowler v. National Bank of Commerce, 312 N.W.2d 269 (Neb. 1981)).

[20] *Id.*

Supreme Court remanded the case with directions to dismiss.[21]

V. DISSENT

Justice White, dissenting in part, agreed with the majority that the plaintiffs' petition failed to state a cause of action, but disagreed with the court's dismissal of the case. Unlike the majority, Justice White felt that the petition could "easily" be amended to correct its defect.[22]

Justice White's disagreement with the plurality opinion lay in its implication that "unequal financing may not be considered in the overall determination of whether the district is supplying at least a minimum quality of instruction to its students."[23] Justice White found a guarantee of "minimum quality of instruction" in the language of the Nebraska Constitution. Article VII, Section 1 of the Nebraska Constitution states that "the Legislature shall provide for the free instruction in the common schools of the state of all persons between the ages of 5 and 21."[24] Justice White left room for the possibility that the plaintiffs' petition could be amended to take advantage of this constitutional provision.

Conceivably, according to Justice White, the plaintiffs' complaint could be amended to allege that the current funding scheme resulted in a lack of adequate funding for the state's poorer districts and, as a result, the quality of education in those districts fell below the "minimum quality of instruction" required by the Nebraska Constitution. Since the plaintiffs' petition could have been amended in this fashion, Justice White would not have dismissed their claim without leave to amend.[25]

Justice Lanphier joined in Justice White's dissent but wrote separately to argue that the plaintiffs' petition did not require amendment.[26] Justice Lanphier viewed the facts so differently from the majority as to cause one to wonder whether they reviewed the same case.

Justice Lanphier argued that the original petition already included sufficient allegations to state a cause of action. The plaintiffs alleged that teachers in poorer districts were paid lower wages, students had fewer resources such as libraries, current textbooks, and counselors, and advanced courses in math, science, and foreign languages were unavailable.[27] Moreover, the plaintiffs alleged that students in poorer districts suffered from these deficiencies since they were more likely to be required to take remedial courses before college, a requirement that "stigmatized" them and limited their college admissions

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[21] *Id.*

[22] *Gould*, 506 N.W.2d at 354 (White, J., dissenting in part).

[23] *Id.*

[24] *Id.* at 353 (quoting NEB. CONST. art. VII, § 1).

[25] *Id.* at 354.

[26] *Id.* (Lanphier, J., dissenting).

[27] *Id.*

potential.[28] Justice Lanphier pointed out that these allegations had to be accepted as true for the purpose of determining whether the defendants' demurrers should be sustained.[29] Accepted as true, these allegations established that the education provided to poorer school districts was constitutionally inadequate.[30]

VII. CONCURRENCE

The concurring opinion by Justice Caporale addressed the points raised by the two dissenting opinions. Justice Lanphier argued in dissent that the plaintiffs' claim depended upon demonstrating that the "constitutional infirmity" lay in the inadequacy of the education provided in Nebraska's poorer school districts. However, Justice Caporale indicated that the plaintiffs' petition was grounded in equal protection, not in inadequate education. As a result, the plaintiffs' claim "rest[ed] not on the adequacy of the education provided, but on the premise that such education is different from that provided elsewhere."[31] In other words, the claim that Justice Lanphier heard plaintiffs making was not the claim that they actually made. According to Justice Caporale, Justice White recognized this distinction.

As noted above, Justice White agreed with the court that the plaintiffs failed to state a cause of action, but contended that the petition could be amended. Justice Caporale pointed out that "amending" a petition for relief in this way is not permitted because there is a distinction between amending an existing complaint and pleading a new and different cause of action.[32] A petition can be modified to "amplify, expand, or elaborate" the original allegations because doing so does not state a new cause of action.[33] But, a "modification" which relies on an entirely different set of grounds for relief essentially articulates a new cause of action and, therefore, is not permitted.[34] If the plaintiffs "amended" their complaint as Justice White suggested, they would be changing the basis for their cause of action from equal protection to one based on the state's failure to provide a constitutionally adequate education. Such a shift in position would not be an amendment of the original lawsuit, but the formation of an entirely new one. For this reason, Justice Caporale believed dismissal of the plaintiffs' case was proper.

VIII. CONCLUSION

Because the Nebraska Supreme Court concluded that the plaintiffs did not

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 355 (emphasis added).

[32] *Id.*

[33] *Id.*

[34] *Id.* (citing Muenchau v. Swarts, 102 N.W.2d 129 (Neb. 1960); Johnson v. American Smelting & Refining Co., 116 N.W. 517 (Neb. 1908)).

state a valid cause of action, it did not believe it necessary to reach the other issues raised by the plaintiffs' appeal. However, it is interesting to note that one of those issues was whether the constitutional violations complained of were remedied by the enactment of sections 1059 and 1059A of the Laws of Nebraska.[35] This issue will remain undecided until another case on this subject is brought before the court. Since the dismissal of the plaintiffs' lawsuit does not have any preclusive effect, they remain free to file a new complaint, conceivably grounded in those constitutional principles outlined by Justices White and Lanphier.

Marc G. Guggenheim

Skeen v. State, 505 N.W.2d 299 (Minn. Aug. 20, 1993). MINNESOTA EDUCATION FINANCE SYSTEM DOES NOT TO VIOLATE EDUCATION CLAUSE OR EQUAL PROTECTION CLAUSE OF THE MINNESOTA CONSTITUTION.

I. BACKGROUND

Fifty-two school districts and ten parents brought suit against the State of Minnesota, the State Board of Education, and the Commissioner of Education in October 1988. Plaintiffs claimed that certain elements of the Minnesota education finance system resulted in wealth-based differences between school districts in violation of the education clause of the Minnesota Constitution.[1] In June 1989, twenty-four school districts with higher tax bases intervened as defendants.

The case was tried for sixty-seven days in the Wright County District Court. The trial court found that the referendum levy, debt levy, and supplemental revenue provisions of the education finance system violated the education clause and the state guarantee of equal protection.[2]

The State and the intervenors appealed separately.[3] The court of appeals consolidated their appeals and certified the case to the Minnesota Supreme

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[35] *Id.* at 352.

[1] Skeen v. State, 505 N.W.2d 299, 302 n.1 (Minn. 1993) (citing MINN. CONST. art. XIII, § 1). Article XIII, section 1 (hereafter the "education clause") provides:

> Uniform system of public schools. The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

Id.

[2] *Skeen*, 505 N.W.2d at 302. A discussion of these provisions follows.

[3] *Id.*

Court.[4]

The supreme court's opinion thoroughly analyzed the composition of parties involved in the litigation, the language and meaning of the education clause, the elements of the state education finance system, and relevant policy considerations.

II. THE PARTIES

A. *The Plaintiffs*

The fifty-two plaintiff school districts represented approximately 25% of the state's student enrollment from kindergarten to twelfth grade.[5] These districts were primarily located in "outer-ring" suburbs and neighboring rural areas. The resident income and home values in the plaintiff districts were somewhat higher than the state average.[6] However, their property tax base per pupil unit (ppu)[7] was below the state average.

The majority of the plaintiff districts belonged to the Association of Stable and Growing School Districts (ASGSD), a group of school districts which were experiencing higher than normal enrollment increases.[8] Across the ASGSD members, enrollment increased 22% between 1973 and 1988. In contrast, during the same period, enrollment across the state declined by 12%.[9]

B. *The Intervenor Districts*

The twenty-four intervenor districts represented approximately 17% of the total state student enrollment.[10] These districts were primarily from the "inner-ring" suburbs and the "Iron Range." Their property tax bases were significantly higher than the state average.[11]

Many of the intervenor districts belonged to the Association of Metropolitan School Districts (AMSD). During the period 1973 to 1988 member districts as a whole suffered a 32% enrollment decline. Some of the individual districts lost more than 50% of their enrollment.[12]

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] The per pupil unit (ppu) is the basis for determining the allocation of education funds in Minnesota. This figure accounts for the relative cost of educating students at various grade levels. At the time this case was decided, kindergarten students were counted at 0.5 pupil units each, elementary students at 1.0 pupil units each, and secondary students at 1.3 pupil units each. The number of students enrolled at each grade level is multiplied by the appropriate pupil unit figure. The products are then totaled to derive the total number of pupil units in the school district. *Id.* at 304.

[8] *Id.* at 302.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

C. *Districts Not Party to the Litigation*

The court noted that challenges to the education finance system in other states were usually brought by inner-city school districts.[13] Often, these districts suffer from low property tax bases. In Minnesota, however, because the state placed a higher property tax rate on commercial property, urban districts typically have higher property tax bases than rural ones. For instance, although the state's three largest metropolitan school districts, Minneapolis, St. Paul, and Duluth, have the majority of the state's AFDC and minority population, they also have the highest property tax bases in the state.[14]

Also absent from this litigation were small, rural school districts. These districts constitute more than half the total number of school districts in Minnesota but less than 12% of the total student population.[15]

III. THE MINNESOTA EDUCATION FINANCE SYSTEM

A. *Uniform Basic Revenue*

In 1990, 90% of all public education costs were financed from the state's basic revenue.[16] The basic revenue guarantees that each district will receive a certain amount of money on a ppu basis. To raise money for the basic revenue, the state requires all school districts to impose a uniform property tax.[17] Property taxes are assessed as a percentage of the school district's "tax base."[18] At the time of trial the property tax rate was 26.3% of the "tax base."[19]

The "tax base" is formulated by counting a designated percentage of each property's market value in the school district's cumulative "tax base."[20] The designated percentage varies according to the type of property and is specified by statute.[21] The sum of the amounts computed for each parcel of property in

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 304.
[17] *Id.* at 305 (citing MINN. STAT. § 124A.23 (1992)).
[18] *Id.* (citing MINN. STAT. § 124A.23 (1992)).
[19] *Id.* (citing MINN. STAT. § 124A.23, subd. 4 (1992)).
[20] *Id.*
[21] At the time the case was decided the percentages were:

Residential Homestead	
First $72,000	1.00%
$72,000 - $115,000	2.00%
Over $115,000	2.00%
Residential Non-Homestead	
3 or less units	2.80%
4 or more units	3.50%
Commercial and Industrial	
First $100,000	3.30%
Over $100,000	5.06%

Id. (citing MINN. STAT. § 273.13 (1992)).

the district's "tax base" is the school district's net "tax capacity."[22]

Any shortfall in the guaranteed minimum revenues and the revenues raised by applying the property tax rate to the tax base is made up by the State.[23] This process is called "equalization."

As part of the shift to greater reliance on basic revenue for education funding, the legislature eliminated separate funding for categorical education programs, such as gifted and talented or summer school programs. Instead, each district was given a lump sum with discretion to allocate their resources among categorical education programs. Under this revision, plaintiffs experienced an 8.1% increase in revenues, while the intervenors experienced only a 3.8% increase.[24]

B. *Additional Funding Programs*

Accepting the more equalized funding across the state, plaintiffs claimed that statutes which allowed districts to obtain additional funds through referendum levies, supplemental revenue, debt service levies, and training and experience funding were unconstitutional.[25] The court noted that at the time of the appeal 93% of the state funding was equalized. Of the mere 7% of all public education funding which remained unequalized, 6.3% — by far the largest amount — had been obtained through the referendum levy.[26]

1. Referendum levy

Minnesota law allows school districts to obtain funding in excess of the amount provided by the State via uniform basic revenue if voters approve a certain percentage increase in their property taxes.[27] Prior to 1991, none of these revenues were equalized by the State. Therefore, school districts with higher property tax bases could generate greater revenues than districts with lower property tax bases for any given percentage increase in property tax rates.

Plaintiffs claimed that this unequalized additional revenue resulted in wealth-based funding disparities across school districts. These disparities allegedly resulted in different educational opportunities and, consequently, violated the Minnesota constitutional requirement of a "uniform system of public schools."[28]

In support of this contention, plaintiffs offered statistical evidence and expert testimony purporting to establish the significance of the funding dispar-

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[22] *Id.*

[23] *Id.* at 304.

[24] *Id.*

[25] *Id.* at 306.

[26] *Id.*

[27] *Id.* (citing MINN. STAT. § 124A.03 (1992)).

[28] *Id.* at 306-07 (noting that plaintiffs failed to account for enrollment changes, cost differences, fiscal pressures, and legislative funding reforms).

ities. Although the trial court largely accepted plaintiffs' testimony as conclusive, the supreme court balanced the evidence against the intervenors' explanations of why funding disparities existed.[29]

2. Supplemental revenue

Minnesota law also allows the State to provide supplemental revenue, funds in excess of those provided under the uniform basic revenue, to school districts.[30] This revenue was designed to prevent districts from experiencing revenue decline after legislative reforms were imposed in 1987. The supplemental revenue program guaranteed that districts would receive $250 ppu more than they received prior to the 1987 reform. This revenue comprised only 0.3-0.5% of all education funds.[31]

The trial court found this provision of the education finance system unconstitutional, even though it was only a temporary measure, because it frequently resulted in supplemental revenues for wealthier school districts.[32]

3. Debt service levy

Minnesota law also authorizes voters to levy taxes to finance bonds for construction or renovation of school buildings.[33] Although these revenues were not dependent on the wealth of school districts, the trial court also found this provision unconstitutional.[34]

IV. DISCUSSION

A. *The Education Clause Claim*

The court looked first at the history of the education clause to determine the meaning of the word "uniform." On the basis of state case law and interpretations of similar provisions by other states, the court determined that "uniform" was not to be read narrowly. Doing so would require almost no disparities in funding of education by individual school districts. Instead, the uniformity requirement was to be read broadly so as to ensure minimum standards, particularly in light of the relatively small disparities in funding evident in this case.[35]

Consequently, this requirement did not prevent school districts from supple-

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[29] *Id.* at 307. The court specifically considered the effect that changing enrollment might have had. The plaintiffs had not fully taken this factor into account. The court felt that enrollment fluctuation could have been a major factor in accounting for the disparities.

[30] *Id.* (citing MINN. STAT. § 124A.22 (1992)).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 308 (citing MINN. STAT. § 124.95 (1992)).

[34] *Id.*

[35] *Id.* at 310.

menting the uniform and basic revenue provided by the State, nor did it prohibit school districts from recognizing the need to raise revenues to compensate for additional costs which may not be addressed through the equalized state education funding system. As a result, plaintiffs were unable to show that the system of education funding was unconstitutional.[36]

B. *The State Equal Protection Claim*

The plaintiffs also claimed that the education funding system violated their right to equal protection under the Minnesota Constitution.[37] The court determined that a general and uniform system of education was a fundamental right under this provision.[38] This fundamental right was held, however, not to extend to the funding of the state education system, beyond providing a *basic* level of funding to assure that a general and uniform system would be maintained.[39] The court concluded that because the present system satisfied this requirement, the plaintiffs' challenge failed.[40]

V. CONCLUSION

Even though the small disparities in funding were not sufficient to support a constitutional attack on the educational finance system in the Minnesota state courts, they were sufficient to persuade the state legislature to amend the challenged statutes.[41] These changes will result in a substantial reduction of the number of school districts receiving supplemental revenue and the total amount of revenue received.[42] They will also provide for referendum levies which are more equalized across the state.[43] Whether this litigation was instrumental in effecting these changes is unclear, but in the end, plaintiffs'

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[36] *Id.* at 312.

[37] *Id.* The equal protection clause is Article I, Section 2 of the Minnesota Constitution. It provides in pertinent part: "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." MINN. CONST. art. I, § 2.

[38] *Skeen*, 505 N.W.2d at 313 ("[W]e hold that education is a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate.").

[39] *Id.* at 315.

[40] *Id.*

[41] *Id.* at 319 n.12.

[42] *Id.*

[43] *Id.*

goal was realized because the net result will be more equitable treatment for Minnesota schoolchildren.*

Patrick Otto Bomberg

Idaho Schools for Equal Educational Opportunity v. Evans, 850 P.2d 724 (Idaho Mar. 18, 1993). SCHOOL FINANCE SYSTEM DOES NOT VIOLATE EITHER THE EDUCATION CLAUSE "UNIFORMITY" REQUIREMENT, OR THE EQUAL PROTECTION CLAUSE OF THE IDAHO CONSTITUTION, BUT MAY VIOLATE THE EDUCATION CLAUSE "THOROUGHNESS REQUIREMENT.

I. BACKGROUND

The Supreme Court of the United States held in *San Antonio Independent School District v. Rodriguez*[1] that education is not a fundamental right to which the Court will apply the strict scrutiny standard of judicial review.[2]

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* *The Minnesota legislature passed a $5.2 billion education bill to equalize education among school districts and make the state the primary funder of basic educational programs. School Funding Bill Some Modest Steps Toward True Reform, ST. PAUL PIONEER PRESS, May 23, 1993, at 16A. The bill provides an additional $100 in state funds per pupil to districts with no voter-approved school property taxes. Id. A sunset provision makes existing referenda expire in 1997. Id. Until then, districts may raise additional funding through local taxes, but are discouraged from doing so by the bill. Id. After 1997, levies may be renewed, but will be based on property market value, not tax value, and the revenue generated will have to be shared with other districts. Id. In addition to changes to the funding mechanism, $112 million will be devoted to reducing the class sizes in elementary grades. Id.* [ED.]

[1] 411 U.S. 1 (1973).

[2] *Rodriguez* was a class action on behalf of certain Texas schoolchildren against state school authorities challenging the constitutionality, under the equal protection clause of the Fourteenth Amendment, of the state's statutory system for financing public education. The plaintiffs claimed that using an ad valorem property tax within the district to supplement educational funds received by each district from the state resulted in substantial interdistrict disparities in per-pupil expenditures. These differences, they alleged, were attributable chiefly to the differences in amounts received through local property taxation because of variation in the value of taxable property within each district.

The Supreme Court held that: (1) strict scrutiny was not applicable where there was no showing that wealth was a suspect class since plaintiffs could not prove that any definable category of poor persons was discriminated against; (2) strict scrutiny was inappropriate because education was not a right afforded explicit or implicit protection under the Constitution; (3) the traditional standard of review under the equal protection clause, requiring a showing that the state's action had a rational relationship to legitimate state purposes, was applicable; and (4) the Texas financing system rationally

States are, however, free to provide broader freedoms or rights in their own constitutions. In this case Idaho citizens, school districts, school superintendents, and superintendent's associations challenged the Idaho education finance system. The challenge compelled the Idaho Supreme Court to determine whether education is a fundamental right guaranteed by the Idaho Constitution.

A. *The Idaho Funding Scheme*

Idaho public schools are funded by a combination of local, state, and federal funds.[3] The State partially or totally reimburses the districts for certain education expenses: 80% of exceptional education personnel costs, 85% of transportation costs, and 100% of teacher retirement benefits, Social Security, and unemployment insurance.[4] Districts also receive money from the State Educational Support Program. The amount of money provided to each district through this program is reduced by a projected "local contribution" equal to the money which would be collected by a 0.36% property tax levy by the school district.[5] Under this formula, a low property value district contributes less money to the Educational Support Program fund than a high property value district because it has a lower tax base.[6] In addition, school districts may, with voter approval, raise more money through supplemental tax levies.[7]

B. *Procedural History*

Groups of concerned citizens represented by Idaho Schools for Equal Educational Opportunity ("ISSEO"), Blaine County School District ("Blaine"), and the Frazier group ("Frazier") brought separate suits against the State of Idaho by and through the Legislature and Governor ("State") and the Boise City School District ("Boise").[8] Eventually all suits were consolidated and the issues limited to those raised by the ISSEO and Frazier complaints.

ISSEO alleged that the current system of financing public schools was unconstitutional because a lack of funding rendered unavailable resources necessary to provide students with a thorough education.[9] The Frazier group alleged that the funding system was not thorough, and, in addition, that a system funded by property taxes did not provide a uniform education in viola-

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furthered a legitimate state purpose, and thus did not violate the equal protection clause since the system assured a basic education for every child.

[3] Idaho Schools for Equal Educational Opportunity v. Evans, 850 P.2d 724, 728 (Idaho 1993).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 729.

[9] *Id.*

tion of the equal protection clause of the Idaho Constitution.[10]

The district court partially granted the State and Boise's motion to dismiss for failure to state a cause of action and for lack of standing.[11] The court held that both the equal protection claims and the uniformity claims had been decided adversely to plaintiffs in *Thompson v. Engelking*.[12] The court also held that, although the other plaintiffs had standing to sue, the citizens did not.[13]

On appeal to the Idaho Supreme Court, plaintiffs argued that the district court misread *Thompson* and that the citizens had standing to sue. Respondents claimed that *Thompson* mandated the dismissal of all appellants' claims, and that the citizens as well as all other individuals and organizations party to the suit lacked standing.

II. ANALYSIS

A. *A Uniform Education*

The majority first considered the effect of *Thompson* on the plaintiffs' uniformity claim. The court rejected plaintiffs' argument that *Thompson* should not be followed and held that *Thompson* had not only reached the correct result, but also that it controlled the outcome of this decision.[14] The court found that appellants incorrectly read *Thompson* as advocating a synthesis of the majority opinion in *Thompson* with a concurring opinion.[15] *Thompson's* precedential effect, the court reasoned, was its holding that a funding system which created unequal per student expenditures between school districts did not violate the education clause or the equal protection clause.[16] Moreover, the court said, *Thompson* favorably quoted the Washington Supreme Court's definition of a "uniform education" as one "administered [to] enable [] a child to transfer from one district to another within the same grade without substantial loss of credit or standing . . . ."[17] In the end, the court reaffirmed its prior

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[10] *Id.*

[11] *Id.*

[12] *Id.* (citing Thompson v. Engelking, 537 P.2d 635 (Idaho 1975) (school funding system that created unequal per student expenditures does not violate the education clause or the equal protection clause of the Idaho Constitution)).

[13] The court found that since the citizen/taxpayers did not suffer a "distinct palpable injury," as a result of the alleged lack of funding, they did not have standing. *Id.* at 735.

[14] *Id.* at 730.

[15] *Id.*

[16] *Id.* (quoting *Thompson*, 537 P.2d at 652) (article 9, section 1 does not guarantee to the children of [Idaho] a right to be educated in such a manner that *all* services and facilities are equal throughout the state)).

[17] *Id.* (quoting *Thompson*, 537 P.2d at 652) (alteration in original). The court also declined the plaintiffs' invitation to construe the word "uniform" to mean substantially equal educational opportunities because the majority believed that the uniformity requirement in the education clause required only uniformity in curriculum, not uni-

holding in *Thompson* that the education clause required only uniformity in curriculum, not in funding.[18]

B. *Equal Protection*

The court next decided that the equal protection clause of the Idaho Constitution was not violated by the school funding system. Appellants argued that the portion of *Thompson* stating that the funding system did not violate the state equal protection clause was merely dicta.[19] The majority, however, believed that the result reached in *Thompson* as to the equal protection claim was sound and prescribed the proper procedure for resolving such a claim.[20] It found two classifications in the instant case: (1) citizens who must pay higher taxes than the norm in order to bring their local school district to the same level of funding as other districts because of the school funding equalization program, and (2) students, parents, and school administrators who were receiving less than an equal amount of funding from the State.[21]

As to the first classification, the court determined that in Idaho rational basis was the appropriate standard of review.[22] But as to the second classification, the court found the appropriate standard of review more difficult to determine. Plaintiffs advocated strict scrutiny. Under that test, the State would bear the burden of proving not only that it had a compelling state interest which justified the classification, but also that the discrimination was necessary to promote that interest.[23] Plaintiffs contended that because a right is fundamental for purposes of federal equal protection analysis if that right is expressly guaranteed in the federal constitution,[24] education should be considered a fundamental right for state equal protection analysis because article 9, section 1 expressly mentioned it.[25]

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formity in funding. *Id.*

[18] *Id.* (construing IDAHO CONST. art. 9, § 1).

[19] *Id.* at 731.

[20] The court stated:

> The first step in an equal protection analysis is to identify the classification which is being challenged . . . . The second step is to determine the standard under which the classification will be judicially reviewed . . . . The third step is to determine whether the standard has been satisfied.

Id. (quoting Tarbox v. Tax Comm'n, 695 P.2d 342, 344 (Idaho 1985)).

[21] *Id.*

[22] *Id.* at 731-32 (citing *Tarbox*, 695 P.2d at 344).

[23] *Id.* at 732 (citing State v. Missamore, 803 P.2d 528, 534 (Idaho 1990)).

[24] *Id.* (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973)).

[25] *Id.* Article 9, section 1 provides:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.

IDAHO CONST. art. 9, § 1.

The court rejected that argument, noting that it had previously done so in *Thompson.* It added that in any case, it had never adopted the Supreme Court's definition of fundamental rights, but instead determined whether the right in question was fundamental under the state constitution on a case-by-case basis.[26] In this decision, however, the court partially abandoned its case-by-case determination of fundamental rights, and held that fundamental rights under the Idaho Constitution were positive rights, meaning those directly guaranteed by the constitution.[27] Rights not directly guaranteed by the state constitution were to be considered fundamental only if implicit in the state's concept of ordered liberty.[28]

Given this framework, education was held not to be a fundamental right because it was not directly guaranteed by the state constitution.[29] Relying on *Thompson,* the court explained that article 9, section 1 imposed a duty on the legislature to establish and maintain a general, thorough system of public, free common schools, but did not establish education as a basic fundamental right.[30]

The court also refused to apply intermediate scrutiny. It reasoned that since the appellants limited their equal protection argument to the state constitution, it was not necessary to apply intermediate scrutiny unless the discriminatory effects of the school funding system were either blatant or apparent on its face.[31] Finding that intermediate scrutiny applied to only a small part of the plaintiffs' equal protection challenge,[32] that no suspect class was involved, that no fundamental right was involved, and that the statutes involved did not blatantly discriminate, the court reasoned that rational basis was the appropriate standard of review for the school funding system.[33] Accordingly, the court held that as in *Thompson,* the statutes in question withstood scrutiny under the rational basis test.[34]

C. *Thoroughness*

Notwithstanding the court's holding on the two equal protection claims, it found that the appellants stated a claim upon which relief could be granted based on the thoroughness provision of article 9, section 1.[35] The court

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[26] *Id.*

[27] *Id.*

[28] *Id.* at 733.

[29] *Id.*

[30] *Id.* (quoting Thompson v. Engelking, 537 P.2d 635, 648 (Idaho 1975)).

[31] *Id.*

[32] The court concluded that the only aspect of the funding scheme challenged by plaintiffs which blatantly discriminated was Idaho Code section 33-802. That statute treated chartered school districts differently than non-chartered school districts in their respective powers to levy additional taxes. *Id.*

[33] *Id.* at 734.

[34] *Id.* (The court remanded to the district court the challenge to I.C. § 33-802.).

[35] *Id. See supra* note 25.

reversed the order of the district court dismissing the thoroughness claims, and held that, under article 9, section 1 the requirements for school facilities, instructional programs and textbooks, and transportation systems as contained in those regulations were consistent with the court's view of thoroughness.[36] The court merely declined to disapprove of the regulations on their face, leaving plaintiffs the opportunity to challenge on remand whether the regulations assure thoroughness.

D. *Standing*

On the issue of standing, the court held that since the citizen/taxpayers did not suffer a "distinct palpable injury" as a result of the alleged lack of school funding, they did not have standing on either claim.[37]

ISEEO and the school districts, on the other hand, did have standing and the authority to sue.[38] The State had argued that a school district could not sue its creator.[39] But the court rejected that argument and held that the school district's statutory power to "sue and be sued" was intended to allow it to "prosecute any actions they might deem necessary for the protection and preservation of the school funds and property."[40] The school districts alleged that they were being deprived of funds to which they were entitled under article 9 and were, therefore, authorized to maintain the suit.[41] The court agreed with appellants and also found that the districts had the required "personal stake" in the outcome of the litigation because school districts have an interest in receiving enough money to provide a thorough education for their pupils.[42] The court further held that ISEEO, the association of superintendents, had standing because "an organization whose members are injured may represent those members in a proceeding for judicial review."[43]

III. Analysis: The Dissent

Two justices dissented in part from the majority opinion. Chief Justice McDevitt took issue with the majority's decision to abandon the case-by-case methodology of determining whether a particular right asserted was fundamental. The Chief Justice's primary concern was that the majority's equal protection analysis was unwarranted because this case did not raise the issue.

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[36] *Id.*

[37] The court reasoned that the citizen/taxpayers' claim did not attack the method of funding, but only challenged the amount of funding provided without regard to the method of obtaining the money. *Id.*

[38] *Id.* at 735.

[39] *Id.*

[40] *Id.* at 736.

[41] *Id.*

[42] *Id.*

[43] *Id.* (citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972); Glengary-Gamlin Ass'n v. Bird, 675 P.2d 344, 347 (Idaho Ct. App. 1983)).

McDevitt felt that the court was attempting to craft a bright-line rule for future fundamental rights analyses, when it should properly await a case in which it found a fundamental right to announce this rule.[44] The Chief Justice argued that it simply was not proper that issue in the case.[45]

Justice Bakes wrote a stronger dissent agreeing with the majority that the *Thompson* case correctly disposed of the plaintiffs' claims based upon the "uniformity" language of article 9, section 1, and that *Thompson* was res judicata on the question of whether the statutory scheme for funding the common schools violated the equal protection clause of either the state or federal constitution.[46] However, Justice Bakes strongly disagreed with the majority's conclusion on the thoroughness issue. Justice Bakes suggested that the majority mischaracterized both the express and implied holding of the *Thompson* case when it stated that *Thompson* did not address the thoroughness question.[47] Justice Bakes believed that the district court in this case was correct in dismissing the complaint because *Thompson* both expressly and impliedly held that the Idaho statutory scheme did not violate the mandate of article 9, section 1 to establish a system of basic, thorough, and uniform education.[48]

Finally, Justice Bakes argued, the majority's conclusion that *Thompson* was not dispositive of the thoroughness issue failed to provide sufficient guidance to trial courts regarding the "thoroughness" obligation imposed upon the legislature by article 9, section 1.[49] Justice Bakes considered suspect the majority's conclusion that the word "thorough" in article 9, section 1 constitutionalized the State Board of Education's regulatory requirements for "school facilities, instructional programs and textbooks, and transportation systems . . . ."[50] Referring to that regulation, Justice Bakes suggested that while portions of Idaho Administrative Procedure Act 08.02 described some programs relevant to the question of thoroughness, the majority's decision would raise innumerable complex factual issues.[51] In conclusion, Justice Bakes believed that the majority committed serious error by first concluding that *Thompson* did not resolve the thoroughness issue, and then by adopting the State Board of Education's regulations to determine the constitutional thoroughness

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[44] *Id.*

[45] *Id.* at 737.

[46] *Id.*

[47] *Id.* at 739.

[48] Justice Bakes concluded that: (1) that the majority's "right result - wrong theory approach" was utilized to dispose of the equal protection issue and should have been used to dispose of the thoroughness issue; (2) the *Thompson* court discussed the proceedings of the state's constitutional convention where thoroughness had been prominently mentioned; and (3) the majority in *Thompson* would not have discussed thoroughness unless it intended to dispose of the issue. *Id.* at 739-40.

[49] *Id.* at 740.

[50] *Id.* at 741.

[51] *Id.*

requirement.[52]

IV. CONCLUSION

Citizens, school superintendents and superintendent's organizations challenged Idaho's property-tax based-system of funding public schools as violating the education and equal protection clauses of the Idaho Constitution. These groups also alleged that the funding system did not provide a "thorough" education within the meaning of a provision of the state constitution requiring the legislature to establish and maintain a thorough system of public, free common schools.

The Supreme Court of Idaho held that the provision of the state constitution requiring the legislature to establish a "uniform" system of public, free common schools required only uniformity in curriculum, not uniformity in funding. The court held that education is not a fundamental right because it is not directly guaranteed by the state constitution, nor implicit in the state's concept of ordered liberty. Accordingly, it applied rationality review and found that the scheme for funding public schools did not violate the state equal protection clause. Finally, it remanded the "thoroughness" claim, finding that if the school districts could prove that they could not meet standards established by the State Board of Education with money provided under the current system, they would present a prima facie case that the State had not established and maintained a system of thorough education.

This case illustrates the difficulty of launching a successful equal protection challenge to disparities in public educational funding or opportunity. Recognizing that the Supreme Court had already decided that education is not a fundamental right under the United States Constitution, the Idaho citizens mounted a challenge against their own state, hoping their state courts would declare a fundamental right to education. The Supreme Court of Idaho had before it the perfect opportunity to make such a finding, but refused to do so.

Luis M. Ramos

Claremont School District v. Governor, 635 A.2d 1375 (N.H. Dec. 30, 1993). STATE HAS A CONSTITUTIONAL DUTY TO PROVIDE AN ADEQUATE EDUCATION TO EVERY EDUCABLE CHILD IN PUBLIC SCHOOL AND TO GUARANTEE ADEQUATE FUNDING OF PUBLIC SCHOOLS.

I. BACKGROUND

The plaintiffs in this case were five school districts, five schoolchildren, and

[52] *Id.*

five taxpayers from five "property poor" New Hampshire school districts.[1] They filed a petition for a declaratory judgment alleging that the state system of education financing was unconstitutional because it failed to provide equitable educational opportunities for all children.[2] The superior court had dismissed the petition for failure to state a claim.[3] On review, the New Hampshire Supreme Court reversed and held that the encouragement of literature clause of the state constitution created an affirmative duty to provide an adequate education and to guarantee adequate funding for public education.[4]

II. ANALYSIS

In reaching its decision, the court looked to interpretations of the original intent of the New Hampshire Constitution's framers. "In interpreting an article in our constitution," the court stated, "we will give the words the same meaning that they must have had to the electorate on the day the vote was cast."[5] To accomplish this, the court placed itself as nearly as possible in the situation of the parties at the time the constitution was created.[6] Because the Constitution of New Hampshire was largely modeled on that of Massachusetts (adopted only four years earlier) and contained a nearly identical education provision, it looked to the Massachusetts case, *McDuffy v. Secretary of the Executive Office of Education*[7] for precedent.

The court focused on the constitutional requirement that it is "the duty of the legislature . . . to cherish the interest of literature."[8] In *McDuffy*, the Massachusetts Supreme Judicial Court had relied on Sheridan's dictionary of the English language, published in 1780, to determine that the word "literature" was defined as "learning" in the eighteenth century.[9] Similarly, the

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[1] Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1377 (N.H. 1993).

[2] Specifically, the complaint contained six counts:

"[C]ounts (1) and (2) [alleged] that the State fail[ed] to spread educational opportunities equitably among its students and adequately fund education, both in violation of part II, article 83; (3) that the foundation aid statutes . . . unconstitutionally restrain[ed] State aid to public education by capping State assistance at eight percent; (4) and (5) that both the State school finance system and the foundation aid statutes den[ied] plaintiffs equal protection; and (6) that the heavy reliance on property taxes to finance New Hampshire public schools result[ed] in an unreasonable, disproportionate, and burdensome tax in violation of part II, article 5 of the State Constitution."

Id. Counts one through five were addressed on appeal, while count six was remanded to the trial court to allow petitioners an opportunity to develop an appropriate factual record. *Id.*

[3] *Id.* at 1376.

[4] *Id.*

[5] *Id.* at 1377 (citing Grinnell v. State, 435 A.2d 523, 525 (N.H. 1981)).

[6] *Id.* at 1378 (citing Warburton v. Thomas, 616 A.2d 495, 497 (N.H. 1992)).

[7] 615 N.E.2d 516 (Mass. 1993). *See supra* 4 B.U. PUB. INT. L.J. at 171.

[8] *Claremont Sch. Dist.*, 635 A.2d at 1377 (quoting N.H. CONST. part II, art. 83).

[9] *Id.* at 525 n.17.

Massachusetts court concluded that "duty" meant "any natural or legal obligation," and the verb "to cherish" was earlier defined as "to support, to shelter, [or] to nurse up."[10] Thus, by eighteenth century standards, a "duty on the legislature to cherish literature" translated into "a legal obligation on the legislature to support learning." In the words of the New Hampshire Supreme Court, this phraseology was not "merely a statement of aspiration."[11] Rather, the language commanded, "in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools."[12]

After determining the intent of the framers, the court engaged in an exercise of historical interpretation to determine the "contemporary understanding" of Part II, Article 83 of the New Hampshire Constitution. The court began by noting that the Puritans emigrated to the United States primarily for religious reasons and also to educate their children.[13] To this end, the court credited the Puritans with "contribut[ing] most that was valuable for our future educational development, and establish[ing] in practice principles which have finally been generally adopted by our different states."[14]

This Puritan influence was apparently significant between the years 1641 and 1679, when New Hampshire and Massachusetts were united as a single province. In particular, the court cited two laws from this period to buttress the finding of an affirmative state duty to support public education. The first was a 1642 law which ordered that all children in New England be taught to read.[15] The second, enacted in 1647, established the public schools and required that money for these schools be raised by a tax on private property.[16] In addition, the 1647 law mandated that schooling be provided for all children and that the State control education. The court concluded that these two early Massachusetts laws represented not only an intention to create a governmental obligation to support education, but also constituted "the very foundation stones upon which our American public school systems have been constructed."[17]

When New Hampshire became a separate province in 1680, the early education laws of Massachusetts were reenacted and became the law of New Hampshire. The court discussed three of these laws in particular, as well as several statements made by early New Hampshire governors. The first New Hampshire law noted was a 1693 act requiring the selectman of each town to

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[10] *Id.*

[11] *Claremont Sch. Dist.*, 635 A.2d at 1378.

[12] *Id.*

[13] *Id.* at 1379 (quoting NATHANIEL BOUTON, THE HISTORY OF EDUCATION IN NEW-HAMPSHIRE: A DISCOURSE DELIVERED BEFORE THE NEW-HAMPSHIRE HISTORICAL SOCIETY 3 (Marsh, Capen and Lynn 1833)).

[14] *Id.* (quoting ELLWOOD PATTERSON CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 15 (1919)) (alteration in original).

[15] *Id.* (citing *McDuffy*, 615 N.E.2d at 529 n.27).

[16] *Id.* (citing *McDuffy*, 615 N.E.2d at 529-30 n.28).

[17] *Id.* (quoting CUBBERLY, *supra* note 14, at 18).

raise money by an equally-assessed tax on residents for the construction and maintenance of schools.[18] The second early act of the New Hampshire Legislature cited by the court was a 1719 law requiring every town of fifty or more households to provide a schoolmaster and every town of one-hundred or more households to provide a grammar school.[19]

Perhaps the most direct language addressing the motives of the New Hampshire Legislature, however, is found in a 1721 act concerning the neglect of towns in providing grammar schools:

> Whereas the selectmen of Sundry Towns within this Province often Neglect to provide Grammar Schools for their Respective Towns whereby their youths Loose much of their Time, to the great Hindrance of their learning, For Remedy whereof Be it Enacted . . . That Not Only Each Town but each parish within this Province Consisting of One Hundred Families shall be Constantly Provided with a Grammar School . . . . And [if] any such Town or Parish . . . is Destitute of a Grammar School for the space of one month, the Selectmen . . . shall forfeit . . . the Sum of Twenty pounds . . . .[20]

Here the legislature clearly re-emphasized its view of the duty of government to provide education.

The court acknowledged that these early laws required the towns to fund public education but looked to statements of colonial Governor Wentworth to show that this duty did in fact rest with the State. "Religion—Learning, and Obedience to the Laws," Wentworth commented, "are so obviously the Duty & Delight of Wise Legislators, that their mention, justifies my Reliance on your whole Influence being applied to inculcate, spread & Support their Effect, in ev'ry Station of Life."[21] When in 1771 Wentworth wrote to the legislature requesting that greater consideration be given to the issue of education, the legislature responded positively:

> [W]e think it very a'propos that you have by order of your message plainly pointed out the necessary [connection] between good Education & the prosperous state of the People, for as they by the constitution have a share in the Government it is certainly of importance they should be able to sustain the part they are to bear with honor to themselves & with prosperity to the State which without such an Education is hardly feasibl[e].[22]

In a similar exchange twenty-four years later, Governor Gilman addressed the

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[18] Similar laws were also enacted in 1714, 1719, and 1721. *Id.* (citing BUSH, HISTORY OF EDUCATION IN NEW HAMPSHIRE 10-11 (1898)).

[19] *Id.*

[20] *Id.* at 1379-80 (citing Laws of New Hampshire, Vol. 2 Province Period 358 (1702-1745)).

[21] *Id.* at 1380 (quoting GOVERNOR WENTWORTH, EXECUTIVE PAPERS AND CORRESPONDENCE (1771)).

[22] *Id.* (quoting 7 NEW HAMPSHIRE PROVINCIAL PAPERS 290-91 (1764-1776)).

New Hampshire Senate and House of Representatives and stated that "[t]he encouragement of Literature being considered by the Constitution as one of the important Duties of Legislators and Magistrates, and as essential to the preservation of a free government, will always require the care and attention of the Legislature."[23] Again the State Legislature reacted positively in responding that "the encouragement of Literature is a sacred and incumbent Duty upon the Legislature . . . we feel on our part, the strongest obligation to revere, to cherish, and to support it."[24]

In drawing on legislative history and general historical interpretation to conclude that there exists an affirmative duty on the New Hampshire Legislature to support public education, it remained a relatively small step for the court to conclude that the citizens of New Hampshire have a corresponding right to the enforcement of this duty. In so holding, the court rejected the State's argument that the failure of New Hampshire to provide funding for education during the first fifty years of its constitutional government evinced that no such duty is imposed by part II, article 83.[25] In short, the delegation of power by the State to the towns did not relieve New Hampshire of its constitutional obligation to its citizenry. "While it is clearly within the power of the [state] to delegate some of the implementation of the duty to local governments," the court conceded, "such power does not include a right to abdicate the obligation imposed . . . by the Constitution."[26]

Although the court did not define the parameters of the State's duty to provide education, it did offer a suggestion to the legislature and Governor of New Hampshire:

> [T]here is a wealth of historical data upon which [they] may choose to draw in pursuit of their duty, spanning more than three-hundred years from the 1647 statutory mandate . . . to more recently recommended standards and practices such as the State Department of Education's 1958 report on Minimum Standards and Recommended Practices for New Hampshire Secondary Schools.[27]

The court left it to the legislature to examine the state's relevant history and devise a system which will adequately fulfill its constitutional duty.

III. CONCLUSION

Having established the affirmative duty of the State to provide a constitutionally acceptable education with adequate funding, the court remanded the plaintiffs' petition for further proceedings. Possibly the greatest significance of

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[23] *Id.* (quoting GOVERNOR GILMAN, EXECUTIVE PAPERS AND CORRESPONDENCE (1795)).

[24] *Id.*

[25] *Id.* at 1381.

[26] *Id.* (quoting *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993)).

[27] *Id.*

this case is that together with the recent Massachusetts decision in *McDuffy*, it evinces a trend toward enforcing state constitutional duties of public education. Perhaps in the near future, the courts will be afforded an opportunity to more fully define this somewhat amorphous obligation. Until such time, New Hampshire residents must trust their legislature and Governor to establish what these specific duties entail.

Ralph N. Sianni

Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. Mar. 22, 1993). THE TENNESSEE EDUCATION FUNDING SCHEME VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE STATE CONSTITUTION BECAUSE IT PRODUCES DISPARATE EDUCATIONAL OPPORTUNITIES.

I. INTRODUCTION

On July 7, 1988, the Tennessee Small Schools System (the Association),[1] an unincorporated association of parents and educators, filed suit against the Governor of Tennessee and other state officials on behalf of students in their districts.[2] The complaint alleged that the state's education funding scheme[3] violated the education clause[4] and equal protection provisions[5] of the Tennessee Constitution. The Association sought a declaratory judgment that the state funding statutes were unconstitutional, injunctive relief to prevent the state from acting pursuant to the statutes, and a court order that the state legislature formulate and establish a funding system that meets constitutional standards.[6]

Specifically, the Association contended that the funding scheme's substan-

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[1] The plaintiff Association includes small school districts and superintendents, board of education members, students, and parents in those districts. Tennessee Small Sch. Systems v. McWherter, 851 S.W.2d 139, 141 (Tenn. 1993).

[2] Defendants in the original suit were the Governor and other state officials within the executive and legislative departments. *Id.*

[3] Volume 9, Title 49 of the Tennessee Code.

[4] The education clause provides:

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

Tennessee Small Sch. Systems, 851 S.W.2d at 148 (quoting TENN. CONST. art. XI, § 12).

[5] TENN. CONST. art. XI, § 8; art. I, § 8.

[6] *Tennessee Small Sch. Systems*, 851 S.W.2d at 141.

tial reliance on the capacity of local communities to support their school systems produced substantial disparities in the revenue available for students in each school district. As a result, the educational opportunities available to students from smaller or less prosperous school districts were substantially fewer than those of their peers in larger or wealthier communities. The Association asserted that the command of Article XI, Section 12 of the Tennessee Constitution to maintain and support a system of free public schools established a fundamental right to "an adequate free education."[7] Their children were allegedly denied this fundamental right by the insufficient funding of their school districts.[8] The Association further alleged that the education funding scheme violated the equal protection provisions of the Tennessee Constitution because it resulted in marked inequalities in the enjoyment of those educational opportunities guaranteed by article XI, section 12.[9]

The defendants answered that the educational funding scheme enacted by the state legislature was not subject to review by the courts. They argued that article XI, section 12 "offer[ed] no enforceable qualitative standard" whereby the courts could "assess the quality of education and the sufficiency of the funding" provided by the state.[10] Further, they maintained that the only right guaranteed by the education clause is "one of access to a free public school meeting the minimum standards applied statewide,"[11] and that the equal protection provisions "only assure the nondiscriminatory performance of the duty created by the education clause."[12]

Nine urban and suburban school systems were allowed to intervene in the suit as defendants. They denied that the state constitution guaranteed an education "exactly or substantially the same"[13] for all children of the state. The intervenor-defendants argued that if the court were to deem these issues justiciable, then the remedy for any constitutional violation should recognize "the differentials in costs and needs among the various school systems."[14] In essence, the intervenor-defendants contended that the existing funding scheme satisfied the constitutional requirement despite any disparities in expenditures and educational opportunities.[15] They opposed reform of a funding scheme which favored their more affluent districts and argued that the plaintiff districts had not made their best efforts to raise additional local funds.[16]

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 148.
[14] *Id.* at 141.
[15] *Id.* at 148.
[16] *Id.* at 142.

II. Procedural History

Following a six-week bench trial, the Chancery Court decided in favor of the plaintiffs. The Chancellor's opinion was adopted by the Circuit Court which entered a declaratory judgment that the public education funding system violated the equal protection provisions of the Tennessee Constitution.[17] The Circuit Court later entered final judgment holding that the "fashioning of an appropriate educational funding scheme was the prerogative of the state legislature."[18]

The Court of Appeals reversed the judgment of the Circuit Court and dismissed the complaint.[19] The court ruled that the plaintiffs had failed to establish that the challenged funding system could not withstand scrutiny under any of the three traditional standards of equal protection analysis.[20]

In an unanimous opinion, the Supreme Court of Tennessee reversed the judgment of the Court of Appeals and held that sufficient evidence existed to support a judgment that the state's educational funding system was unconstitutional. In sum, the court found that the statutory funding scheme produced substantially disparate educational opportunities for students within the state and, therefore, violated the equal protection guarantees of the Tennessee Constitution.[21] Specifically, the court found that the constitutionality of the state funding scheme was a suitable question for judicial review, that the Tennessee constitutional guarantee of an appropriate public education provided an enforceable standard of review, and that the state's professed policy of ensuring local control of public school systems was an insufficient interest to justify the disparities in educational opportunities produced by the funding scheme.[22] It remanded the case to the Circuit Court with instructions to fashion an appropriate remedy.

III. Factual Background

The Chancellor's memorandum included an exhaustive review of the Tennessee education funding scheme.[23] The Chancellor determined that public education in Tennessee was funded approximately 45% by the state, 45% by local governments, and 10% by the federal government. Some state funding was distributed in categorical grants for items such as textbooks and transportation, but the largest source of state funding was the Tennessee Foundation Program (TFP) which allocated funds among districts according to an average daily attendance formula. This formula was weighted to account for cost fac-

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[17] *Id.*

[18] *Id.*

[19] Tennessee Small School Systems v. McWherter, No. 01-A-19111CH00433, 1992 WL 119824 (Tenn. App. June 5, 1992).

[20] *Tennessee Small Sch. Systems*, 851 S.W.2d at 142.

[21] *Id.* at 156.

[22] *Id.* at 140.

[23] *See id.* at 142-47.

tors such as grade level, vocational course offerings, and property values, whereas categorical grants contained no provision for equalization among the various school districts.

The Chancellor found that the TFP equalization formula had little actual impact because it applied only to a very small percentage of total education funding.[24] He determined that because the funds available for equalization under TFP were minimal, and because further adjustments to funding were made for the training and experience of teachers, the allocation of state funds under the scheme generally benefited the wealthier school districts.[25] As a result, the Chancellor concluded that the statutory funding scheme provided little real equalization among school districts.[26]

Aside from state funds, remaining revenues available to Tennessee school districts came principally from local property and sales taxes. Many communities had difficulty raising enough money from local taxes to support their schools because the tax rates did not correspond to the number of pupils in the school district, the cost of providing education per pupil, or any other education related factor. This hardship was not obviated by state financial support because the statutory scheme failed to provide for any equalization of local tax funds between counties.

The Chancellor concluded that the state's reliance on the ability of local communities to generate income directly accounted for the disparate revenue available to school districts.[27] For example, in the 1988-89 school year, spending varied from over $110,000 per classroom in one county to below $50,000 per classroom in another. Most of this variation in revenue was attributed to the varying ability of communities to raise sufficient funds with taxes.[28] School districts with a lot of commercial development and high property values relative to other districts had greater sales tax and property tax revenues to generate funds for their school systems. According to the Chancellor, "[m]ost school districts in the state — especially non-urban — cannot reasonably raise sufficient revenues from local sources to provide even the average amount of total funds for education per pupil statewide."[29]

The Chancellor found that plaintiffs' school districts offered far less to their students than did schools in wealthier districts, particularly with respect to special curricula, laboratory facilities, computers, new textbooks, and building maintenance.[30] Smaller school districts also faced substantial difficulty hiring and retaining experienced teachers, funding needed administrators, and providing sufficient programs in physical education, art, music, and advanced

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[24] *Id.* at 144-45 (citing a 1990 audit of the Tennessee Department of Education).
[25] *Id.* at 143.
[26] *Id.*
[27] *Id.* at 143-44.
[28] *Id.* at 144-45 (citing a 1990 audit of the Tennessee Department of Education).
[29] *Id.* at 143 (quoting the Chancellor's memorandum).
[30] *Id.* at 144-45.

placement courses.[31]

Evidence showed that the state acknowledged the existence of substantial disparities in the amount of revenue available to different school districts prior to this suit, yet did little to eliminate them.[32] The Chancellor found that the funding scheme produced great disparity in the funds available to school districts, and that "significant inadequacies and inequities in the system persist."[33]

IV. ANALYSIS

By this decision, the Tennessee Supreme Court has construed its state constitution as requiring the establishment of a free public school system in which all school-age children are guaranteed the opportunity to obtain an education.[34] Under the equal protection provisions of the Tennessee Constitution, the court found that the state is obliged to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students.[35]

A. *Disparate Educational Opportunity*

The court found substantial evidence in the record to hold that the education funding scheme produced "great disparity in the revenues available to the different school districts,"[36] and that a direct correlation existed between the amount of money spent on education and the quality of education received.[37]

The court unequivocally rejected the defendants' argument that no systematic relationship existed between expenditures and student performance, and that if one did, it was not caused by plaintiff districts' "lack of fiscal capacity."[38] It found that in some school districts sufficient funds were not available to provide the facilities necessary for an adequate educational system.[39] According to the court, many schools in poorer districts have decaying physical plants including insufficient heating and plumbing, leaking roofs, and inad-

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[31] *Id.*

[32] *Id.* at 146. One commentator has observed that the Tennessee legislature has repeatedly failed to implement reform measures despite its own findings since the 1970s that its financing scheme was unfair and unreasonable. As evidence of the state's unwillingness to reform the funding scheme, he cites its refusal of plaintiffs' offer to drop the present action in exchange for an agreement to implement the State Board of Education's proposed reform plan. *See* Jonathan Banks, Note, *State Constitutional Analysis of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129 (1992).

[33] *Tennessee Small Sch. Systems*, 851 S.W.2d at 147.

[34] *Id.* at 140.

[35] *Id.* at 140-41.

[36] *Id.* at 141 (quoting the factual findings of the Chancellor).

[37] *Id.* (quoting the factual findings of the Chancellor).

[38] *Id.* at 147.

[39] *Id.* at 145.

equate laboratory facilities. Similarly, the court found that "the textbooks and libraries of many of the poorer school districts are inadequate, outdated, and in disrepair."[40]

Further, the court held that the disparities in educational opportunities among school districts throughout the state were caused principally by the statutory funding scheme.[41] Over the years, the distribution of sales and property tax revenues became more concentrated as economic activity moved toward larger regional centers. Accordingly, available revenues corresponded to the wealth of the tax base, not the need of the school district. The scheme failed to correct for this disparity because only a small portion of state funds were subject to equalization formulas. For this reason, the court concluded that the education funding scheme produced constitutionally impermissible disparities in the educational opportunities.[42]

B. *Education Clause Challenge*

The court held that under settled Tennessee law, and based on precedent in many other jurisdictions, the constitutionality of the education funding system presented a justiciable issue for review.[43] In addition, it noted that several state supreme courts have recognized education as a fundamental right in the context of school finance reform.[44] In the instant case, the Tennessee Supreme Court considered itself obliged to determine whether the legislature "disregarded, transgressed and defeated, either directly or indirectly," the Tennessee Constitution by administering the challenged education funding scheme.[45]

The court rejected defendants' argument that the education clause provided no standard for courts to measure the adequacy of funding or the education program itself.[46] The defendants maintained that an educational system meeting the standards of "uniformity and equality" had never existed in the state, and was not contemplated when the education clause was drafted or amended.[47] The court found that this overlooked the plain meaning of the education clause, which recognized the *inherent value* of education and described

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[40] *Id.*

[41] *Id.* at 156.

[42] *Id.* at 141.

[43] *Id.* at 147-50 (citing Seattle Sch. Dist. No. 1 of King County v. State, 585 P.2d 71 (Wash. 1989)). *See also* McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138 (1983); Board of Educ. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980).

[44] *Tennessee Small Sch.*, 851 S.W. 2d. at 151 (citing *Washakie County Sch. Dist. No. 1*, 606 P.2d at 332; Pauley v. Kelly, 255 S.E.2d 178 (W. Va. 1979)).

[45] *Id.* at 148 (citing Biggs v. Beeler, 173 S.W.2d 946, 948 (Tenn. 1948)).

[46] *Id.* at 148-50.

[47] *Id.* at 150.

the precise duty imposed on the legislature.[48] According to the court, the state's constitutional obligation to "maintain and support a system of free public schools" entails, at a minimum, "the opportunity to acquire general knowledge, [to] develop the powers of reasoning and judgment, and [to] generally prepare students intellectually for a mature life."[49] The court found this to be an enforceable standard for assessing the educational opportunities provided in school districts throughout the state.[50]

In light of these findings, the court declared that the education clause of the Tennessee Constitution "guaranteed to the school children of the state the right to a free public education."[51] Because the plaintiffs were found to be entitled to relief under the equal protection provisions of the state constitution, the court declined to determine the precise level of education mandated by the education clause, or the extent to which the challenged scheme failed to meet that level.[52]

C. *Equal Protection Challenge*

Prior to this decision, the Tennessee Supreme Court in *Marion County Tennessee River Transportation Co. v. Stokes* had held that the equal protection provisions of the Tennessee and U.S. constitutions confer essentially the same protection upon individuals.[53] Notwithstanding *Marion County* and a subsequent U.S. Supreme Court decision that education is not a fundamental right guaranteed by the federal constitution,[54] the court pronounced that education was a fundamental right under the Tennessee Constitution and, therefore, subject to the requirements of equal protection.[55] The court found that the equal protection provision of the Tennessee Constitution guarantees equal privileges and immunities for all those similarly situated[56] and assures the nondiscriminatory performance of the duty created by the education clause.[57]

Though the Chancellor found the state education funding scheme constitutionally invalid under all three standards of equal protection scrutiny, the Ten-

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[48] *Id.*

[49] *Id.* at 150-51 (construing "education" as defined by RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 454 (2d ed. 1987)).

[50] *Id.* at 151.

[51] *Id.*

[52] *Id.* at 152.

[53] *Id.* (citing Marion County Tennessee River Transp. Co. v. Stokes, 117 S.W.2d 740, 741 (Tenn. 1938)).

[54] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[55] TENN. CONST. art. XI, § 8; art. I, § 8. According to one commentator, the Tennessee court's mode of analysis represents a radical departure from prior school finance cases in that it relied on the state equal protection clause, rather than the education clause, to find the school system unconstitutional. *See* William E. Thro, *The Significance of the Tennessee School Finance Decision*, 85 EDUC. L. REP. 11 (1993).

[56] *Tennessee Small Sch. Systems*, 851 S.W.2d at 152.

[57] *Id.* at 153.

nessee Supreme Court invoked only the most deferential level of scrutiny, the rational basis test. Under the rational basis standard, the court examined the record for some reasonable basis for the disparate funding, or facts which reasonably conceived could justify it.[58]

The defense rested largely upon the contention that the benefits of local control of public schools justified any inequities in educational opportunities created by the funding scheme. The Tennessee Supreme Court acknowledged that courts in other jurisdictions have upheld education financing systems against equal protection challenges because of legislative policies designed to protect local control over the operation of public schools.[59] However, it declined to follow their lead and rejected defendants' argument that local control was sufficient justification for the disparities in opportunity so prevalent within Tennessee. The court found most persuasive the opinion of the Arkansas Supreme Court in *Dupree v. Alma School District No. 30*,[60] holding the Arkansas education funding system unconstitutional. In *Dupree*, the Arkansas court rejected the concept of "local control" as a rational basis to justify spending disparities among the state's public schools.[61]

Building on *Dupree*, the Tennessee court distinguished control of the educational resources within a school district from "effective control" of the quality of education provided by the local system.[62] It concluded that local control of the district's actual operations would not be compromised by assigning more responsibility for financing to the state.

The more serious flaw in defendants' argument, according to the court, was the presumption that a discriminatory funding scheme was necessary to maintain local control of the school systems. While it recognized the "beneficial, indeed essential role" of local responsibility for education, the court did not agree that such control should come at the expense of educational services in tax-poor communities.[63] On this basis, the court held that the record failed to reveal a legitimate state interest that justified granting to some citizens educational opportunities that were denied to others similarly situated. For this reason, plaintiffs' rights to equal protection of the law were violated.[64]

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[58] *Id.* at 153-54 (citing Harrison v. Schrader, 569 S.W.2d 822, 825-26 (Tenn. 1978)).

[59] *Id.* at 154.

[60] 651 S.W.2d 90 (Ark. 1983).

[61] The Arkansas Court noted "two fallacies" in the reasoning of the "local control" argument. First, it found tenuous the presumption that altering the state financing system to provide greater equalization among districts would necessarily dictate that local control must be reduced. Second, it found that not only was the funding scheme not necessary to promote local choice, but it actually deprived less wealthy districts of local choice. Dupree v. Alma Sch. Dist., 651 S.W.2d 90, 93 (Ark. 1983) (citing Serrano v. Priest, 557 P.2d 929, 948 (Cal. 1976)).

[62] *Tennessee Small Sch. Systems*, 851 S.W.2d at 155.

[63] *Id.*

[64] *Id.* at 156.

V. CONCLUSION

The Supreme Court of Tennessee found substantial evidence that the state's education funding scheme produced "great disparity in the revenues available to the school districts within the state."[65] Further, it found that these disparities in economic resources among the various school districts resulted in constitutionally impermissible disparities in the educational opportunities afforded under the state's public school system.[66] For these reasons, the court held that the education funding scheme violated the equal protection guarantee of the Tennessee Constitution.

The court found that the state was obliged to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students.[67] It held that the means whereby the state carries out this obligation is a legislative prerogative, and that the legislature may consider "all relevant factors" in the "design, implementation, and maintenance of a public school system that meets constitutional standards."[68]*

Edited by Sharon M. P. Nicholls

Bismarck Public School District No. 1 v. North Dakota, 511 N.W.2d 247 (N.D. Jan. 24, 1994). STATE EDUCATION FINANCE SCHEME VIOLATES THE EQUAL PROTECTION RIGHTS OF STUDENTS IN PROPERTY-POOR SCHOOL DISTRICTS.

I. BACKGROUND

In June of 1989, nine public high school districts in North Dakota and

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[65] *Id.* at 147.

[66] *Id.* at 141.

[67] *Id.* at 140-41.

[68] *Id.* at 141.

* *The Tennessee legislature has passed the Education Improvement Act to equalize funding among school districts. The Act adopts a new funding formula which channels more state funds to tax-poor rural districts. In September 1993, Chancellor Allen High denied the plea of Tennessee Small Schools for a mandatory injunction ordering the General Assembly to provide immediate funding parity among school districts, noting that the Reform Plan will require five years to be completely effective. Paula Wade, Judge Rejects Plea to Equalize Tenn. School Funds Now,* THE COMMERCIAL APPEAL, *Sept. 29, 1993, at A1. In defense of the Reform Plan, the state has asserted that $167 billion will be distributed under the Plan, that 2100 new teachers have been hired statewide, and that an additional $26.6 million has been spent on classroom technology, books, school supplies, and equipment. Paula Wade, End School Litigation, McWherter Urges,* THE COMMERCIAL APPEAL, *Aug. 11, 1993, at B1.*

thirty-one resident taxpayers and parents of children attending schools in those districts sued the state of North Dakota.[1] Plaintiffs claimed that the state's statutory method for distributing funding to public schools, based mainly on each school district's property tax base, resulted in their particular districts receiving a disproportionately smaller share of educational resources per pupil than "property wealthy" districts.[2]

The district court found in favor of plaintiffs and held that the North Dakota education finance system[3] violated the education and equal protection provisions of the state constitution. The court retained jurisdiction to monitor legislative revision of the education finance system to cure the constitutional deficiency.

Two major sources of education funding came under attack: a local ad valorem property tax and state foundation aid. The local property tax was levied on each school district's taxable property value. These values, measured in terms of assessed property per-pupil, were assessed and equalized by each individual county.[4] This resulted in a wide variation of figures among school districts. The disparities in the assessed value of property, mill levies, and the number of students in each district gave rise to disparities in the amount of money available for per-pupil expenditures among the different school districts.

State foundation aid, the other major source of education funding, incorporated a device intended to equalize any disparities in education revenues produced by property taxes.[5] This "deduct" was based on the assessed property value in each district and, in effect, allowed a greater *reduction* in total foundation aid for districts with higher assessed property values than for those with lower assessed property values.[6]

The plaintiffs alleged that the statutory method for the distribution of funds failed to equalize local property tax disparities. This resulted in substantial inequities in educational opportunities in property poor districts, thus violating the education and equal protection provisions of the North Dakota Constitution.[7] The district court held for the plaintiffs, finding that the statutory method for funding distribution did indeed violate the state constitution.[8]

II. ANALYSIS

The controversy between the parties centered on the education provisions of the North Dakota Constitution and, more specifically, on the proper interpre-

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[1] Bismarck Public Sch. Dist. No. 1 v. North Dakota, 511 N.W.2d 247 (N.D. 1994).
[2] *Id.* at 251.
[3] N.D. CENT. CODE §§ 15-40.1 (State School Aid), 15-44 (School Funds).
[4] N.D. CENT. CODE §§ 57-15-14 through 57-15-14.4.
[5] N.D. CENT. CODE § 57-15-40.1.
[6] *Id.* at 252-54.
[7] *Id.* at 251.
[8] *Id.*

tation of the phrase "uniform system of free public schools."[9] Plaintiffs argued that the constitution required the legislature to distribute funding for public schools in a manner that would ensure an "equal education opportunity" to each student, though they conceded that this did not mean equal dollars in per-pupil funding throughout the state.[10] The defendants, on the other hand, contended that so long as the funding method did not deprive school children of access to an education or adequate education it did not violate the education provisions.[11]

To resolve the uniformity issue, the court performed an equal protection analysis. It first defined the standards of judicial review under the state constitution, and then, characterized the nature of the right allegedly abridged in order to determine the proper standard of review.

Plaintiffs argued that the funding disparities should be subject to strict scrutiny review because they abridged a fundamental right, the right to education.[12] Defendants, while agreeing that education was a fundamental right, distinguished the right to an education from the right to education funding. The defendants argued that a rational basis standard of review was appropriate because education funding is " 'classic' social and economic legislation."[13]

Although the court conceded that the relative funding disparities might impair the fundamental right to education, it declined to apply strict scrutiny to the funding distribution scheme on the grounds that "legislative determinations about the financing mix for education involve difficult questions of local and statewide taxation, fiscal planning, and education policy, which are ill-suited for strict scrutiny analysis."[14]

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[9] N.D. CONST. art. VIII, §§ 1, 2. These sections provide:

Section 1. A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.

Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.

[10] *Bismarck Public Sch. Dist.*, 511 N.W.2d at 254.

[11] *Id.*

[12] *Id.* Education is a fundamental right under the North Dakota Constitution. *Id.* (citing Lapp v. Reeder Public Sch. Dist., 491 N.W.2d 65 (N.D. 1992); State v. Rivinius, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983); State v. Shaver, 294 N.W.2d 883 (N.D. 1980); *In re* G. H., 218 N.W.2d 441 (N.D. 1974)).

[13] *Id.* at 258.

[14] *Id.* at 256-57.

In support of their argument for rational basis review, defendants cited *Kadrmas v. Dickinson Public Schools*,[15] in which a state statute authorized non-reorganized school districts to charge patrons for transportation to and from schools. In *Kadrmas*, the court characterized the legislation as "purely economic," and analyzed it under rational basis review.[16]

The court distinguished *Kadrmas* from the case at bar in that the transportation fees at issue in *Kadrmas* were merely a peripheral element of a "uniform system of free public schools," whereas the statutory method of distributing funding here constituted an essential element of a uniform free public school system.[17] The court thus held that rational basis review was inappropriate to review the school financing system.

Instead, the court agreed with the reasoning of the dissent in *Kadrmas*, which preferred an intermediate standard of judicial review because the challenged statute interfered with *access* to the fundamental right of education, an important substantive right.[18] Despite the economic nature of the funding distribution scheme, the court believed its proper focus should be "the rights affected and the individual interests involved," and held that plaintiffs' rights and interests warranted an intermediate standard of review.[19] In attempting to delineate the importance of the right to education, the court compared this right to freedom of religion, freedom of speech, and freedom of the press.[20] It found the funding of education "on par" with other issues which had received intermediate scrutiny, such as infringement of the right to bring a personal injury lawsuit and infringement of homestead rights.[21]

The standard to be met for intermediate judicial scrutiny is whether the challenged legislative scheme bears a close correspondence to legislative goals.[22] The court identified two legislative goals behind educational funding: to support elementary and secondary education with state funds based on the educational cost per pupil,[23] and to provide the children of North Dakota with equal education opportunities.[24] The court found that the statutory method for distributing funding failed to demonstrate a close correspondence to these articulated legislative goals. First, the court found that the deduct used in calculating the state foundation aid failed to serve its intended purpose of equal-

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[15] 402 N.W.2d 897 (N.D. 1987).

[16] *Bismarck Public Sch. Dist. No. 1*, 511 N.W.2d at 258 (citing *Kadrmas*, 402 N.W.2d at 902).

[17] *Id.* at 258-59.

[18] *Id.* at 258 (citing *Kadrmas*, 402 N.W.2d at 904-5 (Levine, J., concurring and dissenting)).

[19] *Id.* at 259.

[20] *Id.* (citing State v. Rivinius, 328 N.W.2d 220, 228 (N.D. 1982)).

[21] *Id.*

[22] *Id.*

[23] *Id.* (citing N.D. CENT. CODE § 57-15-40.1-06(1) (1994)).

[24] *Id.* The court construed the education and equal protection provisions of the state constitution as promoting this goal.

izing disparities in per-pupil expenditures generated by the property tax.[25] Additionally, the court found that the funding distribution scheme allowed some school districts to receive state reimbursement for transportation costs which exceeded their actual costs while other districts received less than half of their actual costs.[26] Acknowledging that the scheme potentially promoted local control of education, the court remained unpersuaded that this administrative benefit was actually realized in the case at bar, or that it justified the disparities in per-pupil expenditures at issue.[27]

In upholding the trial court's determination that the overall impact of the funding distribution scheme was unconstitutional, the court summarized the adverse educational consequences resulting from the scheme. These included: a higher pupil to teacher ratio in property poor districts; reduced curricula; unavailability of textbooks; use of outdated textbooks; shortages and lack of equipment, supplies, and materials; lack of adequate staff; deteriorating facilities; and a lack of libraries.[28] The court reinforced the trial court's conclusion that the deficiencies, caused by disparate funding, amounted to a lack of uniformity in educational opportunity, thereby discriminating against students in poorer districts. This result violated the education and equal protection provisions of the North Dakota Constitution.[29]

III. THE DISSENT

In dissent, Justice Sandstrom reiterated the defendants' distinction between the right to education and education funding. He asserted staunchly that no constitutional right to equal education financing existed.[30] Moreover, he disagreed with the majority on what the education clause of the North Dakota Constitution required.[31] He construed the term "uniform" to apply only to the structure of education throughout the state, *not* to the "educational opportunity" as measured by per-pupil funding.[32] He believed that the education clause required not uniformity in funding but only the assurance of a basic education for each student.[33]

According to Justice Sandstrom, the proper inquiry was instead whether the statutory method of distributing funding interfered with the state's obligation to provide a basic education for all pupils. He found that the state was fulfil-

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[25] *Id.* at 260.

[26] *Id.*

[27] *Id.* at 260-61.

[28] *Id.* at 261-62.

[29] The court held only that the overall impact of the scheme was unconstitutional and stopped short of actually declaring the education finance system unconstitutional. *Id.* at 262-63.

[30] *Id.* at 263.

[31] *Id.* (construing N.D. CONST. art. VIII, § 2). *See supra* note 6.

[32] *Id.* at 265.

[33] *Id.* at 268.

ling this obligation by meeting statutorily imposed curriculum requirements[34] and accreditation standards for public and private schools.[35]

Justice Sandstrom also felt that the failure of the majority and the trial court to consider factors other than funding which might enhance or detract from the quality of education was a deficiency in the analysis.[36] In his view, disparities in funding should not be the sole determinant of the quality of an education and, in any event, did not constitute the deprivation of the constitutional right to a *basic* education.[37] He cited comparisons of the standardized test scores of North Dakota students to those of students nationwide to support his proposition that disparate district funding does not affect the quality of student learning.[38]

Lastly, Justice Sandstrom found fault with the majority's equal protection analysis. In his view, plaintiffs failed to prove a "significant interference" with their fundamental right to a basic level of educational opportunity. Justice Sandstrom found strict scrutiny of the funding distribution scheme unwarranted because in his opinion, a fundamental right was not infringed and a suspect classification was not involved.[39] Instead, he characterized the scheme as purely economic legislation and would have applied a rational basis analysis as in *Kadrmas*. Under that analysis, he found the current education financing scheme constitutional because it promoted legitimate legislative goals of encouraging local control of education and providing a basic education.[40]

Justice Sandstrom stressed a limited role for courts. The courts should not "constitutionalize complex public policy issues unless fundamental or substantive rights" have been abridged.[41] In particular, he noted that the expressed goal of the education finance system was to support education on a per pupil basis, not to equalize or achieve equality in per pupil spending.[42] Furthermore, even if the legislative goal were to equalize funding as the majority assumed, such equalization was not constitutionally required. This left the legislature free to alter funding goals as long as it maintained a basic level of educational opportunity.[43]

Chief Justice Vande Walle, who largely agreed with Justice Sandstrom, filed a separate dissent. In his view, the plaintiffs' evidence revealed inequities

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[34] *Id.* at 268-69.

[35] *Id.* at 269.

[36] *Id.* at 270.

[37] *Id.*

[38] *Id.* In 1991, North Dakota students on average scored higher than the national average on the Comprehensive Test of Basic Skills and achieved top scores on the 1990 National Assessment of Educational Progress eighth grade math assessment. *Id.*

[39] *Id.* at 273.

[40] *Id.* at 274.

[41] *Id.*

[42] *Id.*

[43] *Id.*

in education, but not of constitutional proportions.[44] Walle observed that the plaintiffs' challenge was similar to the challenge brought in *Skeen v. State*[45] but distinguished *Skeen* on its facts.[46] The Chief Justice wrote separately to emphasize that even though the inequities had not yet transgressed the constitution under a rational basis standard of review, they inevitably would if the present education finance system continued unchanged. He faulted the failure of the deduct to equalize funding among the districts. Coupled with the limited ability of tax-poor school districts to generate education funds, this failure would create future disparities that would rise to a level of unconstitutional proportions.[47]

IV. CONCLUSION

The court tied *access to education* tightly to the *fundamental right to education.* This was a significant break with the reasoning of the *Kadrmas* court, which maintained a clear distinction between the two issues. By emphasizing that access to education has an impact on the actual right to education, the *Bismarck* court has paved the road for plaintiff-favorable outcomes to future constitutional challenges to education finance schemes. The decision suggests that obstacles hindering the fundamental right to education, whether they be inadequate funding of school systems or inadequate transportation, will be held unconstitutional in the future.

Frances K. Wu

Alabama Coalition for Equity, Inc. v. Hunt, 1993 WL 204083 (Ala. Cir. Apr. 1, 1993). PUBLIC SCHOOL SYSTEM VIOLATES THE EDUCATION, EQUAL PROTECTION, AND DUE PROCESS CLAUSES OF THE ALABAMA CONSTITUTION BY FAILING TO PROVIDE EQUITABLE AND ADEQUATE EDUCATIONAL OPPORTUNITIES AND BY FAILING TO PROVIDE APPROPRIATE INSTRUCTION AND SPECIAL SERVICES FOR CHILDREN WITH DISABILITIES.

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[44] *Id.* at 275.

[45] 505 N.W.2d 299 (Minn. 1993). *See supra* 4 B.U. PUB. INT. L.J. 186.

[46] The parties claimed that this case concerned how money was distributed under the state finance system, rather than the *amount* of money distributed which was the concern of the plaintiffs in *Skeen. Bismarck Public Sch. Dist. No. 1,* 511 N.W.2d at 275. Also, the Minnesota fully equalized state funding rate was nearly 93%, while that of North Dakota was only 52.8%. *Id.*

[47] *Id.* at 276.

I. BACKGROUND

The Alabama public school finance system was held to violate the state constitution in *Alabama Coalition for Equity, Inc. v. Hunt*.[1] The Alabama Circuit Court of Montgomery County found as a matter of fact that the educational opportunities available to Alabama schoolchildren varied according to the wealth of their local school systems and, furthermore, that no public school students were receiving an adequate education. As a matter of law, the court found that this inequity in opportunity violated the education, equal protection, and due process clauses of the Alabama Constitution. The court also ruled that the public school system violated its statutory responsibility to provide children with disabilities with an appropriate education and special services.[2]

Plaintiffs made two substantial charges in this case: (1) the educational opportunities provided to public schoolchildren were inequitable because they varied widely among school systems without any constitutionally sufficient justification, and (2) the education provided to public schoolchildren was inadequate by the state's own standards of educational adequacy.[3]

In defense of the challenged system, defendants argued that whatever discrepancies existed were created by local school system choice and were not, therefore, the responsibility of the State.[4]

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[1] Alabama Coalition for Equity, Inc. v. Hunt, 1993 WL 204083 (Ala. Cir. 1993). The Alabama Coalition for Equity, Inc. consists of 25 school systems and several parents and children of those systems. Another action, *Harper v. Hunt*, No. CV-91-117 (Ala. Cir. 1993), was brought by a group of schoolchildren who were later certified as a class to represent all children who are or will be enrolled in the Alabama public schools providing less than a minimally adequate education. John Doe, a student with disabilities, moved to intervene as a plaintiff in *Harper* and was certified as a plaintiff sub-class to represent all Alabama schoolchildren with disabilities in *Alabama Coalition for Equity*.

Plaintiffs originally named as defendants Governor Guy Hunt, the State Director of Finance Robin Swift, Lieutenant Governor James Folsom, Speaker of the House of Representatives James Clark, State Superintendent of Education Wayne Teague, and the members of the Alabama State Board of Education. All but the Governor and the State Director of Finance were permitted to realign as plaintiffs because they agreed with plaintiffs' claims.

Seven school systems and the Alabama Association of School Boards submitted amicus briefs.

[2] Alabama law guarantees an appropriate education to all children with disabilities. The State Board of Education is instructed to adopt regulations guaranteeing that right. ALA. CODE §§ 16-39-3, 16-39-5.

[3] *Alabama Coalition for Equity, Inc.*, 1993 WL 204083 at *2.

[4] *Id.* at *9.

II. Analysis: Conclusions of Fact

A. *Lack of Equal Educational Opportunity*

1. Inequitable state funding

Based on plaintiffs' evidence, the court found vast inequities in the funding of local school systems. The testimony of several nationally recognized school finance experts was particularly persuasive. This testimony revealed that the wealthiest school district, Mountain Brook City School System, had $4,820 available to spend on each pupil for the 1989-90 school year, while the poorest school district, Roanoke City School System, in contrast, had merely $2,371 to spend on each pupil, less than half the amount of Mountain Brook.[5] One expert found a difference of $29,700 spent per classroom of 25 students between the five wealthiest school districts and the five poorest.[6] Another testified that these funding discrepancies occurred systemwide.[7] As a result, the court found that the effects of the vast disparity in public school funding were widespread and systemic, affecting all students attending public schools, not just those in the wealthiest or poorest districts.[8]

Governor Hunt argued in response that even if significant school funding disparities existed, the State bore no responsibility for them because they resulted either from local mismanagement or local choice not to fund schools.[9] As to the alleged mismanagement, the court noted that not even Governor Hunt himself could name any particular school system known to have wasted money.[10] Furthermore, Hunt offered no systemic evidence that poorer school systems were more prone to wastefulness than wealthy school systems.[11]

Though Governor Hunt argued that the statistics were misleading because a few wealthy systems skewed the comparison, the court rejected his rationale. The court maintained that the differences between the very worst and the very best systems were highly relevant and ought to be considered in the constitutional analysis.[12]

The court also rejected Hunt's argument that the funding disparities were greatly exaggerated by the failure to include federal aid in the statistics.[13] Though the court acknowledged that the inclusion of federal aid would make funding disparities smaller, it found that it would not "close the gap" between the wealthiest and poorest districts in financing basic, systemwide programs

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[5] *Id.* at *6.

[6] *Id.* (testimony of Dr. Kern Alexander of Virginia Institute of Technology comparing the average total state and local revenues).

[7] *Id.* (testimony of Dr. Margaret Goertz, Visiting Professor at the Institute of Politics, Rutgers University).

[8] *Id.* at *7.

[9] *Id.* at *9.

[10] *Id.* (citing Hunt deposition at 102-03).

[11] *Id.*

[12] *Id.*

[13] *Id.* at *7.

and facilities.[14] Furthermore, it stated that whether federal aid reduces disparities is not relevant because the issue here was whether the *state*, not the federal government, met the constitutional mandate to provide public schools.

The court also rejected the evidence introduced by Hunt to demonstrate that the poorer school systems spent less money on education and had lower tax rates than the wealthier systems because they simply were not "try[ing] hard enough to tax themselves for schools."[15] Conversely, the court believed plaintiffs' expert testimony that poorer school systems devoted more of their total tax revenues to education than wealthier systems.[16]

It also rejected defendants' assertion that citizens typically vote down local tax referenda because they choose not to devote more money to improving public schools. The State failed to produce evidence supporting this contention. Furthermore, plaintiffs had produced evidence demonstrating that opposition to public school taxes was, in some parts of the state, led by parents and supporters of all-white private schools.[17]

Finally, the court noted that most tax initiatives fail for reasons unrelated to the educational needs of schoolchildren.[18] It explicitly found that the State allowed educational opportunities[19] to depend on local tax decisions by setting low requirements for local effort and by failing to provide state funds to poorer communities.[20] Therefore, the State could not "hide behind the claim that it [was] local citizens who cause[d] school funding disparities and deny its primary responsibility for the present system and its results."[21]

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[14] *Id.*

[15] *Id.* at *9.

[16] *Id.* at *9 n.20.

[17] *Id.* at *9. The court noted that the State of Alabama had supported the establishment of the all-white private schools as a way to avoid integration and found that the opposition to school taxes might be a vestige of opposition to integrated education, not to education in general. *Id.*

[18] The reasons cited by the court were: (1) most voters did not have children in public schools; (2) land-owning interests organized to defeat increases in property taxes; or (3) some areas saw little need for high educational aspirations. *Id.* at *10.

[19] The court defined educational opportunities broadly to encompass, "the educational facilities, programs, and services provided for students in Alabama public schools, grades K-12, and the opportunity to benefit from those facilities, programs and services." *Id.* at *5.

[20] *Id.* at *10.

[21] *Id.* State funds for public schools were provided to equalize, or compensate for, differences in local school district expenditures. *Id.* Alabama accomplished this by the Minimum Program Fund (the "Fund"), Alabama Code §§ 16-13-50 *et seq.*, which required a minimum level of local tax effort to be devoted to education. State funds were then allocated in an amount inversely proportional to the local revenues. Local revenues above the set minimum were not equalized. The object was to achieve a state-determined minimal education program.

Testimony revealed that the Fund no longer worked to equalize funding as originally intended. Two factors contributed to this failure: (1) the set minimum level of local

2. Unequal funding resulted in unequal opportunities

The court also found that the discrepancies in school funding significantly affected the educational opportunities available to students in poorer communities. Plaintiffs produced ample evidence demonstrating that districts with greater resources were better able to provide superior educational opportunities.[22]

The court cited several examples of differences in the physical condition of facilities available in wealthier and poorer communities. For instance, in the poorer districts, many schools did not provide soap, towels and toilet paper in the restrooms. Photographic evidence revealed unsafe conditions in poorer districts, including deteriorating structures, beer cans and broken glass littering school grounds, and the presence of mud and cow manure on school grounds.[23] In contrast, the schools in more affluent districts were visibly superior in physical condition, provided safety features lacking in poorer districts,[24] had better lighting and temperature control, and had superior communication facilities.

The evidence also revealed vast discrepancies in the educational programs offered. For example, 49% of high school students enrolled in the wealthier systems were enrolled in the advanced diploma program, compared to only 29% of students in the poorer systems.[25] There was one school system where no students graduated from the advanced diploma program in 1991.[26] This deficiency in opportunity extended to almost every aspect of classroom instruction.[27]

B. *Inadequate Education*

After concluding that inequities in opportunity were prevalent, the court

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funding had not been adjusted since 1938, so that less than 1% of total school revenues were equalized; and (2) approximately 60% of state funds allocated to education bypassed the Fund, though it had originally been intended as the primary mechanism of distributing state education funding. *Id.* at *10-11.

[22] *Id.* at *12.

[23] *Id.*

[24] Safety features of note included ramps for disabled students, crossing guards, entrance and exit ramps, and automobile pick-up points. *Id.*

[25] *Id.* at *14. As of 1995, an advanced diploma is required for students to be eligible for admission to the University of Alabama.

[26] According to testimony, not a single student of the Lee County School System graduated from the advanced diploma program in 1991. *Id.*

[27] Several superintendents testified that their school systems could not afford to offer many programs. *See id.* at *15. Superintendent DeWayne Key, of the Lawrence County School System, testified that there were only 12 schools with open school libraries, and of these, only seven with full-time librarians. The remainder were staffed by part-time librarians, aides, or volunteers. Two public school libraries were completely closed. The evidence also revealed many schools without a school nurse, schools that could not offer foreign language or advanced diploma programs, and schools with overcrowded classrooms. *Id.*

considered whether the opportunities afforded were adequate. To the court, adequacy meant "sufficient for a purpose or requirement."[28] Using this definition, it found that the education provided by the public school system did not fulfill the mandate of the Alabama Constitution,[29] and indeed, failed to provide an adequate education by any known applicable standard.

Plaintiffs argued that the Alabama school system provided an inadequate education in absolute terms as measured either by standards prescribed by state and regional accreditation standards,[30] substantive Alabama educational standards enacted by the state legislature,[31] or indicators recognized by state officials as appropriate measures of school quality.[32] They also alleged that the State provided an inadequate education in relative terms as compared to other states.[33]

Both parties agreed that all Alabama public schools should be able to meet the accreditation standards devised by the Southern Association of Colleges and Schools ("SACS").[34] According to the evidence presented, at least eleven school districts contained schools that were not accredited by SACS.[35] In addition, several of these schools failed to meet the state's own accreditation standards.[36]

Plaintiffs also proved at trial that many Alabama schools were unable to meet other substantive educational standards. One source of these standards,

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[28] *Id.* at *19.

[29] *Id.* The court recognized that it did not have authority to apply its own desired standards to the Alabama public school system. *Id.*

[30] Accreditation standards from the Alabama State Department of Education and the Southern Association of Colleges and Schools were discussed by the court. *Id.* at *19-20 n.25.

[31] These include the Alabama Education Improvement Act, 1991 Ala. Acts 323, Performance-Based Accreditation (the Alabama Department of Education's revised method of accreditation), 1991 Ala. Acts 323 at 619-24, and the Plan for Excellence (a 1984 plan to improve Alabama schools developed by the Alabama Department of Education). *Id.* at *19. Funding has not been provided to implement any of these initiatives to improve education. *Id.* at *21.

[32] These include: drop-out rates, college-level remediation rates, and the extent to which students are prepared for the workplace. *Id.* Another indicator is the level of state funding as compared to other states. *Id.*

[33] *Id.* at *19.

[34] *Id.*

[35] *Id.* at *20. These include Choctaw County, Macon County, Marengo County, Mobile County, Tallapoosa County, Decatur City, Bibb County, Opelika City, Hale County, DeKalb County, Perry County and Lee County. In Lee County, not a single school is accredited by SACS. *Id.*

[36] *Id.* According to the 1990-91 Annual Report of the State Department of Education, five of Lowndes County's eight public schools, five of Wilcox County's seven public schools, and six of Choctaw County's eight schools were not accredited by the state. *Id.*

the Alabama Education Improvement Act,[37] was enacted by the state legislature in 1991, but never funded. According to Governor Hunt, schools must meet the standards of the Act in order to provide an adequate education.[38] A second source of standards was requirements of Performance-Based Accreditation, a revised accreditation method adopted by the State Department of Education. Yet another source of qualitative standards was the Department of Education's Plan for Excellence, which articulates steps to improve public education. The evidence revealed that public schools did not live up to any of these standards. According to testimony at trial, not a single school system in Alabama met all the requirements of Performance-Based Accreditation.[39] The court found that the school facilities were severely deficient and failed to meet state standards in many respects.[40]

State curriculum opportunities were also severely lacking. For example, state guidelines under the Education Improvement Act required that all high school students have four years of math and science and achieve a level of computer literacy.[41] However, evidence at trial showed that several high schools could not offer adequate math and science courses, and many more could not offer foreign language, art, music or drama classes.[42] Many schools also suffered from a shortage of teachers and other staff.[43]

Governor Hunt disputed little of this evidence, but simply argued that these problems were confined to a few isolated school systems in the state. The court rejected his argument on two grounds: first, even the wealthiest public school systems in Alabama are poor by other states' standards, and second, if some districts had inadequate educational opportunities, then the system as a whole was inadequate.[44]

Governor Hunt also argued that "adequate" funding would not solve the problems plaintiffs complained of because there is no systematic relation

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[37] 1991 Ala. Acts 323.

[38] *Alabama Coalition for Equity,* 1993 WL 204083 at *20 (testimony of Governor Hunt).

[39] *Id.* at *21.

[40] *Id.* The evidence supporting a finding of inadequate educational opportunities included: deteriorated school facilities, a shortage of classroom space; too much reliance on portable classrooms; a lack of basic facilities such as science, computer, and language laboratories; lack of auditoriums, gymnasiums and playgrounds; serious structural and maintenance problems including failed septic systems and contaminated playing fields; lack of potable water; leaking roofs; vermin infestation; lack of air conditioning; lack of elective and basic courses; lack of opportunity to pursue an advanced diploma; under-staffing; failure to supply textbooks, supplies and equipment; and insufficient transportation systems. *Id.* at *21-31.

[41] *Id.* at *24.

[42] *Id.* at *25. The highest levels of math and science courses at Monroe High School were Algebra I and General Science. No school in Dallas County or Roanoke City systems offered calculus. *Id.*

[43] *Id.* at *26.

[44] *Id.* at *34.

between expenditures and student achievement.[45] The court accepted the conflicting expert testimony of plaintiffs that a study of Alabama public schools revealed a positive correlation between student achievement and certain expenditures. It then dismissed defendants' contention as immaterial to the proceedings and found a positive correlation between spending on education and student performance.[46]

Defendants' final argument was that any systemwide inequities created by the statutory scheme were rationally justified by the state interest in fostering local control[47] of schools. The court rejected this argument and cited testimony indicating that the funding scheme actually undermined local control of education because limited tax capacity prevents poor districts from choosing to fund education above the ceiling created by the Fund and their tax capacity.[48]

In sum, the court found, as a matter of fact, that the Alabama public schools provided inequitable and inadequate educational opportunities.

III. *Analysis: Conclusions of Law*

Examining the legal consequences of its factual findings, the court held that the Alabama public school system violated the education, equal protection, and due process clauses of the Alabama Constitution. Governor Hunt raised separation of powers concerns that the judicial branch was interfering in the business of the executive and legislative branches by deciding this case, but the court was persuaded otherwise by the decisions of several other state courts in similar cases.[49] The court also rejected the defense that the State could not afford to adequately fund its schools, and observed that constitutional obligations cannot be excused for lack of funding.[50]

A. *The Education Clause Guarantees Educational Opportunity*

Article XIV, Section 256 of the Alabama Constitution states: "The Legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of

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[45] *Id.* at *35 (testimony of Dr. Eric Hanushek, Professor of Economics at the University of Rochester).

[46] *Id.* at *35-36 (accepting testimony of plaintiffs' expert Dr. Ronald Ferguson, Professor of Public Policy at Harvard University).

[47] Local control is the delegation of discretion to school districts to decide what amount of local taxes to devote to education. *Id.* at *36.

[48] *Id.*

[49] *Id.* at *41 (citing Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Robinson v. Cahill, 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978)).

[50] *Id.* at *42.

seven and twenty-one years."[51] The court interpreted this clause to impose a mandatory, continuous, and ongoing constitutional duty on the State, not local communities, to educate all children.[52] Therefore, it held, section 256 gives Alabama schoolchildren an enforceable constitutional right to an education.[53]

The parties also disputed the content of the educational right guaranteed by section 256. Plaintiffs argued that section 256 created a right to attend a school which offered them equitable and adequate educational opportunities.[54] In opposition, Governor Hunt argued that section 256 simply required the State to maintain a public school system, but did not impose any qualitative standards for its adequacy or its funding.[55]

In reaching its decision, the court first looked to the language of the education clause and historical interpretations of the phrase "system of public schools." Generally, "public schools" or "common schools" have been defined as schools which are free and open to all on equal terms,[56] as evidenced by several early Alabama decisions interpreting the present education clause's predecessor in the 1875 Alabama Constitution.[57] Governor Hunt maintained that the two constitutional provisions should not be equated because the 1875 provision included the phrase "equal benefit" whereas section 256 of the 1901 Constitution did not. The court refused to accept this view, noting that the proceedings of the 1901 Constitutional Convention indicated that the word "equal" had been deleted for racial reasons.[58] Since there was no evidence that the Constitutional Convention intended to discontinue equal educational opportunities for white children, the court held that section 256 required the state to provide an equal educational opportunity for all Alabama schoolchil-

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[51] *Id.* at *43 (quoting ALA. CONST. art. XIV, § 256).

[52] *Id.* at *43-44.

[53] In addition to the text of the constitution, the court also found that the fate of Alabama Constitution Amendment 111 supported its holding. The Alabama Supreme Court has stated that Amendment 111 modified the original educational provision to eliminate any claim to a constitutional right to public education. *See* Mobile, Ala.-Pensacola, Fla. Bldg. & Constr. Trades Council v. Williams, 331 So.2d 647, 649 (Ala. 1976). Amendment 111 was passed for racial reasons, which compelled this court to strike down Amendment 111 under the Fourteenth Amendment to the U.S. Constitution. *Alabama Coalition for Equity*, 1993 WL 204083 at *44 n.41.

[54] *Id.*

[55] *Id.* at *44.

[56] *Id.* at *45 (citing Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 38 HARV. J. ON LEGIS. 341, 357 (1991)).

[57] "The General Assembly shall establish, organize and maintain a system of public schools throughout the state, *for the equal benefit of the children thereof*, between the ages of seven and twenty-one years . . . ." ALA. CONST. of 1875, art. XIII (emphasis added). *See* Elsberry v. Seay, 3 So. 804 (Ala. 1887).

[58] *Alabama Coalition for Equity*, 1993 WL 204083 at *46. According to the court, this change was made in order to avoid any explicit requirement that the races be treated equally in educational matters beyond that of having school terms of equal length. *Id.*

dren.[59] Furthermore, since the evidence showed systemic inequities in educational opportunities available to Alabama schoolchildren, the court held that the present system of public education was unconstitutional because it failed to fulfill the requirements of the education clause.[60]

B. *Education Clause Guarantees an Adequate Education*

The court further held that Article XIV, Section 256 of the Alabama Constitution guarantees the right to an adequate education.[61] To arrive at this conclusion the court traced the evolution of Alabama's Constitution from 1819 to the present and found that the commitment to education grew stronger with each revision.[62] The court then discussed the proceedings of the 1901 Constitutional Convention, focusing specifically on the meaning of "liberal system." Drawing on historically accepted understandings, the court concluded that a "liberal system" meant "a system of public schools that is generous and broad-based in its provision of educational opportunity and that meets evolving standards of educational adequacy."[63] It cited the remarks of several speakers at the 1901 Convention professing the importance of education to achieving economic prosperity and a more intelligent citizenry.[64] Finally, the court discussed several more recent decisions by courts of other states holding that their constitutions provided a right to education.[65] Based on this historical analysis, the court concluded that the phrase "liberal system of public schools" of section 256 required that in order to fulfill the constitutional requirements, the public education system must meet a certain basic level of adequacy. Given its findings of fact, the court also concluded that the challenged education system failed to meet that standard.[66]

In its order, the court broadly spelled out what a constitutionally adequate education, comporting with a "liberal system of public schools" should entail.

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[59] *Id.* at *47.

[60] *Id.*

[61] *Id.* at *48.

[62] The Constitution of 1819 was Alabama's first. The identical provision was also included in the 1861 Constitution. ALA. CONST. of 1861, art. VI. The Constitutions of 1865 and 1868 also imposed upon the state an obligation to educate the children. *See* ALA. CONST. of 1868, art. XI, § 6. The 1875 Constitution was the first to speak of the obligation of a "system of public schools." ALA. CONST. of 1875, art. XIII, § 1. As discussed in the text, this provision is virtually identical to section 256 of the 1901 Constitution. *See Alabama Coalition for Equity*, 1993 WL 204083 at *48-49.

[63] *Id.* at *49.

[64] *Id.* at *50-51 (discussing the writings of John Adams and Thomas Jefferson, and the comments of former Alabama Superintendent of Education John O. Turner and former Governor Joseph F. Johnston).

[65] *Id.* at *52-53. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1987); Pauley v. Kelley, 255 S.E.2d 859 (W.Va. 1979).

[66] *Alabama Coalition for Equity*, 1993 WL 204083 at *53.

It set forth seven minimum adequate opportunities:

(i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels;
(ii) sufficient mathematic and scientific skills to function in Alabama, as well as the national and international levels;
(iii) sufficient knowledge of economic, social, and political systems as well as the history of the United States and Alabama so the student can make informed choices;
(iv) sufficient understanding of governmental processes so the student can understand and contribute to the issues facing the community;
(v) knowledge of health and mental hygiene;
(vi) knowledge and understanding of the arts so as to be able to better appreciate his/her cultural heritage as well as others; and
(vii) sufficient training in vocational skills or preparation for advanced training in academic or vocational skills.[67]

In apparent deference to the Alabama legislature and the Department of Education, the court stopped short of deciding what "sufficient knowledge" entails.

C. *Violation of Equal Protection*

The court also held that the State's failure to provide all public schoolchildren with equal educational opportunities violated Article 1, Sections 1, 6, and 22 of the Alabama Constitution.[68] The court concluded that the Alabama public school system failed to pass muster under any standard of equal protection review.[69] It held that evaluation of the constitutionality of the education system required a strict scrutiny standard of review,[70] but reviewed the challenged system under both the strict scrutiny and deferential rational basis standards to emphasize its holding.

First, the court held that education was a fundamental right under Article XIV, Section 256 of the Alabama Constitution.[71] At the very least, it stated, the right to education was implicitly guaranteed by the constitution. Additional evidence of the fundamental character of the right was the amount of resources devoted to education by the state and the prominent theme of education in Alabama's history.[72]

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[67] *Id.* at *63. Note that some of these standards resemble those already enacted under the Alabama Education Improvement Act of 1991, 1991 Ala. Acts 323. The court borrowed from the Kentucky Supreme Court's definition of "adequate education" in crafting these requirements. *See id.* at *52-53 (quoting *Rose*, 790 S.W.2d at 212 (listing seven capacities developed by an adequate education)).

[68] Together, these clauses create an equal protection guarantee under the Alabama Constitution. *Id.* at *53 (citing Plitt v. Griggs, 585 So.2d 1317, 1325 (Ala. 1991)).

[69] *Id.* at *64.

[70] *Id.* at *54.

[71] *Id.* at *55.

[72] *Id.* at *55-57. The defendant contended that the U.S. Supreme Court's decision in

Having decided that education was a fundamental right in Alabama, the court proceeded to its analysis. Under the strict scrutiny standard, the inequities in education must have been justified by a compelling state interest in order to be constitutional. The State defined its interest as promoting local control over the public schools,[73] but argued that it was a legitimate state purpose, not the required compelling state interest.[74]

The court further concluded that the state's interest in promoting local control of public schools was not even rationally related to a legitimate state interest.[75] It found that the interest in local control was actually defeated by the differentials in school funding permitted under the challenged system. Given the general lack of funds, many of the poorer school districts had no meaningful choice about the kind of education they could provide. "They face[d], instead, a daily Hobson's choice whether, for example, to do without library books or to leave the roof unmended in order to meet the budget."[76] The court could not conceive of any justification for school funding to depend upon the "happenstance of local wealth and of students' places of residence."[77]

D. *Due Process Clause*

The court also held that the challenged public school system violated the due process clause of the Alabama Constitution.[78] The court found that the State of Alabama had deprived schoolchildren of their liberty by means of compulsory education statutes which required Alabama children to attend school.[79] The court concluded that if the State was going to do this, it was obligated to provide the children with an adequate education.[80] In this case, the court found that many Alabama schoolchildren had been arbitrarily deprived of their state law entitlement to public education without any constitutionally sufficient justification in violation of their due process rights. In support of this conclusion, the court cited *Wyatt v. Stickney*,[81] which held that patients hospitalized in Alabama mental institutions were entitled to have ade-

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San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), holding that education is not a fundamental right under the U.S. Constitution, should control. The court however, disagreed, noting that *Rodriguez* did not control because this case arose under state law. *Id.* at *57.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* (citing Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977)).

[77] *Id.* at *58.

[78] ALA. CONST. art. I, §§ 6, 13. The plaintiffs also argued that the system violated the due process guarantee of the Fourteenth Amendment to the U.S. Constitution, however, the court did not address this issue.

[79] *Alabama Coalition for Equity*, 1993 WL 204083 at *59.

[80] *Id.*

[81] 325 F. Supp. 781 (N.D. Ala. 1971), *aff'd in part and rev'd in part*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

quate treatment in exchange for the liberty they gave up when institutionalized.[82]

IV. THE SPECIAL EDUCATION SYSTEM

Unlike many other constitutional challenges to school finance systems, *Alabama Coalition for Equity* also addressed the plight of children with disabilities in the public school system. In addition to a fundamental right to an adequate education, Alabama children with disabilities have a statutory right to an appropriate education and special services.[83] The plaintiff-subclass of children with disabilities asserted that they were deprived of an appropriate education and special services and that the state funding system for special education was irrational and violated the due process clause of the Alabama Constitution. In what it stated was a case of first impression, the court ruled in favor of plaintiffs on both claims.

A. *The Right to an Appropriate Education*

The court concluded that as a matter of fact and of law, Alabama children with disabilities were not receiving an appropriate education by any standard.[84] Generally, the court considered the Alabama special education system to be "an exercise in crisis management."[85] Testimony by plaintiffs' expert witnesses and state officials working in the Division of Special Education in the State Department of Education supported that conclusion.[86] The court found seven components of an appropriate education as defined by educational experts: inclusion, program support, curriculum, instruction, peer support, preparation for adult life, and collaborative teaming between special education and regular education teachers.[87] The court also accepted testimony that four elements of program support were necessary to provide an appropriate education for children with disabilities.[88] Though it found that the state plan included these same goals, it held that none of the goals were actually met in any of the four areas of program support necessary for an appropriate educa-

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[82] *Alabama Coalition for Equity*, 1993 WL 204083 at *58.

[83] *Id.* at *60. *See* ALA. CODE § 16-39-3 ("Each school board shall provide not less than twelve consecutive years of appropriate instruction and special services for exceptional children."); ALA. CODE § 16-39A-2 ("All county and city local education agencies are required to provide free appropriate education for all eligible children with disabilities.").

[84] *Id.* at *60.

[85] *Id.* at *16.

[86] *Id.* at *37.

[87] *Id.* (citing the testimony of Dr. Martha Snell, an expert witness for plaintiffs, who spent one week observing special education programs in the state and has several years experience in special education).

[88] The four components are: policy development and implementation, staff and program development, human and financial resources, and monitoring and evaluation. *Id.* at *38.

tion.[89] Among the many deficiencies the court found were the complete absence of any meaningful transition programs, the lack of individualized instruction, and poor teacher in-service training and professional development.[90] It concluded that Alabama children with disabilities were not receiving an appropriate education and related services to which they were entitled, and that Alabama was unable to offer these children an appropriate education due to deficiencies in program support.[91]

In ruling that the state public school system violated the state statute requiring an appropriate education, the court relied on the definition of appropriate education outlined by federal court decisions construing the Individuals with Disabilities Education Act ("IDEA").[92] Under the IDEA, in order to receive federal funding, Alabama must have a policy guaranteeing children with disabilities a free, appropriate public education.[93] Because Alabama must comply with the IDEA in order to receive federal money, and because the legislature clearly intended to receive federal funding, the court construed the Alabama statute in the same fashion as federal law. Federal court decisions have defined an appropriate education as one where the program is composed of specialized education and related services individually designed to benefit children with disabilities.[94] The court found that the Alabama public school system did not meet this standard, and therefore, the State had violated its own statutes mandating an appropriate education for children with disabilities.

B. *Due Process Rights of Disabled Children*

The court found that Alabama's special education funding system violated the due process clause of the Alabama Constitution because it was unreasonable and did not bear a substantial relationship to the public need.[95] Alabama used the total enrollment of a school system to determine the amount of money the system would receive for special education purposes.[96] Under the challenged system, neither the number of children with disabilities nor the degree of a child's disability affected the amount of special education funds received. The court found that this scheme actually penalized schools which tried to serve all children with disabilities in accordance with state law

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[89] *Id.*

[90] *Id.* The court described the inadequate teacher training as "so poor that teachers [did] not know enough to ask for help." *Id.*

[91] *Id.* at *40.

[92] 20 U.S.C. §§ 1400 et seq. This Act was previously known as the Education for All Handicapped Children Act ("EHA") enacted in 1975.

[93] *Id.* at *60 (citing 20 U.S.C. § 1412(1)).

[94] *Id.* (citing Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982)).

[95] *Id.* In order to be acceptable under the state due process clause, the funding scheme must be reasonable and bear a substantial relationship to the public need. Baldwin County Bd. of Health v. Baldwin County Elective Membership Corp., 355 So.2d 708, 710 (Ala. 1978).

[96] *Alabama Coalition for Equity*, 1993 WL 204083 at *17.

because schools were forced to spread funding among a greater number of students.[97] The court concluded that this funding system was irrational, arbitrary, and bore no relationship to the state interest in educating children with disabilities.[98]

The court was not dissuaded from this conclusion by testimony that the State Board of Education had voted to change the funding system to a weighted system.[99] Under the new system, school districts with more children in more restrictive settings than the regular classroom would receive more funds than systems educating children with disabilities in less-restrictive placements. The weighted funding system seeks to defray the costs of the more intensive placements.[100] Though an improvement, the court noted that the new system would still only provide 70% of the funds needed to serve the currently identified special education students. Furthermore, it could potentially lead schools to isolate children with disabilities from their non-disabled peers in order to qualify for more funding. Such isolation would violate state and federal law requiring schools to educate children with disabilities in the least restrictive environment appropriate.[101] In sum, the court did not consider the revisions sufficient to prevent its conclusion that the Alabama special education funding scheme violated the due process rights of disabled students under the state constitution.

V. CONCLUSION

After a trial on the merits, the Alabama Circuit Court of Montgomery County found that the Alabama public school system violated the education, equal protection, and due process clauses of the Alabama Constitution. It further held that the state's special education system violated the statutory obligation to provide an appropriate education to disabled students and the due process clause of the Alabama Constitution.

The court decreed that Alabama schoolchildren "enjoy a constitutional right to attend school in a liberal system of public schools, established, organized and maintained by the state, which shall provide all such schoolchildren with substantially equitable and adequate educational opportunities . . . ."[102] The Supreme Court of Alabama, in an advisory opinion, has ruled that the legisla-

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[97] *Id.* at *60.

[98] *Id.*

[99] Governor Hunt also argued in response to plaintiffs' challenge to the state special education funding system that the proper vehicle for enforcing the right to an appropriate education is by administrative remedy, or by petitioning the state attorney general to file suit. *Id.* at *61. The court noted that the exhaustion of administrative remedies only applies to individual children seeking relief under the EHA, whereas this case was brought solely under state law. The court also noted that state law does not establish that a petition to the state attorney general to file suit is the sole remedy. *Id.*

[100] *Id.* at *17.

[101] *Id.* at *18.

[102] *Id.* at *62.

ture must comply with the Circuit Court order.[103]

Carolyn J. Campbell
Sharon M. P. Nicholls

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[103] Opinion of the Justices No. 338, 624 So.2d 107 (Ala. 1993).