MOCK v. STATE OF KANSAS

No. 91-CV-1009

SHAWNEE COUNTY DISTRICT COURT

TERRY L. BULLOCK, District Judge

31 Washburn L.J. 489

October 14, 1991, Opinion Filed

OPINION OF THE COURT ON QUESTIONS OF LAW PRESENTED IN ADVANCE OF TRIAL

Introduction

The various plaintiffs in these consolidated cases, in the aggregate, challenge the constitutionality of the entire scheme of financing the public schools (grades kindergarten through twelve) of Kansas. They raise various arguments in support of their claims of unconstitutionality, including three key claims:

1) The financing scheme violates the requirements of the education article of the Kansas constitution.

2) The financing scheme violates the equal protection clauses of the Kansas and United States constitutions.

3) The system of taxation used to finance public schools violates the "uniform laws" clause of the Kansas constitution.

Additional sub-arguments include a claim that the cap on "hold harmless" funds, a part of the School District Equalization Finance Act, violates the equal protection clause of the Kansas and United States constitutions and a claim that the school district plaintiffs lack standing to raise the issues presented.

Because of the magnitude of the challenges made in these cases, and because of the impact which a decision of these issues may have on the financial and other affairs of the State and its schools, the Court has elected to identify and decide the essential questions of law in advance of trial. In this endeavor, the Court had the unanimous consent and cooperation of all parties and their counsel, for which the Court is profoundly grateful. All parties have now briefed the various issues and the Court is now prepared. to decide the issues thus submitted.

Scope of Review

Preliminarily, it is important to observe that legislative enactments are presumed to be constitutionally sound. Before the Court can declare any statute unconstitutional, the legislative act must clearly violate some provision of the constitution. It is, however, the duty of the Court to declare legislation unconstitutional when it does fail to meet the requirements of the constitution. *Barker v. State*, 249 Kan. 186, 191-92 (1991).

The Education Article of the Kansas Constitution

Because the penultimate issue presented in the cases at bar is the constitutional validity of the entire financing scheme for *Kansas* public schools, it seems appropriate to begin our deliberations with a careful consideration of the history and textual development of the education article of the Kansas constitution.

Early School History

The history of education in Kansas predates statehood. Pioneer schools existed even prior to the time the territory was organized. In fact, schools were often organized and built well before taxes were collected for their operation. *Heritage of Kansas*, (Emporia, Kansas, State Teachers College, 1963). Provisions in the organic Act and the Act for the Admission of Kansas Into the Union included provisions related to public schools. The Organic Act, Section 34, provided that certain sections of land should be reserved for educational purposes.

The Act for Admission of Kansas into the Union, in paragraph three, repeated this reservation of land for educational purposes. During territorial days, the territorial legislature created the office of Territorial Superintendent of common Schools. This officer subsequently was authorized to certify teachers and to organize local school districts. Education has always been a very high priority for Kansans. In fact, shortly after statehood there existed over nine thousand schools and over twenty-seven thousand school board members. Every child had a school within walking distance of his or her home. (U.S.D. No. 259.Plaintiff's brief, page 27, footnote 3).

Constitutional History

There were four constitutional conventions, the first three of which were unsuccessful. It is important to note, however, that all three constitutions issuing from these ill-fated conventions contained mandatory provisions for education.

In 1859, the Wyandotte Constitutional convention met to draft a constitution to submit to a vote of the residents of the Kansas territory. The constitution used as a model the Ohio constitution, which itself was modeled after the New York constitution. *Kansas Constitutional*

Convention: A Reprint of the Proceedings and Debates of the Convention Which Framed Constitution of Kansas at Wyandotte in July, 1859. (Kansas State Printing Plant, Topeka, Ks. 1920) at page 697.

The Ohio constitution, however, contained only two short sections on education. *Id*. at 687. Our founders desired more and thus premised their proposed, education article on a combination of provisions from Iowa, Oregon, Michigan, Wisconsin and California. *Id*. In explaining the scope and effect intended for the proposed constitution, one framer stated, "It has been the aim of the majority of this body to make this Constitution the draft, the outline of great civil *truths* and *rights*." (Emphasis added). Solon O. Thacher quoted in *Kansas Constitutional Convention* at 569.

Constitutional Provisions Adopted in 1859

In the Ordinance to the Constitution (the official legislative act which adopted the constitution), three of eight sections, including the first section, dealt directly with elementary public education. The new constitution contained an entire article, Article 6, solely concerned with education. Section 2 stated "The legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools." The bulk of the remainder of the article dealt with the financing of schools.

Some of the original constitutional provisions on education have since been amended. The relevance of the earlier text to this case is that it clearly demonstrates the treatment of public school education as a paramount duty of the legislature which has been continuous from the beginning of statehood and before.

Amendments to the Educational Article in 1966: The Current Text

The present text of Article 6, the education article, dates from amendments made in 1966. House Concurrent Resolution No. 537 stated the intent of the legislature in seeking amendment of the education article: [t]hat the Kansas legislative council is hereby directed to make a study of the scope, function, and organization of the state in supervising education to comply with the constitutional requirement of a uniform system of public schools, *The Education Amendment to the Kansas Constitution*, Publication No. 256, Dec. 1965 Kansas Legislative Council, page v.

The committee assigned to review and recommend changes to the education article stated that by including an article on education in the original Kansas Constitution "the people secure[d] to themselves what is of first importance by placing binding responsibilities on the legislative, executive, and judiciary departments." *Education Amendment* at page 2. The committee further noted, "[t]he constitution of 1861 placed a responsibility on the legislature to establish a uniform system of schools," and that "*equality of educational opportunity is a goal which has been generally accepted*." (Emphasis added). *Id*. at 3.

After several floor amendments, the current Education Article was finally adopted, submitted to a popular vote, and ratified by the people, all in 1966. A careful examination of the current text of the article reveals four essential, clear, and unambiguous mandates from the people (the source of all power in our democratic form of government):

> Section 1. Schools and related institutions and activities. The *legislature* shall provide for intellectual, educational, vocational, and scientific improvement by establishing and maintaining public schools ...which may be organized and changed in such manner as may be provided by law. (Emphasis added).
>
> Section 2. State board of education and state board of regents. (a) The *legislature* shall provide for a state board of education which shall have general supervision of public schools ... and all the educational interests *of the state*, except educational functions delegated by law to the state board of regents. (Emphasis added).
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> Section 5. Local public schools. Local public schools under the *general supervision* of the state board of education shall be maintained, developed and operated by locally elected boards. When authorized by law, such boards may make and carry out agreements for cooperative operation and administration of educational programs under the *general supervision* of the state board of education, but such agreements shall be subject to limitation, change or termination by the legislature. (Emphasis added).
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> Section 6. Finance. (b) The legislature shall make suitable provision for finance of the educational interests of the state. *No* tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law. (Emphasis added).

Kansas Case Law

No controlling authority exists in Kansas interpreting the meaning of these constitutional provisions. Diligent research, however, discloses the following general statements of principles from our high court which help light the path to understanding.

In the context of a challenge to unequal educational opportunities based on race, Justice Valentine, in 1881 (more than seventy years before *Brown v. Board of*

Education, 347 U.S. 483 (1954)), rhetorically asked,

> And what good reason can exist for separating two children, living in the same house, equally intelligent, and equally advanced in their studies, and sending one, because he or she is black, to a school house in a remote part of the city, past several school houses nearer his or her home, while the other child is permitted, because he or she is white, to go to a school within the distance of a block? *Board of Education v. Tinnon*, 26 Kan. 1, 21 (1881).

More recently, the Kansas Supreme Court stated "(t]he ultimate State purpose in offering a system of public schools is to provide an environment where quality education can be afforded to all." *Provance v. Shawnee Mission U.S.D. No. 512*, 231 Kan. 636, 643 (1982). In a similar vein, the Kansas Supreme court has also held "(t]he general theory of our educational system is that every child in the state, without regard to *race, creed, or wealth* shall have the facilities for a free education." (Emphasis added). *State v. Smith*, 155 Kan. 588, 595 (1942).

Although the constitutions of the other states of the union vary in content and wording, and in fact none contain the same precise text as that set out in the present Kansas Education Article, it is, nonetheless, instructive for us. to examine, preliminarily, relevant authorities from other states, applicable at least by analogy. (For a complete catalog of the various comparative constitutional provisions, s*ee generally Pauley v. Kelley*, 255 S.B.2d 859 (W. Va. 1979) (at page 884).

The Cases from Our Sister States

Forty-nine of our fifty states include education provisions in their constitutions. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 112 (1973) (Justice Marshall, in dissent). The lone state currently without such a provision, South Carolina repealed its education article in response to the decision of the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Of these forty-nine states, at least ten with school financing systems somewhat similar to that existing in Kansas have ruled those systems unconstitutional for varying reasons. *See DuEree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983); *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary School Dist. No.1 v. State*, 769 P.2d 684 (Mont. 1989); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976, 94 S. Ct. 292, . 38 L.Ed.2d 219 (1973); *Seattle School District No.1 v. State*, 90 Wash.2d 476, 585 P.2d 71 (1978); *Pauley v. Kelley*, 162 W. Va. 672, 255 S.E.2d 859 (1979); *Washakie County School Dist. No.1 v. Herschler*, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824, 101 S. Ct. 86, 66 L.Ed.2d 28 (1980); and *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

Other state courts have reached different results. *See Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Luian v. Colo. State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1082); *McDaniel v. Thom*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 2d 597, 458 A.2d 758 (1983); *Board of Educ., Levittown v. Nyquist*, 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.B.2d 359 (1982); *appeal dism'd*, 459 U.S. 1138, 103 S. Ct. 775, 74 L.Ed.2d 986 (1983); *Board of Educ. v. Walter*, 58 Ohio St.2d 368, 390 N.B. 2d 813 (1979), *cert. denied*, 444 U.S. 1015, 100 S. Ct. 665, 62 L.Ed.2d 644 (1980); *Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979); *Richland County v. Campbell*, 294 S.C. 346, 364 S.B.2d 470 (1988).

A review of all the cases reveals a checkered history for equal protection challenges, while attacks grounded squarely on specific state constitution education articles have generally fared better for the challengers. In these latter cases, the precise wording of each constitutional provision has been highly important. Several cases, which this Court finds most persuasive, deserve more detailed attention.

In *Rose v. Council for Better Education*, 790 S.W.2d 186 (1990), the Kentucky Supreme Court, in interpreting the education article of their constitution held *the entire public school system* was unconstitutional as it was then organized and financed by the legislature. Their constitution simply stated "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." *Rose* at 200.

The rationale of the Kentucky decision was that the school system in Kentucky as operated was not "efficient" and therefore not constitutional. *Rose* at 203. An efficient system, in the eyes of the Kentucky court includes: sole responsibility in the General Assembly; free common schools to all children; schools available to all children; all schools substantially uniform; equal educational opportunities for all children, regardless of place of residence or economic circumstances; ongoing monitoring by the general assembly to prevent waste, duplication, mismanagement, or political influence; all children having a constitutional right to an adequate education; and the provision by the general assembly of sufficient funding to assure adequate education.

In *Edgewood School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989), the Texas court examined their Education Article which provided:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of

public free schools. *Edgewood* at 393.

In interpreting that provision the court observed:

> If our state's population had grown at the same rate in each district and if the taxable wealth in each district had also grown at the same rate, efficiency could have probably been maintained within the structure of the present system. That did not happen. Wealth, in its many forms, has not appeared with geographic symmetry. The economic development of the state has not been uniform. Some cities have grown dramatically, while their sister cities have remained static or have shrunk. Formulas that once fit have been knocked askew. Although local conditions vary, the constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live. *Edgewood* at 396.
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> We conclude that, in mandating "efficiency," the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist. Instead, they stated clearly that the purpose of an efficient system was to provide for a "*general* diffusion of knowledge." (Emphasis added). The present system, by contrast, provides not for a diffusion that is general, but for one that is unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency. *Id.*

Following which, the Court held:

> Efficiency does not require a per capita distribution, but it also does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards. *Id.* at 397.
>
> . . .
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> *Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds. Certainly, this much is required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide. Id.*
>
> Under article VII, section 1, the obligation is the legislature's to provide for an efficient system. In setting appropriations, the legislature must establish priorities according to constitutional mandate; *equalizing educational opportunity cannot be relegated to an "if funds are left over" basis.* We recognize that there are and always will be strong public interests competing for available state funds. However, the legislature's responsibility to support public education is different because it is constitutionally imposed. *Id.* at 397.
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> . . .
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> This does not mean that the state may not recognize differences in area costs or in costs associated with providing an equalized educational opportunity to atypical students or disadvantaged students. (Emphasis added). *Id*. at 398.

Finally, with respect to the contentions raised, concerning the importance of "local control" of Texas schools, the Court noted:

> Some have argued that reform in school finance will eliminate local control, but this argument has no merit. An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices. *Id.* at 398.

In Seattle Sch., Dist. No.1 of King City, v. State, 585 P.2d 71 (Wash. 1978), the Washington Supreme Court reviewed constitutional provisions which provided:

> It is the paramount duty of the state *to make ample provision for the education of all children residing within its borders* . . . (Emphasis added in the original). *Seattle* at 83.

In commenting upon the "duty" imposed by their constitution, the Washington court held:

> By imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a "duty" that is supreme, preeminent or dominant. Flowing from this constitutionally imposed "duty" is its jural correlative, a corresponding "right" permitting control of another's conduct. Therefore, all children residing within the borders of the State possess a "right," arising from the constitutionally imposed "duty" of the State, to have the State make ample provision for their education. Further, since the "duty" is characterized as *paramount* the correlative "right" has equal stature. (footnotes omitted). *Seattle* at 91.
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> "Providing free education for all is a state function. It must be accorded to all on equal terms." (*See also Robinson v. Cahill*, 287 A.2d 187, 213 (N.J. 1972) citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

Relying, in part, on the state's equal protection clause the Court then concluded:

Thus we hold, compliance with Const. art. 9, Sections 1 and 2 can be achieved only if sufficient funds are derived, through dependable and regular tax sources, to permit school districts to provide "basic education" through a basic program of education in a "general and uniform *system of public schools*." (Emphasis added in the original). *Seattle* at 97.

Finally, we note in passing the Washington court made its decision prospective only in effect. (*See Seattle* at pages 105-6).

In *Helena Elementary School Dist. No.1 v. State*, 769 P.2d 684 (Mont. 1989), the Montana Supreme Court examined constitutional provisions that read:

> (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.
>
> . . .
>
> (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. . . . It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system. *Helena* at 689.

The Court then held:

> Art. X, Sec. 1(3), Mont. Const., requires that the Legislature shall provide a basic system of free quality education, that it may provide various types of educational institutions and programs, and that the state's share of the cost of the basic system shall be distributed in an equitable manner. There is nothing in the plain wording of subsection (3) to suggest that the clear statement of the obligations on the part of the Legislature in some manner was intended to be a limitation on the guarantee of equal educational opportunity contained in subsection (1). The guarantee provision of subsection (1) is not limited to anyone branch of government. Clearly the guarantee of equal educational opportunity is binding upon all three branches of government, the legislative as well as the executive and judicial branches. we specifically conclude that the guarantee of equality of educational opportunity applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level. *Helena* at 689-90.

With respect to "local control," the Montana Supreme Court noted and held:

> The State also argued that the Constitutional directive of local control of school districts, Art. X, Sec. 8, Mont. Const., requires that spending disparities among the districts be allowed to exist. That section provides:
>
> *School district trustees*. The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.
>
> While Section 8 does establish that the supervision and control of schools shall be vested in the board of trustees, there is no specific reference to the concept of spending disparities. Further, as made especially apparent after the passage of Iniative 105, the spending disparities among Montana's school districts cannot be described as the result of local control. In fact, as the District Court correctly found, the present system of funding may be said to deny to poorer school districts a significant level of local control, because they have fewer options due to fewer resources. We conclude that Art. X, Sec. 8, Mont. Const. does not allow the type of spending disparities outlined in the above quoted findings of fact. *Helena* at 690.

Finally, in *Robinson v. Cahill*, 287 A.2d 187 (N.J. 1972) the New Jersey Supreme Court was presented with a constitutional provision which recited:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years. *Robinson* at 209.

The Court held:

> The Education Clause was intended to do what is says, that is, to make it a state legislative obligation to provide a thorough education for all pupils wherever located. (*Robinson* at 210).
>
> . . .
>
> The word "thorough" in the Education clause connotes in common meaning the concept of completeness and attention to detail. It means more than simply' adequate or minimal. (*Robinson* at 211).

In reviewing the "local" versus "state" tax question, the court observed:

> Although districts can be created and classified for appropriate legislative purposes . . . the state school tax remain[s] a state tax even though assessed and levied locally upon local property, with revenues returned by the State to local districts. (citations omitted). *Robinson* at 210.

New Jersey, like Kansas, had a "hold harmless" component in their school financing system. In commentingthereon, Justice Botter, for the Court, wrote:

> The Bateman Committee (a New Jersey

committee which had reviewed school finance and had recommended a whole new "needs based" finance scheme) sought to justify minimum aid on the ground that it would provide even wealthy districts with the incentive to improve educational programs, and to maintain them at high levels. The justification offered at trial was that the State "should do something for every district." However, as long as some districts are receiving inadequate education, below that constitutionally required, the reasons offered cannot constitute a valid legislative purpose. As long as some school districts are underfinanced I can see no legitimate legislative purpose in giving rich districts "state aid." I am satisfied by the evidence that a strong reason for minimum aid and save-harmless aid is political, that is, a "give-up" to pass the legislation. *Robinson* at 211.

The New Jersey Court also recognized fundamental constitutional problems with the use of the property tax to support schools:

> Even if districts were better equalized by guaranteed valuations, the guarantees do not take into consideration "municipal and county overload." ... Poor districts have other competing needs for local revenue. The evidence shows that poorer districts spend a smaller proportion of their total revenues for school purposes. The demand for municipal services tends to diminish further the school revenue-raising power of poor districts. Another general disadvantage of poor districts is the fact that property taxes are regressive; they impose burdens in inverse proportion to ability to pay. This is because poor people spend a larger proportion of their income for housing. (citations omitted). *Robinson* at 213.

Finally, with the respect to the need to spend "equal dollars" on each pupil in order to achieve "equal educational opportunity", the Court observed:

> This is not to suggest that the same amount of money must be spent on each pupil in the State. The differing needs of pupils would suggest the contrary. In fact, the evidence indicates that pupils of low socioeconomic status need compensatory education to offset the natural disadvantages of their environment. *Robinson* at 213.

The Analysis of Our Constitution

Thus informed by our history and tradition, the cited general principles of Kansas law, and the experiences of our sister states, the Court now turns to an examination and interpretation of the text of the Kansas constitution. To sharply focus our attention, the exact language of the four critical provisions of the Education Article must be restated:

> The legislature shall provide for intellectual, educational, vocational, and scientific improvement, by establishing and maintaining public schools (emphasis added).
>
> The *legislature* shall provide for a state board of education which shall have general supervision of Public schools ... and *all* the educational interests of the state, except educational functions delegated by law to the state board of regents. (Emphasis added).
>
> Local public schools under the *general supervision* of the state board of education shall be maintained, developed and operated by locally elected boards. When authorized by law, such boards may make and carry out agreements for cooperative operation and administration of educational programs under the *general supervision* of the state board of education, but such agreements *shall be subject to limitation, change or termination by the legislature*. (Emphasis added).
>
> The *legislature* shall make suitable provision for finance of the educational interests of the state. No tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law. (Emphasis added).

Analytical Queries

A series of questions will be posed and answered to aid in understanding and interpreting the language of the text:

1) Upon what entity of government is the sole and absolute duty to establish, maintain, and finance public schools imposed by the plain language of our constitution?

On this point nothing more need be said but that the clear answer appears from the text alone: that answer is the legislature.

2) To whom is this absolute duty to establish, maintain, and finance public schools owed?

In the court's view, the answer is self-evident when the question is stated another way. For whose primary benefit are public schools created and maintained? The answer can only be the school children of Kansas.

Without doubt, much collateral benefit from education inures to the benefit of others in our society, from business, industry, the professions, and the government, to the public at large, but the essential and primary beneficiaries of an education are the students who are educated. Thus, it is clear to the Court that the duty created by the constitutional mandate is owed to the school children of Kansas.

3) If the duty to establish, maintain, and finance public schools is constitutionally owed by the legislature to the school children of Kansas, in what proportion is that duty owed to each individual child?

Once again, the answer is logically inescapable. If the duty is owed to every child, each child has a claim to receive that educational opportunity which is neither greater nor less than that of any other child.

Thus, the fundamental answer is plain: the duty owed by the Legislature to each child to furnish him or her with an educational opportunity is equal to that owed every other child.

4) What can the legislature charge each child required to attend our public schools?

The text of the constitution alone answers this question: except for "such fees or supplemental charges as may be authorized by law," the answer is nothing.

Accordingly, the overall constitutional scheme becomes more plain: the legislature must establish and maintain *free* public schools, which the legislature must finance from public funds and not from tuition paid by students required to attend those schools.

5) If, then, the legislature must establish, maintain, and finance free public schools for the benefit of all Kansas school children, how must it divide its resources among districts, schools, and students?

The answer lies in the educational opportunity which the legislature owes under the constitution equally to each child. This legislative duty is not to districts, not to schools, not to towns or cities, not to voters, not to counties, not to personal constituents - but *to each school child of Kansas, equally*.

6) Must, then, exactly equal (per pupil) dollar amounts be furnished to each school?

Again we must review the text of the education article. Great discretion is granted the legislature to devise, change, and reform education in Kansas. Obviously, educational needs, and concomitant costs, will vary from child to child and from place to place. The mandate is to furnish each child an educational opportunity equal to that made available to every other child. To do so will unquestionably require different expenditures at different times and places.

For example, if a child lives a great way from school, the transportation cost for that child will be greater than for another child nearer to school - just to provide him or her the *same educational opportunity*. Similarly, if a child cannot speak English, it may cost more to teach that child English as a second language before the child can learn math and other subjects. Again, a disproportionate expenditure may be required to afford this child an *equal educational opportunity*. Other examples could be given but these suffice to demonstrate that the constitutional mandate is to provide to each child an equal educational opportunity, not necessarily exactly equal dollars.

Because the legislative duty to each child is the same, however, in the court's view, a disproportionate distribution of financial resources alone gives rise to a duty on the part of the legislature, if challenged, to articulate a *rational educational explanation* for the differential. Any rational basis for the unequal expenditures necessitated by circumstances encountered in furnishing equal educational opportunities to each child, however, would conclude the constitutional judicial inquiry.

Not only is this what the constitution says and seems to mean, but isn't this precisely how one would logically expect the people of Kansas to want their constitution interpreted? The Court invites the following experiment: ask any citizen this question: "If our constitution requires the legislature to establish, rriaintain, and finance free public schools from public funds for all the school children of Kansas what kind of educational opportunity would you expect the legislature to be constitutionally required by our courts to provide each individual child? This Court believes the answer you would get is: EQUAL!

7) Does this mean loot "state financing" is required for public schools?

The clear and simple answer is "yes." The reasons are two: (a) that is what the constitution says; and (b) that is what we have always had - for so-called local school districts are legally only political subdivisions of the state, exercising such of the state's taxing authority as the legislature delegates to them in partial fulfillment of the *legislature's* obligation to finance the educational interests of the state. Thus money raised by school districts through "local"taxation is still state money.[1] It just hasn't been thought-of that way.

8) What financial costs of educating students are included in the constitutional mandate placed by the Educational Article upon the legislature?

Let us return to the text of Article 6 again. The key words from section 1 are "establishing and maintaining" and from section 6(b) "suitable provision for finance." Once again, the answer is clear: *all costs, including capital expenditures* are included. If only operating and maintenance costs were intended, the constitution would not say "establishing and maintaining." Furthermore, as previously demonstrated, in all events there is only the state, inasmuch as school districts are merely political subdivisions of the state. If the "state" (as thus understood to include its subdivisions) were not responsible for building needed schools - who or what would be? And how can a school be "established" unless some edifice to house the school be built, bought, rented, or otherwise acquired?

9) Is the legislature's *only* duty to divide its educational resources in such a way as to provide equal opportunities for every child?

Section 6(b) of Article 6 requires the legislature to

provide "suitable financing." Clearly, then, the answer is *no*. In addition to *equality of educational opportunity*, there is another constitutional requirement and that relates to the duty of the legislature to furnish enough total dollars so that the educational opportunities afforded every child are also *suitable*.

In other words, should total legislative funding fall to a level which the Court, in enforcing the Constitution, finds to be inadequate for a "suitable" (or "basic" as some state's decisions prefer) or minimally adequate education, a violation of the "suitable" provision would occur. In the case at bar, the question of what that "minimum" or "basic" level is will not be reached as all parties to these cases have agreed that if present funding levels are equitably divided, so as to provide every child equal educational opportunities as herein defined, no question of minimal adequacy (suitability) exists to be presented at this time. The Court notes, however, for general edification, that such a day has come in other states, most recently Kentucky. *See e.g. Rose v. council for Better Educ*., 790 S.W.2d 186 (Ky. 1990). In that state, after reviewing expert testimony, the court there held a minimally adequate education is one that has the following goals:

1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state and nation;

4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

5) sufficient grounding in the arts to enable each student to appreciate his or her cultural historical heritage;

6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in and surrounding states, in academics or in the job market. (*Rose* at 212-213).

10) Can the legislature be sued for "restitution" arising from past disproportionate funding?

The answer is no. The Education Article of the Kansas constitution creates no express right of action for damages. The remedy for a violation, therefore, is to strike existing laws which do not comply with constitutional provisions.

Furthermore, as an added precaution, in light of the length of time the present system has existed and the reliance placed upon it until now, should violations be found when the facts are, heard, the Court has determined to make its decision in this case operate prospectively only.

Conclusion

From the foregoing, it is apparent that the interpretation given by this Court to the plain text of Article 6 of the Kansas Constitution is entirely in accord with the constitutional history and traditions of the state, the general principles of law laid down over time by our supreme court, the clear weight of reason, logic, and the modern trend of authorities in our sister states. Indeed our own Legislature, in its most recent session correctly anticipated the basic decision reached here.

In reviewing the school financing system here in Kansas, an interim committee in its report to the 1991 Legislature specifically noted,

> It [the hold harmless component of the SDEA] is, therefore, unsuited for the task of equalizing wealth base differences among school districts. *If applied over multiple years, this approach could not be expected to withstand legal challenge*. (Emphasis added). Report on Kansas Legislative Interim Studies to the 1991 Legislature, School Finance Proposal No. 35, at page 314.

Further, the title of the School District Equalization Act and the legislative statement of purpose in the School Consolidation Act of 1963 reflect an understanding of the duty imposed by our Constitution. The latter provides

> The legislature hereby declares that this act is passed for the general improvement of the public schools in the state of Kansas; the equalization of the benefits and burdens of education throughout the various communities in the state; to expedite the organization of public school districts of the state so as to establish a thorough and uniform system of free public schools throughout the state . . . . K.S.A. 72-6734.

Indeed, the State Board of Education's own Strategic Plan for Kansas Public Education for the Year 2005 recites:

> The Kansas State Board of Education affirms it support for high quality education and learning opportunities for all Kansas citizens and for the elimination of differential access on the basis of race, sex, national origin, geographic location,age, socioeconomic status, or handicapping conditions.

The final question may arise, how could we have come from 1861 to 1991 without having had these issues decided. There are several possible answers:

The first is simple - no one ever asked. Courts only decide cases actually presented. Although several cases

were filed over the years, none were ever prosecuted to final conclusion and thus no controlling precedent ever emerged.

Second, for many years the original system of completely supporting public schools, or nearly completely, with property tax dollars was probably constitutionally sufficient. When the assets of the state consisted virtually entirely of unimproved prairie land, and when school districts had about equal amounts of that - the property tax likely resulted in reasonably equal educational opportunities for every child.

Third, as the assets of the state developed unevenly, various funding programs were apparently invented, by the legislature, which gave schools enough funds that they elected not to complain. Today, however, with tight budgets and many demands on the resources of the state, these plaintiffs here before the Court today have elected to chance litigation.

Finally, commencing constitutional litigation is always a high risk enterprise. As perhaps some plaintiffs today will tell you, the scope of the decision reached this day may be quite different from what they had expected or perhaps even desired.

In any event - here we are. The Court has been presented with the questions now and it has an absolute constitutional duty to decide. However difficult, however popular or unpopular - that is the role of the court from which no judicial officer is permitted to retreat. There is no more solemn duty for any Court than to uphold, protect, and defend the Constitution. This duty, however, is not the sole responsibility of the judiciary. All those in government service, the Governor, Legislators, state and local school board members, even educators and teachers who are on the front lines of education, have all taken the same oath and assumed the same duty.

This Court is confident, therefore that as it today discharges its duty under the Constitution, so tomorrow will its counterparts throughout our democratic and constitutional government.

ORDER

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the rules set forth in questions one through ten, supra, are held to be the governing rules of law applicable to the controversy at bar, which rules will be applied to the facts found controlling at trial.

Because these rulings are entirely dispositive, the Court need not, and does not, reach other contentions raised, with the exception of the standing issue, now moot in view of the holding that the legislative duty herein defined inures to the benefit of all Kansas school children, some of whom are plaintiffs in these consolidated causes. (For a sobering look at what happens in places where the guarantees of the Kansas constitution, as announced in this opinion, are not available or are not yet observed, *see Savage Inequalities*, Jonathan Kozol (Crown Publishers, N.Y. 1991).

Done and entered
at Topeka, the
capital, this
fourteenth day of
October, 1991
Terry L. Bullock, District Judge

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1. See for example, Wichita Public Schools Employees Union v. Smith, 194 Kan 2, at p. 4, wherein our Court held:

"A school district is an arm of the state existing only as a creature of the legislature to operate as a political subdivision of the state. A school district has only such power and authority as is granted by the legislature and its power .... is only such as is conferred either expressly or by necessary implication. (Citation omitted).

"The existence of a school district as a political subdivision of the state of Kansas was established and recognized as early as *Beach v. Leahy*, 11 Kan 23, 29."