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No. 994 **October 1990**

ARGUMENTS USED BY PLAINTIFFS AND DEFENDANTS IN SCHOOL FINANCE LITIGATION

by John G. Augenblick

EDITOR'S NOTE*: The following comments were delivered by John G. Augenblick during the 76th Annual GRA Conference on August 8th, at a panel entitled "Equitable Funding for Education: Recent Court Decisions." Dr. Augenblick is a partner in the Denver-based consulting firm of Augenblick, Van deWaters & Associates, and has been involved in school finance litigation in several states. He is currently assisting plaintiffs in four states. Dr. Augenblick is the former director of the Education Finance Center of The Education Commission of the States.*

The Research Council is reproducing this speech with permission because the issue of the financing of public schools is currently before the courts in Michigan and is a matter of great public interest. In January 1990 the Research Council published Council Comments No. 986 titled "School Finance Reform in Michigan: Will Judicial Intervention Be Next?"

Winston Churchill said that Russia was "a riddle, wrapped in a mystery, inside an enigma." Much the same can be said about school finance.

My purpose today is not to discuss the intricacies of school finance theory -- I leave that to the experts in the legislature. Rather, I want to discuss the role of the courts and the litigation process in school finance.

As you know, as of today, there are ten states where the school finance system has been found unconstitutional. The interesting thing is that between 1970 and 1983 school finance systems were declared invalid in seven states -- **California, New Jersey, Connecticut, Washington, Wyoming, West Virginia,** and **Arkansas,** in chronological order. Between 1983 and 1988, no court rulings were issued.

Then in 1989, three systems were declared unconstitutional -- **Montana, Kentucky,** and **Texas.** Finally, in June, **New Jersey's** new system, the one created in response to the 1973 *Robinson* decision was found in violation of that state's "thorough and efficient" requirement, at least as far as 28 urban districts are concerned.

This renewed activity has stimulated a flurry of other cases. I am involved, on the side of plaintiffs, in **Idaho, Minnesota, Missouri,** and **North Dakota.** There are active cases in **Alabama, Alaska, Indiana, Massachusetts, Oregon,** and **Tennessee,** and cases are being contemplated in **Illinois, Nebraska,** and **Oklahoma.**

These cases started in the late 1960s under the theory that state aid for schools was not allocated in relation to the needs of the districts. At the time, no evidence was available about the level of those needs or the cost of dealing with those needs, with the result that the cases**,** which

had been filed in federal court, were thrown out.

A new approach was used in the *Serrano* case in **California.** The theory was that the amount of money spent on education reflected the quality of service, that education was a "fundamental right," like voting, and that the wealth of school districts was a "suspect classification," like race.

If there was a relationship between the wealth and spending of school districts, then the system was not "fiscally neutral," a violation of the equal protection clause in the federal constitution and similar clauses in state constitutions.

While this approach was successful in **California,** it failed at the U.S. Supreme court level *(in Rodriguez).* A different approach, using the language of the state education clause, which required the provision of education in a "thorough" and "efficient" manner, was initially successful in **New Jersey** in 1973. In other states, words such as "basic" or "ample" or "efficient" are used.

Today, plaintiffs file in state court and raise issues under both the equal protection and education clauses of state constitutions.

What Do Plaintiffs Try to Prove?

1. That the wealth of school districts, traditionally expressed as equalized property wealth per pupil, varies significantly and that the variation is growing over time.

The higher the wealth variation, the harder a school finance system has to work -- and if the variation in wealth is increasing, then a system that has not changed recently may not be able to keep up.

The converse is also true: a poorly designed school finance system can work well if property wealth does not vary very much.

2. That per pupil spending differs across districts, that the variation is increasing, and that differences cannot be explained by factors such as the size of the district, the level of spending for pupil transportation, the proportion of pupils enrolled in high cost programs such as special education, regional cost-of-living differences, etc.

In the 1970s the courts typically looked at expenditure differences without examining the causes of such differences. More and more, however, courts are willing to examine spending differences and are not concerned about differences that can be explained by "legitimate" factors.

3. That the per pupil spending and the per pupil property wealth of districts are strongly related. That is, that an important cause of spending differences is wealth, which violates the principle of "fiscal neutrality" -- that spending should be a function of the wealth of the state as a whole, not of the wealth of a particular community.

This is probably the concern with which most people are familiar and serves as the primary basis of school finance litigation. The relationship between spending and wealth may be analyzed in terms of property wealth, income, proportion of low-income families, and even in terms of proportion of minorities.

The weak point of the argument, as pointed out in the *Rodriguez* case in **Texas** in 1973, is that not all people in property poor districts are poor and not all people in wealthy districts are rich.

4. That tax rates, typically property tax rates, vary among school districts, that the variation is growing, and that tax rates are inversely related to spending levels and wealth.

The situation most likely to draw the court's attention is one in which high spending districts have higher than average wealth and lower than average tax rates while low spending districts have low wealth and relatively high tax rates.

A confusing situation is one in which there is a positive relationship between spending and wealth while there is also a positive relationship between spending and tax rates, indicating that higher spending districts, while relatively wealthy, tend to have higher tax rates. In several cases (i.e., **Colorado),** such a situation was interpreted to be a manifestation of local control, and therefore, acceptable.

Under these circumstances, plaintiffs will attempt to show that poor districts are not able to attain the higher tax rates of the wealthy districts due to factors such as "municipal overburden" or the demographics of the districts -- wealthy districts tend to have a higher proportion of voters with a direct interest in the schools or they tend to have more commercial and industrial property so they can export their taxes.

5. That spending for instruction, administration, and other functions varies and is related to the wealth of districts.

That is, it is not just that spending in the aggregate differs, but that spending for particular functions differs and is wealth related.

The ability to make this argument is limited by the data available although typically such data are available for all districts through the Uniform Accounting System.

This disaggregation is one way to eliminate the factors that may cause variation legitimately. By focusing on regular instruction and eliminating special education or transportation, plaintiffs get to the functions that affect the most pupils and that should be similar across districts, all other things being equal.

6. That the number of teachers, the qualifications of teachers, and the salaries of teachers vary across districts and are related to the wealth of districts.

This point begins to get at the issue that resources, not just funding levels, differ, a subtle distinction that shifts the focus from dry dollars to more important indicators of equal opportunity. Few people, if asked, would not want their children to be in classrooms with better qualified teachers, that is, those with masters degrees and more years of experience, and almost everyone would rather see smaller classes, despite the confusion of research on this point. Finally, people generally believe that higher salaries enable districts to attract better teachers.

7. That the number and type of courses, the levels of course offerings, and the availability of courses varies across districts and is related to wealth

This delves further into the way funds are used and the notion of equal opportunity. This is more difficult to deal with both because statewide data may not be available and because district size will affect results. However, controlling for size, and perhaps using a sample of districts, plaintiffs will try to show that, for instance, three foreign languages are offered in wealthy districts while one or two are available in poor districts, that in wealthy districts a fourth year of a foreign language may be provided while in poor districts only two or three years may be offered, and that there are differences related to wealth in the number of science and mathematics courses, advanced placement courses, etc.

8. That the availability of supplies and materials, such as **computers, varies among districts and is related to district wealth.**

This is a way of understanding better what resources money can buy. Obviously, if it can be shown that gross revenues, and then teacher qualifications, and then course offerings, and then even supplies and materials differ across districts and their availability is related to wealth, then a problem exists.

What often happens, however, is that one component, such as the qualifications of teachers, is related to wealth, while another, perhaps supplies and materials, is neutral. This reflects the complex decisions that districts make, some of which are driven by size, location, or community interest and have little to do with wealth.

9. That the quality of facilities varies across districts and is related to district wealth.

This is typically difficult to prove except on the surface. The argument is that all pupils at least need safe schools and that facilities should be similar, regardless of wealth. In particular, there needs to be sufficient room for both instructional and non-instructional activities, including classrooms, libraries, cafeterias, gymnasiums, swimming pools, fields, etc.

10. That state aid is inadequate to support state requirements related to course offerings, numbers of teachers, teacher salaries, class size, etc.

Most states have school district accreditation requirements. Plaintiffs will attempt to show that the state does not provide enough money even to meet those requirements or that, in states with multiple levels of accreditation, poor districts tend to be accredited at lower levels than rich districts.

Even where there is enough money to meet accreditation standards, plaintiffs may try to obtain testimony from state officials, such as state board members, that accreditation standards are very low and that there is not enough money to raise them.

States that have raised accreditation standards or other state mandates related to things like class size are particularly vulnerable to this argument.

11. That particular components of the state aid structure cause inequities.

That is, that:

- Flat grants exacerbate wealth differences by giving equal support to all districts.
- Foundation levels may be low relative to actual spending so that even if they are very strong, as was the case in Montana, they do not go far enough.
- Equal proportional support for categorical programs, such as special education, does not consider district wealth. When a state pays 30 percent of the cost of special education it makes all districts, both rich and poor, pay the other 70 percent.
- Local unmatched funds, in the form of voted leeway, create inequity.
- Hold harmless funds are inappropriate because they perpetuate inequities from years ago. Hold harmless is a short-term requirement to implement a new system -- it should be phased out over some reasonable time.
- Proportional reduction in state aid when there is a shortfall in state aid may interfere with equalization.

How Will Defendants Respond?

1. The first line of defense is that money "doesn't make a difference." That is, the defense will try to show that there is no relationship between how much districts spend and how well pupils perform. This is not always easy to do since (1) a common test may not be used in every district, and (2) standardized tests may not be the best indicator of pupil performance or of what a state expects schools to accomplish.

Further, this argument may be thrown out as being irrelevant. Whether money "makes a difference" is not the issue -- what is the issue is whether every child has the same educational opportunities, regardless of whether such opportunities actually result in better performance.

2. That every district has sufficient resources to meet state accreditation requirements.

The state will argue that, even if differences in revenue exist, all pupils have sufficient funds to assure that they are exposed to whatever "input" resources the state feels are important, as indicated by accreditation standards.

This will be proven by showing that all districts meet accreditation standards of the state or of the various accrediting agencies and that districts that do not meet such standards are delinquent for reasons other than money.

3. That whatever variation exists in spending can be explained by **factors such as size, transportation, or special education, which I mentioned earlier.**

We have already discussed this point but it is critical. If nothing else, the state will show that at least a portion of the variation in spending is a result of factors beyond the control of districts, at least discrediting plaintiffs who typically show the worst variation they can find using gross figures for the highest and lowest spending districts in the state.

4. That differences in spending, and particularly in how funds are spent, reflect local control.

This is most often discussed in terms of tax rates. That is, the higher spending districts are the ones with the higher tax rates so that effort, not wealth, is the cause of spending disparity.

This may be a tough argument to make if there is a positive association between wealth and tax effort, the situation that, for instance, existed in **New Jersey** in the most recent case. Plaintiffs argued that although low spending districts did, in fact have low rates, those rates were not selected by choice but resulted from competition by other services for tax dollars.

Nonetheless, this argument has been a potent one for defendants.

5. That another explanation of spending differences is poor management.

This is where things can get pretty dirty. The defendants will argue either that some districts simply make poor choices about the use of their funds, resulting in low salaries, large classes, or sparse course offerings -- or -- they will try to show that districts waste money by , for example, providing expensive benefits to employees, hiring too many food service workers or bus drivers, making poor investment decisions, paying too much to buy out superintendents' contracts, building unnecessary facilities, etc. This was one of the factors that entered into the court's decision in **Kentucky,** although it did serve to strengthen the court's convictions, not sway them in the other direction.

6. And finally, that education is not a fundamental interest guaranteed by **the state.**

This is a particularly tough position for any educator to swallow. If education is seen as a fundamental right, it raises education's bargaining power relative to other state functions such as higher education, roads, or prisons. Most educators would prefer to see education declared such a right. However, if defendants can win this point, the court will review the school finance system at a different level of scrutiny, requiring the state to demonstrate only that the system is rational.

Conclusions

How have states responded to successful litigation? In most cases, a decision declaring the school finance system unconstitutional typically leads to:

- More state aid for schools.
- More state control, although such control may not be direct.

Kentucky -- state reduced direct control over number of employees but will set standards for school achievement.

New Jersey -- districts may choose to spend less than the foundation level, but they must show that pupils are achieving at adequate levels.

- The use of one or more "draconian" measures, such as limits on spending, recapture, or equalization of state retirement program.

- Increased oversight, as exemplified by Kentucky's Education Accountability Committee, a new office within the Legislative Research Commission, which, among other things, is charged with evaluating the school finance system.

In conclusion, let me paraphrase Judge Learned Hand:

> A society so divided that the spirit of equity is gone –
> no court can save;
> That society where that spirit flourishes --
> no court need save; and
> In a society which evades its responsibility
> by thrusting upon the courts
> the nurturing of that spirit --
> that spirit in the end will perish.