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ABSTRACT

This paper contains an overview of selected school finance cases litigated in local, state, and federal courts. The first section contains a review of state school finance cases. Constitutional challenges to states' school finance systems were affirmed by the Connecticut Supreme Court, defeated by the Michigan Court of Appeals, and returned to a lower court by the Supreme Court of New Hampshire; in addition, seven property-poor school districts have filed suit in Texas. School districts in Michigan challenged the state's right to reduce school aid. The next section of the paper examines local fiscal issues including litigation prompted by school board decisions affecting areas such as property tax exemption, disposition of interest earned on school funds, extracurricular program fees, transportation, and school district residency requirements. A federal district ruled in Philadelphia that school districts may file a class action suit against 55 manufacturers to recover the cost of asbestos removal. The third section of the paper addresses controversial issues at the federal level: (1) the authority of the federal government to recover misspent Title I funds; (2) school lunch regulations involving soft drinks; and (3) the government's financial responsibility for the Chicago Board of Education's desegregation plan under the terms of a 1980 consent decree. The fourth section addresses the issue of public financial support for nonpublic schools. (MLF)

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Current Litigation Involving School Finance Issues

William E. Sparkman

This chapter contains an overview of selected school finance cases litigated in local, state, and federal courts with decisions rendered in the final months of 1983 and during 1984. An attempt has been made to select a wide range of cases illustrating the variety of fiscal issues confronting the states and local school districts. While some of the cases reported may not have a direct connection to school finance, the fiscal implications should be apparent. The first section contains a review of state school finance cases focusing on constitutional challenges and other issues. The next two sections are directed to cases at the local and federal level. In the final section, the issue of public aid for nonpublic schools is presented.

State School Finance Litigation

Constitutional Challenges

There have been no state supreme court pronouncements on school finance litigation since 1983, when the highest courts in Maryland and Arkansas reached contrary decisions with respect to the constitutionality of their state's school finance law.[1] Because there are extensive summaries of previous school finance cases available elsewhere, this section focuses only on school finance litigation during 1984.[2]

In *East Jackson Public Schools v. State*, the Michigan Court of Appeals upheld the constitutionality of the state's school finance system.[3] Twenty school districts had sought a declaratory judgment

1. The Maryland Supreme Court in Hornbeck v. Somerset Cty. Bd. of Ed., 458 A.2d 758 (Md. 1983) upheld the state's school finance law. The school finance system in Arkansas was declared unconstitutional in Dupree v. Alma School Dist. No. 30, 651 S.W.2d 90 (Ark. 1983).

2. *See e.g.*, Alexander & Salmon, *Developments in Public School Finance: Keeping the Doors Open*, in School Law in Changing Times 206 (M. A. McGhehey ed. 1982); Sparkman, *School Finance Litigation in the 1980s*, in Educators and the Law: Current Trends and Issues 96 (Thomas, Cambron-McCabe & McCarthy eds. 1983); Cambron-McCabe, *The Changing School Finance Scene: Local, State, and Federal Issues*, in School Law Update: Preventive School Law 106 (Semler & Jones eds. 1984).

3. 348 N.W.2d 303 (Mich. Ct. App. 1984).

that the system of financing public schools violated the state's constitution because of disparities in per-pupil funds between the districts. Their arguments were summarized in three allegations. First, the unequal funding violated the state's education article of the constitution. Second, the state constitution created a specific constitutional right to equality of educational finance support which was denied by the school finance formula. Third, the operation of the school finance system denied students the equal protection of the law under the state constitution. The trial court granted the state's motion for summary judgment and dismissed the complaint.

In quick succession, the court of appeals rejected the school districts' allegations. The court held that education was not a fundamental right under Michigan's constitution and that the state's education responsibility was not synonomous with the alleged obligation to provide equal school finance support. Furthermore, there was no denial of equal protection. The court also addressed the issue of whether the school districts had standing to sue. It concluded that the school districts lacked standing to bring the action, because they were merely creatures of the state without power to bring suits to overturn legislation.

In February 1984, the Supreme Court of New Hampshire returned to the superior court a challenge to the state's school finance system.[4] The superior court was directed to determine whether the parties were in disagreement over the "fundamental threshold issue." That threshold issue, according to the supreme court, was the relationship between financial inputs and measurable educational achievement. After reviewing the extensive record of the case, the supreme court noted that the absence of material on the cost-quality issue as well as the size and scope of the record warranted returning the case for further consideration in the lower court. The plaintiffs have alleged that the state's school finance system violates the education and the equal protection clauses of the New Hampshire Constitution. Because of the heavy reliance on local property taxes to support the schools, the plaintiffs, who are seven property-poor school districts, contend that their students are deprived of equal educational opportunities as compared to students in districts with greater property wealth. The state's position is that education is not a fundamental right under its constitution and is not obligated to provide equal funding for all school districts.[5]

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4. Casseman v. New Hampshire, No. 83-371 (N.H. February 13, 1984) (order remanding to the Superior Court for further proceedings).

5. Foster, *N.H. Court Refuses School-Aid Case Pending Ruling on 'merits'*, Educ. Week, March 7, 1984, at 5.

Eleven years after the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriquez*, the Texas school finance system has been challenged as violative of the state constitution. In *Rodriquez*, the Supreme Court upheld the Texas system of school finance against a challenge that it violated the fourteenth amendment's equal protection clause.[6] Rejecting the lower federal court's use of the strict scrutiny standard, the Supreme Court held that education was not a fundamental interest under the constitution nor was a suspect class of persons disadvantaged by the operation of the state's school finance plan. The Court held that there was a rational relation between the finance law and the state's desire to promote and preserve local control of public education. In the years following that decision, the Texas legislature has attempted to address the equalization problems in the school finance plan and has made substantial increases in state education aid. Yet, disparities in per-pupil spending continued to exist because of the vast disparities in local property wealth among the school districts in the state.

On May 23, 1984, seven property-poor school districts filed suit in state court again challenging the Texas school finance law. In *Edgewood Independent School District v. Bynum*, the plaintiffs alleged that the finance system violates the education article and the equal protection clause of the state constitution.[7] Included as a plaintiff in the suit is Demetrio Rodriquez, who filed the original federal court challenge to the Texas school finance plan in 1969. The plaintiffs seek a declaratory judgment that the law is unconstitutional, an injunction against the operation of an illegal finance plan, and attorneys' fees and other costs.

During the summer of 1984, the Texas legislature met in a special session to consider a major school reform package proposed as a result of the Governor's Select Committee on Public Education, headed by H. Ross Perot. Included in the package of education reforms was an overhaul of the school finance law. It remains to be seen whether the new finace law reduces expenditure disparities. The plaintiffs in the pending lawsuit will file an amended petition in order to keep the litigation active. There is likely to be other litigation in the aftermath of the new school finance law. Some districts are considering challenging the Price Differential Index, which was included in the new law to compensate for cost of education differences between the districts resulting from teachers' salaries.

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6. 337 F. Supp. 280 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).
7. Edgewood Indep. School Dist. v. Bynum, No. 362516 (Tex. Dist. Ct. Travis County filed May 23, 1984)

Enforcement of Previous Decisions

Although the New Jersey Supreme Court in 1976 upheld the facial validity of the state's newly enacted school finance law, it has been alleged that the disparities in per pupil spending have increased in spite of the new law.[8] In February 1981, an action was filed against the state seeking a declaratory judgment that the school finance plan violated the state and federal constitutions. The complaint was dismissed in 1983, for failure to exhaust administrative remedies and plaintiffs appealed.

In *Abbott v. Burke*, the state superior court observed that the trial court erred in dismissing the complaint because it misinterpreted the plaintiff's claim to relief.[9] According to the court, the relief sought was a declaration that the school finance law was unconstitutional, instead of the correction of deficiencies in school programs, services and facilities. The fact that the plaintiffs were seeking redress of an alleged constitutional violation precluded an administrative remedy. The superior court concluded that the doctrine of exhaustion of administrative remedies is not applicable when "[t]he issue to be decided is solely one of law, involving a question of constitutionality which is beyond the power of the Commissioner to decide . . . ."[10] The order of dismissal was reversed and the case was remanded for a plenary hearing.

According to the Superior Court of Connecticut, the state has failed to meet its constitutional requirement to provide a substantially equal educational opportunity to its public school students because the school finance law is not "appropriate legislation" to that end. The court in its April 1984, decision in *Horton v. Meskill* found that the state was unable to show a compelling interest to justify various elements of the school finance plan that were found "to impinge on the fundamental right to an education."[11]

Even though the litigation was a challenge to the present school finance law, the court found that it was technically a continuation of the original action commenced in *Horton v. Meskill* in 1974.[12] Three years later, in 1977, the state supreme court affirmed a lower court's ruling that the existing system of school finance violated the state constitution.[13] The legislature adopted, under court pressure, a new school finance plan in 1979, consisting of two major components, the

8 Robinson v. Cahill, 355 A 2d 129 (N.J. 1976)
9. 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984).
10 *Id.* at 1285
11 Horton v. Meskill, No. 185283, slip. op. (Conn. Super. Ct. April 24, 1984)
12. *Id.* at 3, 31 Conn. Supp. 377 1974).
13. *Id.*, Horton v. Meskill, 376 A.2d 359 (Conn. 1977).

Guaranteed Tax Base Grant Formula (GTB) and the Minimum Expenditure Requirement.

It should be recognized that the superior court in its recent decision did not find the GTB formula unconstitutional. What was at issue was the level of funding under the formula and various amendments to the 1979 law that perpetuated fiscal and educational disparities among the school districts. The court agreed with the plaintiffs' contention that elements of the school finance law were not appropriate, and ordered the state to take corrective action to bring the law into constitutional compliance. First, the court concluded that the minimum aid provision was unconstitutional and enjoined its distribution. Second, it held that the three-year old data requirement used in determining certain formula elements was unconstitutional and ordered that all data be no less than two years old. Third, the court concluded that the proposed funding levels and phase-in extension were violative of the constitution and ordered state officials to distribute funds necessary to provide a funding level of 100% of the GTB. Fourth, the court ordered the state board of education to take appropriate action to enforce compliance with a fully implemented minimum expenditure requirement. Fifth, the court concluded that the optional program of study for grades 9-12 provided in statutes was inappropriate and, therefore, unconstitutional.[14] The defendant Canton Board of Education was ordered to adopt and implement the core curriculum enacted by the legislature for high school graduates of the 1987-88 school year. In addition, the state board was directed to enforce the implementation of the core curriculum in all school districts. Finally, the court granted a stay of its decision until the state supreme court rules on appeal.

Reduction in State Aid

In an effort to control public taxes and spending, Michigan voters approved an amendment to the state constitution, known as the Headlee Amendment, to be effective December 22, 1978. The amendment prohibits, among other things, the state from reducing its proportionate share of the financing of the "necessary costs" of existing activities or services required of local government by state law. Because of severe economic problems experienced by the state in recent years, there has been a reduction in the amount of state aid available to the local school districts. School districts began to challenge the state's right to reduce school aid in view of the provisions of the Headlee Amendment.

14. *Id.*, Supplemental (Modified) Judgment (May 29, 1984).

The Michigan Court of Appeals in *Durant v. Department of Education* has interpreted the Headlee Amendment as it applies to school districts.[15] The court first noted that "education," though required by the state constitution, was too indefinite to be considered an existing activity or service required by state law. According to the plain language of the Headlee Amendment, state law refers only to statutory enactments and state agency regulations. The court reviewed the state code and found that it contained several identifiable activities and services which school districts must provide including driver education programs and courses in the constitution, history, government, civics, health, physical education, bilingual instruction (in school districts with twenty or more children of limited English-speaking ability), and special education. Also, auxiliary services that are provided to public school students must be provided to non-public school students. All other activities and services, according to the court, are completely a matter of local discretion and "do not fall within the purview of the Headlee Amendment because they are not specifically mandated by the state legislature or a state agency."[16]

"Necessary costs" were defined as "those which are essential to the completion of the intended purpose of the state mandated activity."[17] The court determined that such costs would be computed on a statewide basis rather than locally. In reviewing the type of state aid available to local school districts, the appeals court concluded that the state was not required to maintain the level of unrestricted aid to a district that was being provided at the time the Headlee Amendment went into effect. However, the state's proportionate share for the necessary costs of the categorical programs (those required of the school district by law) must be maintained at the pre-Headlee Amendment levels. Even though the district's claim was dismissed by the court, the district was allowed the right to a review before the local governments claims review board for a factual determination of whether the costs incurred by the district for the categorical programs were excessive or necessary.

Vouchers

School reform mandates typically emerge from government bodies such as state legislatures or local school boards. A recent grassroots

15 Durant v Department of Educ., 342 N.W.2d 591 (Mich. App. 1983). *See, e.g.*, Waterford School Dist v State Bd. of Educ., 344 N.W.2d 19 (Mich. App 1983) (where the court, following its ruling in *Durant*, dismissed school district's complaint that the reduction in state education aid did not violate the terms of the Headlee Amendment).

16. *Id.* at 596.

17. *Id.* at 597.

approach in Colorado suggests that government bodies may be bypassed in order to bring about changes in the educational system through constitutional amendment. A group of Colorado residents attempted, through the initiative process, to get a proposed state constitutional amendment on the November 1984 general election ballot. The substance of the proposed amendment would have required the legislature to establish a core curriculum in the public secondary schools, to provide merit pay for teachers, and to institute a voucher system for financing all public and nonpublic schools.

The Colorado Education Association filed suit claiming deficiencies in the title of the proposal, the ballot title, and the submission clause. The state supreme court heard the case and noted that its role was "to determine whether the descriptive documents fairly represent the purpose of the proposed amendment."[18] The plaintiffs had alleged that the documents in question failed to reflect certain limiting language contained in the proposed amendment. They claimed that the omission of the limiting language should invalidate the proposal. After reviewing the documents, the court found that the phrases "required by law to be educated therein" and "which are not pervasively sectarian" contained in the proposed amendment were omitted from the proposed title. The supreme court concluded that the documents failed to describe the "class of students and the character of the institutions" affected. Without the limiting phrases, the documents "do not fairly reflect the contents of the proposed amendment."[19] The court remanded the case to the Initiative Title Setting Board with directions to add the missing phrases in the appropriate places in the title, ballot title, and submission clause to correct the omission. The proponents of the initiative, after the defects were cured, failed to get the number of signatures necessary to get the proposal on the November ballot.

Local Fiscal Issues

While federal and state litigation involving school finance issues tends to gain the most attention in the education community, local school districts engage in a variety of legal conflicts with fiscal implications. While some issues may not involve school districts directly, the fiscal impact is clear (e.g. property tax examptions). Other issues have a direct bearing on the local treasury. This section contains a review of selected cases to illustrate the diversity of legal issues impacting on school finance at the local level.

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18. *In re* Proposed Initiated Const. Amend. of Educ 1984, 682 P.2d 480 (Colo. 1984).
19. *Id.* at 482.

Property Tax Exemptions

The question of whether certain real properties qualify for tax exempt status continues to have a prominent place in local school finance issues. Whether the property in question is used for a religious, educational, or other not-for-profit reason and qualifies for tax exemption is a frequently litigated issue. Most of these cases involve a local board of assessors or local government rather than a school district since local tax appraisal and collection functions typically are performed by county government.

The Illinois Supreme Court in 1983 upheld the facial constitutionality of legislation granting property tax exemptions for parsonages, fraternity and sorority houses, and homestead improvements on property owned and occupied by a natural person for residential purposes.[20] In regard to the exemptions for parsonages and fraternity and sorority houses, the court noted that the use of the facility was determinative of its eligibility for tax exempt status. If the facilities were primarily used for the exempted purposes, according to the court, the fact that they were used for other purposes does not destroy the exemption. Also, the homestead improvements exemption was declared to be within the legislature's broad powers as authorized by the state constitution. Therefore, the legislation granting the three classes of exemptions was facially valid.

The highest courts in Georgia and Maine recently upheld tax exemptions for fraternity and sorority houses located on college campuses. The Georgia case involved the property of a nonprofit housing corporation formed at the university to provide housing for the chapter members.[21] The court determined that the houses qualified for exemptions as "buildings used for the operation of educational institutions." In Maine, the court found that the fraternity houses were built by the college on campus property as an integral part of its housing system.[22] Because of the location of the fraternity houses on campus property and the degree of control exercised by the college over the fraternities, the court concluded that the chapter houses were used by the college solely for its own purposes and qualified for the tax exemption. The court noted that the incidential use of the chapter houses for recreation and socialization will not defeat the tax exemption.

Whether the property of church organizations is used exclusively for religious purposes has been the subject of cases in Illinois and Texas. The Appellate Court of Illinois determined that the property

20. McKenzie v. Johnson, 456 N.E.2d 73 (Ill. 1983).
21. Johnson v. Southern Greek Housing Corp., 307 S.E.2d 491 (Ga. 1983).
22. Alpha Rho Zeta v. Inhabitants of Waterville, 477 A.2d 1131 (Me. 1984)

of the Evangelical Teacher Training Association was used exclusively for religious purposes and was entitled to tax exemption.[23] The association was organized by five Bible colleges for the purpose of upgrading Christian education in seminaries, adult programs, and Sunday schools. Its activities included the preparation and sale of Bible study materials and speaking and lecture services by its officers. The court noted that "[w]hether a party has been organized and operated exclusively for an exempt purpose is to be determined from its charter and by-laws and the actual facts related to its method of operation."[24] The court found that the officers were involved in teaching and demonstrating teacher-training methods that served to accomplish directly the organization's religious purpose.

A Texas court ruled on the question of whether property owned by the Texas Conference of Seventh-Day Adventists, which was used as a ranch in conducting the "religious, educational, and physical development" of young people, qualified for tax exempt status.[25] The court found that a change in statutory language affected the tax exemption. The statute in effect prior to 1980 required that in order for an association to qualify for tax exemption it had to be, among other things, *"engaged"* in the joint and threefold development of young people (emphasis added)." The ranch qualified for the exemption under that statute. The statute was amended in 1980 to require an association to *engage primarily* in the three specified activities. The court held that the association was not entitled to the exemption under the amended statute because it was not engaged primarily in the required activities. The court concluded that the association engaged primarily in religious activities and that the development activities conducted on the ranch were subordinate to its religious mission.

Nonprofit organizations in a community often argue that they should be exempt from local property taxes since they enjoy federal tax exempt status. A nonprofit school for gymnastics and performing arts was not entitled to property tax exemption as "property used for public or charitable purposes," according to the Supreme Court of Vermont.[26] Since the school was not providing an essential government function and since its services provided private benefits to a limited class of persons, it was not entitled to tax exemption.

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23. Evangelical Teacher Training Ass'n v. Novak, 454 N.E.2d 739 (Ill. App. Ct. 1983).

24. *Id.* at 741.

25. Texas Conference Ass'n v. Leander Indep. School Dist., 669 S.W.2d 353 (Tex. Civ. App. 1984).

26. Ski-Lan Gymnastics v. City of Rutland, 465 A.2d 1363 (Vt. 1983).

Sometimes a unit of government can act beyond its authority in granting or promising to grant tax exemptions. An interesting case arose in New York where a school district adopted a resolution that tax exemption be granted to the owners of a resort hotel in return for the owner's offer to pay 100% of the assessed taxes in lieu of taxes, if casino gambling were legalized in the state and if the owners were to institute gambling at their proposed hotel site.[27] The resolution was challenged by local taxpayers as beyond the authority of the school board. The court determined that the actions of the owners of the proposed hotel and the school board constituted a contract and that the school board made the tax exemption resolution pursuant to the contract. According to the court, the resolution was null and void as an attempt of the school board to bargain away or sell its powers.

When school districts are involved with other units of local government in litigation involving tax exemptions, they should be certain to appear in the action and not rely on the other units of government to protect their interests. A religious corporation brought an action against a school district, town, and county for a declaratory judgment that it was a tax exempt organization and entitled to tax exemption.[28] The school district failed to appear in the action and a default judgment was entered against it. In refusing to vacate the judgment, the court held that the school district did not show a valid excuse for failing to appear in the action and that it lacked a meritorious defense. The court found that the district had made an *ex parte* determination that its interest would be protected by the town's defense of the tax assessment because it believed that the action against it was "contingent upon and derived from the town's assessment." The result of the default judgment was that the religious organization was relieved of paying the school taxes for all the years in question; whereas, in the settlement with the town and county, the organization was required to pay property taxes for two of the years.

Disposition of Interest Earned on School Funds

Most school districts rely on other units of local government to be the tax collection agency. Typically, local property taxes are collected by county government and distributed to the school districts on a periodic basis. With a good cash management program, substantial interest can be earned through the investment of the undistributed tax revenues. School districts have increasingly asserted their right

27. Citizens to Save Minnewaska v. New Paltz Cent. School Dist., 468 N.Y.S.2d 920 (N.Y. App. Div. 1983).

28. D'Betlan v. Town of Shandaken, 473 N.Y.S.2d 71 (N.Y App. Div. 1984).

to the interest earned on the tax revenues collected on their behalf by another unit of local government.

Several school districts located within Tulsa County (Oklahoma) brought an action against county officials seeking, among other things, a declaratory judgment that they were entitled to receive all interest earned on state and local tax revenues apportioned to them by the county.[29] At issue in the controversy were two statutes: a special statute requiring that all interest revenues be apportioned and credited to the common school fund of the county and a general statute controlling the duties of county officials in various fiscal matters. In a matter of statutory construction, the state supreme court held to the established position that "where there are two statutory provisions, one of which is special and clearly includes the matter in controversy, and prescribes different rules and procedures from those in a general statute, the special statute . applies."[30] Therefore, the school districts were entitled to the interest from the county under the special statute.

An Oregon court reached a similar conclusion in a dispute between a school district and county over accrued interest on mineral lease income received by the county.[31] During the 1930's, the county had foreclosed numerous deliquent tax liens and sold the land, but reserved the mineral rights. The county began leasing those mineral rights for oil and gas production in 1975. The income from the leases was deposited in the county general fund and periodically the mineral lease income, but not the interest earned on it, was distributed to various governmental entities, including the school districts. One of the county's school districts filed suit for a declaratory judgment that it was enitled to a prorata share of the interest earned on the mineral lease revenues. The state appeals court sustained the trial court's determination that school districts were to receive annually the accrued interest. The appeals court found that since the legislature had designated the funds which go to each local government unit, the county was without discretion in the allocation of those funds. According to the court, the counties, however, were entitled by statute to 10% of the principal and interest from the mineral leases as administrative costs

As the result of a recent action by the Colorado Supreme Court, some school districts in the state are not entitled to interest earned

29. Independent School Dist. No. 1 v. Board of County Comm'rs, 674 P.2d 547 (Okla. 1983).

30. *Id.* at 550.

31. State *ex rel.* School Dist. No. 13 v. Columbia City., 674 P.2d 608 (Or Ct. App [illegible]).

on local tax revenues collected by the county.[32] The court held that although a state statute does require counties to credit to the school districts interest earned on funds collected through county tax levies, the statute did not apply to those school districts which elected to have the county apportion the tax revenues at regular intervals. The court determined that taxes received by the county for school tax levies were county funds until allocated and distributed to the electing school districts.

Validity of School District Residency Requirements

The authority of school districts to enact residency requirements pursuant to state statutes and to assess a tuition fee on nonresident students continues to provide legal challenges. Even though the United States Supreme Court in *Martinez v. Bynum* upheld the facial constitutionality of a Texas statute establishing residency for school purposes, local residency guidelines adopted and implemented to state statutes have been challenged.[33] In *Rodriquez v. Yselta Independent School District*, a challenge was made to a local policy denying tuition free admission into its schools in those cases where a school-age child lives separate and apart from his parents guardians, or other persons having legal control of him under a court order.[34] Mirella Hermosillo was left by her natural mother in the care and control of Margarita Rodriquez when the child was six months old. Mr. and Mrs. Rodriquez, who were permanent residents of the school district, reared the girl and provided her sole support. When Mirella was school age, she was granted admission into the public schools on a tuition-free bases contingent upon the Rodriquez family securing a legal guardianship. Mrs. Rodriquez did not want to assume a legal relationship with Mirella at that time. She filed suit against the school district alleging that the local admission policy denied the child a tuition-free public school education in violation of state statutes and the equal protection clauses of the federal and state constitutions.

The Texas Court of Civil Appeals found that the school district's

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32. Calhan School Dist. No. 1 v. El Paso Cty., No. 83SC255, slip. op. (Colo. August 20, 1984).

33. Martinez v. Bynum, 103 S. Ct. 1838 (1980).

34. Rodirquez v. Yaleta Indep. School Dist., 663 S.W.2d 547 (Tex. Civ. App. 1983). *See also* Harris v. Hall, F. Supp 1054 (E.D.N.C. 1983) (where a federal district court upheld the facial constitutionality of North Carolina statutes containing the following challenged features. a domicile requirement for determining the residential status of students, a custody provision requiring that a student live with a parent or guardian domiciled in the district, and a tuition charge for students who are not domiciled in the district).

policy was inconsistent with the residency standards in state statute.[35] This inconsistency, however, was not sufficient to defeat the local policy since the court concluded that it was promulgated and adopted pursuant to another statute, which contained the legislature's broad grant of discretionary power giving school trustees "the exclusive power to manage and govern the public free schools of the district." [36] The local policy, though different from the residency provided in state statute, was upheld as being within the discretion of the school board. In addition to this central ruling, the court found no violation of equal protection or due process.

In reaction to severe budget cuts in the federal impact aid programs, the Onslow County (North Carolina) Board of Education adopted a policy requiring that all nondomiciliary students enrolled in the county's public schools be charged tuition. Since Onslow County is the location of a large United States Marine Corp installation, Camp Lejeune, the direct impact of the policy was on federally-connected students.

The United States government filed suit against the school board alleging that the tuition requirement violated the constitution's supremacy clause and breeched a contract between the government and the board of education.

The position of the United States was affirmed by the Fourth Circuit Court of Appeals in *United States v. Onslow County Board of Education,* in 1984.[37] The court of appeals first considered the contract question and found that the written assurances provided by the school district to the federal government as a condition for the receipt of impact aid for school construction constituted a contractual obligation. One of the written assurances was a commitment on the part of the school district to provide education to federally-connected students on the same basis as other students so long as the buildings constructed with impact aid remain in use. Since the imposition of the tuition fees on predominately the federally-connected children constituted a breech of contract, then the United States government was entitled to sue for specific performance.

In regard to the constitutional issues, the court held that the tuition charge was a tax substitute prohibited by the Soldiers' and

35. Tex. Educ. Code Ann. § 21.031(d) (Vernon Supp. 1982) provides that a student can establish residency for school purposes separate and apart from his parent, guardian, or other person having legal control of him under an order of a court, if his presence in the school district is not for the primary purpose of attending the public schools. The Ysleta I.S.D. policy denies tuition-free admission for such students.

36. Tex. Educ. Code Ann. § 23.26 (Vernon Supp. 1982).

37. 728 F.2d 628 (4th Cir. 1984).

Sailors' Relief Act under the supremacy clause of the United States Constitution; that the tenth amendment could not be used as a defense to congressional action authorized by the war powers provision of the Constitution under which authority Congress enacted the Soldiers' and Sailors' Relief Act; and that the tuition charge discriminated against federally-connected persons, which was considered to be discrimination against the federal government prohibited by the supremacy clause.

Other Local Fiscal Issues

School districts confront a variety of other legal issues with fiscal consequences as illustrated by several recent cases. One of the more notable cases from California where the state supreme court in *Hartzell v. Connell* ruled that it was unconstitutional for school districts to charge students fees for participation in extracurricular programs.[38] The court found that extracurricular programs were educational in character and fell within the free school guarantee of the state constitution. The imposition of fees for participating in such activities, according to the court, would be a constitutional violation. The fact that the school district provided waivers to indigent students, or that the district suffered financial hardship, was not sufficient to overcome the constitutional defect in the activity fees.

The tortuous road of litigation is illustrated by a Pennsylvania school transportation case that has been heard in the federal district and appeals courts on two occasions and may well be heard by a state court. The case began when parents challenged a school board's decision to eliminate round-trip bus service for children in the district's half-day kindergarten program in favor of one-way trips depending on which session the child attended. In the most recent decision in the case of *Shaffer v. Board of School Directors,* the Third Circuit Court of Appeals reversed the district court's order supporting the school board's policy.[39] Finding no constitutional flaw in the school board's transportation rule, the appeals court remanded the case to the district court with instructions to dismiss the pendent state claim without prejudice. The appeals court concluded that the lower federal court had abused its discretion in retaining jurisdiction over a state law claim in the absence of a federal constitutional question and in view of the fact that the issue had important implications for public education in the state.

Where a school district overpays teachers by mistake, it cannot

38 679 P 2d 35 (Cal. 1984).

39 Shaffer v. Board of School Directors, 730 F.2d 910 (3d Cir. 1984).

withhold a portion of their salaries in an attempt to recover the overpayments, according to the Texas Court of Civil Appeals.[40] Finding that the school district was a creditor, the court ruled that it had no right to resort to self-help through salary deductions, an action prohibited by the state constitution and statutes.

Several families in a Nebraska school district sent their children to high school in a nearby South Dakota school district because it was nineteen miles closer to their home than the local high school. When the local school board denied the parents' request for tuition payments, they appealed to the state board of education for a reversal of the local board's decision. The board's action was sustained and the state supreme court had to determine whether the state board's decision was supported by sufficient evidence and if it was arbitrary and capricious. The court concluded that sufficient evidence did exist and that the decision was not arbitrary and capricious even though the students would have to travel a greater distance to their local high school than to a closer one outside of the state.[41]

In September 1984, a federal district court in Philadelphia ruled that school districts may file a class action suit against fifty-five manufacturers to recover the costs of asbestos removal.[42] School districts that have already removed asbestos will be able to join in the suit to recover money already spent in the removal efforts. It was reported that the court held that the class action would not be available to individual schools that may elect to sue the asbestos manufacturers for compensatory damages. In order to sue for punitive damages, however, the districts must join in the class action.

Federal Aid Issues

Title I Recovery

In *Bell v. New Jersey and Pennsylvania,* the United States Supreme Court held that the federal government had the right to recover misspent title I funds from the states.[43] the court noted that the proper way for the government to assert its right was through administrative proceedings in the department of education with the states retaining the right to judicial review of the department's final decision. The purpose of court review would be to determine if the agency's final decision was supported by substantial evidence or if the proper legal standards were applied. The case was remanded to

40. Benton v. Wilmer-Hutchins Indep. School Dist., 662 S.W.2d 696 (Tex. Civ. App. 1983).

41. Richardson v. School Dist. No. 10, 348 N.W.2d 873 (Neb. 1984).

42. School Dist. of Lancaster v. Lake Asbestos (E.D. Pa. 1984) (No 83-0268).

43. 3 S. Ct. 2187 (1983)

the court of appeals for a review of the issues involved in the states' challenges to the department of education's holding that they were liable to the federal government for misapplied title I funds. Specifically, the Supreme Court noted that the primary question on remand was whether the substantive standards of the 1978 amendments to the Elementary and Secondary Education Act (ESEA) apply to title I grants made under preexisting law.

The court of appeals in *State of New Jersey v. Hufstedler* considered New Jersey's claim that the attendance area eligibility standards contained in the 1978 amendments should be applied retroactively.[44] The original regulations provided that an attendance area qualified for title I funding based on either the number or percentage of children from low-income families as compared to the other attendance areas or the school district as a whole. In 1978, Congress amended ESEA to permit local school districts, under certain circumstances, to declare a school attendance area eligible for title I aid of at least 25% of the children in that area were from low-income families.

New Jersey maintained that the 1978 standards should be the basis for determining the eligibility of attendance areas to receive title I funds, even though the eligibility decisions had been made prior to 1978. The nub of the problem was that during 1970-72, Newark determined title I eligibility using a method that overstated the percentage of children from low-income families. The court of appeals noted that the state had raised this argument for the first time on appeal, but concluded that it had discretion to consider the issue.

In deciding that the 1978 amendments applied retroactively, the court concluded that such an application would not result in "manifest injustice" and that nothing in the amendments or their legislative history could be found that would preclude retroactive application. The court felt that Congress was aware of the inequities caused by the application of the original standards and had amended the law with the intention that the changes be applied to previous decisions. The case was remanded to the secretary of education to determine which school attendance areas in Newark that had title I projects in question during the relevant years would qualify under the 1978 standards. The federal government appealed the decision and the United States Supreme Court has granted *certiorari*.

In another title I recovery case, the Seventh Circuit Court of Appeals affirmed a decision of the Education Appeal Board that Indiana must refund $932,482 in misspent title I funds to the govern-

44. 724 F.2d 34 (3d Cir. 1983), *cert. granted sub nom.* Bell v. New Jersey, 53 U.S.L.W. 3235 (U.S. October 1, 1984) (No. 83-2064).

ment"[46] Indiana had sought review of findings that title I funds had supplanted state and local funds in several programs and that another program was not designed to meet the special educational needs for targeted children. The court found that it was shown in the administrative hearing by uncontroverted evidence that Indiana had funded three programs in title I schools solely from title I funds, while similar programs were supported by state and local sources in the nontitle I schools. This practice was determined to be in violation of three requirements of the law. First, federal funds were supplanting state and local funds in the support of title I projects. Second, state and local funds were not being used to provide comparable services in the programs since they were supported entirely by title I funds. Third, the special educational needs of educationally deprived children were not met since they received the same programs in the title I schools as were provided with state and local resources in the nontitle I schools. Important to the court's decision affirming the appeal board's findings on these points was that Indiana failed to present evidence to the contrary when it had the opportunity to do so during the administrative hearing.

The final point of review focused on whether a title I teacher aide project met the special educational needs of the targeted children. Evidence had shown that the teacher aides were assigned indiscriminately to serve all teachers and students in the title I schools, without any attempt to match the aide assignments to the special needs of the eligible children. Indiana's argument that the "overwhelming majority" of children in the target area were eligible for title I was to no avail. The court affirmed the administrative decision on all contested points.

School Lunch Regulations

Many schools have found it lucrative to sell snack foods during the school day. The sales generally occur through vending machines or student organizations with the profits being used for school-related purposes. These snack foods often compete with the food sold through the school breakfast and lunch programs. Several attempts have been made by congress and the department of agriculture to control the sale of nonnutritious foods in schools receiving federal school breakfast and lunch funds. One of the more recent attempts involved regulations prohibiting the sale of several categories of snack foods, including soft drinks, throughout the schools until after the last lunch meal of the day. A national trade organization representing the soft drink industry challenged the regulations alleging,

[46] State of Indiana Dept. of Pub. Instruction v. Bell, 728 F.2d 938 (7th Cir. 1984).

among other things, that the secretary of agriculture had exceeded his authority by limiting the time and place of the sale of snack foods.

The federal appeals court held that although the secretary was authorized to regulate the sale of soft drinks, the time and place restrictions were beyond his authority.[46] Interpreting the language used by Congress, the court concluded that the regulations must be restricted to the sale of competitive foods in "food service facilities or areas during the service of food." While the decision upheld the secretary's authority to regulate competitive foods, including soft drinks, it did require that the regulations be no more limiting than restrictions found in the authorizing legislation.

Desegregation Funding Dispute

In an eighteen month legal battle, the Chicago Board of Education and the federal government have been at odds over the government's financial responsibility for the board's desegregation plan under the terms of a 1980 consent decree. On June 30, 1983, a federal district court entered an order that the government had not made a good faith effort to find financial resources to assist in Chicago's desegregation plan required by the consent decree.[47] The judge ordered a freeze on $47.5 million in the department of education's fiscal 1983 funds and directed the department to find funds for the desegregation effort. The Seventh Circuit Court of Appeals in a September 1983, decision agreed that the federal government had violated the consent decree by not providing funds, but concluded that the district court had acted with "excessive dispatch" in delineating specific remedies.[48] The court opined that the federal government should have been allowed to come into compliance voluntarily. The case was remanded with directions that the lower federal court have a hearing to determine the amount of funds adequate for the desegregation plan.[49]

In a lengthy 116 page opinion, the district court on remand ruled on June 8, 1984, that the federal government "willfully and in bad faith" violated the consent decree.[50] The court approved a $171.6 million funding level for the board of education's 1984-85 desegregation plan. It determined that Chicago could pay $67.7 million of the cost and ordered the government to pay the remaining $103.8 mil-

46. *Id.*.
47. National Soft Drink Ass'n v. Block, 721 F.2d 1348 (D.C. Cir. 1983).
48. United States v. Board of Educ., 567 F. Supp. 272 (N.D. Ill. 1983).
49 United States v. Board of Educ., 717 F.2d 378 (7th Cir. 1983).
50. United States v. Board of Educ., 592 F. Supp. 967 (N.D. Ill. 1984).

lion. In August, the district court filed a supplement to the June remedial order reiterating the federal government's obligation of $103.8 million but ordered that no less than $20 million must be provided by August 22, 1984. The federal government was ordered to provide to the board of education $17 million from the secretary of education's fiscal 1984 discretionary fund and $11.8 million from title IV funds if it failed to provide the full $103.8 million by the deadline.

The government was successful in having that order stayed by the Seventh Circuit Court of Appeals. On September 26, 1984, the court of appeals ruled that the federal government did not have to pay the $103.8 million in desegregation aid to Chicago.[51] However, the government was ordered to give the board of education preference for such funds provided that the district meets the program criteria. The appeals court found that the trial court had abused its discretion with the funding order and remanded the case to a different district court judge. The board of education has requested a rehearing by the court of appeals.

Public Aid to Nonpublic Schools

States and local school districts have used a variety of methods over the years to provide financial assistance to nonpublic schools. Many of these efforts have been challenged in the courts as violations of the first amendment's establishment clause. While some cases have involved single programs such as textbooks, transportation, or shared or released time, others have involved multiple programs of direct or indirect support. The court results have been mixed and, at times, unpredictable. Since 1971, courts have used the *Lemon* test as a basis for evaluating government aid to nonpublic schools.[52] Under this triparte test, a state must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement. It remains to be seen whether the *Lemon* test will continue to be a viable standard in establishment clause cases.

The two most recent cases have been in Michigan and New York. Both cases involved cooperative educational arrangements between the public schools and nonpublic schools. Taxpayers challenged the programs as an establishment clause violation. In *Americans United for Separation of Church and State v. School District of Grand Rapids,* the Sixth Circuit Court of Appeals in 1983, declared unconstitutional the shared time and community education programs oper-

51. Ashworth, *Appeals Court Dumps Chicago Desegregation Funding Order,* Educ. Daily, Sept. 28, 1984, at 1-2.

52. Lemon v. Kurtzman, 403 U.S. 602 (1971).

ating within church-related schools at public expense.[53] Under the Shared Time program, the school district offered courses from its regular curriculum to nonpublic school children during school hours. The courses were taught by public school teachers in classrooms leased by the school district from the participating non-public schools. The Community Education programs provide a variety of educational and other enrichment opportunities for public school children as well as children in the nonpublic schools. The courses were taught by public school employees under the control and supervision of the school district. The classes offered at the nonpublic schools were conducted in rooms leased from the school by the public school district.

Although the court of appeals found that the programs had a secular purpose, it held that their primary effect was the advancement of religion. According to the court, the facts of the case led it to conclude the following: the nonpublic schools involved in the programs were religious with the advancement of religion as their primary mission; the students in the participating schools received the benefits of public school courses without leaving their school, a substantial number of teachers in the programs were either former or current employees of the nonpublic schools; the supplementing of the teachers' salaries was a direct benefit to the teachers in the programs and an indirect benefit to the religious mission of the schools; and a substantial amount of classroom time and tax money was involved in the programs. The court noted that there would have to be "[c]onstant secular inspection and surveillance of all activities not specifically labeled religious" in order to maintain any separation at all.[54] Finally, the court was cognizant of the potential for political divisiveness associated with the type of programs and their costs. The United States Supreme Court has granted *certiorari* in the case with a decision expected during the 1984-85 term.[55]

A constitutional challenge has been made to the New York City Board of Education's practice of sending title I teachers into religious and other nonpublic schools to provide remedial instruction and clinical and guidance services to eligible students. The Second Circuit Court of Appeals in 1984, held that the practice violated the establishment clause.[56] Under the statutory provisions of title I,

53. 718 F.2d 1389 (6th Cir. 1983).

54. *Id.* at 1406.

55. Americans United for Separation of Church and State v. School Dist., 718 F.2d 1389 (6th Cir. 1983), *cert. granted sub. nom.* School Dist. v. Ball, 52 U.S.L.W. 3631 (U.S. February 27, 1984) (No. 83-990).

56. Felton v. United States Dept of Educ., 739 F.2d 48 (2d Cir. 1984), *review granted*, 53 U.S.L.W. 3257 (U.S. October 9, 1984) (84-238).

qualified children from public as well as private schools were to benefit from programs developed pursuant to the law. Beginning in 1966, New York City adopted a program whereby title I programs and services would be provided in the nonpublic schools to eligible students by itinerant public school teachers. This practice has continued to the present time. The constitutional problem in the arrangement arose from the fact that most of the nonpublic schools were religious. It was reported that in 1981-82, 92% of the nonpublic school students attended Catholic schools and Hebrew day schools.

The court of appeals, after a comprehensive review of Supreme Court decisions dealing with government aid to religious schools, concluded that public funds can be used to provide title I services to students in religious schools, but only at a neutral site off the school's premises. The court was concerned primarily with excessive entanglement. It noted that in order to ensure that the title I teachers involved in the program would maintain strict religious neutrality, both the teachers and the schools in which they worked must be subjected to "comprehensive, discriminating and continuing state surveillance." The United States Supreme Court has granted *certiorari*.

Another challenge to the use of government funds in nonpublic schools is pending in Rhode Island. Several parents of public school children have alleged that chapter II of the Education Consolidation and Improvement Act of 1981, has involved the federal and state governments in the operation of religiously oriented nonpublic schools in violation of the first amendment. In *Taft v. Pontarelli*, a federal district court permitted the intervention in the case of parents of children attending religious schools.[67] The court found that the parents had a right to resist the challenge to the benefits their children received and that they were not adequately represented by the defendents in the case.

Conclusions

Because the cases presented in this paper were confined primarily to year of 1984 and were so varied in scope, it is impossible to detect any major trends or evolving issues. It is clear, however, that many of the issues litigated during 1984 were not new and will continue to be viable in the near future. For example, challenges to state school finance laws continue to be made by property-poor school districts seeking the equalization of resources or demanding that the state fulfills its constitutional obligation to provide an adequate educa-

[67] *Taft v. Pontarelli*, 100 F.R.D. 13 (D.R.I. 1983).

tional system. The key factor in these cases is whether the courts find that education is a fundamental interest under the state constitution requiring the application of the strict scrutiny standard. Another critical factor is whether the courts interpret the requirement for equal educational opportunity or equal protection as requiring the equal allocation of resources. Finally, whether the state's education program is adequate under the constitution's education article will continue to be a viable issue. The relationship between cost and quality may be an issue that will be considered by the courts. An impediment to school finance suits brought by school districts could be the determination that school districts lack standing to sue as was the holding in *East Jackson Public Schools v. Michigan*.[58] In addition to new constitutional challenges, it is clear that the courts will order enforcement of previous rulings. Perhaps, the unknown variable in state school finance litigation will be the impact of the school reform efforts undertaken in many states on the questions of equity, equalization, and adequacy.

It is at the local level where the greatest variety of litigation affecting school district finances can be found. The predominant issue seems to be property tax exemptions and whether specific properties qualify for tax exempt status under state tax laws. Although many other issues are raised locally, the primary themes are the same: the protection of the school district's tax base and the conservation of local resources.

Now that it has been established that the federal government has the right to recover misspent title I funds from the states, those states affected will undoubtedly seek judicial review of the findings and orders of the department of education in the federal courts. The use of public funds for nonpublic schools continues to be one of the most persistent legal issues confronted in the courts. This is one issue that likely will continue to generate considerable attention.

58 348 N W 2d 303 (Mich Ct. App. 1984).