MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

SELECT COMMITTEE ON SCHOOL FUNDING

Call to Order: By **CHAIRMAN JOHN COBB** on January 21, 1993, at 3:00 p.m.

ROLL CALL

Members Present:
Rep. John Cobb, Chairman (R)
Rep. Ray Peck, Vice Chairman (D)
Rep. Bill Boharski (R)
Rep. Russell Fagg (R)
Rep. Mike Kadas (D)
Rep. Angela Russell (D)
Rep. Dick Simpkins (R)

Members Excused: Rep. Wanzenried

Members Absent: None

Staff Present: Andrea Merrill, Legislative Council
Eddye McClure, Legislative Council
Dori Nielson, Office of Public Instruction
Evy Hendrickson, Committee Secretary

Please Note: Testimony and discussion are verbatim.

Committee Business Summary:
Hearing: None
Executive Action: None

CHAIRMAN COBB outlined the committee's work for the afternoon. He then turned the meeting over to **Mr. Jim Goetz, attorney for the underfunded school lawsuit.**

(Minutes are verbatim.)

Mr. Goetz: Thank you. This is fine. I assume all of you can hear me. What I'll try to do is give you an overview of where we are with the trial and a bit of the previous action. Then if you have any questions, please let me know.

As most of you probably know, we finished the trial yesterday about 12:30 and we went a total, I think, of 12 or 13 trial days. We started January 4th. The judge at the end ... there was a request by the State for further briefing and a request to hold the record open until the Supreme Court rules on the state's petition for supervisory control.

I requested that the judge move fairly quickly on this case

because I think this body is entitled to a decision. The judge did indicate that he would hold the record open but also indicated that he wanted to issue a ruling before the end of the legislative session. So he gave two weeks to file any additional briefings. I think the case is pretty adequately briefed, but the State wanted an additional briefing.

We filed what are called proposed findings of fact and conclusions of law; we prefiled those. They'll take some minor modification because of variances of proof, but we'll have two weeks to do that as well. So, that's the situation procedurally and timing-wise where we stand.

Now, I think all of you are aware that one of the State's defenses in this case was ruled on pre-trial. That is, on December 18th, which is the date of our pre-trial conference, the judge ruled on various motions that the plaintiffs had and we had filed back in October; had a round of briefings and then they were heard on November 20th.

The two motions that we made were these: one, was to rule on summary judgement on the capital outlay issue on the theory that that had already been ruled on in the first case and affirmed by the Montana Supreme Court ruling that **HB 28** did not remedy the capital outlay constitutional problem.

Judge Sherlock ultimately denied that summary judgement motion, saying they wanted to hear the evidence and saying, essentially, that it's too important of an issue to rule summarily.

The other motion brought by the plaintiffs was to exclude test score evidence that the State had attempted to assemble to try to justify the present system. Our initial motion basically argued that the purpose of the test score evidence was to try to support an argument that money at these levels doesn't make a difference or is not constitutionally significant. We also supplemented that by a motion based on what is called collateral estoppel; that is, that the same parties litigated the same issue to a conclusion. And under what is known in the courts as a rule of finality, once an issue is disposed of, it can't be litigated and re-litigated. Our position was that, having spent six weeks in trial and then an extensive appeal beyond that, that there's no need to re-invent the wheel in a second lawsuit.

Judge Sherlock, eventually after ... Well, let me clarify one other thing. The State responded to the test score issue in November by saying that it was not proffering test score evidence to support that money doesn't make a difference argument, thereby trying to circumvent our collateral estoppel argument. The State said instead that it's offering a defense that all that is constitutionally required is a basic quality education based on Article X, Section 1, subsection (3) of the Montana Constitution. And that the test score evidence is probative of whether the

State is offering a basic quality education. What the State had tried to do was take test scores from other states such as SAT and ACT and compare it to how Montana students have done and say Montana is doing a reasonably good job; and then take other test scores such as the NAEP, I guess it's called, and try to do an intrastate comparison among the districts to try to show that, apparently, that higher spending districts don't do any better on the average than lower spending districts.

But essentially they made it very clear to the court that the only purpose for this test score evidence is to support that theory. And we then amended our motion for summary judgement because we thought it was clear that the basic quality education issue was not an issue in the suit for several reasons. One is, of course, if you read the constitution, the words "basic quality education" don't appear. The second is that there is a great deal of debate as to what the actual words mean, which is basically a "basic system of free quality public elementary and secondary schools."

There is certainly a strong body of evidence from the debates on the constitution that what that means is that there has to be a basic framework of high school and elementary schools, period. But the State was trying to make more of that, and we went through that issue in the last trial and we've gone around and around since that time.

But the basic point is that we were at that point, like two ships passing in the night, because our theory was and always has been that this is an equal protection of the laws case and that this case involves the constitutional provision guaranteeing equality of educational opportunity under Article X, Section 1, subsection (1). And that even if we assume that there is some level of basic quality education that can be defined out there -- and you all know that that's not a simple proposition and reasonable minds differ on that -- but even if you assume that there is some level out there that exists in the abstract, our case is about what happens beyond that. That is, there's no question that there's substantial disparities in funding education per student in this state.

And so, just in terms of traditional constitutional equal protection analysis, you've got a discrimination; it's statistically out there. And so it fits into an equal protection case as well as a guarantee of equality of educational opportunity.

And so we've always viewed the case that way and we didn't view the State's attempt to justify the system through the basic quality education theory as being really on point with what we were presenting in court. Well, the court looked at that -- looked at the constitutional debates, I suppose, looked at the Montana Supreme Court's ruling from the last case and in that ruling the Montana Supreme ...

By the way, the same theory had been advocated in the Montana Supreme Court last time around on the appeal. That is, the Attorney General's office argued that equal protection is irrelevant because it's somehow subsumed within the guarantee of educational opportunity provision. And so they didn't even brief that issue.

And then they said the guarantee of equality of opportunity provision is somehow subsumed in subsection (3), that is the basic public, elementary and secondary schools provision and that, therefore, we don't have to talk about these disparities. And I'm, of course, oversimplifying the State's position, but I make it just to give you some perspective on what the debate was.

And if you look at the Montana Supreme Court's opinion, there is a very clear paragraph in the opinion that says that there is nothing in Article X, Section 3 that indicates that its purpose, or nothing from the clear language, its purpose is to displace or subsume the guarantee of equality of educational opportunity. So **Judge Sherlock** -- citing the State's position that the test score evidence is relevant only to this basic quality education theory and then citing the Montana Supreme Court's language that says that that theory does not modify the guarantee of equality of educational opportunity -- ruled on some re-judgement on December 18th that that is not an issue in the case and, therefore, rejected the State's test score evidence. And that's the issue now that just before Christmas the State petitioned to the Supreme Court to hear by writ of supervisory control which is, as you probably know, kind of an interim kind of an appeal. It's not an appeal as a right, but the court has the discretion to take it or not to take.

And the State has argued, because of the importance of this case and because they think **Judge Sherlock** is wrong, the Supreme Court should accept the case. We were given until the 8th to file our brief, which we did and we resisted.

The Rural Education Association petitions to intervene were denied but given the right to file a Friend of the Court brief and that was due just this last Tuesday. That issue was briefed at least at the preliminary stage on supervisory control.

Now, the Supreme Court has various things it can do at this stage. It can simply deny the petition, saying the State has the right to appeal after final judgement or we do if we lose. They can accept the petition and set a further briefing schedule or set an argument or in some cases I've seen, they can, based on the briefing, rule on the issue. And so we're not ... I can't tell you where the Supreme Court is schedule-wise on that issue. But in any event, that's basically where we are with the case.

Now, a few words on the evidence. I was here briefly when **Dr. Gilchrist** talked to you and I think you got a good feeling for the kind of statistical evidence that's in the case. But let

me give you from a lawyer's perspective kind of a general understanding of what that evidence means.

We take the position that when one is arguing an equal protection case or a guarantee of educational opportunity case, there is basically .... there are two questions conceptually that have to be addressed.

The first is whether you have a discrimination; and the second is: if there is a discrimination, is there a way that it is justified? Are there rational or compelling justifications for that discrimination?

Now, the question of whether there's a discrimination from our proof standpoint boils down to two sub-questions. One is, first, you look at the evidence, the data, the statistical data which **Dr. Gilchrist** went through. And you all are aware of the disparities in spending per student across the state, even when you control for size. And there's some debate at the trial about whether you take 874 funds which are public impact aid funds out before you look at the data; some debate as to whether you should adjust for debt(?) increases or decreases, intra-category, within the foundation schedules. So there's minor, what I would say minor, debate on what the data shows but there is little question in my mind that we showed, and you've seen that evidence, we showed that, even controlling for these factors, there are disparities in spending.

Now, the second part of that discrimination case, as far as I'm concerned, is the question of the meaning of those disparities. If you have a thousand dollar spending difference per student, for example, does that translate into educational quality or does that translate into an issue of whether the higher spending districts are able to provide their children greater educational opportunity than the poorer districts? And in that regard, we have various studies done, one done by Dr. Hitz had a study team from Montana State University; it went out to similarly sized districts, high spending/low spending, to see what the high spending districts could do vis-a-vis the low spending.

Dr. Gilchrist had some expenditure tables which I think you've seen that show the top twenty and the bottom twenty percentile and where the money is being spent which is largely for educational purposes -- instruction, support, those kinds of things. And so that, to my mind, shows the discrimination.

Now, the second broad question is whether the discrimination can be justified. In that regard, on classic equal protection analysis, if there is a fundamental right involved such as voting, such as free speech, then the courts strictly scrutinize the discrimination. So that, that means that the burden shifts to the State to justify with compelling reasons why they have the discrimination.

And so we have a legal question in this case whether education is a fundamental right. In that regard, Judge Loble found in the last case under equal protection that education is a fundamental right. We also have the Board of Public Education on record both in the last case and this case as saying education is a fundamental right. And we have also the Montana Supreme Court in the **Bartmess** case a few years back dealing with grade point averages in the Helena school system and the ability to participate in extracurricular activities and whether that's a discrimination, coming very close to saying that education is a fundamental right.

And so we take the position that education, of course, is a fundamental right which we say then makes the State's burden a very heavy one. That is, that they have to justify the discrimination by compelling reasons. Now, even if it is not a fundamental right, there is then what's called minimal scrutiny which means that the court will affirm the discrimination if it's rational, whatever that means.

Our fall-back position in this case is that the system is not even rational and it's not for this reason, and you got into this I think the other day with **Dr. Gilchrist**. But you're all aware that what was done by HB 28 was to establish a two-tier system; that is, a school district could either drive its budget with the foundation schedules of HB 28 plus 35% which was supported in part by a guaranteed tax shield, or a district could opt to go 4% over previous year's budget. Now, what that meant ... Did **Dr. Gilchrist** get into the Colstrip/Laurel comparison last year? Yes. You saw what that means; it means that those districts which were high spenders, on the eve of HB 28, are able to perpetuate that position by going 4% over previous year's budget where those who were low spenders on the eve of HB 28, can optimize by going 35% over foundation schedules. Now, those low-spending districts did improve their lot with the injection of money into the foundation program with HB 28. So things are better than they were the last case.

But what you have is what I've characterized as a de jure, two-tiered system. De jure means "by law." And the point there is that what this legislature has done is create a locked in, or embedded in law, discriminatory system. So, however you try to justify it, it's not going to make much sense to a court. That is, one of the attempts to justify the kinds of discrimination we've seen in the last case was by the local control justification. But think about that for a minute with respect to this two-tiered system.

If Laurel, for example, down here is spending at 35% above foundation schedules and wants to improve its lot to the level of Colstrip, which would be very difficult tax-wise because their tax base is much lower. But let's just say the taxpayers did want to do that, they can't do that, period. By law they can't; they can only go so high. And so what you've got is a, on its

face, a discriminatory system.

So back to the overall question. What explains these, what we think are significant disparities in spending? And I think the answer is obvious to all. I mean, you can argue about whether the disparity is $3,000 or $2,800 between districts or $2,500, but probably the strongest explanatory factor for those differences is this two-tiered system.

Now, back to the context of where we were before HB 28. The case, the last case, was an equal protection case and a guarantee of education opportunity case modeled largely on the California case, Serrano v. Priest. And what Serrano said is we've got these substantial disparities in spending and what is causing them is reliance on these local sources of revenue to drive your school funding system, and you've got all kinds of variation in your local tax base.

And so we came into the first case and I think established that, because of the tremendous variation in local tax base, wealth, coupled with tax effort, of course, you're resulting in substantial disparities in funding per student. Now, the State comes in this case and, through a statistician, analyzes ... and this was last Thursday, presented evidence analyzing tax base, spending per student and tax effort. And finding that there's a relatively low correlation through something called multiple correlation analysis which I don't fully understand. But basically, there's a low correlation between those factors: spending, tax base and wealth. But then we say, but didn't you miss something, Doctor? And one of the things, of course, he missed, as you well know, is non-levy revenue, which is a source of local wealth that's not in the tax base and not triggered by millages. So that's one of the things he missed; but the other thing, quite obviously that he missed, is we're now beyond that state; we're now beyond the Serrano scene.

And we're to the next stage which is you've now locked in a two-tiered system with the structure of HB 28 and where a district happened to be on the eve of HB 28, in turn, is quite related to what that district's wealth and tax effort was of the very system that was found unconstitutional the last time around.

And so, in general, that's where we are in terms of the plaintiff's theory of the case; in terms of the proof; and in terms of the timing and procedure. Now, I've missed a lot of information; I haven't talked about categoricals and there are other things I haven't talked about. Maybe what I should do is; I hope to be out of here by four o'clock. I should open it up for questions which may suggest some other issues.

(**CHAIRMAN COBB** called for questions.)

REP. KADAS: Just following on what you were just finishing with, then aside from the issue of the two-tiered system, was your

response to the State's holding that spending, tax base and wealth were unrelated, was your only response to that evidence that they didn't include non-levy revenue? Did the inclusion of non-levy revenue indicate a correlation or . . .

Mr. Goetz: No, we didn't particularly focus on that because it seems to me that the ultimate issue in the case is these tremendous disparities in spending per student. For whatever reason, you see, we simply fall back to analyze why they're happening because the State, there may be a legal issue as to whether they can be rationally justified, or justified by compelling interest. But our main focus really was on the disparities and what they mean. So I would not want to be kind of caving (?) into, "Was your only response this?" because in our view, that's not even particularly a central issue in the case.

REP. KADAS: So your central issue was the two-tiered system and because there's . . . and the two-tiered system didn't affect the original . . . or the two-tiered system just builds on top of the inequities built from the original decision, from the Weber decision?

Mr. Goetz: Yeah, or maybe stated another way. You have . . . the ultimate question is, do you have significant spending disparities per student because intuitively that seems like that's a system that we shouldn't have and the answer is yes, you do. And I wouldn't want to say that they're worse than last time. I think in many size categories they're marginally improved. So when you say "built on," I don't think that's quite accurate. So, there you are. You've got your disparities in spending per student; is that meaningful? And the answer is yes because of what that additional money can buy for those high spending districts vis-a-vis where the low spending districts are.

So that's really the focus of the case. Then, as far as I'm concerned, it's up to the State to justify by compelling reasons why that happens. And I don't think the State can do that.

REP. KADAS: Okay, what I'm just trying to get at... You did stress a reliance on this two-tiered thing, and the obvious machiavellian response to that would be to eliminate the 104% cap. And then everybody has the ... you eliminate that two-tier problem. But you've still got the underlying problem of the inequities.

Mr. Goetz: That's right.

REP. KADAS: So you didn't focus too strong on the two-tiered thing.

Mr. Goetz: Well, let me just respond to the obvious machiavellian response. If you eliminate the cap, then you make my job, if I'm defending the plaintiffs, in a way more difficult

because I can't say you've got a de jure system. And, by the way, it's very much like 105 last time, when the State tried to justify these disparities by saying, "Look, you know, it's local control." And I say, "What do you mean, local control; 105 says that these poor districts, even if they want to, can't bring their budgets up," so that's another de jure, by law, problem. And so, if you're litigating equal protection for a plaintiff group, you know, you like to see those.

It's like a racially discriminatory de jure system where blacks aren't allowed into a public facility by law; I mean, it's pretty clear that that's unconstitutional. Okay, if you eliminate the law in the racially discriminatory situation but still have a pattern and practice of discrimination, it makes it a little harder to prove. And the same way here; if you eliminate the cap but then, as **Mr. Smith** for the State said yesterday, if the court strikes down the cap, it unleashes these high spending districts to go further. You can imagine what your data would look like. And so, in a way, it strengthens our case from that standpoint of just a little less legally clear.

REP. KADAS: Well, then, can I ask you to speculate. Had we put, in '89, had we put a different kind of cap in, essentially freezing the highest spending districts and everybody who was above, let's just say for example, 170% of the foundation program, if you follow the logic of that, would you have had a case at that point?

Mr. Goetz: Well, you know, I don't like to speculate and also, without looking at the result, it's very difficult to forget. But you've got a number of problems as you well know. One is the ... even if you, let's say you have a cap somewhere and it tends to equalize better than what they have this time, then you really have to look at what the data looks like. But, you also have significant taxpayer inequity, as you know, and there is some argument for power equalization or improving the guaranteed tax base. As you know, the guaranteed tax base now really takes you only up to the average in the permissive, or the average mill value just in the permissive area. It doesn't help capital outlay; it doesn't help over-permissive or the upper part of permissive. So you've got that kind of problem, too.

So, you know the next question might be, "Well, if you had some different formulation of caps and some power equalizing system, would that produce a result that we would have difficulty with the challenge?"

REP. KADAS: Are you telling me ... I didn't mean to interrupt you. Are you telling me then that even if we got the expenditures within a disparity of, say, 1.3, 1.25, but our tax effort had a disparity of 2, that you would see that as a basis for an equal protection suit?

Mr. Goetz: Yes, if you're asking for my academic opinion. I'm

not talking about what the plaintiffs might do or a different set of plaintiffs, but I think yes, you might well have equal protection problems with that kind of system. Again, we're talking kind of in the abstract.

REP. KADAS: Well, has that been done anyplace else? I mean, all the evidence, all the cases I've seen have been based on expenditure, not on effort.

Mr. Goetz: Well, a lot of these cases really encompass both, that is, equal protection. In fact, our case last time spent a lot of time on the capital outlay and equality of tax effort and in retirement. You see, if you view retirement as you have in Montana, it's something that has to be met; it's outside the general fund. So it can be argued that that categorical is not a student equity issue because there probably is not a clear systematic relationship between poor students and spending per student and retirement. But what it does is cause your taxpayer, some county resident taxpayers have to pay much more for that function than do others. And there was a lot of attention spent on that last trial. A lot of these cases combine kind of a taxpayer equity and student equity issue.

REP. FAGG: **Mr. Goetz**, first of all, I'd like to say, "Thank you very much for appearing." I really do appreciate it, and I know the committee does as well because we understand that you've been very busy lately. I guess, taking the position that the legislature's in, which is basically, we are $250 million in the hole and that this committee will probably be lucky if we get away with this next session without actually cutting the funds to K-12 education. If we can hold the line on last biennium, we're probably going to be fortunate. Taking that into consideration, what is the avenue that you would see that the legislature could take to try to take care of the equalization problem which the courts are addressing? Any thoughts on that?

Mr. Goetz: Well, that's a very difficult question and a very perceptive question. But ... and I'm not about to answer that very directly. I will say that one of the premises underlying this two-tier problem is that the Laurel group can never catch up to the Colstrip group. Now, the premise though is that you have no increase in the foundation schedules. If you did have that increase, then ... and if it's a decent increase, then you might see some closure, some trend toward improvement. I hear you saying there isn't money to do that; all I can say is that my clients and I both view education, and I'm sure everybody on this committee does or you wouldn't be on the committee or in this house, as extremely important. And beyond that, you know, I sympathize with your plight.

REP. SIMPKINS: **Mr. Goetz**, this has been very informative. I've got a couple of things I want to go down with you. During the Loble decision, the judge evidently recognized the 15 different school categories as being educationally relevant at that time.

As I understand it, he pointed out the discrepancy was to be compared in each category.

Mr. Goetz: You're talking about the size categories? Yes.

REP. SIMPKINS: And this time are you, is there a challenge to that as far as the equity of the educationally relevant factor of using those size categories? Is that being challenged?

Mr. Goetz: Not in our suit. That is, if the legislature sets, decides that it costs more for a smaller district to operate than a larger district, then I think that's a rational, educationally relevant criteria. Now, whether those are properly set is another question and I think that's an issue that the rural schools are raising. But we simply said, the legislature's made that decision so we looked at disparities based on those size categories respecting that there well be may be economy of scale and that this body has made that decision that there is.

REP. SIMPKINS: Okay, just a quick question here. I assume the word that you're using as "compelling" is the same as "educational relevant factors."

Mr. Goetz: No, no. Compelling is just a description of the type of burden, a very heavy burden that the State has. The State can meet that burden by showing, or even if it has a lesser burden, a non-compelling or rational basis; it can show it has reasons that are educationally relevant for these differences. If I might, I could give you an example. Let's say that the legislature makes the decision that special education kids cost more to educate, which is a rational, justifiable decision. If you have a weighted schedule for special education students, that's an educationally relevant factor that is justifiable. And if you look across the group and say, "Well, there's a large difference here in spending," but the State comes back and says, "Ah, but, most of it is explained by the special education weighted factor," then probably that could be justified.

Another example, if you have some states account for declining enrollment or students at risk, those would be legitimate reasons to discriminate in the schedule; and they would be educationally relevant factors that could be built into the compelling justification.

REP. SIMPKINS: Okay, then just another followup. In this particular case, how do you consider GTB? Do you consider GTB as part of the school equalization or tax equity, or both?

Mr. Goetz: Well, both. We didn't argue that the GTB doesn't have an equalizing effect; it does, as far as it goes. What it doesn't do is completely equalize even in the permissive arena; it doesn't equalize outside general fund except for retirement as far as it goes. And then, of course, you have the area above permissive where it doesn't affect at all. But as far as it

goes, it is an equalizing factor.

May I say one other thing on guaranteed tax base or power equalizing. One conceptual problem with that approach is that it's a kind of fiscal neutrality approach; that is, it helps equity, particularly taxpayer equity; but one of our experts was quite critical of the GTB approach because it doesn't guarantee kids equity. What it does is guarantees the local jurisdiction the opportunity to raise money at a certain level if it so invokes. But the vice, if you will, that some education experts see in it, and I happen to agree with it, if it's overused -- I don't have a problem if it's a fairly minor feature of the system -- is that it doesn't necessarily address the student inequity problem.

REP. SIMPKINS: My last one is a double part question, if you don't mind. The Loble case, in one statement, stated that it would have to be considered acceptable to equalize down rather than just equalizing up. Is this case dealing at all with a discussion of the state's share? In other words, is this equalizing down philosophy still available or are we talking equalization where equalization only means equalizing up?

Mr. Goetz: Well, first of all, the State's share is language that's attached to Article X, Section 1, subsection (3), which is that basic system language that's not even in the case as far as we're concerned. So, the State's share language, as far as we're concerned, has no operation in this case. It may be in that in theory one could argue for equalizing downward; I think then you might run afoul of some quality issues in the constitutional debates. And so, that's about all I can say about that issue. It wasn't an issue in the litigation particularly.

REP. BOHARSKI: **Mr. Goetz**, I'd also like to thank you for being here. It would be nice if we were all so important that we could decide this thing. It seems to me we're into this difficult dilemma as a legislature -- and maybe the best way to explain it is to go to the extreme -- let's say that the legislature decides to collect however many mills of property tax it takes, 200 mills of property tax. It collects all of the money at the state level, redistributes the money back to the schools, forbids them from levying any local property taxes, and say, "This is what you get; this is how you spend it; everybody's paying the same amount of taxes." It would seem to me that you would basically be out of a job if we were to do that, at least in this case; I'm sure you'd find someone else to hire you on.

If we were to take this to the extreme, which I think everybody on the committee and in the legislature realizes that, yes, that would solve our problems as far as meeting the educational opportunity requirement in the constitution. But at the same, it seems to me that we also then, by so doing, violate the local control and supervision provisions of the constitution. Aren't we in sort of this no-win situation?

Mr. Goetz: Well, I think that's a very perceptive question. And I'll simply answer it this way. Local control was offered as a justification in the last suit. If you look at Article X, I think it's Section 8 is the local control provision. First of all, the debates are quite clear that the framers wanted to accomplish equity, and they were very cognizant of the first Serrano v. Priest decision which was 1971 in California. And so, when they were talking about guarantee of equality of education opportunity, there's no doubt in my mind, reading the debates, that they were talking about equity in funding.

Now, the question: Well, does that conflict with local control and there's some very interesting exchanges on that; it says, "No, it doesn't." For several reasons. One is, and several of our experts spoke to this; they're in favor of local control in terms of management of the schools. So there are two different kinds of local control, and I think you're talking about fiscal control. And one of the things that the California Supreme Court and Serrano said was, local control is a cruel illusion when you have substantial disparities in spending because these low-funded districts don't have the local control to do what they would like to do because of their funding problems. You see, so there's a fiscal dimension that some people call local control; there's a management dimension and finally our Supreme Court addressed local control to the extent of finding that that didn't justify the kind of disparities we're seeing.

So, in general, I don't think there is a conflict in the constitution; and nobody in the plaintiffs group, I don't think has said, including our experts, that you have to have absolute equality. I mean, there is some room even for some fiscal differentiation so, you know, you could try to mix a happy medium there. But the problem is, as Representative Fagg says, you're in this funding crunch, and I very much recognize that.

Tape 2

REP. PECK: Serrano versus Priest. Wasn't a major portion of that decision overturned on appeal in federal court? Or am I mixing that up with some other decision?

Mr. Goetz: You're mixing it up with the ... Well, the first Serrano v. Priest case back in 1971 was based on both the California constitution and the federal equal protection clause, Article ... or Amendment 14. Then San Antonio Independent School District v. Rodriguez came along in the early 70's and that went up to the U.S. Supreme Court, and the U.S. Supreme Court said that there is no violation of the federal equal protection clause. And so then Serrano went back and Serrano II, the California Supreme Court simply applied its own constitution and affirmed basically the previous finding but deleted any reliance on the federal 14th Amendment. So you're right, there is some federal kind of dimension to the first Serrano case and that's

basically what happened there.

REP. PECK: You know, I look at the legal stuff, and I don't understand it. I look at the education stuff, and I think I have a fairly good understanding of that. And with all the background you have in the legal area, I'm sure you must have said to your clients, "There is some element of risk in this case. The legislature may not choose to equalize up; they may choose to equalize down." Now, assume that the legislature would do that and say, "Your schedules are cut 25%; you have an absolute cap at 135% of those schedules." I see that as creating a lot of legal problems for school districts. Does it create further legal considerations for the State of Montana?

Mr. Goetz: I'd like you to clarify that last. What do you mean by "does it create further legal complications for the State of Montana"?

REP. PECK: Well, is it a clearer equity situation in terms of what you claim in your suit? Do you remove some of the major objections that you as plaintiffs, I don't mean you singularly, of course, obviously; but are you getting a solution that's acceptable from the legal standpoint? The State of Montana?

Mr. Goetz: I see what you're driving at, and again I don't ... without looking at particulars as with **REP. KADAS**, I would not want to speculate. I hear what you're saying: if you pose to get more equalized but do downward, would that resolve the constitutional problem? And again, unless I look at a particular system with what it results, I would not want to speculate on that question. Whether it creates more legal problems for the State of Montana, I'm not sure. There are some provisions in the constitution that speak to quality, too, and so, recognizing your tremendous fiscal problems, I would be very leery about simply trying to cut a deal so there you've got some kind of uniform system that doesn't improve the present situation.

REP. PECK: I guess I'd really ask you to speculate on this one. Can we hope for a more specific ruling from the court in your case and/or the other case that would give the legislature greater guidance?

Mr. Goetz: I don't know what this court will do and your question, of course, the premise is that we're going to win this lawsuit, and I'm not going to stand here and disagree with you.

REP. PECK: Well, there's going to be a ruling either way, so I don't think that was necessarily implied.

Mr. Goetz: Maybe I was reading more into it. But I have to say that we have been very careful in the first suit and in this suit not to try to dictate a particular remedy. There are reasons for that founded on separation of powers; that is, it's the court's job to interpret the constitution. It's this body's job to

fashion the school system. And I suppose if we end up in additional rounds of litigation, you will find the court gravitating toward more definition and stricter controls.

For example: In the desegregation context after years in Kansas City, Missouri,. in federal court, after years of frustrating litigation on the system, which the court found a number of times unconstitutional, the court finally imposed a property tax. Now, that was overturned by the U.S. Supreme Court but only basically on those facts. The court interestingly didn't say you can't ever not do that. The court said, that's the last resort and you didn't quite exhaust all your ... But I don't think this body wants to have the court sit and dictate over remedy because you have a lot of creative, a lot of mixes from guaranteed tax base approaches to caps to increasing funding of the foundation program, to building in more levels of education and relative factors. And I think the court really in deference to the legislative branch and would prefer to sit back and let the legislature address that. Now, I realize that that's frustrating to you people who have to try, as we do, to figure out these decisions. Sometimes they're not the model of clarity. I didn't ever say that, but ... But, you know, that's the give and take of the separation of power system. I don't know that I would hope for too much more clarity in this one.

CHAIRMAN COBB: The question I have is going back to what you said about desegregation. If the legislature has a plan to equalize the disparity of spending because education's a fundamental right or it will be a fundamental right, we can't argue or do it over 20 years; it could be really hard to show that compelling state interest, and we'd have to do it over a shorter period of time, you would think?

Mr. Goetz: I would think so. Frankly, one of the arguments I made in the last case was that, and I used a lot of your own documents from the legislative council to document the historical pattern of inequities, and I talked about the generation of school kids that pass through every twelve years through the school system. And remember that the constitution in Article X, Section 1, subsection (1) says "equality of educational opportunity is guaranteed to each person of the state." Now, we know, of course, that we can't change things overnight, but I think you'd want a fairly short leash on that remedial legislation.

CHAIRMAN COBB: If we equalize spending disparities -- and I think you said; I'm not clear -- then you would look at disparities between wealth. That would probably be the next thing you'd look at then. Is that what you said?

Mr. Goetz: Somebody might look at that.

CHAIRMAN COBB: Okay. Well, let's say somebody looks at that. But then you said that guaranteed tax base is okay a little bit

but what did you say? That we shouldn't use guaranteed tax base too much or we use it broader?

Mr. Goetz: The problem, I'll just speak generally, the problem with guaranteed tax base is that in theory it gives each district the, if it's a pure guaranteed tax base or pure power equalization, for the same tax effort it can raise the same amount of money. But then you have some districts that are going to raise it and some that are not and you will have a pattern of disparity of spending per student. The more you rely on that as a component in your system, the larger those student spending disparities will be. So while I think it's helpful to some degree in your system to do that rather than nothing, the real proof in the pudding and the real question is, what are you doing for the kids out there in terms of equality of opportunity.

CHAIRMAN COBB: Just one hypothetical, maybe I can't explain it right. If you mandate that they will raise so much money and then use a guaranteed tax base on that, can you do something like that?

Mr. Goetz: That's possible. What I'm suggesting is that if you do something on top of that, it be a fairly slim portion. That is, unfortunately, the best way to do it, also unfortunately perhaps the costliest to this body, is you've got a very good foundation program there in terms of equalizing as far as it goes and easier said than done. But if you raise those schedules and the greater portion of that is your overall education spending, the better.

Of course, we're not talking the other problem out there of capital outlay. You've got a Florence-Carlton, for example, out there with 52 mills and some districts desperately needing buildings but not having even the bonding capacity to do that.

One other point that I've been asked to talk, and this deals with the, apparently, the recent bill to alter administration costs and extracurricular, and there are several things I'd like to say about that. One is that, universally as we've gone around in this case to take depositions of superintendents from well-funded schools and poorly funded is they feel very strongly that extracurricular activities are very important and, of course, we're not talking just about sports; we're talking about speech and debate, and music, drama and the kinds of things that build well-rounded citizens, but in terms of inculcating a desire to be in school for many school kids. I know this is true of my son who graduated from Bozeman High last year, and he was very active in speech and debate. That set him on fire more than any of his classes did and so that, coupled with the fact that so many experts say extracurricular is just plainly an integral, critical part of education.

If you look at **Jack Gilchrist's** expenditure tables, you'll see, among other things, that compared to instructions, court

services, and building maintenance, that extracurricular forms a very tiny part of that. The other thing on taking out the costs of administration, or some of cost of administration out of your general fund, if that's ... Do I understand that that's part of the proposal? I don't think that anybody can argue that you don't need the support to run the school district, that is, administration, as well as counselors, as well as librarians, as well as teachers. And one of the problems that Serrano v. Priest faced, and by that I mean about the fourth round of Serrano v. Priest in California, is that the California legislature started seeing the light on this equity issue. And realizing that they had to equalize the general fund by the state constitution, they started taking out proponents of the general fund and putting it into categoricals. And, as they did that, then it allowed the tax wealthy districts to perpetuate their advantage because those weren't subject to equalization. So Serrano v. Priest IV actually dealt with that issue, the trend of taking what are generally considered general operating expenses from the general fund and putting them in categoricals. And it strikes me that this is the beginning of that trend here. And all I'm saying is that, based on the Serrano precedent, I think that may cause you additional problems.

We already have, by the way, the evidence in our case is that both retirement and generally transportation are, and Montana's unique in having those as categoricals as opposed to in your general fund. If you did that with administration, it would be another example of trying to shrink the overall portion of the general fund and try to escape equity otherwise, and that might be a dangerous trend.

REP. KADAS: In your talk about the guaranteed, you tried to use guaranteed tax base and power equalization synonymously. We have a version of guaranteed tax base. That to me is not power equalization. Power equalization is when you set a dollar amount and anybody -- or set a value amount, a taxable value amount, and anybody who is below it you subsidize and anybody who's above it, you take away. Do you have the same understanding?

Mr. Goetz: I quite frankly kind of lump those two together because, while I did some reading on that years ago, that hasn't been an issue so I may have mistakenly lumped those together. The general criticism I have is, I think it would still be operable to either concept; that is if you're really concerned about student equity, then you ought to be concerned about using either of those approaches to any great extent.

REP KADAS: If we ... The case here has been that in having, we used to have a lot of districts at 100% of the foundation program amount and they stopped there. We added an additional 35% permissive GTB; almost all the districts that had access to that used it. There were very few, and I think that probably the ones that didn't use it are probably in the process of using it. So if that happens, if everybody uses it, even though they have the

opportunity not to use it, then does that alleviate your concern there?

Mr. Goetz: Yeah, in theory if you had no over-permissive and everybody used it, then you'd have a taxpayer equity argument. So you'd have basically a trend toward equalizing of spending.

REP. KADAS: Well, if only 5% don't use, the fifth percentile, then ...

Mr. Goetz: Then Article X, Section 1, clause 1, says every person is entitled to a guarantee of educational opportunity. So there is an argument there. I didn't make that up, by the way; that's what it says.

REP. KADAS: I want to use **Jack Gilchrist** to kind of fight you here. You know, because he used 5th and 95th, and I assume that you discussed that with him, as the standard.

Mr. Goetz: Yeah, the reason he did that is because that's a traditional way of measuring equity in school finance, but what you have to realize, of course, is what you do is take out the top 5% of students weighted and the bottom 5% weighted and then you measure and then you still have these differences. You have to realize, and we all do, that you're neglecting those 10% that are out there that are even further extreme. I'm sorry that **REP. WANZENRIED** wasn't here for my comments on that.

(End of verbatim minutes.)

CHAIRMAN COBB discussed the rest of the day's agenda and the agenda for the next meeting.

REP. KADAS suggested that the attorney for rural school districts be invited to attend a meeting and discuss that suit and the problems from their perspective.

CHAIRMAN COBB asked **Eddye McClure** to invite **Chip Erdmann** to attend a meeting and to bring any available data or exhibits which he could share with the committee.

REP. FAGG said he would like to hear more about **Nancy Keenan's** power equalization bill.

CHAIRMAN COBB asked **Ms. McClure** to also invite **Superintendent Keenan.**

ADJOURNMENT

Adjournment: 4:30 p.m.

REP. JOHN COBB, Chairman

EVY HENDRICKSON, Secretary

JC/eh

HOUSE OF REPRESENTATIVES
53RD LEGISLATURE - 1993
SELECT COMMITTEE ON SCHOOL FUNDING

ROLL CALL ~~VOTE~~

DATE 1-31-93 ~~BILL~~ NO. _____ ~~NUMBER~~ _____

MOTION: _____

_____

_____

Present Absent Excused

NAME	~~AYE~~	~~NO~~
JOHN COBB, CHAIRMAN	✓	
RAY PECK, VICE CHAIRMAN	✓	
BILL BOHARSKI	✓	
RUSSELL FAGG	✓	
MIKE KADAS	✓	
ANGELA RUSSELL	✓	
DICK SIMPKINS	✓	
DAVE WANZENRIED		

✓

HR:1993
wp:rlclvote.man