

# STATE COURT Docket Watch

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## Merit Selection and School Reform

*An analysis of the correlation between the “Missouri Plan” for selecting judges and litigation decisions regarding school financing and school choice.*

Few areas of law are the source of more contentious litigation than education cases, particularly regarding school financing and school choice. The decisions issued by courts in these cases directly impact the lives of students, parents, teachers, and taxpayers in every state in which they are decided. This article looks at two particular sub-sets of education cases: those dealing with judicially compelled or managed state aid to public schools and those dealing with school choice and voucher programs. In each category, this paper analyzes national data, then looks at specific merit selection (also known as “Missouri Plan”) states where courts have issued “activist” decisions.

### STATE SPENDING ON PUBLIC EDUCATION

Frustrated by taxpayer resistance to increasingly high property tax levies to give more money to public schools, advocates of increased school spending have launched a nationwide effort to use state courts to advance their agenda. In the past three decades, litigation has been brought in 45 of the 50 states to determine if state

statutory or constitutional guarantees mandate a certain level of education spending.<sup>1</sup> In many instances, the state courts have ordered the state legislatures to spend more taxpayer money on K-12 education. The Tax Foundation estimates that in the past thirty years, judges have ordered increased school spending in 27 states for a combined total of \$34 billion annually.<sup>2</sup> These court decisions have forced nine states to raise taxes specifically for education by an estimated \$13 billion annually, while the other \$21 billion each year came from spending cuts or other revenue growth.

These state cases are prime examples of the danger and power of judicially “activist” courts. One commentator has labeled these decisions “a quintessential example of judicial activism—the least accountable branch of state government overrules the highly visible public policies set by state and local legislative bodies, and uses relatively novel legal precedent.”<sup>3</sup>

As this article demonstrates, there

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Special Education Issue

## WILL THE MISSOURI SUPREME COURT ORDER \$1 BILLION FOR PUBLIC SCHOOL FINANCING?

A 1993 Missouri trial court ruling forced the largest tax increase in Missouri history, \$310 million at the time, in order to give more money to Missouri schools.<sup>1</sup> Not content with that victory, a decade later the self-proclaimed Committee for Educational Equity (CEE) was back in court looking for more taxpayer dollars. Backed by a number of school districts and teachers unions, the CEE has pledged that “this time it will pursue the issue all the way to the Missouri Supreme Court seeking to define the Missouri General Assembly’s responsibility to Missouri’s children.”<sup>2</sup>

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## FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and

executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Additionally, readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Mia Reynolds, at [mreynolds@fed-soc.org](mailto:mreynolds@fed-soc.org).

### WILL THE MO SUPREME COURT ORDER \$1 BILLION FOR PUBLIC SCHOOL FINANCING?

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The CEE will get its chance to appeal to the Missouri Supreme Court, because it was handed a loss at the trial court level. The CEE began the litigation on behalf of its member rural school districts in 2004, asking for extensive injunctive relief, including such a sweeping remedy as:

Interim injunctive relief and a permanent injunction which enjoins the Commissioner of Administration, the State Treasurer and the State of Missouri from certifying for payment, paying or otherwise disbursing funds controlled by the State for purposes other than the payment of sinking fund and interest on state indebtedness until such time as funds in amounts which are constitutionally adequate and equitable have been appropriated and are available for disbursement for the support of free public education in Missouri.<sup>3</sup>

Such an injunction would likely have crippled the Missouri government services, including public safety and health care, until the Legislature complied with another injunction putting forth a new school funding formula. And whereas the 1993 case focused on "equity" between school districts, the 2004 case focused on "adequacy," and the plaintiffs' experts asked for \$1 billion more in taxpayer spending.<sup>4</sup>

After the CEE began the lawsuit, a number of suburban districts, known collectively as the Coalition to Fund Excellent Schools, and the Board of Education of St. Louis intervened on behalf of the plaintiffs. The St. Louis BOE brought a particular new angle by arguing that equal funding between districts is illegitimate, because students in urban schools cost more to educate because of the issues they face.<sup>5</sup> In a highly unusual

development, several private taxpayers stepped forward and committed significant personal resources to intervene on behalf of the State.<sup>6</sup> They believed that the lawsuit posed significant danger to the prosperity of Missouri and the wallets of taxpaying citizens, and the court found the danger significant enough to grant their motion for intervention.<sup>7</sup>

After extensive discovery and depositions, the case finally went to trial in 2007. Each side presented several expert witnesses.<sup>8</sup> By the end of the trial court litigation, the school districts had spent \$3.2 million in taxpayer funds to prosecute the suit, while the state spent \$1.4 million in taxpayer dollars to defend. The private citizen intervenors contributed another \$700,000 of their own money to the defense.<sup>9</sup>

Judge Richard G. Callahan, who is elected by the voters of Cole County, issued two decisions in the case, one on August 29, 2007<sup>10</sup> and one on October 17, 2007.<sup>11</sup> After rejecting a political question defense, Judge Callahan engaged in a textualist analysis of the constitutional provision at issue. He found that "may," the word used in the Missouri Constitution, has an optional meaning, and is not the "must" that plaintiffs would prefer. After finishing his analysis of the Missouri Education Clause, Judge Callahan quickly dispatched the equal protection claims under the Missouri and federal constitutions. Finally, the court ruled against one of the plaintiff-intervenors on a tax assessment equality claim.

Judge Callahan's ruling rejecting all of their claims offered the CEE the opportunity to appeal the matter to the Missouri Supreme Court, their desired destination (the heart of the 1993 lawsuit was never confronted by the Missouri Supreme Court, so there is no firm precedent

on education financing). The CEE filed a Notice of Appeal with the circuit court on December 17, 2007,<sup>12</sup> and news reports say the appeal will focus particularly on the adequacy and equity claims.<sup>13</sup> Given the Missouri Supreme Court's recent record,<sup>14</sup> Missouri taxpayers should be concerned that the Court may order a billion dollars or more in new spending on public schools, which can likely only be found through cuts to other government programs or higher taxes.<sup>15</sup>

## Endnotes

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2 Tyler Laney (chairman of the Board of Directors of CEE), *Note from Missouri Committee for Educational Equality*, RURAL POLICY MATTERS, April 2004, *available at* [http://www.ruraledu.org/site/apps/nlnet/content.aspx?c=beJMIZOCiRH&b=1063881&content\\_id=%7B3F61C7EF-328A-4D84-BB59-9261BF64E9D5%7D&notoc=1](http://www.ruraledu.org/site/apps/nlnet/content.aspx?c=beJMIZOCiRH&b=1063881&content_id=%7B3F61C7EF-328A-4D84-BB59-9261BF64E9D5%7D&notoc=1).

3 Second amended complaint of Committee for Educational Equality, *available at* <http://www.schoolchoiceformissouri.org/trial/pdf/CEE%202nd%20amended%20petition.pdf>.

4 Matthew Franck, *This Judge Sits in the Hot Seat*, ST. LOUIS POST-DISPATCH, July 8, 2007, *available at* <http://www.schoolchoiceformissouri.org/trial/pdf/judge%20on%20hot%20seat.pdf>

5 “The issue isn’t one of spending as much as it is one of cost,” says city school attorney Ken Brostron, noting that issues inner city children face are often more costly to address in order for students to reach their potential.” National Association of School Boards,

“Legal Clips,” January 2007, *available at* <http://www.nsba.org/site/view.asp?CID=451&DID=39880>.

6 Children’s Educational Alliance of Missouri, *available at* <http://www.schoolchoiceformissouri.org/trial/citizens.html>.

7 Motion to Intervene, *available at* <http://www.schoolchoiceformissouri.org/trial/pdf/motion%20to%20intervene.pdf>.

8 Testimony available online at [http://www.schoolchoiceformissouri.org/trial/trial\\_selected\\_plaintiffs.html](http://www.schoolchoiceformissouri.org/trial/trial_selected_plaintiffs.html) (plaintiffs) and [http://www.schoolchoiceformissouri.org/trial/trial\\_selected\\_defense.html](http://www.schoolchoiceformissouri.org/trial/trial_selected_defense.html) (defendants).

9 *Costly Battle*, SOUTHEAST MISSOURIAN, October 14, 2007, *available at* <http://medialab.semissourian.com/story/1284170.html>.

10 Available at <http://www.schoolchoiceformissouri.org/trial/pdf/School%20Decision.pdf>.

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12 Jerry Ginger, *Superintendent Newsletter*, ROLLA PUBLIC SCHOOLS, January 2008, *available at* [http://rolla.k12.mo.us/district/administration/superintendent/january\\_2008\\_newsletter/](http://rolla.k12.mo.us/district/administration/superintendent/january_2008_newsletter/).

13 Gene Hanson, *Education Group to Take Funding Fight to Missouri Supreme Court*, THE KEARNEY COURIER, November 21, 2007, *available at* [http://www.kccommunitynews.com/articles/2007/11/26/kearney\\_courier/schools/b.kc.edu.court.appeal.txt](http://www.kccommunitynews.com/articles/2007/11/26/kearney_courier/schools/b.kc.edu.court.appeal.txt).

14 William G. Eckhardt & John Hilton, “The Consequences of Judicial Selection: A Review of the Missouri Supreme Court, 1992-2007,” The Federalist Society, August 2007, *available at* [http://www.fed-soc.org/doclib/20070801\\_FedSocMissouriWhitePaper.pdf](http://www.fed-soc.org/doclib/20070801_FedSocMissouriWhitePaper.pdf).

15 See generally Chris Atkins, “Appropriation by Litigation: Estimating the Cost of Judicial Mandates for State and Local Education Spending,” Tax Foundation, July 2007, *available at* <http://www.taxfoundation.org/files/bp55.pdf>.

## Merit Selection and School Reform

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appears to be a correlation between courts that strike down school financing systems crafted by the state legislature and Missouri Plan judicial selection systems. A review of data from Columbia University<sup>4</sup> finds that in Missouri Plan states where a case has been decided, about 2 in 3 decisions strike down the legislature’s funding statute. By contrast, judges in partisan election states, where the people’s voice is heard most clearly, strike down the financing system less than half the time.

This article provides a brief overview of ten examples of judges from merit selection states acting like “legislators in robes” and issuing sweeping decisions ordering significant changes in state education policy.

- **Alaska:** Judge Sharon Gleason, a trial judge, issued a 196-page decision in *Moore v. State*.<sup>5</sup> She ordered the state to usurp local control and exercise a “considerably more directive role” in troubled school

districts to ensure constitutional standards are met. She stayed her decision for one year to allow the state to develop clear standards for local control and intervention policies when districts fail to meet those standards. She also struck down, on substantive due process grounds, an exit exam for high school seniors that had been required before they could graduate. Judge Gleason drew on an earlier decision by Judge John Reese, also a trial judge, in *Kasayulie v. State*.<sup>6</sup> Judge Reese decided that the Alaska Legislature was not sufficiently funding school facilities in rural areas, in violation of the state’s Education and Equal Protection Clauses. In response, the Legislature and populace passed 2002 Proposition C, which authorized \$170 million in general revenue bonds for school project grants.<sup>7</sup>

- **Arizona:** The Arizona courts were heavily involved in school funding litigation for a full decade. In *Roosevelt Elementary* (1994), the Arizona Supreme

Court struck down the property tax-based plan due to significant capital facility financing disparities between school districts, violating the state constitution's general and uniform public education clause.<sup>8</sup> The Legislature amended the funding plan, but in *Albrecht I*, the court held that the new program was still unconstitutional because it still resulted in substantial capital facilities disparities.<sup>9</sup> The Legislature then passed another law, using revenue from the transaction privilege tax. *Albrecht II* struck that law down as well, reasoning that allowing local school districts to opt-out of the state fund failed the uniformity requirement of the Education Clause.<sup>10</sup> So the Legislature acted again, creating three new funds flush with cash and new building adequacy standards. Finally, in 2003 the state Court of Appeals upheld the system,<sup>11</sup> and the Supreme Court declined review.<sup>12</sup>

- **Connecticut:** Connecticut was one of the first states in the nation to see its Supreme Court order a different educational financing scheme. In *Horton*, the state Supreme Court found that the system of local property taxes and flat per pupil state grants violated the Connecticut Constitution, as it was unfair to property-poor districts.<sup>13</sup> There is currently ongoing litigation to establish standards for a "suitable" education under the state constitution;<sup>14</sup> the plaintiffs seek a \$2 billion increase in state funding for schools.<sup>15</sup>

- **Kansas:** Over the course of three years, the Kansas Supreme Court issued decisions in *Montoy v. State* five times. In *Montoy I*, the court overruled the trial court's summary judgment for the State, saying, "There is a point where the legislature's funding of education may be so low that regardless of what the State says about accreditation, it would be impossible to find that the legislature has made 'suitable provision for finance of the educational interests of the state.'"<sup>16</sup> In *Montoy II*, the court ordered the Legislature to create a new system that spent more money in a more "equitable" manner.<sup>17</sup> The Legislature hurriedly passed a new system, which the court struck down months later in *Montoy III*.<sup>18</sup> There, the court ordered the Legislature to increase funding by \$285 million for that school year.<sup>19</sup> In *Montoy IV*, the court issued a brief order approving the Legislature's spending increase of \$289 million.<sup>20</sup> Finally, in *Montoy V*, the court closed the case, finding that the annual increased funding in the 2008-09 school year of \$755.6 million over that provided in 2004-05 was constitutionally sufficient.<sup>21</sup>

- **Maryland:** The ACLU of Maryland sued the State

in 1994, contending the State was failing to meet its constitutional obligation to provide a "thorough and efficient" education to the students in the City of Baltimore. The parties reached a settlement in 1996 that provided \$230 million in new spending over five years.<sup>22</sup> The case was reopened in 2000, when the trial court found for the plaintiffs and ordered additional state spending of at least \$2000 per pupil in the Baltimore schools.<sup>23</sup> The State ignored the order and instead empanelled a commission, which provided the basis for a 2002 act spending an additional \$1.3 billion annually on schools, especially targeted to high-need districts.<sup>24</sup> In 2004, the trial court issued a decision encouraging the state to accelerate this funding, and also ordering the City to spend \$30-45 million it had cut from the schools' budget.<sup>25</sup> On appeal, the state's highest court generally upheld the trial court's 2004 order.<sup>26</sup>

- **Missouri:** In the 1993 decision *Committee for Educational Equity v. State*,<sup>27</sup> the trial court declared the Missouri funding system unconstitutional and ordered the Legislature to create a new system that provided sufficient funds. In direct response to this ruling, the Legislature passed the Outstanding Schools Act of 1993, which increased state funding of education by more than \$360 million over the previous year, primarily financed by tax increases.<sup>28</sup> The Committee filed a new lawsuit in 2004; the trial court issued a decision in 2007 denying their claims, and the issue is currently on appeal.<sup>29</sup>

- **New York:** Perhaps the most infamous of these cases is the New York decision *Campaign for Fiscal Equity v. State*.<sup>30</sup> After citing several studies by outside consultants, the Court of Appeals, New York's highest court, ordered the Legislature to appropriate an additional \$1.93 billion, adjusted annually for inflation, for New York City schools. The Legislature and governor responded with the State Education Budget and Reform Act of 2007-2008, which committed to an increase of \$7 billion over four years in education spending statewide.<sup>31</sup>

- **Tennessee:** The Tennessee courts spent a decade battling with the Legislature to establish a school financing system the judges found adequate. In *Small I*, the Tennessee Supreme Court passed on an education clause challenge and struck down the system on an equal protection claim, saying the system "has no rational bearing on the educational needs of the districts."<sup>32</sup> Meanwhile, the Legislature passed the



Education Improvement Act, which responded to the trial court decision with a new, \$600 million program to be phased in over six years.<sup>33</sup> The court upheld this new formula in *Small II*, but found it defective to the extent it excluded teachers' salaries.<sup>34</sup> The Legislature, working with the plaintiffs, developed a plan to spend an additional \$12 million over two years on teacher salaries.<sup>35</sup> In *Small III*, the court found this plan inadequate, and ordered more "equalization" of teacher salaries.<sup>36</sup> The trial court closed the case in 2006<sup>37</sup> after the Legislature added \$62 million in new funding over the three previous years.<sup>38</sup>

- **Vermont:** The Vermont Supreme Court issued a per curiam ruling in 1997 striking down the state's education financing system.<sup>39</sup> Setting aside any of the traditional standards for equal protection analysis, the court instead said a "heavy burden of justification" must be met to sustain the current system. The justices said they were "simply unable to fathom a legitimate governmental purpose to justify" the current system, finding the Legislature's rationale of local control utterly inadequate. The Legislature responded by passing Act 60, which increased education spending for the next year by \$300 million, three-quarters of which was drawn from the general fund and one-quarter of which came from new taxes.<sup>40</sup>

- **Wyoming:** The Wyoming Supreme Court has involved itself in that state's education financing system for over three decades. The court first found the state's public school financing system unconstitutional in 1971, saying, "While we do not mean to encroach upon prerogatives of the legislature, we think it might be helpful if we would suggest a possible method by which equal and uniform taxes can be accomplished for school purposes."<sup>41</sup> The court returned to the issue two years later, and again found unconstitutional financing disparity.<sup>42</sup> When the Legislature passed a new financing scheme based on property taxes, the court struck that scheme down as well.<sup>43</sup> When the Legislature again passed a new system, the trial court struck down three of its five parts, upholding the other two. On appeal, the Wyoming Supreme Court struck down all five parts as unconstitutional, giving the Legislature two years to draft yet another new system.<sup>44</sup> In *Campbell II*, the court said the new system was mostly complaint, but not the capital construction program.<sup>45</sup> In doing so, the court announced a sweeping view of its power, rejecting accepted notions of separation of powers, justiciability, and the political question

doctrine.<sup>46</sup> Finally, in January 2008, the court declared the *Campbell* litigation ended,<sup>47</sup> after the Legislature spent nearly a billion dollars on school construction in the five previous years.<sup>48</sup>

These cases all show a high proclivity for merit selection system judges to supplant their own personal policy choices regarding education funding for those of the people's elected representatives. And overall, when compared to the national average, courts in merit selection states are more likely than other courts nationwide to strike down the current system and order more spending.<sup>49</sup>

### SCHOOL CHOICE AND VOUCHERS

A Spring 2007 study by the Institute for Justice and the American Legislative Exchange Council surveyed the laws of all fifty states to evaluate where school voucher programs would be legal under existing state constitutional law and precedent.<sup>50</sup> Sixty-four percent of the fifty states were coded as "Vouchers – Yes" states by the study. Even more impressively, seventy-seven percent of states where the people elect their judges were coded "Voucher – Yes" states. Only about half of merit selection states were "Voucher – Yes" states, seven percent less than the national average and twenty percent less than the elected states. Moreover, many of the leading anti-voucher state court decisions originate from state supreme courts selected by a merit commission, such as Florida. The following examples illustrate the strong anti-voucher current running through decisions from judges produced by a merit selection system.

- **Alaska:** The Alaska Supreme Court held that a tuition assistance grant program that gave tax dollars to Alaskan students who attended private Alaskan colleges and universities violated the state constitution.<sup>51</sup> Rejecting the distinction that would be key for the U.S. Supreme Court in *Zelman*, the Alaska Supreme Court held that "though the tuition grants are nominally paid from the public treasury directly to the student, the student here is merely a conduit for the transmission of state funds to private colleges."<sup>52</sup> The court also found unconstitutional public funding of school bus services for private school students, concluding that the Alaskan Blaine Amendment was more restrictive than the First Amendment as interpreted by the U.S. Supreme Court in *Everson*.<sup>53</sup>

- **Colorado:** The Colorado Supreme Court struck down a pilot voucher program which directed some local tax funds from the district to students who wanted to

spend those funds on tuition at private schools.<sup>54</sup> The court found this violated the local control provision of the state constitution's education clause; the dissent pointed out that the plain language of the provision at issue concerns only control over instruction in *public* schools.

- **Florida:** In 2006, the Florida Supreme Court issued the most infamous decision of any state supreme court in a voucher case. Reversing a unanimous intermediate appellate court panel, the Florida Supreme Court decided that the Opportunity Scholarships Program violated the Florida Constitution's education clauses.<sup>55</sup> The Florida Constitution provides that, "Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools."<sup>56</sup> The court reasoned that the voucher program violated this provision because "[i]t diverts public dollars into separate private systems parallel to and in competition with the free public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida's children."<sup>57</sup> The dissent points out that nothing in the text of the constitutional provision requires that the public schools be the *sole* method of education, but only that the Legislature provide for public schools. The court inserted the *sole* by judicial fiat in order to strike down the Opportunity Scholarships Act.

- **Hawaii:** Like the Alaska Supreme Court, the Hawaii Supreme Court found that the state constitution was more restrictive than the U.S. Constitution as interpreted in *Everson*, and struck down transportation services to private schools.<sup>58</sup> More recently, the Hawaii Attorney General issued an opinion analyzing that decision, and concluded that "just as the indirect bus subsidies in *Spears* were deemed unconstitutional, so would a publicly funded school voucher program be deemed unconstitutional."<sup>59</sup>

- **Missouri:** The Missouri Supreme Court has a history of rulings that make it nearly impossible for vouchers to pass state constitutional muster. The court has held that public funds may not be used for bus transportation<sup>60</sup> or textbook loans<sup>61</sup> to private schools. The court also held that federal Title I education funds granted to the State may not be used to provide special education programs to private school students on the premises of private schools.<sup>62</sup> Based on these rulings, the Institute for Justice study found that a state constitutional amendment would be necessary to make a voucher program permissible in Missouri.<sup>63</sup>

- **South Dakota:** The South Dakota Supreme Court has held that it violates the state constitution for the state to buy textbooks with tax funds and then loan those textbooks to private schools.<sup>64</sup> The holding makes the state constitution more restrictive than the U.S. Supreme Court's interpretation of the First Amendment in *Board of Education v. Allen*. An opinion by the state Attorney General synthesized the court's decisions as a simple rule: "If money or property of the state is going for the benefit of a sectarian or religious society or institution, for sectarian purposes, or to the aid of a sectarian school, then the constitutional provisions would prohibit state involvement."<sup>65</sup> Under this rule, the Attorney General concluded that it would be unconstitutional for a school district's buses to stop at a church-owned pre-school while running their normal routes.

- **Vermont:** The Vermont Supreme Court interpreted the state's compelled support clause to outlaw a voucher system where parents could send their children to religious schools, reasoning that "we see no way to separate religious instruction from religious worship."<sup>66</sup>

As these examples demonstrate, many merit selections states are not friendly to school vouchers. The national statistics show that proponents of school voucher programs do better in states where judges are elected.<sup>67</sup> Based on this data, advocates for children would do well to press for a judicial selection system that is transparent and open and discourages the appointment of "activist" judges.

## Endnotes

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2 Chris Atkins, "Appropriation by Litigation: Estimating the Cost of Judicial Mandates for State and Local Education Spending," Tax Foundation, July 2007, *available at* <http://www.taxfoundation.org/files/bp55.pdf>.

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- 18 *Montoy v. State*, 112 P.3d 923 (Kan. 2005).
- 19 *Id.* at 941.
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