

## **MEMORANDUM**

DATE: JUNE 11, 2001

RE: LAKE VIEW SCHOOL DISTRICT No. 25 ET AL. v. MIKE HUCKABEE, ET AL., PULASKI COUNTY CHANCERY COURT No. 92-5318

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This memorandum outlines the opinion entered by Judge Collins Kilgore in this case.

The focus of this memorandum will be the more crucial factual findings, legal conclusions, and apparent remedies set forth in the order.

### **BRIEF HISTORY**

As an overview, this case has been pending since 1992. The complaint broadly alleged that the State's system of public education violated the education and equal-protection clauses of the Arkansas Constitution and the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The case was tried during an approximate one-week period in late 1994. The primary defense of the case was handled by the Department of Education's then in-house litigation counsel, Elizabeth Boyter Turner. In November of 1994, Chancellor Annabelle Clinton Imber held that the then existing system of public education violated both the education and equal-protection clauses of the Arkansas Constitution. Central to Judge Imber's conclusion on the equal-protection-clause issue were three statistical measures, the Federal Range Ratio, the Gini Index of Inequality, and the Coefficient of Variation, which, in her opinion, demonstrated that the disparities in school-district spending per student were too great to be constitutionally tolerable. At the same time, however, Judge Imber declined to issue rulings on the constitutionality of particular "elements" of the system and would not dictate a remedy. Instead, Judge Imber stayed the

effect of her decision for two years to give the General Assembly time to enact a new school-funding system "in accordance with her opinion."

The State appealed Judge Imber's November 1994 ruling to the Arkansas Supreme Court. In that appeal the State challenged, among other things, Judge Imber's use of the three statistical measures and the legal conclusions she drew from them. While that appeal was pending, the General Assembly enacted Act 917 of 1995 and other related statutes that repealed the old funding system and created a new funding system that would take effect in fiscal year 1996-97. Subsequently, on March 11, 1996, the Supreme Court dismissed the State's appeal on procedural grounds. In its opinion the Court held that because of the two-year "stay" included in Judge Imber's order, that order was not a "final" order that the Supreme Court could review. The Supreme Court thus offered no opinion on, or guidance concerning, Judge Imber's legal or factual findings. The case was remanded to Judge Imber.

On remand, the plaintiffs filed numerous amended complaints and petitions, all of which alleged that Act 917 did not comport with Judge Imber's November 1994 rulings and that the new system was unconstitutional. By late 1996, Judge Imber had certified the case as a class action and permitted numerous individual school districts to intervene most of them on the side of the State. Judge Imber was then elected to the Arkansas Supreme Court effective January 1997. After it became clear that the time remaining on her court calendar could not accommodate a compliance trial, Judge Imber recused from the case, and it was transferred to Judge Collins Kilgore.

Following the transfer, an attempt was made to settle the case. Judge Kilgore rejected the proposed settlement and, in August 1999, dismissed the case as moot. He also held that sovereign immunity barred the recovery of attorneys' fees by counsel for the plaintiffs. The ensuing appeal resulted in a reversal by the Supreme Court both on the merits issue and the attorneys' fee issue in March 2000. The trial resulting in the opinion at issue followed.

This case was tried from September 18 to October 30, 2000. The trial was held for the purpose of complying with the Supreme Court's opinion requiring a hearing on whether the current system of public schools complies with the Arkansas Constitution. *Lake View School District No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000). Specifically, the Supreme Court remanded the case for "a compliance trial and decision by the chancery court on whether the disparities in treatment noted in [the chancery court's] 1994 order have been corrected so as to pass constitutional muster. . . ." *Id.* at 494, 10 S.W.3d 901. This language in the Supreme Court's opinion referred only to funding disparities. *Ibid.* Subsequently, however, Judge Kilgore ordered that the trial would be expanded to determine whether "Arkansas provide[s] its citizens with an adequate educational system under Article 14 [of the Arkansas Constitution]. . . ." *Lake View School District No. 25 et al. v. Huckabee, et al.* No. 92-5318, slip op. at 5 (Pulaski County Chancery Court Sept. 13, 2000). Thus, the trial examined both the equitable distribution of funds to school districts and the adequacy of the educational system in this state. With one slight exception, the trial did not address attorneys' fees because Judge Kilgore held that the record was closed on that issue. The exception was the requirement that the plaintiffs' attorneys submit time records for the compliance phase of the trial.

### **THE LEGAL STANDARD**

Judge Kilgore established a standard for the State to meet both before the trial and in this order. Two concepts embodied in the Arkansas Constitution are at issue in this case. Those are the requirement that the State provide a "general, suitable, and efficient system of free public schools" found in Article 14, section 1, and the equal protection provisions of Article 2, sections 2, 3 and 18. See *Lake View School Dist. #25, et al. v. Huckabee, et al.*, No 92-5318, slip op. at 35 (Pulaski County Chancery Court Sept 13, 2000) (Sept. 13, 2000, Order); *Lake View School Dist. # 25, et al. v.*

*Tucker, et al.*, No. 92-5318, slip op. at 46-50 (Pulaski County Chancery Court Nov. 9, 1994) (the 1994 Order).

Judge Kilgore held that in order to comply with this constitutional mandate the State must provide a system of education that meets the dictates of *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). Sept. 13, 2000, Order at 3, ¶ 8 (citing the 1994 Order, Conclusion of Law ¶ 9). Such a system, he held, requires "substantial uniformity, substantial equality of financial resources and substantial equal education opportunity for all students." *Rose*, 790 S.W.2d at 192. The system should be "adequate, uniform and unitary." *Ibid*.

This statement of the requirements of the system, however, adds little clarity to the otherwise imprecise terms "general, suitable and efficient." See 1994 Order, Conclusion of Law ¶8. Thus, Judge Kilgore also adopted further language from *Rose*. Pursuant to that language, the elements of the system of common schools enacted by the State should be:

1. The system is the sole responsibility of the General Assembly.
2. The tax effort should be evenly spread.
3. The system must provide the necessary resources throughout the state.
4. The system must provide an adequate education.
5. The system must be properly managed.

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[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v)

sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training, or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

*Rose*, 790 S.W.2d at 211, 212; Sept. 13, 2000, Order at 3-4, ¶8.

This standard can be further reduced to requiring the State to enact a system of education that embodies legitimate standards for student performance, a method for accountability to ensure that those standards are met, and provision of sufficient resources to deliver the standards to students. *Lake View School District No. 25, et al. v. Huckabee, et al.*, No. 92-5318, slip op. ¶ 48 (Pulaski County Chancery Court, May 25, 2001) (the 2001 order). Such was the legal measuring stick the State had to meet in the compliance trial and must now meet if this order is upheld.

Finally, the September 18, 2001, Order addressed what the type of analysis would be in the case. Previously, the Arkansas Supreme Court had left open the question as to whether the education clause should be analyzed under the "rational basis standard" or the "strict scrutiny standard" which is a higher burden for the State to meet. *Dupree v. Alma School District No. 30* 279 Ark 340, 346 (1983). Judge Kilgore did rule on this question stating "[t]he State of Arkansas has a compelling interest in having an educated electorate, and therefore, strict scrutiny will be the standard by which compliance will be measured." Sept. 13, 2000, Order at 5-6, ¶14.

### **CRUCIAL FINDINGS AND CONCLUSIONS**

Judge Kilgore set forth numerous factual findings and legal conclusions in his order. No attempt will be made to set forth each and every one. Rather, following is a listing of the more crucial and important of them. Also, it is often difficult to determine whether a particular point is a "finding of

fact" or a "conclusion of law" regardless of where it is located in the opinion.<sup>1</sup>

Prior to a discussion of each, however, it is interesting to note Judge Kilgore's specific finding with regard to the issue of mismanagement on the part of individual districts. An argument emphasized primarily by the Alma intervenors was that many districts simply misused or mismanaged the funds they received. Judge Kilgore rejected the relevance of this argument by writing that "under the Constitution, the State bears the ultimate burden of educating its children, no matter where the blame is cast." 2001 order ¶ 22.

### **Findings and Conclusions Regarding the Statistics**

As written previously, Judge Imber's' 1994 order relied heavily on three statistical measures to conclude that the previous system was unconstitutional. While Judge Kilgore continues to utilize them, he seems to de-emphasize their importance. He writes that they merely "assist in mathematically determining if any variances in the distribution of funds by the State to the school districts are constitutionally acceptable." 2001 order ¶ 1. He also notes that, with respect to the constitutionality of funding variations, "[t]he formulas do not provide an exclusive way to answer the questions." *Id.* ¶ 20. This language contrasts with Judge Imber's order in which the statistics appear to be determinative.

With respect to the statistics, the trial focused on what funding amounts should be included within their calculation. The State argued that funds paid to the Pulaski County districts under the desegregation settlement should not be included, and Judge Kilgore agreed. *Id.* Conclusions of Law ¶ 3(b). He also agreed with the State's argument that the 1994 order did not require the use of a weighted average daily membership, or WADM, as the basis for distribution of funds. *Id.* Conclusions of Law ¶ 3(c).

On the other hand, Judge Kilgore disagreed with the State that

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<sup>1</sup> The same was true of Judge Imber's 1994 order. Perhaps it is just the nature of the subject matter.

revenues to the districts were the appropriate measure rather than expenditures on students by the districts. He reasoned that "under the Constitution the State is solely responsible for the education of its citizens. Its duty does not end upon the disbursement of revenues to the districts. Moreover, the best measure of whether funds are being efficiently applied to the education of the State's children is by an accurate accounting of expenditures." 2001 order ¶ 3. Thus, while he accepted the State's calculation of the statistics, he found that two of the three statistics fell outside the range that Judge Imber held would be acceptable. *Id.* ¶ 21; Conclusions of Law ¶ 3(a).

### **Across-District Comparisons**

A significant portion of the 2001 order is devoted to findings and conclusions regarding facilities and equipment, teacher pay and curriculum. See 2001 order section A.1. – 3. These comparisons, according to Judge Kilgore, are greater measures of the "equity" of the system than the statistical measures. While he never so writes in the order, it seems clear from a close reading.

With respect to each, Judge Kilgore finds a disparity between the quality and quantity among districts. These disparities are great in his view; too great to be equitable. These disparities are a result of the difference in wealth among districts. Throughout the opinion, he compares what is available to students in wealthier districts and poorer districts and determines that the disparities mean that "all students in Arkansas do not have an equal opportunity to learn." *Id.* ¶23.

### **Adequacy Issues**

Very likely the most important point made by Judge Kilgore in the order is that [i]f an adequate education system exists for all of Arkansas' students, then it follows that the system will be equitable." *Id.* Conclusions of Law ¶ 8. This phrase underlies much in his opinion. The important point about the phrase is that it recognizes that adequacy will likely be achieved by

inequitable spending. For example, Judge Kilgore notes that facilities in Eastern Arkansas are much worse than those in other parts of the state. *Id.* ¶ 37. At the same time, these areas are less able to make use of existing State funding mechanisms like the debt service funding supplement because they lack the property wealth to incur sufficient initial debt to qualify for it. *Id.* ¶ 39. Thus, the State must spend more in those areas for facilities and other capital needs.

Several additional adequacy areas are addressed directly by the opinion. With respect to financial adequacy, three points are crucial. First, the State "bears the responsibility to ensure adequate funding for all students. It may not permit a local district to underfund its portion of that obligation." *Id.* ¶ 49.

Second, Judge Kilgore takes the State to task for its method of arriving at a funding figure. The State typically funds education simply by allocating whatever money is in the budget, which figure is usually a percentage increase over the previous biennium. *Id.* ¶ 53. No study has been done to determine whether that budgeted amount is sufficient. *Id.* ¶ 49. Such was also the case in 1994. *Ibid.* Thus, Judge Kilgore orders the State to undergo an adequacy study. *Id.* Conclusion of Law ¶ 8.

Third, Judge Kilgore notes that the "purpose of the Educational Excellence Trust Fund has been defeated." *Id.* ¶ 52. This fund was created in 1991 to supplement the amount of money available to education in the general revenue budget. However, since that time, the amount budgeted to education in the general revenue budget has decreased. Thus, Judge Kilgore arrived at his conclusion.

The opinion also examines what is termed "educational adequacy." Section B. 2. Here Judge Kilgore does what no other court has done before. He uses "performance" as a measure of adequacy. Thus, in his view, the low national ranking and high remediation rates among Arkansas students are strong, evidence of inadequacy.

Teacher pay receives additional attention in the adequacy portion of the opinion. Here, Judge Kilgore notes that Arkansas teachers are

compensated far less than their counterparts in neighboring states. Section B. 7. This fact makes it difficult for districts, particularly those on the border with other states, to attract and maintain qualified teachers.

Disparities in pay among Arkansas districts are also addressed. 2001 order ¶¶ 119-120. Typically, the districts with the greatest number of high-needs or at-risk students on a percentage basis are the districts that can pay teachers the least. The opinion finds that this fact "destabilizes the education system by driving qualified teachers away from the districts where they are most needed." *Id.* ¶ 119.

Finally, a few notes concerning the Arkansas Comprehensive Testing and Accountability Program, or ACTAAP. The opinion seems to review favorably the "substantive components" of ACTAAP such as Smart Start, Smart Step, Individual Student Achievement Plans, Remediation, and staff development. Simply put, however, Judge Kilgore holds that insufficient funds are available in the education budget to accomplish ACTAAP's goals. Thus, more funds are needed.

### **Remedies**

The opinion foregoes ordering a specific remedy in the section captioned "Remedy." See 2001 order section VI. It holds that courts are "not equipped for the task." *Ibid.* Instead, Judge Kilgore leaves it to the legislature to fashion a remedy consistent with the opinion.

Nevertheless, certain remedial steps can clearly be taken from the opinion. First, because in the court's view competent, motivated teachers are the most essential element of an adequate system, Judge Kilgore orders both higher and substantially equivalent salaries across the state. *Id.* Conclusions of Law ¶ 4, 6.

Second, as written previously, the opinion finds curriculum disparities unacceptable. Thus, Judge Kilgore requires substantially equivalent curriculums to be offered throughout the State. *Id.* Conclusions of Law ¶ 1.

Third, the State is required to "form some adequate remedy that allows every school district to be on an equal footing in regard to facilities, equipment, supplies, etc." *Id.* Conclusions of Law ¶ 2. Anything short will offend both the Education Clause and the Equal Protection Clauses of the Arkansas Constitution.

Fourth, as mentioned previously, a financial adequacy study must be performed.

Fifth, Judge Kilgore notes that a child entering kindergarten lagging behind his peers is at substantial risk of failure. Thus, the State will be required to create and maintain a pre-school program that will allow children "to compete academically with their peers." The opinion places this mandate on an equal footing with the requirement that teacher salaries be increased and equalized.

Sixth and finally, as written previously, the order finds that expenditures are the correct measure to include in the calculation of the formulas. However, the expenditure data reported to and maintained by the State is untimely and inaccurate. Thus, the State will be required to "take necessary steps to effect a more accurate accounting of expenditures." *Id.* Conclusions of Law ¶ 3(a).

### **Attorneys' Fees**

Only brief mention will be made here of attorneys' fees. This portion of the order is broken into two parts. The first deals with the fees owing to the plaintiffs' attorneys prior to this compliance phase of the trial. Here, Judge Kilgore awards a fee equal to 6.5% of the collective benefit created by the initial portion of the ease. The figure he uses is the \$130,000,000 contained in the rejected agreed order. He also notes that this amount would be essentially the same if the lode star method were used along with the plaintiffs' claim of 15,000 hours.

The second portion awards fees on an hourly basis based on the plaintiffs' attorneys' estimate of hours for the compliance phase of the trial. The total fees awarded are \$9,338,035. No fees are awarded for the attorney for the plaintiffs' attorneys and no costs are awarded.

### **RECOMMENDATION ON APPEAL**

The State Board of Education should make a determination at its June 11, 2001, regular meeting as to whether or not it wishes to proceed with an appeal.