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To: Senate Committee on Judiciary and House Committee on Judiciary

From: Lauren Douglass, Principal Research Analyst

Re: Other States' Judicial and Legislative Responses to School Finance Litigation

This memorandum examines the approach of other states' courts and legislatures in imposing remedies in school finance litigation. According to information provided by the National Conference of State Legislatures (NCSL), all but four states have had some variation of school finance litigation since the late 1960s. Due to the extent of such litigation, this memorandum is by no means comprehensive; however, it seeks to highlight trends, where they can be found. Further, the nature of the topic requires cases to be decided under the terminology of state law, making it difficult to compare one state's court rulings to another.

Separation of Powers and the Political Question Doctrine

A 2009 law review article identifies seven states that have declined to intervene in challenges to K-12 school finance citing separation of powers principles or a determination that the issue is a nonjusticiable political question: Alabama, Florida, Illinois, Nebraska, Oklahoma, Pennsylvania, and Rhode Island.[1] These cases often cite the test for the political question doctrine outlined in *Baker v. Carr,* 369 U.S. 186, 217 (1962). The first part of the test refers to a "textually demonstrable commitment of the issue to a coordinate political department," such that the analysis in these cases frequently relies on states' own constitutional provisions. Additionally, part two of the test refers to "a lack of judicially discoverable and manageable standards for resolving [the issue]," and thus lack of specificity in constitutional provisions or elsewhere in the law sometimes leads courts to decline to consider these cases.

In the Florida case, the Florida Supreme Court upheld dismissal of a suit citing provisions of the *Florida Constitution* that prohibit one branch from exercising the powers of another and give sole authority to appropriate to the legislative branch.[2] Further, the court stated the appellants did not provide a standard for adequacy that "would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing by law for an adequate

1 Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 Column. J.L. & Soc. Probs. 545, 547 (2009).

2 *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 407-08 (Fla. 1996).

and uniform system of education)."[3] In Alabama, after issuing four decisions over the course of nine years, the court found to pronounce a specific remedy from the bench would equate to an exercise of the legislature's sole duty to administer state funds to public schools and quoted a c*onstitutional* provision stating the judicial branch "shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."[4]

No Specific Remedy Provided

Where courts have ruled in favor of plaintiffs, some have declined to provide a specific remedy, deferring instead to the legislative branch. In *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court held Kentucky's entire system of common schools was unconstitutional, including statutes creating, implementing, and financing the system; the creation of local school districts, school boards, and the Kentucky Department of Education; school construction and maintenance; and teacher certification.[5] The court instructed the General Assembly that the system must be efficient and set binding criteria; however, the court emphasized the General Assembly had sole responsibility for providing the system of common schools.[6]

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3 *Id.* at 408.

4 *Ex parte James*, 836 So. 2d 813, 817, 819. (Ala. 2002). *See also Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (referencing lack of judicially discoverable or manageable standards and stating "the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion"); *Nebraska Coal. for Educ. Equity & Adequacy v. Heineman,* 273 Neb. 531, 554 (2007) (holding it "beyond our ken" to determine funding adequacy as the court is not the proper forum for resolving broad and complicated policy decisions or balancing competing political interests); *Okla. Educ. Ass'n v. State*, 158 P.3d 1058, 1066 (Okla. 2007) (stating the Legislature has few constitutional restraints in carrying out its duty to establish and maintain a free public educational system and when the methods used for carrying out this duty are challenged, the only justiciable question is whether the Legislature acted within its powers); *Danson v. Casey*, 484 Pa. 415, 427, 399 A.2d 360, 366 (1979) (stating "the only judicially manageable standard this Court could adopt would be the rigid rule that each pupil must receive the same dollar expenditures," and "expenditures are not the exclusive yardstick of educational quality"); *and City of Pawtucket v. Sundlun*, 662 A.2d 40, 62 (R.I. 1995) (finding the constitution charged the General Assembly with the duty to promote public schools and referring to lack of judicially manageable standards).

5 *Id.* at 215.

6 *Id.* at 216. *See also Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993) (affirming the trial court's holding that the appropriate remedy should be fashioned by the General Assembly and stating the constitution "contemplates that the power granted to the General Assembly will be exercised to accomplish the mandated result, a public school system that provides substantially equal educational opportunities to the school children of Tennessee," such that "the means whereby the result is accomplished is, within constitutional limits, a legislative prerogative.").

School Closure as a Remedy

New Jersey is the only state known to have closed schools. In the case of *Robinson v. Cahill*, 351 A.2d 713 (1975), the New Jersey Supreme Court issued a deadline for legislative action similar to the deadline in *Gannon*, and schools closed for eight days.

Other Remedies

In Arkansas, the Supreme Court released jurisdiction in a 2004 opinion; then in 2005 it recalled the case, having stated in the 2004 opinion that "this court will exercise the power and authority of the judiciary at any time to assure that the students of our State will not fall short of the goal set forth by this court," and appointed masters to make findings of fact.[7] The masters were charged with examining and evaluating legislative and executive action taken to comply with the court's order and its constitutional mandate and reporting their findings to the court.[8]

Other courts simply retain jurisdiction and continue to monitor legislative action for compliance with court orders. The Wyoming case *Campbell Cty. Sch. Dist. v. State*, 181 P.3d 43, 83-84 (Wyo. 2008) chronicles the Wyoming Supreme Court's oversight of school finance in three different cases, beginning in 1971, saying, "Each time jurisdiction was retained, legislative action was finally forthcoming. . . . In this case, . . . we retained jurisdiction reluctantly and at the request of both parties, and went to great lengths to provide flexibility to the parties in hopes of a final resolution." In New Jersey, the State is in the process of complying with a 2011 judicial order to fully fund the School Funding Reform Act of 2008. The most recent order in *Abbott v. Burke* is the 21st reiteration of the ongoing line of cases first filed in 1981.

In ongoing litigation in Washington, the Supreme Court found the State in contempt of court but delayed sanctions until the close of the 2015 Legislative Session. On August 13, 2015, it issued an order imposing a fine of $100,000 per day on the State for each day it is in violation of the court's order in *McCleary v. Washington,* 279 P.3d 227 (2012).

Additional Resources

NCSL maintains an online spreadsheet containing citations to modern school finance cases and categories for the outcomes of those cases. It can be accessed at http://bit.ly/School-Finance-Litigation-Citations-NCSL

The spreadsheet is premised on an American Law Report on the validity of public school funding systems, 110 A.L.R.5th 293 (Originally published in 2003), and on law review articles.

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7 *Lake View Sch. Dist. No. 25 of Phillips Cty., Ark. v. Huckabee*, 210 S.W.3d 28, 29 (Ark. 2005).

8 *Id.* at 30 (2005) (stating the masters would have the same powers and authority as set forth in *Lake View Sch. Dist. No. 25 v. Huckabee*, 356 Ark. 1, 144 S.W.3d 741 (2004).).