



Trouble in Kansas

Parents in a wealthy district sue to pay more taxes

by JOSHUA DUNN and MARTHA DERTHICK

Kansas's judicially grounded regime of equitable school spending recently led to a most peculiar federal case, *Petrella v. Brownback*, in which parents from a wealthy suburban Kansas City school district, Shawnee Mission, sued for permission to raise their property taxes so that they could spend more on education.

The case is striking both for its facts and for the plaintiffs' far-reaching claims.

Like some other states, such as Vermont and Texas, Kansas has responded to school finance litigation by limiting how much school districts can spend. Following a 1991 trial court decision in *Mock v. State* invalidating an existing plan, the legislature under a state

judge's supervision enacted a sweeping reform that met his standards for equity yet made a concession to wealthier districts with provision for a local-option budget. The state would provide a base level of funding per pupil but allowed districts to levy additional local taxes up to a cap of 25 percent of their base. By 2010 the cap had risen to 30 percent or, with approval of district voters, 31 percent.

In the wake of the recent economic downturn, the state reduced its base payment to all districts. Noting Shawnee Mission's nearly \$20 million in budget cuts over two years and plans for school closures, the plaintiffs asked the court to enjoin the local cap.

The plaintiffs asserted that the cap violates several constitutional guarantees. Citing Supreme Court decisions in *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925), which held that the liberty guaranteed in the Fourteenth Amendment's Due Process Clause includes a right of parents to control the education of their children, the plaintiffs charged that the local cap infringes on that right. As well, by forbidding additional taxes it limits their right to use their property as they wish. Still more inventive, they invoked the First Amendment right of assembly, saying that the cap prevents voters from expressing their collective wishes at the ballot box. These violations together, they contended, constitute a denial of equal protection of the law.

In the 2008–09 school year, at \$4,701, Shawnee Mission was 265th out of 296 districts in state funding, receiving \$2,643 less per pupil than the average. At \$12,174 per pupil, the district's spending was almost \$500 below the state average. That a rich district could perversely become poor is explained by the fact that the base amount provided by the state is subject to complicated weighted increases that favor

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sparsely populated western and urban eastern districts while disfavoring suburban eastern ones such as Shawnee Mission. The local cap prevents districts from closing the difference.

In making their novel legal claims, which they summarized with the phrase "collective political freedoms," the plaintiffs were assisted by high-powered legal

talent from Kansas City's Shook, Hardy & Bacon, famous for cutting its teeth in defense of cigarette makers; Washington, D.C.'s boutique firm Massey & Gail; and Harvard Law School's Laurence Tribe, who as special consultant to Massey & Gail signed the district's brief. This talent, however, could not secure a favorable decision. In March 2011, U.S. District Court Judge John Lungstrum dismissed the case. The school district, as an entity of the state, he said, has no right to tax beyond what the state allows. Nor could the local cap be severed from the rest of the school funding statute. Striking it down would require striking down the entire school finance structure, an option Judge Lungstrum was unwilling to entertain.

The parents have said that they will appeal. But if the local cap cannot be severed, federal courts will likely remain reluctant to wade into the state's school funding choices. Given the problems generated in Kansas and elsewhere by school finance litigation, federal judges might reasonably doubt whether courts are suitable venues for resolving such disputes. Late in 2010, 63 Kansas districts, including Kansas City, filed a class action against the state charging that it is violating the state constitution by failing to fund schools adequately. It remains to be seen whether the Kansas courts will embrace one more round of battle in a state with a long history of finance litigation and growing signs of legislative resistance, including a revived interest among the Republican majority in amending the state constitution to discourage future school-finance litigation.

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