EXHIBIT 1
DATE 1-11-05

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

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COLUMBIA FALLS Elem. School Dist. No. 6 and H.S. Dist. No. 6, EAST HELENA Elem. Dist. No. 9, HELENA Elem. Dist. No. 1 and H.S. Dist. No. 1, BILLINGS Elem. Dist. No. 2 and H.S. Dist. No. 2, WHITE SULPHUR SPRINGS Elem. Dist. No. 8 and H.S. Dist. No. 8, TROY Elem. Dist. No. 1 and H.S. Dist. No. 1, MEA-MFT, MONTANA SCHOOL BOARDS ASSOCIATION, MONTANA RURAL EDUCATION ASSOCIATION, SCHOOL ADMINISTRATORS OF MONTANA, ALAN & NANCY NICHOLSON, PETER & CHERYL MARCHI, MICHAEL & SUSAN NICOSIA, for themselves and as parents of their minor children,	CAUSE NO. BDV-2002-528
Plaintiffs,	
vs.	
THE STATE OF MONTANA,	
Defendant.	

COPY

REPORTER'S TRANSCRIPT
ON APPEAL

COURTROOM
LEWIS AND CLARK COUNTY
COURTHOUSE - 228 BROADWAY
HELENA, MT
JANUARY 20 - FEBRUARY 4, 2004
VOLUME 1 (JANUARY 20, 2004)

HON. JEFFREY M. SHERLOCK, DISTRICT JUDGE, PRESIDING

PREPARED BY: PENNY L. DOIG-MARTIN
OFFICIAL COURT REPORTER
HELENA, MONTANA

JANUARY 20, 2004

THE COURT: Please be seated.

Good morning.

MR. MOLLOY: Good morning, Judge.

THE COURT: And we're here in Cause No. 2002-528 for the hearing on the merits, and are we ready to proceed?

MR. MOLLOY: We are, Your Honor.

THE COURT: Mr. Morris.

MR. MORRIS: The State is ready, Your Honor.

THE COURT: Okay. Let's go.

MR. MOLLOY: Thank you, Judge.

I have just a couple of housekeeping matters before I get into our opening statement. I point out to the Judge that we set your set of exhibits back there and we will tell you before a witness is going to testify which of those volumes you would want to grab.

THE COURT: Very good.

MR. MOLLOY: We have a set for the witness over here so we won't have to hand them out, and Dawn has the original set.

Your Honor, my secretary couldn't remember whether she gave you a set of our briefs, proposed findings and conclusions, so that is yours.

1 THE COURT: If they're not, I'll exclude
2 those.
3 MR. MOLLOY: They're not part of the record.
4 THE COURT: Go ahead.
5 MR. MOLLOY: May it please the Court. We
6 are honored to be here, Judge, on behalf of the students
7 throughout Montana's public school system who are
8 currently being educated in our elementary and high
9 schools. This case is brought by several school
10 districts, the major statewide educational
11 organizations, and some individuals, all on behalf of
12 the students in our public schools.
13 Over the course of the next couple of weeks,
14 we believe you will hear compelling evidence that will
15 prove our contention; the State of Montana is failing to
16 meet its constitutional obligations with respect to
17 funding for Montana's public schools.
18 Judge, I would like to now summarize the
19 witness -- excuse me -- the evidence the plaintiffs will
20 introduce over the next seven to eight trial days. And
21 to do that, Your Honor, I prepared a set of charts and
22 outline materials that I will go through with you. And
23 you have those in front of you. There are some exhibits
24 that are in the record that I'll also be putting up
25 there to review.

1 other 30. Now, that can vary by school district, and
2 Mr. Johnson will explain that.
3 The funding system that we're here to
4 contest, and we believe the evidence will show, prove
5 that it is not constitutionally adequate, is referred to
6 as House Bill 667. There were cases pending before you
7 in 1993, and at the time the legislature enacted a new
8 funding system referred to as House Bill 667. It
9 changed the foundation program system of funding and
10 enacted this new BASE budget system of funding. There
11 are many similarities in concept but the terms differ,
12 Your Honor.
13 The things that you will hear about now
14 instead of, for example, the foundation program, will be
15 the BASE budget. The BASE budget is composed of a basic
16 entitlement, which is a flat amount of money that every
17 school district in the state receives regardless of how
18 many school buildings they have. So Flaxville would get
19 the same BASE budget, base entitlement, as would
20 Billings. And the next is the per ANB. And if you'll
21 recall, Your Honor, ANB is the student count measure.
22 It's called average number belonging. And you'll hear
23 about that, obviously.
24 House Bill 667 incorporated a mechanism that
25 was designed to prevent schools from spending more money

1 fundamental or structural flaws in the system. And I'll
2 come and talk about some of those. And then I'll talk
3 to you about a very central and key issue, and that is
4 the adequacy of the State's funding. And I do emphasize
5 on state, Your Honor. Much of the evidence in this case
6 will talk about overall spending. The Constitution
7 requires that the State fund and distribute equitably
8 its share of the cost. And the proof is going to show
9 that they're not doing that. It is not paying its share
10 of the cost of the basic system. The State is also
11 failing to meet its funding obligations under subsection
12 (2). Your Honor, I would suggest, and Mr. Morris
13 started by pointing out there has been an amicus brief
14 filed on behalf of the Montana Indian Education
15 Association and others relating to the subsection (2)
16 issues, and we've also addressed those in our briefs and
17 findings. I do not believe you are going to hear much
18 evidence that would defend the State's failure to
19 address that mandate, which is clearly a mandate that
20 the Helena Elementary I court said they must address as
21 part of the funding system. And, finally, the system
22 remains inequitable in some meaningful respects, Your
23 Honor.
24 Now I would like to talk to you about the
25 structural flaws. And there is a fundamental and

1 Now, there is another fundamental problem
2 with the system, and that is that as -- because it is
3 very dependent on the number of kids who show up to be
4 educated in a given school district from year to year, a
5 relatively insignificant enrollment decline can cause a
6 significant adverse impact on the district's budget
7 authority, it's ability to continue to maintain
8 programs. And the system is very complicated and it's
9 irrational. That fact -- the complicated part I don't
10 think we're going to have very much trouble proving.
11 And I think we'll also prove that it's irrational and
12 operates in a way that is not meeting constitutional
13 obligation.
14 Now, I mentioned enrollment declines. Just
15 to give you a picture, Your Honor, and this is
16 Plaintiff's Exhibit 30, some of the flaws and problems
17 with the system were hidden in the first few years of
18 its operation.
19 If you start in fiscal year 1991, and then
20 1993 is when House Bill 667 was enacted, and 1994 was
21 when it was implemented, you will see that we were
22 experiencing increases in enrollment in Montana's
23 schools. Therefore, as additional kids were showing up
24 for school, with it came additional revenues under the
25 State's funding formula. However, beginning in about

1 No one is going to appear in that witness
2 stand during these three weeks, Your Honor, and contend
3 that we do not have right now a quality system of
4 education in Montana. Okay. And in some states the
5 adequacy issue focuses on whether there is just an
6 abysmally poor system of education. The adequacy issue
7 in Montana relates to the funding to maintain that
8 quality program and to allow it to exist. You will see
9 and hear there are real problems, that I'm going to
10 outline for you here, but never in the point of three
11 weeks of evidence nor in any post-trial briefing will we
12 contend that Montana currently doesn't have a quality
13 system. But the Constitution requires that the funding
14 for that be adequate, and we will contend vociferously,
15 Your Honor, the quality is being compromised due to the
16 unconstitutional funding system.
17 Now, state support for K-12 education is
18 declining. I don't think that is a fact that will be
19 much in dispute here. The State is also paying less of
20 the cost of special education. Again, that is not a
21 fact that is in dispute. There are increasing numbers
22 of districts that are at or near this arbitrary cap
23 figure. And that, Your Honor, cannot be a fact that is
24 in dispute. And the BASE budget amounts are not even
25 adequate to allow districts to meet the minimum

1 Now, in terms of the dollars, not just the
2 relative share of the cost, you will see that even
3 without adjusting for inflation the State has not put
4 much additional funds in 13 years or 12 years into
5 public education in actual dollars, not CPI adjusted.
6 There has been a slight increase over time. If you
7 adjust those for the real costs with the consumer price
8 index adjustment you will see that the State is paying
9 less today for K-12 education than it was in 1991.
10 And I told you that special ed. is also
11 following the same pattern. This one is a little busy
12 and more difficult to follow, Your Honor, but what the
13 blue line down there shows is the level of state support
14 for special education, it's been flat, but costs and
15 needs have not been flat. And there has been a slight
16 increase in the federal dollars that are available to
17 districts to meet those needs. However, the majority of
18 the increase is being born at the local level. That is
19 coming right out of district's ability to fund for their
20 regular operations, their regular programs, and that is
21 illustrated also by these charts, which, again, these,
22 Your Honor, are from the State of Montana. We didn't
23 create these. These charts were from the State. If you
24 look at the blue line, that is the State's percent of
25 the support for special ed. They started off where they

1 the students in Montana. And it's happening for --
2 throughout the state.
3 At the high school level, because the
4 enrollment declines are still not hitting in the same
5 level or magnitude as they have been in the elementary
6 level, the relative percentages are less but the trend
7 is the same. We are now up to about one-third of the
8 high school students in this state are being educated in
9 high school districts that have no budget flexibility
10 whatsoever. They have to look for cuts. They can't
11 look to maintain, they can't look to grow, in a time
12 when needs are increasing and mandates are increasing.
13 Your Honor, we will sponsor something called
14 the Professional Judgment Cost of Education Study.
15 Mr. John Myers will testify before this Court next
16 Monday. He's one of the nationally recognized
17 consultants who implemented that study. It was
18 commissioned by the Montana School Boards Association
19 and other groups to try to show to the State that there
20 is a process, there is a rational method that is
21 recognized in school finance policy for trying to figure
22 out and determine what the costs of maintaining a
23 quality program are. And so it was done using over 80
24 educators from throughout the State of Montana going
25 through a very careful process of trying to determine

1 School Boards Association and others took the
2 initiative, at no inexpensive cost, I might add, and
3 showed the State you can do it. That is why we're here,
4 to prove it. We're not here to ask Your Honor to adopt
5 that study as a definition or as the revenue levels that
6 would be necessary.
7 Your Honor, so moving on to the subsection
8 (2) issue, I mentioned to you that with respect to the
9 distinct and unique cultural heritage of the American
10 Indians and our obligation to recognize that in our
11 school funding system the Court in Helena Elementary I
12 said that that provision establishes a special burden in
13 Montana which must be addressed as part of our school
14 funding issues. You will not hear evidence, Your Honor,
15 from the State of Montana that that has been done. You
16 will hear evidence from a couple of witnesses that we
17 will sponsor, Carol Juneau, a state representative, and
18 Joyce Silverthorne, a member of the Board of Public
19 Education, that there have been efforts to give meaning
20 and life and spirit to that constitutional promise. And
21 the Indian Education For All Act was enacted by the
22 legislature. Nice in intent, nice in design, and you'll
23 hear about it, with no funding, despite repeated
24 requests from the Office of Public Instruction and
25 recommendations from the Board of Public Education that

1 for districts in their ability to ask voters to support
2 levies so that they can operate the programs. And there
3 are very significant tax inequities that remain in our
4 system. And it is an equity issue, Your Honor, this
5 competition for dollars between special and regular
6 education. That is not something that our schools
7 should have to be dealing with. They should not be
8 having to say we're going to have to put resources for
9 Joe over here, and therefore Mary and Tom are going to
10 not be able to take this program. That is not the way
11 the system should be working.
12 Your Honor, all of that talks about data,
13 talks about analysis that is very important to prove in
14 a school finance case like this, but what it means is
15 more important. All of that data, though abstract and
16 in some respects technical, what it gets to is the core
17 issue, and that is, is quality being compromised? Is
18 harm occurring in Montana's public school system? And
19 Your Honor, we suggest to you that you will hear
20 compelling evidence that that is, in fact, happening.
21 Perhaps most glaringly, and I would suggest most
22 embarrassingly, is the fact that since 1994 with the
23 enactment of House Bill 667, the rate of violations of
24 our minimum accreditation standards has been on a
25 significant increase, Your Honor.

1 Your Honor, and, again, it's embarrassing, I believe,
2 for the State of Montana to see this happening, we in
3 recognition of the fact that there is no more important
4 component of a quality system than the educators who
5 staff it and deliver the programs, we were where we
6 should have been in 1980. We were about the mid
7 throughout the country in what we paid our teachers on
8 average. Your Honor, if you look at that graph, we have
9 slipped to 47th in the country. We actually went down
10 to 48th for a year and someone else moved up and bumped
11 behind us from another state. When you adjust that for
12 the cost of living, because there is kind of this
13 natural reaction well, yeah, but we live in Montana,
14 can't be as expensive as some of these other places,
15 we're 46th, Your Honor, in the country adjusted for cost
16 of living.
17 Dr. Linda Darling-Hammond, one of the most
18 highly respected people in the country on teacher
19 quality issues, will be here from Stanford University on
20 Friday morning and she will talk about these issues.
21 She will talk about the importance of teacher pay and
22 adequacy. She'll talk about the importance of having
23 adequate professional development programs and adequate
24 resources for teachers to do their job. And, Your
25 Honor, she will be addressing some of these issues.

1 forced to close schools. That can be a logical thing to
2 do in some districts. In others it's not. They're just
3 forced to do it. Problems with buying textbooks and
4 other teaching resources. Facilities needs that are
5 being unmet.
6 And, Your Honor, so far, in about a half an
7 hour of discussion, I've not talked once about the
8 No Child Left Behind Act that we all hear and read so
9 much about. Everything I've just told to you would be
10 existing and these would be problems in Montana schools
11 without the No Child Left Behind Act. The failure to
12 meet Montana's accreditation standards is not related to
13 the No Child Left Behind mandates. But now you take the
14 mandates of No Child Left Behind and you impose that on
15 our school system as a matter of state law, because once
16 we opt into that federal program our state has adopted
17 it as the rules and requirements for doing business in
18 education in Montana. Those mandates are not being met
19 through funding, either from federal resources or from
20 state resources.
21 Your Honor, one of the things you'll hear
22 about are standardized tests. What about them? First
23 of all, we contend that the scores, and we believe that
24 the evidence will show, and even admissions by the
25 State's experts will be important here, that the scores

1 students who are not meeting proficiency levels on
2 tests. And, Your Honor, it's important for the Court to
3 recognize, and you'll hear this from witnesses, this
4 glass under law must be filled to the brim by the year
5 2013. Schools have no choice. They must make sure
6 every student that they educate is performing at minimum
7 proficient levels on tests that are yet in Montana even
8 to be implemented. So the standardized test scores,
9 Your Honor, put simply, do not constitute a valid
10 defense to the State's failure to meet its
11 constitutional obligations in Montana.
12 To conclude, Your Honor, I have pointed out
13 just briefly that I've used a couple of the publications
14 and bars and graphs that generate from the State of
15 Montana. We're not here putting proof on that is a
16 surprise to any policymaker in the State of Montana.
17 The State has been aware of the problems with the
18 funding. Perhaps the best recognition of that is the
19 way they have dealt with it is for the past two sessions
20 they have enacted legislation to commission studies and
21 then have not provided funds necessary to do a
22 meaningful job. The Governor's Advisory Council
23 following the 2001 session made recommendations for some
24 changes, not wholesale but some meaningful changes.
25 None of them that cost any money were implemented.

1 education. And that brings us full circle, Your Honor.
2 This state -- this case is about the State's obligations
3 under the Constitution of the State of Montana and the
4 rights of the students in our schools to be educated in
5 a quality system in which they have a quality of
6 opportunity, and in which the State pays its share of
7 the cost, and in which the State recognizes its funding
8 obligations with respect to preserving and protecting
9 the distinct and unique cultural heritage of the
10 American Indians.
11 I would suggest, Your Honor, that there are
12 no more important issues facing the State of Montana.
13 And I started -- stated at the outset we're pleased to
14 be here, and we look forward to presenting our evidence
15 to the Court over the next couple of weeks.
16 THE COURT: Mr. Morris, do you want to give
17 your opening now?
18 MR. MORRIS: Actually, Ms. Bovingdon will
19 respond for the State.
20 THE COURT: Ms. Bovingdon.
21 MS. BOVINGDON: May it please the Court. My
22 name is Ali Bovingdon, and I appear on behalf of the
23 State of Montana with Brian Morris who is seated at
24 counsel table. Assisting us throughout this trial is
25 Kathy Stelling.