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Half the states are embroiled in lawsuits charging that school spending is inadequate. How much money is enough -- and where will it come from?

**BODY:**

Kansas state legislators, whose job is to somehow square state needs with state political realities, can perhaps be forgiven for regarding their 1992 education funding formula as a pretty good piece of work.

The formula was derived in response to a court ruling that had found the previous formula unfair and unconstitutional. It began by mandating the same base or "foundation" amount of educational spending for every "full-time equivalent" pupil in the state and also required every district to levy a minimum property tax of 20 mills. If this levy didn't raise enough money to enable a district to meet the foundation level, the state would make up the difference. If it raised more money than necessary, the state would reallocate the excess to needy districts.

Then, responding to political pressures from multiple directions, legislators went on to tweak their basic formula. They cranked in extra weighting--and money--for small rural districts. To placate large urban districts, they added extra weighting for them, too. They also added extra weighting for districts with "at risk"--poor--pupils, districts that built new facilities, districts with high transportation costs and districts offering bilingual or vocational education. They allowed districts to tax themselves beyond the 20-mill minimum (and keep the extra money) if they wished. Finally, there was "ancillary weighting," a rather mysterious factor that seemed to apply only to a few of the wealthiest districts in the state.

Although this may have been a good-faith response to concerns about fairness, 11 years later state district Judge Terry L. Bullock swept the whole thing into the dustbin. The formula was the flawed result of a "political auction" and "in blatant violation" of both the Kansas and U.S. Constitutions, he ruled in *Montoy v. State of Kansas*. Bullock then ordered the cash-strapped state to add \$1 billion a year to its education budget, a big jump from the \$3.6 billion it spent in 2002-03.

Kansas had collided with an "adequacy" suit--and lost. It has a lot of company. Two dozen states are now embroiled in these lawsuits, all of which maintain that a state's total education spending is too low. The tide is running strongly in favor of the plaintiffs. State after state is being told that it has no choice but to spend more--usually a lot more--on its constitutional obligation to educate its children, even if this means cutting back on other programs and/or raising taxes.

Advocates of poor and minority children hail these cases as the latest wave in the decades-old battle for civil rights, with the courts once again leading the way. "These suits are the progeny of *Brown v. Board of Education*," says Molly A. Hunter, director of legal research for the Campaign for Fiscal Equity Inc., the group spearheading the suits in many states. "Brown wasn't just about desegregation for desegregation's sake. It was also about access to educational opportunity."

Others see the suits as an end-run around state legislatures and governors. "This is a fairly brazen attempt to extort more money," says Kansas House Speaker Doug Mays, a Republican. The state

promptly appealed the Bullock ruling to the Kansas Supreme Court, with a decision expected before year's end.

## A BIGGER PIE

These adequacy suits are quite different from the "equity" suits that compelled some states--including Kansas--to re-write their school finance formulas in the 1970s, '80s and '90s. The equity suits were "Robin Hood" suits, explains Julie Underwood, general counsel for the National School Boards Association. That is, they challenged the unfairness of wealthy school districts spending far more per pupil than poorer districts. Equity suits were about dividing up the education pie in a fairer way.

Adequacy suits are about getting a bigger pie--considerably bigger. They assert that total state funding isn't high enough to ensure that all pupils have a reasonable opportunity to meet state educational goals. Adequacy suits put plaintiffs in a stronger position than was the case in equity suits, where the state could sometimes pit district against district in court. As the NSBA notes, "school boards [now] can present a united front."

Often, the facts speak for themselves. Hoke County Board of Education v. State of North Carolina spotlighted deplorable conditions in one of the state's poorest counties. Testimony revealed that in the mid-1990s, only 41 percent of high school freshmen went on to graduate--the worst retention rate in the state. Those who did graduate sometimes lacked the skills to perform "even basic tasks."

Clearly exasperated, the North Carolina Supreme Court ruled in July 2004 that the state had failed in its constitutional duty. The court also noted that the case had already dragged on for a decade, costing North Carolina taxpayers "an incalculable sum of money.... One can only wonder how many additional teachers, books, classrooms and programs could have been provided by that money...."

States are the underdogs in adequacy suits because 49 states have education clauses in their constitutions. (The lone exception, South Carolina, repealed its clause in response to the Supreme Court decision in *Brown v. Board of Education*.) These clauses, however perfunctory, make these cases constitutional cases. And courts, of course, are the arbiters of constitutional questions.

Because the cases hinge on constitutional issues, it doesn't do a state much good to argue that it simply can't afford a major increase in education expenditures. When Kansas tried that argument, among others, it got a sharp rebuff in district court. "Money doesn't matter?" That dog won't hunt in Dodge City," retorted Judge Bullock.

Ironically, states are even more vulnerable now because many of them have crafted more rigorous and more specific educational standards. Plaintiffs can now argue that the states haven't matched their money to the new mandates.

**Al Lindseth**, an Atlanta attorney who has represented states in several suits, points out an additional irony. "The legislature isn't even a party to the lawsuit in most of these cases. But guess who gets handed the bill when it's all over?" He notes that typically the formal defendant is the state education department, "and half the time they are sympathizing with the plaintiffs. They want more money and, frankly, more state control."

Even states that are already spending heavily on education, such as New York and New Jersey,

are not immune to adequacy suits. If anything, Lindseth adds, they seem to be more vulnerable. He says it's a matter of political climate: Higher-spending states tend to be more liberal, with liberal courts that, in turn, are more receptive to such suits.

Wherever they occur, school finance battles are intensely emotional. Few things are as potent as schools in shaping a state's, or a community's, image of itself. And few factors loom larger in efforts to attract business and industry. Indeed, for smaller, rural communities anxious about possible consolidation, the loss of their schools is seen as tantamount to losing their towns.

## FIGHTING TO A DRAW

All these forces came together in Kansas after Judge Bullock declared the state's 1992 funding formula unconstitutional last year. He emphatically concluded: "Whether any Kansas child is of a minority race, or is a slow learner, or suffers a learning disability, or is rich or poor, or lives east or west, or any other consideration, that child is 'our child' and our Constitution guarantees that child an equal educational opportunity consistent with his or her natural abilities."

In 2004, the battle moved from the courtroom to the political arena. Ideologically, Kansas--to an even greater extent than many other states in recent years--is divided into three "parties": conservative Republicans, moderate Republicans and Democrats. Likewise, the geopolitical landscape also has three identifiable parts: rural, small-town Kansas, where the population is drying up and schools are having to consolidate; the wealthy suburbs of Johnson County (bordering Kansas City, Missouri), which take pride in their fine schools and lament taxes that subsidize poorer school districts across the state; and finally, small to mid-sized cities, such as Dodge City (25,568), Salina (45,833) and Wichita (354,617), which are trying to educate substantial numbers of immigrant children. The Dodge City and Salina districts, in fact, brought the Kansas suit.

Against this political backdrop, the first move went to Governor Kathleen Sebelius. A first-term Democrat, she is the daughter of former Ohio Governor John J. Gilligan (who served in the early 1970s) and married to the son (Gary) of a popular former Kansas Republican congressman, Keith Sebelius.

Sebelius seems to be very much aware of her father's fate: defeated for reelection because he was perceived as too liberal for Ohio. Thus, although the court was demanding \$1 billion, she responded cautiously with a \$300 million plan, to be phased in over three years. It was to be financed by increasing sales and income taxes. "If we wait, the courts, not legislators representing local school districts, could determine how much we must spend on our schools," she warned.

Her plan was quickly dismissed by the legislature. But lawmakers then stalemated over what to put in its place. The House approved \$155 million. The Senate countered with \$72 million--for one year only. The House rejected the Senate's plan. As the session ground on, figures filled the air like confetti: \$108 million, \$128 million, \$95 million, \$82 million, \$92 million. With the state's rainy day fund already depleted, one plan would have tapped the state highway fund, another the state pension fund.

Finally, having fought itself to a draw, the legislature adjourned. "To paraphrase Aesop: The mountain labored and brought forth nothing at all," an irritated Judge Bullock would later write.

## FEAR FACTOR

In the legislative melee, some moderate Republicans had stuck their necks out--only to pay a political price. One was first-termer Bill Kassebaum. The son of former Kansas Republican Senator Nancy Kassebaum Baker and grandson of legendary GOP Governor Alf Landon, Bill Kassebaum is a rancher and assistant county prosecutor. His hometown of Burdick, population 60, is so small that its high school has been boarded up since 1957.

"I was so upset with the representation we had, ducking the issues," he says. So in 2002, Kassebaum challenged the incumbent Republican state representative, Shari Weber. He ran a Mr. Smith Goes to Washington kind of campaign, saying up front that he would be open to tax increases in order to resolve the state's school finance problem. Against the odds, he won the primary--by 145 votes--and went to the Kansas House.

Kassebaum was as good as his word. He put together a bipartisan coalition to pass the \$155 million House plan. The money was to come from increased state sales and income taxes. All 45 House Democrats and 36 of its moderate Republicans voted for it. Forty-three conservative Republicans voted against it.

But Kassebaum's bill died in the Senate. And when he ran for reelection in the 2004 primary, he again faced Weber, who ran as an anti-tax, anti-abortion social conservative. She had financial support from the Kansas Club for Growth, an offshoot of the anti-tax, Washington-based Club for Growth, and beat Kassebaum by 288 votes. "It's easy to influence people on fear," he says. "It's difficult to counter that."

Where does Kansas go from here? If its legislature couldn't pass even 15 percent of the \$1 billion ordered by the court, can it come up with a full billion? It seems doubtful, although Judge Bullock pointedly noted that the money could be raised simply by rescinding tax cuts passed in recent years.

House Speaker Doug Mays says flatly that the \$1 billion "isn't going to happen, or anywhere close to it." He does venture that it is "possible to go up to \$200 million or so," given an improving Kansas economy and saving on other social programs.

Bullock's order does offer some leeway. It says, "there must be literally hundreds of ways" the legislature could structure an acceptable formula. Moreover, the judge took pains to say that he isn't demanding that every student receive exactly the same amount of support. He just insists that any deviation be justified by a "rational explanation premised on the varying actual costs incurred in providing essentially equal educational opportunities for each of those children."

It's possible that the adequacy suits could ultimately be the catalyst for broader educational reforms. But attorney Al Lindseth thinks that whatever Kansas and other states decide to do, they would be well advised to have lawyers sitting at their elbows. He adds: "There are more ways than [just] money to skin this cat."

Kansas--and states around the country--may have to look at every one of them.