

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

SECOND DIVISION

LAKE VIEW SCHOOL DISTRICT, NO. 25

OF PHILLIPS COUNTY, ET AL.

PLAINTIFFS

VS.

NO. 1992-5318

MIKE HUCKABEE, GOVERNOR OF

THE STATE OF ARKANSAS, ET AL.

DEFENDANTS

FINAL ORDER

The school funding system now in place in the State of Arkansas is inequitable and inadequate under Article 14, § 1, and Article 2, §§ 2, 3 and 18 of the Arkansas Constitution.

I. INTRODUCTION

This case dates to 1992 and its long history is recounted in *Lake View School District No. 25 of Phillips County, Arkansas, et al v. Mike Huckabee, Governor of the State of Arkansas, et al*, 340 Ark. 481, 10 S.W.3d 892 (Ark. 2000). In summary, the 1994 Order issued by Judge Annabelle Imber found the Arkansas School Funding System inequitable under Article 2, §§2, 3, and 18 and Article 14, § 1 of the Arkansas Constitution. The 1994 Order stayed the effect of the decision for two (2) years to give the State time to enact and implement appropriate legislation in conformity with her Opinion. The appeal of the 1994 Order was dismissed because the order was not final as it contained the two-year stay. After the Plaintiffs pursued their case it was dismissed by this court by order of August 17, 1998, as moot because of constitutional and statutory changes since the 1994 Order. The 1998 Order was appealed and resulted in the *Lake View* opinion as cited above. The Supreme Court wrote, "Surely Amendment 74, which allows funding variances among school districts due to local taxes, does not by itself resolve disparities in per pupil expenditures and opportunities under the State Constitution's equal protection clauses..."

“We believe that a compliance trial and decision by the chancery court on whether the disparities in treatment noted in the 1994 order have been corrected so as to pass constitutional muster is the best way to achieve those goals....” The Court directed that “trial should take place as soon as possible”. The trial then took place beginning September 18, 2000, and ending November 1, 2000, although all days were not used for this case.

During the summer of 2000, another 144 school districts attempted to intervene bringing to 188 the number of districts in support of the State Defendants and the present funding system. This intervention was subsequently denied by the court.

Separate from this lawsuit, Plaintiffs filed another lawsuit in the Chancery Court of Pulaski County generally known as *Lake View II*, a/k/a *Lake View School District vs. Mike Huckabee, O.T. 1999-875*. The issue in *Lake View II* was whether the State of Arkansas provides a constitutionally *adequate* education system. However, as will be seen below, this court ruled that the adequacy issue was already properly before the court.

The court held a pre-trial hearing on September 8, 2000, before the trial scheduled September 18, 2000. At this hearing Plaintiffs moved to non-suit *Lake View II* rather than consolidate it with this case. The court accepted the oral motion of the Plaintiffs and granted the non-suit.

While other matters were addressed to dispose of outstanding motions, the court addressed the scope of the trial and particularly the 1994 Order of Judge Imber with specific attention to Conclusions of Law Numbers 9 and 16. Conclusion of Law No. 9 states as follows:

While Arkansas has not defined the terms “general, suitable, and efficient”, courts in other states have defined these terms. In *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 191-192 (Ky. 1989) the Court defined “efficient” as a system which required “substantial uniformity, substantial equality of financial resources and substantial equal educational opportunity for all students” and which required that the educational system be “adequate, uniform and unitary.” Id. at 192. The Court concluded that “an ‘efficient’ system of common schools should have several elements:

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 –they must be uniform.
4. The system must provide an adequate education.
5. The system must be properly managed.”

Id. at 211.

The Court went on to say that “an 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. Id. at 212. See also Pauley v. Kelly, 255 S.W.2d 859 (W.V. 1979).

And Conclusion of Law No. 16 reads as follows:

The Arkansas school funding system violates Article 14, Section 1 of the Arkansas Constitution by failing to provide a “general, suitable and efficient system of free public schools.” See *DuPree v. Alma School Dist. No. 30*, 279 Ark. 340 (1983).

The apparent reason these two Conclusions were articulated in the 1994 Order was that the court felt the adequacy issue had been properly pled and addressed by the evidence and statements of counsel at the trial, and was ready for a decision. Therefore, this court ordered on September 13, 2000, that both the equity, sometimes known as the funding issue, and the adequacy issues would be heard in the compliance hearing.

On November 18, 1996, the court ordered in part as follows:

4. The enactment of a new school funding system and new statistical data constitute new facts. Therefore, the doctrine of the law of the case is not applicable, and the scope of the trial will not be limited to those issues raised at the previous trial of this cause. Nor will the trial be limited to compliance with this Court’s previous order.
5. The scope of the trial will be affected and controlled by the pleadings file (sic) by the parties in this cause.

Judge Imber adopted the standard in *Rose* as the definition for “general, suitable and efficient.” This court adopts that same standard and in the September 13, 2000, order ruled that strict scrutiny would be the standard by which compliance would be measured. In the September order, this court observed:

11. The Constitution in Article 14 uses the language “*intelligence and virtue being safeguards of liberty and the bulwark of a free and good government.*” (Emphasis added). The force of these words clearly indicates that the Constitution gives a value of the

highest priority to a suitable education for Arkansas citizens. The words used are both consistent with and supportive of the proposition that Arkansas has a compelling interest in having an educated electorate to ensure a “free and good government . . . (and) shall ever maintain a general, suitable and efficient (school) system . . . and *shall adopt all suitable means* to secure to the people the advantages and opportunities of education.” (Emphasis added).

12. If speech is uninformed, what purposes can it serve? The free exchange of ideas that underlies the most cherished concepts of our culture has value to the extent that the exchange is well grounded in relevant information and analytical skills. Education provides these.

13. The simplest and clearest construction to put on Conclusions 9 and 16 in the 1994 Order is that under the standards enunciated in *Rose*, as well as the Arkansas Constitution, Arkansas public schools did not meet constitutional requirements for adequacy at the time of the 1994 Orders.

14. Therefore, equity (i.e. funding) and adequacy issues will be heard at the compliance hearing. These are the questions of whether the present system of public schools and the financing thereof complies with the constitution. The 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.

In addition to the findings of the September 13, 2000, order, it should be noted that the language of Article 14 is at least as compelling as the language of the Constitution’s Declaration of Rights which protects our fundamental rights and freedoms, among them freedom and independence, equality before the law, right to bear arms, liberty of press and speech, right to jury trial, etc.

The September 13, 2000, order superseded Paragraph 3 of the court's November 18, 1996 order and put the burden of going forward on the State Defendants.

As the Supreme Court said in *Dupree* : "...[W]e believe the right to equal educational opportunity is basic to our society. 'It is the very essence and foundation of a civilized culture: it is the cohesive element that binds the fabric of our society together.' (citation omitted) Education becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights."

Pending before this court are the Plaintiffs' Fourth Amended Complaint, the Plaintiffs' Petition to Show Cause filed November 21, 1997, Plaintiffs' Petition for Attorney Fees filed February 2, 1998, Amendment of and Supplement to Petition for Award of Attorneys Fees and Costs filed September 19, 2000, Revised and Restated Amendment of and Supplement to Petition for Award of Attorneys Fees and Reimbursement of Costs filed September 19, 2000, Cross-Complaint filed by Rogers and Bentonville Intervenors on September 22, 2000, Rogers and Bentonville Intervenors Motion for Court Appointment of Expert Witness filed September 26, 2000, State Defendants' Motion to Dismiss Cross Complaint filed October 16, 2000, First Amended Cross Complaint filed by Rogers and Bentonville Intervenors on October 23, 2000, Plaintiffs' Motion for Entry of Order on Attorneys' Fees filed February 2, 2001, Plaintiffs' Renewed Motion for Injunction and Sequestration of Funds filed February 2, 2001, and the Alma Intervenors' Motion to Strike Plaintiffs' Response to Alma Intervenors Proposed Findings of Fact filed March 23, 2001.

With this background, the court considers the evidence and the applicable law in forming its findings and conclusions.

II. CONTENTIONS OF THE PARTIES

The Defendants' position is that the passage of Amendment 74 and subsequent legislation cured any inequities in distributing available funds for public school education in Arkansas. The Plaintiffs' position is that grave constitutional inequities still exist. Alma Intervenors agree with the Defendants. Bentonville-Rogers, Little Rock and Pulaski County Intervenors agree with the Defendants as to the equity of distribution of funds but side with the Plaintiffs as to the inadequacy of the funding of the educational system.

A large part of the disagreement between the State Defendants and Intervenors on one side and the Plaintiffs on the other concerns the calculation of a formula known as the Federal Range Ratio. At the trial in 1994, components of the ratio calculation included

a concept known as “weighted average daily membership” (explained below at p. 9), and monies received by the Pulaski County school districts as part of their desegregation efforts. Also, at the trial in 2000, Defendants argued that the use of revenues was more appropriate than the use of expenditures in calculating the Federal Range Ratio; that the law had changed and weighted average daily membership no longer applied; and that the 1994 Order erroneously ordered the inclusion of the desegregation monies in the Federal Range Ratio calculation.

Furthermore, Plaintiffs argue that the State Defendants neglect their constitutional duty to provide sufficient capital improvements for the various school districts and as a result the various school districts have deteriorating physical plants and inadequate funding to upgrade facilities already in place. State Defendants argue the State has provided an equitable funding formula, and that disparities and shortcomings among individual school districts may be accounted for by mismanagement at the local level.

III. FINDINGS OF FACT

A. Equity

1. The 1994 Order directed the Defendant the State of Arkansas to eliminate disparities in its public education system. There are problems, however. In the trial conducted in November, 1994, and the subsequent order, the parties and the court relied on the Federal Range Ratio, and, to a lesser extent, on two other concepts, the Coefficient of Variation and the GINI Index of Inequality. All of these assist in mathematically determining if any variances in the distribution of funds by the State to the school districts are constitutionally acceptable.

2. The Federal Range Ratio is found in the Code of Federal Regulations (CFR). To determine the variance in funds received in the restricted range of distribution between the school district that receives the least funding and the school district that receives the most funding, the CFR requirements can be satisfied by either the use of *revenues* provided to the districts by the State or the amounts of actual *expenditures* by the school districts. 34 C.F.R. §222.60. In the 1994 trial, the court and the parties calculated the Federal Range Ratio using expenditures. Today, the State Defendants and the Intervenors argue that revenues should be used in the calculation because revenue figures from the State are more accurate than expenditure figures provided by the school districts. An

analysis of the Federal Range Ratio using revenues shows the State to be in compliance with the 1994 Order. Use of expenditures shows the State not to be in compliance. On remanding the case the Supreme Court specifically referred to per pupil “expenditures” in stating, “...Amendment 74, which allows funding variances among school districts due to local taxes, does not by itself resolve disparities in per pupil *expenditures* and opportunities under the State Constitution’s equal protection clauses. Correcting such disparities lay at the heart of the 1994 Order. [Emphasis added] *See also DuPree v. Alma School Dist. No. 30, supra.*” *Lake View* at 493.

3. Making an accurate determination as to how much of the revenues distributed by the State actually reach the classroom is more difficult than measuring how much revenue the State provides the schools and school districts. However, under the Constitution the State is solely responsible for the education of its citizens. Its duty does not end upon disbursement of revenues to the school districts. Moreover, the best measure of whether available funds are being efficiently applied to the education of the State’s children is by an accurate accounting of expenditures.

4. Another question in 1994 was whether the Federal Range Ratio should be calculated in terms of ADA/ADM or WADM. ADA is average daily attendance, or the average number of students that actually attend school on a daily basis. ADM is average daily membership, or the average number of students that are enrolled in school on any given day. WADM is weighted average daily membership. The concept of weights has to do with special costs incurred in educating certain students (e.g., students with learning disabilities, students for whom English is a second language, students that live in scarcely populated areas and require extra transportation costs to and from school, etc.) A school district with a greater WADM (i.e., with more special cost students) would receive more money than a school district with a lesser WADM. In the 1994 Order, as amended, the court found at Finding of Fact 61(a) that in the future the Federal Range Ratio should be analyzed using WADM.

5. However, after the 1995 legislation, a new school funding formula was implemented and weights are no longer used. Some of the money that was distributed under the formula using weights is now included in the more general equalization funding that is distributed to the school districts and some is distributed under the new formula as “categorical funding.” The Defendants and the Intervenors contend it is appropriate to eliminate WADM in analyzing the Federal Range Ratio. Plaintiffs disagree.

6. Still another question has to do with desegregation money that is provided to the three Pulaski County school districts (Little Rock, Pulaski County, and North Little Rock). In 1994, the court included the desegregation money in analyzing the Federal Range Ratio. Today, the State Defendants and the Intervenors argue that the desegregation money should not be used in the formula calculation because this is money that is associated with costs that are unique to the recipients and, therefore, including it in the calculation skews the result to the detriment of the three districts. The Plaintiffs take the opposite view; namely that, in the first place the 1994 Order requires the desegregation money be used in the calculation, and, secondly, that failure to do so results in a windfall to the Pulaski County districts in which all other school districts should share.

1. Funding System

7. What follows is a simplified explanation of Arkansas school funding, but it seems sufficient for purposes of these proceedings.

8. After the 1994 Order, legislation was enacted in 1995 and 1997 along with a constitutional amendment in 1997 that changed the school funding formula. (Act 916 of 1995 [later held unconstitutional, see *Barclay v. Melton*, 339 Ark. 362 (1999)]; Act 917 of 1995; Act 1194 of 1995; Amendment 74 to Article 14, § 1 of the Arkansas Constitution; Act 1307 of 1997 and Act 1361 of 1997). The schools are funded through three major sources of revenue: federal funds which are targeted generally to specific categories of students with specific needs; State monies which are distributed through the State funding formula; and local monies raised primarily through the property tax.

9. Local revenues for school districts depend on local property taxes. Because the local tax is levied according to the value of local property, and because the value of property differs from district to district, the amount of revenues available to the various school districts differs. Amendment 74 establishes "...a uniform rate of ad valorem property tax of twenty-five (25) mills to be levied on the assessed value of all taxable real, personal, and utility property in the state to be used *solely* for maintenance and operation of the schools." (Emphasis added) Excess debt millages may be used for maintenance and operation, and thereby, school districts are allowed to obtain the uniform rate of 25 mills using debt service millages rather than millages set aside strictly for maintenance and operations. A.C.A. §26-80-201et seq.

10. The State has determined that the constitution requires it to equalize wealth

(with some variances) among the school districts. This is accomplished with State equalization aid.

11. Under the current funding formula, a school district's wealth is first determined based upon the assessed value of property within that district. The assessed value is multiplied by ninety-eight percent and then that amount is multiplied by twenty-five mills. That number is then divided by the average daily membership (ADM) of the district. A.C.A. §26-80-204(4) and (10). This formula yields the "local resource rate." The State then calculates "base level revenue" which is the total amount of money that any one student should generate based on State and local funds. (That figure is determined by adding all State and local funds available to all public schools in the State and dividing by the number of children.) At the time of trial, that amount was approximately \$4500. If the local resource rate is three hundred dollars per student, then the State supplements that district with forty-two hundred dollars per student to ensure equitable funding among the State's school districts.

12. Any school district that has a local resource rate which is less than the base level revenue is given equalization aid to bring it to the base level. A.C.A. §26-80-201(4)(b)(1 thru 3). A district that is able to raise revenues equal to or in excess of the base level may receive no State equalization aid. In fact, under some circumstances, a school district that raises too much money may, because of Amendment 59, have to "roll back" its millages, thereby forcing it to spend less on its children's education than its patrons are willing to provide.

13. In addition to the equalization money, "additional base funding" is used as a guarantee program that all school districts will have a minimum State and local revenue per average daily membership that is at least eighty percent of the State and local revenue of the school district at the ninety-fifth percentile (i.e.; ranking all school districts from the richest to the poorest, one eliminates the five richest and finds the district at the ninety-fifth percentile.)

14. After WADM was eliminated, various categories of special cost students were merged into State equalization aid but the State recognized that additional money would still be necessary for other special cost students. This additional money is called "categorical funding". Categorical funding is provided outside the formula. Some of the categories are poverty funding (for schools that have 75% of its children in kindergarten and first grade that are on the federal free and reduced lunch program), gifted and

talented, alternative learning, isolated funding, etc.

15. The present school funding formula has three methods to provide school districts with money for capital expenditures, including construction of new buildings. They are Growth Facilities Funding, General Facilities Funding, and the Debt Service Funding Supplement. Growth Facilities Funding, which is in its last year, is to assist districts with growing student populations in building new facilities and acquiring new equipment.

16. General Facilities Funding is formula-driven based on the wealth of a school district. Those funds are used for purchases of buses, computers, facility repairs and maintenance, etc.

17. The Debt Service Funding Supplement supplements debt payments to a district based on the wealth of the district. Less wealthy districts who are able to borrow money receive a larger supplement than richer districts.

18. Even with these three programs, some districts cannot afford to build new buildings, complete necessary repairs or buy buses. Either the money is not available through General Facilities or Growth Facilities Funding or the district is too poor to incur sufficient debt to finance new construction and take advantage of the Debt Service Funding Supplement. The State Defendant does not believe it has an obligation to provide any further funds to schools or school districts that cannot properly fund its capital improvements.

19. Federal funds are distributed outside State equalization aid. Generally school districts have no discretion as to how they are spent.

20. The purpose of the three formulas (Federal Range Ratio, Coefficient of Variation and GINI Index of Inequality) is to aid in analyzing disparities in funding for schools, school districts and students. But the question, as framed by the Supreme Court, is do unconstitutional disparities exist? Does the state fulfill its constitutional duty to provide each of its children an education adequate to give the child the opportunity to realize his potential, enrich his life and be an asset to his community? The formulas do not provide an exclusive way to answer the questions. (Greene, Def. Ex. 68, fn 1)

21. Using expenditures in the calculation of the Federal Range Ratio, this court finds that there is more than a 25% difference between the 5th and the 95th percentile in amount spent per pupil which is not in compliance with the 1994 Order. However, using revenues, the State is within the 25% range differential. Using expenditures in the Coefficient of Variation, the State is not in compliance. Using expenditures in the

calculation of the GINI Index of Inequality, the State is in compliance.

2. Comparison of Schools and School Districts

22. Facilities, materials, teachers and other resources affect a student's opportunity and ability to learn. The State suggests that disparity in the way funds are spent accounts for the many alleged inequities at the local level; i.e., mismanagement and not inequitable distributions of funds is the cause of unconstitutional educational disparities. There is some evidence of mismanagement at the local level, but it is not sufficient to fully support the State's position. Further, even if it were, under the Constitution, the State bears the ultimate burden of educating its children, no matter where the blame is cast.

23. Because wealthy school districts are able to provide more educational resources than poor districts all students in Arkansas do not have an equal opportunity to learn. Lake View provides an example of the limitations of a poor school district. Lake View has a relatively low student/teacher ratio. Ninety-four percent of students at Lake View are on free or reduced lunches. Lake View has one uncertified mathematics teacher for all high school mathematics courses: pre-algebra, algebra I and II, geometry and trigonometry. Calculus is available through distance learning. The mathematics teacher is paid \$10,000 a year as a substitute teacher which he supplements with \$5,000 annually for school bus driving.

24. The mathematics teacher, Roy King, teaches a trigonometry course with a Prentice Hall textbook that is a graphing calculator supported program. The calculators are expensive. There are ten students and four calculators. His classroom has two electrical outlets to support such conventional needs as overhead projectors, computers, lights and other electrical equipment. In his geometry class he does not have compasses. Only one of four chalkboards is useable. His computer lacks hard and software, it has no sound chip, and the printer does not work. Paper is in short supply and the duplicating machine, an addressograph, is generally overworked so that frequently documents, including examinations, have to be handwritten on the chalkboard.

25. Lake View has a basketball team but no uniforms for all of the players. There are no other organized competitive sports teams at the school. The band does not have uniforms.

26. The attendance rate at Lake View is 99.05 percent, the graduation rate is 94.7 percent and the dropout rate is only two percent; all better than the State average.

The college remediation rate (explained below) is 100 percent; more than twice the State average.

27. The Holly Grove School District offers only the basic curriculum required by the State for graduation. There are no advanced courses or programs offered. The starting salary for a Holly Grove teacher is the State minimum, approximately \$21,000.00. Teachers are continually lured away to other districts that pay more.

28. In Holly Grove, science laboratories are in need of updated equipment. Computers need replacing. The bus fleet is old and includes three diesel buses but the remainder are gasoline operated and very expensive to operate. The heating and air conditioning systems are outdated and in need of repair or replacement.

29. Paragraph seventy-three of the 1994 Order finds that the physical plant at Holly Grove is in need of repair to leaking roofs, restrooms, leaking gas line, and a falling library roof. Since the Order, only the gas line and library roof have been repaired.

30. Holly Grove recently increased its millage from twenty-eight to thirty-two mills. However, because of political considerations, millage increases are hard to win in the district. In order to raise money for repairs, other needs, and generally to make ends meet, Holly Grove, has to borrow against its next year's income.

31. Barton Elementary in Phillips County has two bathrooms with a combined number of four stalls for over one hundred children in one of its buildings.

32. Lee County Schools went two years without a band program due to lack of funds. Lee County does not offer any advanced placement courses. Required courses are being taught in the Lee County District but suffer from a lack of funds. The science laboratories have little or no equipment. There are approximately thirty computers for six hundred students. The bus fleet of twenty-six buses has only five that meet State requirements, and the buildings need extensive repairs.

33. The Lee County School District has been unable to get voter approval of a millage increase in the past eight to ten years. Over the past ten years Lee County has experienced a decreasing enrollment. Financial support from the business community goes mostly to private schools.

34. By way of comparison, Fort Smith School District has over forty-five percent of students that qualify for free and reduced lunches. Out of twenty elementary school campuses, ten qualify under the Poverty Index criteria which means that there are between seventy and one hundred percent of the students qualifying for free or reduced

lunches. Several more elementary schools fall between fifty and seventy percent free and reduced lunches. Fort Smith has a higher student/teacher ratio than Lake View with forty percent more students per teacher. The Fort Smith curriculum includes classes on drafting and design, machine II technology, furniture manufacturing, electronics and electricity, band, orchestra, advanced girls' chorus, gifted and talented programs with honors courses, German, Spanish, French, fashion merchandising and marketing. Fort Smith also offers the basic curriculum required by the State.

3. Capital Needs

35. The Director of the Arkansas Department of Education does not believe that it is fair that a child that lives in a property poor district should be in substandard facilities. That is the situation that existed in the State in 1994 and it still exists today.

36. A school district not able to afford a building necessary to meet accreditation standards could face academic or fiscal distress resulting in probation or takeover by the State. However, the Director of the education department does not believe it is the State's obligation to provide any assistance in addition to that being provided to relieve the various school districts.

37. School buildings throughout the State need repairing and updating if not replacing. Some districts in faster growing areas of the State need additional buildings. The physical plant problems are particularly acute in Eastern Arkansas. They include poor heating and air conditioning systems, broken and missing windows, missing floor tiles and walls in need of repair. As Roy King of Lake View observed, it is hard to convince a child that education is important when the school facilities are so poor. The cost per student to construct a new school building is between \$8,000 and \$10,000.

38. Throughout the Lee County School District buildings have leaking roofs, asbestos problems, and some have little or no heating and air conditioning. Ceiling tiles are missing and molded. The Holly Grove capital funding requirements and its problems meeting them have been noted above.

39. The Debt Service Funding Supplement is intended to assist schools which have incurred debt intended to be paid through revenues from increased millages. Thus poor school districts (e.g., Lake View, Holly Grove, Lee County) that have not been able to borrow because the voters would not approve the debt millages or because, even if the millages were approved, the property value of the district is so low that insufficient capital

could be raised to build or repair buildings, may not qualify for the debt service funding supplement or find the supplement insufficient to meet their capital requirements. That is, the amount of the debt service funding supplement for which a district can qualify depends on how much debt the district can incur, and poor districts simply cannot incur the debt available to a richer district.

40. The Revolving Loan Fund does not provide much help to the Holly Grove School District because the fund aid must be repaid out of next year's State aid. Holly Grove cannot utilize the Revolving Loan Fund because any aid it receives from the fund will be withheld from its next year's State aid. The district will continually go into deeper debt.

41. Revenues for school districts are necessary for day to day maintenance and operation. There is little if any surplus for capital expenditures. This hand-to-mouth existence particularly exacerbates the conditions in school districts where facilities have suffered from years of neglect.

42. The Rogers School District millage is above the State average at 33.5. Rogers has to regularly go into debt to keep pace with its rapidly growing population. Money spent on refinancing and debt service is diverted from educating children.

43. If the definition of a wealthy district is based upon assessed value per student, Rogers is an above average or a wealthy district. There is not a correlation between a district being above average in wealth and being above average in expenditures per student. For example, Lake View spends more money per student than Rogers even though Rogers is considered wealthy and Lake View is considered poor.

B. Adequacy

44. The Court will preface this section with an observation based on the evidence but not directly addressed at trial: Large scale education is an extremely complex process with many components. As with many projects that result in mass production, the temptation to standardize the process can be irresistible. However, in education many of the parts defy standardization; namely the individual students, teachers, staff and administrators, as well as, in many cases, the subject matter. Because these components resist standardization, and because of technological advances and ongoing efforts to improve our schools, the process appears to be in a permanent state of change which makes the search for solutions to the money problem noted here even more difficult.

45. Students are staying in school longer. That means that many more students who require special attention are also staying in school longer and putting a heavier burden on available resources. Yet, while the law demands more of the schools, the percentage of the State budget available for schools has decreased. Cultural and demographic changes, new technologies, new standards for student achievement and accountability of teachers and administrators are all contributors to the accelerating demands and complications of public education.

46. There is no one universally accepted definition of an adequate education. However, there is a harmony among all suggested definitions. The court has already adopted the *Rose* factors as the requirements for an adequate education in Arkansas. Other definitions will emerge. All of them are useful in discussing this difficult topic.

1. Financial Adequacy

47. In education finance terms, “adequate” is defined as an amount of revenue per pupil enabling a student to acquire knowledge and skills necessary to participate productively in society and to lead a fulfilling life. The dollar amount that is “adequate” is a function of many variables, including specified levels of skill and knowledge, purchasing power of a dollar in a given locality, characteristics of students and other factors such as population sparsity and school size.

48. There are three elements for an adequate education system. First, the State must clearly specify what its expectations of student achievement are. Second, there must be an effective accountability system that holds the schools accountable for results. Third, the State must provide adequate funding to allow a program to be developed that will produce the expected outcomes. Arkansas has two of those three elements in place: the curriculum frameworks that specifies student expectations and the accountability system.

49. 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. The State Board of Education spends whatever money is in its budget and no study has been done to determine whether the money budgeted for education is enough to pay for education in the State of Arkansas. The 1994 Order included Finding of Fact number 132:

There have been no studies to show how much
it costs per pupil to provide a “general, suitable

and efficient” educational opportunity to Arkansas schools. The amount of money spent on a student’s education in Arkansas is directly related to the amount of money available to be spent.

50. A report on the school funding formula concluded that currently in Arkansas the initial level of funding, the base local revenue per student, is based on available revenue and is not related to achieving an adequate education. (Trial Transcript p. 242) The Chairman and some members of the State Board of Education do not believe that education funding is adequate to educate the children of Arkansas.

51. Even though one of the statutes enacted since the 1994 Order (See ACA §6-20-301 *ff*, A.C.R.C. Notes regarding Act 917 of 1995) required that a committee be formed to produce a report to the Department of Education or Education Committees in the Senate and House on the question of adequacy, one was never done. [Simon, Gordy]

52. The Educational Excellence Trust Fund was established in 1991 and was intended to supplement monies already being utilized for education. It is not governed by the Revenue Stabilization Act but rather there is a separate process that allocates the money from the trust fund. That is, it was intended to be an addition to State funding, and not in place of it. When it was created in 1991, approximately 50% of the State’s budget was devoted to education. However, the percentage of the State budget being devoted to education and subject to revenue stabilization has gone down since the creation of the Educational Excellence Trust Fund. Now, the combination of the trust fund and the money allocated from the State roughly equal the percentage of state funding being spent prior to the creation of the trust fund. The purpose of the Educational Excellence Trust Fund has been defeated.

53. One of the specific responsibilities of the Director of the Department of Education is to recommend the funding formula allocation, the biennial operating budget, and the Department of Education budget to the Governor and the State Board for approval. The Governor’s office requested the Director to maintain the 1999 budget within a limited percentage increase over the previous biennium.

54. An agency budget and appropriation are not the same things. An appropriation is simply the authority to spend the money if it is available. An agency’s budget is based on the available funding. It is possible to have appropriation authority to spend far in excess of the actual funding available. The Department of Education has the

authority to loan school districts funds, primarily for buses and small construction projects.

55. The Department of Education provides catastrophic funding for any school district faced with a high cost student, i.e., a student costing more than Thirty Thousand Dollars to educate. Special education is funded through a combination of state and local aid, various line item appropriations from the State and federal funds. This means that the only categorical funds going out for special education are to those districts that have a high cost student as defined above. Money for special education is otherwise included in the equalization aid under the new formula.

56. The poverty index is derived from the number of students who qualify for the federal free and reduced lunch program. Generally, children who qualify for free and reduced lunches come from homes that cannot provide opportunities such as internet access, ample reading and writing supplies, and parents who emphasize the importance of education and reading at an early age. A heavy concentration of free and reduced lunch students placed in one classroom over-taxes the teacher and puts a strain on available resources. These students typically require extraordinary resources to help them achieve proficiency. The poverty index funds in Arkansas assist only those children in kindergarten and first grade.

2. Educational Adequacy

57. One must look to more than the question of how much money is spent on the education system in determining whether it is adequate. The determination of whether a state's funding system is adequate is only part of the adequacy effort.

58. A measure of adequacy is performance. The following statistics were put into evidence and are found to be accurate:

- 1) Arkansas ranks at number 50 among the states in per capita state and local government expenditures for elementary and secondary education.
- 2) Arkansas students scored several tenths below the national average on the ACT from 1990 to 1999.
- 3) Arkansas ranks lower than the national average for percentage of adults ages 25 years and older who have graduated from high school.

- 4) Arkansas ranks 49th in the nation in percentage of the population age 25 years or older with a bachelor's degree or higher.
- 5) Arkansas ties for last place in the nation in percentage of adults with graduate degrees.
- 6) Arkansas' fourth and eighth grade students do not rank at or above the national average for proficiency in math, reading, science or writing as measured by the Southern Regional Education Board's State Analysis of the National Assessment of Education Progress (NAEP) test scores.
- 7) Arkansas ranks 49th among the states for median household income.
- 8) Arkansas ranked 48th in the nation in 1998 on spending per student.
- 9) On the ACT test in English, Arkansas students exceed the national average.
- 10) For the period 1996 through 1998, the percentage of Arkansas high school graduates attending college is approximately 53%.
- 11) The first set of scores on the ACTAAP test showed that only 44% of the fourth graders were proficient in reading and only 34% of the students were proficient in math.
- 12) In a survey published in "Education Week", Arkansas received an F on the adequacy indicator and a C on the equitable division indicator. (Transcript p. 1386)
- 13) In the 1996-97 school year, the last year comparable figures are available for the entire nation, Arkansas spent \$4,535 in operating funds per pupil. The national per pupil spending average was \$5,923. Although there does not exist a thoroughly accurate way of adjusting for differences in cost of education because some school

districts are located in communities with higher costs of living, it is clear that Arkansas' costs are not fully 25% lower than the nation as a whole.

14) Arkansas generally ranks between 48th and 50th in teacher pay.

3. ACTAAP

59. The Arkansas Comprehensive Testing and Accountability Program (ACTAAP) is the blueprint for education in Arkansas. It was created after educators, legislators, the executive branch and general public determined what is necessary to properly support schools and educate children. Before ACTAAP was adopted, education programs in the State were largely disjointed efforts by a number of entities. There are four purposes of ACTAAP: improve student learning and classroom instruction; establish accountability; provide evaluation; and assist policymakers in decisions regarding how to accomplish the other three goals.

60. "Frameworks" are a part of ACTAAP. Frameworks are a general statement of the knowledge that students should achieve. There are frameworks for every grade, kindergarten through eight, and then selected frameworks for courses in high school. The purpose of a framework is to make sure that a child can demonstrate proficiency in meeting a specified standard for a particular grade or subject.

61. The frameworks define content standards by discipline at grades four, eight and twelve in different areas, including English Language Arts, Reading, Mathematics, Science, Foreign Language, Social Studies, Health, History, Physical Education, Visual Arts, and Music and Performing Arts. (State Defendant's Exhibit 5) They are intended to be a guide to development of local curriculum instruction and assessment in all public schools. The State Department assists in offering advice and counsel to the school districts in creating a curriculum. This service is provided without charge.

62. The rules and regulations adopted by the State Board require that all teachers have a minimum of 30 hours of professional development annually to assist in accomplishing the ACTAAP mission.

63. There are two types of tests to measure whether students are at grade level under the State's standards: the Criterion Reference Test, also known as the Benchmark Test, and the Norm Reference Test. A Criterion Reference Test is customized to individual

states. It does not compare one student against another. It measures whether the student meets the standards that the State has set for the relevant grade (fourth, sixth and eighth). ACTAAP largely depends on the Criterion Reference Test as a measuring stick.

64. A Norm Reference Test is a test that measures how well a student does on an examination compared with every other child in the testing group that took it. In Arkansas, the Norm Reference Test used is called the SAT-9. When that test is graded, the child's score is listed as a percentile. If a child receives a score of the 65th percentile, that child did as well as 65% of the students that took the exam. The Norm Reference Tests are required at grades five, seven and ten.

65. ACTAAP requires all schools to test their students at the fourth, sixth and eighth grade and, for certain subjects, at "end of course". For example, when a student completes a course of Algebra 1, regardless of grade, that student would be tested. Performance levels are descriptions of student performance on the Criterion Reference tests. There are four levels: advanced, proficient, basic and below basic. The State requires a proficient rating, which means that children not only possess substantial knowledge and skills in the content area but that they be able to apply and use those skills.

66. Under ACTAAP, it is not enough to have only a basic knowledge of facts but proficiency in applying the facts and developing higher order thinking skills must be achieved. This is a higher standard than has been accepted in the past. ACTAAP sets goals that may not be met. Although ACTAAP has as its goal that children will be proficient in reading, writing and mathematics at grade level, that goal has not been reached. However, ACTAAP will not be fully implemented until calendar years 2003 and 2004. Plus, there are no guarantees that ACTAAP will remain as part of the State's education policy as executive and legislative branches of the government change.

67. Smart Start is the kindergarten through fourth grade component of ACTAAP. It is the component being stressed the most because a child must begin to learn early and correct academic deficiencies to have any realistic chance of being successful in later grades. Even though students are identified in the first or second grade as needing extra help, in many cases the efforts to bring them up to grade level are unsuccessful. Those students continue to fall further behind year after year. If a student is not on grade level, and especially reading by the third grade, chances are the child will never catch up. Significant intervention is required. Remediation is absolutely necessary. Unless the student qualifies for some specially designated program, the school district does not have

sufficient funds for remediation.

68. The primary monies used for training in Smart Start are line item budgets within the Public School Fund which are administered through the Department of Education. They are not funds sent directly to the schools.

4. The Schools

69. As part of ACTAAP the Holly Grove School District, like all districts, is required to have an individual improvement plan for each child in the fourth grade that does not perform at a proficient level. The district receives no extra money to help implement an individual improvement plan. Most of the parents at Holly Grove are former Holly Grove students. The cycle of Holly Grove's poverty can be broken if the children are better educated.

70. The Fort Smith School District screens every incoming kindergartner in five areas and has found that more than half are at least one year behind in two areas, and about 25 or 30 percent of them are two years behind. Over 45% of students in the Fort Smith School District qualify for free or reduced lunches. Fort Smith uses its Poverty Index Funds exclusively on literacy development at those very youngest years.

71. Rogers Public Schools recognizes the need to provide additional assistance to those students who are identified in the lower quartile on the standardized tests. Unless the student qualifies for some specially designated program such as special education the school district does not have sufficient funds to help the child.

72. In the Rogers Public Schools almost 50% of students are not proficient at grade level in the elementary schools. Yet the school district does not have the funds to provide the individual plans for individual students, including money to pay teachers for additional hours and transportation for students for remedial programs. For the 2000-2001 school year, Rogers had 536 new elementary students, 300 of whom were performing below grade level.

73. A single bus in the Rogers School system will run three times in the morning and three times in the afternoon. Students are required to transfer between buses. Some have to transfer twice. The first students get on the bus at 5:50 a.m. and the last one gets off the bus in the evening at 5:00 p.m. Rogers did obtain a grant to work with those middle school students performing below grade level in an after school program. However, half of those students who were identified as needing the program could not

attend because they lived too far away from the school and the school could not provide transportation for them due to lack of funds.

74. Rogers Public Schools incurred approximately \$2,100,000 in transportation cost this year. The cost per student is approximately \$190 per student, yet the school district receives no State aid for transportation costs.

75. From 1990 to 2000, enrollment in the Rogers School District has increased by approximately 4,300 students. Rogers has therefore had to continuously plan and build classrooms and school buildings in order to accommodate the growth. It has spent over sixty million dollars since 1990 to accomplish this. They have had two millage increases and relied heavily on the Second Lien Bonding authority. Rogers uses the debt millage above the 25 mill uniform rate of tax to pay the debt it owes. It also receives General Facilities Funding and Debt Service Supplement money to use toward the debt. Growth Facilities Funding is no longer available as it was eliminated in legislation in 1999.

76. Rogers must shuttle students from its various attendance zones in order to fill the classrooms to a maximum allowed by State standards. In some instances, their efforts to insure the standards are met causes siblings to be divided. Further, Rogers Public Schools must rely on combination classes in order to achieve maximum efficiency in the space available. Rogers spends approximately \$432 per student for debt, which takes away from maintenance and operating expenditures; i.e., money that could be spent in the classroom, more efficient transportation of students, more remediation, or more instructors for other high cost students.

77. In Rogers Public Schools there were 84 students enrolled in English as a Second Language (ESL) program in 1991. In October, 2000, there were 2,615 students enrolled in that program. In fact, 17.4% of the student body in Rogers is ESL. Rogers has 24 ESL teachers and two instructional assistants. It actually needs an additional ten ESL teachers. Although Rogers receives about \$743,000 for ESL students, that amount does not cover all the costs of the ESL program. Last year Rogers spent \$1,013,000 on the ESL program.

78. The funding from the State for ESL students is done on a proportional basis. There is a pool of money available for ESL education and that money is divided equally among all of the ESL students in the state.

79. There has been an increase in the number of special education students in Rogers Public schools over the last ten years. The number has gone from 500 in 1990 to

1326 in 2000. The school runs short about \$3.5 million dollars for special education each year.

80. In Bentonville Public Schools, one student requires a registered nurse in attendance with him at all times. The school district does not receive any money earmarked for medically fragile students.

81. Bentonville has not always had success in passing millage increases. In order to build the new high school, reserve funds and second liens were used. Private fund raising was used to meet construction costs and needs of the district. This is in addition to the \$8.2 Million in various grants.

82. Since 1987, enrollment in the Bentonville schools has increased 83.57%. In the last eight years, Bentonville has had to build new middle and elementary schools, renovate an old high school to make it a junior high, and build a new high school. It has gone into over \$20 million in debt. The interest on the indebtedness could otherwise be used for teachers' salaries, instructional materials and other educational needs. Debt service has increased by 55.79% in the last three years.

83. Bentonville receives money from the federal government to deal with special education needs, but all of that money and money from other sources for special education does not meet the actual expenses incurred by the district for special education.

84. The Little Rock Public Schools cannot meet the needs of their children with the money it has and yet it has more money per student and in total than any other school district in Arkansas.

5. State Efforts

85. Present technology would suggest that the appropriate way for a state to exercise its responsibilities is not through detailed spending control but close observation of student performance. The Standard Assurance Unit of the Department of Education is available for that role. It has three responsibilities: accreditation of schools, standards review and assistance to schools in academic distress.

86. The Standards of Accreditation were established in 1983, and put in place and adopted by the State Board of Education in 1984. All districts were required to be in compliance by July 1, 1987. The standards are periodically revised and most recently were revised in January, 2000.

87. If a school district is found to be not in compliance with one or more of the

standards of accreditation, the district can suffer various consequences. Those range from a citation, which is a minor violation, to probation, which if not corrected could lead to a loss of accreditation. If a school loses accreditation after going through probationary status for two consecutive years, then it would be subject to a number of penalties including annexation, consolidation and other remedies.

88. Act 915 of 1995 requires the Department of Education to establish rules and regulations for which schools could be identified in academic distress in phases one, two or three. Phase one academic distress would be a school district that has 50% or more of their students in the lower quartile in the SAT-9 tests for grades 5, 7 and 10 for the last three years. If 40- 49% are in the lower quartile, the review includes five secondary indicators which are attendance rate, completion rate, the enrollment in the core curriculum, the percentage of students taught by teachers not certified in that subject area and disparity by race and gender on the SAT-9. If a school district is below the state average on three or more of these indicators, then it could be placed into phase one academic distress.

89. A phase one academic distress district is required to submit a written improvement plan. At the end of the year, implementation of that plan is reviewed, along with the test scores. If there has been no significant decrease in test scores and the district did implement its improvement plan, then the district remains in phase one. If there is not sufficient evidence that the plan has been implemented or if the scores decrease greatly, the district can be placed in phase two academic distress.

90. If a district is in phase two, the Department of Education writes the improvement plan and the district's test scores are reviewed again to make certain there is no decrease in test scores. If either the plan is not implemented or there is a continued decrease in test scores, the district could advance to phase three academic distress.

91. A phase three academic distress classified school district becomes subject to action of the State Board of Education which could include consolidation with another district, annexation, or State take-over. There have been schools that have lost accreditation for one year, but never has a school lost their accreditation for two consecutive years. No school district in the State has ever been classified as phase three academic distress. Thirty-nine school districts have been identified in academic distress over the years. Currently there are twelve.

92. The Altheimer, Crawfordsville, Elaine and Parkin school districts have been

in phase two academic distress for two consecutive years. Because all four implemented the plan drafted by the State Department of Education and there was no significant decrease in test scores, the criteria was not met to advance the districts to phase three academic distress. All the districts on the academic distress list are in the group of schools classified as poor.

93. An academic improvement plan is required for all students who fail to perform at the proficient level as measured by the Benchmark exams. An academic improvement plan is developed for an individual student and indicates to the teacher and the student what that student's strengths and weaknesses and needs are in order to improve to be at grade level. The same state law which mandates the administration of the Criterion Reference Tests also requires that any student who performs below that proficient level must have an individual plan written for how the school will address the deficiencies that that student has.

94. ACTAAP has a unique feature known as a school performance report, or school report card. This will measure individual schools and will be reported publicly. It shows how that school performed on a number of indicators that are found within ACTAAP.

95. Report cards issued by district and by schools are part of the overall policy adopted to insure a general, suitable, and efficient system of education. There is a three year history on some indicators. Generally, the report card will include the SAT-9 Norm Reference test scores, the Benchmark exams, a promotion rate, a school safety indicator, a percentage of teachers that are fully certified, a percentage with master's degrees, district data from one year on the millage rate, and average teacher salaries.

96. The test scores shown on the school report cards are the closest things to measuring what students know. It is permissible under the present system for a school district under a deficiency removal plan to have teachers teaching specific courses for which they are not certified

97. One of the components utilized to determine whether children are receiving an adequate education is to review the results of the accountability test. If only 44% of the general fourth grade population were proficient in reading and in the second year only 47% were proficient in English, that would indicate that the system had not provided those students enough resources to meet the goals.

98. For the eighth grade Benchmark tests administered in April, 2000, only 16% of the students were proficient or above in mathematics statewide and only nine percent

were proficient or above in the Little Rock Schools.

99. Although the Rogers Public Schools score above the norm both state and nationally on the standard tests, there are students who score in the lowest 25% of the tests. Those are students who do not have the necessary skills to be successful academically in the rest of their careers.

100. The first test results reported for the fourth grade revealed that 35% of the fourth grade students in Rogers performed below the proficient level on literacy and 45% scored below the proficient level on mathematics.

101. By looking at the State's averages and the local assessments done by the Little Rock Schools, the gap between proficiency and deficiency has increased each year as students who are not proficient in the fourth grade have progressed through the system. Based upon the review of the most recent Arkansas academic achievement results, it can be said that this State has a remarkably serious problem with student performance. At these levels, students will not be able to compete successfully with their peers from other states let alone other nations. They will not be able to lead productive lives.

6. Remediation

102. The RemediationRate identifies the percentage of students who as entering freshmen in college are required to take at least one remediation course in order to begin. The most recent statistics available indicate that the remediation rate for high school students entering college was 58% in either English or mathematics.

103. The school report card remediation rate reflects strictly seniors that graduated from high school. It does not include those who have come back to college after having been out of school for several years. Further, it measures only those students who go on to colleges. It is a logical conclusion that those who graduate but do not go on to college may have an even greater deficiency in either math or English.

104. Rogers Public Schools adopted an Academic Guarantee Policy in which the students were promised that if they had a three point zero or above grade point average and had taken certain steps in high school, which included college preparatory courses, and still had to be remediated in college, Rogers Public Schools would pay the tuition for the remedial courses. Of those students going on to college from Rogers High School in 1999, 44% had to take remedial classes in either English or mathematics. From the 1999 graduation class there were 24 students with a 3.0 or better accumulative grade point

average who took core courses and yet had to be remediated.

105. Entering students or students already in school may also be in need of remediation in order to perform at grade level. The Smart Start law states: “remediation means the process of using diagnostic instruments to provide corrective, specialized, supplemental instruction to help a student in grade two through four to overcome academic deficiencies”. A.C.A. §6-15-419(10)(A)(i). It further provides, “remediation shall not interfere with or inhibit student mastery of current grade level academic learning expectations”. A.C.A. §6-15-419(10)(B). The remediation rate of children in school directly relates to the child’s not being prepared upon entering the first grade.

106. Students who need remediation are less likely to graduate from high school, go to college, become part of a skilled work force and are more likely to become engaged in criminal activity, enter the criminal justice system, and go to jail and prison where the State’s annual cost to maintain the individual far exceeds the cost to remediate the student and make him an economic and cultural asset to the State. There is no evidence of any one system that will ensure that every child will leave the school system a productive member of society, but the evidence is overwhelming that students who start behind not only stay behind but that the gap between students who thrive and those who struggle continues to widen with age.

107. Teachers are given no extra time to plan or extra pay for students who are behind when they reach their classrooms. In many cases, those students continue to lose ground. The State does not provide any additional money or aides in order to help remediate those who need it.

108. One-on-one instruction is an accepted means of remediating students. However, Rogers Public Schools cannot provide that type of remediation due to a lack of funds. A school district with a higher percentage of students who are not proficient will not be able to remediate if it cannot be done in Rogers.

109. A student who is not proficient in one of the ACTAAP testing areas must be remediated. There is no additional help from the State to assist a specific or individual child in need of remediation.

110. The Department of Education offers assistance to school districts as a part of the Smart Start and Smart Step (which is a continuation of Smart Step for grades following grade four) initiatives. The assistance comes in the form of additional training for teachers. However, there is no additional money provided to the district to send the

teachers to that training.

111. The change in mandatory attendance laws which occurred in 1987 has had a significant impact on the schools. The fact that students are not allowed to drop out from schools (which is a desirable end) has, nevertheless, resulted in an increased expense because more remediation is required for the students who at one time would have left the system. [Standridge] That has required the creation of alternative schools for secondary students who just cannot adapt to the traditional high school. Each school district is required to have an alternative school.

112. The Rogers Public Schools do not have enough funds to do everything necessary to remediate the children not performing at grade level. The district needs extra tutorial programs. There needs to be transportation for a large majority of the students to attend these programs. It needs smaller class sizes for those students who are below grade level. And it needs to have more learning aides for those students. The district also needs money to help the parents learn how to work with their children.

7. Teacher Salaries

113. Arkansas' entry level teachers' salaries are dead last among all of its eight bordering states. This underscores the State's labor market disadvantage in the competition for teaching talent. The State's average beginning salary is 82% of the national average and is also below that of its regional competitors. The State spends 20% less on average for its teachers than the national average and 20% less for its beginning teachers. The cost of living is less in Arkansas, but it is unlikely to be anywhere close to 20% less.

114. In the Memphis, Tennessee city school district, average teachers' salaries are \$40,190. Beginning teachers' salaries with a BA for the 2000-2001 school year are \$32,045. In areas surrounding Memphis in Shelby County, Tennessee, the beginning salary is \$31,895. In contrast, the corresponding Arkansas school district has average salaries of \$34,209 and starting salaries for teachers with a BA of \$26,350. Beginning Arkansas teachers competing with Memphis would need immediate raises of \$5,625 each and the average Arkansas teacher salary would have to be immediately raised by \$5,981 just to catch up. There is no evidence in the record to indicate whether the Memphis school district intends to give raises in the future but it can be reasonably assumed that it will.

115. In Texarkana, the average salary for beginning teachers with a BA degree is \$20,437. The average salary is \$32,537. In contrast the adjoining school district in Texas pays beginning teachers \$24,240. Arkansas is paying beginning teachers \$3803 less than Texas. When compared to similar occupations, Arkansas teachers receive approximately 91% of what non-teachers receive.

116. Rogers ranks second in the State in teachers' salaries. Springdale Public schools rank first, Bentonville Public Schools ranks 66th and Fayetteville Public Schools ranked 20th in average teachers' salaries. The teachers' pay schedule has substantially affected the ability of the Rogers Public Schools to recruit and retain teachers. Rogers recruits teachers outside of the Northwest Arkansas area, including other states such as New Mexico and Texas.

117. Even though Rogers is the seventh highest paying district in the State in starting salaries, the minimum salary in nearby Oklahoma for their lowest paying district is higher than the Rogers salaries. The stricter licensing requirements and the increased expectation of teachers have not been accompanied by a concomitant increase in pay. There are as many as 12,000 certified teachers in Arkansas at present who are not teaching.

118. The Lake View high school science teacher has 41 years teaching experience and two Masters Degrees and makes \$31,500 per year, as compared to the Barton kindergarten teacher with a bachelor's degree with 21 years experience making \$33,610 per year. [Davidson, V. Phillips] A teacher with two Masters Degrees and 38 years experience in the Ft. Smith school district would make \$43,524 per year. [Gooden]

119. While some disparity is acceptable in teachers' salaries, differences that exist are so great that they work to destabilize the education system by driving qualified teachers away from districts where they are most needed. Schools and school districts with more disadvantaged students need more qualified teachers per student. However, the schools with the higher number of disadvantaged students are typically the schools which have the lower teacher salaries. 120. Arkansas' teacher salaries rank 45th in the nation. Poorer school districts which are bordered by other states and school districts which pay higher salaries have a difficult time recruiting new teachers. The State Board of Education is in the process now of trying to advance a comprehensive strategy to attract, motivate and retain high caliber teachers to the teaching profession. That strategy demands increases in salaries.

121. The working conditions in the schools such as lack of supplies and inadequate facilities also make recruiting and retaining teachers very difficult. There are problems recruiting teachers to the Lee County Schools and the Holly Grove School District because of low pay. Many of those that do teach in Lee County have to have a second job in order to live.

122. Arkansas teachers are underpaid in comparison to the rest of the market. Bentonville has difficulty filling positions in the vocational areas in particular because the pay is much better in the private sector. Bentonville will lose 15% of its teaching corps in the next three years due to retirement. It has a difficult time recruiting and maintaining teachers in the computer arts field due to the inability to compete with salaries in the industry.

123. Teachers' salaries are the most critical thing Arkansas needs to address. ACTAAP, Smart Start, and Smart Step all depend primarily on the classroom teacher to function. The challenges of finding ways of retaining quality teachers and attracting new teachers is going to take additional funding. The single most important factor necessary to insure that the State's system of education meets the *Rose* factors is the availability of well educated, well motivated, and well compensated teachers.

IV. STATEMENT OF LAW

124. As previously found by this court, the Arkansas Constitution, Article 14, §1 requires that the State provide a "general, suitable and efficient system of free public schools' and Article 2, §§ 2, 3, and 18 requires that the schools be equally available to all the people. Article 14, §1 also permits the State and the school districts to "spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age. . ."

125. Amendment 40 provides that "The General Assembly *shall* provide for the support of the common schools. . ." and provides that "school districts are hereby authorized to levy . . . an annual tax for the maintenance of schools. . ." (Emphasis added) Amendment 74 to the Constitution allows for variances in funding to local school districts. "The primary reason for allowing such variations is to allow school districts . . . to raise additional funds to enhance the educational system within the school district." It is the responsibility of the State of Arkansas to provide for the support of public schools and to ensure that those schools provide an adequate, or general, suitable and efficient

educational system. The Constitution has no provision to allow the ultimate responsibility to be shifted to local school districts or to except individual students from the benefit of an education.

126. Conclusion of Law No. 9 of the 1994 Order states as follows:

While Arkansas has not defined the terms “general, suitable, and efficient”, courts in other states have defined these terms. In *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 191-192 (Ky. 1989) the Court defined “efficient” as a system which required “substantial uniformity, substantial equality of financial resources and substantial equal educational opportunity for all students” and which required that the educational system be “adequate, uniform and unitary.” *Id.* at 192. The Court concluded that “an ‘efficient’ system of common schools should have several elements:

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 - they must be uniform.
4. The system must provide an adequate education.
5. The system must be properly managed.” *Id.* at 211.

The Court went on to say that “an efficient system of education must have as its goal to provide 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. *Id.* at 212. See also *Pauley v. Kelly*, 255 S.W.2d 859 (W.V. 1979).

127. Conclusion of Law No. 16 of the 1994 Order states as follows:

The Arkansas school funding system violates Article 14, Section 1 of the Arkansas Constitution by failing to provide a “general, suitable and efficient system of free public schools.” See *DuPree v. Alma School Dist. No. 30*, 279 Ark. 340 (1983).

128. Amendment 74 (b)(2) States in part as follows: “Except as provided in this subsection the uniform rate of tax shall not be an additional levy for maintenance and operation of the schools but shall replace a portion of the existing rate of tax levied by each school district available for maintenance and operation of schools in the school district. . .”

129. In *Dupree v. Alma School District No. 30*, 279 Ark. 340; 651 S.W.2d 90 (Ark. 1983), the Supreme Court stated,

. . . the educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence . . . Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged. . .

The evidence offered may have shown that the appellee districts offered the bare rudiments of educational opportunities, but we are in genuine doubt that they were proved to be suitable and efficient. However, even were the complaining districts shown to meet the bare requirements of educational offerings, that is not what the constitution demands. For some districts to supply the barest necessities and others to have programs generously endowed does not meet the requirements of the constitution. *Bare and minimal sufficiency does not translate into equal educational opportunity.* (Emphasis added) “Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequalities of state action.” *San Antonio School District v. Rodriguez*, 411 U.S.1, 70, 93 S.Ct. 1278, 1315, 36 L.Ed.2d 16 (1972). “*Whether the state acts directly or imposes the role upon the local government, the end product must be what the constitution commands. [When a district falls short of the constitutional requirements] whatever the reason for the violation, the obligation is the state’s to rectify it. If local government fails, the state government must compel it to*

act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation.” (Emphasis added) Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, 295.

130. A.C.A. §26-80-204(17) is the statute setting forth the calculation of the uniform rate of tax:

“Uniform rate of tax” means a uniform rate of ad valorem property tax of twenty-five (25) mills to be levied on the assessed value of all taxable real, personal, and utility property in the state to be used solely for maintenance and operation of the schools. In calculating the uniform rate of tax imposed by Arkansas Constitution, Article 14, § 3, as amended by Arkansas Constitution, Amendments 11, 40, and 74, the following categories of millage may be utilized to meet the minimum base millage requirement:

- (A) The local school district’s maintenance and operation millage;
- (B) the dedicated maintenance and operation millage;
- (C) Excess debt service millage; and
- (D) The millage derived from the ratio of the debt service funding supplements divided by the total assessment; . . .

131. A.C.A. §26-80-204(4) gives the definition for “Base local revenue per student” as follows:

- (A) As applied under Acts 1995, No. 917, as such

may be amended from time to time, if Category 1 is fully funded, the local revenue per student in the local school district with the highest amount of local revenue per student.

(B) If Category 1 is not fully funded, the term means the revenue per student to which the state equalizes calculated by taking the sum of: (i) The total available state aid for state equalization funding per student; (ii) Ninety-eight percent (98%) of the uniform rate of tax times the total state assessed valuation; and (iii) Seventy-five percent (75%) of the average miscellaneous funds collected in the previous five (5) years or the previous year, whichever is less, and by dividing the sum by the total state average daily membership for the previous year. . .

132. A.C.A. §26-80-204(10) states the definition of “local revenue per student” as follows:

. . . as applied under Acts 1995, No. 917 as such may be amended from time to time, in each year ninety-eight percent (98%) of the amount of revenue available, whether or not collected, in a local school district solely from the levy of the uniform rate of tax plus seventy-five percent (75%) of the average miscellaneous funds collected in the previous five (5) years or the previous year, whichever is less, divided by the average daily membership of such local school district for the previous year. . .

133. A.C.A. §§6-15-401 et seq. contain the provisions for the Arkansas Comprehensive Testing, Assessment, and Accountability Program Act (ACTAAP). A.C.A. §6-15-402 (a)(1) states as follows:

The purpose of the Arkansas Comprehensive Testing, Assessment, and Accountability Program Act is to provide the statutory framework necessary

to ensure that all students in the public schools of this state demonstrate grade-level academic proficiency through the application of knowledge and skills in the core academic subjects consistent with state curriculum frameworks, performance standards, and assessments. The State of Arkansas recognizes and declares that students who are not performing at grade-level standards of academic proficiency are especially harmed by social promotion because they are not equipped with the necessary academic skills to be successful and productive members of society. The Department of Education is committed to having all students perform at grade level and beyond. For this reason, the Arkansas Comprehensive Testing, Assessment, and Accountability Program will emphasize point-in-time intervention and remediation upon the discovery that any student is not performing at grade level.

134. A.C.A. §6-15-419(10) states as follows:

(A)(i) “Remediation” means a process of using diagnostic instruments to provide corrective, specialized, supplemental instruction to help a student in grades two through four (2-4) overcome academic deficiencies.

(ii) For students in grades five through twelve (5-12), remediation shall be a detailed, sequential set of instructional strategies implemented to remedy any academic deficiencies indicated by below-basic or basic performance on the state-mandated criterion-referenced assessments.

(B) Remediation shall not interfere with or inhibit student mastery of current grade level academic learning expectations.

V. CONCLUSIONS OF LAW

A. Equity

1. The Fort Smith School District curriculum offers a variety of courses, including fashion merchandising and marketing, and has access to courses at a local technical college. By comparison, Holly Grove, Lake View and Lee County are examples of school districts that provide the bare necessities of a curriculum and struggle to do so. Perhaps the deprived schools and school districts may never be able to offer the rich curriculum of Ft. Smith and others in similar circumstances, but the stark contrast between Ft. Smith and Holly Grove, Lake View and Lee County is a clear example of students being deprived of their rights of equal protection provided by Arkansas Constitution, Article 2, §§ 2, 3 and 18 by reason of their “fortuitous circumstance of residence” as stated in *Dupree*. Under Arkansas Constitution Article 14, §1 and Article 2, §§2, 3 and 18, school districts throughout the State must provide substantially equal educational opportunities for their children. Denying these opportunities based solely on a school district’s location in a poorer part of the State is not a compelling reason for the State to abandon its constitutional obligations.

2. Buildings properly equipped and suitable for instruction are critical for education and must be provided. Even though supplemental money is provided to districts that incur debt for capital improvements, districts that cannot afford to incur debt receive no funding from the State for such improvements. The State cannot shift to local school districts its ultimate burden of ensuring every school district has substantially equal facilities to provide a general, suitable and efficient system of education. When the local district fails or has failed because of the inequitable effects of the funding formula, or for some other reason, to build or maintain adequate facilities, or mismanages its resources for its daily operations, the State cannot abdicate its Constitutional responsibility and blame “local control.” The State’s constitutional role is to ensure an adequate and equitable education and consequently it must correct any constitutional deficiencies as soon as possible. To allow certain districts to continue to suffer from the results of past inequities such as lack of adequate facilities, equipment and supplies, making it harder for them to attract qualified staff, teachers and students, is itself inequitable.

Improving the quality of schools has a high priority across the United States, and, perhaps, the world. School districts within the State are in competition with one another and the State competes with its neighbors. The school districts that are most fortunately endowed with resources continue to have inherent advantages, namely property wealth, that allow them to improve. Many of the schools on the bottom lack these

inherent advantages as they struggle to achieve equality. Under the present funding system, by the time the poorer districts reach the level of the more prosperous districts, *if they can*, they will still find themselves at or near the bottom. Providing equal funding to all school districts will not cure the inequities.

For the reasons stated, the equal protection and opportunities guaranteed by Article 2, §§ 2, 3 and 18 have not been provided in that every school district does not have an equal opportunity to build, renovate and/or maintain the necessary physical plant. To provide an equal opportunity, the State should forthwith form some adequate remedy that allows every school district to be on equal footing in regard to facilities, equipment, supplies, etc. Under Arkansas Constitution Article 14, §1 and Article 2, §§ 2, 3 and 18, school districts throughout the State must provide substantially equal buildings properly equipped and suitable for instruction of students. Denying these facilities based solely on the district's location in a poorer part of the State is not a compelling reason for the State to abandon its constitutional obligations.

3. a) There are three reasons that expenditures and not revenues should be used in calculating the Federal Range Ratio: 1) The Supreme Court used the term "expenditures" in expressing concern that "disparities in per pupil expenditures" be corrected; 2) An accurate accounting of expenditures is the best measure of whether available funds are being efficiently applied to education; and 3) The 1994 Order specifies that expenditures and not revenues be used in the calculation. Number 3 can be discounted because of the 1996 order that found the law of the case doctrine would not be applicable at a later trial; however, the other two reasons are sufficient to require expenditures as the component of the Federal Range Ratio. No doubt to the extent reliance is placed upon the formula, this puts a heavier administrative burden on the State, but the responsibility of equitably funding the educational system is solely the State's, and therefore the State must take necessary steps to effect a more accurate accounting of expenditures.

b) The desegregation money provided to the Pulaski County School Districts should not be included in calculating the Federal Range Ratio because they represent funds that compensate the Pulaski County School Districts for expenses unique to them. *See also Magnolia School District No. 14 of Columbia county, et al. v. Arkansas State Board of Education, et al.*, 303 Ark. 666, 799 S.W.2d 791 (1990).

c) The Plaintiffs were unable to overcome the presumption of constitutionality

in the State's use of categorical funding rather than Weighted Average Daily Membership in the school funding formula. By passing new legislation, the State has attempted to make improvements in the school funding formula provisions for special or high cost students. The improvements may not be ideal, but the Plaintiffs have failed to prove them unconstitutional. Therefore, it is not necessary to use Weighted Average Daily Membership in calculating the Federal Range Ratio.

4. The teachers' salary disparity within the State is a violation of Article 2, §§ 2, 3 and 18, because the disparity is the result of local school district discretion and bears no rational relation to the State's interest in providing a general, suitable and efficient education for our children. Moreover, the salary disparities act to destabilize local districts that cannot or will not pay competitive salaries and are unable to hire and retain quality teachers.

5. The Plaintiffs have raised the issue that Amendment 74 and Article 2, §§ 2, 3 and 18 have been violated by allowing under A.C.A. §26-80-201 et seq. school districts to use the excess debt millages to satisfy the uniform tax rate of 25 mills. However, the court finds otherwise. Plaintiffs' argument is that Amendment 74 requires school districts to levy twenty-five mills to be dedicated to maintenance and operations, and that by failing to do so the State loses substantial sums of money that would otherwise be available for Arkansas public schools. Some school districts have levied various millages in order to secure debt incurred through bond issues. Because of the requirement that millages dedicated to the retirement of debt be equal to 150% of the indebtedness there are virtually always excess debt millages. In fact, it is represented in the bond indenture, and, therefore, the voters must be presumed to know that the excess millages are to be available for maintenance and operations.

Plaintiffs complain that this use of excess debt service mills does not satisfy Amendment 74 and that the amendment requires each school district to levy twenty-five mills, independent of any other mills, exclusively for maintenance and operations. However, Amendment 74 (b)(2) states in part, "Except as provided in this subsection the uniform rate of tax shall not be an additional levy for maintenance and operation of the schools but shall replace a portion of the existing rate of tax levied by each school district available for maintenance and operation of schools. . ."

The Plaintiffs argue for a result that could easily have been obtained by more specific language in the amendment. However, no such language is present, and

therefore, the method of counting mills to meet the uniform rate of tax used by the State complies with the language of the Constitution.

2. Adequacy

6. A comparison of Arkansas teacher salaries to Memphis, Tennessee and Texarkana, Texas (competitive markets) illustrates a dire situation. Money may not be the only motivator to attract quality personnel, but it appears to be the most consistent one. This is even more of a factor for teachers in specialized fields (e.g., teachers of English for students for which English is a second language and teachers in newly evolving technologies). Teachers' salaries in this State are wholly inadequate under the *Rose* standards to attract and maintain qualified teachers to provide our students with the education Article 14, § 1 of our Constitution requires and as articulated in detail in *Rose* and the 1994 Order. The requirements of ACTAAP cannot be met without high quality personnel, but there is no money available to hire them. No deficiency in our education system is in more urgent need of attention than teachers' salaries.

7. Three facts were uncontroverted at trial: 1) A substantial number of our children are entering kindergarten and first grade significantly behind their peers; 2) Those children that enter the first grades needing remediation will have a difficult time performing at grade level by the third grade; and 3) If a student cannot perform at grade level, especially in reading, by the third grade, then he is unlikely to ever do so. The only possible conclusion is that in order to provide our children with an adequate education as required by the Constitution and ACTAAP, the State must forthwith provide programs for those children of pre-school age that will allow them to compete academically with their peers. The urgency of this need equals that of the deficiency in teacher salaries.

8. An uneducated person has virtually no chance today to sample much more than a harsh subsistence. *Dupree* was decided eighteen years ago when the Supreme Court found the State's funding system to be unconstitutional and that many of Arkansas' students were receiving only the bare rudiments of an education. Not much has changed since then except that nineteen classes have graduated from our high schools; practically a generation.

This case was begun in 1992. Since then, nine classes have graduated from our high schools. One wants to believe that at least our better students are being well educated. However, the Rogers School District program to pay for college remediation

for its top students reveals the sad reality of the quality of our education system today. If our best are not being prepared for the rigors and trials of an ever increasingly complex world, what is happening to the least advantaged to whom we owe an equal or greater duty?

If an adequate education system exists for all of Arkansas' students, then it follows that the system will be equitable. The State funds its educational system by first determining how much money is available and then deciding how to divide it. The State refers only to available funds and not to Constitutional requirements. Perhaps an adequate amount of education funding can be determined in this manner, but that seems impossible to this court. Pursuant to Act 917 of 1995, and in order that an amount of funding for an education system based on need and not on the amount available but on the amount necessary to provide an adequate educational system, the court concludes an adequacy study is necessary and must be conducted forthwith.

C. Contempt

9. Plaintiffs' request that the State Defendants be held in contempt of court for failure to comply with the terms of the 1994 Order. This the court declines to do. While it is true that some of the constitutional deficiencies found in the 1994 Order still exist, the State has attempted through legislation, particularly Act 917 of 1995, and Amendment 74 to ensure a more equitable funding of the schools. For the reasons stated above, these efforts fail to correct all of the constitutional shortcomings found in 1994, but there is insufficient evidence to indicate that the failure was willful or contemptuous.

* * *

VI. REMEDY

The court recognizes the exceptional intractability and complexity of the problem at hand. There is a shortage of resources. Taxation, political and cultural hurdles to a solution may seem to create a Gordian knot; a problem not to be solved. It seems impossible to read a newspaper, news magazine or listen to a news broadcast without encountering opinions of all varieties addressing education; how to do it, how to fund it. Countless books have been written on the same subjects. However, it can be safely said that the one constant is the agreement that an adequate education for our children is necessary. Our Constitution requires it. Too many of our children are leaving school for a life of deprivation, burdening our culture with the corrosive effects of citizens who lack

the education to contribute not only to their community's welfare but who will be unable to live their own lives except, in many cases, on the outermost fringes of human existence. No problem we face as a State needs more immediate attention.

We should resort to the courts in forming a remedy for the many problems noted here only when all else has failed. They are not equipped to undertake the task. And, speaking for this court, it would only be with utter and profound reluctance that it would attempt such an endeavor. However, it is difficult to overstate the urgency and magnitude of these issues which are, for now, left to the legislature.

* * *

If any of the findings of fact are deemed to be conclusions of law or any conclusions of law are deemed to be findings of fact, then they are hereby adopted as such.

All issues raised in the various pleadings listed on pages 6-7 have now been addressed except for the request for attorneys' fees addressed in the next section. If the other requests were not addressed directly by this order, the relief requested is denied.

VII. Attorneys' Fees

The Supreme Court, in its March 2, 2000, Order in *Lake View*, held that this court erred in denying attorneys' fees to the Plaintiffs. The fee request was based on the benefit derived by the State and all members of the Class from new legislation passed since the 1994 Order. The Supreme Court stated this case is analogous to *Millsap v. Lane*, 288 Ark. 439, 706 S.W.2d 378 (1986), wherein the Supreme Court decided that Millsap's derivative suit on behalf of Millsap Processed Foods (MPF) preserved a value of over \$540,000 in corporate assets. The Court increased the attorneys' fees based on the economic benefit to MPF resulting from counsel's efforts.

"Here, there is no question but that a substantial economic benefit has accrued not only to the poorer school districts as a direct result of *Lake View*'s efforts but to the state as a whole." *Lake View* at 495. The Court held that even though sovereign immunity applied as a defense for the State Defendants, that the State waived that defense by agreeing to notices to the Class advocating attorneys' fees be paid. The Court did decline to mandate a particular method for calculating fees or to state a particular fee amount.

Arkansas generally follows the American rule, which is that attorney fees are not

chargeable as costs in litigation unless specifically permitted by statute. *Millsap*, 706 S.W.2d at 379. An exception to the American rule is the common fund theory of awarding fees. The common fund theory allows that where a plaintiff has created or augmented a common fund for the benefit of others as well as himself, attorney fees may be awarded. *Id.* In common fund cases such as this, courts allow the lawyers to recover fees if there has been a substantial benefit to members of a class. In *Lake View*, the Supreme Court states the common fund of \$130,000,000 benefits the Plaintiffs and the whole State of Arkansas.

The rationale for allowing fees to the lawyers is one of fairness in that those not directly involved in the litigation, namely the members of the Class and the State, have benefited from the efforts of the lawyers while incurring no risk themselves. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). Or put another way, persons who obtain a benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense. *Boeing v. Van Gemert*, 44 U.S. 472 (1980). It is based on the equitable theory that those who have benefited from litigation should share its costs. See Report of the Third Circuit Task Force, *Court Awarded Attorneys Fees*, 108 FRD 237 (Arthur R. Miller, Reporter 1985).

In this case, the attorneys agreed that a common fund of \$130,000,000 for school districts was created through new legislation by the Plaintiffs' lawyers' efforts. As stated in the *Lake View* opinion, “. . . at the April 6, 1998 hearing, James M. Llewellyn, Jr., on behalf of the State advised the chancery court that ‘at least One Hundred Million and probably more’ was created by the effects of Amendment 74 alone and that ‘all of us still stand on the Agreed Order recitation that there was [a] One hundred and Thirty Million Dollar fund created.’” *Lake View* at 495.

Further, the substantial or common benefit theory of recovery would apply here too. Under that theory, the common fund doctrine would be applied to cases where lawsuits produce non-monetary benefits. See generally *Mills v. Electric Auto-lite*, 396 U.S. 375 (1970); *Alyeska Pipeline Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975). Courts have treated both the common fund and the common benefit doctrines as one, but the trend is to treat them independently. The issue under both doctrines is whether a substantial benefit, pecuniary or otherwise, was conferred on an ascertainable class. *Mills, supra*.

The Supreme Court stated in *Lake View* that “With the gradual elimination of disparities in funding and opportunities for students and with the passage of Amendment

74, education in the State unquestionably has benefited.” *Lake View* at 495.

Once the court determines that a common fund or benefit has been created, the next step is to determine a reasonable attorneys’ fee. The issue becomes whether the court should award a fee based on a percentage of the common fund created or by some other approach. One purpose of the percentage method is to encourage early settlement by not penalizing efficient counsel and ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation. See 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Action*, §14.03 at 14-3 through 14-7 and cases in footnotes 17-20 (3d ed. 1992). The importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk non-payment has been recognized. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326 (1980).

Along with the contingent fee based on the economic benefit, the lodestar approach of awarding attorney fees was mentioned by the Supreme Court as a possible theory under which this court may award fees. In the 1970s, federal courts awarded a reasonable percentage of a created fund as a reasonable fee award. See Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 FRD 237, 242 (Arthur R. Miller, Reporter 1985). As class action litigation increased, high fee awards were criticized and courts tried to find a common fund fee determination that would yield a reasonable fee supported by specific findings. See Conte, *Attorney Fee Awards*, §2.03, 2nd Edition. The Third Circuit in *Lindy Brothers Builders v. American Radiator & Standard Sanitary Corp (Lindy I and Lindy II)*, *supra*; 540 F2d 102 (3d Cir. 1976) (en banc), held that the trial court must articulate its findings to demonstrate the reasonableness of the amount of fees awarded. 487 F2d at 166-167. The lodestar method was given as a guideline by the Third Circuit and it allows that a court must first multiply the hours reasonably spent by a normal hourly rate for noncontingent work to arrive at a lodestar figure. The lodestar should then be further considered for adjustments for factors such as contingency and quality. *Id.* at 167-170.

The Fifth Circuit later set forth twelve factors to consider in determining a reasonable fee award. Those factors are 1) The time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results

obtained; 9) the experience, reputation, and ability of the attorneys; 10) the “undesirability” of the case; 11) the nature and the length of the professional relationship with the client; and 12) awards in similar cases. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

“In practice, the lodestar method proved difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result. Accordingly, it has been criticized by courts, commentators, and members of the bar.” Manual for Complex Litigation, Third, §24.121 *citing* “Court Awarded Attorneys Fees, Report of the Third Circuit Task Force,” *reprinted in* 108 F.R.D. 237 (1985). “In recent years, the trend has been toward the percentage of the fund method.” *Id.* One reason for preferring the percentage over the lodestar method is that when courts consider the time spent on cases in awarding fees, a plaintiff’s lawyer has no incentive to settle a case when the court is using lodestar. *Johnson, supra.* Further, a fee based on the value of time expended is no more logical than basing it on out of pocket expenses. The rationale is that either can be manipulated and deter settlement.

Today, courts have largely reconciled the two methods (percentage and lodestar) in common fund cases because in actual practice the proper use of both methods should lead to a common fund fee of similar size. See Conte, §2.06 and *Wing v. Asarco Inc.*, 114 F.3d 986 (9th Cir. 1997).

The Arkansas Supreme Court has established factors in determining fee awards much like those set forth in *Johnson*. See *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717(1990). Those factors include the experience and ability of the attorney, the time and labor required to perform the legal service properly, the amount of money involved in the case and the results obtained, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, whether the fee is fixed or contingent, and the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. *Id.* at 229.

In applying the above factors to this case, the court finds that the time and labor involved in this litigation has been long and arduous. The fact that the case was filed in 1992, the obvious substantial preparation and study necessary to prepare before filing, the 26 volumes of pleadings and the sheer magnitude of discovery, indicates the time spent. The Plaintiffs’ lawyers state that in excess of 15,000 hours have been spent on this case over the last ten years. No one has disputed that.

The novelty and difficulty of the questions involved are quite obvious to this court. The issues presented span the education system, which is an enormous subject to grasp. Many witnesses testified not only about the nearly impenetrable complexity of education funding and the complicated contemporary education system, but also touched on the relationship among the statewide property tax that creates the school fund, various statutes related thereto, and Amendment 59. The many details not covered by this opinion could fill hundreds of pages.

The customary fee for such a case is a contingency fee basis. Expert witnesses Richard Hatfield testified that contingency fees are normally 33 1/3% and even 40% in extremely difficult cases. (Deposition of Richard Hatfield, p. 24) The average percentage fee award in Arkansas is 25%. (Deposition of Carrold Ray, p. 47) The fee arrangement was contingent on recovery, and the contingency puts the Plaintiffs' lawyers at a very high risk because of the time and effort involved and the uncertainty of success and the collecting of a fee. After years of work and providing an invaluable service to the State, because of the appellate process, Plaintiffs' lawyers do not know to this day when or how much they will be paid.

The attorneys for the Plaintiff class have the experience necessary and have built a reputation in the litigation of this case. Because of their relationship with the named Plaintiff and their interest in this litigation over a ten year period, the lawyers persevered and have prevailed at the trial and appellate levels. As a result of the lawyers efforts, new legislation was passed in 1995 and 1997, along with Amendment 74 in 1996, and a common fund of \$130,000,000 was created that benefited the entire Class.

Plaintiffs point to numerous cases in Arkansas wherein attorney fees have been awarded based on a percentage of the common fund created in class action cases. See *Cash v. City of Little Rock*, 277 Ark. 494, 644 S.W.2d 229(Ark.1982) where 25% of benefit was awarded as fee; *Ragan v. Venhaus*, 289 ark. 266, 711 S.W.2d 467 (Ark. 1986) where 10% of benefit was awarded as fee; *Henry v. Powell*, 262 Ark. 763, 592 S.W.2d 107 (Ark. 1980) where 15% of benefit was awarded as fee; *Graham v. City of North Little Rock*, 278 Ark. 547, 647 S.W.2d 452(Ark. 1982) where 25% of benefit was awarded as fee; *Bosnick v. Pledger*, 306 Ark. 45, 811 S.W.2d 286 (Ark. 1989) where 15% of benefit was awarded as fee; *Hasha v. City of Fayetteville*, 311 Ark 460, 845 S.W.2d 500(1993) where 25% of benefit was awarded as fee; *Hartwick v. Thorne*, 300 Ark 502, 780 S.W.2d 531 (1989) where 15% of benefit was awarded as fee; and *Barnhart v. City of Fayetteville*, 321 Ark.

197, 900 S.W.2d 539 (1995) where 58% of amount recovered was awarded as fee. The percentages have been reduced in cases where the recovery or fund has been exceptionally large.

Plaintiffs argue and the court agrees that the factors to be considered in determining the award of fees have been met. As stated above, the Plaintiffs worked on a contingency fee basis, and therefore, no contemporaneous time records were kept during the years of litigation prior to June 19, 2000. Plaintiffs seek a percentage fee award of 25% of the common fund of \$130,000,000, or \$32.5 million, plus costs in the amount of \$325,000.

Therefore, taking into consideration the circumstances of the case, the expert testimony given by Carrold Ray and Richard Hatfield regarding attorney fees in this case, the affidavits filed by the Plaintiffs' lawyers, the responsive brief filed by the State Defendants, the contingency nature of the case, and the factors as set out under *Johnson* and *Chrisco*, and for, as recognized by the Supreme Court, the Plaintiffs' efforts in creating a substantial benefit for the State as well as the common fund of \$130,000,000.00, Plaintiffs' lawyers are awarded \$8,500,000.00 for the liability phase of this lawsuit. This amount is approximately 6.5% of the \$130,000,000.00 common fund which is quite low compared to other percentage fee cases, but the court finds this percentage reasonable considering the unprecedented amount of the common fund.

As an aside, if the court were to apply the lodestar theory, it would first have to decide the number of hours the lawyers worked. Using the undisputed 15,000 hours claimed by the Plaintiffs' lawyers for the liability phase (i.e. through the 1994 Order) and applying an hourly rate of \$150.00, the same award would be obtained using a multiplier of 3.778 (because of the length and difficulty, the risk of being paid being contingent upon success and the importance of this case, a multiplier of 3 to 4 is reasonable).

The Order of July 27, 2000, states in pertinent part as follows:

“The Court will accept no further evidence or testimony on the issue of attorneys' fees for class counsel. The Court declines to rule, at this time, concerning the method by which the Court will calculate a fee award to class counsel. However, all counsel for the Lake View School district and the plaintiff class

are hereby ordered to prepare and submit to the Court: . . .(b) for the period from February 1998 through June 18, 2000, "reconstructions" of time records or estimates of time spent and work performed on this case."

Even though the court intended for the lawyers to reconstruct their time records and feels that intention was made very clear in open court, a reasonable interpretation of the above order could be an estimate of hours. The Plaintiffs' lawyers did submit a joint affidavit summarizing their work generally and stating that their combined efforts were anywhere from 4,500 to 5,500 hours from February, 1998 to June 18, 2000. No hourly fee request was given. Because only a bare estimate was provided, the court will allow 3,500 hours.

Finally, the Plaintiffs' lawyers submitted affidavits stating the hours worked on this case between June 19, 2000, and November 1, 2000. Combined, the attorneys worked 2,086.90 hours during that time. However, no hourly rate was stated. The court will allow an hourly rate of \$150.00 for work between February, 1998, and November 1, 2000.

Therefore, the court hereby awards attorneys' fees in the amount of \$838,035.00 for the time period beginning February, 1998, through November 1, 2000. Thus, Plaintiffs' lawyers are awarded total attorneys' fees in the amount of \$9,338,035.00. There will be no additional award for costs.

In any future request for fees, Plaintiffs must submit contemporaneous time records and state an hourly rate.

Plaintiffs' request for fees for the Plaintiffs' Solicitor is denied.

The Court denies the State Defendants' request to reapportion the fee for the Trial Transcript.

IT IS SO ORDERED.

Chancellor Collins Kilgore

Date_____