

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DOUGLAS COUNTY SCHOOL DISTRICT
0001 A/K/A OMAHA PUBLIC SCHOOLS
(OPS), THE NEBRASKA SCHOOLS TRUST
et. al .,

DOC. 1028 PAGE 017

Plaintiffs,

v.

MICHAEL O. JOHANNNS, in his official
capacity as Governor of the State of
Nebraska, et. al.,
Defendants.

**PLAINTIFFS' SUPPLEMENTAL BRIEF
IN OPPOSITION TO MOTION TO DISMISS**

**BEFORE THE HONORABLE
PATRICIA A. LAMBERTY**

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I. INTRODUCTION

Plaintiffs filed a Second Amended Complaint superceding their First Amended Complaint for two purposes: to substitute Ron Ross as a Defendant in place of Lorelee Byrd, whom Ross succeeded as Treasurer of the State of Nebraska; and to more specifically allege the relevant language contained in the Bill of Rights to Nebraska's Constitution, art. I, § 4, which reads:

[K]nowledge . . . being essential to good government, it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction.

This language in Nebraska's Bill of Rights was relied upon in Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss (pp 23-24) and discussed by Plaintiffs at the January 8, 2004 oral argument on Defendant's Motion to Dismiss. However, it was not specifically cited in the First Amended Complaint. This Supplemental Brief clarifies that the bases for Plaintiffs' claims also include Neb. Const. art. I, § 4, and explains the importance of that provision to the various claims set forth in Plaintiffs' Second Amended Complaint.

The Parties have stipulated that Defendants' Motion to Dismiss the First Amended Complaint may stand as a motion to dismiss Plaintiffs' Second Amended Complaint. A summary of all amendments found in the Second Amended Complaint are set forth as an Endnote to this Brief.

II. SIGNIFICANCE OF BILL OF RIGHTS PROVISION NEB. CONST. ART. I, § 4.

Nebraska's Bill of Rights expressly defines an essential purpose of education¹ in Nebraska:

[K]nowledge . . . being essential to good government, it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction.

Neb. Const., art. I, § 4.² This provision serves as a further ground to compel a denial of the Motion to Dismiss with regard to all of the claims. It reaffirms Plaintiffs' contention, in their first two adequacy-based claims, that the education provisions in Nebraska's Constitution require a funding system adequate to provide a meaningful education.

When Neb. Const. art. I, § 4 is read in conjunction with the education provision in Neb. Const. art. VII, § 1, Nebraska's constitutional education provisions are very strong.³ The placement of a legislative duty regarding education within Nebraska's Bill of Rights further erodes Defendants' contention that Plaintiffs' claims present a nonjusticiable political question rather than a legal question concerning a right recognized by Nebraska's constitutional drafters to be important to the citizens of Nebraska. Neb. Const. art. I, § 4 also further demonstrates that education is a fundamental right in Nebraska, which raises the level of review that impinging legislation

¹ Provisions such as these are commonly considered to be "education" provisions in the case law. This is regardless of whether the words "knowledge", "instruction" or "education" are used.

² This provision was taken from The Northwest Ordinance which provided that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1781, art. III, U.S.C.A. Const. at 21. Note that Nebraska's Bill of Rights goes further and making it "a duty" of the Legislature to "pass suitable laws" to effect its purpose.

³ They cannot be considered weak in any sense. See Plaintiff's Sur-Reply Brief, refuting Defendant's reliance on this since-disproven theory.

must withstand in order not to run afoul of the equal protection, special legislation and substantive due process provisions of the Nebraska Constitution.

A. The Legislature Is Constitutionally Required To Pass Suitable Legislation To Provide Instruction That Affords All Persons The Opportunity To Obtain Sufficient Knowledge To Participate Meaningfully In Government.

The significance of Neb. Const. art. I, § 4's education provision is its express statement of an essential purpose of education in Nebraska. Our constitutional framers considered education so important that they included it in our Bill of Rights.⁴ Not only does the provision explicitly state an essential purpose of education, but it places a mandatory duty on the Legislature to carry out that essential purpose through suitable legislation. Then, underscoring the importance of knowledge and instruction, the constitutional framers in 1875, in an article devoted solely to public education, further describe the scope of the Legislature's duty by requiring it to "provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Neb. Const. art. VII, § 1.

Neither constitutional provision can be read in a vacuum, and each must be read in conjunction with the other. Taken together, an essential purpose of providing "free instruction" in Nebraska is to afford all persons the opportunity, through the acquisition of knowledge, to meaningfully participate in government and to be sufficiently prepared so that they can create a "good" government. Meaningful participation in government is not limited to being able to read; it includes understanding and applying jury instructions, voting intelligently on ballot questions, making informed decisions on the

⁴ Plaintiffs' research did not uncover an education provision in any other state's Bill of Rights except for the State of Ohio. Ohio Const. art. I, § 7.

issues facing candidates for public office at all levels of governance, possibly serving in elected and appointed offices, and sufficient preparation to serve in our armed forces.⁵ Good government encompasses an understanding of economic issues, and the ability to assure the economic self-sufficiency of our citizenry.

That Plaintiffs have a constitutional right to an education which will prepare them to participate in government is further consistent with other provisions of several sections in the Bill of Rights: the right to liberty and self government (§ 1), freedom of speech and press (§ 5), trial by jury (§ 6), freedom from unreasonable searches (§ 7), and justice without delay (§ 13).

The positioning of Nebraska's two education provisions within the Constitution is significant. One is in our Bill of Rights and the other is part of a free-standing article covering solely education within the framework of government; neither is simply part of the article defining the Legislature's powers. Defendants' assertions that Nebraska's education provisions are impotent would better be supported by a constitution that was simply silent on the issue. Taken together, our two constitutional provisions mean far more than mere access to instruction in a classroom. That instruction must impart knowledge which, at a minimum, is of sufficient quality to give each student the opportunity to be able, knowledgeably, to participate in good government. As Plaintiffs' earlier briefs discuss, the history and circumstances surrounding the adoption of the provisions support this plain meaning.

⁵ *Brown v. Bd. of Education*, 347 U.S. 483, 493 (1953) ("Education is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.") Clearly, service in the armed forces is necessary to good government.

1. The plain meaning of the education provisions requires an opportunity for all students to receive instruction that will enable them to participate in government meaningfully.

Nebraska's two education provisions read together inexorably result in the conclusion that the purpose of the Legislature's duty to provide for free instruction in the "common schools" is so that *all* students acquire "knowledge" because it is "essential to good government." Knowledge is synonymous with words such as learning, erudition, and scholarship.⁶ "Essential" is defined as "constituting an indispensable structure, core or condition of a thing: basic fundamental . . . necessary, indispensable."⁷

Since our government is a government of the people (and not simply a government for government's own sake), "good government" essentially must involve the liberties and rights of people. If legislatures have a constitutional duty to educate, then citizens of the state have a correlative constitutional right to be educated. See, *McDuffy v. Secretary of Executive Office of Educ.*, 415 Mass. 545, 566, 615 N.E.2d 516, 527, FN 23 (1993). *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wash.2d 476, 585 P.2d 71 (1978).

The constitutionally-stated means of acquiring "knowledge" is by the "instruction" provided through the "schools." The Legislature has a "duty" to see that this is accomplished by passing "suitable" laws that result in the opportunity to obtain that "knowledge." The duty is mandatory. "Duty" is by definition an "obligation". The use of

⁶ Excerpted from *The American Heritage® Dictionary of the English Language, Third Edition* © 1996 by Houghton Mifflin Company; accord, Webster, *An American Dictionary of the English Language*, G&C, Merriam (1870), a copy of which is attached for the convenience of the Court).

⁷ Webster's Third New International Dictionary (1966); accord, Webster, *An American Dictionary of the English Language*, G&C, Merriam (1870), a copy of which is attached for the convenience of the Court).

the word "shall" imposes a mandatory duty upon Nebraska's Legislature. The right to obtain the "instruction" guaranteed by our Constitution belongs to *every* person in the State of Nebraska. The education provision found at Neb. Const. art. VII, § 1 further requires, with regard to "person(s)" between the ages of "5 and 21," that the "instruction" to obtain the "knowledge" that is "essential to good government" provided for in Neb. Const. art. I, § 4 be "free" and available to all in the "common schools." A funding system that results in the denial of this opportunity to thousands of students in Nebraska is *not* legislation that affords the "free instruction" mandated by the express education provisions of Nebraska's constitution.

Courts across the United States have recognized that the express purposes of education set forth in state constitutions impose a constitutionally-enforceable standard, requiring an affirmative answer to two questions: (1) Does the funding system accomplish the constitutional purposes? and (2) Are the means adopted suitable? This analysis was made by the courts in Texas, Massachusetts, and New Hampshire, each of which have constitutional provisions similar to Nebraska's two education clauses.

2. The essential purpose stated in Nebraska's constitutional education provisions imposes a constitutionally enforceable standard of adequacy.

In *West Orange-Cove Consolidated I.S.D. v. Alanis, et. al.*, 107 S.W.3d 558, 563 (Tex. 2003), the court construed Texas' constitutional education provision, which read: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const., art. VII, § 1. The Texas court held that its provision required its Legislature to meet standards. As to purpose, the Court stated "the education

provided must be adequate: that is, the public school system must accomplish that 'general diffusion of knowledge. . . essential to the preservation of the liberties and rights of the people.'" The Texas court determined that the while its Legislature had the sole right to decide *how* to meet this standards set by the people of Texas in their constitution, the Judiciary had the final authority to determine whether the standard had been met.

The Texas statement of the purpose of education equates directly to the purposes described in Nebraska's constitution: The Texas standard of "general diffusion" equates to Nebraska's standard that education be for "all persons." In addition, because our government is a government of the people (and not simply a government for government's own sake), the "good government" language in Nebraska equates to the "liberties and rights of people" language in the Texas constitution. Plaintiffs' allegation is that this standard is not met by Nebraska's school funding system.⁸

In *McDuffy v. Secretary of Executive Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (1993) the Massachusetts court applied reasoning similar to that of the Texas court, in analyzing a Massachusetts constitutional education provision reading: "Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures

⁸ In Texas the court also held that "efficiency" precluded significant inequalities in its educational funding system; Nebraska's constitution, by providing that education be provided to *all* persons between the ages of 5 and 21, in addition to comparing strongly to the Texas statement of purpose, also places the same equity standard in Nebraska law as does the Texas efficiency requirement.

and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them especially the university at Cambridge, public schools and grammar schools. . ." Mass. Const., chap. V., § II. The court reasoned:

The two statements . . . state plainly the premises on which the duty is established: First, the protection of rights and liberties requires the diffusion of wisdom, knowledge, and virtue throughout the people. Second, the means of diffusing these qualities and attributes among the people is to spread the opportunities and advantages of education throughout the Commonwealth. In the statement of these two premises for which the duty is established it is revealed that: the duty is established so that the rights and liberties of the people will be preserved. The immediate purpose of the establishment of the duty is the spreading of the opportunities and advantages of education throughout the people; the ultimate end is the preservation of rights and liberties. Put otherwise, an educated people is viewed as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic State.

Id. at 561, 615 N.E.2d 525. The court then found that "cherish" meant "to support."

In *Claremont Sch. Dist. v. Governor*, 138 N.H. 183, 635 A.2d 1375 (1993), the

New Hampshire court also construed a similar provision:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government to cherish the interest of literature and the sciences, and to encourage private and public institutions. . .

N.H. Const. art. 83. *Id.* at 138 N.H. at 187, 635 A.2d at 1378. The New Hampshire court's reasoning is likewise applicable:

The Encouragement of Literature clause incorporating the sense of these definitions, thus declares that knowledge and learning spread through a community "are essential to the preservation of a free government," and that "spreading the opportunities and advantages of education" is a means to the end of preserving a free, democratic state. The duty of ensuring

that the people are educated is placed upon "the legislators and magistrates, in all future periods of this government," and that duty encompasses supporting all public schools.

Id. at 138 N.H. at 187, 635 A.2d at 1378. Similar to Massachusetts, the New Hampshire court found that "encouragement" meant, in part, "support."

Thus, the New Hampshire and Massachusetts courts each found, based on the constitutional purpose language described herein alone, that there were constitutional standards for education which were not being met by each respective state's school funding system. They reached these results *without* the benefit of the additional constitutional command to the Nebraska Legislature, compelling it "to provide for the free instruction in the common schools."

Finally, Missouri has a similar constitutional education provision, which reads: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons with ages not in excess of twenty-one years as prescribed by law." Mo. Const., art. IX, § 1. In 1993, the school funding system was successfully challenged at the trial level. While the case never was appealed due to legislative changes in Missouri's school funding system, the trial court held that the "General Assembly must provide adequate funds to establish and maintain a system of public education at the elementary and secondary level providing a general diffusion of knowledge and intelligence at the level necessary in this era to preserve the rights and liberties of the people." The court further declared that "the State did not meet the requirements." *Committee for Educational Equality, v. State of Missouri*, No.

CV 190-1371CC and No. CV190-510CC. (Cir. Ct. Cole Cty Jan 15, 1993)(See Appendix).

Even in states where the purposes of education were not set forth so plainly as to arrive at a standard against which to judge a state's school funding system, courts have come to the conclusion that at a minimum, the purpose of education is to equip the citizenry of a free republic with the skills to participate in that republic. The courts are in surprising agreement on what it takes for a citizen to be equipped to meaningfully participate in "good government". In *Campaign for Fiscal Equity v. State*, 100 N.Y.2d 893, 801 N.E.2d 326 (2003), the New York Court of Appeals held as follows:

The issue to be resolved by the evidence is whether the State affords New York City schoolchildren the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.

. . . .

The record establishes what would strike many as an obvious truth: A high school education is today as indispensable as a primary education was in 1894. Children in the 21st century need the opportunity for more than a ninth grade education to be productive citizens. Back in the 19th century, a high school education was not needed to obtain a good job. Now, a high school education is a pre-requisite to most good jobs. Those who lack a high school education and have obtained good jobs have done so in spite of, not because of, the lack of a high school education. While it may be true that there will always be menial low-skills jobs, and thus a need for people to fill them, it should not be the purpose of the public schools to prepare students for those jobs, which are limited in number and dwindling.

100 N.Y.2d at 908 and 934, 801 N.E.2d at 332 and 351-52. The consensus of courts which have examined these issues is that education provisions which require preparation to participate in government necessitate providing the opportunity for a high

school education adequate to prepare students for higher education, or to find productive work.⁹

Nebraska's constitution offers at least as much protection to its people as do the constitutions of Texas, Massachusetts, New Hampshire, Missouri, and (as discussed in Plaintiffs' prior briefs) Kansas. The Motion to Dismiss should be denied for these reasons, as well as the reasons argued in Plaintiffs' prior briefs and those which follow.

3. Nebraska's constitution also imposes the constitutional standard of suitability.

Nebraska's constitution also expressly requires that the education laws passed by the Legislature be suitable. In the context of education provisions, the meaning of the term "suitable" has been analyzed in a number of other cases. For example, in *Edgewood Independent School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989), the Texas court found that the use of the word "suitable" was a standard imposed on the Legislature by the people when framing the constitution. The court stated:

This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free

⁹ In so holding in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989), court ruled education should provide opportunity for every child to be equipped 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. These factors have been cited by many other courts, e.g.: *McDuffy v. Sec. of Executive Office of Educ.*, 415 Mass. 545, 615 N.E.2d 516 (1993); *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 703 A.2d 1353 (1997); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Montoy v. State*, 2003 WL 23171455 p*8 (Kan. Dist. Ct., Sept. 8, 2003); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002), cert. denied, *Wilson v. Huckabee*, ___ U.S. ___, 123 S.Ct. 209 (2003), mandate recalled to appoint master, *Lake View Sch. Dist. No. 25 v. Huckabee*, ___ S.W. ___, 2004 W.L. 101641 (Ark. Jan. 22, 2004).

schools. This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions. (Citations omitted). . . .If the system is not "efficient" or not "suitable," the legislature has not discharged its constitutional duty and it is our duty to say so.

Id. at 394 (emphasis added).

The word "suitable" is also a key word in the Kansas education provision: "The legislature shall make suitable provision for finance of the educational interests of the state." Ks. Const. art. 6, § 6. "Suitable" was recently defined in the Kansas case of *Montoy v. State*, 2003 WL 22902963 at*/5 (Kan. Dist. Ct. Dec. 2, 2003) as "fitting, proper, appropriate, or satisfactory. Webster's New Collegiate Dictionary (1977)." The court held, in part, that the "suitable" standard was not met in an underfunded system where "those most vulnerable and/or protected students...are experiencing an 'achievement gap' of staggering proportions when compared to other Kansas students." The court also made clear that in addition to providing funding suitable to afford an opportunity for an adequate education, the opportunity must be equal for all children. *Id* at *11.

Plaintiffs in this case have alleged the very claims which persuaded the Kansas trial court that Kansas' education funding laws were not suitable, namely, that our state's school funding system fails its most vulnerable students, resulting in an achievement gap in violation of state constitutional standards.

B. The Solemn Duty Of This Court Is To Review Nebraska's School Funding System Legislation To Determine If It Meets The Requirements Of Nebraska's Education Provisions

By including an education provision in the Bill of Rights, as well as devoting an entire article to the topic of education in Nebraska's Constitution, there can be no doubt our constitutional framers intended to grant specific educational rights to the children of Nebraska. It is this Court's solemn and paramount duty to enforce those rights. To do so requires a determination of whether or not Nebraska's school funding system meets Nebraska's constitutional requirements for education. When a legislative scheme results in denying thousands of students the opportunity to obtain the "knowledge essential to good government," as claimed by Plaintiffs, whether such a system meets constitutional standards or is otherwise "suitable" is not a political question, it is a legal question. Nebraska's two constitutional education provisions taken together provide the standards by which that legal question can be answered. The Legislature has acted. Now it is time for the judiciary to determine whether that action meets constitutional requirements. As recently reaffirmed by the Nebraska Supreme Court, the construction and interpretation of the Constitution is a judicial function. *Calabro v. City of Omaha*, 247 Neb. 955, 972, 531 N.W.2d 541, 553 (1995).

C. The Inclusion Of An Education Provision Within The Bill Of Rights Further Affirms That Education Is A Fundamental Right In Nebraska

Whether education is a fundamental right should not affect this Court's analysis of Plaintiffs' first two claims that Nebraska's school funding system violates the education provisions of Neb. Const. art. I, § 4 and art. VII, § 1. The resolution of those claims depends solely upon the meaning of our Constitution's education provisions. In

contrast, whether education is a fundamental right impacts the level of scrutiny which the Court must give to the school funding system under the equal protection and substantive due process clauses. This Court may never need to reach the question of whether or not education is a fundamental right, since Plaintiffs have alleged and are prepared to prove that the equal protection and substantive due process clauses are violated no matter what level of scrutiny is applied. In any event, the Court does not need to reach this issue in deciding this Motion to Dismiss, since Plaintiff's have stated claims for relief whether education is a fundamental right or not.

Nonetheless, the inclusion of an education provision within Nebraska's Bill of Rights which describes knowledge as being "essential" affirms that the opportunity to obtain an education in Nebraska is a fundamental right. In *DeRolph v. Ohio*, 78 Ohio St.3d 193, 197, 677 N.E.2d 733, 736 (1997), reaffirmed, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002), the Ohio court recognized the significance of a provision in Ohio's Bill of Rights, substantively identical to that contained in Nebraska's Bill of Rights, in determining that education was a fundamental right in Ohio. The court wrote:

In 1802, when our forefathers convened to write our state Constitution, they carried within them a deep-seated belief that liberty and individual opportunity could be preserved only by educating Ohio's citizens. These ideals, which spurred the War of Independence, were so important that education was made part of our first Bill of Rights. Section 3, Article VIII of the Ohio Constitution of 1802. [This now appears as Ohio Const. art. I, § 7].

Over the last two centuries, the education of our citizenry has been deemed vital to our democratic society and to our progress as a state. Education is essential to preparing our youth to be productive members of our society, with the skills and knowledge necessary to compete in the modern world.

Likewise, courts in other jurisdictions have found similar language to be indicative that education was a fundamental right in their state. In *Serrano v. Priest*, 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929, 135 Cal. Rptr. 345 (1977)(Serrano II), the court reaffirmed its holding in *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971)(Serrano I), in which it considered a similar provision as evidence that education was a fundamental right under California's constitution.¹⁰ The California provisions closely resemble Nebraska's provisions. "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Cal. Const. art IX, § 1. "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every school year, after the first year in which a school has been established." Cal. Const. art. IX, § 5.

Another example is Nevada. There, the court construed the following two provisions: "The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof." Nev. Const., art. 11, §1; and "[t]he legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district" Nev. Const., art. 11, § 2. The Nevada court held that "[o]ur Constitution's framers

¹⁰ In *Serrano I* the court found education was a fundamental right under both the state and federal constitution. In view of the ruling of the United States Supreme Court in *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S.1, 33-34 (1973), in which the Court held that education was not fundamental because it was not explicitly or implicitly guaranteed or protected by the terms of the federal constitution, the court in *Serrano II* held that for the reasons stated in *Serrano I*

strongly believed that each child should have the opportunity to receive a basic education. Their views resulted in a Constitution that places great importance on education. Its provisions demonstrate that education is a basic constitutional right in Nevada." *Guinn v. Legislature of the State of Nevada, et. al.* 71 P.3d 1269, (Nev. 2003).

Though the Court need not, on this Motion to Dismiss, determine whether education is a fundamental right in Nebraska, the existence of the two provisions in Nebraska's Constitution, and in particular the fact that one appears within the Bill of Rights, leads to only one conclusion: in Nebraska, education is a fundamental right.

III. CONCLUSION: THE MOTION TO DISMISS SHOULD BE DENIED

In conclusion, because Plaintiffs have stated bases upon which relief may be granted in each of their separate claims, this Court should overrule Defendants' Motion to Dismiss as to each of those claims, and order the trial of this matter to proceed on the merits.

Dated this 23rd day of February, 2004

Respectfully Submitted,

DOUGLAS COUNTY SCHOOL DISTRICT
0001 A/K/A OMAHA PUBLIC SCHOOLS
(OPS), THE NEBRASKA SCHOOLS TRUST
et. al .,

By: _____

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ENDNOTE

Summary of Amendments to Complaint

Save for designating the pleading as the "Second Amended Complaint," and substituting RON ROSS in the place and stead of LORELEE BYRD in the listing of Defendants in the caption, the proposed amendments are to the titles relating to the FIRST and SECOND claims and to paragraphs 2a, 2m, 90, 92, 93, 102, 104, 105, 106, 107, 109, 112, 113, 136, and 139 of Plaintiffs' First Amended Complaint, as follows. Deletions in the Second Amended Complaint of language found in the First Amended Complaint appear as overstricken text, additions in the Second Amended Complaint to the language found in the First Amended Complaint appear as underlined text:

A. To paragraph 2 a:

a. Defendant MICHAEL O. JOHANNIS ("Governor") is the Governor of the State of Nebraska, is a resident of Lincoln, Lancaster County, Nebraska, and is sued in his official capacity. He is charged by oath of office to enforce the Constitution and laws of the State of Nebraska, and, by so doing, prevent violation of said Constitution and laws by the Officers, Departments and Agencies of the State of Nebraska. Neb. Const. art. XV, § 1. The Governor, pursuant to Neb. Const. art. IV, § 6, has the supreme executive power of Nebraska and must faithfully execute the law, including the mandates of Neb. Const. art. VII, § 1, Neb. Const. art. I, ~~§§§ 3 and 4~~, Neb. Const. art. III, § 18.

B. To paragraph 2 m:

m. Defendant ~~LORELEE BYRD~~ RON ROSS is the Treasurer of the State of Nebraska, is a resident of ~~Arlington, Washington~~ Lincoln, Lancaster County, Nebraska, and is sued in ~~her~~ his official capacity. ~~She~~ He is required, among other duties, to receive and keep all money of the state not expressly required to be received and kept by some other person; to disburse the public money upon warrants drawn upon the state treasury according to law; to render a full statement to the Department of Administrative Services of all money received by ~~her~~ him from whatever source, and of all disbursements of public funds. Neb. Rev. Stat. § 84-602 (Reissue 1999).

C. To paragraph 90:

90. Nebraska's Constitution and laws, including Neb. Const. art. I, § 4 and art. VII, § 1, (~~Education Clause~~) Clauses); Neb. Const. art. I, § 3 (Equal Protection Clause); Neb. Const. art. III, § 18 (Special Legislation/Equal Protection Clause); and Neb. Const. art. I, § 3 (Due Process Clause) guarantee quality education as a fundamental right; guarantee equal opportunity for such an education; prohibit discrimination based on race, ethnicity, or national origin; guarantee due process of law; and further define student rights to a quality education.

D. To paragraph 92:

92. Nebraska's constitutional ~~mandate for the provision of~~ mandates that the Legislature pass suitable laws to encourage schools and the means of instruction and that it provide for free instruction in the common

schools ~~has~~ have content and meaning which cannot be abridged by the Legislature. “ . . . [K]nowledge- . . . being essential to good government, it shall be the duty of the Legislature to pass suitable laws to . . . encourage schools and the means of instruction. ” Neb. Const. art. I § 4. "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Neb. Const. art. VII, § 1. ~~This provision guarantees~~ These provisions guarantee each person ages 5 to 21 in Nebraska a fundamental right to free instruction that provides each such person the opportunity, through adequate preparation, to participate actively in civic and political life, and to compete fairly in Nebraska's, and the nation's, economy.

D. To paragraph 93:

93. The instruction guaranteed by Neb. Const. art. I, § 4 and VII, § 1 is a fundamental right because it is, and always has been, expressly stated in Nebraska's Constitution and because of the critical impact an education has on the individual rights and liberties which lie at the core of our free and representative government. Nebraska, as a condition of statehood, was required by the United States Congress to provide for public education.

E. To the title under "III. CLAIMS FOR RELIEF," following paragraph 99:

FIRST CLAIM: Direct Violation of the Education ClauseClauses, Const. art. I, § 4 and art. VII, § 1

F. To paragraph 102:

102. OPS and the OPS Board of Education and, including Plaintiff OPS Board Members and Officers, and the Nebraska School Trust members have the right and responsibility to execute their statutory duties, to support and defend the Nebraska Constitution, and to provide to each OPS student, including student Plaintiffs, the free instruction guaranteed by Neb. Const. art. I, § 4 and art. VII, § 1.

G. To paragraph 104:

104. The Nebraska Schools Trust, on its own behalf and on behalf of its members, has the right to seek a school funding system in Nebraska that offers each student in its members' schools the opportunity to obtain the free instruction guaranteed by Neb. Const. art. I, § 4 and art. VII, § 1.

H. To paragraph 105:

105. Neb. Const. art. I, § 4 and art. VII, § 1 ~~has~~ have meaning independent of legislative interpretation, and ~~grants~~ grant each student the opportunity to become an active and productive citizen in our democracy, to find meaningful employment, and to qualify for higher education.

I. To paragraph 106:

106. Nebraska's school funding system is unconstitutional, on its face and as applied, because it:

(a) fails to provide resources adequate to provide the free instruction guaranteed pursuant to Neb. Const. art. I, § 4 and art. VII, § 1 to each OPS and Nebraska Schools Trust members' students;

(b) adversely affects OPS and Nebraska Schools Trust members' financial affairs, and prohibits OPS, Plaintiff OPS Board Members and Officers, and Nebraska Schools Trust members from fulfilling their constitutional responsibilities and obligations, as delegated by the Legislature and as undertaken by oath by Plaintiff OPS Board Members and Officers, to provide to each student, including Plaintiff students, the instruction guaranteed by Neb. Const. art. I, § 4 and art. VII, § 1;

(c) causes an unconstitutional and unlawful expenditure of tax dollars;

(d) violates the rights and responsibilities of OPS, Plaintiff OPS Board Members and Officers, and the Nebraska Schools Trust and its members, pursuant to Neb. Const. art. I, § 4 and art. VII, § 1.

J. To paragraph 107:

107. Defendants, and each of them, by executing and/or implementing Nebraska's school funding system, have:

(a) violated and continue to violate each OPS and Nebraska Schools Trust member students', including Plaintiff students', constitutional right to a free instruction guaranteed pursuant to Neb. Const. art. I, § 4 and art. VII, § 1;

(b) adversely affected and continue to adversely affect OPS and Nebraska Schools Trust members' financial affairs, and have prohibited, and continue to prohibit OPS, Plaintiff OPS Board Members and Officers, and Nebraska Schools Trust members from fulfilling their constitutional responsibilities and obligations to provide to each student the instruction guaranteed by Neb. Const. art. I, § 4 and art. VII, § 1;

(c) caused and are causing an unconstitutional and unlawful expenditure of tax dollars;

(d) violated and continue to violate the rights and responsibilities of OPS, Plaintiff OPS Board Members and Officers, and the Nebraska Schools Trust and its members pursuant to Neb. Const. art. I, § 4 and art. VII, § 1.

K. To the title "SECOND CLAIM" following paragraph 107:

SECOND CLAIM: Violation of the Education Clause, Neb. Const. art. I, § 4 and art. VII, § 1, as defined by statute and regulation.

L. To paragraph 109:

109. In addition to the independent meaning found in Neb. Const. art. I, § 4 and art. VII, § 1, the Legislature has defined, by statute and regulation, the content of Neb. Const. art. I, § 4 and art. VII, § 1 to be the provision of a quality education, as set forth in paragraph 96, herein. Neb. Rev. Stat. §§ 79-701, -702 (Reissue 1996).

M. To paragraph 112:

112. Nebraska's school funding system, by failing to provide resources adequate to provide the free instruction guaranteed pursuant to Neb. Const. art. I, § 4 and art. VII, § 1, as defined directly by the Nebraska Constitution, and as defined by the Legislature through statute and regulation, to each OPS student, including Plaintiff students, and to each Nebraska Schools Trust member student:

(a) fails to provide resources adequate to provide the free instruction guaranteed pursuant to Neb. Const. art. I, § 4 and art. VII, § 1 to each OPS and Nebraska Schools Trust members' students;

(b) adversely affects OPS and Nebraska Schools Trust members' financial affairs, and prohibits OPS, Plaintiff OPS Board Members and Officers, and Nebraska Schools Trust members from fulfilling their constitutional responsibilities and obligations, as delegated by the Legislature and as undertaken by oath by Plaintiff OPS Board Members and Officers, to provide to each student, including Plaintiff students, the instruction guaranteed by Neb. Const. art. I, § 4 and art. VII, § 1;

(c) causes an unconstitutional and unlawful expenditure of tax dollars;

(d) violates the rights and responsibilities of OPS, Plaintiff OPS Board Members and Officers, and the Nebraska Schools Trust and its members, pursuant to Neb. Const. art. I, § 4 and art. VII, § 1.

N. To paragraph 113:

113. Defendants, and each of them, by executing/implementing Nebraska's school funding system, have:

(a) violated and continue to violate each OPS and Nebraska Schools Trust member students', including Plaintiff students', constitutional right to a free instruction guaranteed pursuant to Neb. Const. art. I, § 4 and art. VII, § 1, as defined directly by the Nebraska Constitution and as defined by statute and regulation;

(b) adversely affected and continue to adversely affect OPS and Nebraska Schools Trust members' financial affairs, and have prohibited, and continue to prohibit OPS, Plaintiff OPS Board Members and Officers, and Nebraska Schools Trust members from fulfilling their constitutional responsibilities and obligations to provide to each student the instruction guaranteed by Neb. Const. art. I, § 4 and art. VII, § 1, as defined directly by the Nebraska Constitution and as defined by statute and regulation;

(c) caused and are causing an unconstitutional and unlawful expenditure of tax dollars;

(d) violated and continue to violate the rights and responsibilities of OPS, Plaintiff OPS Board Members and Officers, and the Nebraska Schools Trust and its members pursuant to Neb. Const. art. I, § 4 and art. VII, § 1.

O. To paragraph 136:

136. Nebraska's school funding system is unreasonable, arbitrary, and discriminatory because:

(a) it fails to provide the resources necessary to meet the guarantees made by Neb. Const. art. I, § 4 and art. VII, § 1, as defined by the Constitution itself;

(b) it fails to provide the resources necessary to meet the guarantees made by Neb. Const. art. I, § 4 and art. VII, § 1 as further defined by the Legislature by statute and regulation;

(c) it fails to provide each student in OPS and Nebraska Schools Trust members, including each Plaintiff student, adequate resources such that each such student has an equal opportunity to obtain the instruction guaranteed by Nebraska's Constitution and laws, in violation of Neb. Const. art. I, § 3;

(d) it fails to provide each student in OPS and Nebraska Schools Trust members, including each Plaintiff student, adequate resources such that each such student has an equal opportunity to obtain the instruction guaranteed by Nebraska's Constitution and laws, in violation of Neb. Const. art. III, § 18;

(e) it fails to provide the resources necessary for each student in OPS and the Nebraska Schools Trust members, including Plaintiff students, to meet the state standards;

(f) it was not designed to, and in fact fails to, provide adequate funding such that each student has an equal opportunity to obtain the instruction guaranteed by Nebraska's Constitution and laws, in violation of Neb. Const. art. I, § 4, Neb. Const. art. VII, § 1, Neb. Const. art. I, § 3, and Neb. Const. art. III, § 18.

(g) it adversely impacts and continues to adversely impact OPS's and Nebraska Schools Trust members' financial affairs, and has prohibited, and continues to prohibit, OPS, Plaintiff OPS Board Members and Officers, and Nebraska Schools Trust members from fulfilling their constitutional responsibilities and obligations to their students pursuant to Neb. Const. art. I, § 4, Neb. Const. art. VII § I, Neb. Const. art. I, § 3, and Neb. Const. art. III, §18, and as defined in statute and regulation;

Nebraska's school funding system thus deprives each OPS and each Nebraska Schools Trust member student, including Plaintiff students, of their liberty and property rights without due process of law.

P. To paragraph 139:

139. Declare that each OPS student, including each Plaintiff student, and each Nebraska Schools Trust member student has a right, pursuant to Neb. Const. art. I, § 4 and art. VII, § 1, to obtain free instruction that provides an education which enables each student to become an active and productive citizen in our democracy, to find meaningful employment, and to qualify for higher education.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Brief was sent this ____ day of _____, 2004 to the following:

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