

STATE OF MICHIGAN
COURT OF APPEALS

DONALD S. DURANT, et al,

Plaintiffs,

FOR PUBLICATION
May 10, 2002
9:25 a.m.

v

No. 230859

STATE OF MICHIGAN, DEPARTMENT OF
EDUCATION, STATE OF MICHIGAN,
DEPARTMENT OF MANAGEMENT AND
BUDGET, and TREASURER OF THE STATE
OF MICHIGAN,

Defendants.

Updated Copy
August 16, 2002

Before: Neff, P.J., and Sawyer and Fitzgerald, JJ.

NEFF, P.J. (*concurring*).

While I concur with the legal conclusion reached by my colleagues, I write separately to express my recognition that the right result lingers beneath the bare language of Const 1963, art 9, § 11 (Proposal A). This case can be summed up in one sentence: "That may be what the Constitution says, but *it is not* what it means." The outcome in this case does not keep faith with the implementing legislation, 1993 PA 336. It does not keep faith with what state officials told voters Proposal A meant. Most importantly, it is undoubtedly not what the voters understood when they passed Proposal A by an overwhelming margin in 1994.

The primary rule of constitutional interpretation is the rule of "common understanding." *Durant v Michigan (On Remand)*, 238 Mich App 185, 210; 605 NW2d 66 (1999) (commonly referred to as *Durant II*). A constitutional provision should be given that interpretation "which reasonable minds, the great mass of the people themselves, would give it," taking into account the times and circumstances under which the constitution was adopted. *Id.* at 211 (quoting *Durant v Michigan*, 456 Mich 175, 192; 566 NW2d 272 (1997) (*Durant I*)). However, such rules of interpretation are employed only where the text of the constitutional provision is indeterminate. *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 309; 633 NW2d 357 (2001); *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 222; 634 NW2d 692 (2001).

I

Const 1963, art 9, § 11 provides:

There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education, and school employees' retirement systems, as provided by law. Sixty percent of all taxes imposed at a rate of 4% on retailers on taxable sales at retail of tangible personal property, 100% of the proceeds of the sales and use taxes imposed at the additional rate of 2% provided for in section 8 of this article, and other tax revenues provided by law, shall be dedicated to this fund. Payments from this fund shall be made in full on a scheduled basis, as provided by law. Beginning in the 1995–96 state fiscal year and each state fiscal year after 1995–96, the state shall guarantee that the total state and local per pupil revenue for school operating purposes for each local school district shall not be less than the 1994–95 total state and local per pupil revenue for school operating purposes for that local school district, as adjusted for consolidations, annexations, or other boundary changes. However, this guarantee does not apply in a year in which the local school district levies a millage rate for school district operating purposes less than it levied in 1994.

I agree with my colleagues that the specific language of art 9, § 11 does not require that the annual foundation allowance set by the Legislature be allocated as unrestricted per pupil operating revenue. However, a review of the times and circumstances surrounding the passage of Proposal A leaves no doubt that these two school finance terms were sold to the voting public as one and the same. Per pupil revenue is the common language of school finance. Despite the rhetoric, everything boils down to a per pupil revenue amount when it comes time for comparisons. How much is it this year? How much will it increase next year?

The history of Proposal A leaves no doubt that the "per pupil revenue" in art 9, § 11 is a cross reference to the "foundation allowance" in subsection 20(1) of the State School Aid Act MCL 388.1620(1), 2000 PA 297, subsection 20(1)—the unrestricted school operating funds promised as the cornerstone of Michigan's school finance reform. "The *per pupil* funds guaranteed by art 9, § 11 are commonly referred to as the 'foundation allowance.'" *Durant II, supra* at 197. A review of the times and circumstances surrounding the passage of Proposal A shows that the annual foundation allowance enacted by the Legislature in subsection 20(1) of the State School Aid Act *was understood to be* the constitutionally guaranteed per pupil revenue allocated to local districts to operate schools. There was no disconnect between the proposed constitutional language and the legislatively enacted language: different terms, same meaning.

II

Proposal A altered the constitutionally prescribed tax revenue base for public education. Historical notes to Const 1963, art 9, § 11; *Durant II, supra* at 196-197. With the passage of 1993 PA 145 and 1993 PA 336, the Legislature eliminated local property tax revenue as the primary source of public school funding and replaced formula funding with a "foundation grant"

system, which distributed state aid payments to each local school district through a foundation allowance per membership pupil. 1993 PA 336, § 20; *Durant II*, *supra* at 196, 212.

The specifics with regard to how this funding mechanism would operate were set forth in 1993 PA 336. Section 20 of 1993 PA 336 established a statewide basic foundation allowance to begin at \$5,000 per pupil in combined state and local revenue for the 1994-95 state fiscal year, with the amount of the foundation allowance to be adjusted each year on the basis of changes in state tax revenues and local school district pupil counts. 1993 PA 336, subsections 20(1) and (2).

Subsection 20(2) of 1993 PA 336 provided in relevant part:

For 1995-96 and each succeeding fiscal year, the basic foundation allowance shall be determined by multiplying the amount of the basic foundation allowance for the immediately preceding state fiscal year by the final index calculated under this subsection. The result is the amount of the basic foundation allowance per membership pupil for the current state fiscal year.

The practical import of subsection 20(2) was that the foundation grant would be adjusted for future fiscal years by the percentage change in the growth of State School Aid Fund revenue, adjusted by any change in the pupil membership of a school district.

When the Legislature enacted 1993 PA 336, voters were thereafter faced with two choices on March 15, 1994: (1) pass Proposal A, raising the sales tax and securing guaranteed funding for schools in the constitution, or (2) defeat Proposal A, raising the income tax and providing no guarantees regarding school funding. Either way, the *foundation grant system* of funding schools was implemented.¹ The difference was that Proposal A guaranteed the foundation grant; the alternative, the statutory plan, did not.

If voters approved Proposal A, the State School Aid Fund would provide each school district with a foundation grant of per pupil revenue as unrestricted funding, guaranteed not to fall below the amount established for 1994-95, essentially \$5,000. 1963 Const, art 9, § 11; Senate Fiscal Agency, *Issue Paper: School Finance Reform, Analysis of the Ballot and Statutory Reform Proposals*, January 10, 1994, p 18. *In addition to the per pupil foundation allowance*, local school districts would continue to receive certain categorical funding, including special education funding mandated under Const 1963, art 9, § 29 (the Headlee Amendment). House-Senate Fiscal Agency, *The Michigan School Aid Act Compiled and Appendices*, October 1994, pp 56, 64 (Table 3). This is the promise of Proposal A that has been perverted by semantic hijinks, shown by the artificial distinction drawn between the per pupil revenue language of Proposal A and the foundation grant language of the legislation.

¹ "[S]chools will be funded at a world-class level no matter how you choose." Opinion of Governor John Engler, presented in *Proposal A[,] Is There a Better Way to Fund Schools, Help Economy?*, The Detroit Free Press, March 11, 1994, p 11A.

III

An examination of voter information concerning Proposal A in the three-month period between the effective date of § 20 of 1993 PA 336 and the election, reports of voter sentiment, and official statements by Proposal A proponents, leave no doubt that art 9, § 11, as amended, was commonly understood to guarantee the annual foundation allowance set by the Legislature in subsection 20(1) as local school per pupil revenue for district operating expenses.

Proposal A passed by a sixty-nine to thirty-one percent margin. *Durant II, supra* at 197. The pro-Proposal A message to voters was that Proposal A had "built-in safeguards to foster fairness for consumers, taxpayers and the state's 1.5 million school children":

Proposal A is more than a choice between raising the sales tax to 6 percent vs. raising the state income tax to 6 percent under a backup plan.

The ballot measure offers what schools have desperately sought for decades—reliable, stable funding.

* * *

For taxpayers and consumers, let's compare Proposal A to the backup plan

Proposal A is a *constitutional amendment*, making it *tamper-resistant*. Changing it requires another ballot question or a three-fourths vote by both state houses.

"Plan B," as some call the backup plan, is constructed by the Legislature and thus prone to the fancies of current and future lawmakers.

Constitutionally-mandated school funding enhances stability. The divisive and dicey millage votes which schools have depended on for decades will be largely gone. There should be no more Kalkaskas—schools that shut down in mid-school year because they've run out of money.

* * *

Michigan voters hold history in their hands, and should make the most of it with a resounding "yes" on March 15. [Editorial, *Proposal A, It's fairest for taxpayers, school kids*, Lansing State Journal, February 27, 1994, p 6A.]

The "guarantee" of a foundation grant dedicated to school operating expenses as per pupil revenue was a constant refrain in voter information regarding Proposal A. For example, shortly after the passage of the school finance package on Christmas Eve 1993, Governor Engler touted Proposal A as the right choice for voters in his 1994 State of the State address, urging voters to pass Proposal A because it would, among other things, provide: "*Constitutionally guaranteed full funding for public schools.*" (Emphasis added.)

The Governor's casting of Proposal A as a constitutional guarantee of full funding for schools was adopted in other analyses of Proposal A:

The current [State School Aid] formula will be completely replaced by a *guaranteed foundation allowance* that will provide state funds for all districts.

* * *

The *guaranteed foundation allowance* for 1994-5 will be \$5,000 per membership pupil. This amount will annually be indexed to: 1) the growth in the state revenues that are dedicated to the state school aid fund, and 2) changes in the number of pupils. This double indexing provision is designed to ensure that the state will have the capacity to fund schools in future years. [Harvey, Moore & VerBurg, *March 15, 1994 Ballot Issue, Michigan's Public Education: School Reform and Funding Changes*, Michigan State University Extension, p 3.]

Voters were informed that constitutional amendments under the ballot plan "[g]uarantee that the total state and local per pupil revenue for school operating in future years will not be less than the amount for 1994-5." *Id.* at 4. The common understanding was not only that Proposal A guaranteed base operating funds for local schools, but also that these funds would normally increase year to year:

Under the new system, school aid is based on a per-pupil foundation grant, where districts receive a flat amount per pupil and locally raised school mills are much less important than in the past.

* * *

Once reached, the \$5,000 foundation grant will *increase* each year at the same rate as state school aid fund revenue, adjusted for the change in pupil count. Categorical funding will be rolled into the foundation grant, with the exception of special education, adult education, and a few other programs.

* * *

FY 1994-95 funding will be distributed to districts with a base between \$4,200 and \$6,500 per student according to a formula. This formula *guarantees* each district an increase in funding over FY 1993-94 levels, but the more a district now spends, the smaller its increase.

* * *

Districts that now spend more than \$6,500 per pupil are *guaranteed* \$160 per pupil more than they spend in 1993-94.

* * *

The FY 1994-95 state payment to districts with a foundation *guarantee* of \$6,500 per pupil or less is the difference between the foundation *guarantee* and local revenue per pupil Under both plans the FY 1994-95 state payment to districts with a foundation *guarantee* of more than \$6,500 per pupil is the difference between \$6,500 and local revenues per pupil. [Cummings, *School Finance Reform: Which Districts Will Benefit Most?*, Public Sector Consultants, Inc, February 14, 1994, pp 1-2 (emphasis added).]

The message to voters was that the foundation grant of unrestricted per pupil revenue was guaranteed by Proposal A, subject to a minimum floor level of \$5,000 per pupil:

The constitutional amendment also guarantees that 60 percent of all sales tax revenues resulting from the current 4-percent rate, plus 100 percent of all revenues raised by the additional 2 percentage points in the sales tax rate, will be earmarked for a constitutionally established school aid fund. The amount of money spent on schools this year is *constitutionally guaranteed as a floor* for school spending in all future years.

Thus, the constitutional amendment would prevent a direct repeat of the state lottery gimmick, in which lottery money went into the school aid fund, but other school aid appropriations were cut. [Preventing More Tax Hikes, The Detroit News, January 23, 1994, p 2B (emphasis added).]

The Detroit Free Press attributed similar statements to official sources: According to administration officials, "the ballot proposal guarantees a *minimum* level of funding," which would better protect schools in the event that tax revenues plummeted unexpectedly. Bell, *The Other Shoe Drops in Fight over Which Tax Gets Big Boost*, The Detroit Free Press, February 26, 1994, p 1A (emphasis added).

As recently as October 2001, explanations of Proposal A continued to equate the foundation allowance set in subsection 20(1) of the State School Aid Act with the per pupil funding guaranteed in art 9, § 11 and represent that this per pupil funding has constantly increased:

The two key provisions of [P]roposal A were (1) the replacement of most school property taxes with an increased sales and other use taxes and (2) the adoption of a minimum "foundation" grant of \$5,000 per pupil that would come from the state. This school year, the foundation grant is set at \$6,500 per pupil.

Proposal A had five major objectives: (1) Reduce property taxes; (2) Reduce reliance on local property taxes to provide school funding; (3) Increase the state's share of school funding; (4) Assure a minimum level of per pupil funding; and (5) Reduce the funding disparities between school districts.

Since the passage of Proposal A seven years ago, most people agree that all of the major objectives have been achieved.

* * *

Proposal A guarantees each district a minimum level of per pupil funding. In 1994, fifty-five percent of Michigan's school districts were getting less than \$4,500 per student. In the 2001-02 school year, all Michigan school districts will receive at least \$6,500 per student. Since the passage of Proposal A, overall state per pupil funding has outpaced the rate of inflation. [*School Finance Reform Lessons from Michigan*, Testimony by Matthew I. Brouillette, Director of Education Policy, Mackinac Center for Public Policy, Prepared for the Pennsylvania House of Representatives, Select Committee on Public Education Funding, October 10, 2001, <<http://www.psrn.org/SC%20Oct%2010%20armstrong/ed%20policy.html>>.]

The common understanding of art 9, § 11 undoubtedly was consistent with this information.

Proposal A was presented to voters in combination with 1993 PA 336, so closely linked that when voters adopted Proposal A, the implementing legislation, already enacted, automatically activated. The plan laid before voters was a constitutionally guaranteed per pupil revenue amount, enacted as the basic foundation allowance. Voters accepted this guarantee, no doubt adopting Proposal A with the understanding that it was tamper resistant. Nonetheless, changing financial times can tempt even taint, later interpretation of constitutional mandates. *Lockwood v Comm'r of Revenue*, 357 Mich 517, 551-552; 98 NW2d 753 (1959).

IV

The allocation scheme in 2000 PA 297 breaks faith with all these representations and promises because it makes an artificial distinction—never intended or expressed—between the constitutionally guaranteed per pupil revenue and the legislative foundation grant. This legislative scheme begins in subsection 20(1) by setting forth the annual foundation allowance, i.e., per pupil revenue amount, for successive fiscal years from the State School Aid Fund. However, these foundation allowances are not allocated solely to unrestricted per pupil funding for general school operating costs as in the past and as promised the voters when they were urged to pass Proposal A. In fact, these foundation allowances now are not allocations at all; they are used only for calculation purposes as base figures.

The revision of the school aid allocation scheme found in 2000 PA 297 is most certainly contrary to the intent of the ratifiers of Proposal A. Rather than allocating the entire per pupil foundation allowance set in subsection 20(1) of 2000 PA 297 to local school districts for unrestricted reimbursement of school operating costs, the act creates a foundation allowance for computation purposes only, and, in effect, caps the actual foundation allowance payment to local school districts at \$5,000, despite a State School Aid Act provision that identifies a higher per pupil foundation allowance, and despite public pronouncements by various elected officials identifying that higher per pupil foundation allowance as being the primary source of school funding. As a consequence, the per pupil revenue amount for local school districts for school operating expenses has been subjected to a de facto reduction on the balance sheet, but not in the eyes of the public. This funding scheme, this freeze of the foundation allowance, is a subterfuge,

a shell game, but one that the strict language of the constitutional amendment, divorced from the common understanding of the voters who approved it, allows. Therefore, I reluctantly concur with my colleagues that a strict legal analysis supports the legislative scheme of 2000 PA 297.

/s/ Janet T. Neff