

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-3174

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

WILLIAM J. VINCENT AND JUDY S. VINCENT, INDIVIDUALLY AND AS PARENTS OF TONYA M. VINCENT, CAROL BARTLEIN, INDIVIDUALLY AND AS PARENT OF KURT BARTLEIN, SARA BARTLEIN AND KIMBERLY BARTLEIN, PAM BRITTEN, INDIVIDUALLY AND AS PARENT OF TRAVIS BRITTEN, CORTNEY BRITTEN AND TAYLOR BRITTEN, KAREN DRAZKOWSKI, INDIVIDUALLY AND AS PARENT OF STEVE DRAZKOWSKI AND ANN DRAZKOWSKI, MICHAEL ENDRESS AND SUSAN ENDRESS, INDIVIDUALLY AND AS PARENTS OF JILL ENDRESS AND MEGAN ENDRESS, MICHAEL J. FAIRCHILD AND JULIANA SCHMIDT, INDIVIDUALLY AND AS PARENTS OF KARA B. FAIRCHILD AND ALEXANDER R. FAIRCHILD, CHARLES HETFIELD, INDIVIDUALLY AND AS PARENT OF ANGELA HETFIELD, REBECCA HETFIELD AND BROCK HETFIELD, JOHN KELLER AND KATHLEEN KELLER, INDIVIDUALLY AND AS PARENTS OF COURTNEY K. KELLER, LYNN KLATT, INDIVIDUALLY AND AS PARENT OF LESLIE KLATT AND ROSS KLATT AND AS FOSTER PARENT OF BLADE CORRENTE, WILLIAM LOASCHING, INDIVIDUALLY AND AS PARENT OF KELLY LOASCHING, KARI LOASCHING, KIRT LOASCHING AND KATIE LOASCHING, MARGARET MCGINNITY AND THOMAS MCGINNITY, INDIVIDUALLY AND AS PARENTS OF ANN MCGINNITY, KATE MCGINNITY, MEGAN MCGINNITY AND BETSY MCGINNITY, JOYCE A. OLSON, INDIVIDUALLY AND AS PARENT OF CASEY BROUHARD AND ROBERT BROUHARD, DENISE CALLAWAY REISTAD AND GARY REISTAD, INDIVIDUALLY AND AS PARENTS OF GEORGE

REISTAD, KELSEY REISTAD AND SONJA REISTAD, MARY ROCHON-JEWERT, INDIVIDUALLY AND AS PARENT OF KEITH JEWERT AND CANDYL JEWERT, PAO VANG, INDIVIDUALLY AND AS PARENT OF PHONG VANG, LEE VANG, MARY VANG, SEE VANG, TOUA VANG, SHENG VANG, LUE VANG, XAY VANG AND JENNY VANG, GLORIA WAHL, INDIVIDUALLY AND AS PARENT OF JORDAN WOODS-WAHL, RONALD J. WALSH, INDIVIDUALLY AND AS PARENT OF RYAN J. WALSH AND LAURA M. WALSH; AND, JACQUELINE WARD, INDIVIDUALLY AND AS PARENT OF JESSICA JUSTINIANO AND TATIANA JUSTINIANO, TONYA M. VINCENT, KURT BARTLEIN, SARA BARTLEIN, KIMBERLY BARTLEIN, TRAVIS BRITTEN, CORTNEY BRITTEN, TAYLOR BRITTEN, STEVE DRAZKOWSKI, ANN DRAZKOWSKI, JILL ENDRESS, MEGAN ENDRESS, KARA B. FAIRCHILD, ALEXANDER R. FAIRCHILD, ANGELA HETFIELD, REBECCA HETFIELD, BROCK HETFIELD, COURTNEY K. KELLER, LESLIE KLATT, ROSS KLATT, BLADE CORRENTE, KELLY LOASCHING, KARI LOASCHING, KIRT LOASCHING, KATIE LOASCHING, ANN MCGINNITY, KATE MCGINNITY, MEGAN MCGINNITY, BETSY MCGINNITY, CASEY BROUHARD, ROBERT BROUHARD, GEORGE REISTAD, KELSEY REISTAD, SONJA REISTAD, KEITH JEWERT, CANDYL JEWERT, PHONG VANG, LEE VANG, MARY VANG, SEE VANG, TOUA VANG, SHENG VANG, LUE VANG, XAY VANG, JENNY VANG, JORDAN WOODS-WAHL, RYAN J. WALSH, LAURA M. WALSH, JESSICA JUSTINIANO AND TATIANA JUSTINIANO, MINORS, ON BEHALF OF THEMSELVES AND ALL OTHER PUBLIC SCHOOL STUDENTS AND PROSPECTIVE STUDENTS IN THE STATE OF WISCONSIN SIMILARLY SITUATED; AND, MARY BILLS, DOUGLAS HASELOW, RAY HEINZEN, MARY LOHMEIER, DAVID SMETTE AND JEROME A. SOMMER, ON BEHALF OF THEMSELVES AND ALL OTHER PROPERTY TAXPAYERS IN THE STATE OF WISCONSIN SIMILARLY SITUATED; AND RAY HEINZEN, MARY LOHMEIER AND ROLAND ROCKWELL, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS OF THE STATE OF WISCONSIN SIMILARLY SITUATED; AND SCHOOL DISTRICT OF ABBOTSFORD AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF ALGOMA AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF ALMA AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF ALMA CENTER-HUMBIRD MERRILLAN AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF ASHLAND AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF AUGUSTA AND ITS SCHOOL BOARD, BALDWIN-WOODVILLE AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, BARRON AREA SCHOOL

DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF BAYFIELD AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF BELOIT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF BENTON AND ITS SCHOOL BOARD, BERLIN AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF BLACK HAWK AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF BLACK RIVER FALLS AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF BLOOMER AND ITS SCHOOL BOARD, BOYCEVILLE COMMUNITY SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF CADOTT COMMUNITY AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF CAMERON AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF CASHTON AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF CHETEK AND ITS SCHOOL BOARD, CLAYTON SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF CLEAR LAKE AND ITS SCHOOL BOARD, CLINTONVILLE PUBLIC SCHOOL DISTRICT AND ITS SCHOOL BOARD, COCHRANE-FOUNTAIN CITY COMMUNITY SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF COLFAX AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF CORNELL AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF CUBA CITY AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF DENMARK AND ITS SCHOOL BOARD, DESOTO AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, DODGELAND SCHOOL DISTRICT AND ITS SCHOOL BOARD, DODGEVILLE SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF DURAND AND ITS SCHOOL BOARD, ELK MOUND AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF ELMWOOD AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF FALL CREEK AND ITS SCHOOL BOARD, FREDERIC SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF THE CITY OF GALESVILLE, VILLAGES OF ETTRICK AND TREMPPEALEAU, TOWNS OF CALEDONIA, DODGE, ETTRICK, GALE AND TREMPPEALEAU IN TREMPPEALEAU COUNTY AND THE TOWN OF NORTH BEND IN JACKSON COUNTY AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF GILMANTON AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF GRANTSBURG AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF GREENWOOD AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF HOLMEN AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF HORICON AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF HOWARD-SUAMICO AND ITS

SCHOOL BOARD, KEWAUNEE SCHOOL DISTRICT AND ITS SCHOOL BOARD, KICKAPOO AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF LA CROSSE AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF LAKE HOLCOMBE AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF LAONA AND ITS SCHOOL BOARD, LENA PUBLIC SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF LUCK AND ITS SCHOOL BOARD, MANITOWOC PUBLIC SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF MARION AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF MAYVILLE AND ITS SCHOOL BOARD, MEDFORD AREA PUBLIC SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF THE MENOMONIE AREA AND ITS SCHOOL BOARD, MILWAUKEE PUBLIC SCHOOLS AND THE BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, MINERAL POINT UNIFIED SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF MONDOVI AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF MOSINEE AND ITS SCHOOL BOARD, NECEDAH AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF NEW RICHMOND AND ITS SCHOOL BOARD, NORTH CRAWFORD SCHOOL DISTRICT AND ITS SCHOOL BOARD, OCONTO FALLS SCHOOL DISTRICT AND ITS SCHOOL BOARD, OCONTO UNIFIED SCHOOL DISTRICT AND ITS SCHOOL BOARD, OSSEO-FAIRCHILD SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF OWEN-WITHEE AND ITS SCHOOL BOARD, PEPIN AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF PHILLIPS AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF POYNETTE AND ITS SCHOOL BOARD, PRAIRIE FARM PUBLIC SCHOOL DISTRICT AND ITS SCHOOL BOARD, PULASKI COMMUNITY SCHOOL DISTRICT AND ITS SCHOOL BOARD, RACINE UNIFIED SCHOOL DISTRICT AND ITS SCHOOL BOARD, REEDSVILLE SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF RIB LAKE AND ITS SCHOOL BOARD, RICE LAKE AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, RIVERDALE SCHOOL DISTRICT AND ITS SCHOOL BOARD, RIVER RIDGE SCHOOL DISTRICT AND ITS SCHOOL BOARD, SAINT CROIX CENTRAL SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF SENECA AND ITS SCHOOL BOARD, SEYMOUR COMMUNITY SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF SHELL LAKE AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF SIREN AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF SOMERSET AND ITS SCHOOL BOARD, SOUTHWESTERN WISCONSIN COMMUNITY SCHOOL DISTRICT

AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF SPRING VALLEY AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF STRATFORD AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF SUPERIOR AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF THORP AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF TIGERTON AND ITS SCHOOL BOARD, TOMAH AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, VALDERS AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, VIROQUA AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF WABENO AREA AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF WASHBURN AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF WAUPUN AND ITS SCHOOL BOARD, JOINT SCHOOL DISTRICT, VILLAGES OF WAUZEKA AND STEUBEN, TOWNS OF WAUZEKA, BRIDGEPORT, EASTMAN, HANEY, MARIETTA AND PRAIRIE DU CHIEN AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF WEST SALEM AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF WESTON AND ITS SCHOOL BOARD, WEYERHAUSER AREA SCHOOL DISTRICT AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF WINTER AND ITS SCHOOL BOARD, SCHOOL DISTRICT OF WONEWOC AND UNION CENTER AND ITS SCHOOL BOARD, AND MARY BILLS, PAM BRITTEN, AND LYNN KLATT, ON BEHALF OF THEMSELVES AND ALL OTHER SCHOOL BOARD MEMBERS IN THE STATE OF WISCONSIN SIMILARLY SITUATED,

PLAINTIFFS-CO-APPELLANTS,

TERRANCE CRANEY, GUY COSTELLO, REGINA WASHINAWATOK, JEFFREY ERHARDT, KATHLEEN HILDEBRANDT, RANDY KUIVINEN, WILLIAM NELSON, DOUGLASS THOMAS, AND WISCONSIN EDUCATION ASSOCIATION COUNCIL,

**INTERVENING PLAINTIFFS-
APPELLANTS,**

V.

JACK C. VOIGHT, IN HIS OFFICIAL CAPACITY AS STATE OF WISCONSIN TREASURER, JOHN T. BENSON, IN HIS OFFICIAL CAPACITY AS STATE OF WISCONSIN SUPERINTENDENT OF PUBLIC INSTRUCTION, WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, CATE ZEUSKE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF REVENUE,

**AND WISCONSIN DEPARTMENT OF REVENUE,
DEFENDANTS-RESPONDENTS.**

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Plaintiffs and intervening plaintiffs appeal from an order granting defendants' motion for summary judgment, in which the trial court upheld the constitutionality of Wisconsin's public school finance system.¹ They assert that the current system does not provide all students with equal educational opportunities and, therefore, violates article X, section 3 and article I, section 1 of the Wisconsin Constitution. In *Kukor v. Grover*, 148 Wis.2d 469, 436 N.W.2d 568 (1989), the supreme court upheld the constitutionality of a school finance system similar to the current system. For us to reach a contrary conclusion, the plaintiffs must demonstrate that the current system materially differs from the system that existed in *Kukor*. See *State v. Lossman*, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1984) (appellate courts are bound by prior supreme court decisions). Plaintiffs have not done so. Therefore, we must affirm.

¹ The supreme court denied appellants' petition for bypass.

BACKGROUND

A. Wisconsin's Public School Funding System

The framers of the Wisconsin Constitution recognized the importance of education when they included therein a provision for the creation and funding of public schools. Article X, section 1 of our constitution vests the “supervision of public instruction” with the state superintendent and other legislatively designated offices. Section 2 states that school lands should be secured as the basis of state support for the district schools. Section 3, the critical provision in this case, states “[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable” Section 4 states that “[e]ach town and city shall be required to raise by tax, annually, for the support of common schools therein, a sum not less than one-half the amount received by such town or city respectively for school purposes from the income of the school fund.” Section 5 states that a “[p]rovision shall be made by law for the distribution of [state aid] among the several towns and cities of the state for the support of common schools therein, in some just proportion to the number of children and youth resident therein” The meaning of these sections, particularly sections 3, 4 and 5, has been debated in the courts, and will be discussed later in this opinion.

Wisconsin school districts currently receive their funding from several sources: (1) state aid; (2) property tax; (3) federal aid; and (4) other nonproperty tax revenues (such as fees and interest earnings). The two primary sources are state aid (54.6% in 1996-97) and local property taxes (38.5% in 1996-97). State aid is distributed through the following three methods: (1) the general equalization formula; (2) categorical aid; and (3) the state property tax credit

program. The purpose of state aid is to enable the state to assume a greater proportion of the costs of public education and to relieve the local communities of some of their tax burdens. Section 121.01, STATS.

Equalized aid is the primary source of state aid, and it is distributed through a guaranteed tax base system. Under a guaranteed tax base system, the state guarantees a certain amount of wealth behind each pupil for different levels of spending. In determining a district's level of state aid, a formula is applied that compares a school district's per-pupil tax base to the state's guaranteed tax base. If a district's tax base falls below the state guaranteed tax base, state aid is provided to make up the difference.² Under this system, a school district can support a given level of per-pupil expenditures with the same local property tax as other school districts with the same level of per-pupil expenditures, regardless of property tax wealth.

The formula used to determine equalization aid is complex.³ There are five factors that must be considered: (1) membership; (2) shared cost; (3) equalized property valuation; (4) the state's guaranteed valuations; and (5) the total amount of funding available for distribution.⁴ The first four terms are defined

² For example, if District X has a tax base of \$800,000 per pupil or 40% of the primary state guaranteed tax base (\$2,000,000), the state will assume the remaining 60% of the district's primary shared costs. Conversely, if District Y has a tax base of \$1,500,000 per pupil or 75% of the primary state guaranteed tax base (\$2,000,000), the state will assume the remaining 25% of the district's primary shared costs.

³ The description of Wisconsin's public school financing system is based on reports submitted by members of the Wisconsin Legislative Fiscal Bureau.

⁴ The equalization formula is as follows:

$$\text{State Aid} = 1 - \frac{\text{Equalized Valuation Per Member}}{\text{State Guaranteed Value}} \times [\text{Shared Cost}]$$

in Chapter 121, STATS. Membership is the total number of pupils enrolled in a district by a certain date. Section 121.004(5), STATS. Shared cost is the school district expenditures that are eligible for aid through the equalization formula. *See* § 121.07(6), STATS. The shared cost is determined on a per-pupil basis by subtracting certain deductible receipts from the gross costs of the district's general fund (operating costs) and debt service fund (expenditures for long-term debt retirement). These primary deductions include: (1) state categorical aid; (2) federal aid; and (3) local, nonproperty tax receipts (such as ticket sales, student fees and interest earnings). Equalized valuation is the full market value of taxable property in the school district. Section 121.004(2), STATS. This amount is divided by the number of members in the district to determine the equalized value per member, which is then the amount used in the equalization formula. Guaranteed valuation is the amount of property tax base support that the state guarantees each pupil. Section 121.07(7), STATS.

The current three-tier cost equalization formula was enacted in 1995, and it replaced a similar two-tier formula that will be discussed later in this opinion. The first tier provides aid for those shared costs up to the primary cost ceiling, which was set at \$1,000 per member in 1996-97.⁵ *See* § 121.07(6)(b), STATS. The state's sharing of costs at the primary cost ceiling, referred to as primary shared costs, is calculated by dividing the district's equalized valuation per member by the primary guaranteed valuation, which was set at \$2,000,000 per

⁵ For the purpose of illustration, we will use the guaranteed valuations and ceilings for K-12 districts. The guarantees for school districts only operating elementary grades are one and one-half times the K-12 guarantees, and the guarantees for unified high schools are three times the K-12 guarantees. *See* § 121.07(7), STATS.

member in 1996-97. Section 121.07(7)(a), STATS. This amount is then multiplied by the shared cost per member up to the primary cost ceiling.⁶

Under this formula, every district received primary aid in 1996-97, because no district had a equalized valuation per member greater than \$2,000,000. Furthermore, this primary aid is guaranteed and cannot be reduced by negative aids generated at the secondary or tertiary aid levels. This is referred to as the hold-harmless provision, and it is a controversial aspect of the current system because it provides certain high property value districts with funding that they would not have received under the former two-tier system.

The second tier is for shared costs that exceed \$1,000 per member but are less than the secondary cost ceiling. The secondary cost ceiling was \$5,936 per member in 1996-97. *See* § 121.07(6)(d), STATS. The state's sharing of secondary costs is calculated using the secondary guaranteed valuation, which was \$569,584 for 1996-97.⁷ The secondary guarantee is not set statutorily, but is

⁶ The following is an illustration of how the first tier of the equalization formula applies:

District A has 1,000 members or students and the equalization value per member is \$300,000. The shared cost per member is \$7,000. The equalization formula would be as follows:

$$\text{State Aid} = 1 - \frac{\$300,000}{\$2,000,000} \times (\$1,000 \times 1,000)$$

(primary)

$$[1 - .15] \times [\$1,000,000]$$

$$.85 \times \$1,000,000$$

\$850,000 in total primary aid

⁷ The formula remains the same as the one used to determine primary aid except that the state guaranteed valuation per member is reduced from \$2,000,000 to \$569,584 and the shared cost is the amount in excess of the \$1,000 primary cost ceiling but less than the \$5,936 secondary cost ceiling. The formula would look as follows:

(continued)

allowed to float to a level that generates equalization aid entitlements that are equal to the total amount of funds available for distribution. School districts that have equalized valuations greater than the secondary guaranteed valuation do not receive secondary aid.⁸

The third tier is for shared costs that exceed the secondary cost of \$5,936. *See* § 121.07(6)(dr), STATS. State aid on these tertiary shared costs is set by statute at 100% of the statewide average equalized valuation per member. The statewide average valuation per member in 1996-97 was \$232,954.⁹ If a district

$$\begin{aligned} \text{State Aid} &= 1 - \frac{\$300,000}{\$569,584} \times (\$4,936 \times 1,000) \\ \text{(Secondary)} & \\ & [1 - .052670019] \times [\$4,936,000] \\ & .47329981 \times \$4,936,000 \\ & \$2,336,208 \text{ in total secondary aid} \end{aligned}$$

⁸ In 1996-97, 173 of the state's 426 school districts (or 40.6%) were primary and secondary aid recipients under the equalization formula. Because some of the state's largest school districts, including Milwaukee, Racine, Kenosha and Appleton, are in this category, positive primary and secondary aid districts accounted for approximately 50.5% of the state's total membership.

⁹ The formula remains the same as the one used to determine secondary aid except that the state guaranteed valuation per member is reduced from \$569,584 to \$232,954 and the shared cost is the amount in excess of the \$5,936 secondary cost ceiling. The formula would look as follows:

$$\begin{aligned} \text{State Aid} &= 1 - \frac{\$300,000}{\$232,954} \times (\$1,064 \times 1,000) \\ \text{(tertiary)} & \\ & [1 - 1.28780789] \times [\$1,064,000] \\ & - 0.28780789 \times \$1,064,000 \\ & - \$306,338 \text{ in tertiary aid} \end{aligned}$$

District A's total state aid is: \$ 850,000 in primary aid plus \$2,029,980 in secondary aid after the reduction (\$2,336,208 in secondary aid plus (-\$306,228) in tertiary aid), resulting in a total of \$2,879,980.00 in state aid. Overall, District A would receive \$2,879,980 (out of the total \$7,000,000) or approximately 41% of its shared costs through the state's equalization formula.

spends more than the secondary cost ceiling and has an equalized valuation per member below the tertiary guaranteed valuation, it will receive tertiary aid. However, if a district spends more than the secondary cost ceiling and has an equalized valuation above the tertiary guaranteed valuation, it will receive negative tertiary aid. Negative tertiary aid is deducted from the district's secondary aid but not from its primary aid.¹⁰

There also are other general state aid programs which provide unrestricted aid to school districts. Integration aid is one such program, and it is designed to provide an incentive for school districts to voluntarily improve the racial balance within and between school districts. *See* § 121.85, STATS. Integration aid is divided into intradistrict and interdistrict transfer aid, and it is distributed to districts regardless of wealth.

Interdistrict transfer aid is allocated by giving the school district receiving the students its average amount spent per-pupil multiplied by the number of pupils who have transferred for integration purposes from other districts. Further, if these transfer students constitute five percent or more of the total enrollment of the receiving district, that school district receives a twenty-percent increase in the amount of integration aid due to these integration efforts.

¹⁰ The tertiary guarantee feature of the equalization formula is intended to serve two purposes. First, it serves as a disincentive for higher-than-average spending levels by causing districts to be taxed at much higher rates for costs incurred above the ceiling. Second, it attempts to narrow the per pupil spending disparities among school districts by redistributing state aid to districts that spend at below-average levels. In 1996-97, 33.6% of the state's school districts (or 143 districts) received positive tertiary aid. These districts accounted for 21.8% of the state's total membership.

In 1996-97, under this current three-tier system, 50.5% of districts received both primary and secondary aid; an additional 21.8% also received positive tertiary aid; 23.7% of districts received primary and secondary aid, but the secondary aid, while still positive, was diminished by negative tertiary aid; and 4% received only primary aid.

Special adjustment aid, allocated under § 121.105, STATS., is intended to cushion the effect of the loss of state aid to school districts from one year to the next. This aid prevents a district's state funding from falling more than fifteen percent or one million dollars in a single year whether the decline is due to an increase in equalized property value in the district or to a decrease in student enrollment. Similar to integration aid, it is distributed to districts regardless of wealth.

State categorical aids are designed to assist in funding specific program costs for children with exceptional educational needs, such as handicapped education, bilingual/bicultural education, pupil transportation, school lunches, and driver education. Categorical aids are provided on a flat aid or cost reimbursement basis. It also is distributed to school districts without regard to their fiscal spending, which means that those high-property-value districts are as likely to receive this funding as are low-property-value districts.

The final method of state aid comes in the form of a school tax levy credit. *See* § 79.10(4), STATS. The school tax levy credit is distributed to taxpayers based on their municipality's share of the average school tax levies for all municipalities. School districts that rely to a greater degree on local property taxes, rather than on state equalized aid, receive a greater share of this tax credit.

The legislature also has enacted revenue caps which limit the amount of revenue a district can raise from state aid and local property taxes. *See* § 121.91, STATS. The base spending limit is based on a district's spending in the 1992-93 school year, and a statutorily defined flat rate spending increase is allowed each year. The spending increase was \$206 per pupil in 1996-97. A local

school district may exceed these revenue limits only by passing a voter referendum.

B. Established Precedent

1. *Busé v. Smith*

The supreme court has issued two significant opinions regarding the constitutionality of the state public school finance system. The first was *Busé v. Smith*, 74 Wis.2d 550, 247 N.W.2d 141 (1976), in which the court considered the constitutionality of a statutory provision requiring certain districts with equalized valuations above the secondary guaranteed valuation to pay any negative sum resulting from the formula to the state, which would then be redistributed as state aid. This “negative aid” provision was intended to promote equality by creating a disincentive for school districts to tax and spend above a set amount. *Id.* at 557-58, 247 N.W.2d 144-45. While the court ultimately found the provision to be unconstitutional under the uniform taxation requirement of article VIII, section 1, of the Wisconsin Constitution, it reached this conclusion only after deciding that the system did not violate the uniformity provision of article X, section 3.

Article X, section 3 states that “[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free ... to all children between the ages of 4 and 20 years old....” The defendants in *Busé* argued that this language required “equality of educational opportunity,” and that the negative aid provision promoted equality by controlling the disparities that existed among the various districts. *Busé*, 74 Wis.2d at 565, 247 N.W.2d at 148.

The court concluded that the framers of the constitution intended the phrase “as nearly uniform as practicable” to mean that the “character of instruction” should be as uniform as practicable. *Busé*, 74 Wis.2d at 565-66, 247 N.W.2d at 148-49 (quoted source omitted). The court concluded that it was responsible for determining what subjects were to be included in “character of instruction,” but it was for the legislature to determine what uniformity was “practicable.” *Id.* at 566, 247 N.W.2d at 148-49. The court noted that:

Whether absolute uniformity of an equal opportunity for education in all school districts of the state is socially desirable, is not for this court to decide. We can only conclude that the plain meaning of sec. 3, art. X does not mandate it.

Id. at 568, 247 N.W.2d at 149.

The court further recognized that article X, section 4 of the Wisconsin Constitution¹¹ limits state involvement by mandating that communities retain partial control over school funding. *Busé*, 74 Wis.2d at 570-71, 247 N.W.2d at 150-51. The constitutional framers believed that “one-third of the expense of supporting schools, should be borne by each town.” *Id.* at 570, 247 N.W.2d at 150 (quoted source omitted). Their rationale was that if schools were funded entirely by state aid, the people of the community would lose interest in the operation and success of the schools. *Id.* at 571, 247 N.W.2d at 150-51.

¹¹ Article X, section 4 of the Wisconsin Constitution states that:

Each town and city shall be required to raise by tax, annually, for the support of common schools therein, a sum not less than one-half the amount received by such town or city respectively for school purposes from the income of the school fund.

While the court recognized that the framers intended local communities to be responsible for raising some minimum level of funding, it also recognized that there should not be a limit on the amount of funding that communities could raise. It stated that “[l]ocalities are empowered to raise funds for education, and to spend those funds for educational purposes over and above those required by the state.” *Id.* at 572, 247 N.W.2d at 151. The court ultimately held that while article X, section 4 requires a minimum level of local funding, it does not set a maximum.

Later in its opinion, the court also analyzed the negative aid provision under article I, section 1 of the Wisconsin Constitution.¹² It stated that equal access to education was a fundamental right and strict scrutiny therefore should be applied. *Id.* at 580, 247 N.W.2d at 155. The court concluded, albeit without providing any meaningful rationale, that there was “adequate justification for the classification sufficient to meet the requirements of the strict scrutiny test.” *Id.*

2. *Kukor v. Grover*

The supreme court’s decision in *Kukor v. Grover*, 148 Wis.2d 469, 436 N.W.2d 568 (1989), provides greater guidance in addressing the constitutionality of the current funding system. In *Kukor*, the appellants argued that the school funding system failed to take into account the fact that certain children have differing educational needs requiring certain districts to commit

¹² Article I, section 1 of the Wisconsin Constitution states that: “All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.”

greater financial resources in order to provide these students the same level of educational opportunity. *Id.* at 481, 436 N.W.2d at 573. They further contended that those districts with a greater number of these higher-need children were the least capable of raising sufficient financing from property taxation because of lower property valuations and an overburdened tax base. *Id.* The appellants specifically attacked the equalization formula as violating both the uniformity provision of article X, section 3 and the equal protection clause of article I, section 1.

While a majority of the court concluded that the system did not violate the Wisconsin Constitution, it could not agree as to why. In order to understand the *Kukor* holding, we will summarize the reasoning of the three-member plurality, the one-member concurrence, and the three-member dissent.

The plurality, written by Justice Ceci, began by explaining how the two-tier equalization formula was applied, and how taxing and spending disparities continued among lower and higher property value districts.¹³ The

¹³ The two-tier equalization formula at issue in *Kukor* was similar to the current three-tier equalization formula discussed above. Both formulas determine the level of aid a district will receive primarily based upon the difference between the district's equalized valuation per member and the state's guaranteed valuation at each spending level. The plurality described the formula as follows:

Where the primary guaranteed valuation exceeds the equalized valuation, this difference is multiplied by the primary required levy rate to determine primary state aid. The primary required levy rate, or mill rate, is the primary shared cost divided by the primary guaranteed valuation, with both figures computed as explained above. Simply stated, the required levy rate is determined by dividing the amount of money which needs to be received by the guaranteed value of the property to be taxed. Where shared costs exceed the primary cost ceiling, the difference between the secondary guaranteed valuation and the equalized valuation is multiplied by the secondary required levy rate to determine secondary aid. The secondary required levy

(continued)

plurality then focused its attention on whether these disparities were unconstitutional. It began by analyzing the appellants' argument that because the system operated as a function of property valuation, as opposed to educational needs, it violated the uniformity provision. *Id.* at 484, 436 N.W.2d 574. Similar to the court in *Busé*, the plurality observed that the uniformity provision cannot be read in isolation; it must be read in conjunction with the other sections of article X. *Kukor*, 148 Wis.2d at 487, 436 N.W.2d at 575. However, while the *Busé* court focused on section 4 and the preservation of local control, the plurality in *Kukor* emphasized the requirement of section 5, which provides that state funds be distributed “in some just proportion to the number of children” in each district. The plurality noted that:

The present equalization system far exceeds the degree of uniformity which might be accomplished under [section 5]: whereas [section 5] provides only for each district to receive an equal amount of state resources, ch. 121, STATS., provides a greater amount of state funds per pupil to districts with lower equalized property valuations.

Kukor at 148 Wis.2d at 492, 436 N.W.2d. at 577. The plurality also recognized that while greater uniformity in educational opportunities is “desirable and necessary,” it is not “constitutionally mandated under the uniformity provision.”

Id. The plurality reasoned that:

[T]he uniformity provision thus could only have been intended to assure that those resources distributed equally on a per-pupil basis were applied in such a manner as to assure that the “character” of instruction was as uniform as practicable. Viewed in this regard, the “character” of instruction which is constitutionally compelled to be

rate is computed by dividing the secondary shared cost by the secondary guaranteed valuation.

Kukor v. Grover, 148 Wis.2d 469, 478-79, 436 N.W.2d 568, 571-72 (1989) (citations omitted).

uniform is legislatively regulated by § 121.02, STATS., regarding, for example, minimum standards for teacher certification, minimal number of school days, and standard school curriculum. The state assures compliance with these standards by providing for the imposition of sanctions upon districts found not to be in compliance. *See* § 121.02(2), STATS. The appellants have not asserted that due to the distribution of school aid under the equalization formula, their districts are unable to meet these standards, and there was testimony by appellants' witnesses that basic educational programs had in fact improved. Consequently, we hold that the school finance system as set forth in ch. 121, STATS., does not unconstitutionally impinge upon the uniformity requirements of WIS. CONST. art. X, sec. 3.

Id. at 492-94, 436 N.W.2d at 577-78 (footnotes omitted).

The plurality also examined the equalization system under the equal protection clause of the Wisconsin Constitution. The appellants argued that the finance system failed to treat similarly situated students equally, and that the quality of education a student receives depends upon his or her place of residence. *Id.* at 495, 436 N.W.2d at 579. They also asserted that because equal opportunity for education is a fundamental right, the finance system should be subject to strict scrutiny as opposed to the rational basis standard. *Id.*

While the plurality agreed that education is a fundamental right, it qualified this finding by emphasizing that equal opportunity for education does not mandate absolute equality in district spending.

[T]o the extent that art. X delineates state distribution of resources in an equal per-pupil basis, to assert that equal opportunity for education mandates an entirely different scheme of financing requiring the state to distribute resources unequally among students to respond to the particularized needs of each student is inconsistent with the intent evidenced in the express language of art. X. Accordingly, since the deficiency allegedly exists not in the denial of a right to attend a public school free of charge, nor in the less affluent districts' failure to meet the educational standards delineated under [the statute], nor in

the state's failure to distribute state resources to the less affluent districts on at least an equal per-pupil basis as distribution is made to wealthier districts, no fundamental right is implicated in the challenged spending disparity.

Id. at 496-97, 436 N.W.2d. at 579. Because the rights at issue were premised upon spending disparities and not upon complete denial of an educational opportunity, the plurality concluded that a rational basis analysis was appropriate.

Id. at 498, 436 N.W.2d at 580.

The plurality focused on two factors when determining whether a rational basis existed for the taxing and spending disparities. First, they were satisfied that the finance system allowed localities to retain some measure of control over educational spending. “To the extent that district per-pupil expenditures may differ as a consequence of the operation of ch. 121, this difference is a result of decisions made at the local level—a variation whose legitimacy is grounded in the constitutional requirement that control be retained by localities.” *Id.* at 498-99, 436 N.W.2d at 580. It also recognized that, based on established precedent, the legislature was entitled to deference concerning what degree of uniformity was practicable.

While our deference would abruptly cease should the legislature determine that it was “impracticable” to provide to each student a right to attend a public school at which a basic education could be obtained, or if funds were discriminatorily disbursed and there existed no rational basis for such finance system, we will otherwise defer to the legislature's determination of the degree to which fiscal policy can be applied to achieve uniformity.

Kukor, 148 Wis. 2d at 503, 436 N.W.2d at 582. The plurality concluded that while more and improved programs were needed in the less affluent or overburdened districts, these factors did not make the funding system unconstitutional. *Id.* at 510, 436 N.W.2d at 585.

Justice Steinmetz began his concurrence by stating the following:

I agree with the result reached by the majority; however, in coming to this conclusion, I find the appellants have not met their burden of proving the school finance system unconstitutional. The majority devotes attention to the protection of local control. I do not find local control arguments relevant to whether the formula contravenes either the uniformity provision or the guarantee of equal protection.

Kukor, 148 Wis.2d at 510, 436 N.W.2d at 585 (Steinmetz, J., concurring).

Justice Steinmetz stated that the legislature is required only to present students with an equal opportunity for an education. *Id.* at 511, 436 N.W.2d at 586. Unless it is established beyond a reasonable doubt that the legislature has unconstitutionally denied a uniform opportunity for education or has treated students unequally, Justice Steinmetz agreed that the court should defer to the legislature's determination as to what degree of fiscal uniformity was practicable. *Id.* at 512-13, 436 N.W.2d at 586. He also agreed with the Ceci plurality that education is a fundamental right, and "that where a statutory classification adversely affects or interferes with a fundamental constitutional right, the classification is subject to strict scrutiny" *Id.* at 513, 436 N.W.2d at 586 (quoting *Busé*, 74 Wis.2d at 580, 247 N.W.2d at 155). However, because the appellants do not challenge any statutory classification, but rather the method by which public schools are funded, Justice Steinmetz concluded that the appellants were required to prove that the statutory scheme was unconstitutional beyond a reasonable doubt, which indicated that he agreed with the plurality that strict scrutiny is not applicable. *Id.*

Moreover, Justice Steinmetz asserted that while there is a threshold of disparity that could make the funding system unconstitutional, that threshold

had not been met. *Kukor*, 148 Wis.2d at 514, 436 N.W.2d at 587. He stated that “[a]s long as the level of education funded is reasonably acceptable,” and the district has not deteriorated to the point that it could not be comparable with other districts, “the funding system is not unconstitutional.” *Id.* Justice Steinmetz concluded by stating that:

The state constitution requires that an education system which is as nearly uniform as practicable be presented to each student. It does not require the legislature to allocate funds to provide a school system which produces students who are educated to a level as nearly uniform as practicable, although the latter may be desirable. This case has been a public cry to the legislature, disguised as a constitutional attack, that additional funds are necessary to improve education in some districts.

The challenge that the formula fails to treat similarly situated students equally to the extent that the quality of education a student receives depends upon his or her place of residence also has not been demonstrated as causing a constitutional equal protection violation of art. 1, sec. 1 of the Wisconsin Constitution.

Kukor, 148 Wis.2d 514-515, 436 N.W.2d at 587 (footnotes omitted).

The dissent, written by Justice Bablitch, did not agree that this case concerned spending disparities. It stated that the issue was whether the state has met its constitutional obligation to provide an equal opportunity for education to all children in the state. *Kukor*, 148 Wis.2d at 516, 436 N.W.2d at 587 (Bablitch, J., dissenting). The dissent maintained that the purpose of the uniformity clause is for the state to provide a character of instruction such that “all children are provided with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.” *Id.* at 521, 436 N.W.2d at 590. In other words, the state must provide “a character of instruction that allows each child an equal

opportunity to become an educated person.” *Id.* After reviewing the evidence, the dissent concluded that the state failed to meet its obligation. *Id.* at 526, 436 N.W.2d at 492. It noted that:

The fundamental flaw of the state formula is that it distributes dollars without regard to educational needs. It assumes that every child in this state begins his or her educational journey from the same starting point. If all children began that journey from the same starting point, then the formula would provide no constitutional objection: every child would start with the same opportunity. That may well have been the reality, with few exceptions, in 1848. It is not even close to reality today. The result is that a significant number of school children in this state are denied an equal opportunity to become educated people.

Id. at 516-517, 436 N.W.2d 588.

The dissent also criticized the majority for not establishing clearer guidelines as to where “spending disparities” end, and the “denial of equal opportunity” begins. *Id.* at 525, 436 N.W.2d at 591. It stated that “[i]f this record does not offer a denial of equal opportunity of education, what record will?” *Id.* It further observed that “[f]or a state which historically has placed a high value on free public education to rich and poor alike, this record is a disgrace.” *Kukor*, 148 Wis.2d at 525, 436 N.W.2d at 591. The dissent also rejected the majority’s reliance on preserving local control as a justification for perpetuating the disparities that existed. *Id.* at 527, 436 N.W.2d at 592. It concluded that the funding system was unconstitutional, and the legislature should “address anew its constitutional mandate to provide a system of education throughout the state that gives an equal opportunity to every child in this state to become an educated person.” *Id.* at 531, 436 N.W.2d at 594.

C. Procedural History

The plaintiffs in this case include school districts, parents, students and taxpayers. The intervening plaintiffs consist of the Wisconsin Education Association Counsel, teachers and school administrators from throughout the state. The defendants are the State Treasurer, the State Superintendent of Public Instruction, the Department of Public Instruction, the Secretary of the Department of Revenue and the Department of Revenue.

In October 1995, the plaintiffs in this action challenged the constitutionality of the Wisconsin's public school funding system. The Wisconsin Education Association Council and a number of teachers and superintendents intervened. Both plaintiff groups and the defendants moved for summary judgment.

The plaintiffs and intervening plaintiffs maintain that the state's equalization formula fails to adequately address the substantial disparity in resource levels for the various districts, and the failure of the funding system to take into account the differing needs of certain children, who are disproportionately located in lower-property-value districts. The plaintiffs focused primarily on the structural inequities inherent in the current system, particularly the inequities caused by the varying local tax rates. The intervening plaintiffs, on the other hand, focused on the harm done to certain districts by the current revenue limits. However, both the plaintiffs and the intervening plaintiffs agreed that the current financing system violates the uniformity clause of article X, section 3 and the equal protection clause of article I, section 1.

The trial court granted the defendant's motion for summary judgment, concluding that it was bound by the supreme court's decision in *Kukor*.

It stated that the plaintiffs did not provide the statistical evidence necessary to prove that the current system created greater disparities among lower and higher property value districts than existed at the time *Kukor* was decided. Both plaintiffs and intervening plaintiffs appeal.

STANDARD OF REVIEW

This case is on appeal from the circuit court's grant of summary judgment. Our review of summary judgments is de novo, applying the same methodology as the trial court. See *Krug v. Zeuske*, 199 Wis.2d 406, 411, 544 N.W.2d 618, 620 (Ct. App. 1996). A motion for summary judgment must be granted when there is no genuine issue of material fact, and the movants are entitled to judgment as a matter of law. See § 802.08(2), STATS. And where, as here, both sides move for summary judgment "we generally consider the facts to be stipulated, leaving only questions of law for resolution." *Krug*, 199 Wis.2d at 411, 544 N.W.2d at 620 (quoting *Rock Lake Estates Unit Owners Ass'n v. Township of Lake Mills*, 195 Wis.2d 348, 356 n.2, 536 N.W.2d 415, 418 n.2 (Ct. App. 1995)).

DISCUSSION

We are to decide whether the current funding system is constitutional. The plaintiffs and intervening plaintiffs (hereinafter "plaintiffs") raise several challenges to the system. Many of these challenges are the same as those raised in *Kukor*. The plaintiffs, however, argue that *Kukor* is not controlling because (1) there was no clear majority opinion in *Kukor*, and (2) the current system differs from the system that existed then. Based on these assertions, the plaintiffs contend that a different result is permissible and warranted.

We first decide what weight should be given to *Kukor*. When a majority of the court does not agree on the reasoning for a holding, the reasoning enunciated in the plurality opinion is not the opinion of the court, and lower courts are not bound by that reasoning in subsequent cases. *State v. King*, 205 Wis.2d 81, 88-89, 555 N.W.2d 189, 192-93 (Ct. App. 1996). In *Marks v. United States*, 430 U.S. 188 (1977), the U.S. Supreme Court held that, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five [or a majority of the] Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ...’” *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). We find this reasoning persuasive.

The plaintiffs contend that *Kukor* has little precedential value because Justice Steinmetz found the equalization system constitutional on grounds different than the majority. We disagree. While Justice Steinmetz rejected local control as a justification for the disparities, he agreed with the plurality on three points. First, Justice Steinmetz agreed that, absent a showing beyond a reasonable doubt that the legislature unconstitutionally denied a uniform opportunity for education or treated students unequally, the court should defer to the legislature’s determination as to what degree of uniformity is practicable. *Kukor*, 148 Wis.2d 512-13, 436 N.W.2d at 586 (Steinmetz, J., concurring). Second, he agreed that while education is a fundamental right, the appellants were not asserting that they were denied that right. *Id.* at 513, 436 N.W.2d at 586. Instead, they were challenging the statutory method by which public schools were funded; therefore, a strict scrutiny analysis was not implicated. *Id.* Third, he stated that the uniformity clause did not require the legislature to maintain absolute uniformity among school districts. *Id.* at 514, 436 N.W.2d at 586-87.

We reach the following conclusions after reviewing the plurality and concurring opinions. First, article X, section 3 does not require absolute uniformity. *Kukor*, 148 Wis.2d at 487, 436 N.W.2d at 575 (Ceci, J., plurality); *id.* at 514, 436 N.W.2d 586-87 (Steinmetz, J., concurring). It requires only that the state guarantee a basic education for all students. Second, the legislature is entitled to great deference when determining what degree of uniformity is practicable. *Kukor*, 148 Wis.2d at 503-04, 436 N.W.2d at 582 (Ceci, J., plurality); *id.* at 512-13, 436 N.W.2d 586 (Steinmetz, J., concurring). Finally, while equal access to education is a fundamental right, equal access or allocation of resources is not. As a result, the funding system need not be analyzed with strict scrutiny. *Kukor*, 148 Wis.2d at 487, 436 N.W.2d at 575 (Ceci, J., plurality); *id.* at 496-97, 436 N.W.2d 579 (Steinmetz, J., concurring). While we recognize that the majority agreed on concepts, rather than specifics, and did not delineate definitive standards, this court is prohibited from reaching a different conclusion when the supreme court has spoken. *Lossman*, 118 Wis.2d at 533, 348 N.W.2d at 163.

Therefore, for the plaintiffs to prevail, they must establish beyond a reasonable doubt that the current system is unconstitutional, and to do this, they must establish that the system materially differs from the system in *Kukor*. The plaintiffs point to certain changes made to the funding system since *Kukor*. In particular, they point to: (1) the first-tier hold-harmless provision in the current three-tier equalization system, (2) the changes in the categorical grant system, (3) the changes in the school tax levy credit system, and (4) the implementation of revenue limits. We will address each of these in turn.

The current three-tier equalization formula, which was enacted in 1995, guarantees primary aid in two ways. First, the primary guaranteed valuation per member is set higher than the equalized valuation per member of every

district, including the richest district in the state, which means that every district receives primary aid. Conversely, under the two-tier system, certain districts' equalized valuations exceeded the primary state guaranteed valuation, which meant that those districts did not receive equalization aid. Second, the current system has a hold-harmless provision that guarantees primary aid to districts even if their secondary or tertiary sums are negative. The two-tier system had no such guarantee.

The plaintiffs contend that this hold-harmless provision is “disequalizing” because instead of closing the gap between the higher and lower property value districts, it either maintains or widens the gap by providing equalization aid to certain districts that already are spending well above the state average.¹⁴ The plaintiffs support this assertion by drawing comparisons between lower and higher property value districts with similar memberships. They contend that lower property value districts tax at a higher rate than higher-property-value districts but still spend less per pupil.¹⁵ While these comparisons demonstrate

¹⁴ The Legislative Fiscal Bureau concluded that seven and one-half percent of all school districts, or four percent of the state's students, are receiving only primary aid. These presumably are some of the districts that did not receive equalization funding under the prior system. However, there is no evidence indicating what percentage of funding these districts are receiving. This information is critical to determining if a significantly greater disparity exists under the current formula than under the prior formula.

¹⁵ One of the plaintiffs' experts, Bambi Statz, stated that: (1) high-wealth districts tend to spend more per student than low wealth districts, and (2) high-wealth districts generally tend to tax at lower rates than low-wealth districts. She opined that: (1) educational opportunities that are dependent upon financial resources are less accessible to students living in poorer districts than to students living in wealthier districts; and (2) taxpayers in poorer districts are taxed at a higher rate and must make a greater effort to support education than taxpayers in wealthier districts. As a result, she concluded that the state funding system is not as nearly uniform as practicable, and its failure to provide equitable access to resources denies equal educational opportunities to students in poorer districts.

disparities, they fail to establish whether these disparities are substantially greater than the disparities that existed in *Kukor*.¹⁶

The only comparative evidence offered by the plaintiffs concerning the equalization formula is the total amount of annual equalization aid provided by the state from 1987-88 to 1996-97. In 1987-88, the state provided approximately \$1.198 billion of equalization aid, which accounted for 80.9% of state aid. In 1996-97, the state provided \$3.109 billion, which accounted for 87.2% of state aid. In gross amount, state aid has more than doubled.

The plaintiffs respond to this fact by asserting that, even though the total amount of equalization aid has increased, the taxing and spending disparities between lower and higher property value districts have not diminished. The plaintiffs, however, have not provided us with the comparative information needed to test their assertion. The plaintiffs do provide us with the shared costs per member for each district for 1995-96, and this information indicates that approximately eighty-one percent of all school districts were within \$1,000 of the state spending average per student. Such evidence does not support the plaintiffs' assertion that the distribution of equalization aid is disequalizing.

More importantly, the plaintiffs seem to suggest that the system must be as equal as possible. But the court stated in both *Busé* and *Kukor*, that absolute uniformity is not required. Article X, section 4 of the state constitution allows local communities to spend over and above the state spending average. The best

¹⁶ The plaintiffs include an assertion that seventy-four percent of districts are worse off under the three-tier system than they were under the two-tier system. However, they fail to explain how this conclusion was reached. Furthermore, even if this assertion is true, the plaintiffs still have not demonstrated that the current system *materially* differs from the system in *Kukor*.

we can conclude is that we do not know that the current equalization formula creates substantially greater disparities than existed at the time of *Kukor*.

The plaintiffs next challenge the distribution of categorical aid. Categorical aid is distributed on a flat cost reimbursement basis, regardless of the district's wealth, for programs such as integration, special education, lunches, libraries, transportation, and drivers' education. The plaintiffs contend that the current method for distributing this aid adds to the inequality among districts. They argue that lower-property-value districts have a greater need for this aid than the higher-property-value districts because the higher-property-value districts are more capable of raising funds for these programs locally. The plaintiffs also challenge the state's movement from categorical aid toward equalization aid. While it is true that a lower percentage of aid is provided through categorical aid (16% in 1987-88 to 10.7% in 1996-97), the actual dollar amount has increased from \$237,700,000 to \$381,500,000.

Furthermore, categorical aid is not a significant source of state aid; it makes up only about thirteen percent of all state aid (or \$454,000,000). It also is distributed to address a specific need, not to improve the education of all students. If a district has a higher percentage of qualifying students, then it generally should receive a higher percentage of aid under the current allocation system. More importantly, the plaintiffs have offered no convincing evidence that the state's categorical aid system is distributed on a basis that favors higher-property-value districts.

The plaintiffs offer a similar argument concerning the state's distribution of special adjustment aid, and we reach a similar conclusion. This type of aid cushions districts against decreases in state aid, which would occur if

there was a drop in a district's population. It protects taxpayers in these districts from significant increases in their taxes by maintaining a certain level of state aid. The plaintiffs have provided no evidence that special adjustment aid contributes to the denial of equal opportunities in education.

The third aspect of the current system that the plaintiffs consider to be highly disequalizing is the current school tax levy credit. This is a tax credit distributed based on a municipality's portion of statewide levies for school funding proposed during the preceding three years.¹⁷ However, this credit does not go toward school funding; it is money municipalities receive from the state that they are to repay to the taxpayers. The plaintiffs argument essentially is that, after the property tax credit is paid, wealthier districts end up paying a lower mil rate than poorer districts because they receive a greater percentage of the property tax credit. The plaintiffs, however, do not view the local property tax credit as state funding for schooling, but rather as a method by which the legislature provides property tax relief to individual taxpayers.

Finally, the plaintiffs challenge the imposition of revenue caps. Revenue caps were introduced in 1993, for the purpose of providing property tax relief. They prohibit local school districts from increasing their school revenues by more than a set amount (currently \$206 per pupil) each year.¹⁸ Prior to the

¹⁷ The current distribution formula can be stated as follows:

$$\frac{\text{Municipality's 3 Year Ave. School Levies}}{\text{Statewide 3-Year Ave. School Levies}} \times \text{Total Funding} = \text{Municipality's Credit}$$

¹⁸ These revenue caps can be by-passed if a voter referendum is passed. However, if a district raises taxes in excess of the per-pupil expenditure increase rate, that excess amount is then deducted from their state equalization aid.

setting of these revenue caps, the local school districts decided what the appropriate tax rate should be. Now it is statutorily defined.

The plaintiffs contend that these revenue caps do not take into account the fact that most costs are fixed regardless of the number students. So, when a struggling school district loses students, it has less money available to pay for those fixed costs, and they generally must cut programs in order to pay them. Revenue caps also are problematic if the school gets an influx of students who require special instruction, because these additional resources are quite expensive. When lower-property-value districts are confronted with an influx of these special-needs children, they need to cut other programs in order to provide the funding required to comply with state and federal educational mandates. The plaintiffs further contend that because a district cannot increase its spending above the revenue limit without a voter referendum, the revenue caps serve to perpetuate the disparities in educational opportunities that existed in 1992-93. Those districts that taxed and spent above the state averages in 1992-93, continue to do so today, and lower-property-value districts continue to struggle at or below the state spending averages. With this in mind, however, the plaintiffs still have not provided evidence that the revenue limits have resulted in substantial spending disparities. Therefore, our analysis is again limited.

The plaintiffs also have not presented evidence that certain children are now denied a basic education. They have offered affidavits from teachers and administrators concerning the conditions in certain districts, such as: deteriorating infrastructure, limited space, out-dated textbooks, reduced staffing, inadequate number of counselors, and lack of necessary computer technology. They also contend that lower-property-value districts are unable to provide the same type of course curriculum, technology, and other student related programs and services as

higher-property-value districts. But the plaintiffs have not provided objective proof, like standardized test scores, to establish that children are being denied a basic education.

Decisions on how to distribute state aid in conformity with the constitutional equalization requirement are left to the legislature and the supreme court. After *Kukor*, we are limited to determining whether the system allows children to access a basic education. And while the court in *Kukor* did not establish definite standards as to what this entails, the plaintiffs have provided no comparative evidence that the system denies children access any more than it did when that case was decided. If anything, the evidence suggests that the state is providing greater aid to school districts than it did at the time *Kukor* was decided. Therefore, we are unable to reach a contrary result.

While there could be methods of distributing state aid that would result in less disparity between districts and greater equality of educational opportunity, we do not have the authority to institute such methods. *State v. Lossman*, 118 Wis.2d at 533, 348 N.W.2d at 163.

CONCLUSION

While the plaintiffs present evidence of the current disparities that exist between districts, they fail to provide us with evidence that the system materially differs from the system in *Kukor*. In order for this court to find the finance system unconstitutional, when the supreme court found a similar system to be constitutional, we need evidence that greater disparities exist under the current system, and that some children are now denied a basic education. Without this evidence, we have no choice but to affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 97-3174(C)

DYKMAN, P.J. (*concurring*). After reading the record in this case, I agree with the trial court's conclusion that lower spending school districts are laboring under very difficult conditions. The inability of these districts to raise funds has resulted in increased class size. Classes are sometimes taught in partially condemned buildings, basements, storage rooms, hallways, auditorium stages, unused shower facilities, elevator shafts and janitor's closets. Maintenance is delayed, resulting in leaking roofs, antiquated heating and cooling systems, inadequate lighting and water running through the walls. There is a lack of options in advanced math, science, electives, extracurricular activities and computer technology. Textbooks are outdated. Expensive special education requirements take funds from general programs. There is a high concentration of students with high needs in the inner cities, and a shrinking population to support them.

Single parent families struggling with obtaining basic needs often do not have the money or time to prepare young children for their school years. School districts must first teach basic concepts of learning itself, a process not always achieved. It is not surprising that a child who starts school questioning education itself will take additional resources to educate. Nor is it surprising that if the resources are not there, that child is more likely to avoid school.

The cost of providing a basic education to high needs children is and will be steep. But Wisconsin is competing in a world economy, and the cost of an inability to compete is also steep. I also believe that there is a direct relationship

between a failed education and crime. We are told that the costs of our prison system have or soon will exceed the costs of our university system. There is no end in sight. Like it or not, Wisconsin taxpayers are going to pay the cost for failing to provide for our children's education, either directly or indirectly.

Buse v. Smith, 74 Wis.2d 550, 247 N.W.2d 141 (1976) and *Kukor v. Grover*, 148 Wis.2d 469, 436 N.W.2d 568 (1989), leave no room for an intermediate appellate court to fashion a remedy for a school financing system that for the most part, treats all children as fungible, though it is apparent that they are not.¹⁹ Perhaps the only solution is to bear the indirect costs of the present system until those costs are so high that a different solution becomes politically feasible. Until then, I note, as did both pluralities in *Kukor* and the trial court here, that substantially improved programs are needed in our less affluent school districts.

¹⁹ In part, the problem is that *Kukor*, which contains no majority opinion, also contains no test to use in determining whether a statutory method to determine unconstitutionality violates the constitution. We cannot tell whether *Kukor* was a close case or missed by a mile. And, the changes since *Kukor* cannot be added up in a meaningful way.

