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CAUSE NO. 362,516

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL	>	IN THE 250TH JUDICIAL
VS.	>	DISTRICT COURT OF
WILLIAM KIRBY, ET AL	>	TRAVIS COUNTY, TEXAS

FILED
IN SUPREME COURT
OF TEXAS

JUN 21 1989

JOHN T. ADAMS, Clerk
By _____ Deputy

STATEMENT OF FACTS

VOLUME XLIV OF XLVI

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THIRD COURT OF APPEALS
SUSAN K. BAGE, CLERK

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v.44-46

TAKEN APRIL 29, 1987

MONICA ROSS WEIDMANN
Official Court Reporter
250th Judicial District Court

Travis County Courthouse • Austin, Texas 78701

1 CAUSE NO. 362, 516

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3 EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL > IN THE 250TH JUDICIAL
4 >
5 VS. > DISTRICT COURT OF
6 >
7 WILLIAM KIRBY, ET AL > TRAVIS COUNTY, TEXAS

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8 STATEMENT OF FACTS

9

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10 BEFORE THE HONORABLE HARLEY CLARK, JUDGE PRESIDING

11

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16

17 BE IT REMEMBERED that on this the 29th day of April,
18 1987, the foregoing entitled and numbered cause came on
19 for trial before the said Honorable Court, Honorable
20 Harley Clark, Judge Presiding, whereupon the following
21 proceedings were had, to-wit:

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1 APRIL 29, 1987

2 COURT DECISION

3 THE COURT: Let me tell you how we're going
4 to proceed this morning. I'm going to read you a
5 statement and give you findings regarding the
6 fundamental right issue in the case, which I think
7 will be dispositive of the case. That seems to be
8 the issue that most people are interested in. And
9 then after I've done that, we will stop and have a
10 recess so that you all can visit with each other and
11 anybody else you would like to.
12 After that, I've asked the lawyers to come
13 back, oh, later in the morning, maybe 10:15 or so and
14 we will perhaps discuss and decide some of the issues
15 that will be remaining in the case.
16 Listen, I'm very grateful to the lawyers, both
17 sides of this case, for their remarkable ability and
18 perseverence to presenting this matter to me. I feel
19 very fortunate. I've been sitting here for almost
20 three months now listening to experts from all across
21 the nation about what's good and bad about education
22 in general, and what's good and bad about education
23 in the State of Texas. And I'm grateful for the
24 education. I hope I put it to good use.
25 I've told the lawyers that -- and I've told

1 some of the witnesses, although I wish I had told all
2 of them, that the witnesses from both sides, the
3 administrators, superintendents, the teachers, from
4 both sides of the case, whether they came here as
5 witnesses called by the Plaintiff or
6 Plaintiff-Intervenors, or the Defendants or
7 Defendant-Intervenors, showed a high level of
8 dedication to the education of children in this state
9 and a great concern for their welfare. And I
10 appreciate that very much.
11 Now as to the statement.
12 They cannot vote yet; they are yet incompletely
13 educated and quite inexperienced. Many of them are
14 only beginning to learn to read and write. They are
15 still wet and stand upon wobbly legs. They know not
16 the way, so we must lead them. They know not how, so
17 we must show them.
18 There are three million public school children
19 in Texas.
20 The Texas Constitution guides the response our
21 state government must make in regard to the education
22 of these young citizens. In Article VII, it
23 provides, "A general diffusion of knowledge being
24 essential to the preservation of the liberties and
25 rights of the people, it shall be the duty of the

1 Legislature of the State to establish and make
2 suitable provision for the support and maintenance of
3 an efficient system of public free schools."
4 Our basic law also states that all men -- "all
5 free men, when they form a social compact, have equal
6 rights..."
7 As well, by statute in the Texas Education
8 Code, the Legislature has set policy regarding these
9 matters. That statute says, "It is the policy of the
10 State of Texas that the provision of public education
11 is a state responsibility and that a thorough and
12 efficient system be provided and substantially
13 financed through state revenue sources so that each
14 student enrolled in the public school system shall
15 have access to programs and services that are
16 appropriate to his or her educational needs and that
17 are substantially equal to those available to any
18 similar student, notwithstanding varying local
19 economic factors."
20 I hold that under our State Constitution,
21 education is a fundamental right for each of our
22 citizens.
23 To expound a bit, if you will allow me, by
24 these edicts then the state is required to devise and
25 continually sponsor a system of finance for our

1 public schools that will give each school district
2 the same ability as every other district to obtain,
3 by state legislative appropriation or by local
4 taxation or both, funds for educational expenditures
5 including facilities and equipment. As a
6 consequence, each student by and through his or her
7 school district would have the same opportunity to
8 educational funds as every other student in the
9 state, limited only by discretion given local
10 districts to set local tax rates. Equality of access
11 to funds is the key. Equality of access to funds is
12 the key and is one of the requirements of this
13 fundamental right.
14 To test the current system against the
15 requirements just mentioned, I will make certain
16 findings of fact. This will not be an exhaustive
17 list that I read to you, it will be illustrative
18 only. A complete list will come later when the Court
19 files Findings of Fact and Conclusions of Law. But
20 to preserve your time, I will not go through them
21 all.
22 The findings that I wish to share with you this
23 morning are as follows: first, Texas, in its
24 creation and development of school district
25 boundaries, did not follow any rational or

1 articulated policy. Neither in their creation nor
2 in their perpetuation has an effort been made to
3 equalize local tax bases. There is no underlying
4 rationale in the district boundaries of many school
5 districts.
6 Two, historically, there has been a pattern of
7 a wide variation of taxable property wealth per pupil
8 among the state's school districts. These variations
9 have consistently worked against the children
10 attending low wealth districts by restricting the
11 ability of these districts to raise funds from local
12 sources.
13 Three, by agreement of the parties, this case
14 was tried using 1985-'86 data as the determinative
15 year.
16 Four, the current Texas public education system
17 is a State system which includes both state
18 appropriations and revenues from local ad valorem
19 taxes. The Texas system in 1985-'86 was funded at
20 approximately $11,000,000,000.00. 42 percent of
21 which was provided by the State and 49 percent of
22 which was provided by local district taxes. The
23 balance was furnished by other sources, including
24 money from the federal government. Of the total
25 expenditures for public education in 1985-'86, almost

1 $3,000,000,000.00 was expended by local districts
2 from their local tax bases for enrichment over and
3 above the state sponsored Foundation School Program.
4 Five, there are 1,063 school districts in
5 Texas. The wealthiest school district in Texas has
6 over $14,000,000.00 of taxable property wealth per
7 student. The poorest district has approximately
8 $20,000.00 of taxable wealth per student. The
9 1,000,000.00 Texas public school students in the
10 districts at the upper range of property wealth have
11 more than two and a half times as much property
12 wealth to support their schools as the 1,000,000.00
13 students in the bottom range of the districts; the
14 300,000 students in the lowest-wealth schools have
15 less than three percent of the State property value
16 to support their educational systems while the
17 300,000 students in the highest property wealth
18 districts have almost 25 percent.
19 Six, the unequal opportunity to raise funds is
20 exacerbated by the fact that children with the
21 greatest educational needs are heavily concentrated
22 in the State's poorest districts, because there is a
23 significantly higher percentage of families below the
24 poverty level in low wealth districts than in high
25 wealth districts.

1 Seven, in many instances, wealthy and poor
2 districts are to be found in the same county. As
3 examples, North Forest Independent School District, a
4 predominantly Black district in Harris County has
5 $67,000.00 of property value per student, while the
6 adjoining Houston Independent School District has
7 $348,000.00. And the largely Mexican-American
8 Edgewood district has $38,000.00 per student. Alamo
9 Heights, in the same county, has $570,000.00 per
10 student; Wilmer-Hutchins, a predominantly Black
11 district in Dallas County, has $97,000.00 per
12 student, while the Carrollton-Farmers Branch
13 district, which is at least partly in Dallas County,
14 has over $500,000.00 per student.
15 Eight, if every district in the state were
16 taxing the average of what all districts do in fact
17 tax, the combined amounts of state aid and local tax
18 revenue would vary widely across the wealth spectrum
19 under the State's current funding formulas. The
20 result would be, state and local revenue available
21 for the 150,000 students in the top range of wealth
22 would be more than two times as much as state and
23 local revenue available for the 150,000 students in
24 the bottom range of wealth. State and local revenue
25 available for the 600,000 students in the top range

1 of wealth would be more than one and a half times as
2 much as state and local revenue available for the
3 600,000 students in the bottom range.
4 Nine, money spent on facilities in Texas public
5 schools is raised exclusively from local school
6 district tax money. The Texas finance formulas do
7 not include the cost of facilities.
8 Ten, there is a direct positive relationship
9 between the amount of property wealth per student in
10 a district and the amount the district spends on
11 education. Generally speaking, this is not true in
12 every instance. But generally speaking, expenditures
13 in a district are a function of property wealth in
14 the district.
15 11, the 159 districts with market value of
16 taxable property less than $100,000.00 per student
17 spent on average $117.00 per student above the
18 Foundation School Program, while the 143 districts
19 with taxable values of more than $500,000.00 per
20 student spent on average $2,200.00 per student above
21 the Foundation School Program.
22 12, the state sponsored Foundation School
23 Program does not cover the real cost of education and
24 virtually all districts spend above the Foundation
25 School Program to enrich the educational program that

1 they have. And these expenditures are necessary to
2 provide students an adequate educational opportunity.
3 13, the average tax rate in the State's 100
4 poorest districts is 74 cents contrasted with 47
5 cents in the 100 wealthiest; in those same districts
6 the average expenditure per pupil in the poorest
7 districts was $2,900.00 as contrasted with the
8 $7,200.00 in the 100 wealthiest.
9 14, there are disparities in the levels of
10 expenditures per pupil between wealthy and poor
11 districts. The 200 school districts at the upper end
12 of the wealth spectrum spent over twice as much per
13 student in 1985-'86 as the 200 districts at the lower
14 end of the wealth spectrum, the 150,000 students at
15 the upper end of school district wealth had as much
16 as twice as much spent on their education as the
17 150,000 students at the lower end of school district
18 wealth, and the 600,000 students in the State's
19 wealthiest school districts had two-thirds more spent
20 on their education than the 600,000 students in the
21 State's poorest districts.
22 15, and lastly, the State does not adjust
23 Foundation School Program allotments to take into
24 account mandated increases in the minimum salary
25 schedule and the cost of expanding maximum class size

1 mandates to higher grades. These Program allotments
2 understate the true costs of meeting State
3 requirements; and there are no State funds, as I've
4 mentioned, provided for facilities. In each instance
5 this means that the necessary funds can only be
6 raised through local property taxes, and the tax
7 rates required to raise each $100.00 of such funds
8 vary widely across the wealth spectrum under the
9 State's current funding formulas.
10 So in addition to that, I will tell you that
11 the Court does not detect in the evidence or the law,
12 a compelling reason or objective that would justify
13 continuation of this discrimination.
14 It has been maintained by the state with
15 evidence and very able argument that there is not a
16 direct relation between educational expenditures and
17 learning by students as reflected on academic tests
18 such as the TEAMS tests used in this state. This
19 Court, however, does not sit -- although I'm
20 fascinated with it, I do not sit to resolve disputes
21 over educational theory, but to enforce the
22 requirements of our Constitution. If one district
23 has more access to funds than another district, the
24 wealthier one will have the best ability to fulfill
25 the needs of its students irregardless of what those

1 needs may be. The question of discrimination in
2 educational quality must be deemed to be an objective
3 one. And one that looks to what the state provides
4 its children and their school districts, and not what
5 the students or the districts are able to do, but
6 what they do, in fact receive.
7 So the facts that I have recited and found
8 indicate that our financial system, which includes
9 the combination of state and local funds as they
10 currently act in tandem, do not yet meet the
11 requirements of our Constitution.
12 So with all due respects to history and to the
13 Legislature for its recent generous and thoughtful
14 efforts to rectify this situation, by order of this
15 Court, which will follow, the current system will be
16 set aside.
17 Now then, my bailiff, Mr. Bowles, has copies of
18 what I've just read to you. If anybody would like a
19 copy, you may come forward. Wait just a minute. You
20 may come forward and get a copy from Mr. Bowles. I'm
21 going to excuse the lawyers to visit with you and/or
22 each other or the press, and/or the TV media. Let us
23 try to reconvene at again at 10:15. You may be
24 excused.
25 (Morning Recess)

1 THE COURT: Okay. In addition to what I've
2 just found and held, I will hold that the State's
3 system of financed public schools would be
4 unconstitutional on the rational basis theory also,
5 as well as the "not efficient" theory of the
6 Plaintiffs.
7 The Plaintiffs have argued certain state
8 constitutional provisions having to do with equal
9 taxation. The equal taxation law cited by the
10 Plaintiff-Intervenors and the Plaintiffs, I do not
11 think can be used to strike down the state system of
12 school finance. Because, as they allege, taxpayers
13 pay at different rates, at different levels of
14 opportunity. That was their theory, the Plaintiffs'
15 and the Plaintiff-Intervenors' theory. I think by
16 using those constitutional provisions, they are
17 trying to put a square into a hole. Another way of
18 putting that, I don't think you can get on that
19 streetcar and get to where you want to get, using
20 that law or that theory. So there may be other
21 constitutional provisions or interpretations that
22 would have the same effect or result, but I don't
23 think they can use that law to get them to that
24 place. What else do you think I need to decide?
25 MR. O'HANLON: Judge, holding the State's

1 system, the same objection that we've had all the way
2 through -- holding the State's system of education as
3 unconstitutional is not going to give us a whole lot
4 of guidance without telling us why. And what we need
5 is a decision on the formula structure and whether or
6 not we meet rational basis or compelling interests on
7 each one of the aspects of that formulaic structure.
8 If the problem is the tax base, let's just go out and
9 set it and say it. And let's determine whether or
10 not on appeal, that can be upheld. If something
11 else, then we need to know that.
12 MR. KAUFFMAN: Your Honor, I think that
13 probably the next step would be to, as you said, to
14 draw up some more detailed findings of fact and
15 conclusions of law. And to issue a declaratory
16 judgment and an injunction, with the Court's
17 immediate stay, an injunction to apply after a
18 certain period of months. We feel that the Court's
19 decision does outline the type of remedy that would
20 be appropriate. And that the Legislature would have
21 the guidance necessary. At the Court's instruction,
22 we can and we have in our proposals, outlined what we
23 felt to be the major shortcomings in the system. And
24 I tried to structure them in my findings to provide
25 guideposts for the Legislature to come forward with

1 any system that they think would meet the Court's
2 standards. We feel that those are sufficient to
3 allow the Legislature or any decision maker to see
4 what would be required to meet the Court's order. We
5 can, if the Court requests, submit further findings
6 or more detailed proposed findings to that effect.
7 We do feel we've outlined what the -- what are the
8 major shortcomings in the system and the types of
9 things that the Legislature would have to do to put
10 the system right, and make it constitutional.
11 MR. R. LUNA: If I could address Mr.
12 Kauffman's suggestion that after a certain number of
13 months, he said the Court enter an injunction. We
14 are, of course at this point in time, primarily
15 concerned with the immediacy of the impact of the
16 decision the Court just made. Many districts are
17 already having elections to sell bonds and those
18 bonds are in the process of being sold. I know a
19 number of phone calls had to be made immediately in
20 regard to those bond sales and the information that
21 is about to be put out on them. That will have a big
22 impact on the -- immediate impact on the bond market.
23 Therefore, if the Court can see its way to somehow
24 structure this, hopefully, so that we would have a
25 chance to go ahead and carry the case out on appeal

1 before it sets the present system aside, so that we
2 have no system, and nothing we can sell in the bond
3 market. We just hope the Court will take that into
4 consideration in addressing its final order.
5 MR. O'HANLON: I think it's silly to talk
6 about an injunction in this case. I think there's no
7 -- the Plaintiffs haven't made a showing of
8 entitlement to an injunction. Declaratory relief,
9 certainly. They haven't made any showing that
10 Legislature has acted irresponsibly in connection
11 with this, or that it will disobey the order of the
12 Court. So I'm not sure they've made any showing
13 whatsoever with respect to injunctive relief.
14 With respect to your first finding, once again,
15 back to the long colloquy that we've had about
16 district lines, we still feel that we've somehow been
17 sandbagged on the issue of district lines, and would
18 move the Court at this time to reopen the evidence,
19 and to bring those districts in here, and to explain
20 to the Court how those district lines came to be. If
21 we're going to be held in account to the standard of
22 having to explain their existence, I reurge that they
23 are necessary parties to -- because you're talking
24 about putting them out of existence, and that they be
25 given the right to come in here and explain how their

1 lines got to where they are.
2 THE COURT: Okay. I'll overrule your
3 request.
4 I need to put my mind on whether or not we need
5 more specific findings as to how the current state
6 sponsored system, that is the -- how the money is
7 allocated to the districts, how that falls short.
8 And then the other thing that I need to put my mind
9 to, it looks to me like this morning, is about this
10 injunction.
11 I think that the Plaintiffs and the
12 Plaintiff-Intervenors could be more specific about
13 how the Foundation School Program works and where its
14 shortcomings are, insofar as reaching what I have
15 indicated to be, what I think, are the constitutional
16 requirements of the state sponsored system. I think
17 you can do that. I don't think you've done that well
18 enough. I've been fussing at you all about that.
19 And gave you two chances to do that, and you haven't
20 done it right yet. You've gotten a little closer,
21 but you haven't done it right yet.
22 MR. RICHARDS: We're happy to go back to
23 the drawing board on that, Your Honor. We'll do so
24 forthwith.
25 THE COURT: All right.

1 MR. RICHARDS: And the issue of injunction
2 or declaratory relief, I suppose we have always been
3 in the posture of seeking alternative injunctive or
4 declaratory relief. And I assume whatever order the
5 Court enters, can reassure Mr. Luna's concerns about
6 not creating this flutter in the bond market. I
7 think, in any event, that can be preserved.
8 THE COURT: All right. Say that again now
9 for me, Mr. Richards.
10 MR. RICHARDS: Well, I assume -- from the
11 outset, we have said to the Court that we've sought
12 either injunctive and/or -- the declaratory relief
13 and/or injunctive relief, and that continues to be
14 our posture. And I suppose it would be appropriate
15 for us, at this point, to try to craft, if the Court
16 wants, further findings and a proposed order, if that
17 would be -- facilitate this discussion.
18 THE COURT: And what would you have this
19 injunction do?
20 MR. RICHARDS: Well, the only injunction
21 relief we have ever traced would be the injunction
22 relief that was issued -- as a model, was the ones
23 issued by the three judge court in Rodriguez, which
24 was issued and then stayed, as I recall, by its own
25 order for at least a year under its own terms. Maybe

1 it was two years, I don't remember the length of the
2 stay of it. I mean, it has always been our view if
3 the Court did decide to issue an injunctive relief,
4 that a stay would be reasonable and --
5 THE COURT: Let's ask Mr. Luna a question.
6 What would satisfy you about the issuance of these
7 bonds?
8 MR. R. LUNA: Well, of course, the use of
9 the word "injunction" at all, Your Honor, in the bond
10 market, I think is going to cause enormous concern.
11 I don't see that an injunction is going to
12 particularly help or hurt the Plaintiffs either way.
13 So first of all, we of course prefer not to have any
14 injunction. The Court's order is pretty clear in the
15 way you've already set it out. If, on the other
16 hand, the Court believes that there does need to be
17 some type of injunction issued, then obviously, we
18 need a significant period of time to get beyond the
19 marketing, the representations that have already been
20 made to the public.
21 THE COURT: What is a significant amount of
22 time?
23 MR. R. LUNA: Well, we would hope that
24 there would be at least a two year period, which is
25 what they had in the Rodriguez case, and hopefully

1 longer than that, if the Court would consider it.
2 MR. O'HANLON: I've got a real question
3 about the very power of the court to do this. In the
4 first place, what you're going to have to do is
5 enjoin the Legislature, who are not a party to this
6 lawsuit. And even if they were a party to the
7 lawsuit, you're ordering -- they're asking you to
8 order a co-equal branch of government to enter into a
9 legislative act of some kind. And I don't think you
10 can do that, even if they were a party to this
11 lawsuit. Obviously, the parties to this lawsuit are
12 -- administered the school finance system, but are
13 not responsible for its creation.
14 THE COURT: What did the three judge
15 district court in Rodriguez do? Did it have an
16 injunction?
17 MR. RICHARDS: They issued an injunction,
18 Your Honor, which said that it enjoined, as I recall,
19 the system of public school finance to the extent
20 that it made property and property wealth of local
21 districts a determinant in the funding. Stayed their
22 order -- Bob says for two years, I couldn't remember
23 whether it was one year or two years -- in an effort
24 to permit the Legislature to cure the problem.
25 THE COURT: But who was enjoined?

1 MR. RICHARDS: Oh, I'm sorry. I guess it
2 was -- in that instance, I guess I'm sorry to say,
3 I'm not informed, I'd have to go back. I have the
4 order back at the office, but I don't know the exact
5 identity of the defendants in that case. It was not
6 the Legislature, obviously. And no one -- I don't
7 think an injunction running against the Legislature
8 is what anyone has asked for. The Legislature either
9 responds or doesn't respond, that's their privilege.
10 The injunction runs against the appropriate state
11 officials, but I do not --
12 THE COURT: Such as the distributor of
13 money?
14 MR. RICHARDS: Seemed to be the distributor
15 of money --
16 MR. O'HANLON: What do you mean, enjoin
17 them not to distribute funds?
18 THE COURT: I don't know, I'm just talking,
19 just thinking, listening.
20 MR. O'HANLON: The only relief that they
21 want is to not distribute funds pursuant to an
22 unconstitutional system. If you want to do that,
23 you've really nailed the poor districts, if they run
24 and file an injunction.
25 THE COURT: Well...

1 MR. KAUFFMAN: Your Honor, these things --
2 we're not treading on new ground here, now. Cities
3 and states have been enjoined by both state courts
4 and federal courts for years. The way it's done is,
5 you say, "If you don't fix it, eventually you're
6 really going to get it. You're not going to be able
7 to vote, you're not going to be able to pay for
8 schools, or whatever." And we have as Defendants in
9 this case, Mr. Bullock is a Defendant, and Mr. Kirby
10 is a Defendant, Mr. White was a Defendant, we might
11 have to change parties there. And we have --
12 THE COURT: I'm sure Mr. O'Hanlon is going
13 to be real agreeable to you changing parties now.
14 MR. KAUFFMAN: I don't think he'll mind.
15 But as I understand these structures -- and
16 again, this has also happened in many other states,
17 the bond markets have not fallen in any of these
18 other states, children have continued to be educated.
19 And the way these injunctions have been framed in
20 other states, is to enjoin the state education
21 officials from further funding of the school finance
22 system as it is now constituted, after a certain
23 amount of time. And the fact that they're already
24 throwing around periods like two years, leads me to
25 feel that a time deadline in an injunction, something

1 more in the effect of three to six months would be
2 helpful, in order to keep the issue on the front
3 burner, to make sure that it is not delayed for --
4 until the -- day before the end of the second year,
5 is what I'm afraid of.
6 So I think that this Court would have the
7 authority to say that after six months, Mr. Bullock,
8 and Mr. Kirby, and Mr. Clements could not continue to
9 fund the school finance formulas under their present
10 structure. And unless the system is brought to
11 constitutional standards. And I do not think that
12 that would cause any irreparable problems; it hasn't
13 in the past. And that's the way these things are
14 structured.
15 THE COURT: All right. Let's take a look
16 at the real order in the three judge court in
17 Rodriguez. Let's take a look at that.
18 MR. O'HANLON: Six months is a little -- I
19 mean, this case is going to be on appeal for a year
20 and a half. It's -- I mean, by the time we go
21 through the court of appeals and up to the Supreme
22 Court, we're talking about a year and a half, I
23 think, anyway. I think anyway we cut it, given the
24 length of this record and the amount of study and
25 whatnot, that is going to have to go into it. So

1 we're really talking about the next general session
2 of the Legislature.
3 THE COURT: Let's do this, let's take a
4 look at the -- excuse me, sir. Yes, sir?
5 MR. R. LUNA: I was just going to suggest,
6 Judge -- I'm sitting here and doing some quick
7 calculations. If we went the two years, as they did
8 in Rodriguez, that would put us to roughly the end of
9 April of '89. I can see some benefit to that, in
10 that not only do we have this legislative session, we
11 have one more that would have picked up. In
12 addition, with a little bit of running room, it might
13 be the state's economy would have a chance to recover
14 a little bit, and that could make a significant
15 difference. And have the Legislature review this
16 problem. School begins on September 1 of that year.
17 If we've got to pick out a date, maybe we could shoot
18 at the beginning of school, September 1, 1989, if
19 we've got to have a date.
20 MR. TURNER: Your Honor, I might add that
21 it seems to me that if I'm reading your findings --
22 your statement correctly, that the heart of the issue
23 is the variation in wealth from district to district,
24 and the ability of those districts to expend money
25 that they raised from that property wealth. So it

1 could be, if I'm reading this correctly, that what
2 we're saying here is that the -- ultimately, the
3 Legislature is going to have to redistrict, under
4 your ruling, would have to redistrict school
5 districts in this state. If that is the direction
6 that this matter takes, it seems that you clearly
7 need a full legislative session to give the
8 Legislature the opportunity to do that.
9 And I'm not sure that the Legislature, if faced
10 with that requirement, I'm not sure that they
11 wouldn't even desire to appoint or create in statute
12 some mechanism whereby the matter could be studied
13 over an interim, or even a committee of the
14 Legislature created that has the authority to do this
15 and submit a plan back to the Legislature.
16 So it seems like that the far reaching nature
17 of this decision would dictate that a considerable
18 amount of time would be necessary to orderly
19 transcend into this new system that would be required
20 under this order. And I think that there was ample
21 evidence brought out in the case, I think before the
22 Court, about the potential disruptive effect and
23 adverse impact that change has, generally, on
24 education when it occurs, as it did under House Bill
25 72, generally. And therefore, it would seem to me,

1 in keeping with the Court's interest in trying to
2 enhance education, to ensure that any transition that
3 occurs that involves dramatic changes in district
4 boundary lines, could occur in this state over a
5 period of time, so that there would not be --and so
6 any adverse impact over and beyond which would be
7 absolutely necessary to make that transition. So, I
8 would think that at a minimum, a period of time
9 through the next regular session of the Legislature
10 and through a period of time when acts would
11 normally, in their normal course, become effective.
12 So a period of at least -- say, three months past the
13 legislative session that convenes in 1989 would seem
14 to be a very reasonable suggestion regarding
15 timetables, if this Court deems some kind of
16 injunctive order necessary.
17 THE COURT: It would be September of '89?
18 MR. TURNER: That's right.
19 THE COURT: But what would need to be
20 accomplished by September of '89?
21 MR. TURNER: Well, if this Court is
22 declaring that our current system, which comprises of
23 various district boundary lines must be restructured,
24 then I think that's what has got to be done.
25 THE COURT: Okay, but that would be done --

1 either the Legislature redistricts, and/or changes
2 its appropriation formulas, that would be done in the
3 spring and early summer of '89. And so, just several
4 months after that, you know, assuming this goes up on
5 appeal and I'm affirmed, and the Legislature convenes
6 and does this, several months after that, the new
7 system goes into effect.
8 MR. TURNER: Well, what I would --
9 THE COURT: It would be like this coming
10 September, the new system goes into effect and we
11 find out what the new system is a month from now.
12 MR. O'HANLON: Can't do it.
13 MR. TURNER: No, what I'm suggesting is
14 that the Legislature be given the opportunity for
15 that period of time to come up with the change, the
16 legislative act that conforms with what the Court
17 calls and order is, and that that act be permitted to
18 be phased-in in an orderly manner.
19 THE COURT: Starting --
20 MR. TURNER: Starting in September of 1989.
21 And I would submit --
22 THE COURT: So you're looking at maybe
23 three or four years.
24 MR. TURNER: That's correct.
25 MR. DEATHERAGE: Your Honor, not being --

1 when something becomes effective, I'm not clear what
2 the Plaintiffs are asking this Court to enjoin some
3 Defendants from doing. That's not clear to me, until
4 I know what someone is ordered not to do. I can't
5 deal with when that should be effective or how long
6 it should be stayed.
7 THE COURT: Okay. I think that's an
8 appropriate observation.
9 Yes, sir?
10 MR. E. LUNA: I was going to ask one
11 question. In view of your finding on there's no
12 rational basis for the boundary lines, is the Court
13 holding that these boundary lines don't meet the
14 Constitution, or is that simply an observation? It's
15 not clear to me whether the Court is abolishing the
16 boundary lines, or whether the Court is simply
17 observing that there may be no rational basis. And I
18 don't think anybody put on evidence on those
19 boundaries; there was no pleadings on the boundaries.
20 And the Plaintiffs have announced to the Court that
21 they were not seeking consolidation. So, I wonder --
22 it seems to me that the Court may not be saying that
23 the boundary lines are being held illegal or
24 unconstitutional. Could you comment on that?
25 THE COURT: Let's see -- well, it's not so

1 much the boundary lines, although I think there is
2 evidence about where the boundary lines are in every
3 district in this state, in evidence. I guess
4 boundary lines is another way of saying that, or that
5 particular finding is another way of saying or
6 illustrating that the lines of the school districts
7 or the school districts -- the form of the school
8 districts took shape, for most of them, very, very
9 long ago. And without care or attention, even then,
10 that there would be an equal tax base for all school
11 districts. And over the years, if there was a
12 disparity then, it would certainly continue and it
13 exists today. And because there is a disparity of
14 wealth within those lines, there is a disparity of
15 opportunity for the local school districts to get
16 their hands on money to spend as they see fit for the
17 needs of their children.
18 MR. RICHARDS: Your Honor, I think -- I'm
19 not sure I think what Mr. Deatherage (sic) says is
20 accurate, to the extent that he's asked to be
21 somewhat commenting on -- to some degree something
22 that's not before you. I think if the Court wishes
23 us to try to draft what we would propose as an order,
24 either in the form of declaratory or injunctive
25 relief, at least have that before the Court before

1 the parties are commenting on it. I would suggest it
2 a way of proceeding at this stage, because I think
3 it's --
4 MR. O'HANLON: The problem that I see with
5 it is, is with an injunction, is the only -- given
6 the parties to this lawsuit --
7 MR. RICHARDS: Wait until you see -- I
8 mean, what I'm trying to say is you can't -- just
9 because I let you have something to shoot at, rather
10 than just shooting it in the air, I was saying that
11 we ought to try to come up with something for you to
12 comment on, is what I'm saying.
13 MR. O'HANLON: We can talk about what the
14 only injunction is -- I mean, it's obvious. The only
15 injunction that you can enter is to enjoin the
16 expenditure of funds until you've got a
17 constitutional system. The people that are in this
18 lawsuit, the State Defendants that are in this
19 lawsuit, only administer funds, they don't write the
20 formulas. So all you can do -- I mean, the only
21 thing you can do is to tell them not to spend the
22 money. That's the only injunction that you can
23 enter, if you're going to enter an injunction. Now,
24 that's not going to do anybody any good. That's the
25 point. I mean, that's not going to do anybody any

1 good at all.

2 THE COURT: Well, let's let them work it

3 out right now.

4 All right. The Plaintiffs owe me, yet, what I

5 would consider to be appropriate findings, especially

6 in regard to how the current state system is

7 inappropriate. That is, how the provisions of the

8 House Bill 72 fall short and don't make up for the

9 disparities of wealth. I think you need to be very

10 specific. You know, maybe go through that -- through

11 that law, sort of line by line.

12 In addition to that, I would want in the

13 Findings of Fact very specific provisions as to what

14 the state now does in regard to mandating certain

15 things of the local districts. You touch on it in

16 your Findings, but I want -- seems to me like if you

17 look through House Bill 72, you could probably come

18 up with a list of maybe 15 pages of the fact that --

19 to illustrate that there is not as much local control

20 as people talk about. I want 15 pages of it, if

21 that's what it takes.

22 One last comment. There are two things that

23 are worrisome to me -- well, let me make one comment,

24 and then let me tell you what is worrisome to me.

25 I carefully chose my words in my handout to

1 indicate that one of the requirements of the
2 fundamental right is that there be an equal
3 opportunity to access of funds. I carefully chose
4 those words to say that one of the rights inherent in
5 that fundamental right is equal access to funds. I'm
6 not sure, although Mr. O'Hanlon again, could argue --
7 he may argue otherwise, I'm not really sure that that
8 fundamental right does not also include a minimum
9 educational effort on the part of the state. That is
10 to say, I'm not sure that that -- I would reserve
11 judgment on just how paltry the state can be about
12 providing money and/or requirements for the education
13 of our citizens. I would be hard pressed -- I don't
14 know how the appellate courts would look at it, but I
15 would be hard pressed to say that the state is doing
16 what the fundamental right requires, that they were
17 only requiring and only providing a sixth-grade
18 education for everybody. That might be a violation
19 of all of our citizens' fundamental rights that
20 they're only getting that little education.
21 So, I have carefully worded my statement and
22 comments not to exclude that possibility. And I
23 think the Legislature needs to take that into
24 consideration.
25 No, sir. Thank you, anyway.

1 Next is, I suppose that there exists -- there's
2 a chance of the possibility that the Legislature
3 could try to level down. That is, just put a cap on
4 spending. If that is done, the Legislature would be
5 running the risk of running afoul from leveling too
6 far down, and therefore violating the fundamental
7 right to have an adequate education. Everybody --
8 does that make sense?
9 MR. RICHARDS: Yes, Your Honor.
10 MR. O'HANLON: Yes.
11 THE COURT: So, that is not in this case.
12 But that leaves in the background for the Legislature
13 to take into consideration, if they try to level
14 down. They may level down to a place where they
15 have, in fact, deprived everyone of -- everybody, of
16 a fundamental education.
17 So my advice would be, don't level down.
18 MR. O'HANLON: Your Honor, in regards to
19 that, just briefly, we're going to ask the Court for
20 supplemental findings with respect to the adequacy of
21 the program, itself. I think there is substantial
22 evidence in the case about that.
23 THE COURT: Okay. I'll be glad to look at
24 those.
25 What else can I do to you all over here today?

1 MR. O'HANLON: I think you've managed to do
2 it.
3 MR. E. LUNA: I think now, we've just got
4 to worry about appealing.
5 THE COURT: Okay. How much time do you all
6 need over here?
7 MR. RICHARDS: A week. Would that --
8 MR. KAUFFMAN: I think a week, Your Honor.
9 MR. RICHARDS: Next Wednesday morning,
10 would that be all right?
11 THE COURT: I'll be here.
12 MR. O'HANLON: Could we move it to
13 Thursday? Mr. Luna and I are going to be in trial in
14 Dallas starting next Monday.
15 THE COURT: Okay. That's good.
16 MR. RICHARDS: I just read I'm in trial in
17 Dallas too, so Thursday would probably be good.
18 THE COURT: Okay.
19 MR. DEATHERAGE: Do I understand that next
20 Thursday the Plaintiffs are submitting a requested
21 order and specific findings, did I understand that?
22 THE COURT: That's what I understand.
23 MR. E. LUNA: Will they just be due to be
24 filed then, or will they be presented then?
25 THE COURT: Well, don't you think that --

1 let's distribute them on Thursday. Have them ready
2 to distribute, give them time to take a look. Maybe
3 we can have a hearing early the next week, like the
4 first Monday. How does that suit your trial schedule
5 there, Mr. O'Hanlon?
6 MR. O'HANLON: Monday a week from that --
7 would that be like the 11th?
8 THE COURT: The first of May.
9 MR. R. LUNA: First of May.
10 THE COURT: I'm sorry, it's the 11th of
11 May.
12 MR. O'HANLON: I can be ready by the 11th,
13 Judge.
14 MR. RICHARDS: That would be fine.
15 THE COURT: So we can have a hearing on the
16 11th of May, at 9:00? Okay.
17 Thursday, you're going to distribute those?
18 MR. KAUFFMAN: Yes, sir.
19 THE COURT: You could send them off to
20 Dallas, but these Dallas boys, they may not get them
21 until Monday morning, if they're lucky.
22 MR. RICHARDS: We'll Federal Express them
23 up, or something.
24 MR. GRAY: We'll Federal Express a set to
25 Mr. Luna and if they could distribute them, or do you

1 want us to Federal Express them to each of them?
2 MR. R. LUNA: Each of us.
3 MR. DEATHERAGE: If I don't get them, I
4 don't want to have to argue with Earl, I want to
5 argue with you.
6 MR. GRAY: Fair enough.
7 MR. KAUFFMAN: Better choice, too, I think.
8 THE COURT: All right. Would it be better
9 Tuesday?
10 MR. R. LUNA: We have another trial
11 beginning Tuesday, so Monday would be best for us.
12 THE COURT: Okay. I just want you all to
13 have enough time to get here Monday, so we can get
14 something done.
15 Okay. You all seem satisfied, so I will be,
16 too.
17 Okay. Thank you all very much. I'll see you
18 in a week or so.
19 MR. KAUFFMAN: Thank you, Your Honor.
20
21
22 (Proceedings recessed
23 (until May 22, 1987.
24
25

3-87-190-CV

CAUSE NO. 362,516

C 8353

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL	>	IN THE 250TH JUDICIAL
VS.	>	DISTRICT COURT OF
WILLIAM KIRBY, ET AL	>	TRAVIS COUNTY, TEXAS

FILED
IN SUPREME COURT
OF TEXAS

JUN 21 1989

JOHN T. ADAMS, Clerk
By _____ Deputy

STATEMENT OF FACTS

VOLUME XLV OF XLVI

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SUSAN R. BOLL

TAKEN MAY 22, 1987

MONICA ROSS WEIDMANN
Official Court Reporter
250th Judicial District Court

Travis County Courthouse • Austin, Texas 78701

1 CAUSE NO. 362, 516

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3 EDGEWOOD INDEPENDENT SCHOOL > IN THE 250TH JUDICIAL
DISTRICT, ET AL >
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>
5 VS. > DISTRICT COURT OF
>
6 >
>
7 WILLIAM KIRBY, ET AL > TRAVIS COUNTY, TEXAS

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8 STATEMENT OF FACTS

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10 BEFORE THE HONORABLE HARLEY CLARK, JUDGE PRESIDING

11

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16

17 BE IT REMEMBERED that on this the 22nd day of May,
18 1987, the foregoing entitled and numbered cause came on
19 for trial before the said Honorable Court, Honorable
20 Harley Clark, Judge Presiding, whereupon the following
21 proceedings were had, to-wit:

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1 MAY 22, 1987

2 THE COURT: What do you all want to do this
3 morning?

4 MR. KAUFFMAN: Well, Your Honor, I think
5 there were three or four things on the table. We
6 have filed Findings of Fact and Conclusions of Law,
7 which the Court directed us to do and we're certainly
8 ready to respond to any questions about that, if the
9 Court has any.

10 We also have filed a proposed Declaratory and
11 Injunctive Judgment and would be glad to give you our
12 support for that or to respond to any questions on
13 that. There are one or two typographical errors on
14 that that we can cure, but that's about the only
15 problem with it.

16 And we are prepared to put on our attorneys'
17 fees today. We have exhibits and the argument. We
18 have a witness, if necessary, that can come in right
19 after lunch, but I think we can do it just by
20 argument and stipulation on the attorneys' fees for
21 the Plaintiffs and Plaintiff-Intervenors. So we can
22 take those in any order that the Court wants.

23 THE COURT: Let's talk about what sort of
24 relief you are looking for.

25 MR. KAUFFMAN: Your Honor, we have filed a

1 proposed Declaratory Judgment and an Injunction. The
2 Declaratory Judgment, which has been agreed upon by
3 the Plaintiffs and Plaintiffs-Intervenors and follows
4 the Court's Order, finds the Texas system of school
5 finance unconstitutional as a denial of equal
6 protection, Article I, Section 3 and Article I,
7 Section 3(a), and also the Efficiency Clause of
8 Article VII, Section 1 of the Texas Constitution. It
9 also enjoins the present school finance system, but
10 delays that for two years, which would allow the
11 state time to respond to the judgment of the Court
12 and hopefully, to come up with and submit a
13 constitutional system of school finance.
14 During that two year period, the state will be
15 able to study the problem, design a solution and
16 implement it within the two years. And that's why we
17 have followed the two-year delay. That is the
18 procedure that was followed by the three judge court
19 in the Rodriguez case, and it seems the best one to
20 apply here.
21 THE COURT: Two years from today? Two
22 years from now?
23 MR. KAUFFMAN: Yeah, from the signing of
24 the judgment, which would put us at the end of May,
25 1989, which is of course at the end of the session,

1 the next legislative session, so to give the
2 Legislature and the State two years to study the
3 problem, and then a session to deal with the problem.
4 It would be our hope that all of the Defendants, the
5 State and the school districts, would be on notice,
6 of course, of the Court's finding of
7 unconstitutionality and would begin to react and
8 respond to that finding. So that at the end of the
9 two years, we would not run into problems of saying
10 you can't do it all at once. It would be our hope
11 that at the end of that two year period, the State
12 could design a system which could be implemented
13 immediately, and that by the '89-'90 school year, we
14 would have real relief for the children of the state.
15 And that's the thrust of our judgment.
16 THE COURT: What do you all say over here?
17 MR. O'HANLON: First of all, with respect
18 to the form of judgment, Your Honor. The form of
19 judgment, we're stuck in the same problem, with
20 respect to the Findings of Fact, the Conclusions of
21 Law, the whole thing. The Court has said on numerous
22 occasions that we don't want to be murky here. And
23 this judgment continues to be so, with respect to if
24 you're going to find it unconstitutional, we need to
25 know exactly why. And it doesn't say so, once again.

1 So we have no guidance with respect to how we're
2 going to proceed.
3 We need to know whether the formula allocations
4 are proper. And when you get right down to it,
5 whether the additional funds with respect to comp.
6 ed., to bilingual, and all of this other kind of
7 stuff, are unconstitutional. And none of this has
8 been addressed. The system -- to find the system
9 unconstitutional doesn't provide any guidance at all.
10 Because I think, as the evidence the Court has heard
11 indicates, there's a lot of good aspects with respect
12 to the system. So we need to know specifically why.
13 And this judgment, this form of judgment, doesn't say
14 anything with respect to that, other than it finds it
15 unconstitutional.
16 Now, with respect to the injunction. The
17 injunction isn't going to do anybody any good at all.
18 And the reason is simple, they're asking the Defense
19 to enjoin the Defendants in this case to design and
20 implement a system. Well, the Court knows full well
21 that the Defendants in this case, the agency, the
22 comptroller, the governor, have no authority to
23 implement anything with respect to the school finance
24 system. That's the sole province of the Texas
25 Legislature.

1 Now, with respect to how it's going to work, if
2 the Court has held -- once it becomes final, if it's
3 unconstitutional, they can't expend funds pursuant to
4 an unconstitutional system, it can't be done. So
5 it's going to take care of itself, if the system is
6 finally held to be unconstitutional.
7 Mr. Kauffman's dates are also unrealistic with
8 respect to two years. I'm sure the Court is well
9 aware that this case is going to be appealed. It's
10 going to take awhile for this case to be heard on
11 appeal. The record has got to be prepared, the
12 appellate courts are going to take a long time
13 mulling over the specific fact findings and things of
14 that nature. And to say, to jump up and say two
15 years from now seems like a long time. The two years
16 from the time that this judgment is final, might be a
17 better goal. But I mean, it's going to be a year and
18 a half before this judgment is final. And that
19 leaves us with a six month period.
20 With respect to the findings of fact, and we
21 can deal with those on the basis, these are
22 subsidiary. Most of what the Plaintiffs have put in
23 there are subsidiary findings of fact. If the
24 problem -- and as I read the Court's letter, the
25 problem with the school finance system is not the

1 formulas, is not the -- those kinds of things, the
2 allocations, but with the school district lines, why
3 don't we be honest and come out and say that. And
4 say, "Here is the problem. The school finance system
5 is okay, except it doesn't fully compensate for the
6 wealth differences in the district." And we can find
7 out on a simple basis whether that's constitutional
8 or not. As I understand it, that's the real
9 underlying basis for the Court's ruling. So what all
10 of these other subsidiary fact findings are
11 unnecessary. And they're going to complicate this
12 matter and they're going to tie us up into little
13 minutia. And we're going to be in court, like
14 California, like New Jersey, and we're never going to
15 get out of it.
16 So if the issue is purely and simply -- and I
17 think that it is, that the high diffusion of wealth
18 in this state and the big differences between
19 districts, why don't we just come out and say it, and
20 quit trying to find other -- solace in other reasons,
21 if that's the case, and we'll find out whether it's
22 constitutional or not. And if it isn't, then that
23 will be the issue that will have to be addressed, not
24 all of the other kinds of formula distributions and
25 things of that nature.

1 With respect to attorneys' fees, as once again,
2 we object to reopening. We are not going to allow,
3 should the Court allow us to play, I don't think
4 we're -- I think sovereign immunity dictates that you
5 can't get attorneys' fees against the State. But if
6 that's a viable issue at this point, then we're not
7 going to allow it to go in by affidavit. The Rules
8 of Procedure in Texas allow for confrontation of the
9 witnesses, the requirements with respect to
10 attorneys' fees, the required contemporaneous time
11 records. We don't have any of that; it has not been
12 given to us. In fact, the whole information with
13 respect to attorneys' fees was just presented to me
14 this morning. We have serious issues with respect to
15 who is entitled to attorneys' fees, going back to the
16 districts that put up money for the filing of this
17 lawsuit. We maintain the position that we have from
18 the beginning of this lawsuit, that the school
19 districts, themselves, have no constitutional rights.
20 And that under doctrines of equitable estoppel,
21 they're not even entitled to be in this lawsuit. And
22 to say that they are now entitled to fees, where they
23 volunteered to get into a lawsuit where they have no
24 constitutional rights, we have some great
25 difficulties with that.

1 And that if you allow the Plaintiffs to reopen,
2 because we still feel that we were surprised with
3 respect to school district boundaries. If you allow
4 them to reopen this case with respect to that, we're
5 going to ask the Court to reopen the evidence with
6 respect to district boundaries, so that we can
7 demonstrate to the Court the rational basis that
8 existed at the time that they were created and/or
9 modified of the school district boundaries in the
10 state.
11 MR. TURNER: Your Honor, with regard to the
12 timing issue, we agree with what Mr. O'Hanlon has
13 said, that two years from the entry of a final order
14 or the issuance of the final opinion and of the
15 highest court to which this case is appealed, is the
16 more appropriate wording. And we also would suggest
17 to the Court that there should be some language in
18 this opinion that gives the Legislature some
19 guidelines, if this decision is upheld, as to a
20 method whereby they can phase in the statute that
21 they would have to enact to bring the system into
22 compliance with your order.
23 In other words, if we have a situation where
24 the Legislature meets, let's say in regular session
25 in 1989, passes a bill, it's effective -- say it's a

1 90 day bill, it's effective in the first part of
2 September of 1989. It would seem that the
3 Legislature should have the ability or flexibility to
4 create a statute or pass a statute that would then
5 allow the phasing in of these changes that are going
6 to have to be put in place, to move some of these
7 school districts from spending $4,000.00 plus per
8 student, back to whatever the average is going to end
9 up being, say $2,800,00, $2,900.00, $3,000.00,
10 whatever it ends up. And then, of course, obviously
11 no problem for those who are spending less to get
12 more money by whatever mechanism they come up with.
13 But to cause that to happen at the beginning of
14 the school year in 1989, all at once, I think would
15 create such turmoil and such disruption, that it
16 would not be consistent with the intent of the Court,
17 nor even the language of the Plaintiffs' draft of
18 their order, which suggests that there should be an
19 orderly transition from the unconstitutional system
20 to the constitutional system.
21 And I think that issue needs to be addressed
22 now, because it's going to be apparent to anyone who
23 is trying to deal with practical implementation of
24 this decision, that it's going to take some kind of
25 phase-in period. I mean, even House Bill 72, which

1 shifted massive amounts of money from the richer
2 districts to the poorer districts, and infused
3 additional state aid, had provisions in it that
4 allowed a portion of that money to be taken away from
5 the richer districts in the first year, and then
6 almost an equal amount to be taken away from them in
7 the second year.
8 THE COURT: Okay, stop. You would suggest
9 that the injunction run from a certain -- would begin
10 to run a certain period after this judgment became
11 completely final, so to speak, correct?
12 MR. TURNER: That's correct.
13 THE COURT: And that would include how much
14 time -- we would need to have a session, enough time
15 for a session, right?
16 MR. TURNER: That's correct.
17 THE COURT: Okay.
18 MR. TURNER: And then after the Legislature
19 passes the bill, I'm suggesting that your order
20 should tell them that they have the leeway, when they
21 pass that bill, to implement that system over a
22 period of years, recognizing historically, House Bill
23 72 was three years in implementation of the changes
24 in finance. And we've got an even more massive
25 problem and readjustment that I think would have to

1 take place here. So, to get to where we have a
2 system that meets your order, and to do it orderly,
3 without massive disruption --
4 THE COURT: Okay.
5 MR. TURNER: -- is going to take some time.
6 THE COURT: What do you say to that? The
7 first idea is that the injunction would run some
8 period of time after the appellate courts are through
9 with it. What do you say to that?
10 MR. GRAY: Your Honor, we have specifically
11 built in the Court continuing jurisdiction and having
12 the ability to come in and enter whatever orders in
13 the future may be appropriate and proper. We don't
14 want this Court to assume that there is going to be a
15 two-year hiatus in the appeal process. The process,
16 quite possibly, could go much faster than that. And
17 because of that, we don't want to be in a situation
18 where the effect of the -- of this order is delayed
19 any more than necessary. We do want an orderly
20 transition and we're not trying to disrupt the entire
21 system on a whim. Or right now --
22 THE COURT: Show me the continuing
23 language.
24 MR. GRAY: The continuing language is on
25 Page 7, the paragraph just above the title

1 "Miscellaneous."

2 Our thinking on that, Your Honor, is one, we
3 think the State would be quite foolish to bury its
4 head in the sand during the appeal process. It's
5 clear that there are serious problems with this
6 system. And the time during the appeal process ought
7 to be used productively to study how to remedy the
8 system. But in any event, by Mr. O'Hanlon's own
9 statements, he would anticipate that the appeal would
10 be no more than a year and a half, which has this
11 judgment becoming final, for all purposes, prior to
12 the beginning of the next legislative session. And
13 we don't want to lose an entire legislative session
14 with a final judgment, but no impetus and no Court
15 pressure, whatsoever, for the Legislature to deal
16 with this problem, by putting in the language that
17 the Court retains jurisdiction to deal with the
18 spirit and the intent of this judgment. We have
19 specifically included in the spirit and the intent of
20 the judgment, an orderly transition. And that, in
21 our judgment, would contemplate that if the State and
22 the Defendant-Intervenor districts were able to come
23 forward and show the Court, with substantial
24 evidence, that an orderly transition just cannot
25 happen within this two year period, then the Court is

1 perfectly empowered to further stay the force of its
2 action. If however, though, there is no such
3 compelling reason for further delays, we don't want
4 the judgment, on its face, to delay the inevitable
5 unnecessarily.
6 MR. TURNER: Well, Your Honor, I think that
7 what Mr. Gray is saying, is that he appreciates the
8 fact that there is going to be time required to
9 accomplish an orderly transition to meet the
10 standards that you've set forth. And about what he's
11 saying, is he just doesn't want you to say it up
12 front. He would rather for you to kind of hold your
13 cards and put the pressure on. And I'm suggesting to
14 the Court that we all know enough about the
15 complexity of school finance, as a result of this
16 trial, and we know enough about historically, through
17 House Bill 72's implementation over three years, the
18 kind of changes that take place and how it does take
19 time and how there are hard adjustments. And we know
20 the political realities of that.
21 And I think it ought to be in the interest of
22 the Plaintiffs, themselves, and I'm sure it would
23 likely be in the interest of the Court, to set forth
24 an order that is, as best it can be, acceptable to
25 those political leaders who are going to be charged

1 with the task, if this is upheld, of putting this
2 into place. And to suggest to the Court that what
3 the Court needs to do is take a very active position
4 and say two years from the date of my order, knowing
5 that it might be a year and a half before it's
6 appealed, before the appeal is final. And leave the
7 Legislature six months in there to grapple around
8 with it, and then with the expectation that they've
9 got to put the system in place immediately, and
10 whatever massive changes that are going to be there
11 are going to have to be done. And to suggest that
12 your order ought to allow that kind of rhetoric to be
13 discussed, about being the implication of this case,
14 I think is counter and counter-productive to the
15 Plaintiffs' own interest.
16 And I think that this Court has enough feel for
17 the legislative process of school finance to
18 recognize that what we're suggesting here is true.
19 And to be realistic and practical and to cause this
20 order to be acceptable in the minds of those who are
21 going to have to implement it, I think it's in the
22 best interest of the Plaintiffs that this two years
23 from the final judgment, final appeal, and then to
24 allow the Legislature, say three years, the effective
25 date of their act, to phase in over three years, so

1 that at the end of three years, then the Court is
2 going to look and see if the system that is there and
3 in place is working.
4 Or in the alternative, you can actually look at
5 the law, at the bill that passed, say, if they pass a
6 bill in the regular session of '89, it's effective in
7 September, I think the Plaintiffs could come in here
8 and say, "Judge, you gave them the right to implement
9 a system over three years and pass a bill that will
10 be phased in over three years, but we don't think
11 it's going to result in a constitutional system. And
12 this is the law, and we challenge it again." So
13 they're not going to be put off by a phase in.
14 THE COURT: That's about five years, I'm
15 afraid Mr. Richards won't be here.
16 MR. RICHARDS: I was already thinking of
17 leaving already.
18 THE COURT: In addition to that, I face
19 re-election between now and then, I may not be here.
20 MR. O'HANLON: Judge, the problem that we
21 see with respect to this, is that this whole thing
22 with respect to continuing jurisdiction, A, it gives
23 us some great problems of whether or not the judgment
24 is final.
25 MR. RICHARDS: The Declaratory Judgment Act

1 provides for that.
2 MR. O'HANLON: Second, if you declared this
3 statute unconstitutional, fine. Of what need is
4 there for continuing jurisdiction, if this set of
5 statutes is unconstitutional?
6 THE COURT: I've already crossed the
7 bridge. I'm going to keep -- I'm going to keep
8 continuing jurisdiction. I'm just not going to have
9 all of you all put in as much work as you have, and
10 not make provision if it's legal and feasible for
11 this Court not to continue with the jurisdiction of
12 this case. So I've crossed that bridge. We need to
13 argue about something else.
14 MR. O'HANLON: With respect to the
15 injunction, then, what -- again, the only thing that
16 you -- how do you enforce an injunction? You can
17 enforce an injunction through contempt. Of what
18 control do the Defendants in this lawsuit have with
19 respect to the school finance system? That's
20 something that has to be designed and implemented by
21 the Legislature, and they're not parties to this
22 lawsuit. So I'm not sure where we get with respect
23 to that.
24 THE COURT: Okay. Yes, sir?
25 MR. HUTCHISON: Your Honor, my name is Ray

1 Hutchison, with Hutchison, Price, Boyle & Brooks in
2 Dallas. We represent the Irving Independent School
3 District. This is my first appearance in the case,
4 personally, although the firm has been involved.
5 With the Court's permission, I would like to inject a
6 new ingredient into the considerations. And that is
7 that it is a neat and important idea, of course, to
8 discuss what we're going to do two and three years
9 from now. There is a very important question, what
10 do we do tomorrow, when the system has been
11 pronounced to be -- and will, consistent with the
12 Court's previous written materials, will be declared
13 unconstitutional. In that regard, we, on behalf of
14 the Irving Independent School District, have filed a
15 motion to enter an interim order that attempts to
16 address tomorrow, rather than three years from now or
17 four years or two years, the -- at an appropriate
18 time, and Your Honor, you may not think that this is
19 the appropriate time, we would hope that we could be
20 heard on that motion.
21 THE COURT: Uh-huh.
22 MR. HUTCHISON: Because respectfully, it's
23 many times easy to forget that school districts, like
24 cities and other public bodies, don't do business in
25 a vacuum, they do business in a business world. And

1 they do contracting, they do debt issuance and so
2 forth. And if there is any cloud whatsoever on their
3 legality, as the Court, of course, recognized in its
4 first interim order. If there is any cloud, if
5 there's an opportunity for a lender on Wall Street or
6 Germany or wherever, to loan money to school district
7 "X" in Texas, that has a cloud, he has the
8 opportunity to loan it there or loan it in Idaho.
9 Where there is no cloud, he is going to loan it in
10 Idaho, that is just self-evident. I wish there was
11 something we could do about it, there is frankly not.
12 The reason for the interim necessity is that it
13 is an absolute truth, if I might make a
14 representation to the Court, that economically, our
15 national economy plays a very important part on what
16 is happening to school districts in Texas. When
17 coupled with the enormous demands on school districts
18 in Texas for doing something financially in June and
19 July and August of this year, they have no ability
20 today to borrow money. They have no ability, really,
21 to contract with an alert contractor, because they're
22 dealing with a system or a school district that's
23 been declared to be unconstitutional. The reason for
24 need, immediately, is economically driven and time
25 driven. They need to do something by mid-August on

1 minimum class sizes, for example, under House Bill
2 72. The bond market, itself, economically in two
3 weeks, from March 27 to April 15, increased 167 basis
4 points. And school districts in Texas, by virtue --
5 in all candor, by virtue of the decision in the
6 Court, right or wrong, as it will ultimately be
7 determined, the simple truth is that under the cloud,
8 Texas school districts are out of the market.
9 Interest rates are rising, that's an extremely
10 costly event to the Plaintiffs and the Defendants.
11 As the Court knows, from an amicus filed in this case
12 by a school district in Amarillo that sides with the
13 Plaintiffs, the simple truth is that Texas school
14 districts are shut down. And so, the bottom line is,
15 I hope we can speak more to that if it becomes
16 necessary before today is over, Your Honor.
17 If it's the Court's will that it enter a final
18 judgment today, then obviously, our requested interim
19 art order, material and language, which may or may
20 not be acceptable to the Plaintiffs, but would be
21 included in that final order. If on the other hand,
22 the Court, by what -- for whatever reason, either
23 it's not complete or otherwise, or it needs further
24 study, hopefully the Court will consider actually
25 entering the interim order as hopefully agreed with

1 the Plaintiffs, today, so that on Monday morning, the
2 school districts of Texas can re-enter the
3 marketplace and go on with the job that has to be
4 done under very short time in a very bad economic
5 climate.
6 The Court might say, justifiably, "Well, what
7 happened about my interim order on April 29th that
8 I've already entered in this general subject?" The
9 problem with that order is that it was well
10 intentioned. I know what the Court meant, most
11 people do, you meant that there was nothing going to
12 be upheld invalid in the Texas school system. The
13 problem is, unfortunately, we don't interpret it as
14 Wall Street lawyers interpret it. It's people like
15 that. And what the interim order that was already
16 entered actually says is, that I'm not going to
17 declare any undertakings of school districts in Texas
18 unconstitutional, until I do so. That's what it
19 says. There were a couple of bond issues closed on
20 the basis of it. And then they shut down, because
21 people, away from this courtroom, started reading it.
22 They had an opportunity to loan their money elsewhere
23 and they have done so.
24 So respectfully, Your Honor, we would just
25 simply ask before the day is over, hopefully, that it

1 would not be an unreasonable request and certainly
2 should be a request that the Plaintiffs and everybody
3 should agree that we might address this particular
4 question.
5 THE COURT: Okay.
6 MR. E. LUNA: Judge, I would like to point
7 out along that same line, the Court has said time and
8 time again and even the Plaintiffs have said, that
9 they don't want to interfere with the abilities of
10 the bond -- of the school districts to issue bonds or
11 to pay off the bonds that they've already issued.
12 And the Court, however, in this judgment holds the
13 entire financing system, beginning with Section 16
14 on, unconstitutional. Now, Section 16, that chapter
15 is the one that has all of the financing about the
16 Foundation School Program, and how the formula works,
17 and that sort of thing. What the Court could do is
18 hold that that part of it is unconstitutional, while
19 not holding that Section 20, et. seq., of the
20 Education Code, not holding that one
21 unconstitutional. That one is the one that provides
22 for the payment of the bonds. Because whatever the
23 Court does, if the Court says that the statute is
24 unconstitutional, that is, Section 20, et. seq., that
25 provides for the payment of the bonds, we're going to

1 hold that unconstitutional. But in the judgment,
2 that it goes ahead to say that that does not
3 interfere with any bonds that are issued or the
4 source of payment. That won't wash.
5 If the statute is unconstitutional, how in the
6 world can we say, "But we're going to let you
7 continue, under this statute that we say is
8 unconstitutional, continue to levy that tax, collect
9 that tax, that unconstitutional tax, and pay for
10 those bonds."
11 So we believe that the Court can accomplish
12 what the Court has been saying by saying simply that
13 Chapter 16, the one that has the financing other than
14 the bonds in it, holding that one as unconstitutional
15 and not holding the other -- the other statutes
16 unconstitutional that have to do with the bond. And
17 they do, of course, come under a different
18 constitutional provision.
19 As you know, the State Constitution
20 specifically provides that local districts can levy
21 taxes to build buildings and so forth. Now, that
22 would be a simple way to put everybody in the
23 position that we've all be saying, that we're not
24 trying to interfere with any bonds that are issued
25 now, or in the future.

1 Now, on the injunction, itself, the Court has
2 indicated that the Court wants to retain
3 jurisdiction. That when we get it to proper time, we
4 believe that there is a serious question as to
5 whether or not the Court has the authority to retain
6 jurisdiction, and in fact, as the Court well knows,
7 the Supreme Court of Texas has held in some earlier
8 cases, that the court did not have the authority to
9 obtain jurisdiction. But it's not necessary if the
10 Court would do as Mr. O'Hanlon suggested, give us the
11 guidelines, the findings in this judgment, as to what
12 the Legislature can do and what they can't, or as to
13 what these Defendants ought to do and ought not to
14 do. Then there is not a matter of retaining
15 jurisdiction if the Court enters an order as to what
16 the guidelines are.
17 The Court has the same authority by contempt of
18 court, if somebody violates the injunction. Now, a
19 permanent injunction is always subject to the court
20 carrying it out, but we need the guidelines, the
21 findings that Mr. O'Hanlon was talking about, in this
22 judgment, so that these entities, and certainly the
23 main Defendants, would know what it is they're
24 ordered to do and not to do.
25 So we would urge the Court that the part of the

1 order that orders the Defendants to design and
2 implement forthwith a different system, these
3 Defendants don't have the authority to do that. And
4 the law doesn't order a useless thing. There is no
5 way that the Defendants in this case can design and
6 implement that program that they're ordered to do.
7 So, we believe the Court ought to consider taking
8 that part out, but issuing the guidelines.
9 And if the Court wants to hold that, as the
10 Court has indicated, that Section 16 and those in
11 that chapter are unconstitutional, then after the
12 appeal is over, the Legislature has time to act, and
13 they have some guidelines that the Court sets down in
14 this system, and they'll have to comply with them, or
15 else the other Defendants would be enjoined from
16 paying out any state funds under the already existing
17 Section 16, et. seq., that the Court has already held
18 unconstitutional.
19 We think that is the most reasonable way to do
20 it, in view of the fact that not only the Court has
21 cast considerable doubt on the ability to retain
22 jurisdiction, it's not necessary with the injunction,
23 because the Court has injunction -- has the power to
24 enforce injunction.
25 We will also, at the proper time, have a bit of

1 legal argument on their request on attorneys' fees.
2 We think they're clearly not entitled to attorneys'
3 fees.
4 MR. KAUFFMAN: Your Honor, I think what
5 we're left with is that we maintain our prayer for
6 the injunction as we've stated it. I talked to Mr.
7 Hutchison and we agreed to some modifications to the
8 language we have in our agreed judgment, to respond
9 to his concerns regarding the bond market. And we do
10 not wish to interfere with that, as we've said.
11 As far as picking and choosing the sections of
12 the Texas Education Code that are unconstitutional or
13 not, we would prefer just to make it clear that we're
14 not interfering with the bond market. If we begin to
15 declare only one section or another, as they relate
16 to school finance, unconstitutional, I'm afraid we'll
17 get into a real mess on the final remedy. And I
18 think the broad nature of the injunction in the
19 Declaratory Judgment, as we have phrased it, will
20 allow the Legislature flexibility and allow us
21 flexibility to enforce the constitutional provisions.
22 So we would not agree to that.
23 But we would agree, and in fact, in our
24 proposed order, as you've seen, we have used the
25 language that was in the Rodriguez decision to make

1 sure that the acts of school districts, the bonds,
2 basically anything the school districts do during the
3 next two years, are completely valid and enforceable,
4 and that there will be no question about those at any
5 time. And we certainly do not mean to interfere with
6 those actions.
7 So we would again urge our proposed order upon
8 the Court on those bases. And as I've said, we sat
9 down with Mr. Hutchison, I have come up with some
10 language that would slightly modify the language in
11 our judgment, that apparently would appease the, as
12 you said, the New Yorkers that might be concerned
13 about the validity of the bonds. And once that is
14 done, I think we could have a judgment with which we
15 could all agree.
16 As far as the timing is concerned, we feel, to
17 be honest, that considering that this Court has found
18 the system of school finance unconstitutional, and
19 the 75 pages of proposed findings that we have, that
20 even two years is generous in terms of allowing the
21 state to come forward with the remedy. And the
22 scenarios and hypotheticals that the Defendants are
23 now proposing, look as though they will be four or
24 five or six years. We're not asking the Court to
25 play games with anyone, we want to make it clear and

1 that's why we're proposing this, that the Court has
2 said that this system is unconstitutional and that
3 something must be done in two years.
4 Now there is simply no doubt that if the
5 Legislature comes up with a program and shows that it
6 will take two or three years to implement it, that
7 certainly, that's one reason why the Court should
8 contain continuing jurisdiction. The Court can then
9 hear those arguments, we can respond, and it would
10 take two or three years to phase in and that is what
11 will happen. But if we allow from the beginning, in
12 effect saying that you don't have to have a real
13 solution for five years, then we don't know when the
14 real solution will be. So that's why we again stand
15 by our proposal, that at the end of the two year
16 period, the Court's injunction go into play, and the
17 Defendants would have to come forward with whatever
18 proposed remedy that they have.
19 Excuse me, one more thing. Excuse me, there
20 was a bit of miscommunication on my part with the
21 co-counsel when we drew up the proposed order. We
22 have in the proposed order that only the
23 Defendant-Intervenors are liable for the attorneys'
24 fees. We feel that as against the Plaintiffs in this
25 case, that the State Defendants are also liable for

1 attorneys' fees. And so after we hear our attorneys'
2 fees argument, we would again wish to reurge our
3 argument that the Defendants, as well as the
4 Defendant-Intervenors, are liable for attorneys' fees
5 here.
6 MR. HUTCHISON: Your Honor, very briefly,
7 lest there be some misunderstanding that I might have
8 created in my remarks, I want to make it absolutely
9 clear that my comments were limited solely to the
10 narrow question of what we would do tomorrow and what
11 a judgment should say in that regard. I did not mean
12 to imply for a second that Irving Independent School
13 District agrees in any part what the judgment
14 otherwise has been proposed, because we very
15 definitely align ourselves with the State and the
16 other remarks on this side of the aisle. But I would
17 like to repeat and make an observation, it certainly
18 is within the province of the Court to enter a final
19 judgment today. And if that is the Court's will,
20 obviously we would hope to work and make sure that
21 we've agreed on the appropriate language. But if it
22 doesn't, we would like to open for business Monday
23 morning in the Texas school districts, and so I hope
24 we can come back to that if that decision is not
25 made.

1 THE COURT: I know the injunction part of
2 it, it says that the Defendants are ordered to design
3 the Defendants, and I take it that that's the
4 individual Defendants who would be Kirby, State Board
5 of Education, Governor, Bullock, you've got the State
6 of Texas and the Attorney General Maddox. So I'm
7 going to order all of those to design, implement
8 forthwith and to continually sponsor -- we've got a
9 split infinitive there -- to continually sponsor a
10 system of finance for public schools that will give
11 each school district, after taking into consideration
12 education needs of the students and the legitimate
13 cause of differences...
14 Why shouldn't I order those folks?
15 MR. O'HANLON: Well, Your Honor, with
16 respect to implementation, only the Legislature can
17 implement it. With respect to sponsor, if it's
18 sponsored with respect to the Legislature, that
19 you're ordering them to do an illegal act, which is
20 lobby the Texas Legislature with respect to a
21 particular order. They can provide resources; they
22 can study it; they can do certain things, but that's
23 all they can do.
24 THE COURT: Well, if the State is a party
25 Defendant, yes?

1 MR. O'HANLON: Are you going to order the
2 Texas Legislature to pass a bill? I don't think -- I
3 think that's a direct violation and separation of
4 powers.
5 THE COURT: Over here.
6 MR. GRAY: The State is a party, yes, Your
7 Honor, if that is the direct question. They are a
8 party Defendant and have been from the very
9 beginning.
10 THE COURT: But the question is, can a
11 court order the Legislature to do something, or can
12 the Court only say that if you don't do it right,
13 then I'll -- then the Court will set it aside again?
14 MR. GRAY: That's exactly, I think, what
15 the Court can say, is that you can -- if you don't do
16 it the right way, I will continue to set it aside
17 until you do do it the right way.
18 THE COURT: Maybe we'd better do that,
19 rather than me trying to be telling the Legislature
20 what to do here. So you need to work on that part of
21 it.
22 MR. GRAY: Okay.
23 THE COURT: So I'm putting a big question
24 mark by the second part of the first injunction
25 paragraph, that we need to change some of that

1 language around where I'm not ordering the
2 Legislature to implement. That I don't think it is
3 an appropriate thing for a court to do. It might be
4 appropriate for the Court to continue to have
5 jurisdiction over the case and to review what is done
6 later.
7 All right. At the top of Page 7, I'm going to
8 have to face the time issue. I don't see that I can
9 get around it.
10 MR. TURNER: Your Honor, can I make a
11 suggestion by way of a compromise on that issue?
12 THE COURT: Yes, sir.
13 MR. TURNER: I was going to suggest that
14 the Court might say, as the language reads, "for a
15 period of two years from the date this judgment is
16 signed." And then add the words "or from the date of
17 the final opinion of the highest appellate court to
18 which this" -- excuse me, I didn't read it right.
19 "Or one year from the date of the final opinion of
20 the highest appellate court to which this case may be
21 appealed, whichever is later." And then I think it
22 still would be appropriate to add some indication
23 that the Court is not telling the Legislature that
24 the bill they pass, on the effective date of the act,
25 has to change all of the financing on that date.

1 That there is still something that the Court is
2 saying to indicate that on the effective date, you
3 want to be able to look at that law and that statute
4 and to be able, if you are maintaining continuing
5 jurisdiction and can look at that statute, and say,
6 you know, if challenged by the Plaintiffs, "This is
7 the law now. It appears to me that this meets my
8 guidelines," if they want to challenge it. Or in the
9 alternative, that anytime over the period of
10 implementation or after it's fully implemented, that
11 you will be able to look at it to see that it meets
12 the standards that you've set forth.
13 But if we say two years from the date that the
14 judgment is signed or one year after the final
15 opinion of the highest court to which the case is
16 appealed, whichever is later, that gives us some
17 flexibility, depending on since we don't really know
18 how long it's going to take to appeal the case, and
19 give us some outside dates.
20 And I believe that that would work a little
21 better, even though I do have some reservations even
22 about the two years, because two years from today
23 will be the end of the session in 1989. And most of
24 these bills, unless they get a hundred votes on the
25 floor of the House, are not effective immediately.

1 So you have to -- there are always 90 day bills, most
2 of them are effective 90 days after the end of the
3 session. So it's kind of like maybe two and a
4 quarter years or something.
5 THE COURT: Okay. Let me tell you all what
6 I'm thinking. That if I put a definite time in
7 there, like two years or two and a half years, or
8 maybe two years and nine months from today, if the
9 appellate courts aren't through with it by then, I
10 don't know what happens to my authority to lengthen
11 that out. I mean, I don't know what happens. Do you
12 understand what I'm saying?
13 MR. RICHARDS: Yes, Your Honor.
14 THE COURT: When the appeal goes, I don't
15 know how much -- when I lose jurisdiction on account
16 of the appeal, I don't know how much authority I've
17 got to come back, if the case isn't resolved in a
18 couple of years, to extend my injunction, so to
19 speak. That's the bad news.
20 The good news is that it seems like it makes
21 more sense to me for the order to be definite as of
22 here, and not tie it to some time that the appellate
23 courts may be through with it. For one reason, it
24 may be hard to tell when they are through with it.
25 And we can get into that argument, well, when were

1 the appellate courts through with it? When was it
2 final, final, final, so to speak. And I don't want
3 to get into that.
4 MR. RICHARDS: As I understand it, Your
5 Honor, we would certainly hope to hold to the
6 definite period, that's why we proposed the two
7 years. I assume that inasmuch as the appeal by the
8 State is an automatic stay, that even if the two
9 years were to elapse while it was still up on appeal,
10 the automatic stay would stay the effect of the
11 injunction until it was resolved by the appellate
12 court.
13 Don't you agree with that, Mr. O'Hanlon?
14 MR. O'HANLON: Yes. 6.001 of the Civil
15 Practice and Remedies Code.
16 MR. RICHARDS: So that holding to a
17 definite time may at least give everybody more sense
18 of urgency. I may not be appropriate, but it seems
19 to me, under the circumstances.
20 THE COURT: I think I prefer that, although
21 there is some argument on the other side of it. So
22 let's think a minute, now. When is this session
23 over?
24 MR. HUTCHISON: Next week, June 1st.
25 THE COURT: That's a little quick, don't

1 you think? We don't want to do that, do we?
2 All right. So, when will the next session be
3 over, you understand?
4 MR. KAUFFMAN: June 1st of '89.
5 THE COURT: Is it always --
6 MR. TURNER: No, it doesn't always end on
7 the same date.
8 MR. O'HANLON: It's 140 days from when it
9 opens.
10 MR. TURNER: Yes. And as I recall, the --
11 THE COURT: Will it be over by mid-June,
12 two years from now?
13 MR. TURNER: It would be over by mid-June.
14 THE COURT: So then we would be safe by
15 starting it by mid-June?
16 MR. TURNER: The bill probably wouldn't be
17 effective, but the session would be over.
18 THE COURT: Yeah, 15th of June of '89.
19 MR. O'HANLON: Can I throw another little
20 monkey wrench in here, Judge?
21 THE COURT: Yes, sir.
22 MR. O'HANLON: It needs to be at the start
23 of the school year. Regardless of when it is, it
24 needs to be the 1st of September of any given year,
25 otherwise you're going to create chaos. Because even

1 though the school ends, districts keep getting their
2 checks.
3 THE COURT: Okay. We've sort of been
4 through that. Let's suppose the Legislature of '89
5 were to respond to this, assuming that all of this is
6 affirmed on appeal, which might be a large
7 assumption. But anyway, the soonest a bill could be
8 put into effect would be when?
9 MR. TURNER: In September of 1989.
10 THE COURT: All right. September of '89.
11 Now, assuming all of this is affirmed on appeal and a
12 new good plan is put in -- it's passed by the
13 Legislature. Are we going to expect the school
14 districts -- say the bill passes and the governor
15 signs it, let's say, in July of '89 or August of '89,
16 are we going to expect the school districts to be up
17 for it three weeks later?
18 MR. KAUFFMAN: Yes, sir. And that's what
19 happened on House Bill 72. It was passed on July 2nd
20 of '84 and went into effect six weeks later. So
21 there's certainly precedent for it.
22 MR. R. LUNA: He's right, of course. But
23 he also read to the Court all of the evidence that
24 said how it upset the system, and it was in the LBJ
25 study, and that nothing worked out. They,

1 themselves, put on all of that evidence. So I think
2 it's obvious that that would not work.
3 MR. KAUFFMAN: Our concern, Your Honor, is
4 that -- you know, it could, a new finance system
5 could be implemented by February or March 1st of '89.
6 Nothing is saying that the Legislature couldn't
7 finish it before the end of the session. And we're
8 concerning -- I just want to save as many years as I
9 can, to be honest with you. If we delay it until
10 September 1st, then it won't go into effect until
11 '90-'91, the next decade. And I think it has to be
12 within 21 years of our life, being right now, or it's
13 kind of like against the rule of perpetuities, as I
14 recall. I'm a little concerned about that.
15 So that is our concern, I want to save as many
16 years as possible. Remember, we're talking about two
17 years from now, and if the Legislature knows and the
18 school districts know -- that's important, also, the
19 school districts know that beginning at the beginning
20 of the '89-'90 school year, there are going to be
21 some changes, I think it's important for that to be
22 clear from the outset, according to this Court's
23 order.
24 Now, it could be changed later; it could be
25 overruled by an appellate court; it certainly will be

1 stayed. But it would be clear that this Court, and
2 certainly that's what the Plaintiffs are
3 recommending, that some relief be in effect for the
4 '89-'90 school year. My original intention,
5 actually, was to ask for some relief for '87-'88, and
6 I've already backed up two years. But I think that
7 two years is a reasonable amount of time. And if we
8 begin to put it September 1st for the effective date
9 of the act, then it cannot affect the school
10 districts, because their budgets have to be drawn up
11 in August of '89. That's when school districts draw
12 up their yearly budgets.
13 And so, as happened in House Bill 72, it came
14 out June the 2nd. TEA sent them information saying
15 this will be your amount of state aid, and then in
16 August, the districts draw up their budgets and
17 submit it.
18 MR. THOMPSON: That's the preliminary.
19 MR. KAUFFMAN: Preliminary, that's the one
20 that they start paying their teachers on, September
21 1st.
22 MR. TURNER: Your Honor, I don't know. Mr.
23 Kauffman, you know, I realize that he's anxious to
24 have the system in place that the Court has ordered,
25 and I respect that. But I can't help but rise,

1 again, to object to what he's suggesting. I've
2 served in the Legislature. I worked in the
3 governor's office when we passed House Bill 72. And
4 the massive kind of changes we're talking about,
5 can't be done.
6 THE COURT: Okay. I'm not having a problem
7 with it. I'm just trying to work out the time. Let
8 me tell you what I'm running in my mind right now, is
9 that the order -- that what we want to shoot for is,
10 if there's going to be -- if this judgment is
11 affirmed, that what we want is for the '89
12 Legislature to deal with the problem. And then what
13 I want is -- let me ask this, do all school districts
14 open their doors at the same time?
15 MR. THOMPSON: No.
16 THE COURT: They don't?
17 MR. THOMPSON: No.
18 THE COURT: Some of them start in August,
19 late August?
20 MR. THOMPSON: No.
21 THE COURT: Nobody starts in late August,
22 all after Labor Day?
23 MR. THOMPSON: Right.
24 THE COURT: Everybody after Labor Day?
25 MR. THOMPSON: Right. They cannot require

1 the attendance of students before September 1st.
2 MR. O'HANLON: 1st.
3 THE COURT: September 1. Okay.
4 So what we want is -- yes, sir?
5 MR. HUTCHISON: Your Honor, forgive me, I
6 think there are a couple of other ingredients that
7 need to be carried in mind. It seems to be that the
8 presumption is the solution to this case is money.
9 THE COURT: That's right.
10 MR. HUTCHISON: That might be part of it.
11 THE COURT: That might be part of it, but
12 that's not all.
13 MR. HUTCHISON: In order to do that, you've
14 got to do a lot of governmental under infrastructure
15 changes. If a law is not passed with an effective
16 date of September 1, 1989 and you change the
17 boundaries, in the first place, you've got to go to
18 the federal courts and see if we can do that. We've
19 got a 17-year case in Dallas; we've got a statewide
20 case in Tyler; we have to go to the federal courts
21 and see if we can reconcile that. And then, even to
22 comply with the state law, it's elementary that if we
23 change the boundaries, we've got to change the
24 voters; we've got to change the tax base, locally;
25 we've got to change the board of trustees. I can't

1 see possibly how they can do all of that in two days.
2 THE COURT: Okay. I think we have -- I
3 think that a lot of the thinking here has been that
4 there would only be a change in the financing
5 formulas. The Legislature very well could decide to
6 redistrict. And I would not be a bit surprised, that
7 if the Legislature were to conduct some studies, they
8 might -- the Legislature might find, I don't know
9 this for sure, that redistricting and putting
10 everybody into equal tax base districts very well
11 could save the state some money. And you know, if
12 that dawns on the Legislature, they may want to take
13 a very serious look at that. And if that happens,
14 then it may take much more time.
15 MR. TURNER: Judge, could we just
16 distinguish between the effective date of the act and
17 the concept of the act being one that could be phased
18 in over time or over some period of three years or
19 something? Could we just make that clear? I mean,
20 that's the message that I think the order needs to
21 send. You may want the bill passed and be effective
22 September of 1989, you may want to be able to look at
23 the law and see what it is. But it seems that that
24 law should be one that could result in phase in of
25 changes, whether it's new school districts, or like

1 House Bill 72 did with the shifting of monies, or
2 whatever.
3 THE COURT: All right. Let me tell you
4 this. I would feel very comfortable if we worked on
5 this kind of a timetable. That the Legislature of
6 '89 do what they're going to do, but that this Court
7 at least would be satisfied if what they're going to
8 do, didn't start until September 1 of '90. That is,
9 it gives everybody a year to look at it and get ready
10 for it. That even does not exclude the possibility
11 that beginning in September 1 of '90, that there
12 would be some phase in. Now, I don't know -- the
13 reason I hesitate about that is that I don't want to
14 be taken -- assuming this is upheld, I don't want to
15 be taken advantage of. You know, scratching it out
16 for 12 years. But on the other hand, there might be
17 some things that would be very reasonable to phase in
18 over one to three years. I don't want to exclude
19 that possibility, but I don't want to open the door
20 to be taken advantage of, because I don't think I'm
21 being -- I don't think I'm being hard by setting up
22 this kind of a timetable. If I'm going to set up
23 this kind of a timetable, then I'm going to expect
24 things to really begin to happen September of '90.
25 MR. GRAY: Judge, we can and will draft up

1 something, a proposed judgment on that timetable.
2 And can inform the Court that if, from our
3 perspective, if it appears that for whatever reason
4 the state is not moving forward expeditiously and is
5 dragging its feet, taking advantage of the Court's
6 good graces of the timetable, we will come back in
7 and file a motion to modify under the Court's power
8 of retaining jurisdiction. So we'll be there to
9 protect the interest of our districts to the extent
10 we can.
11 THE COURT: Okay. This way, people will
12 have some time to concentrate their battle in the
13 appellate court for the next 18 months, let's say.
14 And let's say, if this judgment is affirmed, then
15 everyone is going to have to turn -- we're all going
16 to have to turn our attention on revising the system.
17 That will be the Legislature's job. It seems
18 reasonable to give them some time, ahead of the time
19 that they meet in '89, to think about what they're
20 going to do. Hopefully, the appellate courts will be
21 through with this in 18 months. That will give the
22 Legislature about six months or so, I hope, to be
23 thinking about what they want to do, and for everyone
24 to be thinking about what they're going to urge the
25 Legislature to do. And then once they've done it in

1 '89, it'll give everybody a year, almost, to get
2 accustomed to what is going to happen before we have
3 to start implementing it. Now, that doesn't seem
4 unreasonable.
5 And I'm not saying that the Legislature
6 couldn't have some phase in things, like in House
7 Bill 72, in addition to this. I don't know how to
8 say that, exactly, without inviting something I don't
9 want to have happen. But on the other hand, I don't
10 -- it seems like there could be certain things that
11 would have to be phased in that would be reasonable,
12 depending on the choice of the remedies that the
13 Legislature comes up with. If they redistrict and
14 equalize the tax bases, I don't know that there needs
15 to be any phase in. But if they're going to try to
16 do this with equalizing the state money, there might
17 be -- might be a reason to phase in, without
18 prejudging it.
19 All right, everybody got that? Let's do it
20 that way.
21 MR. GRAY: Your Honor, before you leave
22 Page 7, what I am thinking about doing, and if it
23 meets with the Court's blessings, is moving that
24 provision that was problematical on Page 6 on the
25 injunction, about ordering the design and implement,

1 move that into the paragraph where you are retaining
2 jurisdiction and just say that the Court is retaining
3 jurisdiction to implement the spirit and purpose of
4 this intent of this judgment, including to determine
5 if, in fact, blah, blah, blah happens.
6 THE COURT: Okay.
7 MR. GRAY: Would that kind of shifting of
8 that, would that satisfy the Court?
9 MR. E. LUNA: That won't work as well,
10 because if, in fact, he's putting it down there so if
11 the Court doesn't have the authority to retain
12 jurisdiction, then it's not in the judgment. It
13 ought to be in the main part of the judgment.
14 THE COURT: I'm not quite with you, I don't
15 think.
16 MR. GRAY: Okay. Well, what I had
17 understood the concern to be, is the Court cannot
18 necessarily tell the Legislature, "You must do A, B
19 and C." But the Court can let it be known that the
20 Court is going to be reviewing whatever is done. And
21 if it does not pass constitutional muster, the State
22 will be so informed again. And to pass
23 constitutional muster, in the Court's opinion, a
24 system has to be designed, implemented and
25 continually sponsored, that ensures equal access to

1 funds, which is what I have put in here out of the
2 Court's April 29th letter/memorandum. And what I was
3 thinking about doing is, instead of shifting it from
4 an affirmative order, that the Court is ordering the
5 Legislature to design this system, shift it into the
6 retaining jurisdiction section where the Court says,
7 "As part of my retention of jurisdiction, I will
8 review whatever the Legislature does."
9 THE COURT: What I'm enjoining at least the
10 named Defendants from doing is from using the system
11 that we've got now beyond these dates.
12 MR. GRAY: Right.
13 THE COURT: And so that implies a new
14 system has to be created.
15 MR. GRAY: Correct.
16 THE COURT: And I suppose that if -- I
17 don't know if it says so in here, but beyond these
18 dates, I don't want the state spending money under
19 the current system. I will enjoin those who are
20 going to be spending the money, from spending the
21 money beyond these dates.
22 MR. GRAY: Correct.
23 THE COURT: And if a new system is not
24 devised, then I suppose a remedy would be to stop the
25 use of money as of September 1, '90.

1 MR. GRAY: Right.
2 THE COURT: Or maybe even before then, if
3 we know that the Legislature hasn't devised a new
4 system to distribute money. And so I don't know that
5 we -- do you think we need the language that I retain
6 jurisdiction to take such further steps as may be
7 necessary to implement both the purpose and the
8 spirit of this judgment? Because if --
9 MR. E. LUNA: You do not need that
10 retention. That's the point, you don't need it.
11 MR. RICHARDS: I think the Declaratory
12 Judgment Act, by its terms, and maybe we ought to put
13 that in, "by its terms," says the Court may, or does
14 retain jurisdiction under any Declaratory Judgment,
15 to issue further orders necessary to implement the
16 Declaratory Judgment portion of the Act.
17 MR. R. LUNA: Well, I haven't been able to
18 find that section in the Act. Maybe you can direct
19 our attention to it.
20 MR. RICHARDS: Well, they've recodified it.
21 There's new books over there now.
22 MR. O'HANLON: They haven't changed the
23 Act.
24 MR. KAUFFMAN: Your Honor, I think what
25 you're -- if I understand, I think to summarize what

1 you're saying is that you're asking the Legislature
2 to have a plan by September '89 and to implement it
3 by September '90.
4 THE COURT: Yes.
5 MR. KAUFFMAN: And if we just say that, we
6 can probably figure out some way to say that in terms
7 of a negative injunction that would meet the
8 standards of an injunction.
9 THE COURT: As a caveat, I'm not really
10 happy with the language in here that would even imply
11 that I'm going to enjoin the Legislature. It will
12 have to be the officers of the state that will be
13 enjoined.
14 MR. O'HANLON: Judge, if you want to keep
15 that, you only need the Texas Education Agency. The
16 Texas Education Agency is the one that distributes
17 the funds.
18 THE COURT: Okay.
19 MR. O'HANLON: And just enjoin them from
20 distributing the funds after such and such a date,
21 pursuant to this system. I mean, that's all you
22 really need.
23 THE COURT: Okay. Somebody needs to find
24 the recent version of the Declaratory --
25 MR. RICHARDS: Let me go look for it.

1 THE COURT: Let's take our customary 10:30
2 break. And let's do two things during the break
3 time. I'm really interested in this bond problem.
4 I've read, with considerable sympathy, the Amarillo
5 letter and its motion, as well as, sir, your motion
6 to enter an interim order. And we need to fix them
7 up as best we can, the school districts that want to
8 issue bonds during this period of time. So let's
9 take -- here is what I want you to all to do. I want
10 Mr. Richards to find the Declaratory Judgment Act
11 language.
12 MR. RICHARDS: Here it is. I think maybe
13 we just don't read it the same. There it is, 37.001.
14 THE COURT: Okay. And during break time,
15 which will be extra long so you all can confer, is
16 you all get together and work on what we're going to
17 do about changing things around so that we can -- the
18 school districts can go on with these bond issues.
19 So why don't we meet again at 11:00. You all try to
20 -- I mean, get down and specifically work out the
21 language and exactly where it's going to fit into
22 this thing. And I'm interested that we correct that
23 problem.
24 MR. KAUFFMAN: Yes, sir.
25 THE COURT: Okay. See you all again at

1 11:00.

2 (Morning Recess)

3 THE COURT: We'll get to the bond problem
4 in a minute. We'll take up this supplemental relief
5 problem now. And it has to do with that paragraph
6 just above the word "miscellaneous," on Page 7.
7 I've looked at the Declaratory Judgment statute
8 that I've been given. It seems to me like we could
9 have a paragraph, maybe take out the paragraph that's
10 there and have a paragraph with the language similar
11 to, doesn't have to be exact, but similar to what's
12 in this statute.
13 I think by indicating deadlines as of September
14 1, 1990, that enjoining the Texas Education Agency
15 from dispersing money under the old system as of that
16 date is pretty coersive and very clear. And if there
17 needs to be additional steps taken by the Court
18 before and after that, it seems to me like the range
19 is similar to what is found in Article 37.001 or the
20 Section 37.001 of the Civil Practice and Remedies
21 Code would be in keeping with the law and would
22 accomplish a continuing jurisdiction function,
23 probably without running the risk that this order is
24 not final -- without running the risk of the argument
25 that this order is not final.

1 Now, have we got the bond money worked out?
2 MR. GRAY: Yes, sir, I believe we do.
3 MR. RICHARDS: Mr. Gray and I are being
4 associated with the firm of Hutchison, Price and
5 Boyle. We get a one percent override on everything
6 from here on in.
7 THE COURT: Oh yeah?
8 MR. HUTCHISON: Your Honor, if I might for
9 the record just simply suggest to the Court that I
10 don't warrant that any language will work --
11 THE COURT: Yeah.
12 MR. HUTCHISON: -- in a case like this. I
13 can warrant to you that we've tried, in good faith,
14 to take care of the problem that really developed
15 after the Rodriguez decision, back a few years ago.
16 We think it will do it. Obviously, we don't
17 interpret it. And I don't warrant the reasonableness
18 of Wall Street lawyers, not a lot of Texas lawyers,
19 but we do think that it would take care of the
20 integrity of bond issues from this point during the
21 period of the stay. We may have a quick test of
22 whether or not we need any bonds when we get to the
23 fee question a little bit later today.
24 THE COURT: Okay.
25 MR. GRAY: But Judge, we can incorporate

1 the language that we've worked out in and under our
2 miscellaneous section. And it's our hope and intent
3 that we can get a final judgment, that we've done all
4 of the arguing on and whatever, to the Court this
5 afternoon, if that's what the Court is of mind. That
6 we would forego any need for an interim order, it
7 would just be incorporated into the final judgment.
8 MR. E. LUNA: Are you willing to add to
9 that, that specifically that the Court finds that
10 section -- beginning with Section 20 of the Code in
11 regard to the issuance of bonds and levying of tax to
12 pay for them is not unconstitutional?
13 MR. GRAY: Mr. Luna, I thought that Mr.
14 Hutchison was speaking on behalf of the bond lawyers.
15 And he and I have worked out specific language that I
16 think is satisfactory to him, and I'm prepared to
17 stand by that agreement. If I need to negotiate with
18 -- more of you, just come on, but I'd just soon not
19 negotiate in open court.
20 THE COURT: Okay. What else needs to be
21 decided?
22 MR. KAUFFMAN: Your Honor, you had
23 suggested one or two other changes in the injunction.
24 And I have redrawn, on Page 6, the first paragraph of
25 the injunction where it appeared as though the Court

1 was affirmatively forcing the Legislature to do
2 certain things. And I've rewritten that language, I
3 think, in more of a correct structure. If you'll
4 look on Page 6 in the injunction, the second part, it
5 says "and further," it would read "Defendants are
6 hereby -- "
7 THE COURT: Wait a minute. All right.
8 MR. KAUFFMAN: Excuse me, I guess it's on
9 the sixth line.
10 THE COURT: Okay.
11 MR. KAUFFMAN: "And further Defendants are
12 hereby enjoined from implementing any system of
13 finance for public schools that does not give to each
14 school district." And then go on with the language.
15 So it would again, would enjoin --
16 MR. RICHARDS: Enjoined on and after 1990.
17 MR. KAUFFMAN: Well, of course, the whole
18 thing is stayed.
19 MR. RICHARDS: No, they're enjoined on and
20 after September 1, 1990.
21 MR. KAUFFMAN: I'm sorry, so enjoined on --
22 MR. RICHARDS: On and after.
23 MR. KAUFFMAN: "On and after September 1st,
24 1990 from implementing any system of finance for
25 public schools that does not give to each school

1 district," and then following the rest of that
2 language.
3 MR. RICHARDS: Now, the Defendants are
4 going to have to specify.
5 MR. KAUFFMAN: Okay.
6 MR. O'HANLON: How do the Defendants in
7 this case, if the implementation is the statute,
8 you're enjoining us to do something -- not to do
9 something that we can't do, anyway. The Legislature
10 has to implement the statute.
11 THE COURT: Is that going to be the -- I
12 was thinking that what I would be enjoining is the
13 Texas Education Agency from spending money under the
14 old system.
15 MR. KAUFFMAN: Well, of course, that's what
16 this does, yes.
17 MR. RICHARDS: But you mean with more
18 specificity, Your Honor?
19 THE COURT: Uh-huh.
20 MR. RICHARDS: I think clearly it has to
21 specify who are the Defendants which are enjoined. I
22 think clearly we have to name them with specificity.
23 I think that's probably part of an injunction --
24 THE COURT: Wait just a minute.
25 You see, what you want me to do here is order

1 various people to design a program that gives each
2 school district, after taking into consideration so
3 on and so on and so on. I think what I'm telling you
4 is that I'm not real happy with ordering the
5 Defendants, namely the Legislature, to do anything.
6 But I'm very willing to order the Texas Education
7 Agency not to spend a penny after September 1, 1990,
8 under the old system.
9 MR. RICHARDS: What about the treasurer?
10 THE COURT: Or the treasurer, whoever the
11 parties are that would have some authority over the
12 money.
13 MR. GRAY: Judge, we can accomplish that,
14 yes, sir. What we will do is after the parenthesis,
15 Chapter 16 of the Texas Education Code, insert
16 specifically and name the Defendant, the comptroller
17 and the Commissioner of Education are prohibited from
18 spending -- or are enjoined from spending any funds
19 on or after September 1 of 1990 under the current
20 system, period.
21 THE COURT: Mr. Kauffman, you can
22 accomplish what you want in the whereas clauses, so
23 to speak. Whereas or because the current system does
24 not give each school district, after taking into
25 consideration, so on and so on.

1 MR. KAUFFMAN: In effect, we've done that
2 in the Declaratory Judgment part of the order, we
3 just stressed that.
4 THE COURT: Okay.
5 MR. KAUFFMAN: I just want it in the
6 injunction, itself, to set some -- what I consider
7 extremely broad standard which would have to be met.
8 I think it meets one of the concerns of the
9 Defendants, basically taking the broadest possible
10 standard, which is that the system has to -- whatever
11 system is implemented, must give each school district
12 the same ability as every other district.
13 THE COURT: That's fine. I want to issue a
14 prohibitory injunction and not a mandatory
15 injunction, right?
16 MR. KAUFFMAN: Yes, sir.
17 THE COURT: And there certainly isn't
18 anything wrong with -- either in the findings or in
19 the preliminary to the judgment, itself, in saying
20 what's wrong. And that ought to be signal enough.
21 MR. KAUFFMAN: Yeah. And the findings have
22 done that in some detail, yes, sir.
23 THE COURT: Okay.
24 MR. O'HANLON: With respect to the Court's
25 language about after taking into effect the special

1 needs of the students and all of this other kind of
2 thing. It's casting an almost impossible burden. If
3 we're going to equalize the tax base, doesn't it make
4 more sense, in some respects, to do it on a per
5 capita basis? Because if you do it on -- if you
6 require, and it's inherent in here in some respects
7 that we do it on an individualized need basis, are we
8 not breeding an incredible amount of litigation over
9 whether or not some child has higher needs and
10 therefore, that lowers his actual tax base or
11 something to that, and you run -- that's fraught with
12 all kinds of problems. Have we not done enough to
13 equalize the tax base on a per capita kind of basis?
14 Are we going to cut that fund?
15 MR. TURNER: Judge, I think this is an
16 important point. Because what Mr. Kauffman just told
17 you is that he wanted this language, this injunction
18 language, because what he talks about there as
19 enjoining is a system that does not give each
20 district or each student the same ability -- each
21 district the same ability as every other district,
22 whether by appropriation or by local taxation, the
23 same ability to raise money.
24 THE COURT: Uh-huh.
25 MR. TURNER: And you know there's a lot of

1 ways you could have written your decision and entered
2 this order. You could have called -- you could have
3 said that your standard is substantially equal
4 dollars. And in essence, you know, not said exactly
5 equal dollars, you could have said substantially
6 equal to what we're looking at, and the system as you
7 see it today is not substantially equal.
8 And you made a comment a minute ago from the
9 bench, which is what has prompted me to follow-up
10 here. You made the comment, when we were talking
11 about the remedies here, you know, the Legislature
12 and the timetables. You said, "The Legislature may
13 not choose to do this just by putting more money in
14 the system. They may choose to do something with
15 boundaries."
16 Early on, well, not early on, but some point in
17 the course of trial, I recall all of us talking about
18 remedies, maybe arguing about it, I don't think it
19 was testimony. And you made the comment, "Well, we
20 all agree we don't want caps, don't we?" The only way
21 to keep the current system of school district
22 boundaries and just remedy this by additional
23 appropriations, is to have caps. And we all know
24 that. So, what Mr. Kauffman is asking you to do
25 here, and I'm not saying it's inconsistent with what

1 you wrote, because I think what you wrote says what
2 he has here. But you're not saying the standard is
3 substantially equal dollars. You're saying we've got
4 to have the same ability in every district to raise
5 money. And that is a very precise -- that is the
6 highest standard of language that you could have
7 chosen. And there's no question in my mind, when
8 this becomes a part of an order, that Legislature
9 over there, they're going to struggle around, they're
10 going to think "Oh, let's -- maybe if they get some
11 money or they'll put some more in, or maybe we'll
12 just do some more House Bill 72 type stuff, and that
13 ought to do it, give them more money." And frankly,
14 all of the Plaintiffs' school districts might say,
15 "Boy, that's great. That's what we were after in
16 this lawsuit, anyway. We wanted more money. We
17 didn't think House Bill 72 did us enough." But the
18 language that's in this order is going to say before
19 this Court, if this is upheld, that that more money
20 doesn't meet this standard. This is the highest
21 standard of scrutiny of exactness that you could have
22 chosen. And I only raise it because of what I heard
23 you say a moment ago, and that is, "Well, you know,
24 the Legislature may not choose to do deal with this
25 by money." And if you're thinking that they could

1 deal with this by money, I'm suggesting to you that
2 the very wording that the Plaintiffs are suggesting
3 that you put in this order, defies that.
4 THE COURT: Okay.
5 MR. TURNER: And it may cause some
6 rethinking here in the way -- you know, I've always
7 felt that your order should be speaking in terms of
8 substantially equal dollars, that you weren't asking
9 for perfection. But the standard of this order is
10 perfection. And if we're talking about a fundamental
11 right, I don't see how in the world in future years
12 we can't come back into this Court or any plaintiff
13 or individual student, and argue that the standard is
14 not an exact one. It's not a substantially equal
15 standard, it's exact. And I don't know if you --
16 maybe you didn't intend that.
17 THE COURT: You say that if the Legislature
18 chooses to remedy the situation, if it can be
19 remedied by the mere expenditure of state money, that
20 -- are you saying that they can't remedy it that way,
21 is that what you're saying?
22 MR. TURNER: That this standard cannot be
23 met by more dollars. We can spend five times as much --
24 THE COURT: Without a cap.
25 MR. TURNER: Without a cap, that's correct.

1 And if your order had been substantially equal, I
2 would say, you know, that still left room for the
3 Legislature to come in with more dollars or shift
4 some dollars, you know, take away some money from the
5 rich districts. But this standard, that won't work.
6 That will not meet this standard. And I'm not sure
7 you intended the standard to be that high.
8 THE COURT: I intended the standard to be
9 high, but I don't -- I'm not looking to set up a
10 situation that's going to require or even attempt,
11 you know, to lend itself to the temptations of the
12 cap. What do you say over there?
13 MR. O'HANLON: District requires that.
14 MR. THOMPSON: District requires that.
15 THE COURT: You know, it may come to that,
16 but I would rather avoid that, if I can avoid that.
17 MR. GRAY: I think I can initially respond.
18 What you're doing does not do that. What you're
19 doing does force the state to look at how it goes
20 about funding public education and doesn't rely, to
21 the extent it does rely on local property taxes, with
22 this huge wealth differences that we know exists. We
23 have gone through any number of options, on regional
24 tax authority options -- there's any number of bits
25 and pieces that are available out there.

1 If they are going to do absolutely nothing,
2 leave every district totally exactly as they are,
3 with the exact taxing powers they currently have, we
4 know, the evidence is clear, that you've got
5 districts that are taxing at eight cents that are
6 raising $19,000.00 per student. And without changing
7 any of that at all, it will be difficult to solve it
8 totally by money. It could be done, but it's going
9 to cost an awful lot of money. But those are the
10 kind of options that the Legislature needs to address
11 out there and needs to solve.
12 We're not after caps on educational
13 expenditures any more than the Defendants and the
14 wealthy districts are, either. Obviously, they don't
15 want them, because they've been spending well in
16 excess of whatever cap -- we've had a cap forced on
17 us for years just because of the economic reality.
18 All that you are doing by this judgment,
19 though, is sending a very clear signal that you
20 cannot rely on desperate property wealth as a way to
21 fund your local schools to the detriment of those
22 people that are having to live in poor areas.
23 MR. O'HANLON: You can't do it. I mean,
24 Mr. Turner is right, it can't be done. I mean, if --
25 unless you eliminate -- as long as you have a

1 reliance on the local property tax base, I think
2 that's what the problem is here. If you allow them
3 free access to their own property tax base, then
4 you're going to have the same problems no matter what
5 the level of the state funding is. That's the
6 message of House Bill 72. Even though the huge
7 increase -- huge increase in money that was available
8 to the poor districts and all the -- and most of the
9 money, if not all of the money in House Bill 72 went
10 from 50 percent down in wealth in this state. And in
11 fact, some of the richer districts actually -- and
12 they're continuing to lose money. We still haven't
13 gotten there.
14 So the only thing that you can do is either
15 totally do this consolidation, which the Plaintiffs
16 have said in the middle of the trial that they
17 weren't after, but now apparently they are, or you
18 can impose a cap. Those are the only options. Or
19 you can -- or we can undo Article VIII, Section 1(e).
20 But that -- I mean, you can't, from the bench, rule
21 that a constitutional amendment -- to revoke a
22 constitutional amendment is constitutionally
23 required. So I mean, if we're talking about a
24 situation in which we have to meet the standard of
25 equal wealth or equal ability to raise funds,

1 consolidation or cap are the only options. It's
2 simply -- there simply are no other options. Or some
3 kind of form of power equalization, or some of the
4 other things that you may have heard about, but those
5 are, in essence, caps in another form. "You can
6 raise whatever money you want, local district, but
7 we're going to take it from you." But that, in
8 essence, is a cap. It's just another way of
9 achieving it.
10 MR. TURNER: Your Honor --
11 THE COURT: Well, a way to get at it would
12 be to do away with the constitutional amendment, you
13 know, prohibiting state ad valorem taxes. The state
14 pass a very simple, a very small ad valorem tax, and
15 use that to make up the difference.
16 MR. O'HANLON: That's correct.
17 THE COURT: I'm not taking money from the
18 wealthy districts, everybody do what they want.
19 MR. O'HANLON: Well, no, because even if we
20 do, if we allow the local -- even if we raise, even
21 if we raise, we put a small local ad valorem tax in,
22 and it's disingenuous, to me, to say that that's
23 constitutionally required to do away with that
24 amendment. But even if we did do that and we raise
25 $3 billion or $4 billion, you're still going to have

1 at the extremes, because of the way that money
2 spreads over the state, you're still going to have
3 differences. That if your standard is access to the
4 same amount of money, you're not going to be able to
5 accomplish, because $3 billion spread over 3,000,000
6 kids, is only $1,000.00 a child. And you still
7 haven't caught it yet. You can't do it.
8 MR. TURNER: Your Honor, I think what this
9 Court saw in this case is just what Mr. Gray just
10 spoke of, and that is, large differences in property
11 wealth that had not been overcome by the state
12 finance system, so as to more equalize expenditures.
13 What the language of the order says is not that -- in
14 other words, let me say it this way. If this Court
15 had had a system before it where the differences in
16 property wealth weren't anything like what we've got,
17 top to bottom, I think this Court would have been
18 more amenable to saying, "I think that the system in
19 place is working and there's not that much
20 disparity." But instead, what we've ended up with is
21 language in the order that says that the system must
22 grant the same ability. It doesn't even say
23 substantially the same. It says the same. And if
24 we're going to have the same ability to finance
25 through local taxation and state appropriations,

1 every school -- every child in this state, the
2 property tax bases have to be exactly equal. That's
3 what the same ability means. And I don't really
4 think the Court, at the bottom of this, intended to
5 issue an order that required exactly the same ability
6 in terms of local tax bases. The suggestion just
7 made about interposing a state property tax over the
8 system, Mr. O'Hanlon is exactly right, as long as the
9 local district can still raise money on its own,
10 freely, it's not ever going to be the same ability.
11 And I think the Court saw, in terms of, you
12 know, legalese aside, in terms of fairness, I think
13 what this Court saw is the differences are too big.
14 Not that they've all got to be exactly the same, the
15 property tax base has got to be exactly the same per
16 child. But the order that you're handing down
17 doesn't leave room for the Legislature just to come
18 in and pump more dollars in, or even just to take
19 more dollars under the formulas from the rich
20 district and shift it to the poor, because still,
21 you're going to be left with those unequal property
22 tax bases. And that doesn't meet the standard Mr.
23 Kauffman has laid before you, because there will not
24 be same ability through the local taxation for people
25 to raise money for school children.

1 So I think that some language that talks about
2 substantially equal, even though I think that from
3 our side of the table, that kind of language is the
4 very reason we didn't want the Court to rule the way
5 it did, because if you say substantially equal, it's
6 kind of like, gosh, I'm going to be here listening to
7 this thing for the rest of my life, deciding what's
8 substantially equal, you know, my judgment of
9 substantially equal. But that's the nature of these
10 cases. In other states, they come back to you. And
11 I'm suggesting that the language that's here is the
12 highest standard of perfection of language that you
13 could have chosen. And it's not the one I think the
14 Court really intended.
15 THE COURT: What is gained by saying
16 substantially equal?
17 MR. TURNER: You at least, at a minimum --
18 and I think there ought to be more. But I'm saying
19 that's a good first step, because it signals to the
20 Legislature that you're not required to equalize
21 those tax bases. That if you can pump some money in
22 there or you can move some formulas around, and you
23 can get this thing looking better, then I may think
24 that's what meets constitutional muster, because it's
25 substantially equal, the spending is.

1 I think the key not only is substantial equal
2 ability, but we're talking about, you know, what you
3 have been looking at is the expenditures. And you
4 want them, I think, to be substantially equal or more
5 equal. But I don't think you were trying to say they
6 had to be perfect. And of course, you didn't say
7 they had to be perfect, because you did leave the
8 ability of the local taxpayers -- you made mention in
9 your letter, I don't know if it's in here -- that you
10 thought local taxpayers ought to still have
11 discretion about how much they tax themselves. But
12 the order, itself, does require the tax bases to be
13 equal, from which the taxpayers then make that
14 judgment.
15 And you know, as a practical matter, you know,
16 we talk a lot about this case, about how property
17 values change, and about how our system works well
18 now, because it adjusts, to some degree, to the
19 increases and decreases in the property wealth of
20 districts, and kind of makes some automatic
21 adjustments. All of that is not -- it's almost a
22 standard, Your Honor, that is fine in theory, but how
23 do you ever get it? I mean, we could tell the
24 Legislature to redistrict tomorrow, and make every
25 school district in this state equal property wealth

1 per child, adjusted by various whatever we're going
2 to have to do, I imagine that's going to be pretty
3 complicated, but adjusted for various categories of
4 needs. And two years later, it would not meet the
5 standard, because property wealth will have changed
6 and districts will not have the same ability, through
7 local property taxation, to raise the money for
8 education of their children.
9 So, you know, if you want to give the
10 Legislature some breathing room to even consider what
11 you've just suggested from the bench, that they might
12 be able to figure out through just formula changes
13 and money to make this system acceptable, it's got to
14 be through some other language than what we're
15 looking at.
16 And I think the Court recognizes, you know, our
17 position with regard to appeal of the case and the
18 way the higher court is going to look at it. And
19 again, it's just kind of like I said on the point
20 awhile ago about being reasonable from the
21 Plaintiffs' side about implementation, if they're not
22 going to be realistic about what they're having you
23 order, it seems like to me they're working against
24 their own interest.
25 MR. HUTCHISON: Your Honor, I would like

1 just briefly, if you don't mind, to supplement these
2 comments with I, of course, thinking they're very
3 well taken, with a little bit of history on the words
4 that are in the proposed judgment, a function of the
5 wealth other than wealth of the state as a whole.
6 That concept, of course, has been debated publicly
7 and for a very long time in Texas. And it took
8 official -- it took official posture in the debates
9 of 1974, in which the constitutional revision
10 commission came in and projected to the
11 constitutional convention a concept in those precise
12 words, if I recall. I don't know whether this came
13 from those debates or whatever. But nevertheless,
14 the idea was that Article VII and Article I of the
15 Texas Constitution ought to be changed. What this is
16 saying is that it's already there. And then on the
17 question -- then when the whole process moved to the
18 constitutional convention and the debate started once
19 again, and I believe the history would -- records
20 would reveal that this was one of the most
21 extensively debated concepts in the whole
22 constitutional convention process of 1974, there is
23 extensive debate on what that means. And it means
24 precisely what Mr. Turner is suggesting and the state
25 is suggesting. And that is that it means precision

1 and absolutely precise distribution. And it
2 eliminates any type of local enrichment. I --
3 forgive the reference, I participated in this very
4 debate, myself. And all of these things are
5 recorded.
6 The convention ultimately addressed the issue
7 by putting in a provision after these words that
8 said, "provided, however," and this is substantially
9 correct, I'll tell the Court. That "provided,
10 however, nothing in this Constitution shall prohibit
11 a local school district from enriching its school
12 programs above state minimums." And if that is --
13 that's the history that's recorded, the great debate
14 in this state, as to what that means and what these
15 words mean, and it means precision, without the added
16 language relative to local enrichment. And that was
17 then the final, my recollection, is the final
18 formulation of the issue of public policy in Texas
19 and what it ought to be in the future.
20 As you know, for one reason or another, these
21 amendments, while presented in the subsequent
22 legislative session to the people, this precise issue
23 was presented as a separate proposition to the people
24 of Texas. And it was, like all others, defeated.
25 I don't attribute, for a second, that it was

1 because of this issue. They were all defeated. And
2 because I think the people didn't like the people
3 that wrote it. And I happen to have been one of
4 them. As a matter of fact, I was the chairman, and
5 maybe they liked me less than others. But the point
6 is that this has been extensively debated. And
7 standing as it is, when I read it, until this debate
8 today, I assumed that that is what the Court
9 intended. That it had to be precise, that there
10 could be no deviation.
11 Interestingly, on another subject that's been
12 raised just within the last few minutes, the concept
13 of a state property tax to supplement, or as a legal
14 alternative, to supplement education funding. A
15 little history, as well, may be relevant on that
16 point. The reason -- one of the reasons the state
17 property tax was eliminated and voted out, was
18 because it was fundamentally unconstitutional. And
19 there are federal cases pending to have it declared
20 unconstitutional, because we don't have in this state
21 a system of equalization. And everyone conceded that
22 if you, on a state tax basis, you've got to have a
23 system that taxes Dallas' two-family bedroom home
24 just like El Paso. And that that system is not in
25 place and it's not in place today.

1 THE COURT: There's no system to equalize
2 value?
3 MR. HUTCHISON: No, sir.
4 THE COURT: To adjust value?
5 MR. HUTCHISON: No, sir.
6 THE COURT: And you say that's --
7 MR. HUTCHISON: The Federal Constitution
8 issue, and everyone conceded that.
9 MR. RICHARDS: We don't concede.
10 MR. KAUFFMAN: We don't concede anything
11 you've said in the last 15 minutes.
12 MR. HUTCHISON: Excuse me, I don't suggest
13 you concede, I'm suggesting you're relating to the
14 people who considered it, rightly or wrongly. It was
15 believed that the case would probably win in the
16 federal -- by federal standard, because we didn't
17 need a federal standard. And what we did, what the
18 Legislature did is fix, in order to alleviate the
19 problem, is we fixed the ratio to value at zero until
20 such time as the constitutional amendment could be
21 submitted to the people and it was ultimately
22 repealed. I -- respectfully, I did not intend to
23 imply that you agree with anything I might say. But
24 nevertheless, that is a reflection on history. I
25 think it is substantially accurate, Your Honor. And

1 this does have a history of debate in this state.
2 THE COURT: Okay. And the language you're
3 talking about, is it the --
4 MR. HUTCHISON: What was added after this
5 language, and it can be checked very quickly because
6 this is all recorded, "function of the wealth other
7 than wealth of the state as a whole, except that it
8 is not intended to be ordered here that local school
9 districts would be precluded from enriching their
10 school programs above state minimums."
11 MR. RICHARDS: Your Honor, I think that was
12 essentially to viscerate the order, is the way it
13 sounds to me, if you want to think through what that
14 means.
15 MR. HUTCHISON: But if there's a cap, if
16 it's not intended that there's a cap --
17 MR. RICHARDS: Well, first, the language
18 comes not from the constitutional debates, it comes
19 from the Court's decree.
20 MR. HUTCHISON: Well, I understand. But I
21 think some history on word is relevant. And this is
22 a very extensively debated subject.
23 MR. GRAY: Your Honor, we specifically, on
24 Page 5, deal with the limitation on tax rates. That
25 they can -- that what is spent is limited only by

1 discretion given to taxpayers to tax themselves.
2 That's the operative language in the whole judgment.
3 This other section is under the -- the section giving
4 guidance to the Legislature on what kind of system is
5 necessary to come forward in the future, and it is
6 one in which it looks at the state's wealth as a
7 whole, as opposed to this vast wealth disparities
8 that we currently have. And what Mr. Hutchison would
9 have you say is that the wealth disparities are just
10 well and good. That's what they've been saying for
11 three months. And obviously, we take strenuous issue
12 with that.
13 MR. TURNER: Your Honor, there are many --
14 Mr. Thompson pointed out to me that there are many
15 points in the proposed draft where the Plaintiffs ask
16 you to find that the property wealth is, and they use
17 the word "substantially" unequal. You'll find that,
18 Mr. Thompson said five times, where they say the
19 property wealth is substantially unequal. Then, what
20 they're doing here in this language that we've been
21 talking about, is they're not asking you to now
22 require that the property wealth be substantially
23 equal rather than substantially unequal as it is now,
24 they're asking, and asking you to sign an order that
25 makes it be exactly the same. And that's the point

1 that we're trying to make. Even the findings that
2 they ask you to make about substantial inequality of
3 property wealth and what's resulting from that, does
4 not lead one, necessarily, to the conclusion that we
5 have to devise a system with exactly precise, as they
6 say, "same ability" in each district to raise taxes.
7 So, you know, that's what we're looking for.
8 And I understand what the Plaintiffs are saying
9 about Mr. Hutchison's comments about allowing local
10 enrichment, because that does go to the heart of the
11 suit. You know, that's what we sought to try to
12 uphold from our side of the table, was this right of
13 local enrichment. But if we require, by order, the
14 same ability, we can't have any flexibility on local
15 enrichment, we have to have a cap or none -- or no
16 ability at all to raise local funds. Or in the
17 alternative, draw district lines where they're
18 exactly the same.
19 THE COURT: Yes, sir?
20 MR. KAUFFMAN: Well, I think we're
21 forgetting -- as I understand it, we have, according
22 to the Court, have won this lawsuit. And what that
23 means is that the Court has found it denies equal
24 protection. And what the Court has ordered here is a
25 strong clear order, and will tell the Legislature

1 what the Court sees to be the demands of the equal
2 protection clause. And that is what we're asking
3 for. There is a lot of discretion there to come up
4 with a plan that accomplishes this. It will not
5 require every district to have exactly the same tax
6 rates or exactly the same tax value. What it will
7 require is that the system, after all is said and
8 done, if you'll look at all of the districts, if
9 you'll look at all of the taxing authorities, if
10 there are any, if you look at all of the use of the
11 state funds, that a district has the same ability, is
12 what it talks about, as every other district to spend
13 the same on its kids.
14 And this is an extremely important lawsuit. It
15 will probably be the last time it will ever be
16 litigated, as far as what school finance means in
17 terms of equal protection of children. And we feel
18 that the standards should be very strong. That
19 school finance, and this Court should state that
20 that's what equal protection clause means. And
21 that's what we suggest to the Court. It's a clear
22 standard.
23 We have heard objections that we are not giving
24 the Legislature or Defendants any guidance. This
25 does give them guidance, and now, of course, there

1 are complaints about that.
2 We feel that the combination of the findings of
3 the Court, in which discussions of the disparities
4 are mentioned, discussions of possible remedies are
5 mentioned, discussions of the problems with the
6 formula, that that will give guidance to the
7 Legislature to come up with a plan that meets this
8 standard. And that's why we've said the same
9 ability, so that we are not involved in continuous
10 fights over the meaning of substantial.
11 We did certainly mention several times in the
12 decree that there are substantially unequal taxable
13 property wealth, clearly true. We are not aiming at
14 getting taxable wealth to be substantially equal.
15 We're aiming at getting each child equal protection.
16 And that's the standard that's set here. And the
17 Legislature has got to go about doing that. If the
18 Legislature can't, the Legislature will have to come
19 back and say that. But this will be the standard of
20 the Court, and that's why we're suggesting it.
21 MR. O'HANLON: The standard of the Court is
22 unclear. This is a hot bed. We're breeding
23 litigation. It says, "After taking into
24 consideration the educational needs of the student
25 and the legitimate cost differences in educating

1 students." Let's assume that we manage to get two
2 districts in -- that had the exact same tax base.
3 And let's assume that one of those districts had a 30
4 percent comp. ed. student rate and another district
5 had a 40 percent comp. ed. student rate. Now, are we
6 taking into consideration the special needs of the
7 students by giving them access to the same tax base
8 or not? It's unclear. That a strict reading of this
9 order would say no, that we would have to count the
10 heads in that district and make special provision in
11 the tax base, because they have ten percent more
12 comp. ed. kids. Now, how do we do that? How does
13 anybody comply with that order, given that standard
14 of exactitude?
15 MR. KAUFFMAN: That is something that the
16 state purports to comply with now, that's why there
17 are all of these formulas dealing with the special
18 needs of children and the special cost of districts.
19 MR. O'HANLON: Of course they do. No one
20 has ever, to my knowledge, ever held that equal
21 protection requires exactitude. And that's what the
22 Plaintiffs are asking this Court to do, is that it be
23 absolutely precise. And it's -- nobody has ever done
24 that.
25 THE COURT: Suppose that we had 20 school

1 districts in the state, one of which had great
2 numbers of Hispanic students whose educational needs,
3 at least in terms of the bilingual program, would be
4 substantial, much more than, say, some other school
5 district. But let's say all of those school
6 districts have the same tax base. What would you say
7 to that kind of a situation? That is to say, even
8 with the same tax base, it would -- if you were going
9 to do a right job, it would cost a lot more in the
10 Hispanic district than it would in the North Texas
11 district. Now, what would you say to that?
12 MR. KAUFFMAN: I would say then that the
13 state could use its funds in such a way to send more
14 state money to the district with the greater needs,
15 and then the districts having the same tax base --
16 THE COURT: Wait a minute. Suppose the
17 state says, "We're going -- we're going to equalize
18 the tax bases and we're not going to send you any
19 money. You're on your own. We'll set out some
20 minimum standards. You're on your own."
21 MR. KAUFFMAN: Well, I guess if the state
22 doesn't spend any money for education, I'm not sure
23 what we can do with them.
24 THE COURT: Sir?
25 MR. KAUFFMAN: I'm not sure what we can do

1 with them if the state doesn't spend a dollar on
2 education. I'm not exactly sure how we would have
3 any control to tell them what to do. I would see
4 that as highly unlikely, but if they did that, we
5 might be out of business, too.
6 THE COURT: Suppose the state comes back
7 and says, "All right, we're going to give you $10.00
8 per bilingual student." That means -- and the tax
9 bases are equal, that means you get a lot more money
10 than the North Texas school district.
11 MR. KAUFFMAN: If that state money is used
12 and maximizes the use of the state money to meet the
13 special cost needs of the districts, then that's the
14 end of the fight; it's done. All we can ask is that
15 the state money that is used, be used in the best way
16 possible to equalize these differences. And that the
17 state's authority to structure the entire system in
18 such a way to meet these differences is done. And
19 that's what we want. If they did have, there were 20
20 districts of equal tax base, I would think that the
21 remainder of the problem would be fairly minimal to
22 solve. But whatever state money was used would then
23 be used to meet just the special needs of the
24 children within those districts.
25 THE COURT: Well, is it a violation of the

1 constitutional principles for the state to have a
2 good reason to unequally spend money on education?
3 MR. RICHARDS: No, Your Honor, that's the
4 whole analysis. If the state has a good reason to do
5 it, to dispense it in an unequal manner, that passes
6 rational basis and, I assume, compelling state
7 interest.
8 MR. KAUFFMAN: That's right. That's why we
9 specifically put in -- that's why I specifically put
10 in this phrase about meeting educational needs of the
11 students. I would like say, in terms of the record,
12 that it's an amazing change of position here. We
13 were accused of trying to destroy the educational
14 progress of Houston and Dallas and picking on them,
15 in effect. And this is the sort of thing that would
16 especially respond to the special needs of whatever
17 districts there are, whether wealthy or poor, who
18 have special educational needs. That's one of the
19 reasons we want this in here.
20 MR. TURNER: Your Honor, one thing. I
21 think the reason they wanted that in there, they use
22 the language "the legitimate cost differences of
23 educating students." The next lawsuit you're going to
24 see is a lawsuit challenging the weighting system,
25 that would probably survive any change that would be

1 contemplated by this decision. So, eventually,
2 you're going to have that suit, because the order,
3 here, talks about legitimate cost differences. And
4 in this lawsuit, we haven't tried the weighting
5 system of the state formula. That was not mentioned
6 one time about being improper. But when you start
7 looking at the language and the exactitude that's
8 required here, there's no question that somebody
9 pretty soon will tell you in a pleading that the .12
10 weighting for bilingual is not enough. So you'll get
11 to try all of those issues for the handicapped and
12 everything else, because the language of this order
13 requires preciseness.
14 MR. O'HANLON: What we're trying to tell
15 the Court, is that kind of weighting stuff, and
16 special needs, and assessment with respect to
17 financing formulas, are pure and simply not
18 justiciable. That those issues with respect to
19 allocation and resources from the state are not
20 justiciable. That that's been litigated time and
21 time again on the federal context with respect to all
22 of the welfare programs. That those kinds -- those
23 assessments, as to what is the proper amount, are
24 simply not a matter for the Court. And that they're
25 putting that into a justiciable controversy by virtue

1 of this order.

2 MR. HUTCHISON: Your Honor, I would like to

3 ask one more extension of the hypothetical that you

4 gave, and that is everybody is equal and then you use

5 state money for bilingual or whatever on a special

6 need. Now, add one more ingredient. Now, the other

7 district in North Texas or wherever decides that it

8 wants to spend a little bit more, as many school

9 districts need to do, spend more to get people to

10 live there in order to teach, local enrichment. And

11 under -- I would just submit to you on the wealth of

12 the state as a whole, they could not do that. If

13 that's the Court's intent, fine. But I just

14 question --

15 THE COURT: Say that again.

16 MR. HUTCHISON: Under the language, which

17 is another paragraph than the one you're looking at,

18 that distribution of state -- or equal -- attending

19 public schools in the State of Texas is not made a

20 function of wealth other than the wealth of a state

21 as a whole.

22 THE COURT: Where are you reading that?

23 MR. HUTCHISON: Page 7, last clause of the

24 first full paragraph.

25 That is a little bit different subject, but

1 it's highlighted by your hypothetical. And I'm just
2 asking, basically, the local enrichment question. Is
3 it the intent of the Court's order that the district
4 not be able to enrich a local program? Under that
5 language, I would just submit, historically, the
6 answer would be no. And I'm just seeking to
7 determine what the Court's desire is.
8 MR. GRAY: Your Honor --
9 THE COURT: I don't have any desire to
10 prohibit what you've just indicated there.
11 MR. HUTCHISON: Then respectfully, Your
12 Honor, I think that at this point, the judgment
13 should expressly preserve the right of local
14 enrichment, because precedential debate on these very
15 words in this state are overwhelming.
16 THE COURT: No, what the Court decided was
17 that everybody needs to have an equal shot at local
18 enrichment.
19 MR. GRAY: Judge, he has not read the
20 entire judgment. Or if he has, he's forgetting part
21 of it. We dealt specifically with that on Page 5,
22 where we say each student would have the same
23 opportunity at educational funds as every other
24 student in the state, limited only by discretion,
25 giving local districts to set local tax rates. And

1 all that we're talking about and all that -- I know
2 Mr. Hutchison hasn't been here during very much of
3 the trial. But it has been abundantly clear that if
4 you tax at 40 cents in one district compared to 40
5 cents at another district, under today's system, that
6 gets you vastly, vastly differences of funds
7 available to be spent on kids. We want a system to
8 be that if you tax at the same rate, if you've got
9 the same type of kids to educate, you get the same
10 result. And that's exactly what we're talking about
11 when you say the wealth of the state as a whole.
12 Now, if the state wants to have districts with this
13 huge wealth, then they can fund state money to make
14 up the difference, that's their prerogative.
15 THE COURT: Okay, let me do this now.
16 While I've got all of you here, I want to work you as
17 hard as I can. And I would like to stop an hour for
18 lunch and get you all back here. And I'd really like
19 to -- I would like -- do you all have some language,
20 now, that you could interline with what we have here
21 and let everybody see? I'm talking about the
22 injunction language, the --
23 MR. E. LUNA: Judge, why don't we just add,
24 in order to cure it, just specifically say,
25 "Provided, however, nothing in this order shall have

1 any effect on the right of a local district to have
2 local enrichment of any program."
3 THE COURT: If that's not clean and clear,
4 I just, you know --
5 MR. RICHARDS: Well, Your Honor, the whole
6 problem is, it's going to viscerate what you just
7 said. Now, that's obviously what they're fishing for
8 here. And that's fine, if you start them off equal.
9 But if you start making that kind of proviso, you
10 swallow up your entire order, as I see it, and that's
11 the risk of it. If you start them off equal and they
12 get themselves to an equal tax base somehow, then
13 they want to enrich, that's fine. I think that's
14 what you've said. But if you start writing that
15 proviso in, I think you nullify the whole order.
16 THE COURT: What I think the law requires
17 is that each child in each district, through the
18 authorities in that district or otherwise, have equal
19 access to the same amounts of money. And now what
20 the districts do with that money is up to them. They
21 may want to locally enrich to pay teachers more
22 money. They may want to locally enrich to spend more
23 money on bilingual than the state gives them.
24 MR. O'HANLON: Equal access to money or
25 equal access to tax base? There's a difference.

1 THE COURT: Equal access to funds.
2 MR. O'HANLON: Well, if it's the students'
3 rights, then it is unconstitutional, if that's your
4 analysis, for a district to enrich. Because they
5 would have -- the district that chose the higher tax
6 rate with the equal base would have more funds
7 available to the student. And that would -- if you
8 say it's the students' rights to equal -- access to
9 equal funds, then local enrichment is, per se,
10 unconstitutional.
11 THE COURT: Well, that's not right. And if
12 you will read what I wrote the other day and read to
13 you all, I think you will understand what we're
14 getting at. So here is what we're going to do.
15 We're going to take an hour for lunch. And what I
16 want to have happen is, it may not happen, is that I
17 want to -- I want to get to language that's
18 interlined and everybody has equal access to it, and
19 that we can sort of settle down on. What I don't
20 want to have happen is, have some of this unresolved
21 and have you all go away and have to come back. I
22 would like to get it done today, if I can. I may
23 not.
24 MR. E. LUNA: Could I just say one thing?
25 The way we could interline it, Judge, if we just

1 added to this paragraph on Page 6, and just say --
2 MR. RICHARDS: We're not going to add it
3 there, Earl, you're just wasting your time.
4 THE COURT: Just a moment.
5 MR. E. LUNA: If we just added, so
6 everybody understands the verbiage, so we've got the
7 same verbiage. Say "Notwithstanding any other
8 provision in this judgment, nothing herein shall
9 prohibit local enrichment of any program by any
10 district."
11 Now, they say they don't want to prohibit it,
12 but if we just say that, then it doesn't prohibit
13 local enrichment. You've otherwise said that they're
14 going to have the same base, everybody is going to
15 have access to the same amount of property. And if
16 we just add to there that "Notwithstanding any other
17 provision of this judgment, nothing herein shall
18 prohibit local enrichment of any program by any
19 district."
20 MR. RICHARDS: And that, Your Honor,
21 effectively nullifies every other provision of your
22 judgment, if I -- Earl's syntax is bad, I think I
23 heard it correctly. It's a proviso of the right that
24 wipes out the judgment.
25 MR. E. LUNA: Then you do want to prohibit

1 it?

2 MR. O'HANLON: I really do have a basic

3 question here. Are we talking about access to funds,

4 or access to the tax base? Because that's the

5 difference -- that solves the enrichment problem

6 right there. Is it the individual student's access

7 to funds, or access to a tax base? Now, I don't mean

8 necessarily equalize, but the functional equivalent

9 by virtue of tax base and the combination of state

10 aid at the local discretion of taxpayers. Because if

11 you say each student has equal access to funds, then

12 you really do have a problem with local enrichment.

13 THE COURT: Okay. If you will read what I

14 wrote --

15 MR. O'HANLON: I have.

16 THE COURT: -- the other morning, that will

17 tell you.

18 Here is what we're going to do. We're going to

19 stop for an hour and let you all get some lunch.

20 We're going to meet back, and then we're going to

21 spend a couple of hours maybe going line by line

22 through this thing. And we're going to try to get it

23 down to language that I like.

24 Now, on attorneys' fees, I don't know if we're

25 going to reach that today. Does that sound right?

1 MR. RICHARDS: I would agree with you that
2 you're not going to reach it today, is that what you
3 mean?
4 MR. KAUFFMAN: It's hard to find David ever
5 to agree.
6 THE COURT: All right. You go down there
7 and get yourself a reasonably good club sandwich in
8 the basement cafeteria. And I'll see you all again
9 at 1:00.
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13 (Lunch Recess)
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1 THE COURT: Okay.

2 MR. GRAY: Your Honor, we have spent the
3 better part of the last hour with all counsel going
4 through the proposed judgment page by page and have
5 reached, basically, an agreement. There are one or
6 two areas in which the Defendant-Intervenors want to
7 address to the Court, but I'm prepared to take the
8 Court through the judgment page by page and show you
9 where we have agreed. And if we can address the
10 other things in as rapid a manner, I can -- if the
11 Court will excuse me, I can go to my office, have it
12 retyped, and have a final document back to be
13 entered, subject to the attorneys' fees provision,
14 this afternoon.

15 THE COURT: Okay.

16 MR. O'HANLON: I need to make that clear,
17 that's agreement as to form.

18 THE COURT: Yeah. Well, maybe -- would it
19 expedite things to let me know the areas where there
20 is not an agreement?

21 MR. GRAY: Yes, sir.

22 THE COURT: And let's settle that. If
23 everybody else is sure about where there is
24 agreement, then...

25 MR. GRAY: I think there are only two areas

1 where there is not agreement. Throughout the
2 document, the Defendant-Intervenors, instead of equal
3 opportunity for funds, want substantially equal
4 opportunity for funds. Our position on that, quite
5 simply, is when you insert substantially, you open up
6 the door for what is and what is not substantially
7 equal.
8 And two, our understanding of the equal
9 protection law clause is that you have to have equal
10 access unless there is a valid legitimate reason for
11 not having equal access. And if -- so we think the
12 standard is indeed equal and it's not substantially
13 equal, and they have to come back in and justify
14 anything lesser than that.
15 THE COURT: Okay. I'm going to go with
16 that, I thought about that over my lunch. I'll go
17 with that, with some fear and trepidation that the
18 Legislature might try to remedy that with a cap, but
19 that is not my job. It's going to be ya'll's job to
20 keep that from happening, if you don't want that to
21 happen.
22 MR. GRAY: The other area of concern
23 between the Plaintiff -- between the Plaintiff and
24 Plaintiff-Intervenors and the Defendant-Intervenors,
25 is on Page 5, where on the Declaratory Judgment

1 language, we took this language directly out of the
2 Court's April 29th letter/memorandum, in which we
3 read this language to say that all students will have --
4 basically that a 40 cent tax rate in District A will
5 get you the same amount of money as a 40 cent tax
6 rate in District B, in that the differences in funds
7 available to be spent will be if District A chooses
8 to tax at a higher or lower rate than District B.
9 And we read this language to say just that.
10 Mr. Turner has proposed alternative language,
11 which we don't think is as clear as this language is.
12 And it's his position that his language says that in
13 a better way than this language says that.
14 Mr. Turner, I think that's an accurate
15 statement of your position.
16 THE COURT: Read me your language.
17 MR. GRAY: The language we have is the
18 language in the judgment. We've made a few changes.
19 THE COURT: Okay. Where does it start?
20 MR. GRAY: On Page 5.
21 THE COURT: Yeah.
22 MR. GRAY: And it starts with the second
23 paragraph under Declaratory Judgment, where it says
24 "The Court hereby declares," and it continues on
25 after the words, in caps, "UNCONSTITUTIONAL and

1 UNENFORCEABLE IN LAW, because it fails to ensure that
2 each school district in this state has the same
3 ability as every other district to obtain, by state
4 legislative appropriation or by local taxation, or
5 both, funds for educational expenditures, including
6 facilities and equipment, such that each student, by
7 and through his or her school district, would have
8 the same opportunity to educational funds as every
9 other student in the state, limited only by
10 discretion given local districts to set local tax
11 rates."
12 THE COURT: Okay.
13 MR. GRAY: Then I have an insert that we
14 have agreed to on that, and that is how we proposed --
15 THE COURT: Just a minute. You've taken
16 out the parenthetical phrase there?
17 MR. GRAY: Yes, sir, I have taken out the
18 parenthetical phrase there --
19 THE COURT: That's good.
20 MR. GRAY: -- and I have added the insert
21 that comes after "local tax rates."
22 THE COURT: Okay, tell me.
23 MR. GRAY: Which reads "Provided this does
24 not prohibit the State from taking into consideration
25 the legitimate needs and district or student --

1 THE COURT: In districts?

2 MR. GRAY: No, "the legitimate needs and
3 district or student cost differences associated with
4 providing a public education."

5 That's a slight change, by the way, but it's
6 the same concept. It just read better.

7 THE COURT: Okay, just a minute.

8 After "local tax rates," your suggestion will
9 read, "Provided this does not prohibit the State from
10 taking into consideration the legitimate needs and
11 district or student cost differences associated with
12 providing a public education."

13 MR. GRAY: Yes, sir.

14 And there is no disagreement with the proviso,
15 that additional language we proposed. The
16 disagreement is in the body, itself, language. And I
17 think Mr. Turner can probably better address his
18 position than I can for him.

19 THE COURT: Okay.

20 MR. TURNER: Judge, what we were trying to
21 do is just offer some language that would make it
22 clear that even though you're requiring the same
23 opportunity, whether that be by equal tax bases or
24 appropriations, or some combination, that a district
25 that wanted to make greater effort than that by

1 accessing a little higher tax rate, that they would
2 have that right. And here is the language we
3 suggested. "Nothing in this judgment is intended to
4 limit the ability of school districts to raise and
5 spend funds for education greater than that raised or
6 spent by some or all other school districts, so long
7 as each district has available, either through
8 property wealth within its boundaries or state
9 appropriations, the same ability to raise and spend
10 an equal amount per student, after taking into
11 consideration the legitimate cost differences in
12 educating students."
13 THE COURT: All right. Read it one more
14 time.
15 MR. TURNER: "Nothing in this judgment is
16 intended to limit the ability of school districts to
17 raise and spend funds for education greater than that
18 raised or spent by some or all other school
19 districts, so long as each district has available,
20 either through property wealth within its boundaries
21 or state appropriations, the same ability to raise
22 and spend an equal amount per student, after taking
23 into consideration the legitimate cost differences in
24 educating students."
25 THE COURT: Okay. What is wrong with that?

1 MR. GRAY: There is nothing wrong with that
2 in and of itself. But that, substituted in lieu of
3 this language in Paragraph 5, is the problem.
4 THE COURT: Okay.
5 MR. GRAY: I mean, we don't have any
6 problem with saying that if District A wants to tax
7 more than District B, it will have more funds,
8 because that's everybody's intent. And I think what
9 we would -- I think our dispute is that we're not
10 prepared to give up the Court's initial language as
11 to why it was set, you know -- this initial language
12 is why the system was declared unconstitutional. And
13 we think it needs to be in there.
14 MR. TURNER: Well, as far as I'm concerned,
15 as long as this language is in the judgment, I think
16 it clarifies the rest of the language, efficiently,
17 for everybody to know that you can still make greater
18 effort and not be unconstitutional in doing so.
19 THE COURT: Okay. Why don't you put it in
20 in a paragraph at the end of Page 5. Is that a good
21 place to stick it in?
22 MR. TURNER: That will be fine.
23 MR. GRAY: That's fine.
24 THE COURT: All right. It's fine with me,
25 because that is the intent. And if that is not

1 discernible from what we've already got in here, then
2 maybe to say so will be of some benefit.
3 MR. GRAY: That's absolutely fine.
4 THE COURT: Okay.
5 MR. R. LUNA: I think the only other issue
6 left, Judge, after that, is attorneys' fees. Is that
7 right, Rick?
8 MR. GRAY: Yes. And I was not even going
9 to -- they're obviously taking issue with if we're
10 entitled to attorneys' fees and how much. And I was
11 not going to get into that at this point.
12 MR. R. LUNA: We thought we might suggest
13 to the Court is that while Mr. Gray was having this
14 retyped, there's a chance we might actually have a
15 completed form of judgment today for the Court to
16 take a look at, with the exception, of course, the
17 blank for attorneys' fees. Therefore, since our
18 position is, is that attorneys' fees in this case
19 should not be awarded, that if we could address that,
20 those legal arguments, while the judgment is being
21 typed --
22 THE COURT: Okay.
23 MR. R. LUNA: -- it may be if the Court
24 agrees with us on that position, then the judgment
25 will be final today. If it does not, then of course,

1 it will need to decide how it's going to handle that.
2 THE COURT: Okay.
3 MR. GRAY: The only problem is that Mr.
4 Richards is not here. And if I'm going to be absent
5 to prepare this, when the argument is on attorneys'
6 fees, then we're -- not that Mr. Kauffman can't
7 adequately handle our position, but I think that
8 someone from the Plaintiff-Intervenors would like to
9 be here during that argument.
10 MR. R. LUNA: I'm sorry, Mr. Richards was
11 here just a minute ago. I didn't realize he had
12 gone.
13 MR. GRAY: He unfortunately has another
14 substantial hearing this afternoon.
15 MR. TURNER: Judge, it shouldn't take long.
16 THE COURT: Okay.
17 MR. GRAY: I think if we can go through,
18 and if I could talk to Mr. Kauffman briefly, we
19 probably can -- I'll be satisfied and I'll go about
20 having this redone. I wanted to run through it with
21 the Court, briefly, to let the Court know what we
22 were proposing, to make sure that that was indeed
23 acceptable to the Court before I had it retyped.
24 MR. R. LUNA: Let me make this suggestion.
25 Our arguments are going to be short and simple.

1 Either the districts are entitled to sovereign
2 immunity or they're not. We will also discuss the
3 equity basis of everyone pleading with their own
4 costs, whatever they are. I think the arguments will
5 probably be less than ten minutes. It may be that
6 Mr. Gray would like to stay for ten minutes.
7 THE COURT: Defendant-Intervenors' claim an
8 immunity from being subjected to attorneys' fees on
9 account of sovereign immunity?
10 MR. R. LUNA: Yes, they're state agents,
11 yes, sir.
12 THE COURT: Okay. Let's get into that in
13 just a minute.
14 We've got the bond problem solved, we hope?
15 MR. HUTCHISON: Yes, sir, I think so.
16 THE COURT: You think that will make the
17 New York fellows happy?
18 MR. HUTCHISON: Yes, sir.
19 THE COURT: By way of a few suggestions
20 from me, why do we need in these parenthetical
21 comments, "substantially unequal taxable property
22 wealth?" Why do we need "substantially"?
23 MR. GRAY: We don't.
24 THE COURT: Let's scratch "substantially"
25 out. It'll just contain "unequal taxable property

1 wealth." And there is three of those that I -- three
2 of those on Page 5 and one on Page 6 at the top.
3 MR. GRAY: Okay. I have the three on Page
4 5; I have the one on Page 6.
5 THE COURT: I think that's the only place
6 they show up.
7 MR. GRAY: I will proof it to make sure, to
8 the extent of my ability, that they are all out of
9 there.
10 THE COURT: And you intend to type the
11 judgment up with the part about attorneys' fees in
12 there, just leaving the blanks and so on?
13 MR. GRAY: Yes, sir.
14 THE COURT: And if we have to, we can fill
15 in the blanks and/or scratch all of it out and deny
16 attorneys' fees.
17 MR. GRAY: Yes, sir.
18 THE COURT: We can work on that later.
19 MR. GRAY: There is one -- the form of the
20 judgment denies attorneys' fees in the award as to
21 the State, but based upon sovereign immunity. Mr.
22 Kauffman has a separate cause of action of racial
23 discrimination that he has pled, that
24 Plaintiff-Intervenors have not pled. And he's
25 maintaining that he is entitled to attorneys' fees,

1 even against the State as well as the other
2 districts. That's not addressed in this judgment,
3 topside or down. And that could be added to it or
4 not, depending on how the Court should rule.
5 THE COURT: What do you want to do? Do you
6 want to visit with Mr. Kauffman a minute before you
7 leave?
8 MR. GRAY: Well, what I was --
9 THE COURT: I mean, do we want to try to do
10 this argument before --
11 MR. TURNER: Let's just do that. I don't
12 think --
13 THE COURT: Let's do that.
14 Tell me about your ideas about sovereign
15 immunity.
16 MR. TURNER: Judge, I think this is very
17 simple. In fact, you decided the matter in Texas
18 Employment Commission versus Camarenda. (Phon.)
19 THE COURT: I did?
20 MR. TURNER: Is that Camarena? Excuse me.
21 You held there that the Plaintiffs had no right,
22 based on sovereign immunity, to an award of
23 attorneys' fees against -- in that case, it was a
24 state agency.
25 THE COURT: That's the highway department?

1 MR. TURNER: Texas Employment Commission.
2 MR. O'HANLON: TEC.
3 THE COURT: Okay.
4 MR. TURNER: This was an unemployment
5 compensation case. It's equally clear, from all of
6 the cases and even arguments the Plaintiffs have
7 brought before the Court, and even some of the cases
8 they have in their Findings of Fact and Conclusions
9 of Law, that a school district is a political
10 subdivision of the state.
11 THE COURT: That's your position on this?
12 MR. TURNER: That's our position.
13 THE COURT: Okay.
14 MR. TURNER: And it's really as simple as
15 that.
16 Now, the case that you decided, and the opinion
17 of the court of appeals kind of explains the law,
18 perhaps.
19 THE COURT: Did they affirm me?
20 MR. TURNER: They did.
21 THE COURT: They were right for once.
22 MR. GRAY: Your Honor, I might point out
23 that the companion case to Camarena, in which you
24 denied -- well, I'm not sure it was you, but another
25 judge denied attorneys' fees. I believe it was you,

1 as a matter of fact. You made a ruling that "I would
2 order them otherwise, but I denied based on sovereign
3 immunity." The Supreme Court has accepted that writ
4 of error. And that issue is currently pending before
5 the Supreme Court.
6 THE COURT: Okay.
7 MR. TURNER: Basically, what it comes down
8 to, as Camarena pointed out, there's always two
9 issues in sovereign immunity. Are you immune from
10 suit, is the first question. Second question, are
11 you immune from liability? And the only thing I
12 think that is worthy of note, here, is the fact that
13 the State is always immune from suit. And that's why
14 you have to go over to the Legislature and get a
15 resolution for permission to sue.
16 School districts are not immune from suit
17 because of the Texas Education Code, which says a
18 student in the school district can sue and be sued in
19 its own name. But the cases are also equally clear
20 that the question of whether a school district has
21 liability is the same issue that confronts the Court
22 when the State is involved.
23 So, here, we have no -- there's no waiver of
24 liability, by any statute, that would cause the
25 school district to be liable in declaratory judgment

1 for attorneys' fees. And that's, as I say, exactly
2 what the holding of Camarena was, is that there's no
3 liability for attorneys' fees.
4 THE COURT: The Plaintiffs are looking for
5 attorneys' fees from you all, and the
6 Plaintiff-Intervenors, both?
7 MR. GRAY: Yes, sir. Plaintiff-Intervenors
8 are only looking for attorneys' fees from the
9 Defendant-Intervenors, not from the State. We have
10 urged, in our proposed judgment, that the Court make
11 a finding of whether it was a reasonable and
12 necessary fee, and make the affirmative statement
13 that the Court would award that fee as to the State,
14 Defendants, but for sovereign immunity. So if the
15 Supreme Court speaks to the issue in the meantime,
16 that can be resolved.
17 THE COURT: Okay.
18 MR. GRAY: We take a position quite
19 different from Mr. Turner on whether or not the
20 Defendant-Intervenors, these districts who have
21 voluntarily chosen to intervene in this litigation,
22 whether or not they have the shield of protection of
23 sovereign immunity.
24 THE COURT: Okay. I'm going to hold they
25 do. But even if they don't, I'm going to follow the

1 I don't want to rule. I really don't want to put
2 your fees on them. That's that.
3 MR. KAUFFMAN: Your Honor, can I at least
4 try?
5 THE COURT: Okay.
6 MR. KAUFFMAN: All right. Three arguments:
7 First, the Defendant-Intervenors came into the case
8 and have asked for a -- they've asked for a
9 declaratory judgment, so they've come and sought
10 relief in this Court against us. And therefore, we
11 feel they have waived their immunity through that.
12 Secondly, they've also asked for fees against
13 the Plaintiff and Plaintiff-Intervenor districts.
14 Assuming, therefore, that they would think that they
15 are -- that school districts are liable for fees.
16 Third, there's a difference between state
17 immunity and local district immunity. And the
18 federal court cases regarding the eleventh amendment
19 have pointed out the difference between a state's
20 immunity and political subdivision immunity. And we
21 would pursue that with the Court.
22 And the last answer is that we have -- in this
23 case, we feel a liability for attorneys' fees against
24 the state, as well as against the local districts,
25 under Section 106 of the Civil Practice and Remedies

1 Code. And that is the discrimination section of the
2 Civil Practice and Remedies Code. And it says that,
3 "No officer or employee of the state or of a
4 political subdivision of the state who is acting or
5 purporting to act in an official capacity may not,
6 because of a person's race, religion, color, sex, or
7 national origin," and "refuse to grant a benefit to a
8 person or impose an unreasonable burden on the
9 person." And we have alleged in this case that the
10 State has discriminated against Mexican-Americans
11 through the school finance system. And that this
12 Section 106.001 has been violated.
13 Now, the important point, as far as waiver of
14 immunity, is in the remedy section of this act of
15 Chapter 106 of the Civil Practice and Remedies Code.
16 And in the remedy section, it says this: "In an
17 action under this section, unless the state is the
18 prevailing party, the court may award the prevailing
19 party reasonable attorney's fees as a part of the
20 costs. The state's liability for costs is the same
21 as that of a private person." And that's in Section
22 106.002 of the Civil Practice and Remedies Code. And
23 that clearly does waive the State's sovereign
24 immunity. And it says it in a fashion that is
25 exactly what the State has always stated in its

1 briefs, is required to waive sovereign immunity in
2 clear and unambiguous language. It says, "The
3 state's liability for costs is the same as that of a
4 private person." And in the sentence right above
5 that, it said, "The court may award the prevailing
6 party reasonable attorney's fees as a part of the
7 cost."
8 So therefore, the State has made its decision
9 that in cases of national origin discrimination, that
10 the State is liable for attorney's fees and costs.
11 And therefore, whatever immunity the local districts
12 would have through the State is therefore waived, as
13 well as the State's immunity from fees being waived.
14 This is not a new act. This act has been on
15 the books for about 10 or 15 years. But it is clear
16 that the State decided that in cases of national
17 origin discrimination, that its immunity is waived.
18 And I've got the section here, it's 106.002(b).
19 And our argument is therefore that both the
20 State's and the local districts' immunities are
21 specifically waived by that section --
22 THE COURT: Okay.
23 MR. KAUFFMAN: -- since we have proved a
24 case of national origin discrimination against
25 Mexican-Americans.

1 THE COURT: Okay. I will not award you
2 fees against the Defendant-Intervenors.
3 As to the State --
4 MR. O'HANLON: Judge, I just got through
5 reading this judgment. I don't see a word in here
6 about national origin discrimination. I know he's
7 alleged it, but he hasn't proved it and you haven't
8 found it. The form of the judgment that Mr. Kauffman
9 just agreed to doesn't find it either, so I don't see
10 how he gets there.
11 This is strictly a matter of equal protection
12 based on geographic location. And that's what the
13 Court has ordered. You haven't found any racial
14 discrimination. And you haven't found intentional
15 discrimination. How could you, on behalf of the
16 Defendants in this lawsuit, because they're
17 administering the statutes that exist, that the
18 Legislature isn't a party to this thing. There's no
19 finding of intentional discrimination in here. There
20 hasn't been even any proof of intentional
21 discrimination in this case.
22 MR. KAUFFMAN: Well, of course, we disagree
23 with that strongly. We feel that we have proved a
24 case of national origin discrimination under two or
25 three bases. And I'm prepared to argue that as well.

1 The Court, in its letter, did not make its
2 opinion on whether there was national origin
3 discrimination or not. It said neither that there
4 was nor that there wasn't.
5 In our proposed findings, we have a section on
6 nation original discrimination. We have a specific
7 finding and proposed legal conclusion that there is
8 discrimination against Mexican-Americans. The
9 judgment, itself, mentions both Section 3 of the
10 Constitution and Section 3(a), which is the Equal
11 Rights Amendment to the Constitution, which applies
12 to cases of national origin discrimination. So
13 therefore, it is in the proposed judgment that we've
14 made.
15 The Equal Rights Amendment to the Texas
16 Constitution has recently been considered finally by
17 the Supreme Court. And In the first opinion on the
18 subject in a February 1987 decision called "In the
19 Interest of Unnamed Baby McLean." And I can get a
20 copy of that to the Court. I have some extra copies
21 here. But the guts of that opinion is, Your Honor,
22 that the State Supreme Court has said that the Equal
23 Rights Amendment, which specifically prohibits
24 national origin discrimination, is to be considered
25 as adding to the rights under the Equal Protection

1 Clause. In fact, the Supreme Court specifically said
2 that there have been no reasons to have an Equal
3 Rights Amendment unless it actually went farther than
4 the Equal Protection Clause of the Federal or the
5 State Constitutions. And it's very clear by the
6 Supreme Court decision in the Interest of McLean,
7 that the Supreme Court considers the Equal Rights
8 Amendment a very strong standard, and outlaws any
9 discrimination against national origin, race, or sex
10 groups. So we would say that we have proved that
11 case.
12 First of all -- for the following reasons:
13 First of all, we do not feel intent is even necessary
14 under the Equal Rights Amendment of the Texas
15 Constitution. We feel that it is, in effect,
16 standard. And Baby McLean makes clear that it's a
17 very strong standard and is stronger than the equal
18 right -- it is stronger than the Equal Protection
19 Clause.
20 Secondly, if you have to show intentional
21 discrimination, we feel that we have shown it by the
22 state. You do not need to show an intentional
23 discrimination case. You certainly do not need
24 anyone who has stood on the floor of the House of
25 Representatives and said, "We are passing this to

1 discriminate against Mexican-Americans." The
2 standards for intent cases have been set up by the
3 U.S. Supreme Court several times. And you can look
4 at the effect of the statute. And the effect on
5 Mexican-Americans is clear and it is very negative.
6 You look at the history of the actions, and the
7 history of the school finance system has been very
8 negative against Mexican-Americans. You look at
9 possible alternatives with less discriminatory
10 effects, we have shown that there are many
11 alternatives. In fact, the guts of what this Court
12 is ordering is an alternative which will have less
13 discriminatory effect on Mexican-Americans.
14 In addition, we have the statement of the
15 Commissioner of Education, Dr. Kirby, stating that he
16 does not feel the Legislature would pass a school
17 finance formula that sent too much money to poor or
18 Mexican-American districts. And he said that,
19 there's an exhibit in the record showing that. And
20 Dr. Kirby testified to that. He did not testify that
21 that was his preference, he said that he didn't think
22 anything like that could pass through the
23 Legislature.
24 So we feel, for those reasons, that we have
25 proved our case of national origin discrimination.

1 And again, in our Findings of Fact, we have
2 specifically proposed that to the Court in our
3 proposed findings. And if that is so, then the
4 provisions of Section 106 of the Administrative Code
5 do come into play. And the sovereign immunity of the
6 State is waived. So --
7 THE COURT: And if intent need not be
8 proved, then what needs to be proved, say?
9 MR. KAUFFMAN: If it is not -- we're saying
10 first, that it's not -- I'm sorry, I didn't
11 understand you, I'm sorry.
12 THE COURT: If intent is not necessary to
13 be proved, then what is necessary to be proved?
14 MR. KAUFFMAN: Then what would need to be
15 proved is a negative effect. And that the State has
16 not shown legitimate or sufficient State reasons for
17 that effect.
18 In the litigation involving Title VII of the
19 Civil Rights Act, there's a tremendous body of law on
20 effect of discrimination. It does not mean per se
21 discrimination, that any time any act affects one
22 group worse than the other, that therefore there's a
23 violation. It says that if there's a negative
24 impact, a strong negative impact, which we have shown
25 here, then you have to look at the State purposes,

1 the State reasons, the State business necessities,
2 the way that that litigation developed, for that
3 particular practice. And we feel, in this case, that
4 there is discrimination, a discriminatory effect, a
5 strong one on Mexican-Americans. And that the State
6 has not shown, sufficiently, reasons why that system
7 must be in place. And therefore, we would meet the
8 standards under the Equal Rights Act.
9 This is what was recommended in a Law Review
10 article written by Professor Schoen at the Texas Tech
11 Law Review. And that Law Review article was cited by
12 the Supreme Court in Interest of McLean, where Schoen
13 went through -- he's sort of the historian on the
14 Act. Rod Schoen is his name. He has gone through
15 and says that that is his interpretation of the Equal
16 Rights Act. He also said, "If the Equal Rights Act
17 didn't go any farther than regular equal protection,
18 then there's no reason to have it." That's what the
19 Supreme Court found in the Interest of McLean.
20 THE COURT: Yes, sir?
21 MR. O'HANLON: Well, my understanding of
22 the Equal Rights Amendment was is that it was
23 designed to go a little farther than the Equal
24 Protection Act, because it's specifically designed to
25 include women as a suspect classification. That's

1 why it was passed. But with respect to 16.001, it
2 doesn't say. It says "an officer or employee of a
3 political subdivision of the State." That's what it
4 says. It doesn't say the Legislature. It's a waiver
5 for specific -- a specific cause of action for an act
6 of individual discrimination. That's what that
7 statute is for. That's what it means. It doesn't
8 mean -- it doesn't have anything to do with this kind
9 of case.
10 With respect to impact, I'm not sure I've been
11 in the same courtroom. All of the statistical
12 analysis shows that Hispanics, despite the fact that
13 they're concentrated -- a lot of them in poor
14 districts -- are likely to be in wealthy districts as
15 they are to be in poor districts. Same with respect
16 to Blacks, they're fairly well dispersed about the
17 state. They haven't proved anything with respect to
18 an impact in this case. And they haven't proved
19 anything with respect to intent. And that's why I
20 assume the Court's letter didn't say anything about
21 it.
22 MR. R. LUNA: If I could address the
23 question of equity, briefly. Nobody had to be in
24 this lawsuit. Everybody wanted to participate.
25 We've all wanted to be here and share what little we

1 might be able to contribute with the Court. We think
2 it's a matter of equity. While both sides have
3 costs, there will probably be a better role, in this
4 situation, because of the proof and so forth, that
5 each side simply go away with its attorneys' fees and
6 its own costs. And both sides have a lot of each.
7 MR. O'HANLON: If Mr. Kauffman is making an
8 attempt to amend the Court's order, then I think we
9 ought to get down and argue. But I don't want to
10 drag this out, unless it's in the context of the
11 order in the entire case.
12 MR. KAUFFMAN: Well, Your Honor, it's in
13 our proposed findings. All of these issues are in
14 our proposed findings. It's in our petition that was
15 filed in May of 1984.
16 MR. O'HANLON: The proposed findings? I
17 want to see what's in the order. If it's not in the
18 order, then I don't think you found it. The fact --
19 and if the mention of Article 3a, then I move that it
20 be stricken from the order, if Mr. Kauffman wants to
21 make that kind of solution to it. That any reference
22 to Article 3a be stricken. I might also point out
23 the fact that the Plaintiffs in this case were the
24 ones that were promoting the passage of House Bill 72
25 to the Legislature in this case, as been testified

1 to. And how they can turn around and say that when
2 we passed their bill, that we intentionally
3 discriminated against them, is a little bit strange
4 to me.
5 I might point out that this case, the first one
6 was, in fact, a sex case. And that's why the Equal
7 Rights Amendment was passed to protect gender as a
8 classification. So it doesn't support the expansive
9 reading of Article 3a that Mr. Kauffman is proposing
10 to the Court.
11 MR. KAUFFMAN: Let me -- specifically
12 mentions national origin and race, the Equal Rights
13 Amendment.
14 THE COURT: And who would I find as
15 refusing to grant the benefit or who has imposed an
16 unusual burden? Who would I find, the Legislature?
17 MR. KAUFFMAN: Well, it would have to be
18 the named Defendants carrying forward the policies of
19 the Legislature. And that has been -- Your Honor,
20 that's the way that statute has been interpreted,
21 that if a school board decides to lay off half of its
22 employees and lays off all of the Mexican Americans,
23 you bring an action against the school superintendent
24 who laid them off, who carries out the policy. And
25 that's the way that those acts are interpreted. I

1 mean, rather than saying the State cannot, it says
2 that the officer cannot. It mentions the State as a
3 party in the remedy section there.
4 MR. O'HANLON: What this case -- and I'm
5 reading this case for the first time. It says,
6 "First step in a case invoking this provision is to
7 determine whether equality under the law has been
8 denied. Any discrimination which occurred in the
9 instant case is clearly under the law because it is
10 required by state statute." Okay? "Our next inquiry
11 is whether equality was denied because of a person's
12 membership in a protected class of sex, race, color,
13 creed, or national origin." And that's a burden they
14 clearly cannot meet in this case.
15 If we have a problem with respect to wealth,
16 it's because of the district lines. Now, the
17 Plaintiffs have shown that the district lines exist
18 in this state and that they capture wealth. There is
19 no evidence with respect to why they were there, or
20 anything of that nature. And if you're going to show
21 intentional discrimination, you have to show that
22 that's the reason that created it. That they were
23 drawn in a way as to capture Hispanics and exclude
24 them. And they haven't made that showing. And in
25 fact, they've made quite the opposite showing,

1 because of the aggregation of Hispanics in certain
2 parts of this state as a whole, not in any particular
3 school district.
4 So there's no showing, absolutely no showing
5 that that denial was because of membership of a
6 protective class. It's because of being in a certain
7 geographic location. And that's not racial
8 discrimination. You may find it unconstitutional
9 under equal protection grounds, but that's not
10 discrimination based on race. It's discrimination
11 based on a specific geographic location. I think
12 that's where the Court's findings have gone.
13 THE COURT: What do you say to that, Mr.
14 Kauffman?
15 MR. KAUFFMAN: Well, Your Honor, we feel
16 that there's more than sufficient record here on the
17 Mexican-American discrimination issue. Dr. Cardenas
18 talked about the historical discrimination against
19 Mexican-Americans, about his efforts since 1968 to
20 address that problem in the Legislature.
21 Dr. Kirby stated that he knew, and it's known,
22 that the people in the poorest districts are
23 Mexican-Americans. That certainly every school
24 finance system that has been passed in the State of
25 Texas, has been done with that knowledge, at least --

1 I guess during the last 20 years, since the date has
2 been available.
3 We've shown that 95 percent of the people in
4 the poorest districts are Mexican Americans. We've
5 shown that those districts have less to spend on
6 their children than do other districts. We've shown
7 that those children have higher, rather than lower
8 cost and needs than do students in other districts.
9 We've shown from Dr. Kirby, his testimony that -- I
10 quote this, because I think it's a very strong point.
11 He said, "Texas will not support a system of school
12 finance that sends too much money to minority and
13 poor districts." And we feel that under the Equal
14 Rights Amendment and under the liberal standards of
15 that amendment, that there has been a violation of
16 the rights of Mexican-Americans under the school
17 finance system.
18 MR. O'HANLON: You simply don't have --
19 it's the Legislature that has a right to the system.
20 The Plaintiffs in this case are the ones -- the
21 statute in question was drafted up by the Plaintiffs
22 and their experts in this case. And then the
23 Legislature passed it. And that's the issue, if that
24 statute is discriminatory. Or the only other aspect
25 of this case that has anything to do with it, is the

1 district lines. And there's been no showing of an
2 impermissible motive in the drawing of those lines.
3 They've asked the Court to -- and the Court has ruled
4 that their existence can no longer be rationalized.
5 If you want to get into that -- and I have
6 offered to -- if the Plaintiffs are going to reopen
7 on attorneys' fees, I request to reopen on the
8 district lines, themselves, to determine -- to show
9 you how they came to be. But until this point, there
10 has been no evidence, none, as to how they came about
11 to be created. And that is required, a required
12 showing.
13 MR. R. LUNA: I would like to go back, just
14 briefly, to the old example of those rich Hispanic
15 districts of Dallas and Houston. I think that we
16 continually forget what the evidence has shown, that
17 those districts are going to be Hispanic districts
18 very shortly. There simply cannot be discrimination
19 if all of the money is flowing to those districts.
20 There's no discrimination in that system.
21 MR. O'HANLON: The correlation, if I can
22 recall, the correlation between Hispanics and wealth
23 per ADA is .21, which is barely in the significant
24 range. It's barely in the significant range at all.
25 And you don't write a statute for Hispanics, you

1 write it for all folks in this state. And if you
2 look -- if you combine the Blacks and the Hispanics
3 as minorities in this state, your correlation goes
4 down to about .1, which is meaningless. So that if
5 you look at dispersal of all of the minorities in
6 this state, then there is no correlation between
7 wealth and either of those protected classes.
8 That's the evidence in this case, that in a
9 certain segment of districts, in the very poorest
10 districts, there are a lot of Hispanics, is true.
11 But you don't write a state finance system for a
12 segment of districts. If you look at the richest
13 five percent of the districts, you'll find that
14 there's a high percentage of Hispanics in those
15 districts as well. But you don't look at extremes.
16 You don't look at -- you look at the whole state
17 system. And if you look at the evidence with respect
18 to the dispersal of minorities in this state, there
19 is no significant correlation as to wealth and the
20 presence of minorities are not within a particular
21 district. That's the evidence in this case. It's
22 clear. It came in from Mr. Moak, it came in from Dr.
23 Verstegen. There is no correlation between those.
24 So even on an impact test, which I don't grant
25 for a minute is applicable, the standard is

1 intentional discrimination under a constitutional --
2 under a deprivation and under 106 that was handed
3 before you. It doesn't exist. There is simply no
4 evidence of it.
5 THE COURT: One last word and I'm going to
6 rule.
7 MR. KAUFFMAN: Okay. As far as the impact
8 is concerned, the correlations that Mr. O'Hanlon
9 talked about are not the story. The story was given
10 by Mr. Cortez, who looked at the districts, not
11 looking at the entire range of districts of where
12 there was a concentration. And he said that there's
13 30 percent Mexican-Americans in the state, and there
14 are 95 percent in the very poorest districts, and
15 there's 60 percent in the bottom quarter of the
16 districts. I mean, all of the kids in the very
17 poorest districts are Mexican-American. And the
18 great majority of the kids in the bottom quarter of
19 the districts are Mexican-American. And this has
20 been that way for some time.
21 So there is a strong pattern of concentration
22 of Mexican-Americans, as well as concentration of the
23 poor, in the low wealth districts. And that has been
24 known and testified to by the witnesses here. And
25 Dr. Kirby said that he knew that, as well, and that

1 that has been the pattern. So we feel that the
2 evidence is strong on the issue. And that under the
3 Equal Rights Amendment, there certainly is
4 discrimination against Mexican-Americans under the
5 school finance system as it exists.
6 We have listed all of our facts here in our
7 proposed facts. I think there are three or four
8 pages, Page 26 through 28. And we've also stated our
9 cause of action.
10 In terms of intent, it said that the standard
11 was set in the Arlington Heights case, a 1977 Supreme
12 Court case. And it was aware that you would never
13 find statements of intentional discrimination, you
14 had to look at factors. And it did list the impact,
15 which we have shown, the history, which we have
16 shown, the availability of other alternatives, which
17 we have shown, any statements made, such as Dr.
18 Kirby's, which we've also shown. So we feel that
19 first, we do not have to show an intentional case.
20 It's an effects case as under Title VII. But if we
21 do need to show an intentional case, we've done it.
22 THE COURT: I'm not going to deny your
23 request on the basis of what you said the law is, but
24 I'm going to deny your requests on account of --
25 although I'll have to say, I think it's a close

1 question about the evidence. So I'm going to deny it
2 on an evidentiary basis.
3 Okay.
4 MR. R. LUNA: One last question. Does each
5 side pay their own costs as well?
6 MR. GRAY: Your Honor, the Declaratory
7 Judgment Act specifically does not give -- or their
8 sovereign immunity does not go to the State for court
9 costs. That is also the ruling of Camarena. So
10 court costs can be assessed against the State. And
11 the State has no protection of sovereign immunity in
12 that regard.
13 THE COURT: Okay. Insofar as I'm legally
14 able to do so, I'll put the costs on the State.
15 One last word. I may be spoiled, having done
16 both of the farm workers' cases, but there, the
17 evidence was absolutely clean and clear about the
18 effect on those people on account of national origin.
19 And it's not -- it's not as clean and clear in this
20 case because of the fact that there are many
21 Hispanics scattered all over the state. And as we've
22 had evidence, Houston and Dallas have large
23 populations. And they are wealthy districts. And
24 the predictions are that there will be even more
25 Hispanics in those districts, shortly. And it could

1 be that the demographics of the state are such, and
2 have grown-up, that the demographics have changed by
3 people moving into districts that were not there
4 originally. But I guess you could argue that the
5 state, after awhile, should have -- either knew or
6 should have known that. Maybe it should have
7 rectified the situation. But basically, on account
8 of the fact that there are Hispanics in at least some
9 high wealth districts, I'm going to -- and that the
10 evidence is not nearly so clean and clear as in other
11 cases that I've had and have gone with that theory, I
12 will say that the evidence is not sufficient for me
13 to rule that way in this case, although it's a close
14 -- it's close. I will concede that.
15 We'll put the costs on the State.
16 MR. TURNER: Your Honor, with respect to
17 the Defendant-Intervenors, as I understood your
18 ruling, what you were saying is that one, you agree
19 that the law did allow an award of attorneys' fees in
20 this case against the Defendant-Intervenors. And
21 secondly, irrespective of what the law was, in your
22 exercise of your discretion, you would not assess it
23 against the Defendant-Intervenors?
24 THE COURT: That's right.
25 MR. DIPPEL: The same is true of the costs,

1 Your Honor? There are no costs assessed against the
2 Defendant-Intervenors?
3 THE COURT: True.
4 MR. GRAY: Your Honor, on this very point,
5 what I will do then, when I go back for the judgment,
6 to have it typed, if I'm understanding correctly, I
7 am still going to leave the blanks for proving up
8 attorneys' fees?
9 THE COURT: Yes, sir.
10 MR. GRAY: And I will then make the cost
11 taxed against the Defendants, which are the State
12 Defendants. And I will then provide that the Court,
13 although it would otherwise do so, will not enter
14 judgment for reasonableness or attorneys' fees
15 against the Defendants, because it finds that the
16 Defendants had the benefit of sovereign immunity to
17 leave open the question. If that should be clarified
18 on appeal, then the findings of what the
19 reasonableness and necessary fees have already been
20 made, so they can --
21 THE COURT: Yes. We need findings about
22 reasonableness of fees, so that when I get reversed,
23 maybe you can get your figures.
24 Yes, sir?
25 MR. O'HANLON: I don't think you can do

1 that. I don't think you can say -- you can come back
2 after a final judgment and assess fees.
3 THE COURT: Sir?
4 MR. O'HANLON: I don't think you can come
5 back after a final judgment and assess fees.
6 MR. GRAY: Now, what you can do and what
7 we're asking the Court to do, the Court can make a
8 finding of what is a reasonable and necessary fee.
9 And make that fact finding now, and then refuse to
10 give it. And if the Court should be later held to be
11 wrong, that you should have given it, you don't have
12 to open up the evidence again to award that fee, it's
13 just -- the appellate court will direct it back for a
14 judgment to be awarding the fees that are previously
15 found.
16 MR. O'HANLON: I'm objecting to that.
17 THE COURT: Why the objection?
18 MR. O'HANLON: Because if we're going to
19 have a final judgment, let's have a final judgment
20 right now. The law right now says that sovereign
21 immunity precludes attorneys' fees. That's what it
22 says. And Your Honor, it couldn't be more clear.
23 MR. GRAY: You're not -- excuse me, Your
24 Honor.
25 THE COURT: I guess the question is, does a

1 finding like that have to be in the judgment, or can
2 it be in findings of fact, to have the effect on
3 appeal that you would like, in the event that the
4 appellate court thinks I'm wrong, either on the law
5 by sovereign immunity, or on the evidence in regard
6 to the discrimiantion allegation. And I don't know
7 if it needs to be in the findings of fact and/or in
8 the judgment, but it should be one of those places,
9 whichever is appropriate, but not both.
10 MR. O'HANLON: Well --
11 MR. GRAY: I had thought -- and again, I do
12 not know for sure, either. But in other cases, the
13 farm workers' cases, for example, or the Camarena
14 case is a perfect example. The Court did exactly
15 that. The Court found the fees in the judgment, but
16 then refused to award them, based on sovereign
17 immunity. So that there is a specific finding of
18 what is the reasonable and necessary fee, so you
19 don't end up having to reopen the evidence.
20 MR. O'HANLON: I'm not sure that was
21 objected to in the Camarena case. And I'm certainly
22 objecting to that right now. And I'm not going to
23 agree to the assessment of fees without the chance to
24 defend myself on them.
25 THE COURT: About the what, about the

1 reasonableness?
2 MR. O'HANLON: Yes, sir.
3 THE COURT: I thought we were going to get
4 to that later.
5 MR. GRAY: I think we are, too. I'm
6 leaving a blank in here.
7 THE COURT: We're leaving it blank.
8 MR. O'HANLON: We're going to sign an order
9 with a blank in it?
10 THE COURT: No, I'm not going to sign it
11 today. We're not quite through today. We're going
12 to get it all nailed down, except reasonableness.
13 Yes, sir?
14 MR. R. LUNA: Well, I was going to suggest
15 that in the event the Court wanted to get a final
16 order to get it signed today, I don't think it has to
17 to have any blanks or anything in there. If it's
18 reversed on appeal, of course, the Court would remand
19 it for a hearing on the attorneys' fees, which might
20 even be better if we did it that way, because a part
21 of their attorneys' fees are for the appellate work.
22 And they're gonna -- of course, they're going to
23 guess, they're going to ask the Court to assess fees
24 to plug in there, makes some of it guesswork. If it
25 comes back, those will be actual numbers that can be

1 reviewed.

2 THE COURT: Well, this happens all the

3 time, where it's either judges or the juries make

4 findings about damages and/or reasonableness of

5 attorneys' fees. And on appeal, cases can be

6 rendered and done away with and they don't have to be

7 remanded for -- and if you go on and prove up your

8 costs on appeal, in the trial court, with reasonable

9 probability, and we're through with it.

10 So I think the better way to do this is to go

11 on, if we're going to do this, is to have evidence --

12 I guess we're not going to be able to sign the

13 judgment today -- is to have some evidence about

14 attorneys' fees. And I will make findings about

15 reasonableness of attorneys' fees, deny them for the

16 reasons that I've stated, legally and factually. And

17 I think it's safe to have those in the forms of

18 findings of fact. I think that's safe. But if

19 there's any doubt about it, I don't think that -- I

20 think it's appropriate to have what in essence is

21 findings of fact in a judgment, so I don't see

22 anything technically wrong with that. And the Court

23 will note Mr. O'Hanlon's standing objection to this.

24 MR. O'HANLON: And also with respect to if

25 the Plaintiffs are going to reopen with attorneys'

1 fees, I want to reopen with respect to district
2 lines.
3 THE COURT: Well, are they reopening?
4 MR. O'HANLON: Yes, sir. That's exactly
5 what they said they were going to do at the time that
6 they rested. And we had this conversation before.
7 MR. GRAY: Your Honor, we had -- I don't
8 want to retread old ground, but at the close of the
9 evidence, I don't know, a month or two ago, all
10 parties, Mr. Turner wanted to file a trial amendment
11 so he could even seek attorneys' fees, he hadn't done
12 that before. We wanted to get the evidence and the
13 case in chief over with and get those issues
14 resolved, to see if there was even a need for
15 hearings on attorneys' fees. And everybody had
16 agreed that we would reserve attorneys' fees for a
17 later day. But the Court said, directed to me
18 directly, when is that later date to be? And with
19 the impression being the Court wanted attorneys' fees
20 to go up at the same time that the judgment, itself,
21 went up. And that's why we're doing this.
22 MR. O'HANLON: I think a review of the
23 record will indicate that Mr. Gray is in error on a
24 number of points. In the first place, we didn't
25 discuss this at the time that he rested. He rested

1 when we were about two weeks into the other case,
2 into our defense, before it came up. With respect to
3 everybody agreeing, he's again wrong. I didn't agree
4 to any of this.
5 THE COURT: Well, either -- you want to put
6 on evidence about attorneys' fees, right?
7 MR. GRAY: Yes, sir.
8 THE COURT: And assuming that I let them
9 reopen for that purpose, now what do you want to
10 reopen for?
11 MR. O'HANLON: I want to reopen to show the
12 rational basis for district lines, if that's one of
13 the issues in this case. And I think I was led down
14 the path about that not being an issue in this case.
15 And it certainly has been, in respect to this
16 proffered judgment. Before it's entered, I want a
17 shot of convincing the Court that I can show you that
18 there is a rational basis for the district lines at
19 the time they were drawn, every one of them.
20 THE COURT: What do you say about him being
21 led down the path blindly about the fact that
22 district lines was not an issue?
23 MR. GRAY: Your Honor, all I can say to
24 that is he had to have had his eyes closed and his
25 ears closed from day one. It was -- the whole, from

1 the time you read the pleadings, from the time the
2 first words ever came out of anybody's mouth, the
3 issue before this Court has always been and continues
4 to be the way the state funds public education, with
5 the reliance it puts on local district wealth being
6 as desperate as it is. And we've never said that the
7 lines, themselves, these districts out there, are
8 unconstitutional in any form or fashion. What is
9 unconstitutional, is the state using those lines to
10 fund public education. That's what we're -- where
11 you reach the unconstitutionality.
12 MR. O'HANLON: We have to use those lines
13 to fund public education, because it's only a
14 district that's encompassed by those lines which can
15 tax, pursuant to Article VII, Section 3. And if I'm
16 not mistaken, and we've had this part transcribed,
17 the Court said, at one point in its discussion when
18 this came up the first time, that you weren't going
19 to hold that the district lines were
20 unconstitutional. Well, you haven't quite, in this
21 order, but you've come mighty close to it. You've
22 come mighty close to not leaving the state any choice
23 but to substantially redraw the district lines, which
24 is at one point in this case, my understanding that
25 you said you weren't going to do.

1 MR. KAUFFMAN: At least four times we've
2 been through this, I'm sure of it. And I do remember
3 the -- well --
4 MR. O'HANLON: We offered the Plaintiffs a
5 trial amendment and they refused it.
6 THE COURT: Okay. Out of a super abundance
7 of caution, if the record is such that it looks like
8 that the Plaintiffs and the Plaintiff-Intervenors
9 rested without having a chance to offer proof about
10 their attorneys' fees, then I will allow them to
11 reopen for that purpose only. But I'm only doing
12 that out of a super abundance of caution. But
13 because -- although I don't have a specific memory, I
14 have a sense that I understood, at least, that that
15 was going to come later when we got past the thing on
16 the merits.
17 And I'm going to deny the State's request to
18 reopen to show rationality of the district lines,
19 because it seems to me like, that at least from early
20 on, the geography of the districts became an issue,
21 early on. We talked about that a lot.
22 Okay. Now, there needs to be some language in
23 the judgment, I guess, about what I've just done to
24 you. You now get to be an appellant, and -- if you
25 want to be. So, you'd better see to it that some

1 language is in there that would give you that right.
2 MR. KAUFFMAN: Yes, sir.
3 MR. TURNER: Judge, could we also ask that
4 when Mr. Gray is drafting the judgment, that he
5 distinguish between the Court's ruling as to
6 attorneys' fees, as to the State versus the
7 Defendant-Intervenors? As I understand it, you're
8 saying as an evidentiary matter, you don't think Mr.
9 Kauffman has proved his case, so you're ruling
10 against him. And I guess you're further saying that
11 if you're wrong, then you might have awarded him some
12 attorneys' fees. Whereas with regard to
13 Defendant-Intervenors, you're saying you agree with
14 us on the law, but no matter what the law is, you're
15 going to exercise your discretion regarding awarding
16 attorneys' fees, you wouldn't award any against us.
17 THE COURT: That's true.
18 MR. TURNER: And I just wanted the judgment
19 to say -- distinguish between those two.
20 THE COURT: That's true. He stated that --
21 MR. GRAY: Accurately. That's at least my
22 understanding.
23 THE COURT: Yes, sir?
24 MR. HUTCHISON: Your Honor, we worked out
25 the bond problem in the context of a judgment, based

1 on the assumption that it might get signed today.
2 THE COURT: Okay.
3 MR. HUTCHISON: That not being the case, we
4 would ask the Court simply to institute our request
5 for an interim order that conforms to the bond
6 provisions that will be incorporated into the
7 judgment.
8 MR. GRAY: Your Honor, we can put on -- we
9 had one witness lined up. But what I'm prepared to
10 testify about, the entire time of
11 Plaintiff-Intervenors, my time, Mr. Richards' time,
12 and the associates that we've had working with
13 contemporaneous records that we have already
14 exchanged with all counsel. I believe Mr. Kauffman
15 is prepared to do that from the Plaintiffs' point of
16 view.
17 MR. O'HANLON: I haven't seen his
18 contemporaneous records. I haven't seen his
19 attorneys' fees.
20 MR. GRAY: It was supposed to be delivered
21 to you yesterday.
22 MR. O'HANLON: I haven't seen it.
23 MR. GRAY: Did anybody get it?
24 MR. TURNER: I got it.
25 MR. O'HANLON: And I think as to Mr.

1 Richards, it would clearly be hearsay.
2 THE COURT: Why don't we have what we've
3 got as an interim order? Type up everything we've
4 got as an interim order, and then come back and have
5 the final judgment be exactly like this, except there
6 will be amounts filled in for attorneys' fees. That
7 way, we don't have to re --
8 MR. HUTCHISON: We don't have to reinvent
9 the wheel.
10 THE COURT: You think we can get by with
11 that?
12 MR. HUTCHISON: I think so, Your Honor, I
13 think so. It's the order of the Court, just like
14 this. And even though it's interim, it would be --
15 the final judgment, then, would reflect the same
16 thing, except it would have the attorneys' fees in
17 it.
18 THE COURT: Yes.
19 MR. HUTCHISON: I would think so, Your
20 Honor.
21 MR. GRAY: In fact, Your Honor, if it's
22 appropriate, I could --
23 MR. HUTCHISON: Call it an interim order?
24 MR. GRAY: -- entitle it interim order, but
25 even have the blanks in the judgment to be left

1 blank, to be filled in at a later time.
2 MR. O'HANLON: No way. I object to that,
3 strenuously.
4 MR. HUTCHISON: I would think you could
5 just eliminate that, couldn't you?
6 MR. GRAY: I guess I could.
7 THE COURT: Just leave that section out.
8 MR. GRAY: I could leave that section out
9 altogether, then.
10 THE COURT: And then when you come back, I
11 want the final order to be exactly the same as --
12 MR. GRAY: Sure.
13 MR. O'HANLON: I object to this whole
14 procedure. What's an interim order that decides all
15 of these issues?
16 THE COURT: Well, okay. You all go prepare
17 an interim order on the bond finances, then. We'll
18 put Mr. O'Hanlon in charge.
19 MR. O'HANLON: We've got the language, it's
20 just a matter of getting it typed.
21 THE COURT: You do?
22 MR. HUTCHISON: Yes, it's just a matter of
23 typing it.
24 THE COURT: Okay. You all go type that up,
25 then. And then we'll go on and put on what you're

1 preparing, final judgment. And we'll have it all
2 typed up and we can distribute it around. But I
3 won't sign it, we will await evidence about
4 attorneys' fees.
5 MR. GRAY: That's fine.
6 MR. O'HANLON: We are going to have an
7 issue with respect to Mr. Kauffman now on the issues
8 upon which he prevailed and the issues up on which he
9 did not prevail.
10 THE COURT: Yes.
11 MR. R. LUNA: Your Honor, I was going to
12 ask, you know, while this is being typed, we're all
13 here, they've got their records. If the Court is
14 going to have us do it, why don't we start this
15 afternoon? I don't know what the Court's schedule
16 is, but let's get these attorneys' fees out of the
17 way.
18 THE COURT: I would love to do that, except
19 at 3:30, I'm supposed to start something that takes
20 an hour and a half that I have put off considerably.
21 Do you know when Mr. Richards will be back? Did he
22 tell you?
23 MR. O'HANLON: 3:30.
24 MR. GRAY: I think he'll be back at 3:30,
25 or shortly before that.

1 THE COURT: Yeah.

2 MR. GRAY: He has -- unless I am, you know,
3 maybe they're going to even want to cross examine Mr.
4 Richards and I for hours and hours about our records,
5 I don't know. Our presentation of our case in chief
6 on attorneys' fees will not take 15 minutes.

7 THE COURT: Part of the problem with that
8 is, that Mr. O'Hanlon says that he hasn't gotten the
9 materials. I don't know if he feels that he's ready
10 for that kind of a hearing. I got the idea that he
11 feels he is not. Is that so?

12 MR. O'HANLON: I would sure like to see
13 what he is asking for, Judge.

14 THE COURT: Okay.

15 MR. GRAY: I will get him a copy. And if
16 he's -- and I'll be back here with the final
17 judgment, ready to have the blanks filled in and
18 signed, if appropriate. And if there's time for a
19 hearing at 4:30, 5:00, so be it. And if not, also so
20 be it. And we'll just do it at the Court's
21 convenience at a later date.

22 THE COURT: I think we'd better plan on a
23 later date. Maybe we'd better decide when.

24 MR. O'HANLON: I think so.

25 THE COURT: While I've got everybody here.

1 MR. KAUFFMAN: Your Honor, while we're
2 looking, I have given each of the Defendants all of
3 my documentation. So hopefully, some of this can be
4 stipulated, we hope.
5 MR. O'HANLON: These are not
6 contemporaneous time records that meet with the fifth
7 circuit requirements, Your Honor.
8 MR. KAUFFMAN: They are.
9 THE COURT: Do you all want to come back
10 Tuesday the 26th?
11 MR. O'HANLON: Judge, I'm in trial in
12 Dallas on the 26th, probably for three days.
13 THE COURT: Well --
14 MR. R. LUNA: What about a week from today,
15 next Friday?
16 THE COURT: How about Monday, June 1st at
17 2:00?
18 MR. KAUFFMAN: Your Honor, if I may ask a
19 clarification.
20 THE COURT: That doesn't seem to be drawing
21 any objection. Monday the 1st of June at 2:00 on
22 attorneys' fees.
23 MR. KAUFFMAN: Your Honor, if I may clarify
24 one thing from the Defense Counsel. I have three out
25 of town counsel, two on one coast and one on the

1 other. Are they going to require them to come
2 forward and testify? Or can you -- I'll offer them
3 up for depositions before the 1st, but if there's
4 some way we can stipulate as to their hours, I would
5 greatly appreciate it, rather than having them come
6 in just for attorneys' fees.
7 MR. O'HANLON: I'll have to look at the
8 records.
9 THE COURT: Okay.
10 MR. KAUFFMAN: All right.
11 MR. GRAY: May I be excused, Your Honor?
12 THE COURT: Okay. We're going to let him
13 be excused to go type this up. Somebody over here is
14 going to prepare an interim order. And we'll all
15 meet at -- I don't know that you all need to meet
16 back with me again, except that these things will
17 need to be distributed and I need to sign that
18 interim order. And I'm going to be here until right
19 before 5:00, I'm sure. Probably right up here until
20 shortly before 5:00.
21 MR. KAUFFMAN: We would all like to review
22 the interim order, I guess, before you sign it.
23 THE COURT: Why don't you all covey up back
24 here in the jury room. That way, you can get your
25 coats off and do what you want to do back there in

1 the jury room. Let's just meet -- have that as your
2 central meeting place back here to deliver these
3 various things. How about that?
4 MR. GRAY: I'll do my best to be back with
5 it by 4:30, depending on my typist.
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10 (Proceedings recessed
11 (until June 1, 1987
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3-87-190-CV

CAUSE NO. 362,516

C-8353

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL	>	THE 250TH JUDICIAL
VS.	>	DISTRICT COURT OF
WILLIAM KIRBY, ET AL	>	TRAVIS COUNTY, TEXAS

FILED
IN SUPREME COURT
OF TEXAS

JUN 21 1989

JOHN T. ADAMS, Clerk
By_____Deputy

STATEMENT OF FACTS

VOLUME XLVI OF XLVI

FILED
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SUSAN K. DAL...

TAKEN JUNE 1, 1987

MONICA ROSS WEIDMANN
Official Court Reporter
250th Judicial District Court

Travis County Courthouse • Austin, Texas 78701

1 CAUSE NO. 362, 516

2

3 EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL > IN THE 250TH JUDICIAL
4 >
5 VS. > DISTRICT COURT OF
6 >
7 WILLIAM KIRBY, ET AL > TRAVIS COUNTY, TEXAS

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8 STATEMENT OF FACTS

9

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10 BEFORE THE HONORABLE HARLEY CLARK, JUDGE PRESIDING

11

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6 ATTORNEYS FOR THE DEFENDANT-INTERVENORS

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16

17 BE IT REMEMBERED that on this the 1st day of June,
18 1987, the foregoing entitled and numbered cause came on
19 for trial before the said Honorable Court, Honorable
20 Harley Clark, Judge Presiding, whereupon the following
21 proceedings were had, to-wit:

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Pages i-xxvi Missing in Original

1 I N D E X (CONTINUED)

2 JUNE 1, 1987
VOLUME XLVI

3

4 WITNESSES:

5 MR. ALBERT H. KAUFFMAN

6 Direct Examination by Mr. Larson ---------- 7908
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7 Redirect Examination by Mr. Larson ---------- 7951

8

9 MR. RICHARD E. GRAY, III

10 Statement by Mr. Gray ---------- 7952
Cross Examination by Mr. O'Hanlon ---------- 7957

11

12

13 MR. DAVID R. RICHARDS

14 Statement by Mr. Richards ---------- 7970
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15 Cross Examination by Mr. O'Hanlon ---------- 7974

16 Statement by Mr. Kauffman ---------- 7978

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18 Discussion ---------- 7980

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20 Reporter's Certificate ---------- 7994

21

22

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25

1 JUNE 1, 1987

2 THE COURT: Are we going to have evidence
3 on attorneys' fees? Is that the idea for today?
4 MR. GRAY: Yes, Your Honor, I believe it
5 is. The form of the judgment has been reviewed, and
6 all counsel have worked jointly and extensively over
7 the last days and weeks. And I believe we're in
8 agreement, unless there's some last minute concerns
9 about the form of the judgment. So as I understand,
10 all we need to do is put on evidence on attorneys'
11 fees.
12 THE COURT: Okay. I'm ready if you're
13 ready.
14 MR. KAUFFMAN: If we may, Your Honor, for
15 the Plaintiffs, I would like to go ahead and briefly
16 introduce our attorneys' fee case and introduce some
17 exhibits to the Court. Then I will get up and give a
18 brief testimony and allow questions, if any.
19 (Plaintiffs' Exhibit
20 (Nos. 400-416 marked.
21 MR. KAUFFMAN: This is an extra copy of our
22 exhibits for the Court.
23 THE COURT: Okay.
24 MR. KAUFFMAN: And I've given all of these
25 to Counsel.

1 I would like to go ahead and introduce them.
2 And as I said, I'll testify, using these numbers.
3 Plaintiffs' Exhibit 400 is basically just a table of
4 contents of all of the rest of the materials on
5 attorneys' fees.
6 Exhibit 401 is a summary of all of the hours
7 for each of the attorneys of the Plaintiffs who have
8 worked on the case, by month.
9 Exhibit 402 are the contemporaneous time
10 records of Albert Kauffman for work on this case.
11 Exhibit 403 is the resume of Albert Kauffman,
12 one of the attorneys for the Plaintiffs.
13 Exhibit 404 is the Affidavit of Norma Cantu,
14 along with her resume. She was one of the attorneys
15 for the Plaintiffs.
16 Exhibit 405 is the chronology of hours worked
17 by Norma Cantu on the Edgewood litigation.
18 Exhibit 406 is the Affidavit of Jose Garza and
19 the contemporaneous time records of Jose Garza for
20 work on the Edgewood litigation.
21 Plaintiffs' Exhibit 407 is the Affidavit of
22 Jose Roberto Juarez, Jr., along with the hours worked
23 by Jose Roberto Juarez on this case.
24 Exhibit 408 is the Affidavit of Roger Rice,
25 regarding his hours and contemporaneous time records

1 in the case.
2 Exhibit 408-A is the Affidavit of Camilo
3 Perez-Bustillo, his Affidavit.
4 Exhibit 409 are the contemporaneous time
5 records of Roger Rice and Camilo Perez. Both of
6 those were other attorneys for the Plaintiffs in the
7 litigation.
8 Exhibit 410 is the Affidavit of Peter Roos,
9 also containing a copy of his resume and a list of
10 the contemporaneous time records in this case. Peter
11 Roos is another one of the attorneys for the
12 Plaintiffs.
13 Exhibit 411 is an Affidavit of the managing
14 partner of Schulman, Walheim & Beck, the law firm
15 representing the Edgewood ISD, who worked on this
16 litigation. And attached to that is a list of all of
17 the hours and costs incurred by the Edgewood
18 attorneys in the litigation.
19 Exhibit 412 is an Affidavit of the managers of
20 the MALDEF office in San Antonio, showing the hours
21 worked by paralegals on this litigation, with a month
22 by month breakdown of the hours worked by paralegals
23 on litigation.
24 Exhibit 413 is the Affidavit of the -- I forgot
25 his title, but he's the Director of Finance

1 Administration, he's the accountant and comptroller
2 of MALDEF, showing all of the costs spent on this
3 litigation by MALDEF. And attached to that Affidavit
4 is an accounting of all of the checks issued from the
5 trust fund we set up for this case, showing their
6 different designations. And all of these are costs
7 incurred in this Edgewood litigation.
8 Plaintiffs' Exhibit 414 is a list of court
9 costs. And what we have done, Your Honor, is we have
10 two lists of costs. One is all costs incurred by the
11 litigation, that's 413. 414 are -- should the Court
12 decide that only deposition costs and marshalls'
13 costs are appropriate costs in this litigation, we
14 separated out the deposition costs and marshalls'
15 costs, and that's Exhibit 414.
16 Exhibit 415, excuse me, is a summary of the
17 hours in the litigation by each of the attorneys,
18 with their respective hourly rates and the total
19 amount sought by each attorney for the Plaintiffs.
20 It also includes the total amount sought for all of
21 the paralegal time in the litigation by the
22 Plaintiffs. And then it's a detail of the costs
23 incurred in litigation by the Plaintiffs, all this is
24 415.
25 And Exhibit 416 is the summary of all

1 attorneys' fees, paralegal fees, and costs by all of
2 the attorneys who worked for the Plaintiffs in the
3 litigation from day one until today's date.
4 THE COURT: Okay.
5 MR. KAUFFMAN: So we would move, Your
6 Honor, that the exhibits that I have described,
7 Plaintiffs' Exhibits 400 through 416, be admitted
8 into evidence as support for Plaintiffs' claim for
9 attorneys' fees.
10 THE COURT: Any objection?
11 MR. O'HANLON: Not to the form in which
12 they're submitted. I certainly don't agree to the
13 content of them. I can run through a whole bunch of
14 things when the Court wants to hear our response.
15 THE COURT: Okay. Any other objection?
16 MR. R. LUNA: Again, only as to content.
17 THE COURT: With that understanding,
18 they'll be admitted.
19 (Plaintiffs' Exhibit
20 (Nos. 400-416 admitted.
21 MR. KAUFFMAN: Your Honor, I would like to
22 introduce to the Court Mr. Richard Larson, who is the
23 vice-president of MALDEF and an expert on attorneys'
24 fees and has appeared before the Supreme Court two
25 times, I guess, on these issues.

1 And I'm going to go ahead and testify, but if
2 I'm asked any questions, he, in effect, will
3 represent me, if Mr. Larson can appear in the
4 litigation.
5 THE COURT: That's fine.
6 MR. LARSON: Thank you.
7 MR. KAUFFMAN: I'll go ahead and take the
8 stand, then, and explain a little bit more about
9 this.
10 MR. O'HANLON: Your Honor, I'll waive the
11 oath, he's an officer of the Court.
12 THE COURT: All right.
13 MR. ALBERT KAUFFMAN
14 was called as a witness, and testified as follows, to wit:
15 DIRECT EXAMINATION
16 BY MR. LARSON:
17 Q. Mr. Kauffman, with regard to the documents that you
18 have before you, introduced as exhibits, Plaintiffs'
19 Exhibits 400 through 416, can you explain, first, how
20 you arrived at the expenditure of time on this case,
21 initially how the case was commenced?
22 A. We were contacted by school districts and individuals
23 in early 1983 to conduct litigation concerning school
24 finance in Texas. The documents that you have before
25 you are from the records that we, at MALDEF, keep and

1 that the attorneys at META keep on all litigation
2 they're involved in, their contemporaneous time
3 records. The other records are of costs that we've
4 incurred in this litigation.
5 Q. How did this case come to be staffed by the number of
6 attorneys and allocation of resources?
7 A. We originally were contacted, as I said, by several
8 school districts and individual Plaintiffs in early
9 1983 that came to MALDEF asking for help in
10 conducting litigation concerning school finance. We,
11 at that time, we worked very closely with attorneys
12 from META, which is an organization of attorneys
13 specializing in education. And we began to work with
14 them to develop materials, talk to experts, pull
15 together legal authorities, do a lot of factual
16 research. And this all began in early 1983. It took
17 about a year to pull all of the materials together to
18 the form of an actual lawsuit. And then the lawsuit
19 was filed in May of 1984. By that time, seven
20 additional -- I guess four or five additional school
21 districts, a total of eight school districts, and 25
22 families had joined with us. And we filed the
23 litigation in May of 1984.
24 A lot of the research had already been done,
25 when I came to MALDEF in March of 1984. I pulled it

1 together, drew up a petition, circulated it, talked
2 to each of the attorneys, talked to the clients, and
3 got the case filed in May of 1984. Then we have
4 continued to work on it since that time. And I have,
5 in my Affidavit, listed all of the hours that I spent
6 on the litigation.
7 During the course of the litigation, we had
8 beginning in, I think the summer of 1984, we had a
9 full-time paralegal working on this case. And the
10 paralegal reviewed documents of TEA, did computer
11 research, called experts, called other states,
12 gathered materials, reviewed state exhibits, reviewed
13 our exhibits, drew up exhibits. And those paralegals
14 and their time is summarized in the paralegal
15 exhibits here. They worked full time on the
16 litigation.
17 I worked approximately half time on the
18 litigation for the total of my last three years at
19 MALDEF. And that's how I came up with a total of
20 about 2,700 hours.
21 With regard to the hours, if I could go through
22 some of the exhibits. I have, in Exhibit 401,
23 summarized month by month the time of all of the
24 attorneys on the litigation. As you can see, I
25 commenced work on it in March of '84, Norma Cantu

1 began in March of '83, Jose Garza and Roberto Juarez
2 worked mainly on the case in '83-'84. Roger Rice's
3 and Camilo Perez' hours are not listed by month on
4 this exhibit, but they're later in the exhibit.
5 Peter Roos began work on it in mid-'85 and worked
6 through the trial. And Renita Browning worked on it
7 continuously, as support through her work on the
8 Edgewood School District. So, on 401, I summarized
9 the monthly time records of each of these persons.
10 All of this is a summary of each of these attorneys'
11 contemporaneous time records.
12 And all of these hours were necessary and
13 required for the conduct of this litigation. And
14 that's what 401 summarizes for us.
15 402 is the day-by-day time records of mine.
16 And I keep time records on all of the work that I do
17 on all of my cases. And all that I've done here is,
18 you know, our time records systems is to take the
19 little tapes off of our summary sheets and stick them
20 in a book for each case. And that's where this came
21 from, right from my time records.
22 Exhibit 403 is my resume. I've been working
23 full time in the area of civil rights law for 13
24 years, sort of a semi-expert in statistics, I guess,
25 specializing in that at MIT and done research in the

1 area. And then I've done civil rights work, I guess,
2 in -- I think, every federal court in the State of
3 Texas. And it's been full-time in civil rights for
4 13 years, including four years in the field of
5 education, full-time education of civil rights.
6 Exhibit 404 is Norma Cantu's Affidavit and her
7 hours. Norma is the Director of the MALDEF office in
8 San Antonio. She began work on the case for MALDEF
9 in early 1983. During the trial, she worked with us
10 as co-counsel, and helped prepare witnesses, and kept
11 notes of the proceedings, and consulted with us on
12 the progress of the case.
13 Exhibit 405 is Miss Cantu's contemporaneous
14 time records as attested to in her Affidavit.
15 Exhibit 406 is Jose Garza's Affidavit and time
16 records. Jose Garza was the head of MALDEF when I
17 first came there. He's director of all of MALDEF's
18 political access litigation. And has also, as has
19 Norma, been full-time in civil rights for eight
20 years. And are certainly experts in their respective
21 areas of education for Miss Cantu, and political
22 access litigation for Jose Garza.
23 Jose Roberto Juarez is staff attorney in the
24 MALDEF office. 407 is his Affidavit and time records
25 for the research he did on the case.

1 408 is Roger Rice's Affidavit. And 408-A is
2 Camilo Perez' Affidavit. Roger Rice and Peter Roos
3 are considered the nation's leading experts in
4 education of civil rights. Each has been working in
5 the area for 18 years. Roger has, I guess,
6 participated in litigation in every circuit and most
7 states in the country. Peter Roos has done two of
8 the major Supreme Court cases in education, including
9 the alien school children case and the first due
10 process case for students called Goss V. Lopez.
11 Q. Both in the United States Supreme Court?
12 A. United States Supreme Court work.
13 And Camilo Perez is a counsel with them. Roger
14 Rice's hours and Peter Roos' hours are billed at
15 $150.00 an hour. Camilo Perez, who has been in
16 practice for, I think six years, working full-time in
17 education, his hours are at $120.00 an hour.
18 Exhibit 410 is Peter Roos' Affidavit, along
19 with his resume and contemporaneous time records.
20 Exhibit 411 is the attorneys for the Edgewood
21 ISD. And they're the retained counsel of that school
22 district. The Edgewood ISD voted to -- not only to
23 participate in the litigation, but also to allow us
24 to be helped by their attorneys for whatever issues
25 would come up in the litigation. And these are their

1 time records at their contract with the Edgewood ISD.
2 And it reflects the time spent by Renita Browning,
3 who is a two-year or three-year associate in their
4 firm, and the costs that they incurred in litigation.
5 Exhibit 412 is the director of our office, the
6 administrative director. And it includes the monthly
7 breakdowns of all of the paralegal hours in the case.
8 As I said, we had at least one full-time paralegal
9 full-time on this litigation since we began it, I
10 guess, in the summer of '84. And during the last
11 year, we've had two part-time paralegals, one in the
12 office working and another one working on computer
13 work. And this summarizes all of their hours.
14 Very briefly, on these paralegals, Pat Longoria
15 was a teacher for 12 years, and is graduating, now,
16 from U.T. Law School. Liz Landez is a graduate of
17 St. Mary's Law School and was working on the case
18 while she was awaiting her bar results. Adrienne
19 Smith and Jose Sanchez are second-year grad-students
20 in public policy at U.T.S.A. Miss Hernandez is a
21 graduate of the Worden school, where she has a
22 Master's in social work. And Elsa Nava is also a
23 graduate of the U.T. Law School, working on the case
24 while she was awaiting her bar results.
25 Sal Escamilla, in the Exhibit 413, this is the

1 cost Affidavit. For this case, we set up a trust
2 fund. And this is all of the expenditures from the
3 trust fund for this litigation. And he has
4 summarized all of the expenses that are incurred just
5 for this litigation and --
6 Q. Are you sure they're all of the expenses, or all of
7 the costs?
8 A. Well, good question. They're all of the ones we paid
9 for by check from the finance trust fund. We did not
10 include all of the costs of copies, phone calls,
11 general overhead, just the general stuff you do in an
12 office. We do not keep separate time slips on
13 thousands of copies and thousand of phone calls, that
14 sort of thing. This is just the ones that came from
15 the trust fund. The postage matters in here are for
16 express mail, we didn't include anything else on it.
17 Q. Was there a lot of mailing in this case?
18 A. Well, we had 25 Plaintiffs and 12 school districts,
19 and at different times, 10 co-counsel and opposing
20 counsel. So it's a tremendous amount of mailing, as
21 well as keeping track of exhibits, sending exhibits
22 to people, sending depositions to people and
23 reviewing them, whatever. The court costs on Exhibit
24 414, as I said, I'm not sure exactly what legal
25 standards will be applied in the case as far as what

1 is cost and what is not cost. This is the original
2 cost of depositions in the case, as well as the court
3 transcripts which we paid for during the litigation,
4 and the subpoena costs.
5 And 414 is just for the convenience of the
6 Court. It is also, these costs are also included in
7 the cost exhibit on 413.
8 Exhibit 415 is a summary of the attorneys on
9 the case and their hourly fees. We charge $150.00 an
10 hour for Albert Kauffman's time, Roger Rice's and
11 Peter Roos'. These are reasonable and necessary fees
12 and prevailing fees in my work. I have settled
13 cases, recently, at $150.00 and $160.00 an hour, less
14 complex cases than this. When I was in private
15 practice four years ago, I charged $100.00 for
16 non-contingent work.
17 All of this work, by the way, before I forget,
18 was contingent. In other words, we were not paid any
19 attorneys' fees as we went along. We were given
20 money for costs, put into the trust fund by the
21 school district Plaintiffs, and therefore, we did not
22 have to expend those costs. But all of our attorney
23 time was contingent upon winning, of course. We won,
24 but we might not get the attorneys' fees, obviously,
25 so it still is contingent.

1 Both for Roger Rice and Peter Roos, as experts
2 in the area of education law for 18 years, I think
3 certainly $150.00 an hour is reasonable prevailing
4 attorneys' fees for people. It's very minimal for
5 people of that experience level, here in the Texas
6 area where I practice.
7 The other attorneys who worked on the case, and
8 I gave you their backgrounds, we charge $120.00 an
9 hour for them. Although they are roughly as
10 experienced as the other attorneys, they were not the
11 lead attorneys in the case. And we charged $120.00
12 an hour for them.
13 For the paralegals, we charged $25.00 an hour.
14 From my experience working with law firms, they bill
15 paralegal time out at $30.00, $35.00 an hour. And
16 all of these people are highly experienced
17 paralegals, I've worked with each of them.
18 The costs here are all costs necessary. By
19 here, I mean on Exhibit 415. The costs were all
20 costs that were necessary to the conduct of this
21 litigation. None of these costs were incurred for
22 any other case or for any other matter other than the
23 Edgewood versus Kirby litigation.
24 And Exhibit 416 is the summary exhibit, pulling
25 together the attorneys' fees, paralegal fees, and

1 costs for all of the Plaintiffs' attorneys in the
2 litigation from the March 1983 date through June 1st,
3 1987. And that's Exhibit 416.
4 Q. Mr. Kauffman, your fees' request appears to be what
5 we call a load star request, just the hours times
6 rates. Did you give any consideration to requesting
7 an upward adjustment for a contingency risk, or
8 delaying payment for results obtained? I don't mean
9 to treat you like an adverse witness, but --
10 A. Well, I did not. Although, to be honest, it was
11 recommended by others -- other, I guess, experts in
12 the area of attorneys' fees, that we asked for those
13 matters of -- it was a contingent fee case. And it's
14 common in these cases to ask for an upward multiplier
15 that's contingent matter. It's also common, in these
16 cases, to ask for an upward multiplier, if it's a
17 case with tremendous effect or a landmark type case,
18 and that's common to ask for upward multipliers.
19 Also, since it's contingent and since obviously, the
20 time we spent in 1983 will not be compensated for, if
21 it's ever compensated for, probably until 1989 or
22 1990, after the appeals and the final judgment. It's
23 certainly a time delay, in terms of MALDEF getting
24 the fees, in which it needs. So we did not, though,
25 ask for multipliers for any of those things. This

1 $150.00 an hour is a prevailing rate for attorneys of
2 that level of experience, I think, for non-contingent
3 work in this area. Although, as I said, I was --
4 Q. Would you be more specific? Was MALDEF's
5 vice-president for litigation specifically involved
6 in advising you to seek an upward enhancement of an
7 hours-times-rate scale for your work?
8 A. Yes. Mr. Richard Larson, who happens to be here
9 today, and wrote a book on federal court attorneys'
10 fees, suggested we do it, and I decided not to do it.
11 I decided just to go in and put $150.00 an hour.
12 From what I've seen of other cases, you know, these
13 -- including, I guess, White versus Regester where
14 there was a 100 percent multiplier added on and
15 affirmed by the fifth circuit, we still decided not
16 to do is, just to go ahead and ask for the straight
17 fees.
18 Although as far as MALDEF is concerned, it's
19 taking a chance, because obviously, the organization
20 needs the fees. As I understand it, MALDEF is --
21 approximately 20 to 30 percent of its budget comes
22 from attorneys' fees. And it can't go on with its
23 work unless it makes them.
24 Q. Mr. Kauffman, do you know of any attorneys' fees
25 awards in cases similar to the Edgewood versus Kirby

1 case?
2 A. Yes, I do. In the Serrano litigation in California,
3 the California Supreme Court affirmed an award of
4 $800,000.00. And this was for litigation -- this is
5 1977 California Supreme Court, where they affirmed
6 $800,000.00. And this was again for work done in
7 1971, '72, '73, and affirmed by the Supreme Court in
8 '77. And in the White versus Regester, Graves v.
9 Barnes litigation, which was the redistricting of the
10 major urban counties in Texas, I think the final
11 attorneys' fee award, there, was approaching
12 $1,000,000.00 for all of the fees.
13 In the Houston -- excuse me, in the Dallas
14 desegregation case, which is the desegregation case
15 of one school district, the fees have been in the
16 range of $600,000.00 to $800,000.00, now, for the
17 total of that litigation.
18 For the Houston single member district case,
19 there is a fee recently granted by Judge McDonald of
20 roughly $1,000,000.00 in attorneys' fees.
21 So given those matters, I think the fees that
22 we are requesting, in addition to the fees the
23 Plaintiff-Intervenors are requesting, are within that
24 ballpark.
25 MR. LARSON: No further questions, Your

1 Honor.

2 MR. GRAY: No questions, Your Honor.

3 CROSS EXAMINATION

4 BY MR. O'HANLON:

5 Q. Mr. Kauffman, what is your salary?

6 MR. LARSON: Your Honor, I would like to

7 know the relevance of the question.

8 MR. O'HANLON: Oh, I think the relevance is

9 clear. This gentleman works for an agency whose

10 purpose is to do this kind of litigation. I think

11 the way to assess attorneys' fees in this case is to

12 make a determination of what it costs that entity to

13 do it, including the salaries and the operational

14 costs of the entire office. And that's what I intend

15 to get into. This gentleman does not bill by the

16 hour. So I submit to you that that's not the proper

17 way to view these cases.

18 MR. LARSON: If I might, Your Honor, this

19 argument has been raised in the fifth circuit about

20 half a dozen times and every United States court of

21 appeals has addressed it. And it was finally

22 addressed, and we thought forever, by the United

23 States Supreme Court in 1984, in a case called Blum

24 v. Stenson. I'd like to hand up a copy of the

25 Supreme Court's decision.

1 MR. O'HANLON: I'm well familiar with the
2 case. I might want to remind Counsel that this is
3 not a federal court proceeding, and that they lost
4 this case in federal court. This is a matter of
5 state law. The Court has the power to determine
6 reasonable and necessary. And I think that in
7 connection with the proof of that, I should be
8 entitled to show what it actually cost these folks.
9 THE COURT: Okay, I'll overrule. You may
10 ask. You may answer.
11 A. $37,500.00 a year.
12 Q. All right. How much does it cost to operate your
13 office per year?
14 A. I don't know.
15 Q. Is there somebody here that can tell us?
16 A. I think Norma Cantu is here. My understanding is,
17 and I will stand corrected if -- I'll talk to Norma
18 -- is that it's around $500,000.00 a year for the
19 San Antonio office.
20 Q. Okay. $500,000.00 for how many lawyers?
21 A. Five.
22 Q. Five lawyers. So it costs $100,000.00 a lawyer to
23 operate your office, and that includes all support
24 staff?
25 A. I think that includes all of the support staff in the

1 San Antonio office, and that's $100,000.00 per year.
2 The major accounting and administration of MALDEF is
3 not in the San Antonio office and is not reflected in
4 this figure. That's in Los Angeles.
5 Q. Okay. Now, among those, as I do the calculations,
6 there are approximately 2,080 hours in a year.
7 That's 52 times 40?
8 A. Yes, I guess that's right, work hours in a year,
9 that's right.
10 Q. All right. How much -- how many hours, total, was
11 expended by MALDEF in connection with this case?
12 A. I can go back and look, but I'll give you -- it's all
13 here. I think it's about $3,400.00, $3,500.00.
14 Q. All right.
15 A. And I can, you know, go back and add it up for you,
16 but I think that's about right. Now, that is the
17 hours we're charging for. I'm sure there were
18 probably additional hours as well.
19 Q. Okay. But the hours you're charging for, some of
20 those hours you're charging for, I suppose we can get
21 into it, has to do with talking, for example, to Mr.
22 Bullock. Did you notify me that you were talking to
23 Mr. Bullock?
24 A. As I recall, I talked to Mr. Bullock before we filed
25 the litigation.

1 Q. But you knew he was going to be a Defendant, didn't
2 you?
3 A. I wasn't sure at the time.
4 Q. You filed a petition within a week after what it
5 shows down here that you were talking to him. And
6 you didn't know a week before who you were going to
7 sue, Mr. Kauffman?
8 A. I guess not. You know, we drew up the petition,
9 worked on the petition, filed it. I mean, I wasn't
10 sure.
11 Q. All right. Let's go back a second. 2,080 times five
12 is 10,000 hours a year, is that right?
13 A. I think so, uh-huh.
14 Q. All right. Are you particularly more expensive than
15 any of the other lawyers in your office?
16 A. More expensive, let's see. I guess it depends on the
17 work I've done at that time. I probably have more
18 experience than any of the other attorneys in the
19 office. I'm not sure whether I'm more expensive than
20 them or not.
21 Q. In terms of support staff and things of that nature?
22 A. It depends on who you talk to in the office. Some
23 people in the office think that I'm very expensive
24 and I require too much support staff. And during
25 this litigation, at times, we had all five, you know,

1 attorneys and several secretaries working on the
2 case. I really cannot say, for sure, whether I have
3 -- I have a full-time secretary. We have three
4 secretaries, one of them has been allotted to me
5 full-time. And we also have these paralegals who
6 were working under my direction for three years. And
7 we had other paralegal time and other work in the
8 office, but I can't give you a percentage on that,
9 Mr. O'Hanlon.
10 Q. Do the paralegals figure into your $500,000.00 a year
11 overhead?
12 A. Actually, they don't. Because these -- these
13 paralegals were paid out of the trust fund. Most of
14 this paralegal time is in addition to that
15 $500,000.00.
16 Q. Okay. So we've got 1,000 -- as I multiply 2,080
17 times 5, I get 10,400 hours.
18 A. Uh-huh.
19 Q. And you said that you've got $3,500.00 expended by --
20 3,500 hours expended by MALDEF attorneys?
21 A. I think that's right.
22 Q. Okay.
23 A. But that's over a three-year period.
24 Q. Okay. But you had five lawyers over that three-year
25 period?

1 A. That's correct.
2 Q. So you're talking about really a third of the year,
3 aren't you?
4 A. Well, let me make my answer clear. We're talking
5 about a third of all of the attorneys' time in the
6 office --
7 Q. Right.
8 A. -- for one year.
9 Q. Okay. Is that a fair way to measure it, you think?
10 A. I just -- I don't know. As I said, there are
11 probably different rates for different attorneys,
12 different amounts, of course. I really don't know.
13 It's hard to --
14 Q. Okay. So a third of the year, for all attorneys,
15 would be $166,666.67, wouldn't it?
16 A. Now, as I said, that would be overhead excluding the
17 Los Angeles central office overhead, because that's
18 for our office in San Antonio. Los Angeles has the
19 general counsel as a vice-president for litigation,
20 has the accountants, all of that. So I imagine that
21 there's an extra overhead. I don't know how much it
22 is.
23 Q. Okay.
24 A. But they oversee all five of the regional offices
25 and, you know, we enjoy their help and at times,

1 their interference, to be honest with you.
2 Q. All right. Now, let's talk about Mr. Rice for a
3 second.
4 A. Sure.
5 Q. Is Mr. Rice licensed in Texas?
6 A. You know, I don't think so. I don't think he is.
7 Q. Is Mr. Roos licensed in Texas?
8 A. I don't think so.
9 Q. Is Mr. Perez licensed in Texas?
10 A. I don't think so.
11 Q. Okay.
12 A. I think each of them was allowed to appear in this
13 litigation, however.
14 Q. That's right. They don't have any particular
15 expertise in the Texas Constitution, then, isn't that
16 right?
17 A. That's not right.
18 Q. They're specialists, even though they're not even
19 licensed in Texas, in the Texas Constitution?
20 A. They are specialists in litigation in Texas, where
21 most of them, each of them has spent up to a quarter
22 of their time for the last five years.
23 Q. Arguing in federal court, isn't that right?
24 A. That's correct, that's in federal court.
25 Q. And it was over federal issues, not over issues with

1 respect to the State Constitution and what it may or
2 may not have required?
3 A. I am not sure. I think that in the bilingual
4 litigation, they might have dealt with the State
5 Constitution, but I don't know. I think that
6 certainly would not be their major area of expertise,
7 the Texas Constitution.
8 Q. And you know as well as I do, that if it was dealt
9 with in -- the State Constitution, in the bilingual
10 case, that it certainly wasn't reflected either in
11 the trial courts' judgment or the opinions of the
12 fifth circuit?
13 A. That's correct.
14 Q. So these gentlemen didn't bring any particular
15 expertise to this case with respect to the
16 requirements or vicissitudes of the Texas
17 Constitution?
18 A. That is wrong.
19 Q. Well, how do you explain that, Mr. Kauffman?
20 A. Well, because people who have been in practice for 18
21 years and have dealt with litigation in states all
22 over, Peter Roos has done several cases in California
23 state court and has dealt with the California
24 Constitution. When you have that level of expertise,
25 you can pretty much read constitutional provisions,

1 and given your experience in that area, interpret
2 them in light of state constitutional law. I have no
3 doubt that they brought very special expertise to
4 interpreting the Texas Constitution.
5 Q. All right. Let's talk about -- how much money did
6 you get from the school districts?
7 A. Let's see, we were given a fund for use on expenses
8 for the case, not for attorneys' fees.
9 Q. Okay.
10 A. And I think we've received a total of about
11 $80,000.00 to $90,000.00.
12 Q. So you still have a balance in your trust fund, is
13 that correct?
14 A. That's right.
15 Q. What are you going to do with that balance?
16 MR. LARSON: How is that relevant, Your
17 Honor?
18 MR. O'HANLON: I want to know whether
19 they're going to put it in their pocket or give it
20 back.
21 THE COURT: Okay. You may answer.
22 A. Right now, we're going to see what it costs to do the
23 appeal. And if it cost money, as I assume it will,
24 to buy the transcript to prepare for that appeal,
25 that money will be used for that. If, at the end of

1 this litigation, there is any amount left, it will be
2 redistributed to the school districts. I mean, I'm
3 an attorney, licensed under the State Bar of Texas.
4 And I follow the regulations on trust accounts.
5 Q. Okay.
6 A. And I'm not violating the law.
7 Q. I'm not accusing you of that.
8 A. Okay.
9 Q. I'm just trying to figure out what's left and how
10 it's going to be expended.
11 A. Okay.
12 Q. Now, you know, as an attorney licensed under the
13 State Board, the school districts don't have
14 constitutional rights, per se, don't you?
15 A. I would say that you're asking me for my judgment as
16 an attorney. And I would, I guess, declare on behalf
17 of my clients and me, attorney work product. I
18 can't, as a witness here, argue constitutional law
19 with you.
20 Q. Oh, I think you can. You know that you've been doing
21 it for the entire trial, Mr. Kauffman. You know,
22 don't you, that school districts, political
23 subdivisions in the State of Texas, do not have
24 constitutional rights?
25 MR. LARSON: Your Honor, I don't understand

1 what this line of argument has to do with the
2 reasonableness of the fee request.
3 MR. O'HANLON: I'll be happy to explain,
4 Your Honor. That to the extent that he has made
5 collections, and the same thing is going to come with
6 Mr. Gray and Mr. Richards, that they have come from
7 sources of funds that do not have constitutional
8 rights, in and of themselves. That that's a
9 collateral source that we're entitled to figure in,
10 and those people are not entitled to reimbursement.
11 They're not entitled to collect the fees, they don't
12 have any constitutional rights, and they're not
13 entitled to reimbursement. If they want to
14 volunteer, in the course of litigation, funds for the
15 pursuit of that, then I think that that's highly
16 relevant. I don't think we ought to pay back money
17 to school districts for money that they volunteered,
18 when the problem, in all probability, the State gave
19 them the money in the first place. So we're paying
20 for it twice.
21 MR. LARSON: Your Honor, an issue somewhat
22 like this came up in the United States Supreme Court,
23 where the City of Seattle sued the State of
24 Washington. And it was over a school desegregation
25 plan that the City of Seattle had voluntarily

1 implemented. And the state, through a referendum,
2 had passed a law barring voluntary school
3 desegregation. The City of Seattle sued the state.
4 And the state said, "Wait a minute, we're already
5 funding you. You can't get market based fees from
6 us. And the United States Supreme Court said that
7 the state was wrong. The case is the State of
8 Washington versus Seattle. It's 458 U.S. -- I don't
9 know the exact cite.
10 MR. O'HANLON: Once again, I'm constrained
11 to remind Counsel that this is not -- that these are
12 lawsuit cases in the United States Supreme Court, and
13 this has to do with the Texas Constitution and what's
14 going on in Texas. Those cases are purely and simply
15 inapposite of what's before the Court.
16 MR. LARSON: It has to do with a general
17 body of law that's been built up around the area of
18 attorneys' fees, growing in three areas. And it's
19 the same in state law, generally, as it is in federal
20 law. One, pursuant to a fee shifting statute, you
21 can get fees. Two, pursuant to a common fund theory,
22 where the Plaintiffs create a common fund, Plaintiffs
23 can get fees out of the fund. Three, for bad-faith
24 litigation. Those are the three broad exceptions to
25 what is referred to as the American rule against fee

1 shifting. The law had been developed most fully in
2 the federal courts, that is correct. But the state
3 courts have been following that law quite closely.
4 MR. O'HANLON: I challenge Counsel to show
5 me that under Texas jurisprudence. We've got --
6 we've got volunteers, and with the State's own money,
7 the school districts contributing to this litigation.
8 And we don't want to pay for it twice. I think
9 that's unreasonable.
10 THE COURT: All right. I'll overrule, You
11 may ask and you may answer.
12 A. Like some witnesses, I'm afraid I've forgotten the
13 question. It had something to do with constitutional
14 law.
15 Q. The question is, in your opinion, does the school
16 district have constitutional rights, in and of
17 itself?
18 MR. RICHARDS: For the
19 Plaintiff-Intervenors, I just want to be sure that
20 we're not bound by Mr. Kauffman's answer on this
21 issue.
22 MR. O'HANLON: Mr. Richards will get his
23 own time to answer those questions, too. And I'm
24 sure Mr. Kauffman's response will be the same.
25 THE COURT: All right.

1 MR. LARSON: I think he's calling for an
2 opinion, Your Honor, not for a statement of fact from
3 a witness.
4 MR. O'HANLON: I think this witness is
5 qualified to give an opinion on it.
6 MR. KAUFFMAN: Are you stipulating I'm an
7 expert on Texas constitutional law? That would be
8 helpful.
9 MR. O'HANLON: I think you just whipped me,
10 Mr. Kauffman, and I have to give you some deference.
11 THE COURT: So the question is, do the
12 school districts have Texas constitutional rights?
13 MR. O'HANLON: Yes, sir.
14 A. Yes, I think so.
15 Q. You think they do?
16 If they do not, these school districts would
17 be, in essence, volunteering their funds, is that
18 correct?
19 A. I don't -- I don't know what you mean by if they're
20 not, which is hypothetical. And I don't know what
21 you mean by volunteering their funds.
22 Q. Well, did you compel them to come up with this money?
23 How did you go about raising the funds?
24 A. Well, I did it the way I guess any attorney that
25 represents school districts or any other client does

1 it. Which is, if you want me to do this litigation,
2 it's cost-heavy litigation. You will have to advance
3 the costs. And as I understand it, people who
4 represent school districts, everybody does that.
5 Anybody who represents anybody, who can afford the
6 costs, asks for costs.
7 Q. All right. Did you only get money from the Plaintiff
8 districts?
9 A. What do you mean from the Plaintiff districts?
10 Q. From the districts that are Plaintiffs, named
11 Plaintiffs in this case?
12 A. Let me see, yes, I think so. I didn't get any from
13 the individual Plaintiffs.
14 Q. All right.
15 A. Yeah, that's correct.
16 Q. Did you only get money from the districts that are
17 named as Plaintiffs in this case?
18 A. That's correct. There are no other people, other
19 people who volunteered money, yeah. I can't think of
20 any, no. Excuse me, I'm sorry, I accidently adopted
21 your word "volunteered" and I apologize. There were
22 no other school districts -- I want to -- my other
23 testimony was inoperable. There were no other school
24 districts that gave any money to the trust fund.
25 Q. All right. Mr. Kauffman, how do you apportion -- how

1 is it that you apportioned, from looking at your time
2 records, your time with respect to the issues upon
3 which you prevailed and the issues upon which you did
4 not prevail?
5 MR. LARSON: I would like a clarification
6 on prevailing versus not prevailing, particularly
7 vis-a-vis issues, if Counsel would --
8 MR. O'HANLON: Be happy to.
9 Q. You lost on the race discrimination. How do I know,
10 from looking at this, how much time that you spent on
11 race discrimination?
12 MR. LARSON: Well, Your Honor, I would
13 object to that question based upon another Supreme
14 Court decision in the fees law, Hensley versus
15 Eckerhart, which basically says that you should look
16 at the results of the litigation. If the results are
17 excellent, if there are different claims in the cases
18 or even different issues, and the Plaintiffs do not
19 prevail on all issues, they're still entitled to fees
20 for all time expended, because of the excellent
21 results. And I've got a copy of that, too. I guess
22 we expected some of these things to come up.
23 MR. O'HANLON: Once again, Your Honor, it's
24 federal. The standard in Texas is what is reasonable
25 and necessary. If he didn't win and he still got the

1 results, it's going to be hard to argue that it was
2 necessary that he did a whole lot of the other stuff
3 that he did with -- since he won.
4 MR. LARSON: Your Honor, it just so turns
5 out that under federal law, both with regard to Blum
6 v. Stenson and now also Hensley v. Eckerhart, they
7 were both cases decided under a statute referred to
8 as the Civil Rights Attorneys' Fees Awards Act of
9 1976, codified at 42 U.S.C. Section 1988, which
10 authorizes only, quote, "reasonable fees." The issue
11 in both of those cases was whether or not the fees
12 that were awarded were reasonable. And that's the
13 major distinction between federal law and state law.
14 MR. O'HANLON: The distinction is that they
15 must both be reasonable and necessary in Texas
16 jurisprudence, a big difference. So, if we're going
17 to find out, and there's a bunch of stuff in here
18 that we're going to go through, with respect to
19 experts that he didn't call, with respect to -- it's
20 a significant amount of money with respect to
21 computer analysis that he didn't use. And it's my
22 contention from taking the deposition, that that
23 significantly had to do with the race case, that he
24 didn't win. And I don't think we should be in a
25 position of paying him fees for witnesses that he

1 didn't call, for research that he didn't use,
2 especially on issues that he didn't win on.
3 MR. LARSON: Your Honor, on the opinion in
4 Hensley, which I just handed up to you, on Page 431,
5 there's a quote with approval from a trial court
6 decision in a case called Davis versus County of Los
7 Angeles, which helped form the legislative history in
8 Section 1988. And I think it's very relevant. If I
9 may read it into the record, it has to do with
10 reasonable. "It also is not legally relevant the
11 plaintiffs' counsel expended a certain limited amount
12 of time pursuing certain issues of fact and law that
13 ultimately did not become litigated issues in the
14 case or upon which plaintiffs ultimately did not
15 prevail. Since plaintiffs prevailed on the merits
16 and achieved excellent results for the represented
17 class, the plaintiff's counsel are entitled to an
18 award of fees for all time reasonably expended in
19 pursuit of the ultimate result achieved in the same
20 manner that an attorney traditionaly is compensated
21 by a fee-paying client for all time reasonably
22 expended on a matter."
23 And that is commented upon favorably by the
24 United States Supreme Court. So I don't think we can
25 pick cases apart by little issues, or things that

1 were reasonable in Counsel's mind and certainly in
2 the clients' mind to be expending time on, when, as
3 in Hensley, and particularly when, as in this case,
4 the results are not only good, but they are really
5 quite extraordinary, Your Honor.
6 MR. O'HANLON: They don't have anything to
7 do with the issues that we're litigating. If we're
8 talking about a race case, he didn't win that case.
9 THE COURT: Okay. I'll overrule. You may
10 ask.
11 A. Okay, I remember that. I don't think you can tell by
12 looking at Exhibit 402 exactly which of those hours
13 were spent on the Mexican-American cause of action.
14 The Mexican-American cause of action was extremely
15 closely related to all of the other causes of action.
16 The data base was very similar. Almost all of the
17 data that we looked at, you have information on the
18 school districts, and you also add in and look at the
19 percentage of Mexican-American, so I did not separate
20 out my work on that issue from other issues. I think
21 they're very closely related.
22 Q. Well, can you give us an estimate of how much time?
23 Well, let me withdraw that, and let me ask you about
24 Dr. Harris. That was principally what Dr. Harris was
25 hired to do, was he not?

1 A. That's incorrect. That is not correct.
2 Q. Okay. He wasn't hired to run correlations with
3 Hispanics and things of that nature?
4 A. He was doing research in the area of school finance.
5 We found out he was doing that research, he asked for
6 financial help to do his research, it was on all
7 issues of school finance. One of those was
8 concentrations of Mexican Americans. As I recall, it
9 was a minor part of what he worked on.
10 Q. Now, Dr. Harris never testified in this case, did he?
11 A. That's correct.
12 Q. I computed that you spent from -- roughly at 70
13 hours, talking to Dr. Harris, you and members of your
14 staff, is that approximately correct?
15 A. I can add them up, but I'm sure that sounds about
16 reasonable. I really don't know. I probably did.
17 Q. All right. Did any of the information that Dr.
18 Harris did, with respect to his computer runs, ever
19 get into evidence in this case?
20 A. Yes.
21 Q. Which?
22 A. The exhibits that were testified to by Mr. Cortez and
23 the numbers testified to by Dr. Cardenas, as well as
24 -- we used the information in preparation for the
25 cross examination of the Defendants' witnesses.

1 Q. That's the evidence that Mr. Cortez said was a
2 business record of his, when he testified in court?
3 A. I have --
4 Q. That information was put together under his guidance?
5 Was Mr. Cortez really guiding Dr. Harris?
6 A. For the preparation of those exhibits, he was, as I
7 recall. But the data generated was from Dr. Harris.
8 Q. How many thousand of dollars did you spend on Dr.
9 Harris?
10 A. I'll look at the exhibit. I'm sure it was a large
11 amount. He spent hundreds and hundreds of hours
12 working on this issue. I haven't pulled it out, but
13 I imagine it's $20,000.00 to $30,000.00.
14 Q. Okay.
15 A. That, I think, includes the paralegal time to help
16 him. But we certainly spent significant amounts to
17 support his research.
18 Q. What would be a reasonable estimate of the time that
19 you and the members of your office spent in
20 connection with the racial issues?
21 A. Let me see, I think if you -- if you look at the time
22 spent on the racial issue that would not have been
23 spent if the racial issue were not in the case, that
24 that probably was 50 to 100 hours. And I would say
25 that probably was for preparation of some of the

1 testimony of Mr. Cortez and some of the testimony of
2 Dr. Cardenas.
3 Q. How much time did you spend on the racial issues?
4 Now, you said -- you didn't answer my question, you
5 said that if it wasn't in the case. How much time
6 did you spend on the racial issues?
7 A. 50 to 100 hours.
8 Q. That's all?
9 A. That's all the time that I spent solely on the racial
10 issue. As I said, it is impossible to segregate out
11 that from the rest of the issues in the case.
12 Q. I notice, Mr. Kauffman, that you're billing us, both
13 on your time and on your expenses, for going to
14 seminars. How many seminars did you go to? I
15 counted three.
16 A. Those seminars were meetings of school finance
17 experts and all of the major school organizations in
18 the State of Texas, which I attended and discussed
19 all of the school finance issues with them. And I
20 consider it a part of this case, to go find out what
21 the TSTA is working on with the Texas Association of
22 School Boards, what all of these organizations are
23 working on. As well, I saw several TEA officials
24 give speeches at those meetings, the legislators gave
25 speeches. I think Mr. Thompson or Mr. Moak gave

1 speeches. So the reason, as an attorney in this
2 case, it was pretty important to know what those
3 people were saying.
4 Q. The TSTA never intervened in this lawsuit, did they,
5 Mr. Kauffman?
6 A. That's correct.
7 Q. The TASB never intervened in this lawsuit, did they?
8 A. That's correct.
9 Q. All right. Now, do you think that press conferences
10 were reasonable and necessary as attorneys' fees in
11 this case?
12 A. I don't think they should be in there. If they are,
13 they should be deleted.
14 Q. All right. I've got about 20 hours for preparation
15 for press conferences and for press conferences.
16 A. Well, I don't think I spent that much time on it, but
17 if you'll show me which ones you're talking about,
18 I'll see if I agree with you, for sure. Which dates
19 do you mean?
20 Q. Well, for example, there's one on 3/4/85, Page 12.
21 A. That's right, that's for press conference.
22 Q. And I see "Preparation for press conference, seven
23 hours." And I see "Trip to Austin," presumably for
24 the press conference, "four hours." And then I see
25 "Preparation for press conference and press

1 conference, 1.5 hours." So on that day, alone, 12.5
2 hours, and there's about three of those in here.
3 MR. LARSON: The record should show that
4 that's two different days, not on that day, alone.
5 MR. O'HANLON: Excuse me, it would be two
6 different days.
7 A. The preparation there you're talking about is both,
8 if I have the right date in mind, that was for the
9 press conference we held, and also for the final work
10 on the amended petition. But there certainly are
11 hours in there for the press conference.
12 Q. Okay. So you say, "Preparation of materials and
13 witnesses for press conference," really means work on
14 amended petition?
15 A. No, I'm saying that that means preparation of
16 materials and witnesses for the press conference.
17 And as I recall, that was the day before we filed the
18 amended petition. There was also work on the amended
19 petition.
20 Q. Well, the page before it, then, where it says "Final
21 work on amended petition" was in error?
22 A. Well, it was not in error. It might not have been
23 the final work, but I'm sure it was on the amended
24 petition. My experience on those things is you have
25 a final, you write that, and then somebody says, "No,

1 you need to add this or add that, or subtract this or
2 subtract that," so final work becomes not final work.
3 Q. All right. Now, turn to Page 13.
4 That's an example, Mr. Kauffman, but that day
5 is -- that page is almost entirely, but for two
6 items, working with proposed legislation, is not that
7 correct?
8 A. Most of that page is related to legislation, that's
9 right.
10 Q. All right.
11 A. Uh-huh.
12 Q. That's not attorneys' fees in connection with this
13 case, is it?
14 A. Yes, it is.
15 Q. How so?
16 A. I was representing my clients and looking at
17 legislation to determine what effect that would have
18 on the lawsuit. If a proper plan had been
19 implemented during that session, it could have been
20 the end of the lawsuit. So it was in my clients'
21 interest for me to know what was going on.
22 Q. How was that --
23 MR. LARSON: Your Honor, if I may, I would
24 like to object to this line of questioning as well.
25 The United States Supreme Court, one year ago this

1 month, June of '86, in a case called Delaware Valley
2 Citizens' Council for Clean Air versus Commonwealth
3 of Pennsylvania, held that time spent in
4 administrative processes and before the Pennsylvania
5 Legislature in an effort to seek the result obtained
6 in the litigation is compensable in the litigation.
7 MR. O'HANLON: Once again, that's not Texas
8 jurisprudence. And we don't want to pay for
9 lobbying, Judge. That's not reasonable or necessary
10 to this lawsuit, to the prosecution of this lawsuit.
11 I've got 36 and a half hours just on that page,
12 alone, with respect to that, and 15 hours on the next
13 page, and 14 and a half hours on the next page.
14 MR. KAUFFMAN: Of course, that's your
15 characterization as lobbying, I've never
16 characterized it as that.
17 BY MR. O'HANLON:
18 Q. Well, what is "Review bills and discuss with
19 Mexican-American caucus staff?"
20 THE COURT: Just a minute. I don't know
21 that that's really an objection, other than just
22 giving me information. I'll take it as an objection
23 and I'll overrule. We'll have the evidence.
24 Q. What is "Meeting with the Mexican-American caucus,"
25 if it's not lobbying?

1 A. It's to find out what is in the legislation, so I can
2 give my clients advice on it.
3 Q. Well, all right. And that was necessary to this
4 lawsuit, because that legislation didn't pass, did
5 it?
6 A. I am not sure which legislation it was, right now.
7 Q. Well, which --
8 A. There were lots of things going on in the '85
9 Legislature, which had impact on the potential of the
10 case. There were questions about changing the
11 weights; there were questions about changing the PDI;
12 there were questions about changing some of the other
13 formulas. And I'm not sure exactly which part of the
14 legislation that was, each one of those things, but
15 they were all related to the school finance issues.
16 Q. Well, were any of them related to the school district
17 boundaries, Mr. Kauffman?
18 A. I don't recall whether there was anything regarding
19 school district boundaries or not. There was, as I
20 recall, one constitutional amendment that was
21 proposed on school district boundaries, that didn't
22 get out of the House or the Senate, called the Exxon
23 Bill. I'm not sure that was that session or not.
24 But there was some legislation regarding school
25 district boundaries, as I recall, and that was going

1 to sanctify all of the boundary lines. And it didn't
2 get out.
3 Q. All right. And this all had to do with the formulas,
4 nothing with respect -- various aspects of the
5 formulas, nothing to do with the school finance
6 system as a whole, did it? Because the deal was they
7 weren't going to change the basic formula structure,
8 isn't that right?
9 A. No, I don't think all of that is right.
10 Q. Okay. How do you think we ought to pay, the State
11 ought to pay for reviewing newspaper articles?
12 A. Which date are you talking about?
13 Q. Page 33, two hours.
14 A. Okay.
15 Q. There's a number of those throughout this document,
16 as well.
17 A. Okay. As I recall that, those were exhibits to a
18 motion which were filed in the case. At the time
19 that the Defendant-Intervenors intervened, they said
20 that they were caught by surprise in the litigation.
21 And I reviewed my publication file, to show evidence
22 that it was a matter of public knowledge that the
23 lawsuit was ongoing.
24 Q. With respect to the Findings of Fact and Conclusions
25 of Law.

1 A. Sure.
2 Q. Do you think we ought to pay, the State ought to pay
3 for you having to do it three times because you
4 didn't get it right?
5 A. Well, I think I got it better every time.
6 Q. Well, you didn't get it right the first time, did
7 you?
8 A. Well, I don't know what do you mean by "right." Each
9 time I did what I felt was necessary. All of the
10 work I did on the second draft included information,
11 as I recall, in the first draft, and built on it. It
12 is not unusual to have three or four drafts of
13 something like Findings of Fact and Conclusions of
14 Law.
15 Q. I computed that you spent in excess of 120 hours on
16 the Findings of Fact and Conclusions of Law, Mr.
17 Kauffman. Is it your testimony that those were all
18 reasonable and necessary?
19 A. I'm not sure of your sum, but assuming your sum is
20 correct, yes, I do. They are 75 pages long. And
21 they involved a review of 10 weeks of trial and
22 hundreds of exhibits, coordination of many people's
23 findings of fact into one document. I think it's a
24 real good document, 75 pages.
25 Q. Okay. Would you turn to Page 44, please, sir?

1 A. Sure.
2 Q. Do you think that "Press calls and response to press
3 inquiries" are part of reasonable and necessary
4 attorneys' fees?
5 A. Yes, I think at this level, they are, after the
6 judgment was out. As I spoke to my clients, they
7 said that, you know, "There are a lot of legal issues
8 involved in this. We, you know, we are uncomfortable
9 when the press says, 'what are you going to do about
10 this, what are you going to do about that?'" So they
11 asked me to talk to the press for them. And that's
12 my job, so I did.
13 Q. That was reasonable and necessary to this lawsuit?
14 A. Yes, I think it is, I do.
15 Q. And your clients were the school districts?
16 A. The school districts and the individual plaintiffs,
17 that's right.
18 Q. Plaintiffs, that's right.
19 MR. O'HANLON: That's all I've got. Pass
20 the witness.
21 MR. TURNER: We have no questions, Your
22 Honor, of this witness.
23 MR. R. LUNA: No questions.
24 THE COURT: You may step down, sir. Thank
25 you.

1 MR. LARSON: If I may, Your Honor, just one
2 follow-up question with regard to the trust fund, and
3 I'll --
4 REDIRECT EXAMINATION
5 BY MR. LARSON:
6 Q. Did any money from the trust fund ever go into the
7 pockets of the individual lawyers representing the
8 Plaintiffs?
9 A. No. All of that money was just spent on
10 out-of-pocket expenses for the lawsuit.
11 Q. Is there, in writing, a stated purpose for the trust
12 fund?
13 A. Yes. There's a document setting up the trust fund
14 and saying that all of this money will be spent on
15 litigation. And it is the parties' typical trust
16 document for trust funds.
17 Q. Okay.
18 MR. KAUFFMAN: Your Honor, I have the
19 originals. I think you have a set of copies, or I
20 have the original exhibits, whichever.
21 THE COURT: Why don't you put the originals
22 down here where we can all get to them. What I've
23 got up here are mine?
24 MR. KAUFFMAN: Yes, sir.
25 (Witness excused.)

1 MR. GRAY: Your Honor, at this time, I
2 would like to call myself as a witness.
3 MR. RICHARD E. GRAY, III
4 was called as a witness, and after having been first duly
5 sworn, testified as follows, to-wit:
6 THE COURT: You notice they didn't waive
7 the oath for you.
8 MR. O'HANLON: I'm sorry, I was reading
9 this Hensley versus Eckerhart case, Judge, and seeing
10 about prevailing in there in the final part. And I
11 was so amazed about the language in it...
12 MR. KAUFFMAN: Probably going to make David
13 do it twice.
14 MR. GRAY: My name is Richard E. Gray, the
15 III. I'm an attorney and licensed to practice before
16 the courts in Texas. I am a 1976 graduate of the
17 University of Texas School of Law, with honors. I
18 first started my practice in 1976, with the Houston
19 law firm of Butler, Binion, Rice, Cook & Knapp. I
20 pacticed there, exclusively, until September of 1980,
21 at which point in time, I was loaned to the State of
22 Texas to become the Executive Assistant Attorney
23 General to the then Attorney General, Mark White.
24 And served in that capacity until the end of December
25 of 1983. In my capacity as Executive Assistant

1 Attorney General for the State of Texas, I was
2 basically in charge of all litigation for the state,
3 and extensively litigated what General White
4 considered to be the then important state cases, many
5 of which I litigated with and against my co-counsel,
6 Mr. Richards. And I would prefer not to state my
7 record on those cases.
8 I am licensed to practice in all of the federal
9 courts in Texas, the fifth circuit and several other
10 circuits, as well as the United States Supreme Court.
11 I have actively practiced civil rights law from 1980
12 until the present. And in that capacity, I have
13 litigated, both as a Plaintiff and as a Defendant.
14 And in a large number of cases, I have defended the
15 State of Texas and the State of Texas agencies in
16 alleged civil rights violations. I also defended the
17 State, the House, the Senate, and the Legislative
18 Redistricting Board in all of the various
19 redistricting matters, one of which was tried in
20 state court, the others were tried in federal court.
21 Mr. Richards and I were retained, were first
22 involved in this matter in the summer of 1986. And
23 from that time to the present, we have kept
24 contemporaneous time records, by which we have made
25 entries of our time spent on this matter on a daily

1 basis. That daily record is then transferred to a
2 computerized billing format. And the computerized
3 billing format is then billed every month, in the
4 copies of which have already been shared with
5 opposing counsel.
6 The total hours that have been spent on this
7 litigation by the Plaintiff-Intervenors, legal hours
8 by lawyers, are 1,780.55, and law clerk hours are
9 315.10. Of those total hours, Mr. Richards and my
10 time, I believe it's reasonable to compensate those
11 hours at the rate of $150.00 an hour. I have 729.10
12 hours, at $150.00 an hour, would equate to a fee of
13 $109,365.00. Mr. Richards has 484.8 hours. And a
14 fee of $150.00 an hour would equate to $72,720.00.
15 There have been four other lawyers who have
16 participated in this trial with us, two from my
17 office, two from Mr. Richards' office. However, of
18 those four, only one, Mr. Steve Martin, out of my
19 office, spent extensive time on the file. He spent
20 513.30 hours.
21 Mr. Martin's credentials are: He's a lawyer
22 of four or five years, licensure, was General Counsel
23 for the Department of Corrections during the primary
24 litigation days of the Ruiz case, has very extensive
25 experience in coordinating, putting together large

1 litigation, as I consider this to be. And in the
2 capacity in this case, he was primarily responsible
3 for coordinating witnesses, locating witnesses,
4 reviewing all of the documents, putting the basic
5 testimony trial outline together. Then, Mr. Richards
6 and I would take the final steps of preparing the
7 witnesses and so forth, and presenting the witnesses.
8 The other lawyers involved, Mr. Ken
9 Shepherdson, in my office, had 12.85 hours; Mr. Phil
10 Durst, in Mr. Richards' office, had 13 hours; and Mr.
11 Mitch Green, in Mr. Richards' office, had 27.50
12 hours. I am familiar with the experience and
13 capabilities of all four of these lawyers. And in my
14 opinion, a reasonable hourly rate of $120.00 an hour
15 is indeed reasonable. And there were 315.1 hours of
16 law clerk time spent on this matter. The law clerk
17 time we are seeking compensation for is at the rate
18 of $25.00 an hour, which is below, in my opinion, the
19 standard rate in Travis County. And we have incurred
20 total expenses, to date, of $26,299.34. So in my
21 opinion, the reasonable and necessary attorneys'
22 fees, including expenses of all lawyers and
23 paralegals and expenses incurred on behalf of
24 Plaintiff-Intervenors is $284,259.84.
25 I further am of the opinion that a reasonable

1 amount of time and expense necessary to prosecute an
2 appeal of this matter to the first stage of the
3 appellate process would be $25,000.00. I am aware
4 that that is higher than what is normally customary
5 in an appeal. At the same time, given the length of
6 this transcript and the cost of this transcript, in
7 my opinion, that size of additional attorneys' fees
8 are, indeed, will be reasonable and necessary. And
9 further, I am of an opinion that an additional
10 $15,000.00 then, in fees, will be reasonable and
11 necessary for prosecution of a second appeal of this
12 matter.
13 I would point out that during my time as
14 Assistant Attorney General or Executive Assistant
15 Attorney General, I was routinely aware, and in fact,
16 encouraged the Assistant Attorney Generals that I was
17 directing, to seek attorneys' fees on behalf of the
18 State in instances where it was appropriate. And the
19 State routinely sought and got attorneys' fees, based
20 upon the then prevailing market rate as opposed to
21 the overhead factor associated with the office.
22 I am further stating that, in my opinion, the
23 hourly rates that I have testified to are both
24 reasonable and necessary. And I am aware that in
25 litigation of comparable magnitude, such as the farm

1 workers' cases, rates of this such have indeed been
2 approved here in Travis County.
3 I believe that concludes my narrative
4 testimony, Your Honor.
5 MR. KAUFFMAN: I have no questions, Your
6 Honor.
7 CROSS EXAMINATION
8 BY MR. O'HANLON:
9 Q. How much did you get from the school districts?
10 A. We have 55 school district clients and a number of
11 individual clients. We have, to my knowledge,
12 received approximately $100,000.00 from a group
13 called the Plaintiff-Intervenors' Committee. And how
14 and where they have raised that money, from what
15 individual sources, I do not know, precisely.
16 Q. Is there some place where we can find out exactly how
17 much money you got from the Plaintiff-Intervenor
18 districts?
19 A. I believe that the number is right at $100,000.00.
20 But how -- whether how much of that came from
21 District A versus District B versus District C, is
22 what I can't tell you. But as I recall, we have
23 billed to date, and received to date, right at
24 $100,000.00. We have another outstanding billing of
25 $19,000.00 that has not been paid or received.

1 Q. What is your agreement with the school districts?
2 A. Our agreement with the school districts is that we
3 would handle this litigation on a flat fee basis --
4 or excuse me, our agreement is with the
5 Plaintiff-Intervenors' Committee. But if you're
6 asking what our agreement is, which I believe it is --
7 Q. Yes.
8 A. -- is that it is a flat fee, not to exceed
9 $120,000.00. And --
10 Q. All right.
11 A. And that is through -- unless they, through their
12 good wishes, choose to change that agreement, that is
13 through the appeal to the Supreme Court.
14 Q. Does that include you and Mr. Richards and Mr. Durst
15 and all of the lawyers that you talked about?
16 A. Yes.
17 Q. So your agreement is $120,000.00 flat?
18 A. Yes. And it was knowingly, going in, that if we
19 prevailed, we would be seeking attorneys' fees. And
20 it was knowing, going in, that it was substantially
21 below all of our normal hourly rates. But it was a
22 cause that we felt needed to be litigated and needed
23 to be prosecuted, and so we did it.
24 Q. And knowing, going in, that the sovereign immunity
25 bars recovery of attorneys' fees in this state?

1 A. Well, knowing that sovereign immunity, as it
2 currently exists, bars our recovery, I have high
3 hopes that by the time this case is fully litigated
4 with the Supreme Court, under the declaratory
5 judgment statute, that will be changed. But
6 likewise, not believing that sovereign immunity
7 afforded the intervening districts any protection,
8 and knowing that they were, in fact, in the process
9 of intervening, but that's neither here nor there.
10 Q. No. What I'm asking is, is that you said you set
11 that $120,000.00 fee, knowing that the state of the
12 law was that you, unless it changed, you weren't
13 going to get any more than a $120,000.00?
14 A. Not from the State. Not -- I mean, we did -- I
15 realized that sovereign immunity, going in, was a
16 shield for the State.
17 Q. And you are going to collect that entire $120,000.00,
18 is that correct?
19 A. We intend to and expect that we will, yes.
20 Q. From the districts?
21 A. Yes. Or from the Plaintiff-Intervenors' Committee.
22 And I don't know what their source of revenue is, but
23 I believe it to be districts. It may be individuals
24 as well.
25 Q. Okay. Now, you don't represent any individuals, do

1 you?
2 A. Yes, we do.
3 Q. Do you?
4 A. Yes.
5 Q. All right. Let's talk about your bill, some, Mr.
6 Gray. Do you think that the State ought to pay for
7 press conferences?
8 A. If you will point out where you are referring to,
9 I'll be happy to look at it.
10 Q. At Page 3, first section.
11 A. Give me a date, sir.
12 Q. 9/19/86.
13 A. The entry there is Mr. Richards' time. And it
14 appears to say "Press conference with Attorney
15 General's Office." And then there was a conference
16 with Judge Clark, yourself, and myself, on that day.
17 Q. Okay. I'm asking you about the press conference. Do
18 you think that press conferences are reasonable and
19 necessary for attorneys' fees for litigation in a
20 case?
21 A. In litigation of this sort, yes. Litigation of the
22 sort that is of high public interest, where the
23 public is crying to find out what's going on, and
24 indeed, it's an easier tool to educate your clients,
25 I do believe so.

1 Q. Turn to Page 5.
2 A. Give me a date, sir.
3 Q. 10/7/86.
4 A. Yes, sir.
5 Q. "Conference with Larry Yawn." You know who Larry Yawn
6 is?
7 A. Yes.
8 Q. All right. Larry Yawn is with the Governor's office,
9 isn't that right?
10 A. Yes.
11 Q. And Larry Yawn -- the Governor is a Defendant in this
12 case, is he not?
13 A. Yes.
14 Q. And you don't see my name or anybody from the
15 Attorney General's Office down there, do you?
16 A. No.
17 Q. Is it ethical, in your opinion, to contact witnesses
18 or parties to the case without consulting their
19 attorney?
20 A. I did not consult a party to the case. I consulted
21 with Mr. Yawn to ascertain if he knew what the
22 Governor's schedule would be for giving a deposition.
23 Q. All right. And you didn't feel that it was necessary
24 to talk to the lawyer involved in that case, me.
25 A. No, I did not.

1 Q. How about -- there's a number of times in there for
2 "Conferences with members of the Legislature."
3 A. Yes. As I recall, the only time you will find -- in
4 my instance, I may be incorrect, but there was
5 conferences with Representative Paul Colbert, who was
6 very instrumental in the entire House Bill 72
7 process. I met with him on at least one occasion
8 that I can recall, and possibly more, to attempt to
9 accomplish two purposes. One, for him to educate me
10 on House Bill 72, what transpired, what were the
11 political trade-offs and so to speak. And two, to
12 prepare him to testify on our behalf in this
13 litigation, because he felt that what had transpired
14 was -- a wrong had been done that needed to be
15 righted.
16 Q. He didn't testify, did he?
17 A. No, sir, he did not. We made the decision that I
18 frankly think was the right wise decision, which was
19 to avoid calling politicians, in order to attempt to
20 avoid politicizing the case any more than the case
21 was going to be politicized, automatically.
22 Q. And in fact, to the extent that intent was in issue,
23 do you feel that you prevailed on impermissible
24 intent in this case?
25 A. I don't think that we were ever totally pushing

1 intent. But yes, to the extent that intent being,
2 knowing the effect of what you're doing and
3 nevertheless doing it anyway, that has the
4 consequence of hurting millions of school children,
5 yes, I believe it prevailed on that.
6 Q. All right. Now, you sued the State of Texas, did you
7 not, in this case?
8 A. We intervened in the suit in which the named
9 Defendants had already been sued, but I believe one
10 of those was the State of Texas.
11 Q. Right. And these people are all representatives of
12 the State of Texas, are they not?
13 A. In a fairly indirect sense, I suppose.
14 Q. Well, legislators are members of the Legislature,
15 which is one of the three branches of government in
16 the State of Texas.
17 A. That's true.
18 Q. And you didn't feel any ethical responsibility to --
19 when you're talking to members of the Legislature and
20 their staff, to notify Counsel for the Defendants?
21 A. Well, I did feel -- the extent to which I informed
22 Representative Colbert. And Representative Colbert
23 and I both agreed that before he should proceed
24 further, he should discuss this with the Speaker of
25 the House, which presumably he did, because he had

1 agreed to testify. But as far as contacting you and
2 to let you know each and every contact we were
3 having, no, sir.
4 Q. Same with Governor Hobby and his staff?
5 A. As I recall, I never, although I have represented
6 Governor Hobby in the past, I try to avoid talking
7 directly. In fact, I believe I did not talk directly
8 with him at all, and talked with only Camilla Bordie
9 on one occasion, in which to gain information or
10 insight from her into the legislative process.
11 Q. Same with respect to Senator Caperton?
12 A. I don't recall if I -- I don't recall ever talking
13 with Senator Caperton. I'm not saying --
14 Q. Well, it's a bill from either you or Mr. Shepherdson.
15 A. It may be. I'm not saying that it didn't, that I
16 think we didn't. I know Senator Caperton quite well,
17 but I don't recall talking with him on this case.
18 Q. That doesn't create any ethical quandry for you,
19 talking with members of Legislature, when you're
20 suing them over their own statute, without talking to
21 their lawyer?
22 A. Mr. O'Hanlon, you were the one who has repeatedly
23 told us that we didn't sue the Legislature. I was
24 not contemplating and did not believe that we had
25 sued the Legislature. And to the extent to which I

1 could gain insight into the legislative process, that
2 would streamline the trial of this case by doing so,
3 I felt that I ought to do so.
4 Q. Do you think you ought to be compensated for
5 witnesses and things that you didn't put on?
6 A. To the extent that it was necessary to fully prepare
7 the case and be ready to present all aspects of it,
8 and address any contingencies you raised, yes, I do.
9 I'm not aware, other than possibly Representative
10 Colbert, that we prepared any witnesses to put on
11 that we didn't call. But that could be the case, but
12 I'm not aware of it.
13 Q. Well, for example, I see probably 40 hours here, with
14 respect to issues researching the Texas
15 Administrative Code. Now, what did you put on in
16 this case in regards to the Texas Administrative
17 Code?
18 A. Well, I'm not sure, per se, if we put on any evidence
19 dealing with the Texas Administrative Code. As you
20 are aware that in any litigation of this sort, you
21 attempt to be as fully prepared as you possibly can
22 be. And research the law, as fully as you can be,
23 just to make sure that when an able defense lawyer,
24 like yourself, jumps up and makes some objection, we
25 know when you're telling the truth and when you're

1 just singing the song. Not that you would do that,
2 but that you need to always make sure that you know
3 the law to the extent that you can.
4 Q. And how is the Texas Administrative Code -- how was
5 that necessary?
6 A. Tell me where you are.
7 Q. Oh, there's one for seven hours, on 1/17/87.
8 A. Who was that?
9 Q. T.H.
10 A. That's Ted Hollenbeak. He's a law clerk.
11 Q. Right.
12 A. I'm sure we had Ted researching some aspect of
13 something that had been raised, an exhaustion of an
14 administrative remedies aspect or something like
15 that, that we thought might come up. I honestly
16 don't recall that particular instance.
17 Q. Now, you know, as somebody that's litigated
18 constitution, that there's no exhaustion requirement
19 on direct constitutional litigation in this state,
20 don't you, Mr. Gray?
21 A. I very much know so, Mr. O'Hanlon, but I am very much
22 aware that you would, as a good lawyer should, raise
23 every smoke screen you can.
24 Q. Well, do you remember me ever talking about, we're
25 going to win this case because we've got the Texas

1 Administrative Code on our side?
2 A. No, sir, I do not.
3 Q. That the State Board of Education is going to get
4 you, if you don't watch out, or something of that
5 nature?
6 A. I wish I could tell you exactly what the point of
7 that research was, at this point, but I honestly
8 don't recall.
9 Q. All right. Let's talk about Nelda Jones for a
10 second. I've got 30 hours getting Nelda Jones ready
11 for trial. And driving up there and things of that
12 nature, and talking to her. Was that really
13 necessary to get her, prepare her for 30 hours?
14 A. Well, yes. The short answer is, it took two trips to
15 Rosebud-Lott to meet with Mrs. Jones, to prepare Mrs.
16 Jones. As you will recall, or maybe so, maybe not,
17 Mrs. Jones was terrified of the courtroom, was
18 terrified of the prospect of coming to testify, very
19 much believed in what we were doing, but is not a
20 litigious, litigation-oriented person. She is a
21 mother and a school teacher, who the prospect of
22 getting brought into this kind of major litigation
23 was not appealing to her. And there was a lot of
24 hand holding that needed to be done and was done.
25 Q. Now, she volunteered, didn't she? Don't you remember

1 her testimony on that?
2 A. She did volunteer, after we contacted her and asked
3 her to participate, and upon several instances of
4 explaining to her the importance of it. She was a
5 unique individual in that she had taught, both in a
6 very wealthy school district and was now teaching in
7 a very poor school district. And that's why I
8 thought it was so important to have a witness of her
9 background available to bring home, to as many people
10 as we could, the night and day attitude, or the night
11 and day result that you see in what the wealthy have
12 and what the poor have.
13 Q. So it's your testimony that it was reasonable and
14 necessary to spend in excess of 30 hours to get her
15 to get up on the stand and say that Alamo Heights was
16 teacher heaven?
17 A. Well, that's -- I think -- that's not a total correct
18 characterization of her testimony, but yes, sir. And
19 we walked through her entire school, took pictures of
20 her entire school. I made sure she showed me every
21 nook and cranny, because I didn't want to bring
22 pictures of just the bad, I wanted to show everything
23 that they had. It just so happened that everything
24 they had was bad. But we walked through, spent an
25 entire Sunday going up and down her elementary

1 school.
2 Q. How much time did you spend with John Augenblick? I
3 suppose most of it was spent by Mr. Martin.
4 A. Mr. Martin talked with Mr. Augenblick a bunch. And
5 talked with him a whole lot at the time you all were
6 -- excuse me, at the time the State and the wealthy
7 districts were demanding to take his deposition, in
8 order to prepare him for his deposition. Then, as I
9 recall, the State, after we had spent most of the
10 time preparing him, the State withdrew -- or the
11 wealthy districts -- someone withdrew the request to
12 take Mr. Augenblick's deposition. But nevertheless,
13 we had to prepare him to be prepared to give a
14 deposition at ya'll's request.
15 Q. Well, you go on talking to him throughout the case,
16 as I see here. That was necessary as well?
17 A. Sure. He was prepared to be called as a rebuttal
18 witness up until the time that we shut this case
19 down.
20 Q. He was never called as a witness, was he?
21 A. No, sir.
22 MR. O'HANLON: No further questions.
23 MR. TURNER: We have no questions, Your
24 Honor.
25 MR. R. LUNA: No questions.

1 THE COURT: You may step down.
2 MR. GRAY: Thank you.
3 (Witness excused.)
4 MR. O'HANLON: Judge, I'll waive it.
5 MR. RICHARDS: No, no, I'm not sure, under
6 the rules, that you can waive it. I'd just as soon
7 have it in my testimony. I'd just as soon have it
8 in.
9 MR. DAVID R. RICHARDS
10 was called as a witness, and after having been first duly
11 sworn, testified as follows, to-wit:
12 MR. RICHARDS: My name is David Richards.
13 I'm licensed to practice in the State of Texas and
14 have been so licensed since 1957. And have been
15 actively engaged, with some exceptions, in the
16 private practice of law since my licensure in 1957,
17 for the last -- since 1969 in Austin, Travis County,
18 Texas, with the exception of the years 1980 -- with
19 the exception of approximately three years, when I
20 was Executive Assistant Attorney General of Texas,
21 under Attorney General Mattox. I returned to the
22 private practice of law from that employment in the
23 Fall of 1985. I have been, through the bulk of my
24 practice, engaged in civil litigation with heavy
25 concentration in constitutional and civil rights

1 litigation, both in federal and state court. I have
2 appeared in the United States Supreme Court on six
3 occasions, basically all in civil rights cases. And
4 have been to the Texas Supreme Court at least three,
5 as I recall, cases under the Texas -- or it's two,
6 perhaps three cases under the Texas Constitution,
7 Valles versus Clements, in a case on the
8 constitutionality of the old amusement machine case
9 law, which I got declared unconstitutional. And was
10 co-counsel with Mr. O'Hanlon in the business on the
11 No Pass/No Play.
12 My time records reflect expenditure of 484.80
13 hours in this case, all of which, in my opinion, were
14 reasonable and necessary, I suspect is significant in
15 other states. My actual hours, in truth, I suspect
16 my actual hours are well in excess of 500, simply
17 because of my own preferability not to get everything
18 down on time machines. An hourly rate that would be
19 reasonable for me would be $150.00 an hour. That is
20 actually less than my hourly billing rate, the rate
21 which I have been awarded years ago in private civil
22 rights cases under the federal statute. And I concur
23 with my Co-counsel's testimony with respect to
24 appropriate hourly rate from Messrs. Durst and Green,
25 both of whom worked under me in the Attorney

1 General's Office, both of which I'm familiar with in
2 terms of their skills.
3 There was no duplication of hours, in my
4 opinion, with respect to Mr. Gray and my
5 representation of the Plaintiff-Intervenors in this
6 case. I think all of the hours spent by us were
7 reasonable and necessary to the result achieved.
8 And again, I am generally familiar with both
9 the rates of pay being charged by private
10 practitioners in the Travis County area, as well as
11 the rates of pay in attorneys' fees awards in this
12 area. And I think the rates which we seek are
13 consistent with those rates. And that would conclude
14 my testimony.
15 MR. KAUFFMAN: Yes, Your Honor, I have one
16 or two.
17 CROSS EXAMINATION
18 BY MR. KAUFFMAN:
19 Q. Mr. Richards, when you were the Executive Assistant,
20 was it the practice of the Attorney General's Office,
21 when you prevailed and were awarded fees, to use the
22 prevailing rate as the basis rather than an hourly
23 rate plus overhead?
24 A. It is my recollection that we routine -- my office,
25 our office routine has sought to be awarded

1 attorneys' fees at the prevailing market rate rather
2 than based on overhead. In fact, we secured such
3 awards in Travis County. In fact, I testified in a
4 case on behalf of the office in front of Judge
5 Gallardo here and I think had attorneys' fees awards
6 entered in a case for the office at a rate in excess
7 of $100.00 an hour.
8 Q. Are you familiar with the lead attorneys for the
9 Plaintiffs in this litigation, Mr. Kauffman, Mr. Rice
10 and Mr. Roos?
11 A. I am.
12 Q. Would you give a general opinion as to their
13 reputation in the area of civil rights litigation?
14 A. Well, I have litigated cases with you for a number of
15 years. And I did not have an opportunity to know Mr.
16 Rice or Mr. Roos before this time, but became
17 acquainted with them during the course of this
18 litigation. And all of you had excellent
19 reputations, well deserved as being experienced
20 lawyers in the field of civil rights litigation.
21 Q. Would the rate of $150.00 an hour be a prevailing
22 rate for attorneys at that level of experience and
23 ability here in Travis County?
24 A. Yes.
25 Q. And I think you've also worked with Mr. Garza, Jose

1 Garza and Miss Cantu. Do you have any opinion as to
2 their reputation in the area of civil rights
3 litigation?
4 A. I have worked with both of them over the years, and
5 their reputation is excellent. The attorneys' fees
6 and awards which they seek seems to be appropriate.
7 MR. KAUFFMAN: Nothing else, pass the
8 witness, Your Honor.
9 CROSS EXAMINATION
10 BY MR. O'HANLON:
11 Q. Mr. Richards, why, on 9/22/86, did you feel it
12 necessary to contact Patrick Wiseman with respect to
13 this case, rather than myself?
14 A. Well, Mr. O'Hanlon, I just noticed that, myself. And
15 I don't think that I was trying to go over your head
16 on a matter, so I assume you were out of the city.
17 Q. I have checked, and I was not.
18 A. Then I don't have any earthly idea why.
19 Q. All right.
20 A. I can assure you there was no attempt on my part to
21 bypass you. I'd be very careful in a case not to do
22 that.
23 Q. On January 30, 1987, I see 2.3 hours for
24 correspondence and briefing with Steve Hall.
25 A. Well, I'm sure I didn't correspond and brief with

1 Steve Hall for 2.3 hours. I mean, I take it there
2 are other things on there, is that right?
3 Q. No, sir.
4 A. Well, read it to me fully, then.
5 Q. 1/30/87, briefing and conference --
6 A. Excuse me, briefing, I assume there's a comma or
7 semicolon after briefing, that doesn't have anything
8 to do with Steve Hall.
9 Q. No, sir.
10 A. Well, if it doesn't -- it has nothing to do with
11 Steve Hall.
12 Q. Who is that Steve Hall?
13 A. That Steve Hall is an employee of the Attorney
14 General's Office.
15 Q. Why did you think it was necessary to contact him
16 during the course of this litigation?
17 A. I had been requested to do so by my clients.
18 Q. Do you take the position with respect to attorneys'
19 fees, that in order to get them, you must prevail on
20 an issue?
21 A. I take it you must prevail on the central issue in
22 the case.
23 Q. All right. And that issues that you do not prevail
24 on, you're not entitled to compensation?
25 A. A case in which you do not prevail, you do not get

1 attorneys' fees.
2 Q. You disagree with the Supreme Court in Hensley versus
3 Eckerhart?
4 A. Well, the expert on attorneys' fees is here in court,
5 Mr. Larson. And I'd be very loath to get too far
6 into it, but I take it, what the case is saying is
7 you must prevail on a central issue in a case.
8 Subsidiary issues upon which you don't prevail are
9 probably simply merged into the total recovery. And
10 I think that's the general view of it, I believe.
11 Q. Okay. So you disagree with the statement of where
12 the Plaintiff has failed to prevail and the claim is
13 distinct from his successful claims, the hours spent
14 on the unsuccessful claims should be excluded in
15 considering the amount of the reasonable fee?
16 A. The question, obviously, is what constitutes
17 something that's distinct.
18 Q. Due process is separate and distinct from equal
19 protection, is it not?
20 A. Not in my opinion.
21 Q. You don't think so?
22 A. No. I mean, I think in any constitutional context,
23 it would be relatively -- well, no, I don't think so.
24 Q. You all didn't prevail on the due process claims in
25 this case, did you? We took them out of the

1 judgment, unless they got back in.
2 A. Well, you've probably been reading the judgment. I
3 think Gray stuck them back in, but maybe not. It may
4 be that we did not prevail on that. But I do not
5 think in order to prevail and to recover attorneys'
6 fees, you have to be successful on every theory
7 responsive to the court during the course of a
8 constitutional case.
9 Q. How much time did your people, under your direction,
10 spend researching the due process issues?
11 A. Well, I can't tell you that. But I take it, I assume
12 no one did any research here but me in terms of -- on
13 that issue, truthfully.
14 Q. But you --
15 A. I think I'm the only person who did any research on
16 that issue, that I'm aware of.
17 Q. Approximately how much time did you spend on it?
18 A. I couldn't give you an estimate. I think it was all
19 essential to the case, though, I suppose, in trying
20 to develop and articulate plausible constitutional
21 theories. It requires, it seems to me, a certain
22 amount of exploration by the lawyer. And I don't
23 know of any research that I did in this case that was
24 not appropriate and reasonable and necessary to the
25 ultimate trial of the case. I think you will

1 research issues simply in order to hone your own
2 perception of the case. And so, for that matter, I
3 know of no time that was not well spent. I can't
4 give you, I'm sorry, an exact amount of time of
5 thinking through and trying due process issues. I
6 still think we should have won on them, but that's
7 all right.
8 Q. An expert like you on civil rights cases doesn't
9 really need to hone the distinctions in your own mind
10 between due process and equal protection, do you?
11 A. Well, I think the line is fairly blurred, and I say
12 quite yes, we do. I'm not sure what the difference
13 is between equal protection and substantive due
14 process under the Texas cases, if there is a line.
15 MR. O'HANLON: I don't have any further
16 questions.
17 MR. TURNER: We have no questions, Your
18 Honor.
19 MR. R. LUNA: No questions.
20 THE COURT: All right, sir. You may step
21 down.
22 (Witness excused.)
23 THE COURT: Anything else?
24 MR. KAUFFMAN: Yes, Your Honor, for the
25 Plaintiffs, if I can just testify from here, our

1 request for attorneys' fees for the court of appeals
2 would be $25,000.00 and for the Supreme Court, would
3 be $15,000.00. And I support Mr. Gray's testimony
4 that because of the nature of the 10-week trial and
5 the hundreds of exhibits, that the attorneys' fees
6 and costs for these matters would be greater. And
7 looking at the judgment, in summary, Your Honor, we
8 would ask that the Court grant to the Plaintiffs, on
9 Page 9, I think, of the proposed judgment, grant to
10 the Plaintiffs -- or rather, excuse me, would find
11 that $870,000.00 -- $870,855.84, as on Exhibit 416,
12 would be the reasonable and necessary attorneys' fee
13 for all of the legal work, and that $25,000.00 is the
14 sum from the entry of judgment through the first
15 appeal. And the $15,000.00 would be the amount for
16 the further appeal.
17 And just a summary of our case, we would again
18 point out that we did not come in and ask for things
19 like contingent fees, the add-ons and all of that.
20 Instead, we just went straight for the hours that
21 were actually worked on the litigation. I think the
22 testimony shows that there were even additional hours
23 worked that were not requested. And therefore, we
24 would ask that these full amounts be granted by the
25 Court. Excuse me, that the Court find that the

1 amounts we have just requested be entered into the
2 judgment.
3 MR. O'HANLON: Judge, I've got a problem
4 with this. As you know, I've got a problem with this
5 whole procedure. The Court may have been mislead,
6 somewhat, with respect to where we are and where the
7 Supreme Court is, with respect to this issue. The
8 Camarena case is not -- there is no writ of error
9 that has been granted on that case. That case,
10 there's an application pending that has not been
11 granted by the Texas Supreme Court.
12 MR. GRAY: It's the other one, Kevin.
13 MR. KAUFFMAN: Excuse me, Your Honor, but
14 writ of error has been granted on the lie detector
15 litigation against Mental Health, Mental Retardation.
16 MR. O'HANLON: Yes, Your Honor, it
17 certainly has, and that was one of the points in the
18 writ of error. And they had an argument last week
19 and the Supreme Court didn't say a word about it.
20 That's not an active -- as far as we can tell, that's
21 not an active issue in this case.
22 MR. KAUFFMAN: Well, we would rely on the
23 writ of error granted by the Supreme Court which did
24 include the issue.
25 MR. O'HANLON: Yeah, and I would rely,

1 listening to them in the oral argument, about the
2 issues that were pending before them. And they never
3 mentioned the word "sovereign immunity" or anything
4 of that nature. So I would reiterate my position,
5 that this whole -- this whole procedure is first of
6 all, very irregular. And what you're doing is
7 entering a conditional judgment. And I have a
8 problem with doing that. For example, if you want to
9 do that, why don't we talk about what happens if you
10 can't do anything with respect to school district
11 lines? Why don't we condition the judgment that way?
12 Why don't we decide that if you can't touch that,
13 whether the system is constitutional or not? It's
14 not what you held. You held that it was
15 unconstitutional in total. You held that sovereign
16 immunity bars attorneys' fees. But they still want
17 you to condition the judgment and add some things in
18 there to where they can enter -- it's a conditional
19 judgment. That's exactly what it is.
20 The state of the law, right now, is
21 extraordinarily clear. Sovereign immunity bars
22 attorneys' fees. That's what it says. This is a
23 superfluous act. It doesn't have anything to do with
24 it. It clouds the finality, in my opinion, of this
25 Court's judgment. It conditions it, and to no

1 effect, because your ruling at the same time that
2 sovereign immunity bars, but you're still making a
3 fact-finding. So I have grave questions with respect
4 to the propriety of this whole entry into the
5 judgment.
6 With respect to the amounts, I think it's clear
7 that the Plaintiff-Intervenors have been paid exactly
8 what they contracted for from school districts, which
9 do not -- despite Mr. Kauffman's testimony, the law
10 in this state is absolutely clear, have
11 constitutional rights, in and of themselves. So the
12 collateral source is totally paid, they can't
13 contract for them now.
14 With respect to Mr. Kauffman's fee, once again,
15 you have a collateral source which is the Defense
16 fund, in and of itself, but they don't get paid on an
17 hourly basis. So it is unreasonable, in our opinion,
18 to make them profit, at the State's expense, from
19 this litigation. And that's precisely what they're
20 saying. They're saying, "Well, we don't have a load
21 star in this case." But the truth is, they certainly
22 do. It cost them $100,000.00 a lawyer to operate
23 that office for a year. We have got, in this case, a
24 third of a year in terms of hours, which would be
25 $166,000.00. So that would be -- that's the top end

1 of what it cost them to do this litigation, even if
2 you buy all of those hours for press conferences and
3 things of that nature, and for witnesses they didn't
4 call, and issues that they didn't prevail upon, are
5 compensable.
6 We've sat down here and gone through this. And
7 on Mr. Kauffman's bill, we seriously questioned, with
8 respect to this 713 of the hours that are set on
9 there. And with Mr. Gray's and Mr. Richards' bill,
10 we seriously questioned in excess of 490 hours on
11 their bill, for things like talking to our clients
12 without us knowing about it, for witnesses that they
13 didn't call, for -- once again, with respect to them,
14 an extraordinary amount of time with respect to
15 Findings of Fact and Conclusions of Law that had to
16 be done over and over and over again. And that's
17 where we are.
18 THE COURT: Okay. I'm going to let you all
19 rest yourselves for 20 minutes. We'll come back in
20 here at 10 after and we'll decide this. Thank you.
21 (Recess.)
22 THE COURT: This is what I would like to
23 do. I would like, from the Plaintiffs' figures, I
24 would like to deduct 75 hours on account of this
25 unprevailed upon racial issue, take off 20 hours on

1 this press conference, otherwise leave it alone. So
2 you need to subtract 95 hours times $150.00. And
3 otherwise, I will not tamper or tinker with it. I
4 will not make any changes as to the
5 Plaintiff-Intervenors' testimony or their figures.
6 So you need to make some quick calculations there and
7 run them by counsel.
8 MR. KAUFFMAN: Yes, sir.
9 THE COURT: And see how you want this blank
10 filled in. Of course, I'll award the amounts
11 indicated for the appeals, both appeals.
12 MR. O'HANLON: Are you giving them
13 $25,000.00 each for the appeal?
14 THE COURT: Well, do you want to talk about
15 that?
16 MR. RICHARDS: Well, we intend, I think, to
17 proceed separately on appeal. We proceeded
18 separately at the time of trial. And I assume we're
19 preparing separate briefs and stay with it that way.
20 At least that's our current view. That means -- and
21 I, you know, that means then that two different
22 people are going to try to comprehend the record and
23 write briefs, but I think the case is that important.
24 And I think that's our approach to it. Don't you
25 agree on that?

1 MR. KAUFFMAN: Yes, sir, we agree. I'm
2 sure that each side will be reading the entire
3 transcript, looking at all of the exhibits and
4 writing separate briefs. We'll certainly
5 collaborate, I'm sure. I think that each side will
6 be spending at least that much time and money.
7 THE COURT: All right. I'll stand pat on
8 that. I'll go for that.
9 MR. O'HANLON: I have, Judge, in this form
10 of judgment, something that needs to be taken out. I
11 think it's agreed to. There's a provision that
12 denies relief. And it indicates, I believe it's on
13 Page 10, the second to last paragraph. "It is
14 ordered, adjudged and decreed that all relief
15 requested and not otherwise granted herein by the
16 Defendants." We didn't ask any. Because of the
17 waiver of sovereign immunity problems, we ask that
18 that be stricken.
19 MR. GRAY: Judge, what we could do on that
20 is just delete the words "by Defendants and
21 Defendant-Intervenors," just to have it read "that
22 all relief requested and not otherwise granted herein
23 is hereby denied."
24 MR. O'HANLON: That's fine. I just want to
25 make it clear that we haven't asked for anything.

1 Because under some circumstances, asking for
2 affirmative relief may be considered a waiver of the
3 State's immunity. We've been very cautious in this
4 case, from our perspective, to not ask for any
5 affirmative relief, so as not to put ourselves in
6 that situation.
7 THE COURT: Okay. I'm marking that out and
8 initialing it. Actually, I wrote my name there where
9 I marked that out. Let's fill in these blanks, and I
10 would like to sign this here on the first day of
11 June.
12 MR. KAUFFMAN: Yes, Your Honor. For the
13 Plaintiffs' award of fees, the sum will be
14 $856,605.84. And that subtracts 95 hours at $150.00
15 an hour, from our time. So the total for attorneys'
16 fees, paralegal fees and costs for the Plaintiffs
17 would be $856,605.84.
18 THE COURT: Okay. But this judgment reads
19 these -- you're just talking about attorneys' fees.
20 MR. GRAY: We ought to insert attorneys'
21 fees and costs, Your Honor, I suspect.
22 THE COURT: And expenses.
23 MR. GRAY: Yes, sir, just attorneys' fees
24 and expenses. And that change ought to be made
25 twice. Those two paragraphs are mirror paragraphs.

1 THE COURT: All right. I would like you to
2 break it down in your Findings of Fact, for both of
3 you. That is, what's fees and what's expenses and so
4 on.
5 MR. KAUFFMAN: Yes, sir.
6 MR. O'HANLON: I think they're doubling up
7 on us a little bit. It's a small sum, probably, but
8 to the extent that they've figured in. What my
9 understanding of the figure is, is that the
10 calculation of taxable costs is done by Mr. Dickson.
11 It's a ministerial act, it's not done by order of the
12 court. And I think they're charging for those twice,
13 if you include those in your judgment.
14 MR. KAUFFMAN: We didn't mean --
15 THE COURT: Wait a minute. This
16 $856,605.84 includes taxable cost?
17 MR. KAUFFMAN: Yes, sir, it does. And I
18 can make the computation and cure that, too.
19 MR. RICHARDS: The Court is trying to get a
20 judgment that he can sign today.
21 MR. KAUFFMAN: We'll do it right now.
22 THE COURT: Yeah, we need to take that out
23 of there.
24 MR. KAUFFMAN: Okay. Your Honor, I've done
25 that. And I apologize, I wasn't trying to double

1 charge. I would obviously have subtracted it later.
2 But for the Plaintiffs, then, the total would be
3 $850,960.79. And that would exclude the amounts of
4 hours that the Court has instructed us to exclude,
5 but also excludes the $5,645.05 that we will seek as
6 court costs through the clerk.
7 THE COURT: Okay. Over here for the
8 Intervenors?
9 MR. GRAY: Your Honor, I'm looking right
10 now, and I believe it's only a $15.00 deduction. So
11 ours would be reduced to $284 --
12 THE COURT: Wait a minute, $284 --
13 MR. GRAY: 244.84
14 THE COURT: $284,244.84?
15 MR. GRAY: Yes, sir.
16 THE COURT: All right, sir. All right.
17 I'm fixing to sign this judgment. I'm signing it.
18 MR. R. LUNA: While the Court is signing
19 it, let us at least say for the record that we have
20 worked with Counsel in trying to arrive at the
21 wording as the Court has set it out. We do not
22 necessarily agree to the judgment nor to all of the
23 form of it, but we do believe that it complies very
24 closely with what the Court has ordered.
25 THE COURT: Okay. Thank you, sir. I'm

1 going to need several copies of this. Why don't you
2 ask Phyllis to step in here real quick? See how
3 quick she can make copies of this for us. She's
4 going to do that and we'll stand easy for about 10 or
5 15 minutes and let her do that. I'll just have her
6 bring you all copies, I suppose you'd like copies?
7 And otherwise, I don't see any reason that I need to
8 come back, so I wish everybody well. Thank you very
9 much.
10 MR. O'HANLON: We have one other issue that
11 we probably ought to take up. How do you want to do
12 Findings of Fact and Conclusions of Law? By signing
13 that, we've set ourselves a deadline.
14 THE COURT: Uh-huh.
15 MR. O'HANLON: I have several in
16 particular. We have maybe some legal issues involved
17 with them on the Voucher Rule and things of that
18 nature. With respect to the adequacy, in particular,
19 of the current finance system to meet state
20 regulatory requirements, the Plaintiffs introduced --
21 I guess it was the Plaintiff-Intervenors introduced a
22 document in evidence that found, specifically the
23 Accountable Cost Study, Exhibit 212, that the current
24 system is sufficient funding for that -- to meet an
25 adequate program.

1 MR. RICHARDS: Of course, there's some
2 dispute about what the Accountable Cost Study found,
3 but in any event --
4 MR. O'HANLON: Well, there's a specific
5 sentence in there that says exactly that. For
6 1985-'86, the data on which we tried it, the current
7 financing system met state requirements or provided
8 enough money to meet state requirements. There is
9 something in Texas known as the Voucher Rule. The
10 Plaintiffs have introduced this, and we feel that
11 they're bound by that. And I recognize that may be
12 the matter of some debate, and how are we going to
13 deal with that?
14 MR. RICHARDS: What do the rules require?
15 Is it 30 days from the date of entry of judgment? Is
16 it 30 days for the Court to actually enter Findings
17 of Fact?
18 MR. O'HANLON: You've got to send proposed
19 within 10 and they've got to be ruled on within 30.
20 Now, you guys have submitted them, and the question
21 is, how does the Court want to deal with these
22 issues? Do we submit briefs? Do we argue it?
23 MR. RICHARDS: Well, can we consider that
24 our proposed Findings of Fact and Conclusions
25 represent our requests under the rules, or do we need

1 to make another formal tender of those? How should
2 it be done in that respect, do you know?
3 MR. KAUFFMAN: We've actually filed ours,
4 Your Honor, our proposals, already.
5 MR. O'HANLON: We've filed some, too, and
6 we probably are going to file some others. I'm not
7 worried about the propriety of that, I'm worried
8 about how we set about making those kinds of
9 determinations. Do you want to argue it, or do you
10 want us to submit a brief on it? Ours are not going
11 to be that long. Ours go with respect to, obviously,
12 the issue of adequacy and the particular funding
13 level, and the propriety, in essence, of the state
14 requirements, accreditation and other regulatory
15 requirements.
16 THE COURT: Okay. I would say that we can
17 do this with correspondence. And you can either
18 write a brief or write me a letter, which is
19 essentially the same thing. And indicate to me what
20 it is that you don't like, make your arguments, what
21 you want, make your arguments.
22 MR. O'HANLON: If I have to go through
23 theirs one by one, you're going to get about 150
24 pages.
25 THE COURT: Well --

1 MR. R. LUNA: Let me, if I could, comment
2 on that. I want to disagree with Kevin just a little
3 bit. Our judgment is now in. And from here on out,
4 normally, each side would have to float their own
5 boat. They've got their findings in and they need to
6 draft them the best way they think they can to
7 support the judgment. And however those are
8 submitted, I don't know that we ought to be in a
9 position of trying to clean them up for them.
10 THE COURT: Yeah.
11 MR. R. LUNA: On our side, we should simply
12 submit additional, or request revised findings. And
13 the Court rejects it or not, and we go from there.
14 THE COURT: I think that's better.
15 MR. O'HANLON: That's fine.
16 THE COURT: Okay. So if you want -- you
17 would need to submit to me some proposed findings.
18 The only thing I'm worried about, that I'm worrying
19 about, is that the findings that you all have already
20 submitted, those are dated in the clerk's file, post --
21 MR. RICHARDS: I think to clear things up,
22 we would agree --
23 MR. GRAY: We're going to update and
24 resubmit them in a timely fashion.
25 THE COURT: Okay. That will make it clean

1 and clear.

2 MR. RICHARDS: We'll do that forthwith.

3 THE COURT: Okay.

4 MR. GRAY: Your Honor, we may take an

5 opportunity to supplement those findings a little bit

6 at that time, anyway.

7 THE COURT: Okay. When you file things at

8 the clerk's office, I never see them. Both sides,

9 now, needs to file your findings with the clerk, but

10 let me have a copy.

11 MR. KAUFFMAN: Okay, sir.

12 THE COURT: Otherwise, I won't see them.

13 So I won't know what you've done. And I won't have a

14 chance to look at it, probably until -- if I don't

15 know about it, you all will be jingling my phone

16 saying I haven't signed anything and I should have.

17 Because it will get by me, if I don't see them coming

18 into my office.

19 MR. O'HANLON: All right.

20 MR. RICHARDS: All right.

21 THE COURT: Okay. Thank you. Good luck,

22 everybody.

23 MR. KAUFFMAN: Good luck to you, sir.

24

25 (Proceedings closed.)

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, Monica Weidmann, Official Court Reporter in and for the 250th Judicial District Court of Travis County, State of Texas, do hereby certify that the foregoing typewritten pages contain a true and correct transcription of my shorthand notes of the proceedings taken upon the occasion set forth in the caption hereof, as reduced to typewriting by computer-aided transcription under my direction.

I further certify that the cost of the preparation of this Statement of Facts is

WITNESS MY HAND this the 9th day of October, 1987.

Monica Weidmann

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