

1989

Maria Espinal v. Salt Lake City Board of Education : Reply Brief

Utah Supreme Court

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BRIEF

890037

IN THE SUPREME COURT OF THE STATE OF UTAH

MARIA ESPINAL, DONNIE JAMES,
G. HARVEY HAMILTON, JOYCE
CAMPBELL and TERRY HOECHER,
for themselves and all others
similarly situated,

Plaintiffs and Appellants,

vs.

SALT LAKE CITY BOARD OF
EDUCATION,

Defendant and Appellee.

No. 890037

REPLY BRIEF OF
APPELLANTS

Priority Classification
No. 14b.

APPEAL FROM SUMMARY JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE SCOTT DANIELS

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ARGUMENT

POINT I

PLAINTIFFS ARE NOT PRECLUDED FROM ARGUING THAT THE ORDER VIOLATES ARTICLE I, SECTION 7 OF THE UTAH CONSTITUTION

At pages 3, 18 and 20 of the Brief of Respondents ("Br. of Re."), the Board argues that Plaintiffs cannot rely on the provisions of Art. I, § 7 of the Constitution of Utah to determine the propriety of the Order. The Board correctly states at page 3 of the Br. of Re. that Plaintiff's docketing statement does not rely on Art. I, § 7, nor was that Constitutional provision relied upon by Plaintiffs in the proceedings before the trial court.

There are well established exceptions to the general rule that the reviewing court will consider an appeal only upon the theories advanced in the trial court. For example, "Exception to the general rule has been made in some cases where the newly advanced theory involves only a question of law arising upon the proved or admitted facts, and is finally determinative of the case." 5 Am. Jur. 2d, Appeal and Error § 546. See State v. Lee, 633 P.2d 48 (Utah 1981); Earl M. Jorgensen Co. v. Mark Construction, Inc., 540 P.2d 978 (Hawaii 1975); and State v. Northwestern Construction, Inc., 741 P.2d 235 (Alaska 1987). Thus, when the new theory only involves a question of law, it is clearly discretionary with the court hearing the appeal as to whether there would be any impropriety in considering the newly advanced theory. Surely, since the consideration of the subject appeal on the theory of a violation of Utah Const. Art. I, § 7 does not require

the reconsideration of any facts, everyone will be better served by considering the issue now, rather than forcing Plaintiffs to present the issue upon remand or upon the filing of a new action.

Another important exception to the general rule is that a new theory raised for the first time on appeal may be considered by the reviewing court to serve the ends of justice or prevent the denial of fundamental rights. See State v. Lee, supra; Weems v. United States, 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544 (1910); and Swift v. Kelso Feed Co., 161 Kan. 383, 168 P.2d 512 (Kan. 1946). Plaintiffs have consistently maintained that the Order constitutes a deprivation of their fundamental rights. Even though such claims were couched in the context of Utah Const. Art. X, § 8 and Utah Code Ann. 53-6-20 before the trial court, such fundamental rights are clearly protected by Utah Const. Art. I, § 7 given the same facts.

One additional exception to the general rule comes into play "When the question is of such a nature that the present welfare of the people at large, or a substantial portion thereof, is involved" 5 Am. Jur. 2d, Appeal and Error § 551. Under such circumstances an appeal court is authorized in its discretion to direct its attention to such public concerns rather than be hamstrung by technical pleading. See Earl M. Jorgensen Co. v. Mark Construction, Inc., supra, Swift v. Kelso Feed Co., supra; and First National Bank v. South Land Production Co., 189 Okla. 9, 112 P.2d 1087 (Ok. 1941). A substantial portion of the general public

will be well served by the court's consideration of Plaintiffs' Art. I, § 7 argument.

POINT II

PLAINTIFFS' LIBERTY INTERESTS ARE VIOLATED BY THE ORDER

Aside from pointing out that the Honorable trial court Judges disagree with Plaintiffs' position, the Board relies solely on Logan City School District v. Kowallis, 94 U. 342, 77 P.2d 348 (1938) for the proposition that the Order does not violate Art. I, § 7 of the Constitution of Utah. As the Board correctly quotes Kowallis at page 23 of the Br. of Re.:

The provision for being open . . . simply means that all children must have equal rights and opportunity to attend the grade or class of school for which such child is suited by previous training or development.

It is also noted that there is no requirement that every school building shall be open to every school child in the state. The provision is that the system of public schools shall be open to all children of the state. There shall be provided, for each child in the state, a school suitable to its development and training, and as reasonably convenient for attendance as is practicable, which school such child shall have a right to attend. And when the public schools are open to all children on the same and equal terms, compliance has been had with this clause of the Constitution. (Emphasis added.)

What the Kowallis Court said about Utah Const. Art. X, § 1, is equally persuasive with respect to Art. I, § 7. Note that the Kowallis opinion said each child must have equal rights, not that it is preferable that each child have equal rights. Note also

that Kowallis clearly established the right to attend the school which is as reasonably convenient for attendance as is practicable.

One of the great classic legal definitions is the definition of justice as the "equal treatment of equals." The Order simply does not treat equals equally. Pursuant to the Order, a plaintiff like Mrs. Espinal, for example, does not have a right to send her children to the high school as reasonably convenient for attendance as is practicable, while other parents of the same minority and socio-economic status, having children with the same academic achievement scores, and living the same distance from the same high school, are accorded such convenience. The very right to attend denied Mrs. Espinal's children is the very right to attend granted to the children of others who are indistinguishable from Mrs. Espinal by any criteria considered by a majority of the Board when adopting the Order. Such disregard of the equal rights belonging to all children as promised by Kowallis renders the Order unjust, illegal and a deprivation of liberty in violation of Utah Const. Art. I, § 7.

POINT III

THE TERM PARTISAN SHOULD NOT BE CONSTRUED NARROWLY

At page 24 of the Br. of Re., the Board claims that the Order is not prohibited by the "partisan test or qualification" clause of Art. X, § 8 of the Constitution of Utah because the "term 'partisan' is generally associated with participation in a particular political party," and because Plaintiffs ignore the "common political connotation of the term." Incredibly, in support

of that proposition the Board cites Utah Const. Art. VIII, § 9, clearly having to do with the politics of elections, and an Alaska statutory provision which reads "any partisan political organization, faction or activity." The Board thus makes the Plaintiffs' point. Our Art. X, § 8 does not read: "No . . . political partisan test or qualification" On the contrary, such clause simply reads: "No . . . partisan test or qualification"

The Board further ignores accepted rules of construction with its urging that "partisan" has only a political connotation. In a given context, as in the case of Utah Const. Art. VIII, § 9, the term may have that connotation, to be sure, but the context of its use in Utah Const. Art. X, § 8 is conclusive that more than a political connotation is intended. Section 8 proscribes any "religious or partisan test or qualification . . ." (emphasis added), making clear that politics was not the exclusive, or even dominant concern of the framers. The history of the times confirms that to be so. Historian Hubert Howe Bancroft chronicles how, in the period immediately preceding statehood, the territory was rife with factionalism between the Mormons and non-Mormons, or "gentiles." Non-Mormons were dispatched to govern the territory, and the Poland anti-polygamy bill and the Edmunds bill virtually disenfranchised the Mormons. Bancroft, History of Utah (1964) at 682-687. The education system was subject to the same factionalism. Mormons established private schools, frequently operating out of church-owned buildings, to which gentiles were not

admitted, but gentiles were nevertheless required to support the schools through taxes. Id. at 707-709. Such discrimination in the context of the words used, clearly indicates that "partisan" in Section 8 had reference to more than politics. Just as plain is that "partisan" refers to factionalism within society -- to the dividing of students "into classes or groups and grant[ing] allow[ing] or provid[ing] one group privileges or advantages denied another," as condemned in Logan City School District v. Kowallis, 77 P.2d 348, 350 (Utah 1938). The Board's argument at page 25 of the Br. of Re. that if Plaintiffs' position "were carried to any logical conclusion, the Board would be precluded from making any classifications between students even if there were compelling reasons to do so," is a "straw man" argument. That is not what Plaintiffs contend. Plaintiffs have always conceded that given the present Constitutional and statutory provisions in Utah, students can be classified and assigned to attend a particular school for legitimate reasons, but not for the "partisan" reasons relied upon by the Board in adopting the Order.

The partisanship Section 8 sought to eradicate was the partisanship born of blind, prejudiced, unreasoning, one-sided or fanatical discrimination, whether it be based upon religion, politics, race, ethnic origin, socio-economic status, academic achievement, or any other improper divisions or classifications of school patrons. That is precisely why Art. X, § 8 can be used to strike down the Order in the case at bar.

At page 24 of the Br. of Re., the Board also accuses the Plaintiffs of excluding the "element of belief or adherence to a cause" from the concept of partisanship. The Board's argument presumes that such belief constituting the prohibited "partisan test or qualification" must exist only in the minds of the persons subjected to the test or qualification. Clearly, by definition partisanship evidenced by the blind, prejudicial, discriminatory, unreasoning, fanatical, one-sided beliefs of the parties indulging in the partisan conduct, is no less constitutionally offensive than such partisanship in the minds of the targets of such partisanship.

The Order cannot escape Constitutional condemnation by the narrow construction of "partisan" urged by the Board.

POINT IV

THE ORDER WAS NOT WITHIN THE BOARD'S STATUTORY AUTHORITY

In Argument III beginning at page 27 and continuing through page 41 of the Br. of Re., the Board argues that the Order is authorized by Utah Code Ann. § 53-6-20. In all of those 14 pages, the Board has no reply -- not one word -- to the plain holding of this Court, that a child "can[not] be lawfully denied admission to the schools of the State because of . . . location" or "for any cause except the child's own conduct, behavior or health" (emphasis added). Logan School District v. Kowallis, 77 P.2d 348, 350 (1938). Neither has the Board any response to the propositions that, in the absence of segregation or similar Constitutional limitations, the parents' right to supervise the

education of their child transcends the parens patriae claims of the state,¹ the education system may not be manipulated to "standardize its children,"² efforts to do so are "arbitrary" unless they have a "reasonable relation to some purpose within the competency of the state to affect"³ (viz., as defined at Utah Code Ann. § 53-6-20), and that "more than merely a 'reasonable relation' to some purpose within the competency of the state is required"⁴ to justify a limitation on the "interests of parenthood."⁵ These are the fundamental propositions controlling this controversy. They may not be brushed aside, as the Board attempts to do in its Argument III.

Neither may the Board avoid those holdings by urging that the enumeration of powers at Utah Code Ann. § 53-6-20(1) through (13) may be ignored on the theory that the power to do "all [other] things necessary" means it may do anything "convenient," "useful," "appropriate," "suitable," "proper" and "conducive." See Br. of Re. at page 35.

Urging that the term "necessary," as used in Utah Code Ann. § 53-6-20(14), has such broad meaning, is unsupported by the authorities cited and contrary to accepted rules of statutory construction. Beard v. Board of Education, 81 Utah 51, 16 P.2d 900

¹Wisconsin v. Yoder, 406 U.S. 205, 232-4 (1972).

²Pierce v. Society of Sisters, 268 U.S. 540, 534-5 (1925).

³Meyer v. Nebraska, 262 U.S. 290, 399-400 (1923).

⁴Wisconsin v. Yoder, op. cit. note 2 at 232.

⁵Id.

(1932), cited at Br. of Re. page 24, is no authority for that proposition, and to the contrary, plainly held that:

The board of education, being a creation of the Legislature, has only such powers as are expressly conferred upon it and such implied powers as are necessary to execute and carry into effect its express powers. Id. at 903.

The Court in Beard merely concluded that school buildings could be used for organized student dances, lectures, shows, games and entertainment, because a careful analysis of the Utah statutes indicated that such activities were part of the educational system as defined by our legislature.

Thus while "necessary" may, in a given context, mean something less than "indispensable," the statement of that proposition by the Board is plainly another argument against a "straw man." Plaintiffs have made no such claim. To the contrary, we have urged merely that:

The generality of such language, preceded by a specific enumeration of powers, is uniformly limited by the doctrine ejusdem generis. See BLACKS LAW DICTIONARY (4th ed. 1951), and the other authorities cited at pp. 33, 34 of Plaintiffs' original Brief.

The definition of "necessary" in BLACK'S LAW DICTIONARY (4th Ed.) is also very instructive:

NECESSARY. This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity. It may mean something which in the accomplishment of a

given object cannot be dispensed with or it may mean something reasonably useful and proper, and of greater or lesser benefit or convenience, and its force and meaning must be determined with relation to the particular object sought. (Citation omitted.)

Consequently, that which is "necessary," in the context of thirteen specific, enumerated powers, is that which is appropriate to the powers enumerated. It is not merely that which is "convenient" to the whims of an occasional, bare majority of the Board. Beard is not to the contrary, for it held that the "entire control" of the Board must be exercised within "these sections."

Also helpful is a well reasoned, unpublished 1983 opinion by Judge Bruce S. Jenkins construing a different section of Utah Code Ann. Title 53. The distinguished federal judge wrote as follows:

" . . . in seeking statutory interpretations that comport with the Constitution, courts should read the questioned statute in the context of other, similar laws on the same subject. See e.g., Kokoszka v. Bedford, 417 U.S. 642 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the laws, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature'" Id. at 650, quoting Brown v. Duchesne, 19 How. 183, 194 (1957)); Richards v. United States, 369 U.S. 1 (1962) ("We believe . . . we must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy" Id. at 11 (footnote omitted)). This Court must review section 53-4-15 on its face and within the context of other similar statutory provisions and seek a rational interpretation that will allow the statute to

be upheld. Downey v. Burningham, Docket No. 83-1004J (U.S.D.C., D. Utah, decided 1983) at pp. 4-5.

For the convenience of the Court and counsel, Judge Jenkins' unpublished opinion is attached in the Addendum.

The point -- which the Board ignores -- is that nothing in the thirteen paragraphs preceding Utah Code Ann. § 53-6-20(14), refers to or fairly implies a power to balance the enrollment between the schools along racial, socio-economic or academic achievement lines. Nothing in the thirteen paragraphs preceding paragraph (14) declares, or reasonably implies, that the Board can, or should divide students into attendance groups based upon their race, or the circumstances of residing among those deemed poor or rich or high or low in academic achievement. Serious, frightening consequences would attend implication of such a power. Shall we, then, have students bussed between Price and Salt Lake City, or even within Salt Lake or Carbon Counties, to achieve such a balance?

Furthermore, if we were to give the meaning to the term "necessary" as urged by the Board, who could look Mrs. Espinal and her children in the eye without blinking and say, as the Board does at p. 35 of the Br. of Re., that the Order is "convenient, useful, appropriate, suitable, proper and conducive" to the promotion of the education of her children, as they are bussed across Salt Lake City to a school distant from them. Especially when the Board says to them that they are being bussed because of their minority and

socio-economic status, and because they come from a neighborhood of low academic achievers.


In its Argument III, the Board also fails to offer any reply to the admitted fact that the Order gerrymandered the high school boundaries. To gerrymander means to "divide (an area) into political units to give special advantages to one group (gerrymander a school district)." See Webster's 9th New Collegiate Dictionary, 1988. Of course, as discussed at pp. 2 and 3 above, that is precisely what the Order did, and precisely why the Board cannot respond to Plaintiff's contention that the order gerrymandered the boundaries. Nothing in § 53-6-20 expressly or impliedly empowers the Board to enforce such a decision, and thus, by the act of gerrymandering alone, the Order exceeds any powers granted the Board by the Utah legislature, particularly § 53-6-20.

CONCLUSION

It is significant that at pp. 41 and 42 of the Br. of Re., the Board concedes that for "compelling reasons" this Court can review and strike down the Order. In the instant case, those compelling reasons consist of the Order's violation of Plaintiffs' rights as guaranteed by Art. I, § 7 and Art. X, § 8 of the Constitution of Utah, and the Order being ultra vires the express and implied powers of the whole statutory scheme of public education at the time of the Order, as provided in Utah Code Ann. Title 53, and particularly by Section 53-6-20 thereof.

Accordingly, Plaintiffs urge that the summary judgment in favor of the Board be reversed and that this matter be remanded to the district court with instructions to enter summary judgment in favor of Plaintiffs, including without limitation, directing notice to the Board of the particulars in which the Order violates the Constitution of Utah and exceeds the powers of the Board as granted by the statutes of the State of Utah, and giving the Board reasonable opportunity to rescind the Order and develop a voluntary plan consistent with Utah law.

RESPECTFULLY SUBMITTED this 18th day of October, 1989.




Kent B Linebaugh
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing Reply Brief of Appellants was mailed, first-class, postage prepaid, to:

M. Byron Fisher
John E.S. Robson
Douglas J. Payne
FABIAN & CLENDENIN
A Professional Corporation
215 S. State Street, #1200
Salt Lake City, Utah 84111,

this 18th day of October, 1989.



Kent B Linebaugh

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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

PHILIP GORDON DOWNEY, an)
individual, and RANDI FULLER,)
an individual, and as)
Guardian ad Litem for)
Kimberly Ann Downey,)

Plaintiffs,)

vs.)

G. LELAND BURNINGHAM,)
individually and as Superin-)
tendent of Public Instruction,)
Utah State Board of Education)
and its members JAY A. MONSON,)
NEOLA BROWN, JESSE ANDERSON,)
LILA BJORKLUND, JOAN BURNSIDE,)
A. GLENN CHRISTENSEN, EMMA J.)
CHRISTENSEN, RODNEY L. DAHL,)
ROSS P. DENHAM, JOHN P. REDD,)
and KARL SHISLER, and the)
BOARD OF EDUCATION OF THE)
JORDAN SCHOOL DISTRICT,)

Defendants.)

Case No. C 83-1004J

MEMORANDUM OPINION

Plaintiffs, father and aunt, individually and aunt as
Guardian ad Litem, of Kimberly Ann Downey, brought this action
against the Utah State Superintendent of Public Instruction, the
Utah State Board of Education, and the Board of Education of the
Jordan School District.

In their complaint, plaintiffs assert that a newly enacted Utah statute ^{1/} as well as the conduct of the defendants, violates the Fifth and Fourteenth Amendments ^{2/} to the Constitution of the United States. Plaintiffs ask that the statute be declared void.

Defendant School District had sought a \$1,780 tuition payment as a pre-condition to the registration and attendance of Kimberly Downey at school. At an initial hearing held shortly after this action was commenced, the parties agreed that Kimberly Downey could attend school without prepayment of tuition until this matter was fully adjudicated. Briefs were thereafter submitted and the matter was argued to the Court on September 26, 1983. The parties further agreed that the issue presented to the Court at this stage of the proceeding was whether the statute was on its face violative of the Constitution of the United States.

1/ Utah Code Ann. § 53-4-15 (Supp. 1983).

2/ The Fifth Amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law;" U. S. Const. amend. V. The Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend., 14 § 1.

The Court, at this stage of the proceeding, is not asked to decide whether the action of the Jordan School District in applying the statute violated the Constitution. The question presented is a facial question, not an application question.

Plaintiff Philip Downey, father of Kimberly Downey, is domiciled and resides outside the State of Utah. He is a construction worker currently residing in Washington state.

Kim's mother is deceased. Because of his desire that Kim be reared in a traditional family environment, Philip Downey arranged with his sister, Randi Fuller, for Kim to reside with the Fuller family. Kim has lived with the Fuller family for three and one-half years.

In 1982 the Fuller family and Kimberly Downey moved to Sandy, Utah, located in the Jordan School District. During the school year 1982-83, the Fuller children and Kim Downey attended school in the Jordan School District. In August, 1983, Randi Fuller attempted to register Kim in school at the Eastmont Middle School. The school district, as a prior condition, sought the execution of a document annexed hereto as Exhibit "A", which contains an acknowledgement of certain facts and an undertaking to pay tuition. The parties refused to execute the proffered document and this action then resulted. It is undisputed that Kimberly Downey came to Utah for reasons other than attending school and that attending school is merely incidental to her living with the Fuller family.

In my opinion the Jordan School District and the Superintendent of Public Instruction have simply read the statute too broadly; if the statute is appropriately read, no question of constitutional proportion is presented. Kimberly Downey is simply unaffected and tuition ought not to be extracted by the school district as a condition for her attending school.

Legal authority abounds that a statute enacted by the legislature is entitled to a presumption of constitutionality. See e.g., Parham v. Hughes, 441 U.S. 347 (1979) ("State laws are generally entitled to a presumption of validity against attack under the Equal Protection clause" id., at 351); McDonald v. Board of Election, 394 U.S. 802 (1969) ("Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them" id., at 809). Furthermore, in seeking statutory interpretations that comport with the Constitution, courts should read the questioned statute in the context of other, similar laws on the same subject. See e.g., Kokoszka v. Belford, 417 U.S. 642 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature" id. at 650,

quoting Brown v. Duchesne, 19 How. 183, 194 (1857)); Richards v. United States, 369 U.S. 1 (1962) ("We believe . . . we must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy" id. at 11 (footnote omitted)). This Court must review section 53-4-15 on its face and within the context of other similar statutory provisions and seek a rational interpretation that will allow the statute to be upheld.

Utah chooses to administer its public school system through distinct governmental units known as school districts. See, Utah Code Ann. § 53-4-5 (1981). Although the state has twenty-nine counties, the state has forty school districts.

Interdistrict administrative problems have arisen from time to time. For example, a child living in one district needs to attend school in another. A child's parent may live in one district and the child in another. The amount of money each school district receives from the state hinges in part on the number of students attending school in the district; children that attend school outside of the district in which they reside can have significant impact on the budget of both where he lives and where he goes to school. See Utah Code Ann. sections 53-7-20, 53-7-21, 53-7-16(c)(d) (1981).

Resolution of interdistrict problems required a uniform approach. In an effort to resolve such problems, the legislature enacted section 53-4-15 in 1983 so as to establish

concrete standards and uniform methods to deal with recurring interdistrict problems. Section 53-4-15 states that:

(1) The school district of residence of a minor child is:

(a) The school district in which the parent or guardian who has legal custody of the child is domiciled or, if the parent or guardian has no domicile or is assigned to active duty in Utah by the United States Armed Forces, the school district in which the parent or guardian resides; or

(b) The school district in which the child resides, if the child is in the legal custody of a state or private agency, or is an emancipated minor.

(2) Each school district is responsible for providing educational services for all children of school age who are residents of the district.

Utah Code Ann. § 53-4-15 (Supp. 1983).

Section 53-4-15 is in part a codification of the Utah Supreme Court's decision in Logan City School District v. Kowallis, 94 Utah 342, 77 P.2d 348 (1938). That case concerned the constitutionality of a Logan City school board ruling that required all students who were not district residents to pay tuition. The Logan City School District sued residents of the Cache County School District, who were attending school in Logan but refused to pay tuition. Defendant students alleged that the school board was violating the Utah Constitution by requiring Utah residents to pay tuition. In analyzing the constitutionality of the school board's regulations, the court reviewed the legislature's approach to the public school system.

It summarized that approach as follows: "A review of all the statutory enactments from the beginning shows a recognition of the policy that children must attend school within the district in which they reside, whenever there is provided within such district, schools of proper grade and class to meet their needs and requirements." Id. at 353. Based on this historical legislative policy, the court held that:

The Cache County School District, having provided adequate schools and facilities equal to those of Logan City, open and free and reasonably convenient for attendance of all children within such district, all constitutional and statutory requirements have been met, and no child within such district has a legal right to insist upon attendance at public schools elsewhere.

Id. at 353-54. The court concluded that the requirement that a resident of another school district must pay tuition in order to attend school in a preferred district comported with history and legislative intent, and did not violate the Utah Constitution.

On its face, section 53-4-15 is merely a legislative effort to resolve the inter-district problem of a student living in one district who wishes to attend school in another. The statutory definition of a child's residence solves that problem. The statute presumes that a child's parent or guardian is domiciled in or resides in a Utah school district and confines the child's residence to the domicile or residence of the Utah-located parent or guardian. However, if the child is emancipated or is in the legal custody of a state or private

agency, the statute provides that the child's residence will determine where he should attend school.

The legislature's definition of "district of residence" for public school purposes simplifies a school board's administrative difficulties. By presuming that a child resides with his Utah-located parent or guardian, the statute allows an easy determination of which school a child should attend. The problems inherent in determining the number of school-age children in a district for the purposes of allocating state school funds are also eased. The definition of a child's district of residence is obviously applicable to interdistrict problems. Should the definition by implication and interpretation be applied to interstate problems as well?

In my opinion it should not.

First, the statutory context in which the definition section is found is primarily concerned with interdistrict problems. For example, section 53-4-16 allows a child who resides in one district to attend school in another and allows a school board to charge tuition; section 53-4-17 regulates relations between districts and allows one district to pay another when a school district resident goes to school in another district. Second, extension by interpretation to interstate problems could well raise serious constitutional problems which are not raised by the construction herein adopted. Third, if the legislature wishes to address interstate problems beyond

what they have done in section 53-4-18, which permits a school board to allow a child "residing" outside Utah to attend school within the state upon payment of tuition, it may do so.

Under the present statute it has not done so. The point made is narrow, but important. The father of Kim Downey is neither a domiciliary nor a resident of a school district in Utah. Thus her presumptive "district of residence" is not determined by her father's location in Utah. He is not here. He does not live here. She is here. She lives here with her aunt, Randi Fuller and the Fuller family. The definition simply fails to define the residence of a child, living in Utah, whose parent lives outside the borders of the state and it need not do so. The likelihood of an interdistrict problem arising from such facts is minimal. The presumption does not carry beyond the border because the definition is confined to a parent or guardian located in the state.

There is further statutory guidance which requires that Kim be admitted to school without the payment of tuition.

The Utah Constitution requires that "[T]he legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the State,", Utah Const. Art. X, section 1, and defines the "public schools" as follows:

The public school system shall include kindergarten schools, common schools, consisting of primary and grammar grades;

high schools; an agricultural college; a university; and such other schools as the legislature may establish. The common schools shall be free. The other departments of the system shall be supported as provided by law.

Utah Const. Art. X sec. 2.

The Utah legislature has done more than implement the mandate of the Utah Constitution by providing that "[I]n each school district, the public schools shall be free to all children between the ages of 5 and 18 years who are residents of the district," Utah Code Ann. § 53-4-7 (1981). The legislature has also mandated that "[e]ach school district is responsible for providing educational services for all children of school age who are residents of the district." Utah Code Ann. § 53-4-15(2) (Supp. 1983).

The Utah Code also places affirmative duties on persons exercising control over the child to ensure that the child attends school: "Every parent, guardian or other person having control of any minor between 6 and 18 years of age shall be required to send such minor to a public or regularly established private school during the regularly established school year of the district in which he resides." Utah Code Ann. § 53-24-1 (1981). "He" refers to the child. The parent, guardian, or other person who willfully fails to comply is guilty of a misdemeanor. Id. § 53-24-3 (1981) (emphasis added).

Although the Utah Code does not affirmatively require the child to attend school, the child may be subject to

sanctions for failure to attend. For example, a person may be taken into temporary custody by a peace officer, truant officer, or public school administrator "if there is reason to believe the person is a child subject to the state's compulsory education law and that the child is absent from school without a legitimate or valid excuse." Utah Code Ann. § 53-24-23 (Supp. 1983). Or, if the child is found to be "an habitual truant from school," the child is subject to the broad remedial powers of the juvenile court. Utah Code Ann. § 78-3A-16 (Supp. 1981); see id. § 78-3A-39 (Supp. 1981).

In my opinion, the word "resides" found in § 54-24-1 is used with the common sense meaning of "lives" or "is located." Randi Fuller, not as a parent or a guardian, but as an "other person having control" must see to it that Kim attends school in accordance with legislative direction, and the Jordan School District must receive and provide Kim with the education to which she is entitled.

This view is fortified by a recent pronouncement of the United States Supreme Court. In Martinez v. Bynum, _____ U.S. _____, 51 U.S.L.W. 4524 (May 2, 1983), the United States Supreme Court defined residence: "'Residence' generally requires both physical presence and an intention to remain. . . . This classic two-part definition of residence has been recognized as a minimum standard in a wide range of contexts time and time again." Id. at 4526. Kim meets the Martinez definition of

residence. She is physically present in Utah. Her father intends that Kim live with her aunt, and Kim, herself, intends to live with her aunt's family in Utah. Kim is not residing in Utah for the primary purpose of attending school; rather, her reason for being in Utah is to live in a stable family environment.

Because § 53-4-15 does not apply to Kim, the school district must treat her as it treats other residents. The Jordan School District is required by state law to provide free public schools to all children ages 5 to 18 who are residents of the district. Kim is twelve years old and is a resident of the Jordan School District. Therefore, the Jordan School District must allow Kimberly Ann Downey to attend school within the district without requiring her to pay tuition.

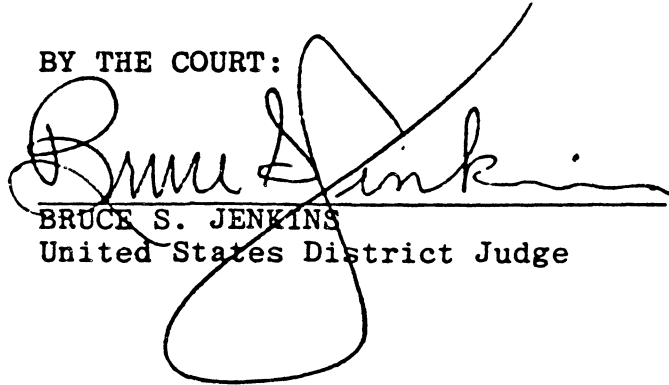
This is not to say that a legislature might not adopt and a school district might not implement a rational policy for dealing with out-of-state students who come to Utah for the primary or sole purpose of gaining an education. Certainly one may adopt a definition, a standard, and a procedure for appropriate fact determinations in conformity with an expressly defined policy. In this instance, that has simply not been done.

There being no need to reach the constitutional question, the petition to declare the statute void in violation of the Constitution is denied, and counsel for plaintiff is

directed to prepare and submit a form of judgment in conformity herewith.

DATED this 30 day of November, 1983.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Bruce S. Jenkins", is written over a horizontal line. Below the line, the name "BRUCE S. JENKINS" and the title "United States District Judge" are printed. A large, loopy flourish extends from the bottom of the signature.

BRUCE S. JENKINS
United States District Judge

EXHIBIT "B"

A G R E E M E N T

THIS AGREEMENT is entered into on this the _____ day of _____, 19____, by JORDAN SCHOOL DISTRICT (hereafter "the District") and _____ (hereafter "Patrons");

WHEREAS, the Utah State Legislature has recently passed legislation, Senate Bill 232, authorizing the Jordan School District to institute a nonresident child tuition program; and

WHEREAS, the Jordan School District has calculated that the per capita cost in the Jordan School District for educating students is \$1,782.00 for the school year 1983-84; and

WHEREAS, Patrons agree that Kimberly Ann Downey
(Student's name) is an out-of-state student who, pursuant to Senate Bill 232, may lawfully be assessed the per capita cost of the District; and

WHEREAS, Patrons are attempting to obtain legal ^{guardianship} ~~custody~~ of Kimberly Ann Downey
(Student's name) and thus not be required to pay a nonresident child tuition; and

WHEREAS, the legal process to establish such guardianship and control has been delayed beyond the date that school begins; and

WHEREAS, the District seeks to accommodate the Patrons by extending the time in which the tuition is to be paid;

NOW, THEREFORE, the parties agree as follows:

1. Patrons will be allowed to enroll Kimberly Ann Downey
(Student's name).
in Eastmont Middle School and the District will allow
(Name of school)
Kimberly Ann Downey to attend classes.
(Student's name)

2. Patrons agree that on or before the _____ day of _____, 1983, they will present to the District evidence of guardianship and/or legal custody in the form of duly executed court documents.

3. If Patrons do not present evidence as outlined in Paragraph 2, Patrons agree to pay the District nonresident child tuition in the amount of \$1,782.00. Patrons agree to pay said amount to the District on or before _____, 1983.

JORDAN SCHOOL DISTRICT

By _____

PATRON

PATRON