

Robert C. Huntley ISB#894
R. HUNTLEY LAW PLLC
950 W. Bannock St., Suite 600
P.O. Box 2188
Boise, Idaho 83701
Telephone: 208-388-1230
rhuntley@huntleylaw.com

T. Jason Wood ISB#5016
WOOD LAW GROUP PC
1906 Jennie Lee Drive
Idaho Falls, Idaho 83404
Telephone: 208-497-0400
Jason@woodlaw.net

Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

PEYTON GIFFORD and MOLLIE GABALDON,
Individually, as Patrons of West Ada Jt. School)
District # 2 and on behalf of and as Guardians Ad)
Litem of their minor child, CHRISTOPHER M.)
GABALDON, and in behalf all other similarly)
situated Parents, Patrons of, and children enrolled)
(past, present, and future) in Kindergarten in)
West Ada School District, Idaho's 114 other)
School Districts, and 54 Charter Schools,)

Plaintiffs,)

vs)

WEST ADA JOINT SCHOOL DISTRICT #2)

Defendant and 168 Putative Defendants)

Case No. _____

Fee \$221

Fee Category AA

Class Action Complaint for:

(1) Declaratory Judgment that:

**(a) Idaho's schools must provide
FREE Kindergarten as mandated
by the Idaho Constitution.**

**(b) Entitlement to Reimbursement
of Kindergarten Fees collected
in violation of Idaho & United
States Constitutions.**

(2) Certification of Class Action¹

Plaintiffs as their claim allege:

I. Jurisdiction and Venue

Jurisdiction lies in this Court under Article IX, Section 1 of the Constitution of the State of Idaho and Article I, Section 14 of the Idaho Constitution, which incorporates the Fifth and Fourteenth Amendments to the U.S. Constitution. Jurisdiction also

¹ Plaintiffs seek status as Class Representatives of all Patrons and Students in West Ada as well as such status in a "Defendants Class Action" against all 114 other School Districts and 54 Charter Schools in the State of Idaho.

lies in this Court to adjudicate claims under the U.S. Constitution which are collateral to state claims.

Jurisdiction may also lie under the Constitutionally Based Educational Claims Act (CBECA), Idaho Code §6-2201, *et seq.*

Venue lies in this Court against the Defendant, West Ada School District #2 which is located in Ada County, Idaho.

II. Parties

A. Parties Plaintiff: PEYTON GIFFORD and MOLLIE GABALDON are the Parents of CHRISTOPHER MICHAEL GALBADON, a minor who will be aged five (5) in September 2019 and will be enrolled in Kindergarten in the West Ada School District (hereinafter “West Ada” or the “District”) in the Fall of 2019.

They bring this action on behalf of themselves and as "Class Representatives" on behalf of all parents/patrons and students enrolled (or to be enrolled) in Kindergarten (past, present, or future) in West Ada Joint School District #2, as well on behalf of all parents/patrons and students enrolled (or to be enrolled) in Kindergarten (past, present, or future) in the other 114 School Districts and 54 Charter Schools in the State of via a “Defendants” Class Action.

B. Parties Defendant:

(1) West Ada Jt. School District # 2 is a municipal corporation of the State of Idaho located in Ada County, Idaho. West Ada and its Attorneys can adequately serve as representative of the Members of the “Putative Defendant Class.”

(2) The other 114 School Districts and 54 Charter Schools in Idaho are members of the “Putative Class” in the Defendants Class referenced herein.

(3) **Future Party Defendants:** Pursuant to the provisions of the Constitutionally Based Educational Claims Act² (CBECA), Idaho Code §6-2201, *et seq.*, Plaintiffs may, at the appropriate time, move to add the State of Idaho, the Idaho State Legislature, the Idaho State Board of Education, and the Governor of the State of Idaho as Parties Defendant. Notification of the filing of this action will now be immediately served upon the Attorney General of the State of Idaho.

III. CLAIM FOR DECLARATORY JUDGMENT

(Idaho Code §10-1201, *et seq.*)

1. Plaintiffs bring this action against the Defendant West Ada Joint School District # 2, as a Class Action on behalf of all school children, in Kindergarten in the 2014-15 and subsequent school years, and on behalf of their parents and guardians, to enforce the "**free** common school" provision of Article IX, Section 1 of the Constitution of the State of Idaho which reads as follows:

§ 1. Legislature to establish system of free public schools.

The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, **uniform**, and **thorough** system of public, **free** common schools. (emphasis supplied).

2. Plaintiffs' claims are also based upon the fact that the Kindergarten fees assessed and collected constitute "**unconstitutional takings**" under the "due process"

² Plaintiffs are of the opinion that CBECA is not applicable to a case of this nature, or if applicable, serves only as an **additional** basis for relief, and therefore cite to it as a precaution in case we are in error. This Complaint is being served on the Idaho Attorney General as a precautionary measure without waiving Plaintiffs' position.

clauses in the Fifth and Fourteenth Amendments to the Constitution of the United States of America under 42 U.S.C. § 1983, *et seq.* for violation of the Plaintiffs' civil rights under the color of state and federal law (and their implementing statutes), and by and through Article I, Section 14 of the Idaho Constitution.

3. Plaintiffs have a right and standing herein to assert both a constitutional claim under Article IX, Section 1 of the Idaho Constitution, and also, concurrently, as a claim under the Constitutionally Based Educational Claims Act, Idaho Code §6-2201 *et seq.*, on the basis of the ruling of the Idaho Supreme Court in *Joki et al. v. The State of Idaho and Meridian Jt. District No. 2* under Supreme Court Docket No. 43907 entered as 2017 Opinion No. 35 under date of April 27, 2017. *Joki* provides in part as follows:

At page 6: A Patron may bring suit against the state"...on the ground that the state has not established and maintained general, uniform and thorough system of public, free common schools," (after obtaining authorization from a district court to add a state defendant).

At page 8, final paragraph: "It follows that in order for an educational service to satisfy CBECA it must be free. Accordingly, Joki's claim relating to the fees levied by the school districts falls squarely within the definition of a constitutionally based educational claim **because the legislature's duty is to provide free common schools.**" (emphasis supplied)

4. In contravention of the constitutional requirement to provide free common schools, Idaho's schools have been grossly underfunded by the State Legislature and have been engaging in the practice of levying fees upon their students and their families for Kindergarten students who matriculate, or seek to matriculate, for a full day instruction. (as distinguished from ½ day).

**The Providing of Kindergarten Free of Charge is Required to Meet
The Constitutional Mandates of "thorough" and "uniform" and
"free."**

5. As noted above, the Idaho Constitution, Article IX, Section 1 states, “. . .it shall be the duty of the legislature of Idaho, to establish and maintain a general, **uniform**, and **thorough system** of public, *free* common schools.” (emphasis supplied).

6. Since the Idaho Constitution was adopted on July 3, 1890, the Legislature has been partially fulfilling its duty to “establish” a **general, uniform, and thorough system** through statutes and agency rule, notably the IDAPA rules of the Idaho State Board of Education, while chronically underfunding public and higher education

7. Through statutes and agency rule, the Idaho Supreme Court “has on a number of occasions “. . .assumed. . .that the legislature had determined that high schools were elements of our free common school system.” (*Paulson v Minidoka County School District No. 331*, 463 P.2d 935 (1970), 93 Idaho 469, [FN2]).

8. Thus, in the course of “establishing” the a **general, uniform, and thorough system** the legislature, as in *Paulson*, has through statute and rule determined that a Kindergarten program, like a high school program, is an element of a free common school system (*Paulson v Minidoka County School District No. 331*, 463 P.2d 935 (1970), 93 Idaho 469),

9. Therefore a student’s enrollment and attendance in Kindergarten is a necessary element in a thorough and uniform education, which must inure to every student in equal proportion.

10. The Idaho Supreme Court in *Andrus v Hill*, 73, Idaho 199 (Idaho 1952), “There is involved no question of the plenary power of the legislature to provide for, regulate, control and alter the public schools of the state, within the definition provided by the constitutional provision imposing that duty on the legislature. Idaho Const. Art. IX, § 1. It Plaintiffs’ class action complaint.

is not a question of what the legislature may do, but a question of what it has done.”

11. To paraphrase *Andrus v Hill*, when the legislature imposes its Article IX, § 1 constitutional duty with a statute, as it did with the Kindergarten statute, it is not a question of what the local school district may do, but a question of what it has done.

12. Beginning with what the legislature *has done*, we examine how the legislature has imposed uniformity and thoroughness.

13. According to *Merriam-Webster*, thorough means “carried through to completion, marked by and careful about full detail, and complete in all respects.” Merriam Webster defines uniform as “having always the same form, manner or degree, not varying.” Finally, the word system means “a regularly interacting or interdependent group of items forming a unified whole.”

14. Furthermore, *Black’s Law Dictionary*, 4th, defines uniform and system: “UNIFORM, *adj.* Conforming to one rule, mode, or unvarying standard; not different at different times or places; applicable to all places or divisions of a country. *People v. Vickroy*, 266 Ill. 384, 107 N.E. 638, 640. Equable; applying alike to all within a class. *Bufkin v. Mitchell*, 106 Miss. 253, 63 So. 458, 459, 50 L.R.A.,N.S., 428. **The words "general" and "uniform" as applied to laws have a meaning antithetical to special or discriminatory laws.** *Ex parte Nowak*, 184 Cal. 701, 195 P. 402, 404. The term "uniform," however, does not mean universal. *Watson v. Geely*, 67 Cal.App. 328, 227 P. 664, 670.” [Emphasis added]

15. In terms of **system uniformity**, the legislature has, through IDAPA 08 TITLE 02 CHAPTER 02 08.02.02 – RULES GOVERNING UNIFORMITY, established professional certification standards that include:

a) Fifteen Classroom Teacher endorsements in Kindergarten,

- b) Two Pupil Personnel endorsements (school counselor) in Kindergarten, and
- c) Three Administrator endorsements in Kindergarten: Director of Special Education, School Principal, and Superintendent.

16. In terms of **system thoroughness**, the legislature has, through statute and rule, determined that Kindergarten education is an element of a free common school system. Plaintiffs enumerate them below.

17. In Idaho Code 33-208 - KINDERGARTENS AND CHILD ATTENDANCE NOT COMPULSORY the legislature makes Kindergarten optional for school districts, however, nearly every Idaho public school district has established Kindergarten, with the exception of Prairie School District and some Idaho Charter school districts. Thus, Idaho by opting to provide Kindergarten, the public schools have added it as necessary element.

18. When Idaho Code 33-208 was enacted in 1975, then Idaho Attorney General Wayne Kidwell provided two opinions: one at the request of Representative C.W. Neider, District 2, and one in response to State Superintendent of Instruction Roy Truby.

19. Representative Neider asked, “Does Article IX, Section 9, of the *Idaho Constitution*, or any other legal authority, prohibit expenditures of state funds to support public kindergartens, where attendance is not compulsory?”

20. In OPINION 8-75, the Idaho Attorney General responded, in part, “Since districts have the authority to establish kindergartens now, the only issue to be discussed is whether or not the legislature may appropriate funds from the State of Idaho to support kindergarten programs established by the district.”

21. The Attorney General went on, stating, “Chapter 10 of Title 33, *Idaho Code*, establishes the foundation program for the distribution of state funds to local school districts. Plaintiffs’ class action complaint.

Part of the formula is based on the number of students in average daily attendance. Students are those between the ages of 6 and 21 years. Therefore, a five year old is not a student within the meaning of the foundation program. . .Therefore, any funds appropriated for kindergartens would have to be made outside the foundation program appropriations, or that program would have to be amended to permit distribution to districts for those who attend the district's kindergartens." Hence, the Attorney General's opinion made it clear that the "optional kindergarten" lacked inclusion in the definition of uniform and thorough because it did not qualify for state appropriation. It was up to the legislature to take that final step.

22. Then State Superintendent of Public Instruction, Roy Truby, asked the Idaho Attorney General for an opinion on allowing school districts to fund kindergarten programs by certifying "emergency levy" funding to pay for kindergarten.

23. Kidwell's opinion included: "The establishment of kindergarten is a positive act on the part of the individual school districts. Therefore, it appears that the increase in school attendance brought about thereby cannot be considered 'unanticipated'. Further, there is nothing to suggest that the number of kindergarten pupils could not be determined prior to the time of enrollment at the beginning of the new school term. . . .Before the kindergarten program in any district is established, practice has shown us that the district studies thoroughly the needs and numbers of those pupils who would be enrolled in the kindergarten program." (ATTORNEY GENERAL OPINION NO. 39-75).

24. These foundational questions of funding were later answered positively by the legislature, as explained below, and Kindergarten became, through statute and rule, an integral part of the Idaho Constitution's uniform and thorough system of free common schools.

25. Indeed, Fourth District Court Judge Richard Greenwood, in *Joki v West Ada*, ruled with clarity that the West Ada School District had done so and could not charge tuition for the second half of a Kindergarten day:

Defendant (West Ada) suggests it is free to charge for kindergarten because the Defendant is not required by law to provide kindergarten. **This is incorrect.** Other than a few exceptions contained in Title 33 to attend Chapter 16, the legislature does not require that school districts offer a particular set of classes. Children under age seven or over age 16 are not required {to attend} school. Ultimately the determination of what constitutes a thorough system of education and the appropriate curriculum is, for the most part, left to the individual school districts. See I.C. §33-1612; *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975). **The decision to offer kindergarten simply represents a decision by the Meridian School District that kindergarten is part of a thorough education. Having determined that kindergarten is a part of its regular curriculum, the Meridian School District is not free to ignore the mandate of the Idaho Constitution that the education be free. The same rules that apply to schools in general apply to kindergarten.** (emphasis added)

26. Moreover, the legislature established, also with clarity, that the school age for enrollment in Idaho's public schools begins at age five (5), which corresponds with Kindergarten entrance:

33-201. SCHOOL AGE. The services of the public schools of this state are extended to any acceptable person of school age. "School age" is defined as including all persons resident of the state, between the ages of five (5) and twenty-one (21) years. For the purposes of this section, the age of five (5) years shall be attained when the fifth anniversary of birth occurs on or before the first day of September of the school year in which the child is to enroll in kindergarten.

27. The companion to school age is the minimum number of school hours for a Kindergarten day, wherein the Idaho legislature established, as a thoroughness standard a ½ day of Kindergarten instruction of 450 hours per year:

33-512. GOVERNANCE OF SCHOOLS. The board of trustees of each school district shall have the following powers and duties:

(a) Each school district shall annually adopt and implement a

school calendar which provides its students at each grade level with the following minimum number of instructional hours:

Grades	Hours
9-12	990
4-8	900
1-3	810
K	450

28. Funding of Kindergarten is also statutory. In the EDUCATIONAL SUPPORT PROGRAM tables, Kindergarten is the first instructional program with a computation of forty (40) students required to qualify for a funded support unit, which amounts to about \$100,000:

33-1002. EDUCATIONAL SUPPORT PROGRAM. [EFFECTIVE UNTIL JULY 1, 2019] The educational support program is calculated as follows:

COMPUTATION OF KINDERGARTEN SUPPORT UNITS

Average Daily

Attendance	Attendance Divisor	Units Allowed
41 or more....	40.....	1 or more as computed

29. In defining thoroughness, the legislature's statute is a list of "basic assumptions" which govern a thorough system of public schools. In IC 33-1612, the legislature's definition does **not exclude** Kindergarten and, indeed, in the corresponding instructional statute and IDAPA rule, which follows the statute, Kindergarten is included:

33-1612. THOROUGH SYSTEM OF PUBLIC SCHOOLS. The constitution of

the state of Idaho, section 1, article IX, charges the legislature with the duty to establish and maintain a general, uniform and thorough system of public, free common schools. In fulfillment of this duty, the people of the state of Idaho have long enjoyed the benefits of a public school system, supported by the legislature, which has recognized the value of education to the children of this state.

In continuing recognition of the fundamental duty established by the constitution, the legislature finds it in the public interest to define thoroughness and thereby establish the basic assumptions which govern provision of a thorough system of public schools.

A thorough system of public schools in Idaho is one in which:

1. A safe environment conducive to learning is provided;
2. Educators are empowered to maintain classroom discipline;
3. The basic values of honesty, self-discipline, unselfishness, respect for authority and the central importance of work are emphasized;
4. The skills necessary to communicate effectively are taught;
5. A basic curriculum necessary to enable students to enter academic or professional-technical postsecondary educational programs is provided;
6. The skills necessary for students to enter the work force are taught;
7. The students are introduced to current technology; and
8. The importance of students acquiring the skills to enable them to be responsible citizens of their homes, schools and communities is emphasized.

30. The corresponding statute on COURSES OF INSTRUCTION establishes the “**ultimate goal of the legislature**” (emphasis added) to be “every student read at or above grade level by grade three (3). The statute establishes Kindergarten as the foundation:

COURSES OF INSTRUCTION

33-1614. READING INSTRUCTION AND INTERVENTION.

(1) It is the ultimate goal of the legislature that every student read at or above grade level by the end of grade 3. School districts shall offer a reading intervention program pursuant to section [33-1616](#), Idaho Code, to each kindergarten through grade 3 student who exhibits a reading deficiency on the statewide reading assessment pursuant to section [33-1615](#), Idaho Code, to ensure students can read at or above grade level at the end of grade 3. The reading intervention program shall be provided in addition to core reading instruction that is provided to all students in

the general education classroom and must be in alignment with the Idaho comprehensive literacy plan. The reading intervention program shall:

- (a) Be provided to all grade K-3 students identified with a reading deficiency as determined by the statewide reading assessments;
- (b) Provide intensive development in phonemic awareness, phonics, fluency, vocabulary and text comprehension, as applicable to the grade level; and
- (c) Monitor the reading progress of each student's reading skills throughout the school year and adjust instruction according to student needs. Monitoring may include both local and statewide assessments.

31. Furthermore, the above statute, I.C. 33-1614, establishes further Kindergarten requirements including a Reading Improvement Plan:

2) Reading Improvement Plan. Any student in kindergarten through grade 3 who exhibits a deficiency in reading at any time based upon the statewide assessment shall receive an individual reading improvement plan no later than thirty (30) days after the identification of the reading deficiency. The reading improvement plan shall be created by the teacher, principal, other pertinent school personnel, including staff-assigned library duties if applicable, and the parent(s) or guardian(s) and shall describe the reading intervention services the student will receive to remedy the reading deficit. Each student must receive intensive reading intervention until the student is determined to be proficient in reading for their grade level.

and parent notification in the event of reading deficiency:

3) Parent Notification. The parent of any student in kindergarten through grade 3 who exhibits a deficiency in reading at any time during the school year must be notified in writing of the reading deficiency. The school district shall assist schools with providing written notification to the parent of any student who has not met grade-level proficiency.

The statute ends with required district reporting and State Department of Education technical assistance for Kindergarten / Reading Readiness.

32. In IDAPA 08 TITLE 02 CHAPTER 03 08.02.03, the THOROUGHNESS rules, Kindergarten is established in a number of sections, including (emphasis added throughout):

112. ACCOUNTABILITY. School district, charter school district and public charter school accountability will be based on multiple measures aimed at providing meaningful data showing progress toward interim and long-term goals set by the State Board of Education for student achievement and school improvement. The state accountability framework will be used to meet both state and federal school accountability requirements and will be broken up by school category and include measures of student academic achievement and school quality as determined by the State Board of Education. (3-29-17) 01. **School Category. (3-29-17) a. Kindergarten through grade eight (K-8): Schools in this category include elementary and middle schools as defined in Subsection 112.05.f.**

129. COMMUNICATION. 01. Communication Skills Emphasis. Communication skills enabling students to be responsible citizens of their homes, schools and communities will be emphasized throughout the curriculum. **The teaching and demonstrating of effective communication skills will be exemplified throughout the kindergarten through twelve (K-12) system.**

130. TECHNOLOGY. **Throughout the kindergarten through twelve (K-12) system,** technology will be integral to curriculum, instruction and assessment. (Section 33-1612, Idaho Code). Technology moves communication to a new dimension. **The kindergarten through twelve (K-12) system must lay the foundation for students to be able to participate comfortably in an increasingly technological society.** Classroom activities will include instruction using multimedia, distance learning and other technologies.

200. K-12 IDAHO CONTENT STANDARDS. As stated in Subsection 105.02 of these Thoroughness rules, all students graduating from Idaho public high schools must meet locally established content standards. The standards set forth in Section 004 of this rule are state content standards that shall be the minimum standards used by every school district in the state in order to establish a level of academic content necessary to graduate from Idaho's public schools. Each school district may set standards more rigorous than these state content standards but no district shall use any standards less rigorous than those set forth in these Thoroughness rules. The implementation time and effective date for these Content Standards rules is the graduating senior class of 2005. (3-29-10).

33. The above recitation of Idaho case law, statutes, and rules clearly establishes the legislature has determined that Kindergarten education is an element of a free common school system, consistently with the teachings of *Paulson v Minidoka County School District No. 331*, 463 P.2d 935 (1970), 93 Idaho 469, therefore a student's enrollment and attendance in Kindergarten is a necessary element in his education which must inure to every student in equal proportion and must be *free of any tuition costs*.

34. Failure to offer *free* Kindergarten, not only violates the Idaho Constitution, but violates every anti-discrimination law and standard. Why? Because requiring parents to pay for the second half of the day, at a rate similar to Boise School District's **\$250 per month**, disadvantages low income families. What is their recourse for the second half of the Kindergarten day? It very likely includes unsupervised latch-key situations or non-education baby-sitting situations. As an informative note, the Idaho Child Care Program stipend cannot be used for Kindergarten.

35. According to the *Idaho Education News*, April 22, 2019, feature on kindergarten tuition, and district websites, the following table illustrates sample tuition rates and districts that include full day costs in their budgets:

District	Tuition Costs for second kindergarten session	Free full day offered?
West Ada	\$300.00 per month	No
Boise	\$250.00 per month	No
Idaho Falls	\$275.00 per month, with a one time \$25.00 registration fee	No
Minidotka County	Began several pilot programs, one with tuition at \$11.00 per day	One of the pilot programs was free
Nampa	0	Yes
Caldwell	0	Yes
Vallivue	0	Yes
Coeur d' Alene	0	Yes

36. Charging tuition for Kindergarten is a discriminatory educational access barrier

for low-income parents. West Ada further discriminates based upon ability to pay via the following policy/practice as articulated in its website:

Tuition Kindergarten Fact Sheet

Tuition Kindergarten is an extra session of kindergarten available to patrons who wish to pay tuition of \$300.00 per month for each child to attend. Students must meet the age requirement of 5 years of age on or before Sept. 1 of the current year. **The session would have a curriculum that is separate from the regular kindergarten programs. The curriculum will be focused on providing students with expanded language arts experiences through drama, speaking, writing and reading. It would provide enrichment in math, science, social science, and general knowledge.** (emphasis supplied)

37. As United States Supreme Court Chief Justice John Roberts stated in a recent special education case, (*Endrew F, A Minor, By And Through His Parents And Next Friends, Joseph F. et al. v. Douglas County School District RE–1* 197 Lawyers Ed. 2nd 335 (2017):

“a general standard...requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . .his educational program must be appropriately ambitious in light of his circumstances, **just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.** The goals may differ, but every child should have the chance to meet challenging objectives.” (emphasis added)

38. A Kindergarten student who does not receive or cannot afford a full day of Kindergarten education does not receive an appropriate, free education.

39. Failure to offer tuition free kindergarten to any Idaho student violates the Idaho Constitution and offends the basic concepts of anti-discrimination jurisprudence.

The Legislature Has Chronically Underfunded Our Public Schools and Universities While Steadily Diminishing the Tax Base Since 1965

40. Idaho is ranked as the lowest state in the nation in terms of per capita funding of its schools. That fact does not arise from necessity. Historically, the

Legislature and people of Idaho strongly supported the institution of the Sales and Use Tax in 1965, primarily for the purpose of adequately funding Education. At the time of implementation, the Sales and Use Tax contained only 17 exemptions, which exemptions were in place for the purpose of exempting sales prior to "sales at retail," (thus distinguishing it from a "value added" tax).

41. Year after year, commencing with 1967, the Legislature has added new exemptions to the Sales and Use Tax, to the point where there are now more than 102 exemptions, with the result that the exemptions have a value of approximately \$2.1 Billion, whereas the tax itself as now imposed provides the State with only approximately \$1.5 Billion in revenue. The result has been to impose increased burdens on West Ada and other schools at a time when limitations upon local taxing authority make it difficult for West Ada and other school districts to provide free public schools as required by the Idaho Constitution.

41. Additionally, over the thirty years last past, the State has enacted legislation adding exemptions and other reductions in taxation rates to the corporate and individual Income Tax rates, thus further reducing the funds available for education appropriately supplied from the General Fund.

42. While reducing general fund tax collections as stated in paragraphs 39 thru 41 above, the State has reduced the authority of school districts to raise revenues through local property taxes.

Paulson v. Minidoka County School District

43. The Idaho Supreme Court, in *Paulson v. Minidoka County School District No. 331, et al.*, 93 Idaho 469; 463 P.2d 935 (1970) ruled that the levying of certain fees

upon the students violated the constitutional mandate, the Court ruling in part:

"Because the Appellants' [Minidoka County School District No. 331] High School is a 'common school,' it must, by constitutional command, be 'free.'"

One-half of the \$25 fee is assigned as a payment for what Appellants themselves call extra-curricular activities. If a student of Minidoka County High School wishes a transcript of his scholastic achievement he must pay the entire \$25, one-half of which is expressly consigned to fund extra-curricular activities. Items which are "extra-curricular" are, by definition outside of or in addition to the regular academic courses or curriculum of a school. A levy for such purposes, imposed generally on all students whether they participate in extra-curricular activities or not, becomes a charge on attendance at the school. **Such a charge contravenes the constitutional mandate that the school be free.** (Emphasis supplied.)

Textbook fees... are indistinguishable from other fixed educational expense items such a school building maintenance or teachers' salaries. The Appellants may not charge students for such items because the common schools are to be "free" as our constitution requires.

The *Paulson* Court held that transcripts were a necessary part of the "**entire product to be received by the student**" and they must be "free," and that the school could not withhold a student's transcript to coerce payment of the lump sum \$25 fee. (Paraphrased)

44. Plaintiffs, through this action, seek return of fees unconstitutionally assessed and paid for the 2014-2015 and subsequent school years.

IV. CLASS ALLEGATIONS

A. Plaintiffs Class Action

45. This case is brought as a Plaintiff's class action pursuant to I.R.C.P. Rule 77.

46. Plaintiffs and their minor child are members of the Plaintiff Class as defined herein and bring this action on their own behalf and on behalf of those students and parents/patrons of West Ada similarly situated. (as well as those in the Defendants Class action)

47. Plaintiff seek: (1) Declaratory Judgment that:

- a) Idaho's schools must provide free Kindergarten to comply with the mandates of the Idaho Constitution,
- b) Entitlement to Re-Imbursement of Kindergarten Fees Collected in violation of the Idaho & U.S. Constitutions be Ordered; and
- c) Certification of Class Action Status, with the Court establishing a protocol and claim procedure for restitution or reimbursement of fees which have been unconstitutionally collected.

49. The class represented by Plaintiffs includes all students enrolled in West Ada and their parents and/or guardians,³commencing with school year 2014- 2015 and continuing thereafter, who have been or will be subjected to assessment for and/or paid fees which violate the "free common schools" provision of Article IX, Section 1 of the Idaho Constitution.

50. Plaintiffs are members of the Plaintiff Class.

51. According to the Idaho State Department of Education Enrollment By Building Spread Sheet 2018-2019, there are currently about 22,000 school children (state-wide) (and hundreds within the West Ada School District) who are members of the Class and literally thousands of parents and guardians who are members of the class, making the members of the Plaintiff Class so numerous that joinder of all class members is impracticable.

52. Plaintiffs' claims are typical of the claims of the members of the Plaintiff Class. Plaintiffs and all members of the Plaintiff Class sustained economic damages as a result of the wrongful and unconstitutional assessment and taking of kindergarten enrollment fees.

53. Plaintiffs will fairly and adequately protect the interests of the members of the Plaintiff Class and have retained counsel competent and experienced in class action litigation as well as prosecution of actions of this nature.

54. A class action is superior to other available methods for a fair and efficient adjudication of this controversy. Since the damages suffered by each individual Plaintiff Class Member may be relatively small and geographically diverse, the expense and burden of individual litigation makes it impossible for the Plaintiff Class Members individually to seek redress for the wrongful conduct alleged.

55. Common questions of law and fact exist as to all members of the Plaintiff Class, which predominate over questions affecting solely individual members of the class.

56. Plaintiffs know of no difficulty which will be encountered in the management of this litigation precluding its maintenance as a Plaintiff Class action.

57. Among the questions of law and fact common to the Plaintiff Class are:

- (a) The proper interpretation of the constitutional mandate for "free" schools;
- (b) The types of fees which are impermissible under Article IX, Section 1 of the Idaho Constitution;
- (c) Whether the fees wrongfully charged must be refunded;
- (d) The terms of a Declaratory Judgment;
- (e) Whether Idaho Code §33-603 should be declared

unconstitutional to the extent it conflicts with the mandate of Article IX, § 1;

- (f) The applicability, if any, of CBECA, §6-2201, *et seq.*;
- (g) Plaintiffs' standing to assert constitutional claims separate and apart from CBECA, including but not limited to claims brought directly under the Idaho Constitution; the

Fifth and Fourteenth Amendments to the United States
Constitution; and under 42 U.S.C. § 1983.

B. Certification Of A “Defendants Class Action”³

58. Plaintiffs request that the other 114 Idaho School Districts and the 54 Charter Schools be certified as a "Defendant Class" pursuant to IRCP Rule 77 in that they meet the qualifications applicable to them as articulated in hereinabove under paragraphs, 45 thru 57 (which are incorporated as though fully set forth herein) as well the following requirements especially applicable to defendant classes.

59. The defendant class is defined as follows:

Those school districts and Charter Schools in the State of Idaho which have been:

- (a) Failing to provide 1/2 day of **free** Kindergarten, and/or
- (b) Been assessing and collecting fees for a second 1/2 day.

59. The certification of this defendant class comports with IRCP Rule 77 requirements of numerosity because the defendants number one hundred sixty-nine (168) schools.

60. The categories of (a) unconstitutionally assessed fees and (b) failure to provide free Kindergarten are typical as against each Putative Defendant, pose common questions of

³ The Court’s attention is invited to NEWBERG ON CLASS ACTIONS, 4th Ed., 2002, Vol. 3, Sections 4:46 thru 4:72, pages 336 thru 418. There it is stated in Section 4:46 at pages 338-9: Defendant class actions have a long history in the United States. As early as 1853, the Supreme Court in *Smith v. Swormstedt* 57 U.S. 288 (1853) upheld an action by a plaintiff class against a defendant class noting the well-established common law rule which permits such class suits. Authority for plaintiff and defendant classes was codified in Federal Equity Rule 38, re-codified in Federal Rule of civil Procedure 23 and carried forward to current rule 23 in the 1966 amended version. The defendant class still plays an important, though diminished, role in contemporary class litigation.

fact and law, and meet the requirement of commonality, all of which is demonstrated in the statement of facts, *supra*.

61. Under both the “Plaintiffs’ Class Action” and the “Defendant Class Action,” the unconstitutional assessment and collection of Kindergarten fees constitutes an “unlawful taking without just compensation” under the Fifth and Fourteenth Amendments to the U.S Constitution and 42 U.S.C. § 1983 *et sec.*, as well as under Article I, Section 14 of the Idaho Constitution.

62. The defendant West Ada Joint School District #2 is positioned to and will adequately represent the interest of all 115 Idaho school districts and 54 charter schools.

63. The defense counsel who will make appearance can adequately represent the interests of the defendant class.

64. The requirements of due process and adequate notice to the Putative Defendant class members will have been met by notice to all school districts of the filing of this action and of their right to seek leave of court intervene.

65. All putative defendant schools are subject to the jurisdiction of this Court.

V. Causes of Action and Basis for Relief

66. Based upon the facts and authorities hereinabove alleged, the Plaintiffs and Putative Class Members assert their right for Declaratory Judgment and Orders for Restitution, Refund, rebate under:

- (1) Article IX, Section 1 and Article I, Section 14 of the Idaho Constitution,
as well as the
- (2) Fifth and Fourteenth Amendments to the U.S. Constitution and Title 42
U.S.C. § 1981 *et seq.*, as well as

(3) The Constitutionally Based Educational Claims Act Idaho Code §6-2201, *et seq.*

VI. Attorney Fees

67. Plaintiffs seek an award of reasonable attorney fees under 42 U.S.C. § 1988; and/or the "Private Attorney General Doctrine," and/or the "Collective Fund Doctrine;" and/or Idaho Code Section 12-121.

WHEREFORE, Plaintiffs pray judgment as follows:

1. Certification of both Plaintiffs and Defendants class actions for pursuant to IRCP 77.
2. Declaratory Judgment that school fees assessed and collected by the Defendants for Kindergarten constitute a Constitutional violation, deprivation of property without due process and/or taking of private property without just compensation, in violation of Article IX, Section 1 and Article I, Section 14 of the Idaho Constitution as well as the Fifth and Fourteenth Amendments to the U.S. Constitution.
3. Restitution, rebate or reimbursement of fees unconstitutionally assessed and collected;
4. An Order appointing a claims administrator to supervise the restitution of and payment of damages to each class member who makes a claim under a protocol and notice procedure to be proposed by counsel and approved by the Court;
5. For reasonable attorney fees Attorney Fees under 42 U.S.C. § 1988; and/or the "Private Attorney General Doctrine," and/or the "Collective Fund Doctrine;" and/or Idaho Code Section 12-121.

6. For costs and disbursements incurred herein; and
7. For such further relief as may be meet and equitable in the premises.

Dated this 16th day of July 2019.

/s/ Robert C. Huntley

/s/ T. Jason Wood

Attorneys for Plaintiffs