IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS,
IN THE MATTER OF PROCEEDINGS BEFORE THE
THREE-JUDGE PANEL APPOINTED PURSUANT TO
K.S.A. 72-64b03 *IN RE* SCHOOL FINANCE
LITIGATION, to-wit:

LUKE GANNON and GRACE GANNON, by their next friends and guardians, Jeff and Meredith Gannon; JADA BURGESS and JETT BURGESS, by their next friend and guardian, Andrea Burgess; OLIVIA KENNEDY, by next friend and guardian, Jennifer Kennedy; COLTEN OAKMAN, by next friend and guardian, Schelena Oakman; CAMERON PINT, by next friend and guardian, Martha Pint; ALEXIS SEEBER and BRADY SEEBER, by their next friends and guardians, David and Misty Seeber; LEVI CAIN, by next friends and guardians, John and Becky Cain; JEREMY COX, by next friends and guardians, Darrin and Lois Cox; ALEC ELDREDGE, by next friends and guardians, Danie and Josh Eldredge; JOSEPH HOLMES, by next friends and guardians, Jim and Joy Holmes; LILY NEWTON, by next friends and guardians, Matt and Ivy Newton; ALEXANDER OWEN, by next friend and guardian, Glenn Owen; MIKE RANK, by next friend and guardian, Ryan Rank; QUANTEZ WALKER, by next friend and guardian, Beulah Walker; MARIXSA ALVAREZ, by next friend and guardian, Bianca Alvarez; PRISCILLA DEL REAL and VALERIA DEL REAL, by their next friend and guardian, Norma Del Real; TONATIUH FIGUEROA, by next friend and guardian, Adriana Figueroa; DULCE HERRERA, GISELLA HERRERA, and KAROL HERRERA, by their next friend and guardian, Eva Herrera; MIQUELA SHOTGUNN, by next	Case No. 10C1569

friend and guardian, Rebecca Fralick;)
ALEXI TRETO, by next friend and guardian,)
Consuelo Treto; TED BYNUM, by next friend)
and guardian, Melissa Bynum; BRIEANNA)
CROSBY, by next friends and guardians,)
Evette Hawthorne-Crosby and Bryant)
Crosby; GEORGE MENDEZ, by next friends and)
guardians, George and Monica Mendez; AMALIA)
MURGUIA, by next friends and guardians,)
Sally and Ramon Murguia; NATALIE WALTON,)
by next friend and guardian, Clara Osborne;)
UNIFIED SCHOOL DISTRICT NO. 259;)
UNIFIED SCHOOL DISTRICT NO. 308;)
UNIFIED SCHOOL DISTRICT NO. 443; and)
UNIFIED SCHOOL DISTRICT NO. 500,)
)
)
Plaintiffs,)
)
vs.)
)
STATE OF KANSAS,)
)
Defendant.)
)

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

INTRODUCTION

This is a "school finance" action filed by four school districts, which include USD 259 in Wichita, USD 308 in Hutchinson, USD 443 in Dodge City, and USD 500 in Kansas City, Kansas. The Plaintiffs also include individual parents and students in the Plaintiff school districts. This three judge panel was appointed pursuant to K.S.A. 72-

64b03 to determine this case. Venue was selected by this panel to be in Shawnee County.

The Plaintiffs challenge the constitutionality of the Kansas system of financing public education. In eight separate counts, the Plaintiffs allege:

> 1. Violation of the requirement that the Legislature provide for suitable finance of the educational interests of the State under the Kansas Constitution Article 6, Subsection 6(b). Plaintiffs claim that, when adopting a formula for financing public education as required by the Constitution, the State must do three things: (1) Provide students with a suitable education; (2) consider the actual cost of providing a constitutionally suitable education; and (3) distribute the funds equitably. Plaintiffs claim that the State has failed to meet its constitutional mandate and, at the same time, when educational costs have increased and student achievement requirements have increased, the State has continued to allow tax cuts and abatements that reduce revenue.
>
> 2. Suspended capital outlay equalization payments. The Plaintiffs contend that capital outlay equalization payments were incorporated into the school funding formula to combat wealth-based disparities in raising funds for capital expenditures. Plaintiffs contend that approximately half of all Kansas school districts are entitled to capital outlay equalization. Plaintiffs contend that the State failed to distribute capital outlay equalization to school districts during the 2009-2010 fiscal year, legislatively suspended equalization payments during the 2010-2011, 2011-2012 and 2012-2013 fiscal years and plan to suspend payments for the and 2013-2014 fiscal year by the 2012 Omnibus Appropriations Act. Plaintiffs contend that the

State's action creates an inequitable distribution of funds in violation of the Kansas Constitution;

3. Unconstitutionality of Omnibus Appropriation Acts. Plaintiffs contend that the Omnibus Appropriations Act of 2009, the Omnibus Appropriations Act of 2010, and the Omnibus Appropriations Act of 2011 are unconstitutional and void in contravention of Article 2, subsection 16 of the Kansas Constitution;

4. Substantive Due Process. Plaintiffs contend that in Kansas, both education and a suitable provision for the finance of the educational interests of the State are a fundamental right;

5. Equal Protection. Plaintiffs contend that in Kansas, both education and the suitable provision for the finance of the educational interests of the State are a fundamental right and that the State, through components of the current funding formula combined with the under-appropriation of money to fund the formula, has denied certain students and school districts equal protection of the law as guaranteed by Section 1-2 of the Bill of Rights of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution;

6. Unconstitutionality of K.S.A. 72-64b03(d). Plaintiffs contend the Act is unconstitutional because it is a legislative attempt to limit the powers of the judiciary in a manner which transgresses the separation of powers by restricting the judiciary's ability to determine and interpret the proper remedy for a violation of Article 6 of the Kansas Constitution;

7. Failure to comply with the mandates of K.S.A. 72-64c03. The Act provides: "The appropriation of monies necessary to pay general state aid and supplemental general state aid under the School District Finance and Quality Performance Act and

state aid for the provision of special education and related services under the Special Education for Exceptional Children Act shall be given first priority in the legislative budgeting process and shall be paid first from existing state revenues. Plaintiffs contend that the State has failed to meet this duty; and

8. Failure to comply with the mandates of K.S.A. 72-64c04. Plaintiffs contend that the State had a duty, under the Act, to increase state aid to schools by not less than a percentage equal to the percentage increase in the consumer price index. Although the Act is now sunset and expired June 30, 2010, the plaintiffs claim that the State failed to meet that duty during the time that the requirement was in effect and by not meeting the duty during the time it was effective, the under-funding has been compounded into future years.

The State generally denies the Plaintiffs' claims and contends that this panel's jurisdiction is limited to whether the legislation is reasonably related to the mandates of Article 6, Section 1 and 6 and is not arbitrary.

1. Suitability of Funding. As to Count 1, the State contends that the school finance system in place satisfies Article 6, Section 6 of the Kansas Constitution and that the State had a rational, reasonable and non-arbitrary basis for its school funding decisions and its school finance legislation. The State contends that its decisions are presumed constitutional. The State further contends that the state, local and federal funding in place has combined to sustain per pupil funding. The State further contends that the cuts to funding were necessitated in response to the worst economic crisis since the Great Depression.

2. Suspension of Capital Outlay Equalization Payments. The State contends there is no private cause of action for a violation of K.S.A. 72-8814. Alternatively, the State claims that Plaintiff's claim is barred by immunity; that this Court lacks jurisdiction to mandate appropriation of funds and that Plaintiffs' claim for FY 2010 to FY 2011 capital outlay state aid is barred by latches.

3. Omnibus Appropriations Acts. The State claims there is no private cause of action for a violation of K.S.A. 72-8814, that the omnibus legislation is presumed constitutional, and that the legislation does not violate Article 2, Section 16 of the Kansas Constitution.

4. Substantive Due Process. The State contends that education is not a fundamental right under the Kansas or United States Constitutions and, therefore, a substantive due process claim cannot arise. The State generally denies Plaintiffs' claims and contends that the State's decisions had and have a rational basis. The State also claims sovereign immunity.

5. Equal Protection. The State contends that education is not a fundamental right under the Kansas or United States Constitutions. The State contends that the Kansas Supreme Court found equal protection rights were not violated by any of the same or similar provisions in the school finance laws at issue in Plaintiffs' claims. The State claims sovereign immunity and that its decisions had and have a rational basis.

6. Constitutional Challenge of K.S.A. 72-64b03(d). The State claims that Plaintiffs' claim is not ripe, and the State generally denies the claim.

7. Failure to Comply with the Mandates of K.S.A. 72-64c03. The State generally denies the claim and states that Plaintiffs' claim is moot.

8. Failure to Comply with the Mandates of K.S.A. 72-64c04. Again, the State denies the claim and claims that Plaintiffs' claim is moot.

LEGAL HISTORY

We, as a panel of judges, do not believe the present case can be well explained without reference to the past. This case finds its genesis in the dismissal of *Montoy v. State*, 282 Kan. 9, on July 28, 2006, (*Montoy IV*), whereby the Kansas Supreme Court concluded that based on its analysis, the Kansas Legislature had substantially complied, *based on the record before it*, with the prior rulings and orders of the Court in relation to the actions or inactions of the Legislature that had initially underpinned its rulings in regard to the constitutional efficacy of the Kansas School District Finance and Quality Performance Act, K.S.A. 72-6405, *et seq.*, and other legislative measures taken or omitted, in regard to K-12 school funding as raised in *Montoy*.

The *Montoy* case, itself, had its initial

beginnings in a case filed in the District Court of Shawnee County on December 14, 1999, which was initially dismissed by the District Court on November 21, 2001, based, fundamentally, on the existing pleadings and grounded on the holding in a prior case of the Kansas Supreme Court in *U.S.D. 229 v. State*, 256 Kan. 232 (1994). In the latter, a constitutional challenge had been made to the School District Finance and Quality Performance Act, a 1992 enactment of the Legislature, along with certain other statutes facilitative thereof. The *U.S.D. 229* case attacked this legislative act on its provisions alone, which, in constitutional legal parlance, is categorized as a *facial* challenge to a law. A "facial" constitutional challenge as opposed to an "*as-applied*" constitutional challenge can be, most simply, described as follows:

> "An appellant may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both. *See, e.g., Kan. Judicial Review v. Stout,* 519 F.3d 1107, 1118 (10th Cir.2008). 'A facial challenge is a head-on attack [of a] legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications.' *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir.2007).
>
> In contrast, '[a]n as-applied challenge

> concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the *particular circumstances* of the case." *Id.* (emphasis added); *see also New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 677 n. 5 (10th Cir.2010) ('[An] "as-applied" challenge to a law acknowledges that the law may have some potential constitutionally permissible applications, but argues that the law is not constitutional as applied to [particular parties].').
>
> 'The nature of a challenge depends on how the *plaintiffs* elect to proceed—whether they seek to vindicate their own rights based on *their own circumstances* (as-applied) or whether they seek to invalidate a[ ] [statute] based on how it affects them *as well as other conceivable parties* (facial).' *Scherer v. United States Forest Serv.,* 653 F.3d 1241, 1245 (10th Cir.2011) (second and third emphases added)."

U.S. v. Cavel, 668 F.3d 1211,1217 (10th Cir. 2011).

The principal claims of the Plaintiffs in *U.S.D. 229* rested in the referenced *Act's* asserted encroachment on local school board authority, which was sought to be declared violative of Article 6, § 5, of the Kansas Constitution's educational article and, as more relevant to the current case now under review, a claim under Article 6, § 6(b) of that *Article*, where the Kansas Supreme Court articulated its parameters as follows:

> "Article 6, § 6(b) provides, in pertinent part, 'The legislature shall make suitable provision for finance of the educational interests of the

state.'

In this issue, it is claimed the Act is violative of § 6(b) of Article 6 in that it fails to make the mandated 'suitable provision.' Much of the argument leads directly back to the first issue, that is, the financing provisions of the Act are not suitable because they infringe on the local control provisions of § 5 of Article 6, previously discussed.

In this issue, districts which have seen their funding reduced by the Act presented evidence of how they have had to reduce programs, personnel, etc., to accommodate the reduced funding. They argue the funding is not 'suitable' when it results in cutting programs deemed necessary by the local boards of education. They acknowledge there is a wide disparity in per pupil spending but argue the legislature is improperly cutting off the mountain tops to fill in the valleys. There was testimony, however, that some school districts believed they had greater local control under the Act.

The district court correctly held that the issue for judicial determination was whether the Act provides suitable financing, not whether the level of finance is optimal or the best policy. The district court's analysis of this issue first considered decisions from other states and then analyzed Kansas law."

256 Kan. at 554.

The Supreme Court then reviewed the financing scheme and applied a rational basis test in scrutinizing any disparities or inequities, which is the least level of constitutional scrutiny for legislative compliance with a constitutional principle under review, and upheld the

legislation claimed affecting these sections of *Article 6* and further rejected some other constitutional claims based on the procedural aspects of the statute's enactment. The parameters for a rational basis review of legislation claimed impacting equal protection concerns is articulated, fundamentally, as follows:

> "'The rational basis standard is a very lenient standard. All the Court must do to uphold a legislative classification under the rational basis standard is perceive any state of facts which rationally justifies the classification. *Kellems v. Commissioner of Internal Revenue,* 58 T.C. 556, 558 [1972 WL 2462] (1972), *aff'd* 474 F.2d 1399 (2d Cir.), *cert. denied* 414 U.S. 831 [94 S.Ct. 63, 38 L.Ed.2d 66] (1973). "Relevance is the only relationship required between the classification and the objective." *Stephenson [v. Sugar Creek Packing],* 250 Kan. at 774 [830 P.2d 41 (1992)]. See also *Stephens v. Snyder Clinic Ass'n,* 230 Kan. 115, 129, 631 P.2d 222 (1981) (stating that a classification which may result in some inequality only violates equal protection if the classification is "irrelevant" to the goals the State intended to achieve through passage of the statute). A classification is "relevant" to its intended goal if it is rationally related to the legitimate legislative purpose behind the statute. *Thompson v. KFB Ins. Co.,* 252 Kan. 1010, 1018, 850 P.2d 773 (1993). However, a statute cannot classify persons into groups based on a criteria which is "wholly unrelated" to the goal of the statute. *Henry [v. Bauder],* 213 Kan. [751] at 753-54 [518 P.2d 362 (1974)]. A classification "'"must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."'" *Thompson,*

> 252 Kan. at 1018 [850 P.2d 773] (quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560 [561-61] 64 L.Ed. 989 [(1920)]).
>
> > "Although the rational basis standard requires that the discriminatory classification ... be rationally related to valid state interests or goals, the standard does not require that the classification be the perfect solution to achieve such goals. See *Thompson,* 252 Kan. at 1021 [850 P.2d 773] (When the legislature must draw a line and '"'there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless [the court] can say that it was very wide of any reasonable mark.'"'); *[State ex rel. Schneider v.] Liggett,* 223 Kan. [610] at 619 [576 P.2d 221 (1978)] ('Establishment of classifications with mathematical precision is not required.')."'"

Injured Workers of Kansas v. Franklin, 262 Kan. 840, 847-848, 942 P.2d 591 (1997); *Peden v. Kansas Dept. of Revenue,* 261 Kan. 239, 258-259 (1996), *cert. denied* 520 U.S. 1229 (1997).

On appeal, the District Court's opinion in *Montoy I* was reversed, stating the then Plaintiffs' petition, particularly, its proffered amended petition, carried an assertion of facts, which due to the passage of time, as well as changes in the law since the *U.S.D. 229* case had been decided, should be allowed to be factually explored.

"The judgment entered by the district court in this case fails to address the factual allegations of the plaintiffs except to say that all allegations of the plaintiffs are without merit and resolved by our recent decision in *U.S.D. 229* v. *State*, 256 Kan. 232, 885 P2d 1170 (1994). As more fully discussed below, giving the plaintiffs the benefit of all reasonable inferences that may be drawn from the record, we conclude that there remain genuine issues of material fact not shown to be a sham, frivolous, or so unsubstantial that it would be futile to try the case. See *Green*, 197 Kan. at 790.

In Count I involving the suitability of school finance, the plaintiffs assert that state law no longer contains educational goals or standards and that the State Board has not issued any regulations containing academic standards or objective criteria against which to measure the education Kansas children receive. The 10 goals quoted by *U.S.D. 229* are no longer part of the statute. L. 1995, ch. 263, § I. What remains is a statutory requirement that the State Board adopt an accreditation system that is 'based upon improvement in performance that reflects higher academic standards and is measurable.' K.S.A. 2001 Supp. 72-6439(a). While the amendment to K.S.A. 72-6439(a) may not represent a serious shift in the goals of public education in the state of Kansas, we believe that the suitability analysis required by *U.S.D. 229* is more rigorous than presumed by the district court.

U.S.D. 229 relied on the legislature to promulgate standards but asserted that the ultimate question on suitability must be one for the court. Accreditation is a "base," but *U.S.D.* 229 also quoted the following caveat from the district court in that case:

> '"The issue of suitability is not stagnant; past history teaches that this issue must be closely monitored. Previous school finance

legislation, when initially attacked upon enactment or modification was determined constitutional. Then, underfunding and inequitable distribution of finances lead to judicial determination that the legislation no longer complied with constitutional provisions.'" 256 Kan. at 258.

U.S.D. 229, quoting the district court, noted that '"while the issues raised by Plaintiffs raise serious policy questions, the arguments do not compel a determination that the financing is not 'suitable' at the present time.'" 256 Kan. at 258. We conclude that this case is sufficiently removed in time from our decision in *U.S.D. 229* so as to preclude summary application of *U.S.D. 229* to dispose of the plaintiffs' claims.

In this case, the plaintiffs assert the following facts are disputed in the memorandum to determine legal issues in advance of trial:

'The state law no longer contains educational goals or standards;

'the BOE has not issued any regulations containing academic standards or objective criteria against which to measure the education Kansas children receive;

'the amount of Base State Aid Per Pupil (BSAPP) has not kept up with inflation. For FY 2003, the BOE requested approximately $635 million in additional educational funding;

'school districts are still required to raise capital outlay expenses locally, and the four mill levy limit has been removed, allowing wealthier districts even greater access to capital outlay expenditures than poorer districts and thus increasing funding disparities; see K.S.A. 72-8801. In *Mock*, this Court specifically held that Article 6(b) of the Constitution, in its direction to the

legislature to provide suitable financing, makes the state responsible for capital expenses. *Mock, supra* at 501. See also *Wyoming* v. *Campbell County School District. et al.*, 2001 WY 19, 19 P.3d 518, 557 (Wyo. 2001) (capital construction financing system based upon a school district's assessed valuation necessarily depends on local wealth creating unconstitutional disparities in educational opportunities.);

'the school finance formula provides widely differing amounts of revenue to different districts;

'the number of minority students in the plaintiff school districts has increased dramatically;

'a substantial gap exists between the performance of minorities and whites and between students in the free and reduced lunch programs and those not in these programs, on state standardized tests;

'the 2001 legislature changed the finance formula to allow school boards to raise a greater proportion of funds with local taxes creating disparities in educational opportunity;

'the plaintiff school districts must raise money locally through the "local option budget" ('LOB') or the capital outlay fund to meet the minimum school accreditation requirements;

'the LOB was originally capped at 25% of the general fund budget of the local school district, and was designed to decrease as the base state aid per pupil increased, in an attempt to achieve parity statewide over time. In the 1993 legislative session this equalizing method was abandoned and the LOB was allowed to increase as the BSAPP increased;

> 'the plaintiff school districts raise less money per pupil with each mill levy than wealthier districts;
>
> 'increased reliance on local taxes has resulted in a less advantageous education in the plaintiff school districts than in wealthier districts;

275 Kan. at 152-154.

In legal parlance, the Supreme Court found the plaintiffs were entitled, principally, to an *as- applied* constitutional challenge of the law.

Thus, when *Montoy I* returned the case to the District Court, a trial of the issues ensued and the District Court made certain findings favorable to Plaintiffs, which, on a then second appeal to the Kansas Supreme Court (*Montoy v. State*, 278 Kan. 769 (2005)) (*Montoy II*), that Court affirmed the District Court's judgment that the Legislature had failed to "make suitable provision for finance of the public schools" but on a basis less expansive than that adopted by the District Court:

> "1. We reverse the district court's holding that SDFQPA's financing formula is a violation of equal protection. Although the district court correctly determined that the rational basis test was the proper level of scrutiny, it misapplied that test. We conclude that all of the funding differentials as provided by the SDFQPA are rationally related to a legitimate legislative purpose. Thus, the SDFQPA does not violate the Equal Protection Clause of the Kansas or United

States Constitutions.

2. We also reverse the district court's holding that the SDFQPA financing formula has an unconstitutional disparate impact on minorities and/or other classes. In order to establish an equal protection violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 60 L. Ed. 2d 870 (1979). No discriminatory purpose was shown by the plaintiffs. Thus, the SDFQPA is not unconstitutional based solely on its 'disparate impact.'

3. We affirm the district court's holding that the legislature has failed to meet its burden as imposed by Art. 6, § 6 of the Kansas Constitution to 'make suitable provision for finance' of the public schools.

. . .

Following the trial, the district court made findings regarding the various statutory and societal changes which occurred after the decision in *U.S.D. No. 229* and affected school funding. Regarding societal changes, the district court found: (1) 36% of Kansas public school students now qualify for free or reduced-price lunches; (2) the number of students with limited proficiency in English has increased dramatically; (3) the number of immigrants has increased dramatically; and (4) state institutions of higher learning now use more rigorous admission standards.

Additionally, the district court found a number of statutory changes made after the decision in *U.S.D. No. 229* which affected the way the financing formula delivers funds: (1) the goals set out in K.S.A. 72-6439(a) were removed; (2) the SDFQPA's provision requiring an oversight committee to ensure fair and equitable funding was allowed to expire; (3) the low enrollment

> weighting was changed; (4) correlation weighting was added; (5) at-risk pupil weighting was changed; (6) the mill levy was decreased from 35 mills to 20 mills; (7) a $20,000 exemption for residential property was added to the mill levy, also decreasing revenue; (8) a new facilities weighting was added; (9) special education funds were added to the calculation to increase the base on which the local option budget funding was calculated; (10) ancillary weighting was added; (11) the cap on capital outlay authority was removed; and (12) most special education funds were limited to reimbursement for 85 percent of the costs incurred in hiring special education teachers and paraprofessionals.
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> . . .
>
> The plaintiffs argued and the district court found that the cumulative result of these changes is a financing formula which does not make suitable provision for finance of public schools, leaving them inadequately funded."

278 Kan. at 771-773.

Significant declarations were made in *Montoy II* going to the issue of the government's compliance with the Kansas Constitution Article 6, § 6(b)'s "suitable provision". The Court said:

> "The concept of 'suitable provision for finance' encompasses many aspects. First and perhaps foremost it must reflect a level of funding which meets the constitutional requirement that '[t]he legislature shall provide for intellectual, educational, vocational and scientific *improvement* by establishing and maintaining public schools....' (Emphasis added.) Kan. Const. art. 6, § 1. The Kansas Constitution thus imposes a mandate that our educational system cannot be

static or regressive but must be one which 'advance[s] to a better quality or state.' See Webster's II New College Dictionary 557 (1999) (defining 'improve'). In apparent recognition of this concept, the legislature incorporated performance levels and standards into the SDFQPA and, although repealing the 10 goals which served as the foundation for measuring suitability in the *U.S.D. No. 229* decision, has retained a provision which requires the State Board of Education to design and adopt a school performance accreditation system 'based upon improvement in performance that reflects high academic standards and is measurable.' K.S.A. 72-6439(a). Moreover, the legislature mandated standards for individual and school performance levels 'the achievement of which represents excellence in the academic area at the grade level to which the assessment applies.' K.S.A. 72-6439(c).

Through these provisions, the legislature has imposed criteria for determining whether it has made suitable provision for the finance of education: Do the schools meet the accreditation requirements and are students achieving an 'improvement in performance that reflects high academic standards and is measurable'? K.S.A. 72-6439(a).

These student performance accreditation measures were utilized in 2001 when the legislature directed that a professional evaluation be performed to determine the costs of a suitable education for Kansas school children. In authorizing the study, the legislature defined 'suitable education.' K.S.A. 2003 Supp. 46-1225(e). The Legislative Education Planning Committee (LEPC), to whom the task of overseeing the study was delegated, determined which performance measures would be utilized in determining if Kansas' school children were receiving a suitable education. The evaluation, performed by Augenblick & Myers, utilized the

criteria established by the LEPC, and, in part, examined whether the current financing formula and funding levels were adequate for schools to meet accreditation standards and performance criteria. The study concluded that both the formula and funding levels were inadequate to provide what the legislature had defined as a suitable education.

Although in *Montoy I,* 275 Kan. at 153-55, 62 P.3d 228, we concluded that accreditation standards may not always adequately define a suitable education, our examination of the extensive record in this case leads us to conclude that we need look no further than the legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula. Within that record there is substantial competent evidence, including the Augenblick & Myers study, establishing that a suitable education, as that term is defined by the legislature, is not being provided. In particular, the plaintiff school districts (Salina and Dodge City) established that the SDFQPA fails to provide adequate funding for a suitable education for students of their and other similarly situated districts, *i*.e., middle- and large-sized districts with a high proportion of minority and/or at-risk and special education students. Additional evidence of the inadequacy of the funding is found in the fact that, while the original intent of the provision for local option budgets within the financing formula was to fund 'extra' expenses, some school districts have been forced to use local option budgets to finance general education.

Furthermore, in determining if the legislature has made suitable provision for the finance of public education, there are other factors to be considered in addition to whether students are provided a suitable education. Specifically, the district court found that the financing formula was not based upon actual costs

> to educate children but was instead based on former spending levels and political compromise. This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors."

278 Kan. at 773-775.

We, note, however, a significant minority of the Court in *Montoy II* (3 of 7) thought the "strict scrutiny test" for the review of constitutional equal protection challenges should have been employed once it is shown that the legislation challenged "actually or functionally deny the fundamental right to educate". This minority of the Court thought the right to education in Kansas was a fundamental right. *Id.* at pp. 317-318.

A "strict scrutiny" constitutional analysis requires that a Defendant assume the burden of proof and show "that the classification is necessary to serve a compelling state interest." *U.S.D. 229* at p. 260 quoting *Farley v. Engelken*, 241 Kan. 663, 670 (1987). However, this minority did not go further and take its strict scrutiny analysis to the facts presented, but, rather, concurred in the judgment rendered.

We would note here that there is also an intermediate level of constitutional scrutiny, termed "heightened

scrutiny", which allows a court to examine whether the reason for the classification is one that would "substantially further a legitimate legislative purpose" or, otherwise, "must serve important governmental objectives and must be substantially related to achievement of those objectives". *U.S.D. 229* at p. 260 quoting respectively, *Farley,* 241 Kan. at p. 261 and *Craig v. Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397 (1976). The burden of proof relative to "heightened scrutiny" would remain on the challenger as is the case with the rational basis test.

The *Montoy II* Court concluded its *Opinion*, as follows:

> "We have in this brief opinion endeavored to identify problem areas in the present formula as well as legislative changes in the immediate past that have contributed to the present funding deficiencies. We have done so in order that the legislature take steps it deems necessary to fulfill its constitutional responsibility. Its failure to act in the face of this opinion would require this court to direct action to be taken to carry out that responsibility. We believe further court action at this time would not be in the best interests of the school children of this state.
>
> The legislature, by its action or lack thereof in the 2005 session, will dictate what form our final remedy, if necessary, will take. To ensure the legislature complies with our holding, we will withhold our formal opinion until corrective legislation has been enacted or April 12, 2005, whichever occurs first, and stay the issuance of our mandate in this case."

278 Kan. at p. 776.

Thus, holding on to its jurisdiction obtained by *Montoy II* and eschewing its own remedy in favor of, and in deference to, a legislative solution to the legal defects it noted in the legislation, the Kansas Supreme Court awaited the Legislature's response, which was expressed by the passage of new bills (2005 HB2247 and 2005 SB3). On May 11, 2005, the Court held what it described as a "show cause" hearing, whereby the parties were to address whether the enacted bills were facially sufficient to cure the *Montoy II* legal deficiencies, as noted, and whether fact finding was necessary in order to evaluate the changes on the basis of an as-applied challenge, or, if not, to suggest the form of remedy and its timeline. Since the *Montoy II* proceeding was at that time in the remedial, *i.e.*, compliance, phase of the *Montoy II* holding, the burden of proof was allocated to the Defendant.

On June 3, 2005, the Court issued a supplemental opinion. 278 Kan. 817 (*Montoy III*). Though then in the remedial phase, the *Montoy III* Court's articulation of its own holdings in its *Montoy II* opinion are instructive:

> "In our January opinion, this court reversed the district court in part and affirmed in part,

> agreeing that the legislature had failed to make suitable provision for finance of the public school system and, thus, had failed to meet the burden imposed by Article 6, § 6 of the Kansas Constitution. *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160 (2005) (*Montoy II*). Among other things, we held that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.*, as funded, failed to provide suitable finance for students in middle-sized and large districts with a high proportion of minority and/or at-risk and special education students; some school districts were being forced to use local option budgets (LOB) to finance a constitutionally adequate education, *i.e.*, suitable education; the SDFQPA was not based upon actual costs, but rather on former spending levels and political compromise; and the failure to perform any cost analysis distorted the low-enrollment, special education, vocational education, bilingual, and at-risk student weighting factors.
>
> We further held that among the critical factors for the legislature to consider in achieving a suitable formula for financing education were 'equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs.' We provided this guidance because 'the present financing formula increases disparities in funding, not based on a cost analysis, but rather on political and other factors not relevant to education.' We also held that 'increased funding will be required.' *Montoy II*, 278 Kan. at 775, 102 P.3d 1160."

279 Kan. at 818-819.

Further, the *Montoy III* opinion directed the Legislature to provide a funding increase, directing as follows:

"The legislature has known for some time that increased funding of the financing formula would be necessary. In July 2002, the Kansas Department of Education prepared a computation of the cost of implementing the recommendations in the A & M study. Calculated in 2001 dollars the total cost of the increase would have been $725,669,901 for each school year. Additionally, the Department adjusted that number because of changes in LOB funding and applied a 2 percent inflation factor for each of the school years of 2001-02, 2002-03, and 2003-04. The resulting number was an increase in costs of approximately $853 million. As noted, the A & M study was commissioned by the legislature, monitored by the legislature's committees, paid for by the legislature with tax dollars, and received by the legislature. Although the State claims it considered the A & M study, it in fact chose to impugn its design and ignore its recommendations. It can no longer do so.

This case is extraordinary, but the imperative remains that we decide it on the record before us. The A & M study, and the testimony supporting it, appear in the record in this case. The State cites no cost study or evidence to rebut the A & M study, instead offering conclusory affidavits from legislative leaders. Thus the A & M study is the only analysis resembling a legitimate cost study before us. Accordingly, at this point in time, we accept it as a valid basis to determine the cost of a constitutionally adequate public education in kindergarten through the 12th grade. The alternative is to await yet another study, which itself may be found legislatively or judicially unacceptable, and the school children of Kansas would be forced to further await a suitable education. We note that the present litigation was filed in 1999.

. . .

As set forth earlier in this opinion, the Legislative Division of Post Audit has been

> commissioned to conduct a comprehensive and extensive cost study to be presented to the 2005-06 legislature. With such additional information available, the legislature should be provided with the cost information necessary to make policy choices establishing a suitable system of financing of Kansas public schools.
>
> We conclude, however, that additional funding must be made available for the 2005-06 school year to assist in meeting the school districts' immediate needs. We are mindful of the Board's argument that there are limits on the amount the system can absorb efficiently and effectively at this point in the budget process. We further conclude, after careful consideration, that at least one-third of the $853 million amount reported to the Board in July of 2002 (A & M study's cost adjusted for inflation) shall be funded for the 2005-06 school year."

279 Kan. at 844-845.

The history of *Montoy v. State* reflects yet a *Montoy IV* opinion which the Supreme Court issued July 28, 2006, 282 Kan. 9, that emanated from hearings held on July 8, 2005 and on May 22, 2006. As *Montoy IV* subsequently reflected, the Governor and Legislature responded to the Court's *Montoy II's* findings of school financing formula inadequacy and *Montoy III's* accompanying funding mandate by calling a special session of the legislature in June-July, 2005, which efforts were further followed through and concluded in the 2006 Session of the Legislature. The *Montoy IV* Court opinion recited as follows:

"Thereafter, on July 6, 2005, the legislature enacted S.B. 3 (L. 2005 Special Session, ch. 2), which provided a funding increase of $147 million over the $142 million provided by H.B. 2247.

With respect to the various components of the formula, S.B. 3 increased the BSAPP by another $35 to $4,257; increased the at-risk weighting from .145 to .193; increased funding for special education by raising the excess cost reimbursement from 88 percent in 2006-07 to 92 percent; lowered the enrollment cut-off for the low enrollment weighting from 1,725 students to 1,662; restored the correlation weighting with a threshold of 1,622 students; eliminated the cap on LOB equalizing supplemental state aid and increased access to LOB equalization for districts with lower property valuations by raising the AVPP entitlement from the 75th percentile to the 81.2 percentile; replaced the extraordinary declining enrollment (EDE)-BOTA provision with a similar declining enrollment provision that applies more broadly to any district with a decline in enrollment from the previous year; and provided for matching state aid for districts with lower property valuations.

S.B. 3 also amended the cost study provision to require the LPA to conduct two cost studies: One would study the cost of inputs, and the other would estimate the cost of meeting student performance outcome standards adopted by the State Board of Education (Board). See K.S.A. 2005 Supp. 46-1131.

The parties appeared before the court on July 8, 2005. The issue before the court at the July 8 proceeding was whether the new legislation complied with this court's June 3, 2005, order for a minimum funding increase. At that hearing, all parties agreed that S.B. 3 complied with the court's June 3, 2005, order.

On July 8, 2005, this court held: 'The legislature, by enacting S.B. 3, has complied with our June 3 opinion regarding the minimum funding increase' for the 2005-06 school year, and we approved the school finance formula, as amended by H.B. 2247 and S.B. 3, 'for interim purposes.' *Montoy,* Order of July 8, 2005. Further, because S.B. 3 increased LOB equalization and provided increased access to such equalization, this court lifted the stay on the provision increasing the LOB authority. Order of July 8, 2005. The stay on the EDE-BOTA provision was lifted as well, because S.B. 3 replaced it with a new provision designed to benefit a larger number of districts. The stays on the cost-of-living weighting and the EDE-Joint Committee on State Building Construction (JCSBC) provisions, however, were continued.

This court retained jurisdiction 'to review further legislative action which may modify, repeal, or make permanent the temporary solution contained in S.B. 3.' Order of July 8, 2005.

On January 9, 2006, LPA completed and submitted to the legislature the cost study report commissioned by H.B. 2247/S.B. 3. As pointed out by the State in its argument before this court, the legislature referred to this report throughout its 2006 session and sought further input and explanation from LPA during the session.

Thereafter, the legislature enacted changes to the school finance formula in S.B. 549 (L. 2006, ch. 197), which was signed by the governor on May 19, 2006.

The plaintiffs then filed a motion for a show cause order and briefing schedule, and on May 22, 2006, this court ordered the parties to brief and argue the issue whether S.B. 549 satisfies our court's prior orders.

> Rather than modifying the provisions of S.B. 3/H.B. 2247, the legislature materially and fundamentally changed the way K-12 is funded in this state."

282 Kan. at 12-15.

The *Montoy IV* Court then looked at the new legislation, which was embodied in S.B. 549 emanating from that 2006 session of the Legislature. We have provided our own emphasis, shown by italics.

> "S.B. 549 adopted a 3-year funding scheme for K-12. It also alters the formula components by creating two additional at-risk weightings: the high-density at-risk weighting which provides additional at-risk funding for districts with high percentages of at-risk students; and the nonproficient at-risk weighting, which provides $10 million in additional funding in 2006-07 for students who are not proficient in reading or math, but are not classified as at-risk (eligible for the federal free lunch program).
>
> An additional fundamental change occurred in providing flexibility to local districts to spend money received for at-risk, preschool at-risk, and bilingual education programs interchangeably. More significant are the changes that S.B. 549 made in the LOB.
>
> The school finance formula provided a feature designed to equalize the ability of districts with lower property wealth to raise money through the use of the LOB. The formula was designed so that districts with an assessed valuation per pupil (AVPP) below the 75th percentile would receive supplemental aid in an amount designed to bring them up to par with the district at the 75th percentile of AVPP. Under this formula, districts with an AVPP above the 75th percentile

would not receive supplemental state aid. K.S.A. 72-6434.

The legislature has increased equalization in two ways. First, it increased the LOB equalization threshold from the 75th percentile to the 81.2 percentile of AVPP. K.S.A. 2005 Supp. 72-6434(a). Accordingly, districts with an assessed valuation per pupil below the 81.2 percentile would receive supplemental aid on the LOBs in an amount designed to bring those districts up to par with the districts at the 81.2 percentile of AVPP.

Second, the 25 percent LOB cap on supplemental general state aid was eliminated. See S.B. 3, sec. 12(b). In S.B. 549, the LOB authority was increased to 30 percent for the 2006-07 school year and 31 percent for 2007-08 and thereafter. An election would be required to adopt an LOB in excess of 31 percent. S.B. 549 did not change the AVPP threshold *and did not impose a limit on equalization supplemental aid.*

S.B. 549 further requires that such supplemental state aid be used to meet accreditation requirements, provide programs required by law, and improve student performance. S.B. 549, sec. 20(e)(1). The 3-year cumulative total of such aid under S.B. 549 is $74 million. Added to H.B. 2247/S.B. 3's increase of $47.7 million, the estimated increase since *Montoy II* is $121.7 million.

Under the prior structure, LOB state aid funding has never been considered part of the foundation level of funding provided by the State for a district's basic operating expenses. However, S.B. 549 now requires that supplemental state aid be applied to meet basic educational requirements, essentially making LOB state aid part of the foundation level of funding.

Further, the original intent and purpose of

the LOB (which would necessarily include LOB state aid) was to allow individual districts to fund enhancements to a constitutionally adequate education provided and financed by the funding formula. *Montoy III,* 279 Kan. at 834, 112 P.3d 923 (citing *Montoy II,* 278 Kan. at 774, 120 P.3d 306). S.B. 549, however, now provides that school districts are required to use LOB state aid moneys to fund basic educational expenses.

The plaintiffs point out that these changes to the LOB state aid do not provide new money and are nothing more than a 'money renaming scheme.' Regardless of whether LOB state aid is new money, the point is that these changes to the equalizing state aid provisions of the LOB component of the formula fundamentally alter the structure of the funding system.

In addition, *S.B. 549 increases the BSAPP from $4,257 to $4,316 in 2006-07; to $4,374 in 2007-08; and to $4,433 in 2008-09.* That amounts to an increase of $101.25 million over the 3 years, and $183.75 million since January 3, 2005. The low enrollment weighting adjustment was lowered to 1,637 pupils in 2006-07 and 1,622 pupils in 2007-08 and 2008-09. The high enrollment weighting (formerly the correlation weighting) threshold was lowered to correspond to the changes in the low enrollment weighting, resulting in $18.5 million over the 3-year period. At-risk weighting was increased to 0.278 for 2006-07, 0.378 for 2007-08, and 0.456 for 2008-09, resulting in an estimated 3-year cumulative increase of $152.55 million. The 3-year total for high-density at-risk is $29.6 million. Bilingual weighting remained unchanged at .395 (based upon the number of student contact hours in a bilingual program). *Special education excess costs reimbursement is set at 92 percent,* totaling an estimated $80.3 million over 3 years, and $111.5 million since January 3, 2005. S.B. 549 provides an estimated total funding increase of $466.2 million. The total increase in funding

> since January 3, 2005, is an estimated $755.6 million.
>
> S.B. 549 leaves intact the cost-of-living weighting, which is a new local property tax levy intended to allow districts with higher regional costs to raise additional revenue, purportedly to fund higher teacher salaries, although the requirement that funds be used for that purpose was removed from the statute. See 279 Kan. at 835, 112 P.3d 923. While we stayed the effect of this provision last year due to concerns about wealth-based disparities, nevertheless, this new component alters the funding formula."

282 Kan. at 15-19.

Here, we interrupt the history of this prior litigation briefly to assert what the Court was attempting to do from and after its decision in *Montoy II* that was issued in June, 2005. First, and foremost, it was reviewing subsequent legislative action to see whether its judgment in *Montoy II* had been complied with in terms of the school finance funding formula defects it had noted, including the noted underfunding it found existing. Hence, the legislative response was being measured from either the prospective of a finding of actual accomplishment or, otherwise, whether the legislative enactment, if responsive, would be seen to *facially* satisfy any constitutional defect of formula structure that led to underfunding or inequitable distribution of the funds to be made available.

What the Court could not declare as having been accomplished by past action, hence, prospective legislation that was touted as remedial, was necessarily viewed from the same legal perspective that would arise in the case of a *facial* constitutional challenge, not an *as-applied* constitutional challenge, the difference previously being noted. Hence, the Court was proceeding on the basis of the perceived promise of results from the enacted legislation. Particularly, this was so as to any of the terms of 2006 S.B. 549 that were intended to operate as a structural change to the existing school financing formula just prior and which would have an effect on expenditures to be made in the future, all of which were ostensibly based on the Legislative Post Audit - input/output - cost study that had, by then, been made available to the 2006 Legislature. Further, these anticipated future expenditures - the Legislature having complied by this time with the 2005 - 2006 funding requirements mandated by *Montoy III* to be made by this date - were then measured against the *Montoy III* declarations of the future dollar funding requirements ordered in order to see whether they would stand as substantial compliance with those declarations.

Though a minority of the Kansas Supreme Court would have held on to its jurisdiction first obtained from *Montoy I* by remanding the case at this point in the proceedings to the District Court to conduct fact finding as to the soundness of the LPA study upon which the legislature purported to act from the judicial perspective of an *as-applied* challenge rather than determining the adequacy of the Legislative response from the perspective of a *facial* challenge, hence, averting a future lawsuit, it did not do so.

Nevertheless, the choice of the latter over the former is the reason this Court is now in session. This panel's function involves an *as-applied* challenge brought by Plaintiffs challenging the State's actions taken from the point of the enactment of 2006 S.B. 549 forward, including any relevant amendments, new statutes, or legislative or executive branch actions that had an effect on K-12 school finance to date.

THIS COURT'S AUTHORITY AND THE PRINCIPLES UNDERLYING THAT AUTHORITY

Before we begin, we would like to make some general observations about both the fundamental role we play as

members of the judiciary in this proceeding, the legal principles guiding us, both by parameter or precedent in this area of the law, and what we perceive now are the issues that should draw our focus.

First, we would say that no judge nor any court wishes to be drawn into any conflict where the court's power to interpret the Constitution is set against the direct powers of one or more of the co-equal branches of government and are in such juxtaposition that the exercise of one branch's authority risks the diminishment of another branch of government's, at least perceived, authority. The judiciary's role in constitutional disputes was well declared, as follows:

> "It is sometimes said that courts assume a power to overrule or control the action of the people's elected representative in the legislature. That is a misconception. First, the duty of reapportionment is legislative in nature and is committed by the Constitution to the legislature, and courts cannot make a reapportionment themselves. Second, conforming to concepts inherent in American republican form of government, the Constitution of Kansas distributes the powers of government to three distinct and separate departments, i.e., the Executive, Legislature, and Judicial. The judiciary interprets, explains and applies the law to controversies concerning rights, wrongs, duties and obligations arising under the law and has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights

> reserved thereby to the people. In this sphere of responsibility courts have no power to overturn a law enacted by the legislature within constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such a case lies with the people. But when legislative action exceeds the boundaries of authority limited by our Constitution, and transgresses a sacred right guaranteed or reserved to a citizen, final decision as to invalidity of such action must rest exclusively with the courts. In the final analysis, this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas. (*Quality Oil Co. v. E. I. Du Pont De Nemours & Co.*, 182 Kan. 488, 493, 322 P.2d 731.) However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it."

Harris v. Shanahan, 192 Kan. 183, 206-07 (1963).

In regard to another section (Art. 2 § 16) of the Kansas Constitution, which puts procedural restraints on the Kansas legislature in the enactment of laws, the Kansas Supreme Court long ago expressed its view in regard to construing constitutional provisions. This view, as there expressed, seems *apropos* here:

> "The first part of section 16 of article 2 of the constitution of Kansas reads as follows: 'No bill shall contain more than one subject, which shall be clearly expressed in its title.' Now it is claimed that said section 6 [of certain legislation] is in conflict with this provision of the constitution, and therefore void. This is the only question involved in this case. About twenty-seven states have constitutional provisions similar to that of ours. In two of these states--

> Ohio and California--the provision is considered merely as directory to the legislature; but in all the others in which decisions upon the subject have been made, the provision is considered as mandatory. And it ought to be so considered. *It would be a dangerous doctrine to announce that any of the provisions of the constitution may be obeyed or disregarded at the mere will or pleasure of the legislature, unless it is clear, beyond all question, that such was the intention of the framers of the instrument. It would seem to be a lowering of the proper dignity of such an instrument to say that it descends to prescribing mere rules of order in unessential matters, which may be followed or disregarded at pleasure. Judge COOLEY uses the following language: 'The fact is this: that whatever constitutional provision can be looked upon as directory merely, is very likely to be treated by the legislature as if it was devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory, seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so, must be conceded. That it is so, we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory.'* Cooley, Const. Lim. 150. Now, whether what Judge COOLEY says is true or not, we have no doubt, both upon reason and authority, that the said constitutional provision should be considered as mandatory; and whenever the legislature clearly violates the provision by putting something in the body of an act which is clearly not embraced in the title thereof, or is wholly foreign to the title, the courts should declare such portion of the act void." (Emphasis and bracketing added)

County of Sedgwick v. Bailey, 13 Kan. 601, 607-608 (1874). (Emphasis and bracketing added)

Policy and politics stop where a constitution

intercedes. A constitution is inviolate to negotiation, preference, or choice. A constitution commands deference and the utmost respect, most of all it commands fidelity. In Kansas, as it is in the other states of our union, a governor's proposal, or a legislature's enactment, is but a first, not a final, opinion of the State's constitutional requirements. Under our system of separation of powers, only the highest court can render a binding and final opinion of a constitution's meaning and operative effect. Any other view announces the flaws inherent in third world constitutions and democracies.

As courts are called upon to give meaning upon questions of a constitution's interpretation, the interpretation rendered speaks the constitutional principle at issue, defines its scope, and most likely describes, at least within the facts and the issues presented, the procedural or factual markers for compliance with its declared tenets. Examples can be given. Compliance with the search and seizure requirements of the Fourth Amendment to the U.S. Constitution and § 15 of the Kansas Constitution Bill of Rights would represent a most simplified example. Our federal constitution, and well as our Kansas

Constitution's Bill of Rights, require the government to first obtain a search warrant from an independent magistrate before entering a person's property or seizing their person. If the facts - and the facts are the only determinant - evidence that such was not done, then the burden rests on the government to demonstrate some exception to the warrant requirement, such exceptions arising not from the exact language of the constitution, but from judicial interpretation of the meaning of this constitutionally enshrined mandate and safeguard. Proof of such exceptions are solely determined by the facts accompanying the action challenging governmental compliance with the Constitution. One example might be the existence of probable cause combined with an exigent circumstance, *e.g., State v. Ramirez,* 278 Kan. 402 (2004).

Another example of the application of constitutional principle might arise from the Fifth and Fourteenth Amendments to the U.S. Constitution, where one's property is sought to be seized or government employment terminated without benefit of notice or opportunity to be heard. *See,* respectively, *Joe Self Chevrolet, Inc. v. Board of Sedgwick County Comm'rs,* 247 Kan. 625 (1990); *Darling v. Kansas Water*

Office, 245 Kan. 45 (1989).

All interpretations of constitutional admonishments for, or limitations on, governmental action establish and provide procedural and substantive precedent as to how to operate in compliance with the particular constitutional mandate at issue. The determination of compliance or non-compliance is empirically based, that is, it is controlled by the existence of facts that either do, or do not, allow the challenged actions to stand.

WHAT KANSAS CONSTITUTIONAL ADMONISHMENTS AND LIMITATIONS ON GOVERNMENTAL ACTION ARISE UNDER ARTICLE 6

The above principles and examples above have been given because we believe that here in the case before us, the facts advanced, without any question whatsoever, as we will later discuss, demonstrate that the Kansas legislature, and, in some instances, perhaps, that of Kansas governors, in actions taken since the *Montoy* case concluded, have failed to follow the established judicial precedent of the *Montoy* case, which is the "template" for demonstrating compliance, even, perhaps, threshold compliance, with the constitutional mandate expressed in Article 6, § 6(b) of the Kansas

Constitution.

In *U.S.D. 229 v. State*, 256 Kan. 232 (1994), the Kansas Supreme Court first clearly established that the question of what was a "suitable provision for finance" as used in Article 6, § 6(b) was ultimately one for the courts. Then, as of June 3, 2005, the Kansas Supreme Court in *Montoy II*, 278 Kan. 769, declared Article 6, § 6(b)'s "make suitable provision for finance of the educational interests of the State" as a mandate to responsible state government officials when dealing with the K-12 school system and its students. Paraphrased, the *Montoy* court stated that "First, and, perhaps, foremost [the actions taken toward satisfying the "suitable provision for finance"] *must* reflect a level of funding which meets the constitutional requirement . . . [which mandates any action taken be one] which cannot be static or regressive, but must be one which 'advance[s] [the Kansas K-12 educational system] to a better quality or state.'" (Emphasis and paraphrasing added). 278 Kan. at 773. The Court then looked at the Legislature's own definitions for a "suitable provision" as exemplified by statutory school accreditation and school performance standards, which at the time then reflected, and now even

more so reflect, benchmarks for suitability as "'improvement or performance that reflects high academic standards and is measurable'", citing then, and still existing, K.S.A. 72-6439(a). *Id.* The Court then cited as one additional factor in determining whether "suitable provision" was being accomplished by government officials under Article 6, § 6(b) as whether, or not, the financing formula or decisions made were *"based upon actual costs", rather than "on political or other factors not related to education"*. *Id.* at 774-75. (Emphasis added.)

Giving due deference to the Legislature in its reaction to *Montoy II,* it might fairly be said that the Court's *Montoy II* opinion, other than in establishing that Article 6, § 6(b) embodied a mandatory obligation upon state government officials, was, perhaps, at first, lacking in sufficient emphasis in its expression of the factual path necessary to establish compliance with that section of the Kansas Constitution. However, the Court's subsequent declarations following in *Montoy III* (279 Kan. 817) and *Montoy IV* (282 Kan. 9) could lead to no doubt about either the need for compliance or the constitutional path to compliance. Deference, too, should be given to the *Montoy*

II Court, as well, since it obviously wished its *Opinion* out for the benefit of the 2005 session of the Legislature and, in doing so, it operated, it is assumed, *from the universal presumption that public officials are, and will be, presumed to follow the law as declared.* Too, here, as noted earlier, unquestionably the Kansas Supreme Court had hoped that the Legislature would act such that the Court could extricate itself from the onerous duty of constitutional oversight of a co-ordinate branch of government's compliance with its own governing constitution.

After the Legislature responded unsatisfactorily to *Montoy II's* declaration, as reflected by the supplemental opinion of *Montoy III*, the latter gave exposition as to the how of compliance in what can be described as none other than in the clearest terms. If any doubt as to the factual parameters of compliance existed, that doubt could surely have been thought to have been laid to rest at this point. In other words, *Montoy III,* issued as it was on June 3, 2005, six months after *Montoy II*, established the "brightlines" necessary to reflect, at least, presumptive legislative compliance with Article 6, § 6(b)'s mandate for "suitable provision for finance".

> "We further held that among the critical factors for the legislature to consider in achieving a suitable formula for financing education were 'equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs.' We provided this guidance because 'the present financing formula increases disparities in funding, not based on a cost analysis, but rather on political and other factors not relevant to education.' We also held that 'increased funding will be required.' *Montoy II,* 278 Kan. at 775, 102 P.3d 1160."

279 Kan. at 819.

Further, in its review of legislative effort to May 11, 2005, the date of the oral argument reviewing compliance to date, the Court's *Montoy* III opinion is filled with reference and emphasis on the importance of cost information and equity in matters of constitutional school finance, which statements follow with the emphasis therein supplied by this Court by italics:

> "We now turn to this court's specific concerns about *whether the actual costs of providing a `constitutionally adequate education were considered as to each of the formula components and the statutory formula as a whole, and whether any unjustified funding disparities have been exacerbated rather than ameliorated . . .*
>
> With the A & M study as background, we next examine . . . in light of the two guiding considerations set forth in our January opinion: *(1) actual costs of providing a constitutionally adequate education and (2) funding equity."*

Id. at p. 830.

"BASE STATE AID PER PUPIL

. . .

At a minimum, the *increased BSAPP provided* for in H.B. 2247 *substantially varies from any cost information* in the record and from any recommendation of the Board or the State Department of Education."

Id. at p. 831.

"AT-RISK

. . .

Neither the State nor the Board *contend that actual costs* of educating at-risk students *were considered.*"

Id. at 830-31.

"BILINGUAL

. . .

Although the increase in this weighting is significant, it still *differs substantially from the cost information* in the record."

Id. at 832.

"*SPECIAL EDUCATION*

. . .

Furthermore, *the A & M study recommended a range*, based on student enrollment, of weights from .90 to 1.50, resulting in a nearly $102.9 million (in 2001 dollars) increase in funding--a stark contrast to the $17.7 million provided by H.B. 2247."

Id. at 833.

"FINANCING FORMULA AS A WHOLE

. . .

We agree with the Board that although H.B. 2247 does provide a significant funding increase, it falls short of providing constitutionally adequate funding for public education. *It is clear that the legislature did not consider what it costs* to provide a constitutionally adequate education, *nor the inequities created and worsened* by H.B. 2247. At oral arguments, counsel for *the State could not identify any cost basis or study to support the amount of funding provided* by H.B. 2247, its constellation of weightings and other provisions, or their relationships to one another."

Id. at 838-39.

"*COST STUDY*

"As we prepare to consider an appropriate remedy and the mechanisms necessary to assure that future school financing will meet the requirements of the constitution, *we agree with all parties that a determination of the reasonable and actual costs of providing a constitutionally adequate education is critical.*

. . .

It also appears that *the study* contemplated by H.B. 2247 *is deficient* because it *will examine only what it costs for education 'inputs'*-- the cost of delivering kindergarten through grade 12 curriculum, related services, and other programs 'mandated by state statute in accredited schools.' *It does not appear to demand consideration of the costs of 'outputs'*--achievement of measurable standards of student proficiency.

. . .

Without consideration of outputs, any study conducted by post audit is doomed to be

incomplete. Such outputs are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the legislature."

Id. at p. 840, 842-843.

"REMEDY

. . .

Although the State claims it considered the A & M study, it in fact chose to impugn its design and ignore its recommendations. *It can no longer do so.*

This case is extraordinary, but the imperative remains that we decide it on the record before us. The A & M study, and the testimony supporting it, appear in the record in this case. *The State cites no cost study or evidence to rebut the A & M study,* instead offering conclusory affidavits from legislative leaders. Thus *the A & M study is the only analysis resembling a legitimate cost study* before us. Accordingly, at this point in time, we accept it as a valid basis *to determine the cost* of a constitutionally adequate public education in kindergarten through the 12th grade.

. . .

As set forth earlier in this opinion, *the Legislative Division of Post Audit has been commissioned to conduct a comprehensive* and *extensive cost study* to be presented to the 2005-06 legislature. With such additional information available, *the legislature should be provided with the cost information necessary to make policy choices* establishing a suitable system of financing of Kansas public schools.

. . .

Clearly, the legislature's obligation will

not end there; *the costs of education continue to change and constant monitoring and funding adjustments are necessary.* H.B. 2247's provisions regarding establishment of the 2010 Commission and mandating annual increases based upon the Consumer Price Index may satisfy these demands, but the legislature may seek other means to assure that Kansas school children, now and in the future, receive a constitutionally adequate education."

Id. at pps. 844, 845, 846.

Again in *Montoy IV*, 282 Kan. 9 (2006), issued on July 28th, the Court reiterated as follows:

"Although we held that increased funding would be required, we did not dictate the manner in which the legislature should amend the financing formula to bring it into constitutional compliance, noting, as did the district court, that 'there are "literally hundreds of ways" the financing formula can be altered to comply with Art. 6, § 6." 278 Kan. at 775, 120 P.3d 306. *However, we did make it clear that the actual costs of providing a constitutionally suitable education and the equity with which the funds are distributed are critical factors for the legislature to consider* in crafting a suitable formula for financing public education. 278 Kan. at 775." (Emphasis added.)

Id. at p. 10.

The *Montoy IV* Court, in abandoning the *Montoy* case at last, clearly did not eschew or back off from deeming the costs of education as critical to the analysis of whether "suitable provision" had been accomplished. In this regard, we refer back to the difference between a "facial", as

opposed to an "as-applied", constitutional challenge to legislation. Proceeding under the facial approach, since the legislation presumptively considered the Legislative Post Audit study commissioned by the Legislature in its 2006 legislative session leading to SB 549's enactment, the Court stated:

> "Accordingly, we may consider the LPA cost study as part of the legislative history of S.B. 549 in determining legislative intent as it is relevant to the question whether the legislature has complied with our orders in this case. That does not mean, however, that we may consider the findings and conclusions in the report as substantial competent evidence of the actual and necessary costs of providing a suitable education.
>
> The cost study has not been subjected to the fact-finding processes of litigation through which the parties were permitted to examine the validity and accuracy of the study, including the methodology and policy decisions supporting the study, the qualifications of the persons participating in the study, the assumptions underlying the study's conclusions, and the veracity of the underlying data. Although such inquiry is vital to determining the validity of the study's conclusions and the degree of weight to accord the study if offered at trial in the district court, this is an extraordinary appeal and the legislature had the opportunity to analyze the methodology and policy decisions of the LPA Cost Study Analysis, and thus to accept or reject its findings as a factor in determining what is suitable finance for the Kansas school system."

Id. at p. 21.

The Court further obviously believed that from the text

of SB 549 and the Legislature's actions and considerations in the 2006 session, the Legislature knew the path to constitutional compliance with Article 6, § 6(b) of the Kansas Constitution when it said:

> "Our prior orders have made it clear that we were concerned that the then existing financing formula was distorted and provided disparate funding because it was based on former spending levels with little or no consideration of the actual costs and present funding needs of Kansas public education.
>
> The legislature has responded to this concern. The legislature has undertaken the responsibility to consider actual costs in providing a suitable system of school finance by commissioning the LPA to conduct an extensive cost study, creating the 2010 Commission to conduct extensive monitoring and oversight of the school finance system, and creating the School District Audit Team within LPA to conduct annual performance audits and monitor school district funding as directed by the 2010 Commission. In addition, the new legislation contains numerous provisions designed to improve reporting of costs, expenditures, and needs.
>
> *These new components provide the fundamental framework for a cost-based funding scheme in which the legislature will be regularly provided with the relevant, accurate information necessary to meet its constitutional obligation to provide and maintain a suitable system of financing of Kansas public schools.*
>
> We also find that the LPA Cost Study Analysis was considered by the legislature in making the decisions that underlie the formula changes in S.B. 549 and, thus, the legislature was responsive to our prior orders to consider actual

costs." (Emphasis added.)

Id. at p. 23.

Here, the Defendant has asserted that the Kansas Supreme Court's focus on the actual costs of providing a "suitable provision" under Article 6, § 6(b) came in the remedial phase of the *Montoy* series of cases, hence, the significance of "actual costs" as an *a priori* concern in measuring the acceptability of legislative enactment or funding is overstated. Respectfully, we firmly reject this advancement. We think it clear, as the high court stated, actual costs are critical both to any formula, weighting, or funding in determining the constitutionality of legislation tied to a "suitable provision for finance" under Article 6, § 6(b). Costs, along with the equity of distributing funds to the need evidenced, are a "critical" factor to be considered. How best is one's opinion of need explained other than by examples of what method or means would be determinative in satisfying that need.

Given that the expressions rendered in *Montoy II* apparently were not fully heeded, the Court's subsequent process of repetition, example, and emphasis on that reality emanating from its *Montoy III* and *Montoy IV* opinions was

both necessary and fortunate in aid of the clarity of understanding needed. It seems therefore that it is an awkward claim, at best, that the consideration of costs by the Legislature, or the lack of such consideration, is not one of those "brightlines" or markers for constitutional scrutiny, just as much as whether a government search is, or is not, preceded by a warrant is the demonstrable point that dictates the course of a *Fourth Amendment* review and, similarly, just as the existence of notice and an opportunity for a hearing marks the beginning basis for constitutional review in Fifth and Fourteenth Amendment challenges.

We acknowledge that the Legislature may, if the occasion warrants and grounds exist, not be bound to blindly accept cost studies or other authoritative recommendations as wholly accurate or determinative, but it may not ignore facts or factually sound recommendations either or act on the basis of stale facts or no facts without a basis *in fact* for doing so. *Montoy IV*, 282 Kan. at p. 24. Nowhere in our free market society, absent duress, would any rational individual act on an economic matter without reference to a need versus its cost. And, of course, the degree of the

need, and its importance, further act to prioritize the expense. We, simply, cannot identify what the possible rationale would be that could support a belief that if such costs would necessarily be incurred if the services at issue were performed in the private sphere that such costs should not exist, or should be ignored, when performed in the public sphere.

Our Kansas statutes and the policies and regulations of the Kansas Department of Education and local school boards clearly, enlightenly, and laudatorily state the goals of our educational system and the acceptable performance guidelines to measure success or failure, all, presumptively, empirically based and professionally sound. No evidence is advanced that the Kansas State Board of Education or local school board's have faltered in their analysis of identifying effective educational teaching resources or applying them. Certainly, the State has not attempted through studies nor has it otherwise proposed alternative, less costly, means to the same end and, most certainly, the funding shortfalls occasioned by the Kansas Legislature's actions to reduce funding, as here challenged, have not permitted local resources to be available for initiatives

toward this end. If goals are to be reached their costs need to be known. The consequence of mere denial or guess is far too severe.

Most importantly, as we have attempted to point out by reference to the erudition necessarily to be exercised in determining compliance with constitutional principles and mandates in other situations, the inquiry to be made is empirical, that is, *fact based*. Thus, what the *Montoy* cases establish is a requirement on responsible government officials, when acting under Article 6, particularly § 6(b), to act on facts and for sound reasons that support educational advancement, and to do so demonstrably in regard to both. Hence, in the absence of facts demonstrative of the basis for any actions taken, the government actions taken under review here, would stumble at the gate in light of *Montoy*. Whether the facts underlying the government action here reviewed were self-generated, based on the conclusions of other state bodies, such as the Kansas State Board of Education, or local school boards, or were commissioned or adopted from reliable outside sources, or all of the above, seems particularly one of legislative choice. However, to act in the absence of facts or act in

deliberate disregard of reliable facts available is, since *Montoy*, not one of legislative, executive, or judicial privilege. Hence, the Legislature's enactment in 2005 of K.S.A. 46-1226(a), which statute still stands, that states

> "(a) Any cost study analysis, audit or other study commissioned or funded by the legislature and any conclusions or recommendations thereof shall not be binding upon the legislature. The legislature may reject, at any time, any such analysis, audit or study and any conclusions and recommendations thereof."

is, without rational justification, no more than a misplaced, however, sincere, declaration of either desire or displeasure, while, yet, surely being a suspect marker of non-compliance, if followed, with the requirements of Article 6, § 6(b) as declared in *Montoy*. Matters intended for permanence are placed in constitutions for a reason - to protect them from the vagaries of politics or majority. A change in the messenger does not change the message.

DID KANSAS GOVERNMENTAL OFFICIALS COMPLY, OR HAVE THEY CONTINUED TO COMPLY, WITH ARTICLE 6, § 6(b) OF THE KANSAS CONSTITUTION?

Whether the Kansas Legislature in and after its 2006 session through its 2012 session and the tenure of this case did consider the actual costs of funding an Article 6, §

(6)(b) "suitable education" in making appropriations for that purpose can be derived from the following facts advanced by the Plaintiffs in their [Proposed] *Final Findings of Fact and Conclusions of Law*, which we, as a judicial panel, find, as may be modified as shown by bracketing by either omission or addition, to be true:

> "185. There has been no recent study to determine the actual cost of delivering a 'suitable education' to Kansas students. *See* Neuenswander Tr. Test. 2112:13-21 (stating that no one in the Legislature has determined the actual cost of delivering an education that meets the college readiness requirements, Common Core requirements, and the requirements of the state assessments). Since the completion of the LPA and A&M studies, the State has not commissioned any other studies into the actual costs of providing a 'suitable education' to Kansas students. *See* Tallman Tr. Test. 988:22-989:16; Tallman Tr. Test. 1060:23-1061:6; Myers Tr. Test. 1631:4-1632:7 (stating that the State has not asked him to update the cost study he previously performed).
>
> . . .
>
> 188. Every witness who testified on the subject has testified that the costs of educating Kansas students and the demands on Kansas education have only increased since *Montoy*. *See* Tallman Tr. Test. 1057:19-1058:5 (testifying that demands have gone up but the resources available have gone down); Lane Tr. Test. 180:1-10 (testifying that 'the resources to support the higher demands are going down, while the demands continue to escalate'); Lane Tr. Test. 253:11-254:11 (testifying regarding increasing demands and stating '[t]he expectations don't go down when the resources go down'); Lane Tr. Test. 255:8-9

(same); Lane Tr. Test. 263:3-11 (same); Mather Tr. Test. 561:5-9; Beech Tr. Test. 794:4-21 (same); Tallman Tr. Test. 1067:20-1068:1, 2051:24-2052:2 (testifying that there was no evidence that the costs of educating students have gone down); Baker Tr. Test. (same); Hammond Tr. Test. 2937:16-2938:3 (same); Doyle Tr. Test. 2857:14-2858:12 (same); Hungria Tr. Test. 2899:25-2900:10; Blakesley Tr. Test. 2997:6-2998:5, 3021:3-17; Jones Tr. Test. 2800:3-14 (same and testifying that costs have actually gone up); Hensley Tr. Test. 2462:9-12 (testifying that the needs of students have gone up); *see also* Tr. Ex. 51, at SIG-KASB000197 (showing expectations have increased while funding has not); Tr. Ex. 105 (illustrating increasing demands and decreasing resources); Tr. Ex. 237 (illustrating increasing demands and decreasing resources). Therefore, there is no reason to believe that the State made the cuts based on a determination that the cost of educating Kansas students has decreased. *See id.*

189. Before and during the time [the] Kansas Legislature and Governor made cuts to base, the following entities recommended that the base be increased or remain stable:

a. Kansas State Board of Education. The Kansas State Board of Education has repeatedly recommended that the state fund the formula at the current statutory level or above. *See* Tr. Ex. 184, at KSBE000090 (wherein the Kansas State Board of Education recommended a $41 increase to the base state aid for the FY2009 budget); Tr. Ex. 186, at KSBE001689 (wherein the Kansas State Board of Education recommended an FY2013 budget that would fund all education programs currently in state statute at their statutory levels); Tr. Ex. 187 (outlining the costs to fund the programs referenced in Tr. Ex. 186); Tr. Ex. 188, at A00080 (wherein the Kansas State Board of Education recommended a budget that would fund the law for FY2011, which totaled additional

funding of $281,780,223); Tr. Ex. 195 (outlining the costs to fund the programs referenced in Tr. Ex. 188); Tr. Ex. 189; Tr. Ex. 190, at KSBE000779 (wherein the Kansas State Board of Education approved a FY2012 budget recommendation to fund programs at the level established in current law for a total of $471,761,017 in new funding); Tr. Ex. 191, at KSBE000722 (wherein the Kansas State Board of Education recommended a FY2010 budget with an increase in the base to meet the state law and to fund the costs of programs necessary to comply with the current law); Neuenswander Tr. Test. 2088:4-2090:22; Mather Tr. Test. 569:11-570:13.

b. 2010 Commission. The 2010 Commission recommended that the State fund the statutory formula with a BSAPP of $4,492. *See* Tr. Ex. 178; Tr. Ex. 179. *See more detail regarding the recommendations of 2010 Commission at* ¶¶ 272-276.

c. A&M. The A&M study concluded that the base state aid should be raised to a level that would be equivalent to $4,650 in 2000-01 [dollars]. *See* Tr. Ex. 236, at SFFF000634. To comply with that recommended funding level would have required an increase in funding of $852,777,901 as opposed to a decrease in funding. *See* Tr. Ex. 204, at EXP-MYERS000005. Updates of that study, based on CPI, indicate that the base should be $4,806 for the 2004-05 school year, *see* Tr. Ex. 207; $5,738 for 2010-11, *see* Tr. Ex. 208; and $5,965 for the 2011-12 year. *See* Tr. Ex. 236. *See more detail regarding the recommendations of A&M study at* ¶¶ 264-268.

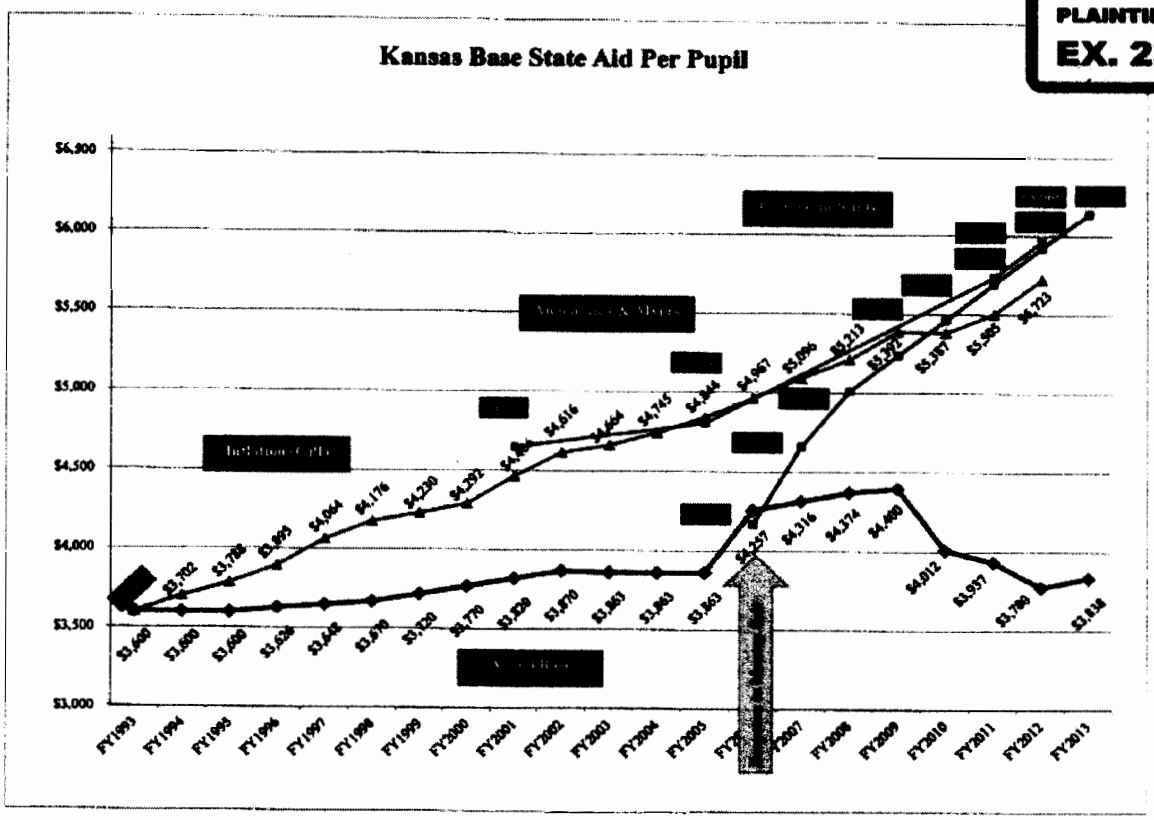
d. LPA. The LPA study concluded the base should be increased to $4,167 for 2005-06 and to $4,659 for 2006-07. *See* Tr. Ex. 236, at SFFF000646. In 2006, the LPA projected costs out to 2013-14 in 2006-07 dollars. *See* Tr.

Ex. 197. The estimates indicated that the base would need to be $5,012 in 2007-08; $5,239 in 2008-09; $5,466 in 2009-10; $5,695 in 2010-11; $5,922 in 2011-12; $6,142 in 2012-13; and $6,365 in 2013-14. *See id. See more detail regarding the recommendations of LPA study at* ¶¶ 269-270.

Id.

"190. The recommendations by these entities are represented graphically in Tr. Ex. 236 (copied below). Additionally represented is an indication of how the base would increase over time based on inflation using the Consumer Price Index (CPI). *See id.* The law in Kansas required that school districts receive an increase in state aid for the 2009-10 school year based on the CPI. *See* Tr. Ex. 1, at PRIMER000121 (citing K.S.A. 72-64c04 and indicating that the law did not expire until June 30, 2010); Tr. Ex. 380 (showing that the CPI increase required by K.S.A. 72-64c04 should have increased the base to $4,444 for FY09; instead the base went down to $4,400 by the end of FY09).

PLAINTIFFS' EX. 236



191. The State chose to ignore the recommendations and information provided to it by the above entities[.]

192. As a result of the State ignoring the above recommendations and information, no increases were made to the base following the 2009-10 cuts. *See* Tr. Ex. 411. The only increase to the base occurred in 2012-13, and it was inconsistent with the above recommendations because it failed to [even] raise the base to the statutor[ily expressed] level (which is $4,492). *Id.*; Tr. Ex. 233.

193. [ ]

194. In determining how much money to appropriate for supplemental state aid (the State

LOB equalization aid), how much money to appropriate to the General Fund, and whether to reduce the money appropriated to the General Fund, the State did not consider the actual costs of providing an education to Kansas school students. *See* Tr. Ex. 173; Tr. Ex. 174; Winn Tr. Test. 777:5-778:8; Hensley Tr. Test. 2445:25-2446:18, 2447:4-20.

195. [ ]

196. [ ]

197. [ ]

198. Educating students costs money. Several administrators repeated the sentiment that 'everything costs money.' *See e.g.* Lane Tr. Test. 237:24-238:7 (stating 'Everything costs money. As you know, there's nothing in life that's truly free.'). Moreover, every witness who testified on the subject agreed that money makes a difference in public education. *See e.g.* Dennis Tr. Test. 1193:18-1195:13; Lane Tr. Test. 216:21-222:24; Tompkins Tr. Test. 1585:7-24; *see also* Tr. Ex. 292 (in which Baker concludes that money and resources that cost money matter in education); Tr. Ex. 293 (same); Tr. Ex. 291 (stating, 'We are working on the momentum that we have created. We cannot continue to make cuts and expect this growth.'): Tr. Ex. 251, at KSDE142872 (stating, 'What sits in our classrooms today, is the future of tomorrow. <u>There is no tomorrow if dollars are cut and school doors are closed</u>.') (emphasis added [by Plaintiffs]); Tr. Ex. 294, at KSDE141291 (stating, 'Dollars spent on education today translate into investment and returns on our investments for our future').

199. Studies in Kansas have shown that money does make a difference. In the LPA study, a 1% increase in district performance outcomes was associated with a .83% increase in spending - almost a one-to-one relationship.' [ ] *See* Tr. Ex.

195, at LEG003440; Tr. Ex. 294 at KSDE141290; Tr. Ex. 136, at KSDE141225; Tr. Ex. 393 (CD contains 64 PowerPoints in which the Kansas State Department of Education has quoted the LPA study in various presentations).

200. Even Defendants' leading expert witness, Dr. Eric Hanushek, stated: 'The money [spent on education] is obviously important at some level. You have to have funds to have teachers in schools.' *See* Hanushek Tr. Test. 2263:25-2264:2.

201. Kansas administrators, principals, and teachers have identified certain strategies and methods that work for improving student achievement within their district. The State's expert, Dr. Hanushek, acknowledged that it was possible for a classroom teacher or building administrator to observe strategies used in the classroom to increase student achievement. *See* Hanushek Tr. Test. 2299:1-16. The strategies identified by these educators include, but are not limited to:

a. Extended learning opportunities, such as longer school days, Saturday school all-day kindergarten, and before- and after-school programs. *See e.g.* Lane Tr. Test. 126:18-24 (testifying that extended learning opportunities are interventions used by Kansas Learning Network to help schools meet expectations); Lane Tr. Test. 169:1-170:15 (testifying that extended learning opportunities can help increase student achievement); Lane Tr. Test. 198:21-199:1 ('We obviously are not meeting the needs of these children in the regular classroom in the regular program. They need additional tutoring. They need mentoring. They need an extended year. They need a longer school day.'); Ortiz-Smith Tr. Test. 1751:8-1752:21 (discussing importance of summer school and other extended learning opportunities).

b. Extracurricular activities, such as sports, speech and debate, and band and orchestra. *See e.g.* Lane Tr. Test. 170:3-171:9 (testifying that extracurricular activities can help increase student achievement); Hatridge Tr. Test. 599:15-24 (testifying that extracurricular activities, such as sports or band, are the only methods teachers can use to motivate some students to come to school in the first place); Stewart Tr. Test. 907:22-908:6 (stating extracurricular activities 'are an important piece of helping our students learn'); Stewart Tr. Test. 922:7-13 (stating extracurricular activities are helpful to increase achievement in students). Extracurricular activities are especially important to students who live in poverty because they do not have access to these activities unless they are provided by the district. *See* Lane Tr. Test. 170:3-171:9. Moreover, exposure to extracurricular activities is 'critical' to breaking the cycle of poverty. *See* Stewart Tr. Test. 910:10-911:21.

c. Smaller class sizes. *See e.g.* Beech Tr. Test. 790:4-17 (identifying smaller class sizes as 'one of those strategies that [she] has recognized help kids that are at-risk move into the more proficient area'); Hanushek Tr. Test. 2295:14-20 (agreeing that there is evidence that class size may make a difference, especially in kindergarten and first grade); Lane Tr. Test. 199:2-3 (discussing the benefits of lower class sizes). As class sizes increase, teachers spend more time doing 'crowd control' and spend less time actually teaching. *See e.g.*, Fulton Tr. Test. 846:7-24.

d. Professional development. *See e.g.* Lane Tr. Test. 167:25-168:25 (stating that professional development has helped Kansas

City improve student performance); Beech Tr. Test. 789:1-16 (discussing benefits of professional development for improving student achievement); Ortiz-Smith Tr. Test. 1748:12-23 (discussing increased need for professional development that occurs outside Kansas in Dodge City because of unique Dodge City demographic and stating '[w]e need to be in places that have populations that look like Dodge City so we can learn from one another'). 'Kansas considers professional development as a method of safeguarding [its] students by ensuring they have the best teachers possible.'; Tr. Ex. 1300, at 49; *see also* Lane Tr. Test. 167:25-168:25 (stating professional development is especially important in the development of quality teachers). The importance of professional development in Kansas is underscored by the requirement that when a school district fails to meet AYP for two consecutive years, that district must spend 10% of the federal money it receives on professional development. *See* Lane Tr. Test. 143:5-144:6; *see also* Lane Tr. Test. 118:5-19 (discussing requirements for professional development under Kansas' QPA).

e. Hiring quality teachers. The State's experts have testified that 'the most important factor influencing student achievement is the quality of the teacher.' *See e.g.* Hanushek Tr. Test. 2282:3-8; 2283:7-10. This also further underscores the importance of professional development, which ensures that Kansas students have the highest quality teachers. *See infra* at § V.B.(f).

202. Implementing these strategies and methods costs money. *See e.g.* Lane Tr. Test. 327:1-7 (testifying that it costs money to implement the strategies that students need to be successful); Mather Tr. Test. 232:1-18 (discussing, specifically, increased costs

associated with reducing class sizes); Lane Tr. Test. 252:21-253:10 (same). Even the State's expert, Dr. Hanushek agreed that teachers, the most important factor influencing student achievement, cost money. *See e.g.* Hanushek Tr. Test. 2282:3-8, 2283:11-12; 2288:15-25.

203. It is often these strategies and programs that school districts have had to eliminate as a result of the cuts, further indicating that the 'strategies that work' cost money to provide. *See* Lane Tr. Test. 254:23-262:2 (discussing reductions in staffing, increased class sizes, decrease in funds necessary for extracurricular activities, and cuts to programs designed to provide extended learning opportunities); Hatridge Tr. Test. 600:6-10 (stating that extracurricular activities have been reduced); Ortiz-Smith Tr. Test. 1751:8-1752:21 (discussing elimination of summer school program and other extended learning opportunities); Morrissey Tr. Test. 637:10-18 (discussing elimination of band and orchestra programs); Morrissey Tr. Test. 638:24-639:5 (discussing increases in class size); Stewart Tr. Test. 907:22-909:21 (discussing reductions in extracurricular activities); Stewart Tr. Test. 962:5-7 (discussing increasing class sizes); Beech Tr. Test. 788:1-789:1 (discussing reductions in elective courses, including art, Spanish, and family consumer sciences and decreased opportunities for professional development); Beech Tr. Test. 795:15-24 (discussing overly large special education class sizes); Beech Tr. Test. 784:16-24 (discussing increasing class sizes); Feist Tr. Test. 1714:20-1715:14 (discussing decreased professional development opportunities). The cost of educating students is increased by the fact that there is no one strategy that meets the needs of all students. *See* Lane Tr. Test. 165:19-166:17. This causes districts to spend time and resources analyzing what methods and strategies will work best for a specific classroom, group of students, or concept. *See id.* Thus, it not only

costs money to implement the strategies that work but it is also costs money to determine which strategies to implement.

204. [ ]

205. [ ]

206. [ ]

207. [ ]

208. [ ]

209. [ ]

210. [ ]

211. [ ]

212. [ ]

213. [ ]

214. [ ]

215. There is a gap between demands and resources in Kansas. While demands have gone up, available resources have gone down. *See* Tallman Tr. Test. 1057:19-1058:5 (testifying that demands have gone up but the resources available have gone down); Lane Tr. Test. 180:1-10 (testifying that 'the resources to support the higher demands are going down, while the demands continue to escalate'); Lane Tr. Test. 253:11-254:11 (testifying regarding increasing demands and stating '[t]he expectations don't go down when the resources go down'); Lane Tr. Test. 255:8-9 (same); Lane Tr. Test. 263:3-11 (same); Mather Tr. Test. 561:5-9; Beech Tr. Test. 794:4-21 (same); Tallman Tr. Test. 1067:20-1068:1, 2051:24-2052:2 (testifying that there was no evidence that the costs of educating students have gone down); Baker Tr. Test. (same); Hammond Tr. Test. 2937:16-2938:3

(same); Doyle Tr. Test. 2857:14-2858:12 (same); Hungria Tr. Test. 2899:25-2900:10; Blakesley Tr. Test. 2997:6-2998:5, 3021:3-17; Jones Tr. Test. 2800:3-14 (same and testifying that costs have actually gone up); Hensley Tr. Test. 2462:9-12 (testifying that the needs of students have gone up); Tr. Ex. 105; Tr. Ex. 237.

216. [ ]

217. [ ]

218. Between 2009 and 2012, total full-time enrollment in Kansas increased by more than 7,200 students. *See* Tr. Ex. 1186. The total weighted enrollment has increased by 38,678.6 students, which is a 6% increase. *See* Tr. Ex. 242 (total in column O). Moreover, the weighted enrollment increased in each of the four Plaintiff School Districts. *Id.* (highlighted information shows, between 2009 and 2012, Wichita had a 7.5% increase in weighted enrollment, Dodge City had a 12.3% increase in weighted enrollment, Hutchinson had a 12.1% increase in weighted enrollment, and Kansas City had a 7.3% increase in weighted enrollment).

219. Currently, almost half of the students (47.6%) in Kansas are economically disadvantaged. Tr. Ex. 101, at ACHIEVEMENT000653; Tr. Ex. 91. This represents 226,911 Kansas students, which is an all-time high in Kansas. *See* Tr. Ex. 91; Tr. Ex. 107 at KSDE138468; *see also* Tallman Tr. Test. 1005:20-1006:7, 1009:7-10 (stating there has been a significant increase in the number of at-risk students); Tr. Ex. 388, at KSDE139823 (showing increase in free lunch applications). Kansas has also experienced an increase in the number of ELL students. *See* Tr. Ex. 107 at KSDE138468. In 2010-11, 9.8% of the students were ELL students. Tr. Ex. 101, at ACHIEVEMENT000653; Tr. Ex. 93 (graphically representing number of ELL students).

220. The State does not dispute that certain students, such as those that qualify for

weightings (i.e. - at-risk students or ELL students) are more expensive to educate. *See* State Opening FOF ¶¶ 271, 279. This conclusion is well supported by testimony of educators and is consistent with conclusions of scholars and school finance experts. *See e.g.*, Lane Tr. Test. 171:10-173:6; Mather Tr. Test. 406:8-408:11 (stating additional resources are needed for certain students because they cost more to educate); Neuenswander Tr. Test. 2068:4-8; Frank Tr. Test.1961:25-1962:2; Tr. Ex. 388, at KSDE139823-24 (showing increased costs associated with increase in free lunch applications); Tr. Ex. 252, at EXP-DUNCOMBE000004, 24; Baker Tr. Test. 1238:19-1239:16.

221. [ ]

222. [ ] [T]he increasing demands on students and school districts alone [most probably] increased the cost of providing students with a 'suitable education.' *See* Tallman Tr. Test. 1057:19-1058:5 (testifying that demands have gone up but the resources available have gone down); Lane Tr. Test. 180:1-10 (testifying that 'the resources to support the higher demands are going down, while the demands continue to escalate'); Lane Tr. Test. 253:11-254:11 (testifying regarding increasing demands and stating '[t]he expectations don't go down when the resources go down'); Lane Tr. Test. 255:8-9 (same); Lane Tr. Test. 263:3-11 (same); Mather Tr. Test. 561:5-9; Beech Tr. Test. 794:4-21 (same); Tallman Tr. Test. 1067:20-1068:1, 2051:24-2052:2 (testifying that there was no evidence that the costs of educating students have gone down); Baker Tr. Test. (same); Hammond Tr. Test. 2937:16-2938:3 (same); Doyle Tr. Test. 2857:14-2858:12 (same); Hungria Tr. Test. 2899:25-2900:10; Blakesley Tr. Test. 2997:6-2998:5, 3021:3-17; Jones Tr. Test. 2800:3-14 (same and testifying that costs have actually gone up); *see also* Tr. Ex. 51, at SIG-KASB000197 (showing expectations have increased while funding has not); Tr. Ex. 105 (illustrating

increasing demands and decreasing resources); Tr. Ex. 237 (illustrating increasing demands and decreasing resources).

223. Despite the increasing demands and associated costs, total expenditures in Kansas have decreased by $79,687,661 since 2008-09. *See* Tr. Ex. 1186 (showing total expenditures of $5,587,044,331 in 2010-11 compared with $5,666,731,992 in 2008-09).

224. [ ]

225. [ ] [T]he use of total expenditures as a measure of the money that is available to school districts [is not a reliable or appropriate means to measure the costs associated with "outputs" or a reliable prognosticator thereof *Findings, supra*; Plaintiffs' Exhibit 199; Plaintiffs' Exhibit 203]. [ ] [T]he State acknowledges 'looking at all expenditures includes a variety of expenditures which are not believed to affect student performance.' *See* State Opening FOF ¶ 98.

226. By all measures, funding for education has decreased.

a. Total expenditures in Kansas have decreased by $79,687,661 since 2008-09. *See* Tr. Ex. 1186 (showing total expenditures of $5,587,044,331 in 2010-11 compared with $5,666,731,992 in 2008-09).

b. There have been over $511 million in cuts to the base between fiscal year 2009 and fiscal year 2012. *See* Tr. Ex. 233; Tr. Ex. 241; Tallman Tr. Test. 1050:16-20; Dennis Tr. Test. 3328:1-8. The BSAPP was $3,863 for 2004-2005. *See* Tr. Ex. 35 at 139388-139389. The base for 2008-09 was $4,400. *Id.* The base for 2011-12 was $3,780. *Id.* This represents a per pupil reduction of $83 since 2004-05 and reduction of $620 per pupil from the

2008-09 peak. *Id.*; *see also* VI.D. (outlining cuts to the base).

c. Each of the Plaintiff School Districts experienced a substantial reduction in funds due to the cuts. *See* Blakesly Tr. Test. 2995:6-2996:10; Hammond Tr. Test. 2931:13-18. Wichita lost over $50 million in funding, including its losses in capital outlay state equalization aid. *See* Jones Tr. Test. 2787:19-2789:23. Kansas City experienced a reduction in funds of $8.7 million. *See* Mather Tr. Test. 429:6-430:7; Tr. Ex. 285 (also stating that budget reductions to the Kansas City school district have totaled $43.3 million in five years).

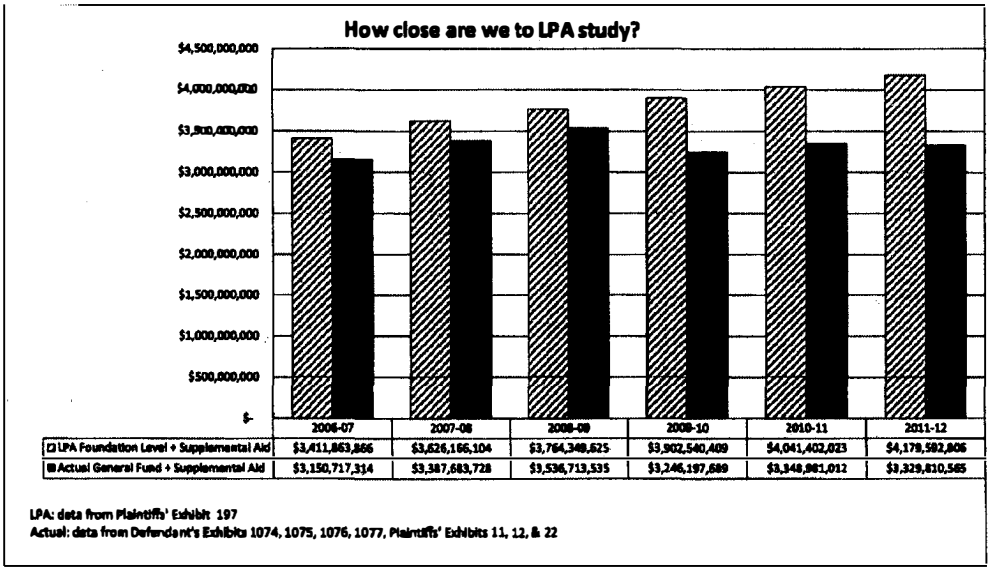
d. The State uses a calculated 'operational expenditures' for comparing spending over time. *See* State Opening FOF ¶¶ 98-104. Based on those calculations, the statewide per pupil operational expenditures have decreased. *See* State Opening FOF ¶ 101. Since the peak in 2008-09, the statewide per pupil operational expenditures have decreased by $395 per pupil. *Id.*

e. Based on the State's calculated 'operational expenditures,' district per pupil operational expenditures have also decreased for each of the Plaintiff School Districts. *See* State Opening FOF ¶ 102. Between 2008-09 and 2010-11, the per pupil operational expenditures have decreased as follows: (1) Wichita (USD 259)'s expenditures have decreased by $300 per pupil; (2) Hutchinson (USD 308)'s expenditures have decreased by $262 per pupil; (3) Dodge City (USD 443)'s expenditures have decreased by $458 per pupil; and (4) Kansas City (USD 500)'s expenditures have decreased by $489 per pupil. *Id.*

B. <u>Operational funding is well below the levels</u>

suggested by the LPA study.

227. Defendant argues that current operational spending is at levels which approximate the foundation operational funding suggested by LPA. *See* State Opening FOF ¶¶ 107-122. This is not supported by the evidence, which shows that the current funding levels are well below those suggested by the LPA study. *See* Tr. Ex. 420 (copied below).



	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
LPA Foundation Level + Supplemental Aid	$3,411,863,866	$3,626,166,104	$3,764,348,625	$3,902,540,409	$4,041,402,023	$4,179,582,806
Actual General Fund + Supplemental Aid	$3,150,717,314	$3,387,683,728	$3,536,713,535	$3,246,197,689	$3,348,981,012	$3,329,810,585

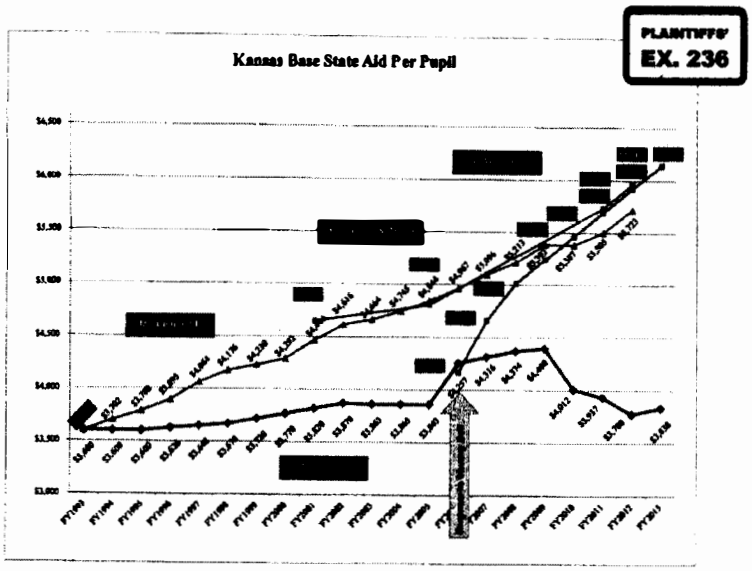
LPA: data from Plaintiffs' Exhibit 197
Actual: data from Defendant's Exhibits 1074, 1075, 1076, 1077, Plaintiffs' Exhibits 11, 12, & 22

228. Based on a comparison of the actual General Fund and Supplemental (LOB) State Aid, the State's funding was approximately $850 million short of the LPA estimates (in 2006-07 dollars) for 2012. *See* Tr. Ex. 420.

229. When adjusted using a 3% inflation rate, the State has funded $1.5 billion less than the LPA estimates for 2012. *See* Tr. Ex. 420.

230. Moreover, Defendant acknowledges that the LPA study is outdated and was only designed to estimate costs for 2006 and 2007. *See* State Opening FOF ¶¶ 52, 109. The LPA study was conducted to be a reasonable estimate of the actual cost of providing a suitable education, at the time it was conducted. *See* Frank Tr. Test. 2051:19-23. Because the steady increase in free lunch students was not calculated in the estimates, 'the overall outcomes-based estimates likely are understated.' *See* Tr. Ex. 176.

231. At no time has the base risen to the levels estimated to be needed by the LPA study. *See* Tr. Ex. 197, at LEG003410; Tr. Ex. 236 (comparing the actual base to the LPA base and copied below). Because LOB is calculated as a percentage of the Recomputed Legal General Fund, the LOB has never reached the levels expected by the LPA study. *See* Dennis Tr. Test. 1158:11-1159:5.



232. The study acknowledged that 'the estimate base-level cost of meeting standards will continue to increase significantly in future years, because the standards adopted by the Board increase each year until 2013-14.' *See* Tr. Ex. 199 at USD 443 001586. Comparing the standards during the years these studies were conducted to the current standards shows that the demands associated with the standards have continuously increased over time. *Compare* Tr. Ex. 203, at LEG001248 *with* Tr. Ex. 67; *compare* Tr. Ex. 203, at LEG001429 *with* Tr. Ex. 74.

233. Additionally, every witness who testified [for the Plaintiffs] on the subject has testified that the costs of educating Kansas students and the demands on Kansas education have only increased since *Montoy*. Tallman Tr. Test. 1057:19-1058:5 (testifying that demands have gone up but the resources available have gone down); Lane Tr. Test. 180:1-10 (testifying that 'the resources to support the higher demands are going down, while the demands continue to escalate'); Lane Tr. Test. 253:11-254:11 (testifying regarding increasing demands and stating '[t]he expectations

don't go down when the resources go down'); Lane Tr. Test. 255:8-9 (same); Lane Tr. Test. 263:3-11 (same); Mather Tr. Test. 561:5-9; Beech Tr. Test. 794:4-21 (same); Tallman Tr. Test. 1067:20-1068:1, 2051:24-2052:2 (testifying that there was no evidence that the costs of educating students have gone down); Baker Tr. Test. (same); Hammond Tr. Test. 2937:16-2938:3 (same); Doyle Tr. Test. 2857:14-2858:12 (same); Hungria Tr. Test. 2899:25-2900:10; Blakesley Tr. Test. 2997:6-2998:5, 3021:3-17; Jones Tr. Test. 2800:3-14 (same and testifying that costs have actually gone up); Hensley Tr. Test. 2462:9-12 (testifying that the needs of students have gone up); Tr. Ex. 105; Tr. Ex. 237. Therefore, there is no reasonable basis to conclude the studies, if conducted again today, would yield an estimate any lower than the original prediction. *See id.*"

Further, we find to be true that school expenditures are now reported on a uniform basis and would have been available to the Legislature:

"48. After Montoy, a uniform reporting of school board expenditures to the State Board was adopted. Also, local district budgeting reports are required. Trial Transcript, Mark Tallman, pp, 1089-90; 2006 Kan. Sess. Laws Ch. 197, sec. 2; 2011 Kan. Sess. Laws Ch.

49. In 2011, the Kansas Uniform Financial Accounting Reporting Act was changed to require the State Board to accomplish uniform reporting. Trial Transcript, Mark Tallman, p. 1092; 2011 Kan. Sess. Laws Ch. 106, sec. 4, amending K.S.A. 72-8254."

Defendant's "*Final Findings of Fact and Conclusions of Law.*"

Further, we find that statistics reflecting the effect of inflation over the years in question (CPI) are readily available from the U.S. Bureau of Labor, including a calculator, that would show inflation's cumulative effect over a period surveyed. (Judicial notice).

We believe it is first necessary to example the various Kansas legislatures and Kansas governors' actions beginning in the 2009 session to this date. We find Plaintiffs' Exhibit 241 accurately summarizes what the legislature and the executive branch undertook to do in regard to the BSAPP and other K-12 school funding resources:

"BASE & CUTS

EXPECTATION

2009 STATUTORY BASE = $4433
2010 STATUTORY BASE = + $59 TO 4492

REALITY
CUT

1. 2/12/09 SB23 RESCISSION BILL - $33 to $4400
2. 3/31/09 HB2354 APPROPRIATIONS BILL - $33 to $4367
3. 5/7/09 HB2373 OMNIBUS BILL - $87 to $4280
4. 7/2/09 GOVERNOR ALLOTMENT - $62 to $4218
5. 11/23/09 GOVERNOR ALLOTMENT - $206 to $4012
6. 3/11/11 GOVERNOR ALLOTMENT - $75 to $3937
7. 5/13/11 APPROPRIATIONS BILL - $157 to $3780

LOSS

- $653 FROM $4433 (2008-09 AMOUNT)

TO
$3780 (2011-12 AMOUNT)

PLUS

1.	2/12/09 SB23 1% SPECIAL ED CUT	$ 4,464,507
2.	3/31/09 HB2354 1% SPECIAL ED CUT	$ 4,464,514
3.	CAPITAL OUTLAY EQUALIZATION NOT PAID	$21,989,096
8.	LOB EQUALIZATION AID REDUCED	$56,594,224

TOTAL TOTAL CUTS $511,020,560/YEAR"

We find further that Plaintiffs' [Proposed] *Final Findings of Fact* accurately and credibly detail the State's diminishment of the revenues available to Kansas school districts:

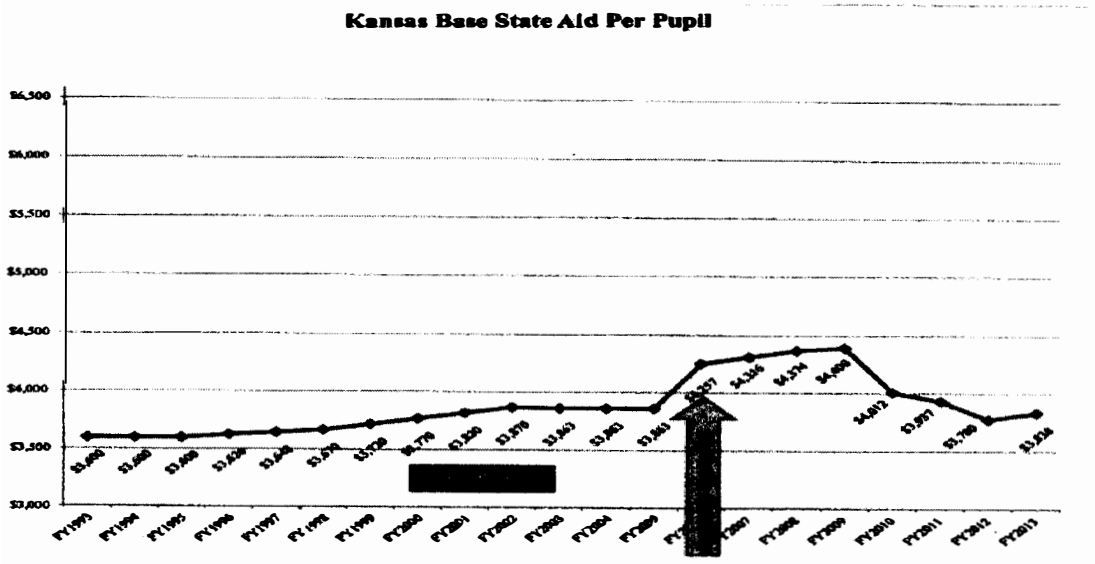
> "245. In 2008-09 the base was cut mid-year by $33, from $4,433 to $4,400, for a total cut to school district General Fund budgets of $20,880,532 *See* Tr. Ex. 240. Special Education was cut 1%, totaling $4,464,507. *See* Tr. Ex. 240. In 2009-10 the base was cut 4 times. *See id.* The first cut was $33 to the base, from $4,400 to $4,367, for a total cut to school district General Fund budgets of $22,544,960 and a special education cut of 1% totaling $4,464,514. *See id.* The second cut was $87 from the base, from 4,367 to 4,280, totaling $76,042,428 (including the $33 prior cut). *See id.* The third cut was a mid-year cut of $62 from the base, from 4,280 to $4,218, totaling $39,327,580. *See id.* The fourth cut was a mid-year cut of $206 from the base, from $4,218 to $4,012, totaling $134,355,363. *See id.* In 2010-11 the base was cut $75, from $4,012 to $3,937, totaling $49,429,629. *See id.* In 2011-12 the base was cut $157 from $3,937 to $3,780 totaling $103,472,687. *See id.* Starting in 2009-10, capital outlay state equalization aid was not paid to entitled districts in the amount of

$21,989,096 starting in 2009-10. *See id.* The state equalization aid for the local option budget was prorated at 85.7%, and for 2011-12 this underfunding resulted in a cut of $56,594,224 to entitled school districts. *See id.*

246. There have been over $511 million in cuts to the base between fiscal year 2009 and fiscal year 2012. *See id.*; Tr. Ex. 241; Tallman Tr. Test. 1050:16-20; Dennis Tr. T3328:1-8. These cuts are represented graphically in Tr. Ex. 233 (copied here).

PLAINTIFFS'

EX. 233



247. The base is the driver for the current formula; it is 'what all else gets multiplied by.' See Baker Tr. Test. 1556:20-23; Myers Tr. Test. 1628:4-8. The cuts to the base has a multiplier effect, cutting more from districts with more weightings or more high need students. Lane Tr. Test. 396:17—397:11; see also Tr. Ex. 1, at PRlMER000223 (in which the Supreme Court explains, 'BSAPP is the foundation upon which school district funding is built, as state financial aid

to schools is determined by multiplying BSAPP by each district's "weighted enrollment."').

248. The base state aid per pupil (the 'BSAPP') was $3,863 for 2004-2005. See Tr. Ex. 35 at KSDE139388-139389. The BSAPP was $4,257 for 2005-06. *Id.* $244 of the increase for 2005-06 was only due to lowering weightings, to make it look like the Legislature had raised the base more than it actually had. *See* Dennis Tr. Test. 3345: 17—3346:2. Tr. Ex. 35 at KSDE139388-139390. The base for 2006-07 was $4,316. *Id.* The base for 2007-08 was $4,374. *Id.* The base for 2008-09 was $4,400. *Id.* The base for 2009-10 was $4,012. *Id.* The base for 2010-11 was $3,337. *Id.* The base for 2011-12 was $3,780. *Id.*

249. School districts had expected the base to increase to $4,433 in FY2009 and $4,492 in FY2010. *See* Tr. Ex. 241; Tallman Tr. Test. 1050:3-7. In reality, the base was reduced further to $3,780 in FY2012. *See* Tr. Ex. 241; Tallman Tr. Test. 1050:11-15. In addition to the base cuts, there were cuts to special education funding, the elimination of capital outlay equalization, and underfunding of LOB equalization. See Tr. Ex. 241; Tallman Tr. Test; 1050:21-1051:17; Dennis Tr. Test. 1179:22-1180:11 (testifying regarding elimination of capital outlay state equalization aid).

250. Each of the Plaintiff School Districts experienced a substantial reduction in funds due to the cuts. *See* Blakesly Tr. Test. 2995:6-2996:10; Hammond Tr. Test. 2931:13-18. Wichita lost over $50 million in funding, including its losses in capital outlay state equalization aid. *See* Jones Tr. Test. 2787:19-2789:23. Kansas City began the 2011-12 school year with an overall budget reduction of $8.7 million, which brought the total reductions over the preceding five years to $43.3 million. See Tr. Ex. 285; Mather Tr. Test. 429:6-430:7.

251. LOB Supplemental General State Aid has been prorated and has not been fully funded since 2008-09. See Tr. Ex. 36, 2011 KASB Convention Presentation, at KSDE142236. It only paid 85.7% to qualifying school districts in 2011-12. See Tr. Ex. 36, 2011 KASB Convention Presentation, at KSDE142236. The underfunding of State Equalization Aid for the LOB Supplemental General State Aid has cut more funds from the poorest districts, and did not cut funds from the wealthiest districts. Poor districts have the option to raise their mill rates to make up for the cut funds, or lower their local option budget by the amount not paid by the State. The mill equivalency of this cut varies based on the district's wealth. *See* Tr. Ex. 22.

252. Special Education has been prorated from the statutory level since 2009-10. Tr. Ex. 248 at KSDE140959.

253. Special Education [would] need[ ] to be increased by $21.7 million to meet state law for FY2013. *See* Tr. Ex. 248 at KSDE140960.

254. In addition, Special Education is only funded by statute to 92% of cost [ ].

255. The Mentor Teacher Program was underfunded for 2008-09 through 2010-11 and was not funded in 2011-12. It would take $3.5 million to meet state law for FY2013. Tr. Ex. 248 at KSDE140963.

256. Professional Development has not been funded since 2008-09. It would take $8.5 million to meet state law for FY2013. Tr. Ex. 248 at KSDE140964.

257. The School Lunch Program has been underfunded. It would take $3.48 million to meet state law for FY2013, an increase of $1 million. Tr. Ex. 248 at KSDE140966.

258. Capital outlay state equalization aid has not been funded since 2009-10. It would take $25 million to meet state law for FY2013. Tr. Ex. 248 at KSDE140967.

259. National Board Certification has been underfunded, and was not funded in 2011-12. It would take $300,000 to meet state law for FY2013. Tr. Ex. 248 at KSDE140972.

E. The School Finance System is Currently Underfunded

260. Public education in Kansas is currently underfunded. See e.g. Tr. Ex. 245. The dollars available for general operating purposes are at the lowest level in Kansas history since 2006. *See* Tr. Ex. 328, at SIG—KASBOO0338; Tallman Tr. Test. 1044:16- 1045:14.

261. The State has commissioned several studies regarding the costs of providing a suitable education to Kansas students. See Tr. Ex. 6 (commissioning the Legislative Post Audit (LPA) study); Tr. Ex. 7 (commissioning the Augenblick and Myers (A&M) study); and Tr. Ex. 8 (commissioning the 2010 Commission).

262. In 2001, the Legislative Coordinating Council was charged with "provid[ing] for a professional evaluation of school district finance to determine the cost of a suitable education for Kansas children." See Tr. Ex. 7, at § (a). As a result, the Augenblick and Myers study was conducted. See Myers Tr. Test. 1611:23-1612:12.

263. Dale Dennis, the Deputy Commissioner of Education, has stated:

> APA [formerly A&M] has produced two large-scale studies for the Kansas Department of Education, including work to examine school district boundaries and an

> analysis of the adequacy of our state's school funding system. We found the firm's staff to be very personable, easy to work with, and responsive to our needs while at the same time producing high quality, reliable work.

See Tr. Ex. 201 .

264. The A&M study concluded that the base state aid should be raised to a level that would be equivalent to $4,650 in 2000-01. *See* Tr. Ex. 236, at SFFF000634. To comply with that recommended funding level would have required an increase in funding of $852,777,901 as opposed to a decrease in funding. *See* Tr. Ex. 204, at EXP-MYERS000005.

265. In 2005, Schools for Fair Funding, Inc. requested that Augenblick, Palaich and Associates (APA) (formerly A&M) update the A&M study. *See* Tr. Ex. 205; Myers Tr. Test. 1626:1 1-1627:13. Myers agreed to do so and offered three different options to do so. *See* Tr. Ex. 206; Myers Tr. Test. 1626:11-1627:13. The A&M study was updated based on option one and simply updated the earlier figures based on CPI. *See* Myers Tr. Test. 1626:11 -1627:13; Tr. Ex. 206 (listing the three options).

266. Based on that update, APA calculated an updated base cost of $4,806 for the 2004-05 school year. See Tr. Ex. 207; Myers Tr. Test. 1626:11-1627:13, 1628:9-21.

267. APA again updated its original study in September 2011 and October 2011. *See* Tr. Ex. 208, 210. Therein, APA used the Consumer Price Index (CPI) to estimate the base for 2010-11 and concluded that the 2000-01 base cost of $4,550 would be $5,738 when adjusted for inflation. *See* Tr. Ex. 208 at EXP-MYERS000060; Tr. Ex. 210; Tr. Ex. 211.

268. Based on those previous updates, it [could] be estimated that the base would need to be set at $5,965 for the 2011-12 year. *See* Tr. Ex. 236; *see* also Tr. Ex. 209 (showing 2011 inflation rates used to calculate inflation on the A&M base for 2011-12 school year).

269. ln 2005, the LPA was charged with conducting 'a professional cost study analysis to estimate the costs of providing programs and services required by law.' *See* Tr. Ex. 6, at § (a). The study allowed for the use of historical data and expenditures, if they used 'a reliable method of extrapolation.' *Id.* Ultimately, the study did use historical spending data consistent with the statute. *See* Tr. Ex. 199. In doing so, the study removed federal funding from the historical spending data. *See id.* at USD443 001586, USD443 001678. They specifically did so to avoid the appearance that LPA was suggesting the State should supplant state funds with federal funds. *See id.* at USD443 001586.

270. The LPA study concluded the base should be increased to $4,167 for 2005-06 and to $4,659 for 2006-07. *See* Tr. Ex. 236, at SFFF000646.

271. In 2006, the LPA projected costs out to 2013-14 in 2006-07 dollars. *See* Tr. Ex. 197. The estimates indicated that the base would need to be $5,012 in 2007-08; $5,239 in 2008-09; $5,466 in 2009-10; $5,695 in 2010-11; $5,922 in 2011-12; $6,142 in 2012-13; and $6,365 in 2013-14. *See id.*

272. In 2005, the Legislature established the 2010 Commission to monitor, evaluate, and make recommendations regarding various aspects of the SDFQPA and the QPA. *See* Tr. Ex. 8; Chronister Tr. Test.

273. The Supreme Court was particularly impressed with the State's decision to commission

the 2010 Commission. *See* Tr. Ex. 1, at PRIMER 000011. It stated:

> The legislature has undertaken the responsibility to consider actual costs in providing a suitable system of school finance by commissioning the LPA to conduct an extensive cost study, creating the 2010 Commission to conduct extensive monitoring and oversight of the school finance system, and creating the School District Audit Team within LPA to conduct annual performance audits and monitor school district funding as directed by the 2010 Commission.

Id. (Emphasis added [by Plaintiffs]). In fact, part of the reason the Legislature commissioned the 2010 Commission was based on language in *Montoy* that the Legislature should do ongoing monitoring of the school finance system. *See* Tallman Tr. Test. 1061:7-23. The *Montoy* Court has instructed that:

> The issue of [the suitability of the school finance system] is not stagnant; past history teaches that this issue must be closely monitored. Previous school finance legislation, when initially attacked upon enactment or modification was determined constitutional. Then, underfunding and inequitable distribution of finances lead to judicial determination that the legislation no longer complied with constitutional provisions.

See Tr. Ex. 1, at PRIMER 000203 (citing language from *Montoy I*) (emphasis added).

274. The 2010 Commission expired in 2010. *See* Tallman Tr. Test. 1061:7-23.

275. The Commission, over a five year period, made several recommendations to the

Legislature regarding education, including, but not limited to:

a. To fund the formula with a BSAPP of $4,492 with a 3-year funding cycle and an annual cost of living adjustment. *See* Tr. Ex. 178; Tr. Ex. 179.

b. To provide all-day kindergarten for all students. *See* Tr. Ex. 178.

c. To fully fund professional development and mentor teacher programs. *See* Tr. Ex. 178; Tr. Ex. 181.

d. Give funding priority to early childhood education, before- and after- school tutoring and support programs, at-risk funding and programs, staff development, leadership academies, and highly qualified teachers. *See* Tr. Ex. 179.

e. To change the formula for determining special education catastrophic aid. *See* Tr. Ex. 179.

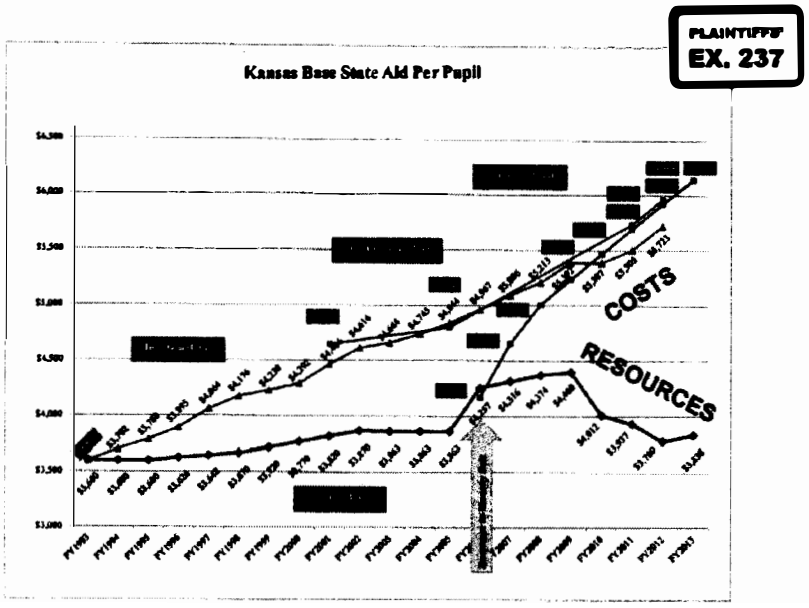
f. To make changes to at-risk weightings and bilingual weightings. *See* Tr. Ex. 183.

g. To improve and increase professional development opportunities. *See* Tr. Ex. 183.

276. The recommendations of the 2010 Commission were based on research; discussion among the Commission; discussion with parents, teachers, people in the community, and school administrators; and personal experiences in the classroom. *See* Chronister Tr. Test. 3242:24-3246:23.

277. These cost studies, and their updates, suggest that the base should be set higher than the current statutory base of $4,492. *See* Tr. Ex.

236 (including excerpts from each individual study); Tr. Ex. 237 (copied below).



278. These cost studies were reasonable estimates of the actual cost of providing a suitable education, at the time they were conducted. *See* Myers Tr. Test. 1611:23-1612:12 (regarding A&M); Frank Tr. Test. 2051:19-23 (regarding LPA).

279. However, both the A&M study and the LPA study are outdated. *See* State Opening FOF ¶ 50 (citing Myers Tr. Test. at 1647–53, 1661-62 and 1671) and ¶ 52 (citing Frank Tr. Test. at 2044-45).

280. Despite the fact that both studies conducted to determine the actual cost of providing an education to Kansas students (the A&M study and the LPA study) are outdated, the State has not commissioned any recent studies of the cost of providing an education to Kansas students, under the current standards. *See* Tallman Tr. Test. 988:22-989:16; Tallman Tr. Test.1060:23-1061:6; Myers

> Tr. Test.1631:4-1632:7 (stating that the State has not asked him to update the cost study he previously performed)."

Plaintiffs' [Proposed] *Final Findings of Fact*.

THIS COURT'S ANALYSIS OF THE COST STUDIES AND FUNDING LEVELS

In order to decide any limitations to be placed on the facts we have accepted above since the mathematics there were not challenged, we have attempted, as best we could, our own analysis. If a conflict develops as a result of this analysis, it is our analysis that controls our ultimate conclusions. Since the enactment of SB549, Kansas school districts' local option budgets, which include, where appropriate, supplemental state aid, have been stated by the State as intended to stand as meeting the State's obligation for meeting, in part, its constitutional "suitable provision for financing" obligation. What the affect of this represented philosophical change in the LOB is, what changes to state supplemental aid payments mean, and what the effect of reductions in the base student aid per pupil (BSAPP) is, all need to be considered.

In the analysis and comparisons following we have used the unweighted enrollments used in FY2012 (2011-12)

throughout since we believe an increase or decrease in students subject to a weighting would not lend aid to an apples to apples - oranges to oranges - basis for any comparison as theoretically an increase or decrease in weighted students means either an expense compensated for by the formula in the case of the former or an expense no longer incurred in the case of the latter. In other words, increases or decreases in either unweighted enrollments or weighted enrollments are captured by the Kansas school finance formula. It is true, however, and of significance, that for every one dollar ($1.00) in reduction to the BSAPP, the impact to school districts' with categories of students that are weighted is to further reduce the total funds available to the district by the exact dollar percentage application to the students weighted, an exception being special education weighted students since special education is funded by a fixed payment and the product of the special education weighting is deducted as "local effort" from general state aid payments due the school district by the State. By example, a school district such as No. 259 Wichita in FY2012 (2011-12) had 44,877.4 unweighted students. Its weighted enrollment was 82,593, less special

education students of 10937.94, or 71,657.1 weighted students exclusive of special education. This meant for every dollar ($1.00) lost by a reduction in the BSAPP, it lost, on the average, about an additional sixty cents (.60¢) or a total of $1.60 for every weighted student and $1.00 for each unweighted student, including each student in special education. (Plaintiffs' Exhibit 12 at USD No. 259: 82,595 - 10937.9 = 71657.1 ÷ 44,877.4 = 1.59673.)

We then proceed to compare the studies using as an example USD No. 259 - Wichita's FY2012 (2011-12) operational totals and per pupil values with recommended state funding derived from prior cost studies, which, by testimony or judicial notice, can be modified to reflect consumer inflation data so as to adjust those studies findings and recommendations to 2011-12 dollar equivalents to see how Kansas's K-12 funding today compares with the recommendations of those studies. A great difficulty in reference to analyzing the various cost studies is that they differ in their assignment of costs to determine the base level or other identified levels for appropriate funding. The Kansas school finance formula denominates, principally, "BSAPP", which is the base student aid per pupil, as the

beginning basis for weightings to arrive at a school district's "general fund" for budgeting purposes. The "BSAPP" in the Kansas school finance formula is an unweighted sum. The "general fund" is, of course, the weighted operating fund.

The Augenblick & Myers Study of 2002 can be seen to have included KPERS in some measure and did not consider federal program fund expenditures in their formulations used - "successful school" approach and "professional judgment" approach - to model those costs. "Supplemental general aid" was not a special program "cost", but rather simply was a means of funding and equalizing certain projected costs it supported, which this study recognized. Thus, this funding expenditure was assigned then, appropriately, by Augenblick & Myers to meeting equalization concerns under a school district's local option budget or to spending under their denominated "second tier" costs, which they envisioned as costs above the "first tier" costs or "foundation level", *its floor for costs to provide a suitable education. Study*, Plaintiffs' Exhibit 203, p. VI - 2: "In our view, the two figures can be viewed as upper and lower limits with which the true figure probably exists." Though they discussed the

comparative projections of the two different approaches, they elected to establish their recommendations from the "successful schools" approach as a base for weightings and from there to project for the "second tier", which they envisioned as encompassing the local option budget or LOB. Their selection of approach is probably based on the fact that the "professional judgment" approach, given it would include, to a greater degree, an ideal level of expenditures, which might or might not encompass all weightings or not do so in a finite fashion, which would thus make it unsuitable as a base for the use of weightings. *See* Plaintiffs' Exhibit 203 at p. E-3; p. VII-6.

Nevertheless, they arrived at recommendations as follows, as relevant here:

- "Kansas should continue to use a foundation program in combination with the LOB as the primary basis for distributing public school support.
- The foundation level (base cost) should be raised in the future to a level that would be equivalent to $4,650 in 2000-01.
- The foundation level should be adjusted by a regional cost factor using figures from the National Center for Education Statistics until such time as the state conducts its own study.

- The foundation level should be adjusted in recognition of the higher costs associated with: (1) the operation of moderate size and small school districts; (2) the needs of students in special education programs; (3) the needs of at-risk students (based on the number of students participating in the free lunch program); and (4) the needs of bilingual students. The adjustments should be based on formulas that are sensitive to the enrollment level of school districts.

. . .

- The second tier (Local Option Budget) should permit districts to raise up to 25 percent more than the revenue generated by the foundation program (*based on the foundation level and the adjustments for size, special education, at-risk students, and bilingual students*). The state should continue to equalize the second tier in the same manner as it does currently.

- The foundation level should be restudied every 4-6 years or when there is either a significant change in state student performance expectations or a significant change in the way education services are provided. In intervening years, the foundation level should be increased based on the work of a committee designated by the legislature to determine an annual rate of increase, which should consider annual changes in the consumer price index (CPI) in Kansas. . . ." (Emphasis added.)

Plaintiffs' Exhibit 203 at pp. ES-3, ES-4.

The "foundation program" reference above, which was used for calculating the LOB base, was found to be a

weighted base of $6918 in 2000-2001 dollars. Plaintiffs' Exhibit 203 at p. E-5; p. VII-12.

Augenblick & Myers analysis followed from its description of the Kansas School Finance System, as follows:

> "The current school finance system was enacted in 1992, replacing another approach that had been in place for two decades. The primary components of the system *are a foundation program and a second tier. The purpose of the foundation program is to assure that a specific amount of revenue is available for all students (base state aid), that additional revenue is available for students with special needs* (special education, students from low income families, and bilingual students) or *for districts* with *certain cost-related characteristics* (particularly enrollment level based on low enrollment weighting and correlation weighting), and that property tax rates are essentially uniform across the state. *The purpose of the second tier, or local option budget (LOB), is to equalize the ability of school districts to generate a limited amount of revenue above the foundation program.* While the foundation program approach is used in most states, in one form or another, the second tier concept is not widely used. Nevertheless, the general structure of the system is designed to be sensitive to the needs of school districts and to wealth differences across districts, which means it meets the criteria necessary to promote inter-district fiscal equity and taxpayer equity." (Emphasis added.)

Plaintiffs' Exhibit 203 at p. VII - 1.

The Augenblick & Myers study further excluded from its costs analysis spending, at least for "tier 1" or the "successful schools" approach, for capital purposes, transportation, special education, or other special purpose programs or any service funded by federal revenue. *Study*: Plaintiffs' Exhibit 203, at p. I-3; p. IV-7 ¶ 1 ("After taking into consideration teacher retirement, we concluded a 20 percent [benefit] rate was appropriate"); "capital outlay", *Id.* p. IV-9. Hence, it appears, more likely than not, some KPERS costs are included in their cost estimates. On the other hand, weights or weighting, as in Kansas, were used to encompass most other enhanced costs. Plaintiffs' Exhibit 203, p. VII-7; p. VII-12. Thus, in attempting to measure the Augenblick & Myers study with other studies or the Kansas School Finances system's BSAPP or LOB, some portion of KPERS should be seen as included in its cost estimates. Thus, for our comparisons, we attempted to remove that cost.

The Legislative Post Audit Study of January, 2006, relied for its output based costs on its consultants, Ducombe & Yinger, Inc. These consultants did not include KPERS expenditures in their cost assessment. See LPA study:

Plaintiffs' Exhibit 199 at p. C-47: Appendix B at "Exclude:" "51-KPERS". Unlike Augenblick & Myers, capital outlay was included. See LPA Study: Plaintiffs' Exhibit 199 at p. C-47 Appendix B: "16 - Capital Outlay"; "700 - Property & Equipment". However, unlike Augenblick & Myers, the LPA study consultants included federal fund expenditures. *Id.* at "07 - Federal". Hence, for these costs the Augenblick & Myers and the LPA studies differ. However, similarly, the LPA study consultants excluded special education, vocational education and other special services. *Id.*, at "Excluded". Further, unlike the Augenblick & Myers study, which made its report against the background of the Kansas school finance system in the sense of BSAPP, weightings, and the local option budget, the LPA study cost projections, though encompassing expenditures assigned to multiple funding sources, nevertheless, made its prognostications from what it denominated as an "adjusted general fund" that had excluded special education, vocational education, and transportation costs in first reaching its "baseline", *i.e.*, - "unweighted", costs. Nothing indicates it considered the LOB. The consultants explanation of their methodology and

what actually was meant, or fell within, the term "baseline cost per pupil" was explained, as follows:

> "Pupil weights are calculated in several steps. First, we develop an estimate of baseline costs to meet the performance standards *in a hypothetical district with a total enrollment between 1,700 and 2,500 students that has no students with special needs*. The student performance variable is set at the performance standard, teacher salaries are set at the state average, and the efficiency related variables are set at values consistent with above average efficiency (67th percentile). *The baseline cost per pupil to meet the 2004 standards is estimated to be $3,698. The baseline cost of meeting the 2006 standards is $4,024 and for the 2007 standards the baseline cost is $4,346.* Then, for each district, we calculate separate per pupil cost estimates when the district's actual values for enrollment, poverty, or bilingual education are used. For example, to predict the additional costs associated with poverty in a particular district, we calculate per pupil costs using all of the values from the hypothetical baseline district except for poverty (which is set at our particular district's actual value). The baseline cost per pupil is subtracted from this predicted cost with poverty. The difference is divided by the share of free lunch students to estimate the increased cost associated with a free lunch student. Finally, the increased cost per free lunch student is divided by the original baseline cost per pupil to get the free lunch pupil weight. A similar process is used for bilingual students and enrollment categories." (Emphasis supplied.)

Plaintiffs' Exhibit 199 at pp. C-28 - C-29.

The "baseline per pupil costs" is the model and fulcrum which this study used to reach its "foundation level" of funding, which the LPA consultants described as follows:

"The bottom line in developing a school finance system to support student achievement standards is to assure that each school district has the resources necessary to reach these standards. The General State Aid formula used by Kansas is a variant on a 'foundation program,' which is the type of basic operating aid program used in most states (Duncombe and Johnston, 2004). For a foundation program to support student performance standards, *the first component of the aid formula should be an estimate of the minimum cost* necessary to achieve these standards, which is commonly referred to as *the **foundation level**. In Kansas, this is analogous to each district's general fund budget. The second component of a foundation formula is required minimum local tax effort,* typically measured as the product of the state-set minimum property tax rate and district property value. Different districts have different foundation levels and different minimum required local tax efforts. *The difference between a district's foundation level and its minimum local tax effort equals the amount of state aid the district receives.*

The cost function is well suited to estimating costs required for different student performance standards (i.e. foundation levels), because it directly links spending and performance, accounting for the effects of factors outside and within district control. We estimate these costs for Kansas in three steps. First, we set efficiency-related variables at values consistent with above-average efficiency (67th percentile). In other words, our foundation levels are an estimate of what it could cost a district to reach the performance standards, if it were relatively efficient. Second, we use the performance outcomes set by the Kansas State Board of Education for the three math exams, the three reading exams, and the graduation rate. To construct a performance standard comparable to the outcome index used in

> the cost model, we took a simple average of the standards for these seven performance measures. Third, we allowed spending to vary across districts based on factors outside district control, namely, enrollment size, the concentration of disadvantaged students, and the predicted costs of hiring teachers.
>
> Given the data used for our cost model, these three steps lead to an estimate of the ***minimum cost for achieving the seven performance targets in each school district (excluding special education, vocational education, and transportation). This cost is the district's estimated foundation spending level.*** Estimated costs (foundation spending levels) for all school districts in Kansas are presented in Appendix F for performance outcomes in 2004, 2006, and 2007." (Emphasis supplied by this Court is by italics, the original study emphasis was/is in bold.)

Plaintiffs' Exhibit 199 at pp. C-32 - C-4.

The Augenblick & Myers study declared its "tier 1" or "successful schools" approach as the "foundation level" or "base" level of funding, but it is clear this "foundation level" is before weighting (Plaintiffs' Exhibit 203 at pp. E-3 - E-4). Thus, in fact, its "tier 1" or "foundation level" equates to the LPA study's "baseline per pupil cost", which is also unweighted. While both of Augenblick & Myers descriptions of "Tier 1" and "Tier 2" have to populate these two models with costs in some fashion to achieve a certain result, only the LPA consultants

describe the "baseline" costs as based on a certain sized school "with *no special needs*". Plaintiffs' Exhibit 199 at p. C-28. The LPA study's "foundation level" of funding is after weighting is applied and, hence, differs from the Augenblick & Myers study in that the LPA study goes on to give its weighted "foundation level" as a "minimum level of funding" *by individual school districts*. *Id.*, at Appendix F. On the other hand, the Augenblick & Myers study's "foundation level" was an unweighted minimum level of funding which was its unweighted "tier 1" level, which is, accordingly, equivalent to the LPA study's "baseline" funding. Both, however, envision that these described minimums are merely the bases from which weightings are then applied. See Plaintiffs' Exhibit 203, at p. VII-7; p. VII-12; Plaintiffs' Exhibit 199, p. C-28, C-29. *Hence, both the Augenblick & Myers study and the LPA study would similarly describe the suitable level of state constitutional funding by the weighted result not merely the "base" or "baseline" costs*. In the case of Augenblick & Myers that level is somewhere between its "tier 1" and "tier 2" level, while the LPA study pegs that level as an equivalent that produces a school district's general fund budget less the local

mandatory mill levy, *i.e.*, 20 mills. Further, the Augenblick & Myers ultimate suitability finding is not addressed or identified specifically to individual school districts while the LPA study consultants identified these suitability results by individual school districts. See Plaintiffs' Exhibit 199 at Appendix F.

Here, based on the above, we find a basis for comparison of their two studies and the Kansas BSAPP model. First, we think that in order to reconcile the Augenblick & Myers "foundation level" - minimum funding - with the Legislative Post Audit Study's "baseline per pupil" funding, that the LPA study should be adjusted to exclude costs tied to federal funds. Without further information we must rely on the manner in which the legislative post audit elected to remove such funds. See, Plaintiffs' Exhibit 199 at p. 35; Appendix 1.2, p. 127. We agree since we are unaware of any federal funds eligible for general use purposes, hence, capable of being used "in lieu" of state funds other than "AARA" funds (stimulus) in 2009-10 and 2010-11. Further, costs assigned to federal programs would be difficult to be seen as a component *of a minimum or base cost* of a suitable education and, if so treated, as the legislative post audit

recognized, might violate federal statute. *Id.* Nevertheless, whether in fact the LPA's consultants, experienced as they were, actually counted such costs, in the measure assumed by LPA officials, engenders in us some doubt.

Secondly, since the comparison is of the minimum or base costs, *i.e.*, unweighted, with the unweighted Kansas BSAPP figures, all the other cost items removed by both studies from their cost analysis, such as vocational education costs and transportation costs from the base figure calculations need not be added back since the Kansas BSAPP does not include them in "base" costs. Similarly, capital outlay costs included by the LPA consultants can be removed. Capital outlay is not part of the Kansas BSAPP or weightings. Further, since capital outlay was paid separately and, in fact, has not been paid since 2009-10, capital outlay has no relevance *on a comparative basis*. However, as we will later note, the failure to pay capital outlay costs in any fashion has a meaningful and substantial effect on the value of the BSAPP and other funding. Hence, each study's base has the capacity to be comparable to the Kansas BSAPP as Kansas deals with vocational education,

transportation costs, and special education expenditures through its weightings. While the Kansas System further designates its fixed payment for special education as paid by a direct deduction as a "local effort" from the amount due the district by the State, the fact special education is first weighted before it is deducted excludes it from inclusion or impact in a "base" or BSAPP cost. Further, it is, by the manner calculated and paid, not of significant impact in a comparison of recommendations made in regard to any weighted level of expenditures required.

Finally, if we deduct the per pupil value of the capital outlay amount actually paid to a district by the State from the LPA figures and deduct the amount of the State paid KPERS for the district as in the Augenblick & Myers study, the resultant figures are roughly, but reasonably, comparable across the board when vocational education and transportation weightings are added to the non-base cost, *i.e., weighted,* recommendations of both studies. The comparisons, which we have proposed above, are shown following. The footnotes following explain the premise for any calculations. We readily acknowledge our comparison is not as sophisticated as it might be,

principally from a lack of precise data, but we believe it demonstrates, within reasonable tolerance, an apples to apples, oranges to oranges, basis to compare competing arguments and the mountains of data and exhibits intended to advance a view point.

Augenblick & Myers Study (2002) Adjusted for Inflation to 2011-12 (In dollars per pupil equivalent) **1, 2**		Legislative Post Audit Study (2006) Adjusted for Inflation to 2011-12 (In dollars per pupil equivalent) **1, 9**		Wichita USD 259 FY2012 (2011-12) Actual (In dollars per pupil equivalent) **6, 12, 13**		Wichita USD 259 Fiscal 2013 (2012-13) **12, 13, 14**	
Tier 1 (**study recommendation**) = base cost or "foundation level" **3**	$5759	"Baseline": (**study finding**)**10**	$5119	FY2012 (2011-12) BSAPP:	$3780 ($3728)	FY2013 (2012-13) BSAPP	$3838 ($3786)
Weighted Tier 1 (**study recommendation**) = "Foundation program" = General Fund **4, 5**	$8710	"Foundation Level" = weighted "baseline" = General Fund (**study finding**) **11, 5**	$8749	Weighted 2011-12 BSAPP = FY2012 General Fund	6077 $6380 ($6285)	Weighted 2012-13 BSAPP = FY2013 General Fund **13**	$6488 ($6393)
Adjusted Tier 1 = (weighted Tier 1 plus FY2012 prorated supplemental state aid due) **4, 6**	$9627	"Foundation level" plus FY2012 prorated supplemental state aid due **6, 11**	$9670	Weighted 2011-12 BSAPP = General Fund plus FY2012 prorated supplemental state aid paid	$7217 ($7122)	Weighted 2012-13 BSAPP = General Fund plus FY2013 prorated supplemental aid to be paid	$7217 ($7176)
Tier 2 (**study recommendation**) = weighted Tier 1 + 25% = Total operating Expenditures **7**	$10,888						

Adjusted Tier 2 = weighted Tier 1 + 27% = total operating expenditures **8**	$11062	"Foundational Level" plus FY2012 prorated supplemental state aid due plus FY2012 local portion of LOB = total operating expenditures **6, 11**	$11,111	Weighted BSAPP (General Fund) plus FY2012 prorated supplemental state aid paid plus FY2012 local portion of LOB = total operating expenses	$8527 ($8432)	Weighted BSAPP (General Fund) plus FY2013 prorated supplemental state aid to be paid plus FY2013 local portion of LOB = total operating expenses	$8639 ($8544)

1. All inflation adjustments made as of January 1 of FY, *e.g.* 2005-06: 1/1/06, per BLS CPI calculator. All per pupil figures based on USD 259 - Wichita - unweighted FTEs per Plaintiffs' Exhibit 12, "Col. 4" ("Declining enrollment provision") or 44,877.4 and otherwise by Plaintiffs' Exhibit 20, as modified. Hence, FY2012 (2011-12) is the base for the comparisons.

2. The *Study* excludes special education, vocation education, transportation, capital outlay and federal funds. It did include KPERS but KPERS was removed by the Court.

When KPERS was removed by the Court, it was allocated between unweighted cost basis and weighted cost basis used, since such a character of expenditure would, most likely, cover that expansion of expenditures. See, Footnote **3**.

Additionally, the Court has *included* vocational education and transportation in *weighted* recommendations. *S*ee Footnote **5**.

3. Tier 1 is a *study recommendation*, and is a lower limit base cost. Original Tier 1 recommendation of $4650 is inflation adjusted from FY2001 to FY2012 or $6076 - less $317 KPERS = $5759. This is an equal measure value to the Kansas school finances system's BSAPP. *S*ee footnote 2, *supra;* Plaintiffs' Exhibit 203 at ES-3; *Id.*, at VII-7; *Id.* at VII-12. The original weighted finding by the *study* of $6918 as inflation adjusted to FY2012 is $9040. Using USD 259 unweighted FTES of 44,877.4 KPERS paid in FY2012 was $26,919,176 and .9716 was, most likely, paid in operations (*S*ee, Defendant's Exhibit 1238), or $26,154,671 ÷ 82,595 weighted FTE = $583 per pupil. A basis of approximately $317 is necessary using USD 259's weighted FTEs of 82,595 to obtain $583 on a weighted basis ($44,877.4 is to 82595 = .5433). Accordingly, $317 is deducted from unweighted Tier 1 leaving $5,759.

4. Weighted Tier 1 is Tier 1, as weighted, which is found by the *Study* to be $6918 (Plaintiffs' Exhibit 203, p. V11-12). Inflation adjusted to FY2012 is now $9040 less $583 of KPERS = $8457 per pupil. This sum is adjusted to add back in vocational

education per pupil of $63 and $190 per pupil for transportation. *See* Footnotes **5**. Hence, the adjusted recommendation is $8710 for weighted Tier 1, which can be seen as an equivalent to the Kansas school finance system's "legal general fund", or adopted general fund. Plaintiffs' Exhibit 203, at p. ES-5.

5. As both the Augenblick & Myers study and the Ducombe & Yinger study excluded vocational education and transportation in their costs while Kansas school finance assigns it a weight for formula purposes, the USD 259 - Wichita - vocation educational FTE (747 x $3780 = $2,823,660 ÷ 44,877.4 = 63) and the transportation weighting FTE (2254 x $3780 = $8,520, 120 ÷ 44,877.4 = 190) have been added to each study's equivalent *weighted* costs. *See* **Footnote 10**

6. Prorated supplemental aid due is calculated from the LOB produced, as appropriate, from either the "weighted Tier 1" "Foundation Program" of the Augenblick & Myers Study or the "Foundation *Level*" under the LPA - Ducombe & Yinger - Study. The amount due is determined using the supplemental state aid percentage to be paid of .4550 to USD 259 - Wichita, then prorated by the 2011-12 figure of 85.7%. Since the BSAPP equivalent under each study exceeds $4433, no recalculation of the "legal LOB" is necessary. See Plaintiffs' Exhibits 18 and 20. Where applicable, the "LOB portion remaining" is the local portion of the LOB that would exist after payment of any supplemental state aid.

For the Augenblick & Myers Study, weighted Tier 1 of $8710 per pupil x 44,877.4 = 390,882,154 x .27 (USD 259's LOB %) = LOB $105,538,182 x .4550 = $48,019,873 x .857 = $41,153,031 ÷ 44,877.4 = $917 per pupil for supplemental state aid due.

For the LPA - Ducumbe & Yinger - Study, "Foundation Level" of $8749 per pupil x 44,877.4 = $392,632,373 x .27 (USD 259's LOB%) = LOB of 106,010,741 x .4550 = $48,234,887 x .857 = $41,337,298 ÷ 44,877.4 or $921 per pupil supplemental state aid due.

7. Tier 2, is 1.25 x the weighted Tier 1 recommendation of $8710, as adjusted. *See* Footnote **4**. This results in a weighted Tier 2 figure of $10,888 per pupil. The .25 increase was considered to be the equivalent of the local LOB. This represents the study recommendation for total school district operating expenditures, *i*.e., including the LOB fixed at 25%. *See* Plaintiff's Exhibit 203 at pp. ES-4, VII-12.

8. Adjusted Tier 2 adjusts Tier 2 by using the LOB equivalent at .27 instead of .25 to make it the equal of USD 259 - Wichita's - LOB % of .27.

9. The *Study* excludes special education, vocation education, transportation, and KPERS. Federal funds and capital outlay were included. We have excluded federal funds from the base year FY2006 (2005-06) in the manner in which the LPA did, which its consultants - Ducombe & Yinger had included. LPA allocated a total of $205.5 million of federal funds in that period with $71.5 million allocated to the "baseline" costs and $134 million to Ducombe & Yinger's "foundation level" of costs, the latter of which equates, as adjusted, to a school district's general fund (*Compare,* Plaintiffs' Exhibit 199 at p. C-28 to pp. C-33-34 and Table 9 at C-37) LPA made the allocation as explained at Plaintiffs' Exhibit 199 at p. 35, Appendix 1:2, p. 127. We are however doing this for comparison purposes only in terms of the "baseline" cost adjustment since it encompassed a school with *no special needs* (*Id.* p. C-28) and we have not been pointed to any federal programs that are not tied to special needs except for special circumstances such as stimulus "AARA" funds disbursed due to the recession for FY2010 and FY2011. Hence, removal of federal funds from "baseline" costs seems misguided. We greatly doubt experts, like Ducobme & Yinger had such expenditures, if any at all, in their "baseline" estimates. Deducting such federal funds from "*weighted*" cost projections, *i*.e., Ducombe & Yinger's "foundation level" costs, seems, if to be done *for comparison*, appropriate, however, even this is suspect since federal funds, at least some, are assigned as "local". (See, K.S.A. 72-6410(c)), hence, removed as a state obligation.

Capital outlay has been excluded by the Court on a per pupil value based on capital outlay to have been paid USD 259 in FY2012 of $4,266,753 or $95 per pupil. (44,877.4 FTEs, unweighted). *S*ee Exhibit 356. Additionally, the Court has included, and has added, vocational education and transportation costs in weighted recommendations. *S*ee Footnote **5**.

10. Original recommendation of $4346 to meet the FY2007 standards was adjusted by LPA to remove federal funds to $4221 in 2003-04 dollars is adjusted for inflation from FY2004 (2003-04) to 2012FY (2011-12) ='s $5171. Plaintiffs' Exhibit 199 p. 35, p. C-28; at appendix F, p. C-68. Additionally, the Court has, as it did with the removal of KPERS from the Augenblick & Myers study, (See Footnote **3**) removed and allocated capital outlay of $95 per pupil (*S*ee Footnote **9**) between the original baseline recommendation of $4346, as inflation adjusted to $5324 and the weighted "Foundation Level", general fund, equivalent originally recommended for USD 259 of $7375 as inflation adjusted to $9035. It would take $51.62 if weighted, to produce $95 using USD 259 as the example (44,877.4 is to 82595 = .5433) in FY2012 dollars. Hence, $5171 is reduced by $52 per pupil = $5119.

11. Original recommendation of $7375 in 2003-04 dollars to meet FY2007 (2006-07) standards for USD 259 - Wichita - is

adjusted as did the LPA to remove federal funds, which would reflect the whole of federal funds or $205.5 million or $359 per pupil, or $7375 - $359 = $7016 ($205,500,00 ÷ $577,000) as its weighted which is then adjusted for inflation from FY2004 to FY2012 to $8591 per pupil. Plaintiffs' Exhibit 199 at Appendix F, p. C-68, C-70. *See* Footnote **10**. From this amount is deducted $95 for capital outlay or $8496 per pupil. To this amount there is *added* $63 per pupil for vocational education and $190 per pupil for transportation (see, Footnote **5**) or $8749 per pupil.

12. The figures in parenthesis roughly reflect the potential loss of value equivalent to the Kansas BSAPP and the district's general fund when non-payment of capital outlay equalization funds in whole occurs forcing needed expenditures to come from operating funds. Since we backed out capital outlay from the LPA study based on USD 259's capital outlay equalization payment due of $4,266,753, we have reversed it here and subtracted it from the FY2012 and the FY2013 BSAPP's and General Fund comparisons in like fashion to demonstrate the impact of its nonpayment. The loss of $52 per pupil was allocated to the BSAPP and $95 per pupil to the General Fund and in the other comparisons. See Footnote **10**.

13. A school district's general fund as computed reflects a FTE weighting for special education, however, in order to compare the weighted recommendations of both studies, which did not include special education, the effect of the special education weighting must be removed. This is consistent with the Kansas Finance Formulas, as well, since the benefit the special education weighting, unlike the benefit of other weightings, is assigned to "local effort" and withdrawn from the formula as a setoff to general state aid due. See K.S.A. 72-6410(c); K.S.A. 72-6446; Plaintiffs' Exhibit 4 at pp. 8-9: *Special Education and Related Services Weighting*.

For FY2012 USD No. 259 had 10937.9 FTE from special education weighting and assuring the same special education payment in FY2013 would ahve had 10772.6 such FTEs. Hence, the effect of removing special education in each of those fiscal years per pupil would be $576.9 ($41,345,273 ÷ 7) 657.1 (82595 - 10937.9) in FY2012 and $575.7 (41,345,273 ÷ 71,872.4 (82595 - 10772.6)) in FY2013, each (remanded or removed)?? to $577 and $576 respectively.

14. For FY2013, the BSAPP was set at $3838. Further, supplemental state aid is to be prorated and paid at 80% in FY2013. Other than these changes, the comparison reflects the same basis for calculation as USD 259's FY2012 budgets with per pupil amounts based on 44,877.4 FTEs. The FY2013 legal LOB was based on 71,822.8 FTEs, as weighted, plus 2008-09 special education of $39,142,041. The recomputed General Fund for the

LOB would be $357,530,740 (71,822.8 FTEs x $4433 + $39,142,041). Its legal LOB % has been deemed to remain at .27 thus giving an LOB of $96,533,300 upon which $43,922,152 would have been due for supplemental state aid if it had been paid in full (at .4550), but which is now to be paid as prorated at 80% or $35,138,121.

Our acceptance of the above comparisons flows, as noted, from an analysis of the underpinnings of both the Augenblick & Myers study of 2002 and the Legislative Post Audit Study of 2006, the testimony of John Myers in his update of the former, and the testimony of Dr. Bruce Baker in regard to those studies and the funding system as a whole, and, of course, and importantly, the too ignored effect of inflation. We have also looked at the principal testifying school districts budget documents in determining the state and local funds available in comparison to changes in the financing formula, particularly, in regard to the base student aid per pupil calculation (BSAPP), supplemental state aid (SSA), and the effect on the local option budget (LOB) in terms of its availability for its original use as designed as a *local option* budget.

In viewing the above chart it is to be remembered that we excluded several items of expenditure or added them in so as to effectuate a comparison of the studies recommendations and removed or placed these costs/expenditures where they

would otherwise appear consistent with the current Kansas school finance formula. However, none of the studies assumed that such costs did not exist at all. Capital outlay is one of such costs.

What the chart discussed above reveals is that on a per pupil funding basis in FY2012, as well as in this 2013 fiscal year, the funding by the State in current dollars substantially lags both the Augenblick & Myers and Legislative Post Audit - Ducombe & Yinger - study recommendations. Our exampled USD No. 259 shows that expenditure of its entire budgeted funds, including supplemental state aid and the local tax generated balance of its LOB funds is, on a per pupil basis, even short of either studies anticipated level for even general fund equivalent expenditures. This is consistent with the evidence produced in regard to the other named Plaintiff school districts and there is no reason to believe this is not the occasion systemwide. The staff and program cuts occasioned by reductions to the BSAPP look to have effected all school districts. See Plaintiffs' Exhibits 254, 255. Also see the *Addendum* at the end of ths opinion which

displays the other Plaintiff school districts as well as one other large district and a smaller one.

Further, simply no evidence has been advanced to impeach the underpinnings of those studies nor the costs upon which they were based. This is not to say they are perfect if simply for the fact they rest in opinion or assumption, but still the respective authors of each study are well versed and respected in their field. As we have seen, it is not the existence of these costs themselves nor whether the area of government to which they go is deserving of expenditure which is doubted, but rather whether the money spent produces the individual and systemic value that should be required of scarce tax dollars. Slashing costs without first determining the best methods to the latter represents not a solution, but rather an act principally grounded on, perhaps, frustration and, certainly, gamble, either of which is unhelpful as policy and immensely and irretrievably destructive of our children's future. The State's attempt to add in costs extraneous to the basis upon which the cost studies were done, or that have traditionally been considered, and paid, separately does nothing to fill the demonstrated input/output funding gap shown from the

studies. Only legitimately subtracting or eliminating the costs considered by the studies could give meaning.

Certainly what the exact amount needed can well be seen to be within a range where some discretion may be exercised simply from the complexity and imprecision of the forecasting tools. A point fixed such as to discourage waste and promote efficiency is rational, but that point cannot be set merely by the amount of funds elected to be made available. *Compare, Americare Properties, Inc. v. Whiteman,* 257 Kan. 30 (1995).

Our next two charts provide some historical view of education funding since before *Montoy* until the present. One looks merely at our exampled school district - USD No. 259 - Wichita - and the other looks at the state funding overall for those periods. We have not included all fiscal years for the reason some past years have no relevance, either, because *Montoy* was being complied with or actions in other years represent water under the bridge or over the dam to which no effective or meaningful legal remedy could be employed. We have, however, set out signpost years. AS noted FY2005 (2004-05) was pre-*Montoy*, FY2009 (2008-09) was the year that backtracking on the financing commitments made

that resulted in the dismissal of the *Montoy* case began, and FY2012 (2011-12) was the year that presents a point when the Legislature, as measured by their actions then, and subsequent, particularly, the income tax cut bill enacted in the 2012 session (L. 2012, ch. 135), and also when the federal government, by withdrawing its stimulus funding that was provoked by the "Great Recession", were not acting under the direct duress of that latter event. As for the portion of fiscal year 2009 and fiscal years 2010 and 2011, we find no need to test the necessity of government action taken since, as we noted, no remedy could presently be employed and nothing could be recouped, the monetary benefits of that funding having been irrevocably lost. Therefore, answers to such questions would be academic, not judicial. If an expectation did, in fact, exist that such questions would be answered, we, respectfully, decline the request. Our noted additional charts follow. Charts pertaining to the other Plaintiff school districts and two others, framed in the same fashion, are attached as an *Addendum* to this *Opinion.*

Kansas School Finance Formula-USD 259 Wichita
(a)

		FY2005 (2004-05) In 2004-05 Dollars	FY2005 (2004-05) In 2012 Dollars (b)	FY 2009 (2008-09) In 2008-09 Dollars	FY2009 (2008-09) In 2012 Dollars (c)	FY2012 (2011-12)	FY2013 (2012-13)
1	Enrollment *2/20/2012*	44877.4	44877.4	44877.4	44877.4	44877.4	44877.4
2	+ At Risk 4 year olds	956.0	956.0	956.0	956.0	956.0	956.0
3	+ Low enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
4	+ High enrollment weighting	2897.2	2897.2	1606.0	1606.0	1606.0	1606.0
5	+ Bilingual weighting	1041.4	1041.4	2056.8	2056.8	2056.8	2056.8
6	+ Vocational weighting	747.0	747.0	747.0	747.0	747.0	747.0
7	+ At-risk weighting	3272.1	3272.1	14920.8	14920.8	14920.8	14920.8
8	+ High Density at-risk weighting	n.a.	n.a.	3272.1	3272.1	3272.1	3272.1
9	+ Non-proficient student weighting	n.a.	n.a.	112.4	112.4	112.4	112.4
10	+ New facilities weighting	351.2	351.2	351.2	351.2	351.2	351.2
11	+ Transportation weighting	2254	2254	2254	2254	2254.0	2254.0
12	+ Virtual student weighting	n.a.	n.a.	501.4	501.4	501.4	501.4
13	+ Ancillary weighting	-0-	-0-	-0-	-0-	-0-	-0-
14	+ Special Education weighting (d)	10,702.9	10,702.9	9,396.7	9,396.7	10937.9	10,772.6
15	+ Declining enrollment weighting	n.a.	n.a.	-0-	-0-	-0-	-0-

16	+ KAMS weighting	n.a.	n.a.	n.a.	n.a.	2.0	2.0
17	+ Cost of living weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
18	= Total Weighted Enrollment (e)	67099.2	67099.2	81,041.8	81,041.8	82595.0	82429.7
19	x Base State Aid Per Pupil	$3863	$4575	$4400	$4744	$3780	$3838
20	Total Legal General Funds (f)	$259,204,210	$306,978,840	$356,583,920	$384,462,299	$312,209,100	$316,365,189
21	Per pupil value of General Fund (20 + 1)	$5776	$6840	$7946	$8567	$6957	$7050

Kansas School Finance Formula Statewide

(a)

		FY2005 (2004-05) In 2004-05 dollars	FY2005 (2004-05) In 2012 Dollars (b)	FY 2009 (2008-09) In 2009 Dollars	FY2009 (2008-09) In 2012 Dollars (c)	FY2012 (2011-12)	FY2013 (2012-13)
1	Enrollment *2/20/2012*	451,392.7	451,392.7	451,392.7	451,392.7	451,392.7	451,392.7
2	+ At Risk 4 year olds	3590.0	3590.0	3590.0	3590.0	3590.0	3590.0
3	+ Low enrollment weighting	42797.4	42797.4	42797.4	42797.4	42797.4	42797.4
4	+ High enrollment weighting	21,197.2	21,197.2	11750.3	11750.3	11750.3	11750.3
5	+ Bilingual weighting	4547.5	4547.5	8981.1	8981.1	8981.1	8981.1
6	+ Vocational weighting	7485.0	7485.0	7485.0	7485.0	7485.0	7485.0
7	+ At-risk weighting	18682.7	18682.7	85,193.3	85,193.3	85,193.3	85,193.3
8	+ High Density at-risk weighting	n.a.	n.a.	11,865.0	11,865.0	11,865.0	11,865.0

9	+ Non-proficient student weighting	n.a.	n.a.	1076.8	1076.8	1076.8	1076.8
10	+ New facilities weighting	5060.7	5060.7	5060.7	5060.7	5060.7	5060.7
11	+ Transportation weighting	25667.1	25667.1	25667.1	25667.1	25667.1	25667.1
12	+ Virtual student weighting	n.a.	n.a.	5588.9	5588.9	5588.9	5588.9
13	+ Ancillary weighting	6718.6	6718.6	6718.6	6718.6	6718.6	6718.6
14	+ Special Education weighting (d)	112,860.8	112,860.8	99,086.6	99,086.6	115,337.9	111,442.8
15	+ Declining enrollment weighting	n.a.	n.a.	473.5	473.5	473.5	473.5
16	+ KAMS weighting	n.a.	n.a.	n.a.	n.a.	41.0	41.0
17	+ Cost of living weighting	n.a.	n.a.	5286.9	5286.9	5286.9	5286.9
18	= Total Weighted Enrollment (e)	699,999.7	699,999.7	769,013.9	769,013.9	788,306.2	784,411.1
19	x Base State Aid Per Pupil	$3863	$4575	$4400	$4744	$3780	$3838
20	Total Legal General Funds (f)	$2,704,098,841	$3,202,498,628	$3,383,661,160	$3,648,201,942	$2,979,797,436	$3,010,569,802
21	Per pupil value of Total Legal General Funds (20 + 1)	$5991	$7095	$7496	$8082	$6601	$6670

(a) In order not to distort comparisons due to student population growth, FY2012 (2011-12) FTE enrollment (declining enrollment provision) and FY2012 student categories eligible for weightings were used. However, weightings formula and BSAPP are for FY shown where different and applicable,

except ancillary and new facilities weightings are based on FY2012 only. Unless a difference is clear the assumption is the particular weighting would provide the same result.

(b) Inflation adjusted from 1/1/05 to 2012, based as on U.S. Bureau of Labor Statistics, using its calculator. However, beginning at the FY beginning of 7/1/04, it would be higher, *e.g.*, $4653 (4730 + 4575 ÷ 2).

(c) Inflation adjusted from 1/1/09 to 2012 per (b) above. However, beginning at the FY beginning of 1/1/08, it would be less, *e.g.*, $4735 (4744 + 4727 ÷ 2).

(d) Special ed is that paid in FY2012 ÷ BSAPP for FY shown = special education student equivalent to that of FY2012. Statewide special education due for FY2013 (See L. 2012, ch. 175, § 88(a)) is 58.1046% of FY2012 amount.

(e) Total weighted enrollments different from 2012 due to weighting difference in FY shown. Also see (d).

(f) Excludes transfers or other authorized adjustments, *e.g.,* Defendant's Exhibit 1032 : USD 259 FY2012 Form 150.

What these just referenced charts reveal on an apples to apples, oranges to oranges basis in terms of the operating funds that were the focal point of the Augenblick & Myers study, as well as that of Ducombe & Yinger study, is that when viewed on a current dollar and constant student (FTE) basis statewide, school finance funding is now on a back to the future basis. In other words, the legal general funds available in FY2005, when inflation adjusted, would be higher statewide then than now exist for FY2012 and FY2013: $3.202 billion (FY2005) vs. $2.980 billion (FY2012) and $3.202 billion (FY2005) vs. $3.010 billion (FY2013).

Further, the Kansas Supreme Court in the *Montoy* case originally ordered that a total of $859 million be provided. On the release of the case on a finding of substantial compliance in *Montoy* IV in July, 2006, it had been promised a BSAPP of $4433 by the third year (FY2009). In FY2005, the total expenditures in 2005 dollars for the school districts' general funds was $2.704 billion and in FY2009 *2009* dollars was $3.384 billion or a total difference, unadjusted for inflation, of *$680 million*. Even including supplemental state aid, which had been increased by SB549 from the 75th percentile to the 81.2 percentile, that increase promised, and presumed paid, added only $121.7 million additional. *See, Montoy IV* at pp. 16-17. Nevertheless, the bottom line is that any funding short of a BSAPP of $4433 through FY2009 was not in compliance with the commitment made in 2006 that resulted in dismissal of this suit's predecessor.

Looking at USD 259 - Wichita - alone, its comparable inflation adjusted general fund budget in FY2005 would have been $306,978,840 while in FY2012 it was only $312,209,100 or $5,230,260 higher in constant dollars and in FY2013, only $9,386,349 higher in constant dollars ($316,365,189 -

$306,978,848). This is a cumulative increase at this point since pre-*Montoy* of 3% in inflation adjusted dollars. The reduction in the general fund budget since FY2009 through FY2013 in inflation adjusted dollars has been $68,097,110 ($384,462,299 - $316,365,189), or 21.5%. In FY2009, the BSAPP was at $4400, which, due to a cut, was $33 below the commitment represented to the *Montoy* Court. It is now for FY2013 fixed at $3838.

Reference to the comparison charts in the *Addendum* involving the other named Plaintiff school districts and two other districts reflect, in inflation adjusted dollars, similar modest increases (Plaintiff school districts) or decreases (USD No. 299 - Blue Valley and USD No. 372 - Silver Lake). The difference between Plaintiff school districts and the other two school districts exampled most likely rests in the weightings available to them. Nevertheless, what seems clear is that the benefit of the increased weightings made by the Legislature after FY2005 has largely been neutralized.

Based on these facts referenced and our own analysis just noted, we must conclude that the Legislature could not have possibly considered the actual costs of providing an

Article 6, § 6(b) suitable education in making its appropriations in its annual sessions after its 2008 session through its 2012 session. Inflation itself during the period had to be known as well as the plethoria of Kansas State Board of Education information collected and published by it in regard to the increasing demands on school districts, both from the increase in pupils falling into weighted categories as well as the consistent increase in the education goals that needed to be reached. The effects of the "Great Recession" in shoving students into at risk categories could not be other than expected and observed. The upward elevation and upgrade of standards for a suitable education equally had to have been recognized, hence known. Educators, state and local education officials, and even the Legislature's own established commission recommended to the contrary of what was done. In truth, and in fact, it appears that the Kansas Legislature, followed its own declaration embodied in K.S.A. 46-1226(a), as noted, and wholly disregarded the considerations required to demonstrate a compliance with Article 6, § 6(b). Further, not only were the above factors disregarded, but also they did not provoke the

clearly obvious need for an updated cost study that might properly reflect the cost of the growing demands placed on our school children and their school districts if our children are to succeed in our more complex world of work. We recognize the impact of the "Great Recession" and its extraordinary effect on revenues and the suddenness of its onslaught but even reaction to that has limits as we will later note.

THE LOCAL OPTION BUDGET (LOB) AND SUPPLEMENTAL STATE AID

In the consideration of the "suitable provision for financing" made available, we have, as noted, also looked at the local option budget (LOB), which, facially, appears now to have been significantly altered from what it was previously. This was noted in *Montoy IV*, which, we repeat here as follows:

> "More significant are the changes that S.B. 549 made in the LOB.
>
> The school finance formula provided a feature designed to equalize the ability of districts with lower property wealth to raise money through the use of the LOB. The formula was designed so that districts with an assessed valuation per pupil (AVPP) below the 75th percentile would receive supplemental aid in an amount designed to bring them up to par with the district at the 75th percentile of AVPP. Under this formula, districts with an AVPP above the 75th percentile

would not receive supplemental state aid. K.S.A. 72-6434.

The legislature has increased equalization in two ways. First, it increased the LOB equalization threshold from the 75th percentile to the 81.2 percentile of AVPP. K.S.A. 2005 Supp. 72-6434(a). Accordingly, districts with an assessed valuation per pupil below the 81.2 percentile would receive supplemental aid on the LOBs in an amount designed to bring those districts up to par with the districts at the 81.2 percentile of AVPP.

Second, the 25 percent LOB cap on supplemental general state aid was eliminated. See S.B. 3, sec. 12(b). In S.B. 549, the LOB authority was increased to 30 percent for the 2006-07 school year and 31 percent for 2007-08 and thereafter. An election would be required to adopt an LOB in excess of 31 percent. S.B. 549 did not change the AVPP threshold and did not impose a limit on equalization supplemental aid.

S.B. 549 further requires that such supplemental state aid be used to meet accreditation requirements, provide programs required by law, and improve student performance. S.B. 549, sec. 20(e)(1). The 3-year cumulative total of such aid under S.B. 549 is $74 million. Added to H.B. 2247/S.B. 3's increase of $47.7 million, the estimated increase since *Montoy II* is $121.7 million.

Under the prior structure, LOB state aid funding has never been considered part of the foundation level of funding provided by the State for a district's basic operating expenses. However, S.B. 549 now requires that supplemental state aid be applied to meet basic educational requirements, essentially making LOB state aid part of the foundation level of funding.

> Further, the original intent and purpose of the LOB (which would necessarily include LOB state aid) was to allow individual districts to fund enhancements to a constitutionally adequate education provided and financed by the funding formula. *Montoy III*, 279 Kan. at 834, 112 P.3d 923 (citing *Montoy II*, 278 Kan. at 774, 120 P.3d 306). S.B. 549, however, now provides that school districts are required to use LOB state aid moneys to fund basic educational expenses.
>
> The plaintiffs point out that these changes to the LOB state aid do not provide new money and are nothing more than a 'money renaming scheme.' Regardless of whether LOB state aid is new money, the point is that these changes to the equalizing state aid provisions of the LOB component of the formula fundamentally alter the structure of the funding system."

282 Kan. at pp. 16-17.

We find further that beginning after the 2008-2009 fiscal year that supplemental state aid has been prorated. (Plaintiff's [Proposed] Finding of Fact No. 308). Further, we find the testimony of Dale Dennis, Deputy Commissioner of Education, on the history of the legislature's funding of this component of state funding since the enactment of SB549 and the budget effect of the funds paid is undisputed.

> "Q. And the mill levy required of every school district is 20 mills?
>
> A. In the general fund the answer is yes.

Q. And then what authority do the local folks have, the local school board, above the 20 mills?

A. In the general fund that's it. In the LOB, then it's 30 or 31 percent and whether or not they want to pay the property tax that goes with it.

Q. Okay. And the 31 percent is 31 percent of what?

A. That's of that 43 -- 4,433 times the adjusted enrollment, plus special ed times 30 percent or 31.

Q. We call that the statutory set amount?

A. The statutory set amount is 31 percent, mm-hmm, that's the maximum.

Q. So in terms of computing the 20 mills and in terms of what that raises, does that depend on the assessed valuation within a county?

A. The assessed valuation within the school district.

Q. And we hear the term that -- we hear discussion of a mill and one area doesn't raise what a mill in another area does. Explain how that works.

A. Well, comparable size school districts, for example, might be Galena, one mill there might raise 18, 19,000, where in Burlington one mill might raise 350, 400,000. And the reason I chose those two as examples, sir, is that they are similar size in enrollment.

Q. They're also pretty much the bookends on mills, right?

A. Yes. There's one higher. Burlington has always run second or third, but we've got one now due to gas and oil that's a little higher.

Q. How much is it?

A. It's a little over 500,000 assessed valuation per student. That's in Satanta.

Q. So depending on where you live and the property -- assessed valuation of the property determines how much that mill raises?

A. The answer is yes, that along with the state aid you receive and the amount you decide to levy for the LOB.

Q. Understood. Take a look at Exhibit 36. What is 36?

A. It looks like a PowerPoint that I may have done in 2011 at the KASB Convention, Kansas Association of School Boards.

Q. Okay. Turn to Page 9 of your PowerPoint or there are numbers down in the lower right-hand corner, KSDE 142236.

A. Okay, sir.

Q. And the slide at the top says Supplemental General State Aid LOB Low Valuation Districts.

Explain what that slide shows.

A. That slide shows that in 2008/'09 that we

funded the statutory amount for supplemental general state aid, LOB. What the formula called for in the law we funded.

It shows in '09/'10 we funded 89.5 percent of the formula. '10/'11 we funded 91.7. And this was an estimate for '11/'12. '11/'12 is going to turn out to be 86.1 instead of 85.7.

Q. Now, that we're sitting where we are in time, looking back, '11/'12 is going to be 86 point what?

A. 86.1, I believe, sir.

Q. 86.1?

A. Yes, sir.

Q. All right. And then walk us through the next slide there, LOB low valuation districts, an example.

A. This is a district with low assessed valuation. Your enrollment is about 798 kids. Assessed valuation per pupil is 17,958. And the state aid ratio for this district due to poverty is 82.77.

Their LOB budget was a million-eight-twelve. Their state aid entitlement would be a million-five. Because of the proration, now the million-five, we're going to prorate it 85.7. That drops the state aid down to $1,285,000, a difference of $214,000. So the millage equivalency of that drop in state aid is about 14 mills.

Q. Explain how, in the formula, equalization works. Where does the equalization come in?

A. If it's fully -- if it's funded, the districts below the 81.2, 81.2 percentile, if you go below that, then the state aid makes with me and gives you the valuation as if you're 81.2. It makes it up. But when the state aid -- if the state aid prorates, you get a whole different picture.

Q. Explain that whole different picture.

A. When you prorate to a poor district just like this, then your mill levy is going to go up substantially. Where if you're in the top 19 percent, it won't affect it at all.

Q. Give us an example of a district in the top 19 percent.

A. Burlington, Satanta.

Q. Now, are there other types of equalization within the school finance scheme?

A. Yes, sir."

. . .

Q. What is the effect on a school district that is entitled to it, what are the effects of the underfunding of LOB equalization?

A. The board will have to make a decision: Do I raise my property tax, or do I cut the budget? I mean, that's the choice.

Q. There's no other choice?

A. There's not many other choices. You compute it. The mill levy is higher than your taxpayers you think can afford, then you have to lower the

budget or raise the mill levy. That's your two choices.

Q. And in your experience have there been schools that have had to cut their budgets --

A. Yes, sir.

Q. -- as that equalization is underfunded?

A. Yes, sir."

TR: Dale Dennis, p. 1169, l. 3 - p. 1174, l. 5; p. 1176, l. 17, p. 1177, l. 7.

For the fiscal year 2013 (2012-13), based on legislative appropriation, the LOB equalization aid will be paid prorated at 80%. *(Defendant's Final Proposed Findings of Fact* at No. 313; Testimony, Dale Dennis at TR p. 3346).

While, as noted earlier, the *Montoy IV* court merely noted the changes to the LOB funding formula, it made no findings in regard to it other than to note perceived increases in budget authority, the formula for determining state supplemental aid, and the directive for its use by school districts receiving it to apply it to state mandated requirements. However, one of the concurrences noted the following:

"However, I have some concern with the new provisions of S.B. 549 that include equalizing LOB state aid as part of the State's funding toward

meeting its constitutional requirement to suitably fund public education. My concern centers on the fact that in order to receive LOB state aid, districts have to impose a local property tax levy by enacting an LOB. Essentially, the State is arguing that allowing local districts to levy property taxes as a condition for receiving equalizing LOB state aid is synonymous with providing state funding. However, because the LOB is optional and some school boards or taxpayers may reject a local tax to support their school district, children in districts in which base level funding is inadequate and in which an LOB is not adopted, or is not adopted at the full cap, may not have the funds necessary for a constitutionally adequate education. In other words, if equalizing LOB state aid would be necessary to fund a district's basic educational costs, and a district or its voters choose not to adopt LOB funding in full or in part, the legislature has not met its constitutional duty to those children in that district. Counting equalizing LOB state aid as part of the State's foundation funding in essence shifts the legislature's constitutional responsibility to the local school districts. While the legislature may constitutionally allow local districts to choose to provide extras beyond the minimum constitutionally adequate education, *Montoy III*, 279 Kan. at 839, 112 P.3d 923, it cannot allow districts to choose to fund less. By including equalizing LOB state aid to establish that S.B. 549 provides adequate funding, the legislature is essentially making the LOB funding mandatory in those districts where a constitutionally adequate education is not provided by base level state funding.

As of 2003, all but four of the Kansas school districts have opted into the LOB funding, and many were at the maximum cap as it then existed. Because there is such a high level of participation in the LOB funding, my concern about the equalizing LOB state aid does not alter my

> conclusion that S.B. 549 substantially complies with our order to consider actual costs and equitably distribute the State's education funding. However, so long as the legislature allows the LOB to remain an optional funding source rather than a mandatory one, my concern may be relevant in any subsequent challenge to the funding formula as amended by S.B. 549. In the school districts that receive less than the base level of state funding and which would have been eligible for equalizing LOB state aid but do not adopt an LOB at all, or adopt an LOB in an amount lower than the amount necessary to generate the funding shortfall, the State is arguably still responsible for providing constitutionally adequate funding. If other school districts begin opting out in part or in full of the LOB funding, the equitable distribution of state funding may be at risk. Such heavy dependence on a local contribution has historically caused disparity and equity concerns which have led to Kansas school finance litigation, including this case. We must never again allow a funding scheme that makes the quality of a child's education a function of his or her parent's or neighbors' wealth.
>
> The inclusion of equalizing LOB state aid in S.B. 549 provides an essential financial log in keeping afloat the raft of adequate funding for the education of Kansas children. However, if local communities at some future time decide to remove that log, the delicate raft will have a difficult time remaining afloat, and, again, the constitutional right of all Kansas children to a suitably funded education could soon find itself imperiled."

282 Kan., Rosen, J., *concurring* at 30-31.

In *USD 229,* the Kansas Supreme Court effectively concluded that as local school districts' authority to tax was under control of the legislature, the legislature's act

of commandeering local taxing effort for the benefit of the State was, notwithstanding, Article 6, § 5's grant to local school boards a measure of autonomy in the designation of how local educational services were to be provided, constitutional. 256 Kan. at 251-253. Hence, the 20 mill draft of property tax revenues from a local district as and for the State's use in meeting its obligations statewide was sanctioned. If such was permitted, it would seem, as impliedly stated in *USD 229, Id.*, that revenues generated from a local mill levy in excess of 20 mills, in aid of the local option budget, could also be re-directed to some degree, at least, as to their use or that limitations on the maximum amount of funds that could be derived from local effort taxation could be declared, both of which have been seemingly done by K.S.A. 72-6434(e)(1)'s assignment of use and by K.S.A. 72-6433's setting a "cap", now at 30% of weighted final total enrollment (FTE) or at 31%, subject to a protest petition, based on a base per pupil expenditure (BSAPP) of $4,433 as set by K.S.A. 72-6433d. The effect of these latter statutes preserved, in the face of the State's falling revenues due to the "Great Recession", the theoretical capability in local school districts to maintain

their local option budgets substantially unaffected by the state budget cuts. All such locally derived funds above that produced by the 20 mill mandated levy, and, if received, the supplemental state aid, prior to the enactment of SB549 in the 2006 session of the Legislature, were available, primarily, for use at local board discretion for the purpose of meeting any authorized use, including any purpose underlying the State's financing formula. One exception was that only local LOB funds generated above a 25% LOB authorization could be transferred and used for capital outlay purposes. (Defendant's *"FINAL PROPOSED FINDINGS OF FACT"* at No. 45.)

Supplemental state aid, which prior to SB549 unquestionably went purely to equalize LOB purchasing power, is state aid calculated on the difference between the money generated locally from the local LOB mill levy, when translated to the average valuation per pupil (AVPP), and the money generated by the school district that would be ranked on the 81.2 percentile of AVPP on the same mill levy in an array of all school districts statewide. Those districts above the 81.2 percentile get no state supplemental aid. The actual dollar amount derived from the

mandated local 20 mill levy is setoff and treated as in satisfaction or partial satisfaction of the State's funding obligation, depending on the amount, in general state aid funding to the school district, that is, the weighted FTE funding calculated from the current legislatively set, and weighted, BSAPP, otherwise due. Those school districts under the 81.2 percentile would receive state supplemental aid funds paid inversely to the percentage their AVPP was to the AVPP at the 81.2 percentile. An AVPP at the tenth percentile of AVPP, by example, would yield a state supplemental aid payment of 90% times the dollar difference in AVPP. Those school districts at the 81.2 percentile or higher would get no supplemental state aid and would only get a weighted BSAPP amount if an amount remained due after the 20 mill setoff required which would be further subject to a setoff for the fixed amount it would be entitled to receive from the State for special education. Those districts below 81.2 would get the weighted BSAPP amount remaining after the actual dollar amount derived by the local 20 mill levy in their district and less the state's fixed special education payment and, then, would receive a supplemental state aid payment.

We note that all LOB funds in any school district are inherently dedicated to school purposes. However, it was only after SB549 was enacted that state supplemental aid, if received, was directed to be spent as dictated by the State (K.S.A. 72-6434(e)(1)). The enactment of the latter, if seen as a mandatory requirement, now means that discretionary use of the local option budget is unlimited for school districts not receiving supplemental state aid, but, yet, for those that do the degree of their discretion remaining over these local option budget funds is dictated by the size of the State's supplemental aid grant to them. Hence, the poorer the district in terms of property tax wealth, the greater the loss of local option budget discretion by a school district. Of course, limitations on spending discretion inherently applied as well to the BSAPP generated general state aid funds, particularly, funding amounts generated through weightings, interfund transfers, and unencumbered balances of the districts, however, some restrictions on these dedicated funds were loosened, by example, see L. 2011, ch. 107. Nevertheless, all such spending was continued to be limited to state directed expenditures. The difference in the limitations, on general

state aid funds and supplemental state aid funds, however, is that the former limitations on general state aid - general fund - expenditures were uniformly applicable to all school districts while the latter would be a limitation based on wealth, effectively making the latter, more or less, involuntary indentured servants of the State and requiring, in effect, that such moneys be spent at the company store.

The Defendant's *FINAL PROPOSED FINDINGS OF FACT* note the degree of local control over actual expenditures beginning at its suggested findings at No. 321-329, following:

> "321. Except for certain monies that have guidelines or regulations tied to their use, the local boards of education and their administrators have discretion on how to spend the money that they are provided. *See e.g.*, Trial Transcript, Dr. Cynthia Lane, pp. 342-43. Ultimately, the State provides money to the districts and then the districts decide how to spend that money. Trial Transcript, Brad Neuenswander, p. 2118.
>
> 322. Local district's school boards decide how much to tax under the LOB and Capital Outlay levies; decide how the general fund and LOB money will be spent; and decide how much money the district should have in its contingency fund and whether the district should spend it down, keep it intact or increase it. *See, e.g.*, Trial Transcript, John Allison, pp. 2566-67; Trial Transcript, Dr. Shelly Kiblinger, pp. 3174-76.

323. Local district's administrators decide how much money goes to individual schools. Principals generally are provided discretion to operate their schools as they see fit. See *e.g.*, Trial Transcript, Lori Blakesley, pp. 3026-27. However, decision on how to fund individual schools is left up to the local board of education, with input from the district administrators and the community. *See, e.g.*, Trial Transcript, Alan Cunningham, pp. 1900-01; Trial Transcript, Bill Hammond, p. 2955.

324. Decision on what education strategies are funded is largely local. For example, MTSS 'multi–tiered system of support' is an approach to improve instruction and learning by breaking instruction into tiers. MTSS is not mandated. Trial Transcript, Brad Neuenswander, pp. 2081-82, 2085-86. Local districts and its principals decide whether the MTSS strategy is funded and used. Trial Transcript, Brad Neuenswander, pp. 2118-19. Districts make decisions about which strategy or program to fund by judging what the districts believe are their biggest needs. *Id.*

325. Another example of local decision is whether to charge for all day kindergarten or to offer preschool. Preschool and all-day kindergarten are not required under the Kansas statutes and the districts can charge fees for preschool and all-day kindergarten, but most of the plaintiff school districts do not charge a fee. *See, e.g.*, Trial Transcript, Dr. Cynthia Lane, pp. 307-08; Trial Transcript, Alan Cunningham, p. 1891-92.

326. Several plaintiff school districts chose to make cuts to summer school and extended learning programs. However, these programs are also not required by the Kansas statutes and regulations. *See, e.g.*, Trial Transcript, Alan Cunningham, pp. 1891-92.

327. The choice to devote more resources to increase salaries of present staff versus hiring more teachers is a local district decision. For example, teachers in Hutchinson will get a $1,000 bonus and around a 3.9% salary increase next year and this applies district wide. Trial Transcript, Ronn Roehm, pp. 3070-71. That district could have decided to hire more teachers with that revenue.

328. When funding was increased immediately after the *Montoy* decisions, the districts - presumably with the best of justifications - gave their teachers and administrator substantial raises. *See, e.g.*, Trial Transcript, Linda Jones, p. 2785. This, like the other examples noted, demonstrates the breadth of the local district control over their spending.

329. In short, once the General Fund and Supplemental Funding money is provided to districts, the State has no control over the use of the money beyond the statutory limitations requiring spending on the foundation education."

We accept the above facts as true. Further, it is also true that since the LOB is based on a weighted FTE, currently at the higher statutory BSAPP of $4,433 as set by K.S.A. 72-6433d, LOB funds generated from the higher BSAPP, would encompass added money, by example, derived from "at risk" or "bilingual" weightings. Notwithstanding, local school board discretion would control their actual expenditure for a weighted purpose, including the state supplemental aid component, if present, since, unlike a district's general fund, no specific instructions would

apply. The only restriction would be on state supplemental aid funds to be spent consistent with the state supported general fund generally, but not specifically by purpose. Thus, even if supplemental state aid is seen as legislatively directed as in furtherance of the State's obligation for a "suitable provision for financing", the fact is, even then, state supplemental aid would inject some local control feature into the satisfaction of what is a State constitutional obligation and would omit any existing general state aid restrictions on expenditure of funds targeted for at risk or bilingual students.

In our exampled U.S.D. No. 259 - Wichita, the following chart demonstrates the interrelationship between local funds, state supplemental aid, and the effect of its proration, both on its actual LOB budget and, as well, as if it were at 30%:

USD 259 - Wichita - Values of LOB/ Supplemental State Aid					
LOB Actual			LOB at 30%		
1	Enrollment 2/20/12	44,877.4	1	Enrollment 2/20/12	44,877.4
2	Adjusted General Fund	$313,499,186	2	Adjusted General Fund	$313,499,186

3	Per pupil value (2+1) =	6985.7	3	Per pupil value (2+1) =	6985.7
4	Statutory Local Option Budget Percentage w/o vote	30%	4	Statutory Local Option Budget Percentage w/o vote	30%
5	Actual LOB Percent Authority Actually Adopted	27%	5	Actual LOB Percent Authority Actually Adopted	30%
6	x Legal General Fund *Re-computed (at $4433 per Form 150)*	$356,797,965	6	x Legal General Fund *Re-computed (at $4433 per Form 150)*	$356,797,965
7	= Legal LOB @ 27%	$96,335,451	7	= Legal LOB @ 30%	$107,039,390
8	Per pupil value (7+1) =	2146.6	8	Per pupil value (7 +1)	2385.2
9	Adjusted General Fund (2) + Legal LOB (7) =	$409,834,637	9	Adjusted General Fund (2) + Legal LOB (7) =	$420,538,576
10	Per pupil value (9+1) =	9132.3	10	Per pupil value (9+1)	9370.8
11	State Supplemental (Equalization) AID (SSA) percentage paid.	.4550	11	State Supplemental (Equalization) AID (SSA) percentage paid.	.4550
12	Non-prorated SSA if pd. in full (7x11) =	$43,832,630	12	SSA if pd. in full on 30% LOB (7) x (11) =	$48,702,922
13	Per pupil value (12+1) =	976.7	13	Per pupil value (12+1) =	1085.2

14	Legal LOB (7) - SSA pd. in full (12) = Local Portion of LOB	$52,502,821	14	Legal LOB at 30% (7) - if SSA pd. in full (12) = Local portion of LOB at 30%	$58,336,468
15	Per pupil value = (14) ÷ (1)	1169.9	15	Per pupil value (14) ÷ (1)	1299.9
16	State Funds: Adjusted General Fund (AGF) (2) + SSA if pd. in full (12) =	$357,331,816	16	State Funds: Adjusted General Fund (2) + SSA if pd. in full on 30% LOB (12)=	$362,202,108
17	Per pupil value (16) ÷ (1)	7962.4	17	Per pupil value (16) ÷ (1)	8070.9
18	State Funds (16) + local portion LOB (14)= Total Funds available	$409,834,637	18	State Funds (16) + local LOB at 30% (14) = Total Funds available	$420,538,576
19	Per pupil value (18÷1) =	9132.3	19	Per pupil value (18÷1) =	9370.8
20	SSA proration amount:	85.7%	20	SSA proration amount:	85.7%
21	.857 (20) x SSA if pd. in full (12) = prorated SSA	$37,564,564	21	.857 (20) x SSA if pd. in full (12) = prorated SSA	$41,738,404
22	Per pupil value (21÷1) =	837	22	Per pupil value (21) ÷ (1) =	930
23	Difference SSA if pd. in full (12) - prorated SSA (21)	(-)$6,268,066	23	Difference SSA if pd. in full on 30% LOB (12) - prorated SSA pd. (21) =	(-)$6,964,518
24	Per pupil value (23÷1) =	139.7	24	Per pupil value (23÷1) =	155.2

25	State Funds (16) - Difference (23) =	$351,063,750	25	State Funds (16) - Difference (23) =	$355,237,590
26	Per pupil value (25+1) =	7822.7	26	Per pupil value (25+1) =	7915.7
27	Legal LOB (7) - prorated SSA paid (21) = local portion of LOB	$58,770.887	27	Legal LOB at 30% (7) - if SSA prorated pd. (21) = Local portion of LOB at 30%	$65,300,986
28	Per pupil value = (27) + (1)	1309.6	28	Per pupil value = (27) + (1)	1455.1
29	Previously available traditional use LOB (7)	$96,249,466	29	Previously available traditional use LOB at 30% (7)	$107,039,390
30	LOB available for traditional use if prior prorated SSA paid	$58,770,887	30	LOB at 30% available for traditional use if prior prorated SSA paid	$65,300,986
31	LOB available for traditional use if SSA pd. in full	$52,502,821	31	LOB at 30% available for traditional use if SSA pd. in full	$58,336,468

This chart clearly demonstrates the value to the local school district and the fiscal impact of redirecting the purpose of supplemental state aid and the effect of prorating, both in per pupil value and overall revenues, on a school district's, heretofore, discretionary spending authority under its local option budget.

If the concurrent restriction on the use of, and the assumption of State control over, state supplemental aid funds is seen as mandatory, we would find such State co-option of some school districts LOB funds, through the designation of the state supplemental aid portion as a restricted use State fund, distorts an equal ability between districts in the *use* of their LOB funds. Further, if now the whole of, or a portion of, a LOB fund, due to fiscal necessity derived from an underfunding of its district's general fund, is required to be expended, as a practical matter, as in satisfaction of the State's constitutional funding obligation, then, to the extent a school district is required to do in comparison with other districts, its ability to use its LOB funds has been equally inequitably compromised. Some district school boards believe their local constituency can afford, would agree to, and have approved a higher mill levy for school purposes, while others desirous of the same goal believe that their constituency can not afford to, or, even if they could afford to, would not support, and have not supported, an increase in their district's LOB. Any consequence to the failure of the latter, when it exists, or any noted

consequence to the unequal ability to use the LOB fund, would have to be assigned to the State.

Lastly, given that supplemental state aid has been prorated in some measure after FY2009, its inherent driver, being wealth based, is even more inequitable. Throughout, the litigation history concerning school finance in Kansas, wealth based disparities have been seen as an anathema, one to be condemned and disapproved, beginning with *State v. Smith*, 155 Kan. 588, 595 (1942), then *Caldwell v. State* (No. 50616, *Johnson Co. Dist. Ct.* (1972)), *Mock v. State* (91CV1009, Shawnee Ct. Dist. Ct. (1991)), *USD 229 v. State*, 256 Kan. 232 (1994), and ending with the *Montoy* case. All have been consistent in constitutional condemnation of wealth as a measure for the distribution of Kansas' education dollars. Here, there has been no showing of a cost based justification for prorating the payment of supplemental State aid money even under this now flawed measure that's original purpose was in the attempt to abrogate a wealth based disparity among districts in the availability and *discretionary* use of local option budget authority.

Standing, therefore, as empirically naked, proration of supplemental state aid reflects no other reason than a choice based on the amount of funds desired to be made available. As such, we find the proration of supplemental state aid funding violates the Article 6, § 6(b) constitutional requirement for an equitable and non-wealth based distribution of State education funds.

On the other hand, the fact that general state aid funds have fallen so short as to make a district's discretionary use of LOB funds ephemeral and but a mirage establishes a further basis to find underfunding of the BSAPP unconstitutional.

As we have noted, if the draft of supplemental state aid funds for state use as literally stated by K.S.A. 72-6434(e)(1) is seen as mandatory, then its effect is to de-equalize a school district's authority over expenditure of its local funds, the degree to which it occurs being solely based on a school district's wealth or lack thereof. If that is true, then K.S.A. 72-6434(e)(1) is unconstitutional as creating a wealth based disparity between local school districts. However, if viewed as directory only, rather

than as a mandatory admonition to local school districts, that statutory section can be seen as constitutional.

There is a presumption that the Legislature would not intend to enact an unconstitutional law and there is a duty in the courts, if way be had without violence to the statute, to choose a constitutional interpretation over an unconstitutional one:

> ". . . that it is the court's duty to uphold the legislation rather than defeat it and if there is any reasonable way to construe the legislation as constitutionally valid, that should be done (*Marks v. Frantz,* 179 Kan. 638, 298 P.2d 316); that, at the threshold of the inquiry of validity of a statute, courts start with the presumption the law-makers intended to enact a valid law and to enact it for the accomplishment of a needful purpose, *State ex rel. Boynton v. Board of Education*, 137 Kan. 451, 453, 21 P.2d 295;. . ."

State, ex rel, v. Fadely, 180 Kan. 652, 659 (1957).

It seems reasonable to us to construe K.S.A. 72-6434(e)(1) as directory not mandatory. This statute changed no formulas and did not facilitate the distribution of the money. There are no sanctions anywhere that might be applicable to a school district were it to spend such supplemental state aid moneys *at its choice*. Nothing else changed in regard to supplemental state aid but the percentile ceiling for its reimbursement to eligible school

districts. Perhaps, K.S.A. 72-6434(e)(1) reflected an effort to claim credit where no credit was due, one effect of which would be to avoid a tax increase above the 20 mills at the front end of the funding formula that determines "local effort" by masking it as within the guise of *voluntary* local taxation for the LOB. Nevertheless, certainly it would not be effective, standing alone, to wrest control over local school districts' local option budgets nor would it seem the intention to do so would rationally be attempted by fixing its affect on the degree of their lack of property wealth. Legislators could be presumed to be aware of the *USD* 229 case and cases earlier that precluded a disparity in the distribution of State funds keyed on property wealth. Distributing state funds with conditions on their use not imposed on others who would still have the freedom of use of LOB funds is a distinction without a difference in term of a wealth based disparity.

Accordingly, we see no impediment to declaring K.S.A. 72-6434(e)(1) directory, hence, constitutional. Certainly, the State has lost nothing by this construction as it could neither enforce it nor would it ameliorate its Article 6, § 6(b) duties were the construction the other way.

Accordingly, we find, except as noted in regard to its underfunding by proration, that no constitutional defect attends the distribution of supplemental state aid.

Here, we intervene to add to the above discussions in reference to Plaintiffs' claims of a violation of equal protection of the law under §§ 1 and 2 of the Kansas Bill of Rights and under the Fifth and Fourteenth Amendments to the United State Constitution. While Plaintiffs present these claims as an independent claim (Plaintiffs' *Amended Petition* at Count Five), we believe such advancements, as presented, can be seen as superfluous in that it seems clear that, at least since the *USD 229* and *Montoy* cases, and more probably as early as the cases of *Board of Education v. Tinnon,* 26 Kan. 1 (1881) and *State v. Smith,* 155 Kan. 588 (1942), the judicial view toward Kansas educational equality is inherently already imbued in the Kansas Constitution's education article, including any wealth based disparity. Surely, the recurring phrase in the *Montoy* series of cases that pegs as one of the *critical* factors for consideration the "equity with which the funds are distributed" particularly, when combined with the above noted cases' historical condemnation of wealth based or other

extraneously based funding disparities as measured against the undisputable premise of all such cases as grounded on equal education opportunity, obviate any need for a separate constitutional grounding.

Though some disparities and lack of opportunity within the Kansas school system have been challenged and determined under separate equal protection analysis, *Brown v. Board of Education*, 347 U.S. 483 (1954), being the epitome of example, the Kansas courts' construction of education entitlements, particularly now under Article 6 of the Kansas constitution, need no outreach to other legal assistance in securing such rights to Kansas school children. Hence, little question exists, at least in our minds, that *minimally*, and, most likely, more broadly, Article 6 carries inherently within it, both by concept and historical practice and precedent, the same principles and full protection for equality in treatment assured independently in other situations by §§ 1 and 2 of the Kansas Bill of Rights. Kansas school children would fall within this mantle of protection as well as would Kansas school districts. *Board of Education v. Kansas St. Bd. of Educ.*,

266 Kan. 75 (1998); *U.S.D. No. 380 v. McMillen,* 252 Kan. 451 (1993).

THE STATE'S DEFENSES, IN PART, TO *MONTOY*

Though we find *why* the corresponding annual legislatures or governors, so acted, principally, immaterial, we, nevertheless, believe, given the procedural format of the case now before us, that the State should not be automatically disbarred from attempting to show some rational justification or, if yet existent, *some exception from its constitutional duty* to consider actual, and we might add, current, reasonably up-to-date, costs to provide an Article 6, § 6(b) suitable education.

Here, we have referenced the procedural format of this case as one reason for allowing the State a defense to its seemingly clear disregard of the duties and considerations imposed upon state officials, principally, the relevant legislative bodies whose particular actions are challenged, in delivering a constitutionally compliant Article 6, § 6(b) suitable education. For one matter, we consider the passage of time. Kansas officials first undertook to reduce funding to the State's education system in February 2009. The then Governor, Mark Parkinson, also participated through the

Kansas allotment system that year in cutting funds. Then, the legislature and new governor took up the mantle of funding decreases thereafter. Certain features in the Kansas Constitution, later to be discussed, complicate constitutional enforcement long after the existence of the facts demonstrating a clear act of non-compliance. Hence, Plaintiffs' act of eschewing, most probably, a swifter, yet, perhaps, questionable of success, remedy of declaratory and injunctive relief during perilous economic times to challenge what appears now to be an obvious and continuing pattern of disregard of constitutional funding obligations under Article 6, perhaps, initially abandoned under the stress or the guise of the "Great Recession", left the door open for a defense, though as we have discussed, and will further discuss subsequently, there are no defenses sustainable under the evidence before us.

Here, this Court, except, perhaps, regarding payments claimed due for capital outlay to school districts, is not called upon, as a Court would be in an ordinary civil damage suit, to render, in regard to any shortfall in state aid, a monetary judgment and, for reasons subsequently to be noted, such retroactive relief is circumscribed even were the Court

called upon to render such a judgment. If damage was done through past state action, that loss of educational opportunity resulting is but a moral tragedy whose authors must bear the burden. Hence, as our view then is substantially circumscribed as prospective only, other than to chronicle the failure, the duty here of this panel of judges is, principally, to identify the future relief, if any, required and secure its accomplishment - nothing more, but, certainly, nothing less.

Here, the State advanced principally two defenses. The first, that its authorized expenditures, coupled with directions for their use, currently evidence Article 6 constitutional adequacy. This defense, as noted, has been found to be wholly contrary to the evidence on a basis of either costs or equity.

The second defense goes to the question of whether the outputs achieved, based on performance standards employed, such as testing, demonstrate that any reduced level of funding, as shown by the record, had no unreasonable, or at least no, unconstitutional consequence when measured against student performance in terms of the standards adopted by the Legislature and State Board of Education that define what the

Montoy Court accepted, and what is not here challenged, as the measure of a "suitable education".

However, the soundness of the State's assertion of funding adequacy necessarily requires that this judicial panel find some actual and logical basis to exist, *in fact*, in order to disregard the *Montoy* court's determination that certain dollar expenditures were required to be provided by state government officials or, alternatively, that the cost basis used by the *Montoy* Court in reaching its conclusions of dollar shortfall have been impeached by some legally viable subsequent cost or "output" analysis. As pointed out earlier, no evidence has been presented that would act to impeach the reliability of the A&M cost study, which the *Montoy* Court adopted as a factual basis in arriving at its original conclusion of an existing constitutional shortfall (*Montoy* II) or as used in fashioning a constitutional remedy (*Montoy* III), which later in *Montoy IV*, the Court found the Legislature had *facially* accomplished as of July 28, 2006, by providing or promising $775.6 million dollars, coupled with a statute in place that provided for annual inflation adjustments (K.S.A. 72-64c04, now repealed). Hence, even were this Court panel to permit, or embark on, an inquiry

into the factual underpinnings of the *Montoy* ruling from a perspective of its facts and findings, it could lead nowhere. Certainly, the Legislative Post Audit study produced for the 2006 legislative session did nothing to impair the conclusion reached by the *Montoy* Court that the Kansas school financing scheme was critically underfunded.

However, here the State's challenge can best be said to be grounded on the "value" of what the cost studies and education professionals from the State Board of Education, local school boards, educators, and study experts indicated was required to generate and meet then existing educational suitability standards that defined and measured the suitable education required by the Constitution. No standards currently in effect, or in the process of implementation, stand here challenged in to their suitability by education professionals, except by Plaintiffs' expert Dr. Baker who raises, but which we find Plaintiffs have not proved, questions of whether, in fact, they are too low. See TR: Baker at pp. 1228-1230. The Defendant, however, has produced, along with an argument based on the testing statistics of record, two experts who assert that if one looks at the concept of a suitable education, not from the

perspective of the undeniable costs and expenditures that must be employed to meet it, but, rather, from the results to be achieved from a certain level of expenditures, then, effectively, less could well be the equal of more.

Both of Defendant's experts, Dr. Eric Hanushek and Dr. Michael Podgursky, are not challenged on their credentials to give opinions, but rather on the soundness of their opinions and their methodologies. The Defendant in its *Proposed Final Findings of Fact and Conclusions of Law* fairly synopsizes the view of its experts and the Defendant's and Plaintiffs' competing arguments advanced in respect thereto. This defense summary advanced is as follows, however, these proffered suggested findings are presented only for exposition of the position of the parties, particularly, the Defendant, not as findings of fact by this Court. These assertions are as follows:

> "360. No one contends that it does not cost money to educate students, or that money does not make any difference; however, evidences support that a macro infusion of additional limiting will likely not enhance student performance.
>
> . . .
>
> 362. Both experts presented scatter graphs which plot the relationship between per

pupil spending in a school district in Kansas and student performance. The two graphs which follow are representative examples from Dr. Hanushek's report. Each dot on the graph represents a Kansas school district. The vertical axis indicates the district test scores compared to the state average on Kansas assessments and the horizontal represents each district's spending compared to the state average. Trial Transcript, Dr. Eric Hanushek, pp. 2254-55. Using a standard economic regression analysis, a computer program will take the dots and draw a line. A horizontal line means that there is no relationship between district spending and test scores. If a district spending more money resulted in higher test scores, you would expect to see a line going upward and to the right. Trial Transcript, Dr. Eric Hanushek, pp. 2257-60. Based on multiple scatter graphs shown at trial '[T]here's no reason to expect better performance simply by adding more money.' Trial Transcript, Dr. Eric Hanushek, p. 2261. [Graph omitted by the Court] Exhibit 1169, pp. 35-36 (slides 24-25).

363. Dr. Podgursky similarly looked at student test scores from the KSDE, and demonstrated the data on scatter graphs that compared scores to spending. Exhibit 1170, p. 36-96. 'These data show there is no systematic or stable positive statistical relationship between spending per student in a district and student achievement. Indeed, it is much more common to find a negative relationship between the two variables. This does not mean that higher spending causes lower student achievement. Rather, it simply indicates that reliable statistical relationship between the two variables does not exist.' Exhibit 1170, p. 33.

364. 'Simply put, it is not possible to identify a level of district spending per student that can reliably predict any given level of student achievement'. *Id.* What you get from this picture is that there is no scientific way to answer the question of what amount of money does

it take to get to a particular outcome on test scores. 'There are political ways, which is the way we normally do it, but there's not a scientific way to do that.' Trial Transcript, Dr. Eric Hanushek, p. 2266.

365. Plaintiffs' expert, Dr. Baker, disagrees with Dr. Podgusky and Dr. Hanushek. His main argument is that a relationship between spending and 'outcomes' is shown statistically. *See, e.g.*, Trial Transcript, Dr. Bruce Baker, p. 1452-54; Plaintiffs Exhibit 384. The other experts disagree. Dr. Baker says Dr. Podgusky and Dr. Hanushek did not properly account for variables in their statistical analysis. Trial Transcript, Dr. Bruce Baker, p. 1325-33. Dr. Podgusky says he did by analyzing the data by disaggregated subgroups, which Dr. Baker and the LPA consultants did not. Trial Transcript, Dr. Michael Podgursky, pp. 2404-03. Dr. Hanushek says there is no reason to control for the variables Dr. Baker identifies. Trial Transcript, Dr. Eric Hanushek, pp. 2267-81, 2297-2305. His testimony implies that Dr. Baker and other cost study proponents keep adding variables until their studies produce the results they want. *See id.* at pp. 2280-81. We note a couple of famous quotations: 'Statistics: The only science that enables different experts using the same figures to draw different conclusions,' (Evan Esar, Esarb Comic Dictionary), and 'If you can't explain it to a six year old, you don't understand it yourse1f,' (Albert Einstein). We found much of what Dr. Baker said to be unintelligible.

366. Florence Neymotin, an Assistant Professor of Economics at Kansas State University wrote an article concluding from Kansas data that there is not a strong relationship between increased spending and outputs. Exhibit 1009. This is not the only study, there have been many others. Dr. Hanushek did a 'study of the studies' and concluded that the vast majority of the studies have concluded there is no relationship between pupil teacher ratio and education outputs (Exhibit

1169), the same is true for teacher educational level and teacher experience, instead what is most important is the quality of the teacher. *Id.*; Trial Transcript, Dr. Eric Hanushek, pp. 2232-39, 2325. Dr. Baker rejects Neymotin's study saying she drew conclusions about post-*Montoy* spending from pre-*Montoy* data. Trial Transcript, Dr. Bruce Baker, pp. 1461-62. This criticism calls into question the accuracy of Dr. Baker's evaluation of the applicable literature and scientific studies. Neymotin clearly limited her conclusions to the data, with some additional data, considered in the LPA study. Exhibit 1009. A causal, non- expert, review of her published study shows this. Her conclusions dispute the LPA consultant's conclusions, but do not make an assertion about post-*Montoy* spending. Exhibit 1009.

367. States which spend more (Wyoming is in the top 5 in spending per pupil) do not necessarily rank higher than Kansas on the national assessment tests. Exhibit 1169, p. 54-57. Kansas ranks higher than Wyoming on the probability of going to college, High ACT and SAT scores, graduation rates and national assessments. Exhibit 1169, p. 58.

368. The LPA study – which included the statistical cost study estimates – made a review of literature regarding the effect of spending on education outputs. It reported there were mixed opinions on that subject, some said spending was related to improved student performance, others said there was no relationship. Trial Transcript, Scott Frank, pp. 3021-32.

369. The LPA retained a consultant to study the Kansas data, and that study concluded: 'We found a strong association between the amounts districts spend and the outcomes they achieve. In the cost function results, a 1.0% increase in district performance outcomes was associated with a 0.83% increase in spending – almost a one-to-one

relationship. This means that, all other things being equal, districts that spent more had better student performance.' Exhibit 199, p. 40.

370. Of course, it has been seven years since that statement was made in January of 2006, based upon review of data from 1999-2000 to 2003-04. Exhibit 199, C-5. Common sense suggests it should be possible to determine if the infusion of that money from 2005 affected outcomes over time and to evaluate, if in fact, there was this 1 to 0.83% relationship See Trial Transcript, Scott Frank, pp. 2043-46. Review of the data presented shows that there was no consistent pattern or relationship shown between increases in spending and education outputs either statewide [Exhibit 1212A] or for districts [Exhibits 1213A, 1214A, 1215A, 1216A].

371. Plaintiffs claim that there is a 'lag effect,' but they cannot explain this away. When test scores increased as spending went down, witnesses testified the lag justified the delay. When test scores decreased as spending went up, these witnesses again relied on a lag. Plaintiffs cannot have it both ways. Intuitively some degree of lag in some circumstances could make sense, but no scientific evidence was produced to support the claimed 'lag' and no evidence was produced to differentiate those instances where a lag claim makes little or no sense, e.g., hiring more teachers. On the basis of the evidence presented, the lag argument cannot explain away the creditable scientific testimony that there is no correlation between macro level funding and student achievement.

372. In any event, under any scenario, the purported '1 to 0.83% relationship' does not and was not intended to support a claim that infusion of money would produce — in the real world — a nearly one-to-one increase in percentage student achievement. Trial Transcript, Dr. Bruce Baker, 1452-54.

373. What makes the impact of spending issue so difficult, particularly where closing test scores are the focus, is that there are so many variables which can impact student academic achievement, including parents addicted to alcohol, meth or other drugs (Trial Transcript, Rodney Rathbum, pp. 3112-13; Trial Transcript, Donna Davis, pp. 3044-45), incarcerated parents (Trial Transcript, Dr. Kiblinger, p. 3134), erosion of the nuclear family (Trial Transcript, Rodney Rathburn, pp. 3112-13), parents who do not take advantage of the tutoring offered to their children (Trial Transcript, Donna Davis, p. 3053), illness and lack of health insurance (Trial Transcript, Mary Stewart, pp. 954-55).

374. All agree that significant social and family background factors can influence the achievement gap. Trial Transcript, Dr. Bruce Baker, pp. 1524-26. No state has eliminated the gap between disadvantaged and non-disadvantaged children through its offset strategies. Id, In fact, Dr. Baker could not identify a district where the assumption that applying more money will completely offset these social and family issues. *Id.*

375. On the other hand, Kansas Education Commissioner, Dr. DeBacker, was asked to explain how Kansas has made steady improvement in Kansas assessment test scores, for all groups of students, over the last 10 years in light of the recent reduction in the BSAPP. She attributed this to (a) teachers knowing the state standards, knowing the assessments, knowing how to prepare students (including use of formative assessments to check student learning along the way) and (b) the momentum which has built up where 'we look at what's happening within the actual classrooms with the teachers and with the students and the community getting students ready. We then always say, too, you set a mark for us and Kansans want to meet that mark. And whether the mark is at

> 87.5 percent or 91, we seem to — seem to be able to do it.' DeBacker Depo., p. 98.
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> 376. From this, no one contends, nor do we conclude, that spending money in education is unnecessary or makes no difference. Instead, we conclude that there is a reasonable basis to find infusion of additional money at a macro level in Kansas education would not make a difference in student performance on standardized tests or graduation rates and it is certainly not guaranteed such an infusion would generate greater student performance."

Defendant's *Final Proposed Findings of Fact*.

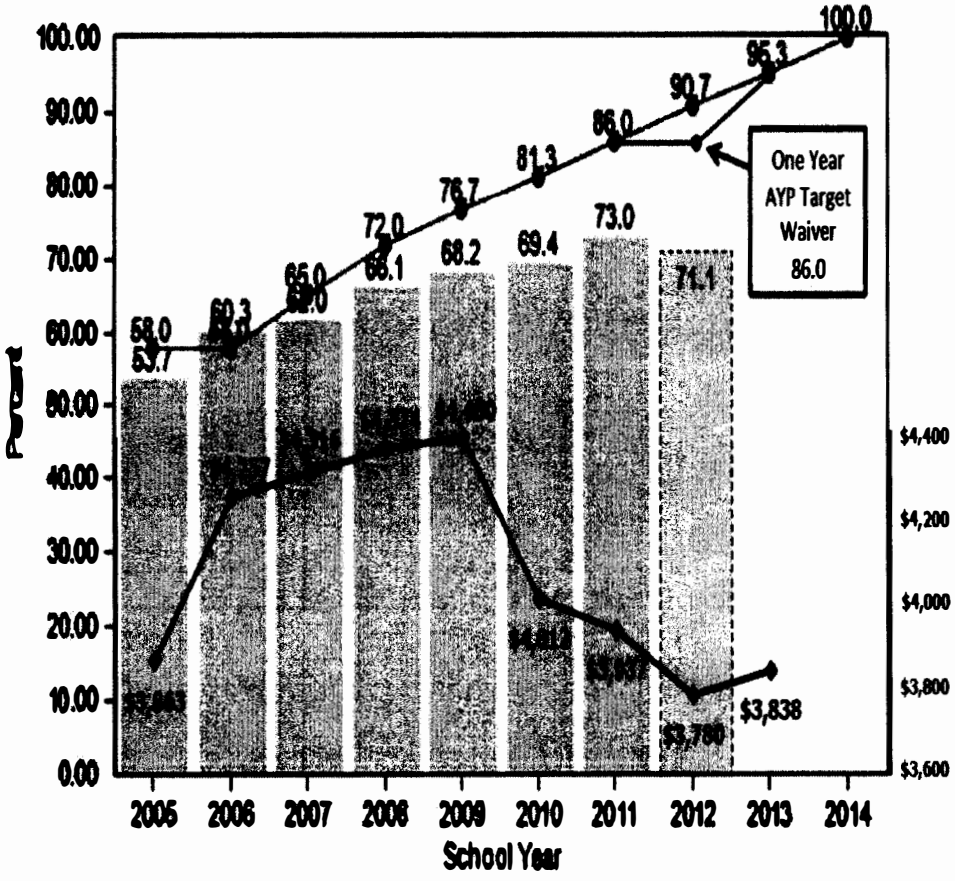
Here, we disagree substantially with the above suggested findings advanced by the Defendant. We disagree for the following reasons and make our findings accordingly on this issue. Most importantly here, we find there is simply no reliable evidence advanced by the State that indicates that *a reduction in funds available* to the K-12 school system would assure an "improvement in performance that reflects high academic standards" as required by K.S.A. 72-6439(a), which the *Montoy court* accepted as a standard of suitability and found to be consistent with Article 6, § 6(b)'s intent. *Montoy II*, 278 Kan. at 773. We find the truth of the matter is contrary to the State's assertions.

The contrary to the State's position is provided authoritatively and credibly, not only by knowledgeable

educators, but the experts behind the Augenblick & Myers Study and the Legislative Post Audit Study (Ducombe & Yinger) and, as well, by the record of the existing measurement standards which Plaintiffs' [Proposed] *Final Findings of Fact and Conclusions of Law* advance as follows:

> "397. The preliminary state data for 2011-12 shows that school districts are beginning to feel the effects of the decrease in funding; while, overall, the State made its AYP goal, subgroups (White and Asian) met the AYP target on the reading assessments. See Tr. Ex. 412. Eight subgroups did not meet the AYP target. *Id.* Only four subgroups met the AYP targets on math assessments; six subgroups did not. *Id.*
>
> 398. The data in Exhibit 412 uses the revised AYP targets, pursuant to a partial waiver the State received. *See e.g.* Allison Tr. Test. 2582:20-25; Neuenswander Tr. Test. 2159:1-10. The waiver allows the State to determine AYP based on the 2010-11 AYP targets instead of the 2011-12 targets. *Id.*
>
> 399. Had the State not been granted a partial waiver for the 2011-12 school year, the State, as a whole, would <u>not</u> have made AYP in either math or reading. See Tr. Ex. 413. Only one subgroup (White) would have met the AYP targets in reading and only two subgroups (White and Asian) would have the met the AYP targets in math. *Id.*
>
> 400. Currently, there are a significant number of African-American students in Kansas who are not meeting the goals the State has set forth for them on the reading assessments and that subgroup has consistently struggled to do so since 2007. *See* Tr. Ex. 416 (copied below).

Reading Assessments



Plaintiffs'
Ex. 416

402. Prior to the release of the 2011-12 preliminary data, Kansas data showed that, generally speaking, achievement scores for all students were slightly increasing. *See e.g.* Tr. Ex. 107, at KSDE138472, 138480.

403. However, it is well known that averages can hide problems with achievement among subgroups. *See* Frank Tr. Test. 1969:18-1970:15; Kiblinger Tr. Test. 3209:10-24. When analyzing student assessment data in Kansas, it is clear that 'when you take the average of all kids in Kansas where some kids do exceptionally well, it tends to disguise or mask subgroup problems.' *See* Frank Tr. Test. 1969:18-1970:15.

404. The achievement gap still exists and 'is still a challenge for Kansas.' *See* Neuenswander Tr. Test. 2076:23-25. Kansas cannot, as Defendant suggests, see State Opening FOF ¶ 209-216, become complacent about the achievement gap in light of reductions of the gap. *See id.*; Tallman Tr. Test. 1132:2-9 (stating that just because Kansas does well on closing the gap is not incentive to give up on narrowing it further).

405. An example of how 'averages hide the problem' can be seen in assessment data for the 2010-2011 school year. There, 12.2% of all students in the State scored below proficient in reading. *See* Tr. Ex. 103. However, 19.5% of Economically Disadvantaged students (or 44,248 students) in the state scored below proficient; 21.6% of Hispanic students (16,801 students) in the state scored below proficient; 27.8% of ELL students (12,675 students) in the state scored below proficient; and 27% of African American students (9,582 students) in the state scored below proficient. *Id.* Averages hide the fact that significant numbers of Economically Disadvantaged, Hispanic, ELL and African- American students are not meeting the state reading standards and, thus, are not receiving a 'suitable education.'

406. The results of the State Math Assessments for the 2010-2011 school year show a more staggering disparity: more than one-third of African-American students (32.6% or 11,569 students) in the State scored below proficient *See* Tr. Ex. 104. This is compared to 14.6% of all students in the State who scored below proficient. *Id.* Moreover, 22.2% of Economically Disadvantaged students (50,734 students) in the state scored below proficient; 22.6% of Hispanic students (17,579 students) in the state scored below proficient; and 25.2% of ELL students (11,489 students) in the state scored below proficient. See *Id.* When the results are narrowed to just those Grade 11 Math scores, 40.3% of African-American students score below proficient, 38.6% of ELL students score below proficient, 28.9% of Hispanic students and 28.5% of Free/Reduced Lunch students score below proficient. *See* Tr. Ex. 106. In fact, 17.4% of all 11th grade students in the state scored below proficient in math. *Id.*

407. In 2010-11, 211 public schools did not make AYP. *See* Tr. Ex. 94. The State should not be satisfied when nearly 15% of its schools cannot make AYP. *See id.* Moreover, in that same year, more than one-third of Kansas school districts did not make AYP. *See* Tr. Ex. 94 (stating 77 of 211 (or 36%) of school districts did not make AYP). The students in these districts and schools are not receiving a suitable education.

408. As a district, Wichita was a district 'on corrective action' during the 2010-11 school year. See Allison Tr. Test. 2499:5-7; Tr. Ex. 119; Tr. Ex. 95, at KSDE000055. A district is 'on corrective action' or 'in corrective action status' when it is 'on improvement' for three or more years. A district is 'on improvement' when it fails to meet adequate yearly progress (AYP) for two consecutive years. *See* Lane Tr. Test. 153:23—154:6; Tr. Ex. 95, at KSDE000055. As of trial, Wichita had been on improvement for five

years and just completed its third year on corrective action. *See* Allison Tr. Test. 2499:1-4. To move off of corrective action, Wichita would need to meet the district criteria for AYP. *Id.* at 2499:10-12. Based on preliminary data, that is not going to happen and Wichita is going to continue to be a district 'on corrective action.' *See* Allison Tr. Test. 2508:24-2508:1. During the 2010-11 school year, the Wichita school district had twelve schools on improvement. *See* Tr. Ex. 95, at KSDE000055. Although the waiver will nullify previous sanctions for failing to meet AYP, this evidence clearly demonstrates that Wichita has failed to meet the AYP goals set for them, pursuant to the NCLB and QPA, for at least the last five years.

409. In 2010-11, prior to the waiver, Wichita students did not meet AYP on either the reading or math assessments. See Tr. Ex. 118. The annual target for that year on the reading assessments was 86%; the total percentage of students who met the annual target was only 74.8%. *See id.* at ACHTEVEMENTOOOOZ9. The total number of students within the subgroups making AYP was much lower. Only 60.7% of ELL students met AYP; almost 40% of ELL students did not. *Id.* at ACHIEVEMENT000033. Only 69.8% of Free/ Reduced Lunch students, 68% of Hispanic students, and 64.6% of African-American students made AYP; approximately one-third of each of those subgroups did not. *Id.*

410. Wichita students similarly did not make AYP on the math assessments. *See* Tr. Ex. 118. On the math assessments, only 70.2% of all students met AYP the annual target was 82.3%. See *id.* at ACPHEVEMENT000035. Only 65.5% of the Free/Reduced Lunch students met AYP, only 66.5% of the Hispanic students met AYP, and only 63.8% of the ELL students met AYP. Only 56.6% of African-American students made AYP in math, meaning that 43.4% did <u>not</u>.

. . .

416. In 2010-11, prior to the waiver, Dodge City students did not meet AYP on either the reading or math assessments. *See* Tr. Ex. 116. The annual target for that year on the reading assessments was 86%; the total percentage of students who met AYP was only 79.8%. *See id.*, at ACHIEVEMENT000053. Only 74.1% of ELL students met AYP, which means that one-quarter (25.9%) did not. *Id.* at ACHIEVEMENTOOOOS7. On the math assessments, only 65.2% of Dodge City's African-American population met AYP. *See id.* at ACHIEVEMENT000064. That means more than one-third (34.8%) of the African-American students in Dodge City did <u>not</u>.

417. As a district, Hutchinson was a district 'on improvement' during the 2010-11 school year and did not make AYP that year. Kiblinger Tr. Test. 3137:14-15; Tr. Ex. 117, at ACHIEVEMENTOOOO96. A district is 'on improvement' when it fails to meet adequate yearly progress (AYP) for two consecutive years. *See* Lane Tr. Test. 153:23-154:6; Tr. Ex. 95, at KSDE000055. Based on preliminary assessment data, it appears that Hutchinson will once again not make AYP and would, under the former law, remain 'on improvement.' *See* Kiblinger Tr. Test. 3137:19-23. During the 2010-11 school year, the Hutchinson school district had two schools on improvement. Tr. Ex. 95, at KSDEOOOOS7. These two schools would, under the former law, be subject to sanctions. Tr. Ex. 95, at KSDE000057. Although the waiver will nullify previous sanctions for failing to meet AYP, this evidence clearly demonstrates that Hutchinson has failed to meet the AYP goals set for them, pursuant to the NCLB and QPA, for several consecutive years.

418. In 2010-11, prior to the waiver, one-quarter (25.2%) of Hutchinson ELL students did not met AYP on the reading assessments. *See* Tr. Ex. 120, at ACHIEVEMENTO00045 (stating that only 74.8% of ELL students did meet AYP). On the

math assessments, only 68.5% of Hutchinson's ELL students met AYP. *See id.* at ACHIEVEMENTOOOO51. That means almost one-third (31.5%) of the ELL students in Hutchinson did not.

. . .

420. The National Assessment of Educational Progress ('NAEP' or 'the Nation's Report Card') is the only national assessment that measures what students know and can do in various subject areas. *See* Tr. Ex. 85; Lane Tr. Test. 183:9-21.

421. Although NAEP and Kansas assessment results cannot be compared, NAEP does allow for a comparison of Kansas students to students in other states. See Tr. Ex. 85 (stating that comparisons of NAEP and Kansas assessment results are problematic). NAEP is the only common tool for measuring student achievement across states. *See* Tr, Ex. 85; Lane Tr. Test. 183:9-21. For this reason, it is another tool available to determine whether Kansas students are receiving a 'suitable education.' *See e.g.*, Tr. Ex. 39 (stating a suitable education must allow students to compete favorably in academics and job market).

422. While Kansas assessments use the five performance categories to measure achievement on the assessments (exemplary, exceeds standards, meets standards, approaches standards, and academic warning), NAEP uses four achievement levels. *See e.g.*, Tr. Ex. 87; Lane Tr. Test. 188:9-20. The 'below basic' achievement level is similar to the bottom two Kansas assessment standards of 'approaches standards and 'academic warning' --- each of these levels indicate that the student is scoring 'below proficiency.'

423. The achievement gap that exists between Kansas subgroups on state assessments, also appears in the NAEP results. For instance, in 2011, more than half of the black students in Kansas (54%), more than half the ELL students

(52%), and two-thirds of the students with disabilities (67%) tested below basic on the NAEP 4th grade reading test. *See* Tr. Ex. 122. The white students in Kansas fared better, with only 24% of them testing below basic. *Id.* However, that still means that approximately every one in five white students who participated on this NAEP assessment scored below proficiency. A similar gap existed in 4th grade math, 8th grade reading, and 8th grade math. *Id.* Notably, with the exception of the 4th grade math assessments, more than half of the students with disabilities and more than half of the ELL students scored below proficiency on each of the different assessments. *Id.*

. . .

C. ACT Results Show Kansas Students Are Not Receiving a 'Suitable Education'

425. In Kansas, to enroll in a state university, a student must receive a score of 21 on the ACT. *See* Tr. Ex. 66; Lane Tr. Test. 160:11-14. The average ACT score in the Kansas City school district is a 17. *See* Lane Tr. Test. 160:11-14.

426. ACT has set College Readiness Benchmarks to determine readiness for courses commonly taken by first-year college students. *See* Tr. Ex. 62, at SIG-ACT000004. The benchmarks represent the minimum ACT scores required for high school students to have approximately a 75% chance of earning a grade of C or better, or approximately a 50% chance of earning a grade of B or better. *Id.* The benchmarks are an 18 in English, 22 in Mathematics, 21 in Reading, and 24 in Science. *Id.*

427. A significant number of Kansas high school graduates are not ready for college-level course work as measured by ACT Benchmarks. *See* Tr. Ex. 145, at KBOR000028. In fact, only 26% of Kansas high school graduates meet the ACT Benchmarks in English, Math, Reading, and Science,

indicating that only 26% of Kansas students are college-ready in all four areas. *See id.*

428. In Kansas, the achievement gap is apparent by considering the number of students who meet the ACT Benchmarks. *See* Tr. Ex. 166, at SIG-ACT000069. For instance, only 19% of African-American students meet the benchmarks in College Algebra, as compared to 55% of White students and 51% of all students. *Id.*

429. [ ] [O]nly 34% of Kansas students pass the benchmarks in College Biology. Only 9% of the African-American students do. *See* Tr. Ex. 166, at SIG-ACT000070.

430. While 79% of White students meet the benchmarks in College English Composition, only 40% of the African-American students do. *See* Tr. Ex. 166, at SIG-ACT000069.

431. According to the ACT Benchmark scores, Kansas student preparation for math and science is low. *See* Tr. Ex. 167, at SIG-ACT000050. This 'is alarming, given the high demand for science- and math—intensive careers such as nursing, pharmacy, and teaching.' *Id.*

D. Graduation Rates Show Kansas Students Are Not Receiving a 'Suitable Education'

432. Between 2010 and 2011, graduation rates significantly declined. *See* Tr. Ex. 107, at KSDE135803-4. This is at least partially due to a new formula for calculating graduation rates. *See id.* at 138523. However, the new formula is a better indicator of the actual graduation rate. *See* Tr. Ex. 63.

433. In 2011, however, there were a significant number of Kansas students who did not graduate in either 4 (19.3%) years or 5 years (24.8%). *See* Tr. Ex. 101. In Kansas City, 18% of the students overall did not graduate within 5

years. *See* Lane Tr. 227:20-228:8. According to 2010–11 data, a significant number of Kansas City students (37.1%) and Wichita students (33.8%) did not graduate within 4 years. *See* Tr. Ex. 135.

434. The graduation and drop-out rates in Kansas prompted the Kansas Association of School Boards to state, on June 13, 2011, that "[t]oo many students still drop-out of school, or graduate without all the skills required for college, careers and citizenship.' *See* Tr. Ex. 193.

435. 'During the 2008-2009 school year, 3,003 Kansas students dropped out of school. That is approximately eight students a day or one every three hours. The dropout rates are disproportionately high among African American, Hispanic, and American Indian students, special education students and students from low-income families. . . persistent gaps still. . . these same student sub-groups experience graduation rates five to ten percent lower than the state average.' *See* Tr. Ex. 132 at KSDE002761.

436. There is a 37% gap between the percentage of white students graduating in Kansas (78%) and the number of Hispanic students (41%). *See* Tr. Ex. 63.

437. Recent data shows that 30% less Hispanic students graduate than are enrolled in Dodge City. *See* Tr. Ex. 270, at USD443 006389. Even fewer go on to receive a college education; by one estimate, there are less than twenty Hispanic college graduates in the Dodge City community. *See* Ortiz-Smith Tr. Test. 1746:15-1747:19.

438. Prior to the waiver, Kansas did not use subgroup graduation rates for calculating AYP. *See* Tr. Ex. 63. This means that Kansas schools could make AYP despite a consistent, or even growing, graduation gap. *Id.*

E. Remediation Rates Show Kansas Students Are Not Receiving a 'Suitable Education'

439. Fourteen percent of the students who attend Kansas universities are in remedial courses. *See* Tompkins Tr. Test. 1576:19-22.

440. That number is higher for community college students, of which 18.7% take remedial courses. *See* Tr. Ex. 251, at KSDE142845."

Even on the very best view from the State's perspective, performance of some Kansas students may have stagnated in some sense, but, unfortunately, even if true, any stagnation is occurring in the face of the enhanced performance requirements forthcoming by the Kansas State Board of Education's adoption of the "Common Core Standards". The implementation of an understanding in educators of what these new standards will mean to the Kansas K-12 school system in terms of system performance has begun and which new standards will substantially have an affect on the funding decisions that have to be made in the 2013 session of the Legislature and forward, yet, no study has been presented to us that would assess, in finite fashion, the costs to achieve them. Nevertheless, as noted, projections of professionals at all levels agree these standards will increase the costs and expenditures necessary to provide the resources to meet those goals.

Further, fidelity to the adoption and carrying forth these standards was integral to the granting of the waiver from the mandates of the *No Child Left Behind Act*. (*See,* Plaintiffs' [Proposed] *Final Findings of Fact* at No. 362; Waiver Request at Defendant's Exhibit 1300; TR: DeBacker at pp. 30-33.) Nevertheless, had the No Child Left Behind *Act's* requirements and goals not been substituted for by the grant of the State's waiver request, and even when based on the best view of the State's asserted student performance analysis, *i.e.*, "stagnated", that *Act's* standards, most probably, would not have been met. See Plaintiffs' *Findings of Fact* at No. 446-449. What these now substituted and existing standards forward and their impact will be are accurately and credibly advanced by the Plaintiffs, as follows:

> "359. Educators in Kansas understand that, under the current system adopted pursuant to the No Child Left Behind Act (NCLB), Kansas assessments are not a good indicator of whether students are college and career ready. *See e.g.* Beech Tr. Test 793:20-794:1; see also Lane Tr. Test. 97:19-21 (stating students may be able to 'receive a letter grade to pass a class but they truly are not ready for college and careers').
>
> 360. The waiver also acknowledges that students who are already above proficiency in Kansas are not currently receiving an adequate

education and has taken the focus off of gifted programs. *See* Neuenswander Tr. Test. 2176:10-2178:5; Tr. Ex. 1300 at 23 (wherein the State acknowledged that, because of the 'over emphasis on making [AYP]' educators were unable to focus on preparing Kansas students for college and careers). There is a problem in Kansas with students who are 'falling through the cracks' due to increased pressure to prepare students for state assessments because this pressure has taken the focus away from college and career readiness. *See* Kiblinger Tr. Test. 3210:7-321 1:16.

361. In July 2012, the State of Kansas conditionally received a waiver from certain federal requirements under NCLB. *See* DeBacker Tr. Test. 30:19-32:2; 82:11-19 (discussing conditional aspect of waiver).

362. In requesting its waiver, the State made an assurance that it had adopted college and career ready standards. *See* Tr. Ex. 1300, at 11, 24. This is consistent with the stated goal of Kansas' public education system to prepare '<u>all</u> students adequately for college and career success.' Tr. Ex. 1300 at 28. The State had already adopted college and career readiness as a measure of a 'suitable education' well before the application for the waiver and well before the State adopted the Common Core Standards. *See* Tr. Ex. 39 (stating the legislature has established that a suitable education in Kansas must be designed, among other things, to enable students to choose and pursue life work intelligently and to enable students to compete favorably in academics and the job market); Lane Tr. Test 162:4-9 (indicating that the language found within Tr. Ex. 39 could also be referred to as a standard of college and career readiness); Tr, Ex. 38 (tracing the college and career readings requirements of a 'suitable education' in Kansas as far back as 1994); FOF ¶ III.A. (citing suitable education requirements); COL § II (defining a suitable education); *see also* FOF ¶

III.G. (providing a more in-depth discussion of Kansas' adoption of the Common Core Standards and the Common Core's emphasis on college and career ready standards).

363. Despite the fact that the State already made a commitment to college and career readiness before applying for the waiver, increasing the number of students who are college and career ready was 'the driving force' behind recent changes to the standards in Kansas. *See* Tr. Ex. 1300 at 21.

364. No studies were conducted to determine whether the waiver would increase the cost of educating Kansas students. *See* DeBacker Tr. Test. 49:3-51:14.

365. In summary, although the waiver will increase the demands on Kansas educators and students: (1) the requirement that Kansas students be college and career ready was already part of the State's definition of a 'suitable education' and (2) the school districts received no increase in funding associated with meeting the increased demands. *See supra*.

C. Increased Demands Associated with Adoption of the Common Core Standards

366. Kansas adopted the national Common Core Standards, which were developed at the national level and adopted by the large majority of the states. *See* Tr. Ex. 56.

367. The Common Core Standards are specifically designed to increase the number of students that graduate from high school ready for college and/or career. *See* Neuenswander Tr, Test, 2084:2-8 ('Common Core Standards are more of a deeper dive into the curriculum --- to prepare — it'll be the set of standards to help prepare kids better for level of college and career readiness.'); Tr. Ex. 56, at KSBE000801 (stating

the standards represent a set of expectations for student knowledge and skills that high school graduates need to master to succeed in college and careers); Tr. Ex. 61, at KSDE138570, 138585 (indicating goal of Common Core Standards is that '[a]ll students leave high school college and career ready'); Tr. Ex. 59, at KSBE001262 (stating the Common Core high school standards 'specify the mathematics that all students should study in order to be college and career ready'); Tr. Ex. 60, at KSBE000809 (stating '[t]he Common Core State Standards for English Language Arts & Literacy in History/Social Studies, Science, and Technical Subjects . . . are the culmination of an extended, broad-based effort to fulfill the charge issued by the states to create . . . standards in order to help ensure that all students are college and career ready in literacy no later than the end of high school'); Tr. Ex. 1300, at 28 (stating Kansas is bringing its academic standards into alignment with Common Core standards to bring the state closer to its goal of '[p]reparing all students adequately for college and career success').

368. As a result of the adoption of the Common Core Standards, there will be a national set of skills and knowledge that K-12 students will be expected to meet in the areas of reading, math and eventually some other subjects as well. *See* Lane Tr. Test.128:24-129.7. The requirements under the Common Core Standards will expand the current NCLB federal requirements to include not only reading and mathematics but also history, social studies, science and technical subjects. *See* Lane Tr. Test. 131:9-19.

369. Common Core Standards will help to assess whether students have the skills necessary to compete not only with neighboring communities and other students across the state but also whether students are competitive with other countries, including those countries that are outperforming the United States in the areas of math, science and

reading. *See* Lane Tr. Test. 130:12-24.

370. The Common Core Standards are significantly more rigorous than the current Kansas standards. *See* Lane Tr. Test. 393:12-25; Tr. Ex. 58, *The State of State Standards — and the Common Core* — in 2010, at KSDE002112-2117; Tr. Ex. 1300, at 23, 56 (stating that by adopting the Common Core Standards, the State was adopting more rigorous college and career ready standards). Commissioner of Education, Dr. Diane DeBacker, stated, prior to the adoption of the Common Core Standards, 'I can assure you that the KSDE staff and the content experts we rely on for advice and guidance agree that these standards are, indeed, higher and clearer than our current standards.' Tr. Ex. 164, at KSDE002722. A comparison study found that the Common Core Standards are superior to the current Kansas standards in both reading (Kansas reading assessments received a grade of 'C' on the scale, compared to the 'B+' received by the Common Core Standards) and in math (Kansas math assessments received a grade of 'F' on the scale, compared to the 'A—' received by the Common Core standards). *See* Tr. Ex. 58, at KSDE002112, KSDE0021 15. The study also noted that Kansas' mathematics standards 'are among the worst in the country.' *See id.* at KSDE0021 17. The actual Common Core Standards are admitted as trial exhibits. *See* Tr. Ex. 59, *Common Core Standards for Mathematics*; Tr, Ex. 60, *Common Care Standards for English Language Arts & Literacy in History/Social Studies, Science, and Technical Subjects.*

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390. The Kansas Board of Regents had adopted new admission requirements for those students graduating from high school in 2015. *See* Tr. Ex. 67; Tompkins Tr. Test. 1574:3-1575:6. The new admission requirements will apply to students who entered high school in the fall of 2011. Tr. Test. Tompkins 1575:7-9; Tr. Ex. 67.

391. The increases are aimed at ensuring 'that the high school experience is adequate preparation for college.' *See* Tr. Ex. 148, at KBOR000121. 'Improving student success is the major goal of these new standards.' *See* Tr. Ex. 153.

392. These requirements have increased and place higher demands on current Kansas students receiving a public education and are more rigorous than the previous standards. *See* Tompkins Tr. Test. 1575: 14-22; Lane Tr. Test. 254:17022; Tr. Ex. 67.

393. Prior to the adoption of the changes to the Qualified Admissions requirements, Commissioner of Education Dr. Diane DeBacker acknowledged the increased demands and costs associated with complying with the new admissions requirements, stating: '[W]e've heard from numerous schools that [the requirement for four years of math] will create significant increased staffing needs. . . . [W]e urge the Task Force to . . . understand that districts are already being forced to reduce staff due to budget cuts.' Tr. Ex. 164, at KSDE002721.

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450. Ultimately, regardless of the measure used by Kansas, the ultimate determination must be whether these students are leaving the Kansas public education system 'able to succeed in college or able to succeed in the labor market.' *See* Baker Tr. Test. 1223:11-1224:12.

451. Currently, all Kansas students are not receiving a suitable education and all students do not graduate from high school college and career ready. *See e.g.* Tompkins Tr. Test. 1575:23-1576:1 (stating that some Kansas students are not prepared to attend Regents universities); Cunningham Tr. Test. 1857:18-1858:3 (testifying Dodge City is not providing a suitable education to its students and stating, 'Are our kids successful one year to the

next? Can our graduates go to the post secondary choice that they make, whether it be college, university or trade school? Can they be successful? And the answer to that for us is no, all students cannot do that.'); Feist Tr. Test. 1700:17-1701:4 (testifying that Dodge City students are not 'as well prepared for college' as they have been in the past); Ortiz-Smith Tr. Test. 1753:3-10 (testifying that we are not providing Dodge City elementary school students with a suitable education because they are not being prepared to graduate from college). For instance, in the Kansas City, Kansas school district only 34% of students attend college and less than 11% graduate from college. *See* Lane Tr. Test. 159:12-160:10.

452. Employers estimate that almost half (45%) of high school graduates lack the skills necessary to advance in careers. *See* Tr. Ex. 251, at KSDE142845.

453. The State is not failing to meet its [performance] constitutional obligation by one or two students, or even five percent of students. The State is failing to meets its [performance] obligation with regard to a significant number of Kansas students. *See* DeBacker Tr. Test. 102:8-104:2 (testifying that thousands of students in Kansas are not meeting standards on the state assessments). For instance, a significant number of Kansas students, 12.2% or 58,218 students scored below proficiency in reading in 2010-11. *See* Tr. Ex. 103. In math, 14.6%, or 69,670 students, scored below proficient in 2010-11. *See* Tr. Ex. 104; DeBacker Tr. Test. 102:8-104:2. More than one-third of African-American students (32.6% or 11,569 students) in the State scored below proficient on math assessments in 2010-11. *See* Tr. Ex. 104. Almost one-fifth (17.4%) of all 11th grade students scored below proficient in 2010-11 on math assessments. *See* Tr. Ex. 106. In 2011, there were a significant number of Kansas students (more than one-fifth) who did not graduate in either 4 years (19.3%) or 5 years (24.8%). *See* Tr. Ex. 101."

We find, and whole heartily agree with the view, that ultimately costs/expenditures always need to be tested from a perspective of value. Both of Defendants experts, Dr. Hanushek and Dr. Podgursky, admit that the "quality" of expenditure is the key and both agree, and Dr. Podgursky noted, that evidence "was mounting" that money well spent can make a difference. Where, we disagree in this case, however, is two-fold. First, treating students as a whole, however, categorized, whether at risk, as English as a second language (ELL), or by race, or even as gifted, as amorphous groups belie the fact that individual students with individual learning skills or differences are the ones whom are actually being taught and attempted to be reached by the educators and staff of our Kansas K-12 schools. Further, not all schools, given Kansas's acceptance and deference to a great measure of local control, can necessarily be expected to produce a synchronized output. Hence, Defendant's experts' methodologies, in attempting to show that a difference in expenditures between school districts could not be *scientifically* demonstrated to produce better results based on a certain level of expenditures, is, on one level, too simplistic and tends

toward generalization. We agree with Dr. Baker on this point. *See* TR: Bruce Baker at p. 1333. Dr. Podgursky admits as much and his graphing was not founded on individual student data. It proceeded from an analysis that treated each student within a group, whether categorized by subgroup or not, the same, which by fact, reality, and by life experience alone, we know cannot be so. Further, measuring an individual student's needs and abilities on a basis that they are synonymous and synchronized with every other student is the antithesis of any currently accepted educational approach to teaching and certainly would be contrary to the educational philosophy embodied in Kansas's constitutional education article. Thus, to say that performance to dollars cannot be "scientifically" proved is but to say it is not yet capable of "scientific" measure, which says more about the choice of methodology than its result.

Further, as is all testing of less than a finished product, the Defendant's experts' methodologies hinge on a transitory group's snapshot - an unfinished product. Dr. Podgursky acknowledged the deficiency in such a measure. Defendant's Exhibit 1170, Podgursky report at p. 33. While

perhaps reflective of the particular group at one point in time, such methodologies do not, as we just noted, reflect other than the group. They do not, and cannot, reflect progress of either the group or its constituent students overtime. Unless the same group and the same constituent students within it is measured subsequently in any testing endeavor against the progressive path of the learning intended over the time period to its conclusion, it can hardly be established that no progress in either the group or, particularly, the individuals in it, has been made. One could make progress, yet fall just below the cusp of proficiency at a particular time of testing. Kansas education officials noted in their *Waiver* application, the deficiencies inherent in the current testing system, by example, noting, as follows:

> "Component 1: Achievement Measures
>
> Two psychometricians on the Kansas Technical Advisory Committee, Paul Holland,[40] and Robert Linn,[41] have demonstrated that the use of the Percentage of Proficient Students leads to distorted pictures of student academic progress, trends, and gaps. After demonstrating how these distortions led to shortcomings in policy and practice, Andrew Ho convincingly argued for distribution-wide measures 'for any serious analysis of test score data, including "growth" related results.'

. . .

> Since the enactment of No Child Left Behind (NCLB), Kansas schools have made significant progress in advancing students not only across the proficiency line, but into the highest two performance levels. As of 2011, 84 percent of Kansas schools were making AYP, and about 60 percent of all Kansas students, in both reading and math, had tested into the two highest proficiency levels. While significant progress has been demonstrated, some subgroups may be disproportionately moving into the highest performance levels, while others have crossed the proficiency line but are not advancing any further.
>
> . . .
>
> As a result, Kansas has designed its system of accountability to recognize natural plateaus and avoid two common on mistakes:
>
> 1. expecting the unrealistic movement of the whole distribution of student skills above an arbitrary mark, and
>
> 2. identifying schools as high or low performers based on natural variation around a mean.
>
> When a natural plateau is reached, schools falling within two standard deviations of the A11 Students mean will be meeting the AMOs for achievement. If system reforms lead to new, upward movement in student achievement then the distributed AMOs will be activated again."

Plaintiffs' Exhibit 1300: *Waiver* at pp. 69-71.

Hence, such one time, *en masse,* snapshot analyses, do not seem reliably predictive of either a reliable pattern or the final product. While we understand, as noted above by

the State's *Waiver* (*Id.*), the capacity is being developed to measure student performance by individuals specifically and, thus, at some point, will be able to identify educational performance not only to that certain individual but to a certain group over a certain time, however, this measure has not been implemented and exampled to us in this proceeding. Such a precise analytical tool would seem to us to be critical when the "Common Core Standards" come into the forefront, which appear to be integral to the State's waiver.

A further consideration here beyond the lack of continuity in the measurements of progress are the premises used to support the defense premise of less money is the equal of the more. Dr. Hanushek's data evolved from spending ending in 2009. His measure of spending was *all* spending, not merely student instruction spending or even operational spending. He compared Kansas's overall spending with Wyoming's overall spending, which we think could only have marginal relevance upon the basis used for comparison. Dr. Podgursky, beyond his graphing of Kansas school districts, based his analyses on 2010-11 spending and 2011 test scores and compared only 2008-09 spending levels using

only NEAP and comparisons nationally and with New Jersey, all again which we feel are marginally relevant and hardly sound apples to apples comparisons. Further, we here again cite the importance of time, specifically, the lack of time to facilitate any measure of the affect of the increased dollars that were infused over the course of three years and intended thereafter based on the *Montoy* holdings. First, it seems common sense would dictate that it would take time to efficiently and fully gear up the additional resources made available, and consistent with adherents of value (all of us), prepare a plan that would maximize results. Hence, when additional, yet limited resources were infused for the 2006-07 school year, again incrementally in the 2007-08 school year, and lastly, infused in the 2008-09 school year, yet were cut in some measure before that school year's completion, and going downhill from there to present, could leave, but three full class years in which to view the affect of more money on student performance outcomes during some portion of their school careers. Further, gearing up in the first school year where additional money was provided and then scrambling beginning in 2009 and continually thereafter in attempting to cobble together locally unspent

resources or federal government resources made available to all states, including Kansas, through the federal stimulus programs seems most likely to have interfered with, or at least substantively distracted, a school district's efficiency and planning that would seem to be necessary to be able to derive the most from resources available. Hence, the value of the school dollar resources, infused in 2006-07, 2007-08, and 2008-09 to the outcomes desired may be seen as having been likely compromised to some degree.

Thus, in point to the efficacy of drawing results from testing as a justification by the State for less spending on K-12 education based, simply, on a, perhaps, plateauing of some testing results in 2010-11 ignores the narrow and transitory window of measure, which "window" otherwise demonstrated a fairly consistent increase in performance. As Kansas education officials noted in their waiver application, and as we noted, some plateauing as a consequence of a *group* testing measure is to be expected and, hence, are moving beyond to other measures, *e.g.*, Plaintiffs' Exhibit 1300: *Waiver* at pp. 69-72, 75-76, 80-83.

However, again, importantly any "window" omits the element of progression. We understood from preliminary

results, but now understand and find from final 2011-12 school year testing results, that student performances have decreased. See, Plaintiffs' Exhibit 418, as supplemented.

The State eschews Plaintiffs' concept of a learning lag to explain increased testing performance reflected after State funding started being decreased in 2009. We agree in some measure since such a focus overlooks the manner in which local districts were able to use their residual dollar resources, their structuring of dollar cuts to assure student instruction resource cuts came last, the will of local school boards and educators to go beyond the call of duty, and the availability of federal aid to salvage their educational mission. Hence, if a rise in testing scores occurring after 2009 is necessary of explanation, it seems much of it could be explained by the combination of local initiative, legislative loosening of school district interfund transfer and unencumbered balance restrictions, and the infusion of federal money into the school systems.

Nevertheless, we find the concept of a "lag" in the ability to demonstrate learning proficiency has appeal by the fact that those students measured by testing in the 2010-11 school year had principally all the benefit of the

increased dollar resources of the 2006-07 and 2007-08, school years and were beneficiaries of the local and federal initiatives taken to maintain instruction resources in the 2008-09 and 2009-10 school years. At least some of the students that were subject to be tested in the 2006-07 school year and forward were exposed to better funding for at least some portion of their careers, perhaps, augmenting either their ability or their desire to learn and providing a foundation for, or demonstrating, an accumulative basis for learning. As for the diminishment in scores occurring in 2011-12, it must be remembered the testing is attempting to measure learning from one point in grade level to a subsequent one. Kids advancing in grades after July 1, 2009, when funding started downward and when the scrambling for resources began in earnest at the local level, were all in the third year of that withdrawal of resources (fall 2009, fall 2010, fall 2011).

When the individual members of this judicial panel went to K-12 schools, we sat in chairs with the teacher at the head of the class whose repertoire consisted of verbal explanation and a blackboard, followed usually with a test or some other demonstration of learning. Then, as we

recall, there was a brevity of individual attention, or, at least, notably outwardly so. Now, however, one accepted current practice is to employ a teacher-student work group concept, whereby students are paired, not by equal ability, but by unequal ability, where after a lesson, or as a lesson progresses, and in conjunction with the teacher, those who "get it" assist those who do not yet "get it". In other words, students help each other in the goals of learning, such that learning is a group enterprise. Further, it is of all of our common experience that wisdom, learning, and understanding comes in fits and starts, often as an epiphany where the "light" suddenly comes on. How many of us have had such an experience - probably all of us - whereby what we have earlier heard or have seen suddenly becomes understood, often much after the fact, either from thinking about it, from further individualized or third party effort, or a mere sudden receptiveness to the information previously received or being received. This, as well, could thus fall within any concept of, or explanation for, a lag in learning. This latter human condition associated with learning further explains why modern schools, with government support, have sought to aid students whose

individual circumstances, by example, "at risk" kids, are such that their individually borne distractions or deprivations tend to, in some degree or another, diminish their ability to learn. Some examples, among many that could be cited, are programs providing breakfast or lunch, pre-school or after school programs, all day kindergarten, field trips, or even theater, band, or athletic endeavors, all which broaden one's base of association such that it may spark inquiry, acceptance, or, otherwise, give purpose to the pursuit of an education.

If "value" is to be a determinative consideration in the evaluation of the costs of providing a suitable education, which we concur it must be, then, nevertheless, we would have to believe the State would have some obligation in this proceeding to advance alternative measures that cost less, but which, at least, produce the same sustained affect in producing the "improvement in performance that reflects high academic standards" which now epitomizes the end measure for a "suitable education". Here, the record is wholly devoid of such alternative approaches, by cost or otherwise, to that goal. Rather, here, the State has effectively asserted that all Kansas K-

12 students have reached their apparent maximum *and will continue to do so* with less money. Here, it is clearly apparent, and, actually, not arguably subject to dispute, that the State's assertion of a benign consequence of cutting school funding without a factual basis, either quantitatively or qualitatively, to justify the cuts is, but, at best, only based on an inference derived from Defendant's experts that such costs *may possibly* not produce the best value that can be achieved from the level of spending provided. This is simply not only a weak and factually tenuous premise, but one that seems likely to produce, if accepted, what could not be otherwise than characterized as sanctioning an unconscionable result within the context of an educational system. Simply, school opportunities do not repeat themselves and when the opportunity for a formal education passes, then for most, it is most likely gone. We all know that the struggle for an income very often - too often - overcomes the time needed to prepare intellectually for a better one.

If the position advanced here is the State's full position, it is experimenting with our children which have no recourse from a failure of the experiment. Here, the

legislative experiment with cutting funding has impacted Kansas children's K-12 *opportunity to learn* for almost one-third of their K-12 educational experience (2009-10 through 2012-2013). Further, given the increased performance results that have accrued after passage of the No Child Left Behind Act and the more focused attention to the increase in standards in the future, the failure to provide full opportunity for learning experiences in our Kansas K-12 school system in the past due to a shortfall in funding is truly sad, however, a continuation of the status quo would only deepen the reflection of opportunities lost. For past students and future students, "all that they can be" was, is currently, and will be, compromised.

Further, and lest one think that funding cuts impact only those children disadvantaged in one sense or another, it should be recalled that a diversion of resources to those most in need leaves those with demonstrated greater potential on their own rather than with their time being spent with a teacher who could challenge them to rise above whatever satisfactory level the government has said they have achieved and do better. Thus, the loss of opportunity for greater achievement and learning is at least equally, if

not more so, damaging in terms of the potential for achievement, both individually and to our state and country, as only bringing up the underachieving to acceptable. An educational system that permits these results is neither fair, nor balanced, nor in the public interest. More importantly, in Kansas, such an educational system is not constitutional.

CAPITAL OUTLAY

Earlier we had shown in parenthesis in the USD 259 - Wichita - columns in the noted comparisons the affect on the Kansas school finance formula from what probably occurs to the operating funds available to a school district under the Kansas school finance formula when costs that would surely be incurred by a school district are incurred, yet, the funds that were designated for their payment are not forthcoming from the State as due. Here, we reference capital outlay equalization payments (K.S.A. 72-8814). Such payments were excluded in the comparisons, but such costs exist notwithstanding. Prior to FY2010, a portion of such costs were paid separately by the State as equalization aid for eligible districts, which, as an original omission to do so before *Montoy,* was noted in *Montoy* as a constitutional

defect, being grounded based on a property wealth based disparity. *Montoy III*, 279 Kan. at 839. In 1994, the *USD 229* case, 256 Kan. 232, effectively held such property wealth based disparities violative of Article 6 of the Kansas Constitution. Here, none of the studies assumed that such costs did not exist at all, at least in districts where the need occurred.

The statutes governing the use of a school district's funds are not considered operating funds when paid from any legislatively authorized fund other than its general fund. (K.S.A. 72-6430(d)). However, a fund transfer from the general fund to another fund is considered an operating expense in the year transferred. K.S.A. 72-6428(a)). If a fund had received a transfer from its general fund, it could be transferred back in the same school year. (K.S.A. 72-6429(a)). Any transfers from a school district's general fund to its capital outlay fund would not have an effect on its right to receive capital outlay state aid. (K.S.A. 72-8814(e)). A school district capital outlay fund (K.S.A. 72-8803) is a fund to which general fund moneys can be transferred (K.S.A. 72-6428(c)). Further, if authorized locally, supplemental state aid received in excess of 25% of

state financial aid can be transferred to a capital outlay fund if the LOB is above 25% and such a transfer had been authorized originally. ((K.S.A. 72-6434(e)(2)). No evidence has been presented that our comparison school district - USD 259 - meets this eligibility requirement and, as will be noted later, and notwithstanding the authority, the availability of such money for use for capital outlay expenses because of other demands on the use of such monies would be unlikely.

The school district's use of a school district's capital outlay fund is designated by statute (K.S.A. 72-8804), hence, restricted. As shown by a *Kansas Department of Education Bulletin* concerning capital outlay, the following expenditures are shown to be authorized or not authorized:

> **"Eligible Expenditures**
>
> *It is our opinion that, subject to the conditions noted in certain instances, all of the following items could properly be charged against the capital outlay fund:*

Architectural fee (incidental to construction)
Athletic field expansion
Boilers - replacement
Building (Quonset) for athletic games, etc.
Buses (school buses, athletic buses)
Fire extinguishers
File cabinets
Furniture
Globes
Musical instruments
Parking lot
Projectors and screens
Remodeling kitchens & eating facilities
Cleaning and painting (attributable to new construction and remodeling)
Science & laboratory equipment
Score board
Television equipment

Improvement to sites
Lighting athletic fields and school grounds
Mowers
Tractors
Typewriters

Athletic equipment:
Yes - Substantial items of gymnasium equipment, such as parallel bars, horses, tumbling mats, etc.
No - 'Supplies' such as balls, bats, shoulder pads, uniforms, etc.

Computer equipment:
Yes - hardware and software (as part of purchase)
No - software and operating system upgrades for existing computers

Lease of school facilities

Library books:
Yes - Books purchased in order to establish a school library
No - Books purchased for replacement purposes, or as part of a continuing supply-resupply program

Mathematics laboratory:
Yes - Machines and major equipment
No - Miscellaneous 'supplies' such as paper, pencils, chalk, etc.

Ineligible Expenditures
The following items would not be proper expenditures from a capital outlay fund:

Athletic 'supplies' such as balls, bats, shoulder pads, uniforms, etc.
Cleaning supplies
Computer software, operating system upgrades (for existing computers)
Contracted services - consultants
Custodial salaries
DVDs
Instructional charts
Insurance
Filters (air, fuel)
Fuel
Maps
Music
Publications
Repairs to equipment
Repairs to vehicles
Supplies for professional services
Taxes for paving and sewer
Textbooks
Tires
Toiletries
Videos
Uniforms - Band, Pep Club, athletic,
Upkeep of grounds, streets

Read below for criteria how to define supplies and equipment from the Kansas Accounting Handbook:

Criteria for Supply Items:
A supply item is any article or material which meets anyone or more of the following conditions:
1) It is consumed.
2) It loses its original shape or appearance with use.
3) It is expendable, that is, if the article is damaged or some of its parts are lost or worn out, it is usually more feasible to replace it with an entirely new unit rather than repair it.
4) It is an inexpensive item, having characteristics of equipment, whose small unit cost makes it inadvisable to capitalize the item.
5) It loses its identity through incorporation into a different or more complex unit or substance.

Criteria for Equipment Needs:
1) It retains its original shape and appearance with use.
2) It is non--expendable, that is, if the article is damaged or some of its parts are lost or worn out, it is usually more feasible to repair it rather than replace it with an entirely new unit.
3) It represents an investment of money which makes it feasible and advisable to capitalize the item.
4) It does not lose its identity through incorporation into a different or more complex unit or substance."

Plaintiffs' Exhibit 351.

On the other hand, a school district is not specifically prohibited from use of its operating fund for capital outlay purposes either through transfer to the capital outlay fund (K.S.A. 72-6428(a)) or directly. K.S.A.

72-6409(b) states:

> "(b) 'Operating expenses' means the total expenditures and lawful transfers from the general fund of a district during a school year for all purposes, except expenditures for the purposes specified in K.S.A. 72-6430, and amendments thereto."

In FY2012 (2011-12), Wichita USD No. 259 would have been entitled to receive $4,266,793 of capital outlay equalization funds. (Plaintiffs' Exhibit 240; Plaintiffs' Exhibit 356). We have no evidence that the needs intended by these character of payments abated suddenly in FY2010 and thereafter. Commonsense says they would be ongoing. Thus, while the State equalization payment intended originally to fill this reservoir of need above that amount produced by USD 259's local tax effort under K.S.A. 72-8801 *et seq.* was terminated by the Legislature, nevertheless, if a need still existed, any expenditures now by USD 259 for capital outlay purposes that would otherwise have used the capital outlay equalization payments for their satisfaction would either have to come directly from USD 259's general fund either by way of a transfer to its capital outlay fund from its general fund or by direct expenditure from the general fund.

Hence, as we have shown in our earlier comparison, when capital outlay costs are not equalized and not paid by the

State, but the need exists, it, most likely, reduces the funds that heretofore were intended to be applied to, and that were derived from, the State school finance formula's BSAPP amount as calculated and weighted, which principally, heretofore, had gone to inputs that were thought to have an effect on student output/performance goals. Thus, the nonpayment of capital outlay equalization aid, when otherwise due, would effectively, and could certainly, *reduce the use value of the BSAPP and the value of the general fund directly*, depending on where that cost impacted or where it would be allocated, or it could, otherwise, squeeze supplemental general aid equalization payments or infringe on local option budget funds, hence, local control. Regardless of where that capital outlay cost impacted, it would act as a diminishment in the use of other funds for their original purpose intended.

Thus, we see that what might have looked like a fair comparison of competing cost estimates, as we reproduced in our chart, actually neglects the affect of costs necessarily to be incurred, but not paid as promised by the State, for capital outlay expenses, which must then come from other operating accounts. The same circumstance would equally

apply were special education not paid for or, as shown in this proceeding, reduced. (Plaintiffs' Exhibits 240, 241). Further, the State's payment of supplemental state aid entitlements *on a prorated basis* also provokes and aggravates either a backup of these heretofore separately paid costs/expenditures into the general fund or the local portion of the LOB, the severity of which depends on the extent of their need for other bonafide purposes, such as spending in the areas of student instruction.

Accordingly, we find, here, that not only does the lack of capital outlay funding, when due, distort and exacerbate the noted deficiencies found in the funding of the Kansas school finance formula, but that the most direct consequence is that K.S.A. 72-8814 as it now stands, having barred payments by its terms for FY2012 and FY2013, makes the authority to lay a capital outlay tax by K.S.A. 72-8801 unconstitutional as the latter now currently stands fully grounded on a wealth based disparity in the authorization and availability of such funds. As a consequence of such finding, it means that the K.S.A. 72-8801 *et seq.* authority is inoperable, which will now require all capital outlay expenditures necessarily to be incurred to be paid from

operating funds of a school district, hence, further diminishing revenues available from state or local sources that were designated for other school purposes.

PLAINTIFFS' CLAIM FOR CAPITAL OUTLAY PAYMENTS NOT MADE

Beyond Plaintiffs' Count One - "suitability" challenge, which we have previously discussed and ruled upon, Plaintiffs raise a specific challenge to the failure to fund the capital outlay equalization payments as described and authorized by K.S.A. 72-8814 for fiscal years 2010, 2011 and 2012. We note also that the same failure to fund attends for FY2013 (2012-13) and FY2014 (2013-14), as well. See L. 2012, ch. 175, § 88(b). These are school district years beginning July 1 of 2009, of 2010, of 2011, of 2012, and of 2013, respectively.

For FY2010 (2009-10) and FY2011 (2010-11), the Kansas legislature in the 2009 and 2010 sessions made specific "no limit" appropriation authorizations for the expenditure of funds in the capital outlay state aid fund (K.S.A. 72-8814(a)) in those respective years omnibus appropriation bill. See L. 2009, ch. 124 § 1(b); L. 2010, ch. 165, § 79(b). In FY2012 and FY2013, the legislature in the omnibus

appropriation bill passed in each of those 2011 and 2012 sessions, the legislature noted in its line item appropriation for the capital outlay state aid fund a expenditure limitation in each of "$0". In these appropriation bills for each of fiscal years 2011 (2010-11), 2012 (2011-12), and 2013 (2012-13), the respective legislatures also amended K.S.A. 72-8814(c). Section "c" as it existed prior to the noted amendments read, as follows:

> "(c) The state board [Kansas State Board of Education] shall certify to the director of accounts and reports the entitlements of school districts determined under the provisions of subsection (b), and an amount equal thereto shall be transferred by the state aid fund for distribution to school districts. All transfers made in accordance with the provisions of this subsection shall be considered to be demand transfers from the state general fund."

See L. 2007, ch. 195, § 36) [added by the Court]

The Legislature in its 2010 session added the following proviso to section (c):

> ",except that no transfers shall be made from the state general fund to the school district capital outlay state aid fund during the fiscal years ending June 30, 2011 [FY2011 (2010-11)] or June 30, 2012 [FY2012 (2011-12)]"

L. 2010, ch. 165, § 144. [added by the Court].

During the 2011 session, K.S.A. 72-8814(c) was again amended to read:

> "except that no transfers shall be made from the state general fund during the fiscal years ending June 30, 2012 [FY2012 (2011-12)] *or June 30, 2013* [FY2013 (2012-13)]."

L. 2011, ch. 188, § 179. [added by the Court]

During the 2012 session, without repeating, K.S.A. 72-8814(c) was amended again to extend the bar on transfers through FY2014. As noted, each of these respective amendments to K.S.A. 72-8814(c) were contained within that particular legislative session's omnibus appropriation bill. The omnibus appropriation bill is the principal funding bill used for all appropriations made in a fiscal year for all governmental purposes, ranging across the breadth of state agencies and functions. See K.S.A.75-6702. A "demand transfer" can be defined to be a transfer of money from one state fund to another, generally from the State's general fund (K.S.A. 75-3036) to another fund, generally a special purpose fund housed in the State treasury. Plaintiffs' Exhibit 372: Kan. Atty. Gen. Op. No. 82-160 (1982); Plaintiffs' Exhibit 409: D. Goossen TR at p. 17.

In the instant case, in each of FY 2011 (2010-11) and FY2012 (2011-12), the Kansas State Board of Education certified, in accordance with K.S.A. 72-8814(c), the entitlements of the school districts to the capital outlay

equalization payments as calculated pursuant to K.S.A.72-8814(b) for those fiscal years, notwithstanding the noted added nomenclature directing that no such demand transfers were to be executed by the state director of accounts and reports and notwithstanding that in each of those fiscal years, the particular legislature had placed "$0" limits on expenditures from the school district capital outlay state aid fund in the respective appropriation bills.

We have addressed Plaintiffs' challenge generally to nonpayment of capital outlay funds previously within the context of Plaintiffs' Count One "suitability" claim finding that the non-payment of capital outlay state aid exacerbated, and most probably diminished, the value of the reduced BSAPP existing from FY2010 forward. We also found that the nonpayment of capital outlay equalization payments created an unconstitutional, wealth based, inequity, which would, if left uncorrected, make the whole of K.S.A. 72-8801, *et seq.*, unconstitutional.

Here, Plaintiffs' arguments seek declaration that *the particular means adopted* to cause such nonpayment in each year were unconstitutional. Essentially Plaintiffs' claim that if the legislative or executive methodology used to

deny payment are now struck as unconstitutional, then it would leave the statute intact and past entitlements yet due and payable. In other words, Plaintiffs seek an order of mandamus from this Court directing such payments be made. For the reasons following, we find Plaintiffs' claims in this regard cannot succeed.

Our analysis of Plaintiffs' claims to capital outlay equalization payments rests not only in the effect of the amendments to K.S.A. 72-8814(c), but by the fact in FY years 2012 (2011-12) and to date, no funds were specifically authorized and made available through the appropriation process by the legislature from the capital outlay state aid fund, *i.e.* "$0" (L. 2011, ch. 118, § 113(b); L. 2012, ch. 175, § 88(b)). Thus, even were we to agree that the legislature's attempted amendment of K.S.A. 72-8814 within the context of an appropriation bill was a violation of Art. 2 § 16 of the Kansas Constitution, Art. 2 § 24 of the Kansas Constitution would moot and override any defect that might be identified to not following the requirements of Art. 2 § 16. Each bill has a severance clause, respectively. See L. 2011, ch. 118, § 194; L. 2012, ch. 175, § 172. Alternatively, if the amendment of K.S.A. 72-8814(c) in

those years within the context of omnibus appropriation bills violated the single or related subject matter requirement of Art. 2, § 16 and could not be severed, then the whole bill would fail, still leaving nothing appropriated for the purpose sought to be claimed by Plaintiffs.

Art. 2, § 24 of the Kansas Constitution provides:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."

The Kansas Supreme Court has long held that for monies *rightfully* in the state treasury, the only mechanism for their release is through the appropriation process. *State, ex rel. v. Fadely,* 180 Kan. 652, 661 (1957). Unless encumbered, the availability of the appropriated funds for the purpose expires after the period for which the appropriation was made. *Hyre v. Sullivan*, 171 Kan. 309 (1951). Thus, while we have found that nonpayment of school district capital outlay funds, whether due to the tenets of amended K.S.A. 72-8814(c) banning demand transfers or simply by the respective legislatures non-appropriation of funds for that purpose, leaves K.S.A. 72-8814 itself, unconstitutional as creating, and operating as, an

inequitable funding disparity based solely on wealth under Article 6, § 6(b) of the Kansas Constitution, nevertheless, there is simply no way this Court can order monies be paid out of the State treasury in the absence of an appropriation therefore. The circumstances in FY2010 (2009-10) are different because for capital outlay an expenditure was authorized by an appropriation bill (L. 2009, ch. 124 § 1(b) and K.S.A. 72-8814(c)) was not amended. However, we have searched the record and have found no certification of entitlements was ever issued from the Kansas State Board of Education to the Director of Accounts and Reports. Hence, no funds ever arrived at or were placed in the capital outlay State aid fund, notwithstanding the legislature's appropriation of a "no limit" authority on expenditures from that fund.

Hence, because no funds had been transferred because no request by the Kansas State Board of Education by its certification had been made, then there was never the ability had to effect an encumbrance of such funds as would seemingly also occur from that certification of entitlements. As no encumbrance of them was ever had, nothing prevented the lapsing of the appropriation made for

FY2010 on June 30, 2010. As former budget director Goossen noted, a certification is only good if there are monies in, or to be in, the fund. See Plaintiffs' Exhibit 409: TR Goossen at p. 102.

We understand that considerable confusion existed about whether the legislature intended an appropriation for capital outlay for FY2010 and whether, not- withstanding, if there was an appropriation, it was eliminated by the allotment process of K.S.A. 78-3722 by Governor Parkinson. See Plaintiffs' Exhibits 353, 368, 409, 410. We believe, however, the language seems clear to us that an appropriation was made, yet, there was never a transfer request for, or certification from, the Kansas State Board of Education concerning those funds for that fiscal year. While Plaintiffs assert they made a viable claim on June 17, 2010, for these funds (Plaintiffs' Exhibit 363 at p. 12-13, claim at ¶10 of claims), we do not believe that any *lis pendens* principle was created by such notice that would have been sufficient to act as an encumbrance and forestall such appropriation's lapse on June 30, 2010. *See, Hicks v. Davis, 97 Kan. 312, rehearing denied 97 Kan. 662 (1916); Hicks v. Davis*, 100 Kan. 4 (1917).

Even if we are in error in viewing the effect of Plaintiffs' notice of claim, we believe Governor Parkinson's allotment of educational funds in November of 2009 was properly exercised. While Plaintiffs advance an attorney general's opinion issued in 1982 that advised that "demand transfers" were not subject to allotment (Plaintiffs' Exhibit 372), we find that Article 2, § 24's requirement that an appropriation is necessary for monies to be paid out of the state treasury, coupled with the fact that for FY2010 an appropriation was made for the capital outlay state aid fund (L. 2009, ch. 124, § 1(b)), means that the allotment was exercised against that appropriation, not the demand transfer itself, effectively mooting the necessity for the latter. The statute establishing the authority for allotments indicates it is to be exercised against "appropriations made against such general fund or special revenue fund". K.S.A. 75-3722. Hence, in our view, the fact the money had not yet arrived pursuant to a demand transfer is immaterial to the object of the exercise of authority, to-wit: "appropriations". Accordingly, when Plaintiffs' notice of claim was issued on June 17, 2010, there was no appropriation authority, *i.e.*, funds available, upon which an encumbrance

could operate, such funds having rightfully been eliminated prior by the allotment process.

While we do not feel it is particularly necessary, given our view that Plaintiffs are precluded from recovery on the grounds noted above, we feel we should, nevertheless, probably further evaluate Plaintiffs' claims for FY2011 (2010-11), FY2012 (2011-12), and FY2013 (2012-13) payments in terms of whether K.S.A. 72-8814(c)'s amendment within the confines of the particular session's omnibus appropriation bill was constitutional. We find the amendment to K.S.A. 72-8814(c) in each noted session was appropriate in that format used.

Art. 2 § 16 provides:

> "No bill shall contain more than one subject, except appropriation bills and bills for revision or codification of statutes. The subject of each bill shall be expressed in its title. No law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed. The provisions of this section shall be liberally construed to effectuate the acts of the legislature."

Clearly, the single subject matter requirement of Art. 2 § 16 was aimed at "log rolling":

> "A mischievous legislative practice, of embracing in one bill several distinct matters, one of which, perhaps, could singly obtain the assent of

> the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all." [citations omitted].

Black's Law Dictionary, Revised Fourth Edition.

The Kansas Supreme Court has supported this view:

> "The inclusion of unrelated legislation in an important and extensive appropriations bill, at the end of the session, is particularly illustrative of the possible harm Section 16 is intended to prevent."

State ex rel. Stephan v. Carlin, 230 Kan. 252, 258 (1981).

The second requirement that no law be amended, essentially, by reference, was articulated as follows:

> "Again,'the mischief designed to be remedied by the constitutional provisions cited was the enactment of amendatory statutes in terms so blind that the legislators themselves were sometimes deceived in regard to their effect; and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws.' *People* v. *Mahaney*, 13 Mich. 496."

The State, ex rel., v. Cross, 38 Kan. 696, 700 (1888).

Here, as noted, Art. 2, § 16 was amended in 1974 to add the exemption of appropriation bills and bills intended to codify statutes from its terms. The amendment to Art. 2 § 16 was probably cautionary because Art. 2 § 16 was seen as mandatory in all its provisos (*State v. Guinney,* 55 Kan. 532, 533 (1895)), hence, jeopardizing, perhaps, an entire

appropriation bill if one had been challenged earlier before the amendment and was in the omnibus format as now.

The legislature's actions in 2010 and in its sessions thereafter that amended K.S.A. 72-8814(c) to add the provisos suspending the mechanism to transfer money for capital outlay equalization aid would have to be seen as meeting the second proviso of Art. 2 § 16 in that the full statute was amended in transparent fashion as Art. 2 § 16 demands. This is not a case where substantive legislation was attempted to be amended by the casual expression of "notwithstanding" in an appropriation bill as this Court is aware was attempted in one case before a judge of this panel. *See Kansas Building Industry Workers Compensation Fund, et al v. State,* 10C83 (Dist. Ct. Sh. Co. (2011)).

The question then becomes whether amending K.S.A. 72-8814(c) in such a format would violate the single subject rule in light of Art. 2, § 16 even through Art. 2, § 16 exempts appropriation bills from its mandate. We are satisfied that given Art. 2, § 16's liberal interpretation mandate to construe it "to effectuate acts of the legislature" saves the procedure and format used here. While an omnibus appropriation bill is the perfect, if not

an inherent, format for logrolling, Art. 2 § 16, as it stands, sanctions it, however wise or unwise that may be seen in retrospect. We find that waylaying the transfers formerly dictated by section (c) of K.S.A. 72-8814 has such a relation to the spending authorized by an appropriation bill as to not violate this constitutional section.

The Kansas Supreme Court has sanctioned a comparable breadth of expenditure authority as within the ambit of an appropriation bill.

> "Section 77 of Senate Bill No. 470 does not appropriate state funds; it does not establish expenditure limitations on state funds; it does not authorize the transfer of state moneys from one fund to another. It does fix budget limitations for school districts. It bears no more relationship to the appropriation of state funds than do statutes fixing the budget limitations of cities, counties, or other taxing districts, or various other statutes which could be cited. Clearly, it adds a second subject to the bill."

State, ex rel v. Carlin, 230 Kan. at 257-258.

There is, of course, a conflict between L. 2010, Ch. 165 § 79(b), *i.e.*, a "no limit" authorization for the capital outlay state aid fund, and § 144 of that bill forestalling that appropriation's implementation, but we feel that is not an issue here for two reasons. First, because the transfer was never made and no funds ever

existed in the capital outlay state aid fund created by K.S.A. 72-8814(a) for FY2011. Secondly, it seems clear that a companion provision of a bill that takes away the source of funding for an earlier appropriation clearly manifests a legislative intention to trump the appropriation and no reasonable legislator could be misled.

PLAINTIFFS' CLAIM THAT CERTAIN OMNIBUS APPROPRIATION ACTS ARE UNCONSTITUTIONAL

In Count Three of its *Amended Complaint*, Plaintiffs assert that the appropriation acts for FY year 2011 (L. 2009, ch. 124), FY2011 (L. 2010, ch. 165) and FY2012 (L. 2011, ch. 118) reflect attempts to amend substantive legislation that otherwise implements the Kansas school finance formula. Plaintiffs claim that such acts are unconstitutional pointing to Art. 2 § 16 of the Kansas Constitution, which section and its purpose we have previously discussed in relation to the capital outlay state aid fund.

We have reviewed the omnibus appropriation acts further in regard to the assertion made and the only other factor that can be identified to Plaintiffs' claim is the fact the legislature has underfunded, by way of reduced

appropriations, the statutory formulas setting both the BSAPP at $4492 for FY2010 and forward (K.S.A. 72-6410(b)(1)) and supplemental state aid that should have been payable for districts below the 81.2 percentile as set by K.S.A. 72-6434(a).

K.S.A. 72-6410, as relevant here, states as follows:

> "(a) 'State financial aid' means an amount equal to the product obtained by multiplying base state aid per pupil by the adjusted enrollment of a district.
>
> (b)(1) 'Base state aid per pupil' means an amount of state financial aid per pupil. Subject to the other provisions of this subsection, the amount of base state aid per pupil is $4,433 in school year 2008-2009 and $4,492 in school year 2009-2010 and each school year thereafter.
> (2) The amount of base state aid per pupil is subject to reduction commensurate with any reduction under K.S.A. 75-6704, and amendments thereto, in the amount of the appropriation from the state general fund for general state aid. If the amount of appropriations for general state aid is insufficient to pay in full the amount each district is entitled to receive for any school year, the amount of base state aid per pupil for such school year is subject to reduction commensurate with the amount of the insufficiency.
>
> . . ."

As can be seen, the first sentence of Section (b)(2) accommodates an executive action that is authorized in the event of a State *revenue* shortfall. K.S.A. 75-6704 provides:

"(a) The director of the budget shall continuously monitor the status of the state general fund with regard to estimated and actual revenues and approved and actual expenditures and demand transfers. Periodically, the director of the budget shall estimate the amount of the unencumbered ending balance of moneys in the state general fund for the current fiscal year and the total amount of anticipated expenditures, demand transfers and encumbrances of moneys in the state general fund for the current fiscal year. If the amount of such unencumbered ending balance in the state general fund is less than $100,000,000, the director of the budget shall certify to the governor the difference between $100,000,000 and the amount of such unencumbered ending balance in the state general fund, after adjusting the estimates of the amounts of such demand transfers with regard to new estimates of revenues to the state general fund, where appropriate.

(b) Upon receipt of any such certification and subject to approval of the state finance council acting on this matter which is hereby declared to be a matter of legislative delegation and subject to the guidelines prescribed by subsection (c) of K.S.A. 75-3711c and amendments thereto, the governor may issue an executive order reducing, by applying a percentage reduction determined by the governor in accordance with this section, (1) the amount authorized to be expended from each appropriation from the state general fund for the current fiscal year, other than any item of appropriation for debt service for payments pursuant to contractual bond obligations or any item of appropriation for employer contributions for the employers who are eligible employers as specified in subsections (1), (2) and (3) of K.S.A. 74-4931 and amendments thereto under the Kansas public employees retirement system pursuant to K.S.A. 74-4939 and amendments thereto, and (2) the amount of each demand transfer from the state general fund for the current fiscal year, other than any demand transfer to the school district

capital improvements fund for distribution to school districts pursuant to K.S.A. 75-2319 and amendments thereto.

(c) The reduction imposed by an executive order issued under this section shall be determined by the governor and may be equal to or less than the amount certified under subsection (a). Except as otherwise specifically provided by this section, the percentage reduction applied under subsection (b) shall be the same for each item of appropriation and each demand transfer and shall be imposed equally on all such items of appropriation and demand transfers without exception. No such percentage reduction and no provisions of any such executive order under this section shall apply or be construed to reduce any item of appropriation for debt service for payments pursuant to contractual bond obligations or any item of appropriation for employer contributions for the employers who are eligible employers as specified in subsections (1), (2) and (3) of K.S.A. 74-4931 and amendments thereto under the Kansas public employees retirement system pursuant to K.S.A. 74-4939 and amendments thereto or any demand transfer to the school district capital improvements fund for distribution to school districts pursuant to K.S.A. 75-2319 and amendments thereto. The provisions of such executive order shall be effective for all state agencies of the executive, legislative and judicial branches of state government.

(d) If the governor issues an executive order under this section, the director of accounts and reports shall not issue any warrant for the payment of moneys in the state general fund or make any demand transfer of moneys in the state general fund for any state agency unless such warrant or demand transfer is in accordance with such executive order and such warrant or demand transfer does not exceed the amount of money permitted to be expended or transferred from the state general fund.

> (e) Nothing in this section shall be construed to (1) require the governor to issue an executive order under this section upon receipt of any such certification by the director of the budget; or (2) restrict the number of times that the director of the budget may make a certification under this section or that the governor may issue an executive order under this section."

The question is whether the second sentence of Section (b)(2), which refers to adjusting the BSAPP, for example, when K.S.A. 75-6704 authority is exercised, also empowers the BSAPP's adjustment simply because the legislature chooses to not fund the $4492 amount for the BSAPP set by Section (b)(1) without the necessity of amending Section (b)(1). We actually think the proper construction of that second sentence, particularly when measured against the Legislature's constitutional duty under Article 6, § 6(b), is that it is merely a description within the school finance act of what will occur whenever the K.S.A. 75-6704 authority is exercised and not a further license to the Legislature to avoid the necessity of amending K.S.A. 72-6410 (b)(1) that actually sets the BSAPP in any year. Further, to construe that second sentence as other than a necessary companion to the first sentence of that section would make section (b)(1) fixing the annual BSAPP

superfluous and make section (b)(1) stand therefore as window dressing only, which we believe would be too Machiavellian to stand as a proper indicia of legislative intent.

We say the above because the Legislature by the duty imposed under Article 6, § 6(b) and the road to fulfillment of its duty under that constitutional provision as detailed in *Montoy*, which we have heretofore taken great steps to set out, is simply not privileged to choose to reduce funding to the Kansas K-12 school system without an identified *factual basis* for doing so. Here, of course, no such factual basis as ever been identified.

However, as we have as noted, we have not delved into the propriety of past acts of government officials, believing our authority is principally prospective only. However, certainly from FY2012 forward, when the "Great Recession" was abating and school fund reserves held at the local level had been substantially diminished, little basis existed in the legislature or the executive for operating under the specter of either the "Great Recession" or the notion that excessive revenues had been built-up in the funds of school districts that could be directed for use and

deemed, in effect, prepaid constitutional funding obligations of the State.

However, even if Section (b)(2) of K.S.A. 72-6410 were viewed as an alternative means of setting the BSAPP or that the then current legislature in any year was acting simply to underfund the BSAPP independent of that section by merely providing insufficient appropriations, the unconstitutionality of such practice would not stem from a violation of Art. 2 § 16, but rather from a failure to follow *Montoy* and identify a factual or equitable funding basis for any such reduction, which, of course, beginning in the 2009 session and thereafter no legislature has sought to do. Rather, in fact, as we have noted, these legislative bodies have acted to cut funds under the Kansas School Finance formula in the face of facts that evidence not less need, but more need, and in the face of authoritative recommendations for increases in funding, not a diminishment in funding. Thus, what the omnibus appropriation acts identified by Plaintiffs do is merely identify evidence of the means used to accomplish unconstitutional conduct rather than establish a separate violation of Art. 2 § 16. However, Plaintiffs' claim the omnibus appropriation acts

cited are themselves unconstitutional is probably correct in that some appropriations made within them in regard to funding the K-12 school system can be seen as facilitative of unconstitutional conduct and, hence, unconstitutional as well as unconstitutional in and of itself if done in the absence of justifying *facts*. However, the appropriate remedy would rest in timely injunctive relief striking or enjoining the appropriation, not after the fact declaratory relief. Accordingly, Plaintiffs' Count Three claim is denied as presently without practical recourse or remedy for the years cited.

HAVE PLAINTIFFS' ESTABLISHED A SUBSTANTIVE DUE PROCESS VIOLATION

Plaintiffs' Count Four of its *Amended Complaint* claims that Plaintiffs have suffered a violation of substantive due process under the School District Finance and Quality Performance Act, K.S.A. 72-6405 *et seq.*, as amended, and by the manner of the government's action under the claimed guise of it. We find Plaintiffs' evidence does not sustain a violation.

One of the keystones of a substantive due process violation is that such a claimed violation impact a

"fundamental right". Regardless of what this panel believes or does not believe as to the nature of the right to an education under Article 6 of the Kansas Constitution, it has never been declared a "fundamental right" by the Kansas Supreme Court. *USD 229*, 256 Kan. at 260-263. The best we have for that position is a minority of the *Montoy* Court. *Montoy II,* 278 Kan. at p. 776, *et seq*. Neither has the right to an education, *per se*, been categorized as a "fundamental right" federally. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 36 L.Ed.2d 16, *reh denied* 411 U.S. 959 (1973). As such opportunity to declare the right to education in Kansas as "fundamental" has been presented and rejected by a higher court, we can envision neither opportunity nor need, as trial judges, to opine our view.

Further, here, the right to substantive due process is an individual and personal right. Plaintiff school districts do not hold a status as individuals and there is inadequate evidence before this Court about the individually named Plaintiffs other than their names and school of attendance (Plaintiffs' Amended Petition and ¶¶ 1-31) upon which this Court could assign one of those named Plaintiffs to a recognized status or class that might, independent of

whether a right to education was a fundamental right, invoke such a due process violation. Accordingly, Plaintiffs' Count Four claim must be denied.

PLAINTIFFS' EQUAL PROTECTION CLAIM

As we have previously noted, we do not believe this claim gains footing outside the protections inherent in Article 6, particularly, § 6(b), of the Kansas Constitution. Clearly, however, the government's underfunding of the BSAPP, which is the driver of revenues under the school finance formula, particularly, for at risk classifications and English language learners, has a greater fiscal impact on the educational opportunities to be made available to those most in need of extra assistance within our school systems, particularly those students attending the school districts of the named Plaintiff school districts and those students and districts that are similarly situated.

Clearly, a dollar lost from the BSAPP to a school district with significant numbers of such students is not simply a dollar, but a dollar *plus* the value of the weighting embedded in the school finance formula on their behalf. Certainly, the impact occasioned to these school

districts and such students in terms of the educational opportunity lost to such students is real and hurtful, but in terms of how it is accomplished, that is by reducing the BSAPP, it, nevertheless, withdraws funding equally in terms of financing the student sought to be served. If it costs a school district $1.00 to educate a non- at risk student and $1.00 plus 55.6¢ to educate a high densely at risk student, then merely the actual costs are being withdrawn as measured against the educational goals intended for such student.

Further, for Plaintiffs' claim to stand independently as a constitutional equal protection violation, it needs to be hinged to a deliberate, or so obvious by impact, intent by the actor to do so, here, the State. *Crawford v. Kansas Dept. of Revenue,* 46 Kan. App. 2d. 464, 468-469 (2011). We find no such intent displayed by the evidence before us.

Further, as we noted in addressing Plaintiffs' Count Four - substantive due process - claim, Plaintiffs' claim under this *Count* of its *Amended Complaint* further falters from lack of any identifying characteristics of, or circumstances attributable to, the named student Plaintiffs. While it is assumed by both sides here that the Plaintiff school districts have standing to raise equal protection

claims, they have not demonstrated that they can raise an equal protection claim on behalf of their students. *Cross v. Kansas Dept. of Revenue*, 279 Kan. 501, 507-508 (2005). Further, even if the Plaintiff school district's have standing under an equal protection claim (*U.S.D. No. 380 v. McMillen*, 252 Kan. 451 (1993) and *U.S.D. No. 443 v. Kansas St. Bd. of Educ.*, 266 Kan. 75 (1998), they, equally, have failed to identify a deliberate, intended disparate consequence from the school finance act or by those acting in furtherance of it.

PLAINTIFFS' COUNT SIX CLAIM THAT K.S.A. 72-64b03(d) VIOLATES THE SEPARATION OF POWERS

In Count Six of their *Amended Petition*, Plaintiffs' claim that the statutory provision establishing jurisdiction in this panel encroaches on the judiciary's right to select the appropriate remedy if a violation is found. K.S.A. 72-64b03(d) states:

> (d) As a part of a remedy, preliminary decision or final decision in which a statute or legislative enactment of this state has been held unconstitutional as a violation of article 6 of the Kansas constitution, the judicial panel or any master or other person or persons appointed by the panel to hear or determine a cause or controversy or to make or enforce any order or remedy ordered by a court pursuant to K.S.A. 60-

253, and amendments thereto, or any other provision of law, shall not have the authority to order a school district or any attendance center within a school district to be closed or enjoin the use of *all* statutes related to the distribution of funds for public education." (Emphasis added)

As we will discuss subsequently in describing our final judgment in this matter, we believe Plaintiffs' assertion is not ripe for review at this juncture of this case.

PLAINTIFFS' COUNTS SEVEN AND EIGHT

In *Counts Seven* and *Eight* of Plaintiffs' *Amended Petition*, Plaintiffs challenge the Legislature's continuing disregard of its own statutes directing its approach to K-12 school financing. Considering *Count Eight* first, it claims that K.S.A. 72-64c04, enacted in response to the *Montoy* decision, which requires that state aid to school districts, with limited exceptions, be indexed to the urban CPI from and after FY2008 has been wholly ignored. From reference to the history of amendments to K.S.A. 72-6410(b)(1), it appears that K.S.A. 72-64c04 was followed with the last amendment of K.S.A. 72-6410(b)(1) being for operation in FY2010 and thereafter (See, L. 2008, ch. 172, § 6), nevertheless, such indexing was clearly not done thereafter

and K.S.A. 72-64c04, which authorized such indexing, expired of its own accord on June 30, 2010.

Further, this is one of those issues, as we have noted, of the good intentions that followed *Montoy*, that, perhaps, have now gone array and for which we feel nothing could be accomplished in terms of remedy. It is, however, further evidence of a retreat from compliance with the *Montoy* decisions beginning in FY2009. Both the Augenblick & Myers and the Ducombe & Yinger study consultants advocated that the affect of inflation on their estimates be considered. We find *Count Eight* fails to state an independently justiciable claim.

Count Seven asserts that the Legislature ignored the directive of K.S.A. 72-64c03, which statute remains in effect, whereby the Legislature committed to treating K-12 general state aid, supplemental state aid, and funding special education as the first priority for both budgeting and payment and a first priority claim on existing revenues. Here, we know that these appropriation items have been underfunded by legislative appropriations from the 2010 session forward. We do not have sufficient information to determine whether that funding declaration was followed in

any respect in relation to other appropriations made and the revenues available as a whole to the State in the past.

While we have not been called upon to rule upon the legal efficacy of 2012 Senate Substitute for H.B. 2117, which enacted an income tax reduction effective January 1, 2013, in the face of the State's active disregard of its constitutional duties under Article 6, § 6(b), we, probably, need not do so in the absence of a non-compliance with our overall opinion in the present case. That *Act's* passage, nevertheless, appears to us to be in direct contravention of the spirit and intent of K.S.A. 72-64c03 which provides:

> "The appropriation of monies necessary to pay general state aid and supplemental general state aid under the School District Finance and Quality Performance Act and state aid for the provision of special education and related services under the Special Education for Exceptional Children Act shall be given first priority in the legislative budgeting process and shall be paid first from existing state revenues."

That *Act* was passed in 2005 and continues to be the law today.

The State has argued and asked us to find that the coming limitation on the State's resources require the Legislature to make difficult appropriation decisions. The State has proposed that we find "the legislature could

reasonably conclude adjustment of state education aid to the levels demanded by plaintiffs would have disastrous consequences to the Kansas economy and its citizens" (p. 34 of the State's Proposed Memorandum and Order). However, at the same time that the State's attorney was advancing that argument, the Legislature passed the income tax cut. According to one of the State's experts, Dr. Art Hall, the Executive Director of the Center for Applied Economics at the University of Kansas School of Business, the tax cut bill will cause a revenue reduction in the first year (2013) of $800,000,000 to $1,000,000,000. *See* TR: Arthur Hall at pp. 2421-2424. While Hall was called by the State to present evidence of the disastrous effect a 1.2 billion dollar infusion of money in a single year for education would have to the State, the same reasoning should apply to an $800,000,000 to $1,000,000,000 reduction in State revenue.

It seems completely illogical that the State can argue that a reduction in education funding was necessitated by the downturn in the economy and the state's diminishing resources and at the same time cut taxes further, thereby further reducing the sources of revenue on the basis of a

hope that doing so will create a boost to the state's economy at some point in the future. It appears to us that the only certain result from the tax cut will be a further reduction of existing resources available and from a cause, unlike the "Great Recession" which had a cause external to Kansas, that is homespun, hence, self-inflicted. While the Legislature has said that educational funding is a priority, the passage of the tax cut bill suggests otherwise and, if its effect is as claimed by the State, it would most certainly conflict with the State's Article 6 § 6(b) constitutional duties.

Nevertheless, Plaintiffs' *Count Seven* claim lacks the necessary facts to sustain it as it is stated, since, again, it effects past actions and we find failing to follow its commands in the past is now beyond our reach in any manner. Nevertheless, we consider Plaintiffs' *Count Seven* more as in the nature of a suggestion or recommendation to be considered, if necessary, as part of any future remedy. It does not otherwise stand independently as a substantive claim.

CONCLUSION AND SUMMARY

In concluding, we need to first mention our assignment of the burden of proof on Plaintiffs' claims. We believe that on all Plaintiffs' claims, the assignment of that burden is properly to the Plaintiffs. The amendments to the School District Finance and Quality Performance Act, K.S.A. 72-6405 *et seq.*, as made by SB549 in the 2006 session of the Legislature and as were discussed in the *Montoy* opinions noted previously enjoy a presumption of constitutionality.

We, however, also believe that in regard to Plaintiffs' *Amended Petition's Count One* - "suitability of funding under the Kansas Constitution" - claim that once Plaintiffs established that no cost studies justified the State's reductions to the BSAPP or to other funding and that existing wealth based disparities would not justify the elimination of capital outlay funding or the proration of supplemental state aid that, then, the burden of proof thereafter shifted to the Defendant to establish some constitutionally viable exception, *as a matter of fact or equity,* that would justify the omission. As we have discussed, the Defendant's claim that recent student performance testing made less dollars the equal or more was found to not be factually viable. However, as to

Plaintiffs' *Count One* claim, even if we were in error assigning the burden of proof here to the State once Plaintiffs made its showing that the *Montoy* principles had not been followed, we still believe, from any perspective of the assignment of the burden of proof, that Plaintiffs have established beyond any question that the State's K-12 educational system now stands as unconstitutionally underfunded.

We have, within the context of this finding, also looked at the weightings, which Plaintiffs assert are constitutionally inadequate. *See Amended Petition* at ¶69(b). When the BSAPP is fully funded, the assumption is that it accommodates the fulfillment of the purpose of the weightings. We know from the evidence that it is the at risk, ELL students, and some minority grouped performers that, particularly, lag behind their peers overall on academic performance testing. We note also that, except for the bilingual weighting in the Ducombe & Yinger study, the *average* of the weightings for bilingual students, at risk students, and special education students are lower in the Kansas school finance formula than those recommended by both the Augenlick & Myers and the Ducombe & Yinger study

consultants, more particularly, that character of students in school districts such as Plaintiffs. *See, respectively,* Plaintiffs' Exhibit 203 at VII-II and Plaintiffs' Exhibit 199 at *C-27-C-32*. We also note, however, that the interchangeability in the use of funds, by example, from at risk and bilingual weightings, provides some ability to balance the respective needs of these subgroups, if the demand from one group is less, *e.g.*, K.S.A. 72-6413(b); K.S.A. 72-6414(f). Of course, without a lesser demand by one weighted group, no such flexibility is provided. The lowered BSAPP, of course, also squeezes all weightings.

We have previously discussed Plaintiffs' position in their assertion of the affect of a reduction in the BSAPP on weightings and discounted any disparate effect between student groups. Undoubtedly, the withdrawal of any funds to the weighted categories of at risk, bilingual, and other weighted groups is of special concern, but it appears to us from the evidence that, given the nature of the Kansas school finance formula with its BSAPP as the driver of funding and its one size fits all design, that the systemic failure lies in reduction of the BSAPP, not the current percentage amount of the weightings, *per se*. We note also

from our comparison charting of the funding provided pre-*Montoy* and now that the value of the weightings has been, effectively, eliminated, however, this is, we believe, attributable to the lowered BSAPP. Without a showing that a school district with no, or minimal, special needs students is overcompensated by the BSAPP and that merely an increase in the weightings in other school districts that have these needy subgroups could counteract the affect of a lower BSAPP, we can make no independent judgment as to the inadequacy of any particular weighting.

We need here, also, to comment on special education. Plaintiffs' claim in ¶ 64(c) and ¶ 69(h) of their *Amended Petition* that special education has been unconstitutionally underfunded. Special education within the Kansas school finance formula is calculated and made pursuant to a separate payment, notwithstanding its appearance in the formula as a weighting. The statute determining its amount fixes reimbursement of special education costs at 92% (K.S.A. 72-978), which amount has not been forthcoming since FY2009. While such claim is true, we fail to find a sufficient anchor in the facts in order to judge the lowered payment as unconstitutional, rather than just lower. *See*

USD 229, 256 Kan. at 254. Without specific information regarding the number of this character of student, their needs, their amenability to success, and the cause of any State depravations that prevent that success, the necessary fulcrum for analysis of the claim is simply not present. Particularly, we cannot relate the *Montoy IV* reference to special education by either the number of students or services in relation to the amount there stated. 282 Kan. at p. 22. In FY2013, the State is funding special education to the federal "maintenance of effort" level. See 20 U.S.C.A. 7901; Plaintiffs' Exhibit 248 at 140959-60; L. 2012, ch. 175, § 88(a). Further, special education funding also has federal funding sources, *e.g.*, L. 2012, ch. 175, § 88(b). Without knowing more, we feel that the "maintenance of effort" level, which is 95.1% of the amount required by K.S.A. 72-978 has not been shown to be, *per se*, unconstitutionally inadequate. We acknowledge, however, that if a need still exists, and like capital outlay is to be paid from a special source but is not, then those costs will impact a school district's general fund or LOB, which adds to the impact of the underfunding of the BSAPP and generally.

Further, another of Plaintiffs' challenges falling within *Count One* pertains to underfunding supplemental state aid, which has been shown to have created, without doubt, a wealth based disparity between school districts based solely on property tax wealth and has not, accordingly, been shown to have either a factual or equitable justification. The burden of showing the constitutional flaw in prorating supplemental state aid, we believe, was on the Plaintiffs and they have sustained it. Further, because we construed K.S.A. 72-6434(e)(1) as directory only, and consider K.S.A. 72-6434(f) as merely declaratory of fact and not as a credit or a setoff to other aspects of the school finance formula, we find Plaintiffs' allegation within its *Count One* claim that K.S.A. 72-6434(e)(1) or (f) created an unconstitutional wealth based disparity among school districts has not been sustained by them.

On Plaintiffs' claims made in *Counts Two - Eight*, we find the burden of proof was on Plaintiffs to establish their claims and, except as to *Count Two,* we find those claims have not been sustained such as to *independently* invoke judicial action. As noted, Plaintiffs *Count Two* was sustained because of the unconstitutionality of K.S.A. 72-

8814(c)'s prohibition on funding transfers, which allows the authority granted school districts pursuant to K.S.A. 72-8801, if exercised, to create a wealth based disparity among school districts when the equalization mechanism established by K.S.A. 72-8814 is, as now, blocked by Section (c)'s bar on transfers to fund it. Finally, and additionally, as we have noted, the lack of funding for the capital outlay expenses anticipated to be paid from capital outlay transfer funds, had they been provided, further augments our finding of underfunding occasioned by the cuts to the BSAPP since these necessary expenditures still exist and are required to be paid, but now, *sub-silenco,* are required to come from BSAPP generated funds or a school district's LOB. Further, as we have noted, we have limited Plaintiffs' remedy for Count II as equitable only, finding monetary relief blocked by Art. 2, § 24 of the Kansas Constitution.

Finally, with the size of the record before the Court, obviously not every argument made, testimony given, or exhibit presented can be individually discussed by us. Much of the evidence presented has been uncontested, except as to the conclusions to be reached from it. However, our finding is that simply nothing presented to us, whether discussed

here or not, would change our conclusions reached, either factually or legally.

CONSIDERATIONS IMPACTING ANY REMEDY

In fashioning a remedy here, we remain astute to the fact that its resolution rests principally in the good faith efforts of our co-equal branches of government, most heavily, however, with the Kansas legislature. We are optimistic of the response and we have tried to be helpful by setting out the basis and parameters of the deficiencies we have found. While we believe one practical basis for extraction of the judiciary from this character of dispute in the future, given *Montoy's* removal of political choice from K-12 funding in favor of an empirical fact based premise for the choices made, could result from the delegation by the Legislature of the vetting of educational programs and the fact finding necessary to support the costs of the recommendations made to the Kansas State Board of Education, which itself is an elected body, reserving to the Legislature its power of funding oversight. Too, a delegation of initial oversight and fact finding to an orderly administrative review could also be employed, through an appropriate process, to

scrutinize and allocate educational operational expenditures for either state funded payment or payment through local option budgets, perhaps, encouraging innovation at the local level then statewide adoption of successful ones thereafter, having been tested and proven successful at the local level after review by two elected entities of government - local boards of education and the State Board of Education, each of which carries both inherent and day-to-day expertise in the field of education. However, what could be is not now what is, thus, it behooves as to address solutions to the constitutional grievances found.

We find consideration of the remedy or remedies to be employed further constrained by the precedent of the *Montoy* decisions as well as the limitations on the factual record before us. The *Montoy* decisions required a factual basis for any funding decision to be made under the Kansas school finance system. Here, such requirement is equally applicable to us. While evidence has been presented about the likely increases in costs to be brought to our school system due to increased standards and the State's *Waiver* from the No Child Left Behind Act, exactly what those exact costs are likely to be has not been presented to us.

Further, given the cost cutting occasioned to the system from FY2009 forward, the true current cost of maintaining a school system that is constitutionally funded can only be determined by harkening to the past, which we have done. However, the only firm cost increase before us is that derived from inflation, which we have incorporated in order to make our cost comparisons meaningful and consistent. As the data which our charts reflect, including additional charts attached as an *Addendum* hereto, the financing made available to our K-12 school system in inflation adjusted dollars rests near, or, in some cases, below that provided before the original *Montoy* decision was made in January, 2005.

Further, the local option budget (LOB), derived from local school board choice of a level of taxation believed appropriate for local school district patrons to support in aid of their school district for educational programs of choice, only exists in many districts in theory not practice, because of the state funding shortfalls.

Further, as a constraint on us, we must consider the *Montoy* decision itself, which, by example, in the face of evidence from the Augenblick & Myers study of a beginning

base - "Tier 1" - recommendation of minimum funding of $4650 per pupil as determined in 2000-2001 dollars, but which was to be adjusted to reflect its value in current dollars at the time of its adoption (see *Footnote 3, supra*, at p. 103) and the Ducobme & Yinger study's recommendation of $4346 in 2003-2004 dollars to meet the 2007 standards (See Footnote 10, *supra* at p. 105), the Kansas Supreme Court accepted, as in "substantial compliance", a BSAPP figure proposed in 2006 SB549 beginning with "$4316 in 2006-07; to $4374 in 2007-08; and to $4433 in 2008-09". (*Montoy IV*, 282 Kan. at p. 19).

As noted, we have scrutinized both studies, but, particularly, focused on the study consultants recommendations since they were, in fact, the only demonstrated experts. We have considered their reports and accepted them, after review, as valid. Properly viewed, both are quite compatible, each one supportive of the other. In retrospect, given our qualms about the legislative post audit adjustments to the Ducombe & Yinger study recommendations, and in comparison with the recommendations of Augenblick & Meyers, we find the *Montoy* decision both conservative and highly deferential to legislative choice when made on *facts* presented to, and obviously considered

by, the Legislature. Certainly, the recommendations reflected by the cost studies could support a finding for a higher value for the BSAPP with *Montoy IV* being seen as acceptance of the figure decided upon as within an acceptable range.

Nevertheless, our opinion here is that without additional facts regarding costs, having found the studies valid, and given *Montoy's* acceptance of threshold compliance at a FY2009 threshold BSAPP of $4433, our range of independent reaction to the evidence is substantially constrained and circumscribed by the noted lack of new facts and the affect of the *Montoy* precedent.

Finally, we find any remedy to be employed here is constrained by the legal setting presented, that is, any remedy or solution will largely rest in the hands of the Kansas legislature. As we noted, there is a presumption that public officials will follow the law as declared, hence, we are optimistic that good faith efforts will follow our decision. On the other hand, we believe that both the subject matter - constitutional funding of K-12 education - and the fleeting nature of the opportunity that constitutionally adequate schooling represents - requires

that a Court order be entered that can be quickly and resolutely enforced, if it would, unfortunately, become necessary.

While the case law we use to discern and describe our authority in terms of remedy may not appear equally analogous, given the sordid view and practice which that case law effectively abolished, we sincerely believe that the failure to adequately fund the kind of K-12 education that Article 6, § 6(b) of the Kansas Constitution requires is, similarly, a chain on opportunity, insidious by its likely lifetime affect, and so warranting of immediate attention before such K-12 schooling opportunities are lost or muted, that any constitutional deficiencies identified warrant sound and prompt response or, *in lieu*, enforcement measures that do not tolerate delay or leave room for obfuscation that the period from the last *Montoy* decision in 2006 to this date unfortunately represents. While one legislature may not bind another, a court order can.

In considering our remedies, we note the following, which we paraphrase, from *Brown v. Board of Education,* 349 U.S. 294, 300, 99 L.Ed. 1083 (1955) (*Brown II*):

> "In fashioning and effectuating the decrees, the courts will be guided by equitable

> principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in [obtaining the benefit of] public schools as soon as practicable on a [constitutional] basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth.... Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." [Paraphrasing by this Court.]

Further, we note a court's authority in matters of constitutional enforcement:

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944), cited in *Brown II, supra*, 349 U.S., at 300, 75 S.Ct., at 756."

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15, 28 L.Ed.2d 554 (1971).

> "Application of those 'equitable principles,' we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S., at 16, 91 S.Ct., at 1276. The remedy must therefore be related to 'the condition alleged to offend the Constitution....' *Milliken I*, 418 U.S., at 738, 94 S.Ct., at 3124. Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of [unconstitutional] conduct to the position they would have occupied in the absence of such conduct.' *Id.*, at 746, 94 S.Ct., at 3128. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." [Paraphrasing by this Court.]

Milliken v. Bradley, 433 U.S. 267, 280-281, 53 L.Ed.2d 745 (1977).

Keeping the above principles in mind and recognizing the principal authority of the Court in this particular setting is in the power of "no", which we hope need not be used, we have considered several factors, most of which we have noted previously. First, we would say that the School District and Quality Performance Act, K.S.A. 72-6405 *et seq.*, as it currently stands, has not been shown to, itself,

be unconstitutional *at this point and on this record*. All the problems raised by Plaintiffs in our view have not been shown to flow from the *Act*, but from a failure by the State to follow the *Act's* tenets and fully fund it as it directs. The unconstitutionality attendant here is due to underfunding, not the *Act* itself or, at least, not yet.

Equally, K.S.A. 72-8801 *et seq.*, but for the Legislature's amendment to K.S.A. 72-8814(c) to cement in place its decisions to not fund its equalization provisions, is, otherwise, sound and necessary. However, we feel we are left with no choice but to declare its unconstitutionality. Again the dilemma faced springs from underfunding.

Further, we consider here the fact we have two different basis from which we must view the funding shortfalls. First, the funding provided may fall below the precedent of *Montoy* and, second, the underfunding occasioned may lack facts to justify the reduced expenditures. All the underfunding noted flies in the face of overwhelming evidence that costs not only have not abated, but, rather, most probably, increased. Accordingly, here, we are faced with acting to enforce a precedent which determined an acceptable constitutional funding level for our K-12 system,

while, at the same time, we must acknowledge that the dollar denominated findings of *Montoy* have been made stale by the passage of time by way of the indisputable affect of inflation.

We find the former easier of enforcing than the latter since the former may be addressed by an injunction requiring the Legislature to simply abide by its duly adopted laws. The latter, however, requires the Legislature to act affirmatively beyond the current legal structure to amend, by example, K.S.A. 72-6410(b)(1) to prevent further unconstitutional erosion of funding to the school system occasioned by inflation, to resurrect an inflation adjustment mechanism for school finances such as existed under K.S.A. 72-64c04, now expired, so as to allow a then current value to future funding decisions, and, otherwise, to act to evaluate and compensate for any new costs that may accrue to the Kansas K-12 school system either from the *Waiver* or the "Common Core Standards", or both.

Enforcing affirmative conduct by the Legislature, we believe, must first yield to the presumption that public officials will follow the law as declared. Hence, we have put aside the consideration of present orders that might

collide with this presumption and rather choose to enter orders prospectively, contingently effective, or not at all at this juncture, knowing that either this Court or, if appealed, a higher court could act at that time to enforce, as necessary, its own judgments. Nevertheless, a judgment and order is required to be entered as merely an order to, simply, "do justice" is not an enforceable one.

Fundamentally, we believe that the best point at which to begin to effect a cure to the constitutional deficiencies we have found in the reductions in the BSAPP is to go back to the 2008 session when a constitutionally compliant legislature amended K.S.A. 72-6410(b)(1) to adjust the BSAPP for FY2010 and forward to $4492 and adopt that sum as a funding requirement for FY2014. All other remedies adopted spring from this point and, as the case law referenced noted, are equitable and can flexibly accommodate any change in circumstance on good cause shown.

ENTRY OF JUDGMENT AND ORDER

(1) The State of Kansas is hereby enjoined from performing the unconstitutional act of altering, amending, superceding, by-passing, diluting or otherwise changing,

directly or collaterally, any portion of the *School District Finance and Quality Performance Act*, K.S.A. 72-6405 *et seq.*, as it existed on July 1, 2012, if the effect of such action would be to abolish, lower, dilute, or delay the revenue that would be derived from the base student aid per pupil set forth by K.S.A. 72-6410(b)(1) of $4492. This order does not apply to the cost of living weighting created by K.S.A. 72-6449.

(2) The State of Kansas is hereby enjoined from performing the unconstitutional act of enacting any appropriation, or directing, modifying or canceling any transfer, or using any accounting mechanism or other practice that would, will, or may in due course, affect, effect, or fund less than the base student aid per pupil of $4492 set forth in K.S.A. 72-6410(b)(1) as it existed on July 1, 2012, or as subsequently inflation adjusted as set forth in paragraph one of this *Order* or, otherwise, to unconstitutionally act to modify, change or alter downward the revenue to be received by a school district that would be derived from a base student aid per pupil of $4492 as set forth in K.S.A. (2012) 72-6410(b)(1) or as such inflation adjusted sum to be derived as set forth in paragraph one of

this *Order* exists in the future.

(3) The State of Kansas is enjoined from the exercise of any claimed authority under K.S.A. (2012) 72-6410(b)(2) except in recognition of that authority authorized to the Governor and the Finance Council by K.S.A. 75-6704 upon its proper exercise.

(4) The State of Kansas is hereby enjoined from performing the unconstitutional act of amending, changing, altering, diluting, superceding or by-passing any of the provisions of K.S.A. 72-6434 as it existed on July 1, 2012, if the effect of the same would be to create a wealth based disparity in the distribution of funds or in the ability to use the local option budget by a school district. The State is hereby enjoined from the unconstitutional act of providing by appropriation, transfer, or otherwise less than full funding of such statutory formula or, subject to the foregoing, any alternative funding means, to any eligible school district for FY2014 and thereafter and are enjoined from the unconstitutional act of proration under section "(b)" of such statute or any like statute.

(5) It is hereby ordered that K.S.A. (2012) 72-8801 *et seq.* is hereby declared unconstitutional and of no force and

effect from and after July 1, 2013. This *Order* may be modified by the Court upon a showing that such statute has been amended to read as it existed on July 1, 2007, and that such transfers thereby authorized are fully funded or that an alternative means of funding capital outlay expenses has been adopted providing revenues for such purposes to school districts and which does not effect a wealth based disparity, is fully funded, and does not, otherwise, erode or encroach on revenues that would be delivered from the base student aid per pupil levels as set forth in paragraph one and two of this *Order*.

(6) It is the order of this Court that Plaintiffs or any one of them, their attorneys acting on their behalf, or such other counsel as this Court may designate is hereby directed and empowered to enforce this *Entry of Judgment and Order* with all deliberate speed before this Court, or any other court of appropriate jurisdiction, should any violation of this Order reasonably appear or be reasonably apprehended. Such Plaintiffs, attorneys acting on their behalf, or such other counsel as this Court may designate shall not join as a party any official, either in his or her official capacity or individually, without a showing first

to the court that the effective enforcement of this *Entry of Judgment and Order*, most probably, requires such joinder or joinders.

Costs are taxed to the State of Kansas. The Plaintiffs' request for attorney fees is denied.

This entry of judgment shall be effective when filed with the Clerk of this Court and no further journal entry is required.

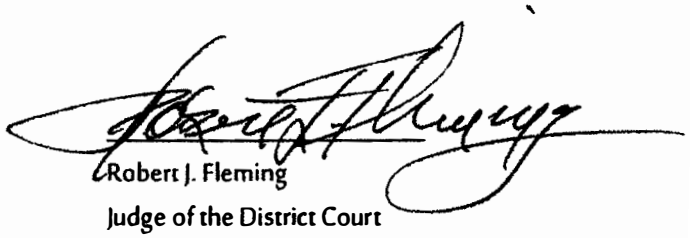
IT IS SO ORDERED, this 10th day of January, 2013.

Franklin R. Theis
Judge of the District Court,
Panel Member and Presiding Judge

(see attached)
Robert J. Fleming
Judge of the District Court
and Panel Member

(see attached)
Jack L. Burr
District Court Judge Retired
and Panel Member

cc: Alan Rupe
Jessica Skladzien
John S. Robb
Arthur Chalmers



Robert J. Fleming
Judge of the District Court
and Panel Member

Jack L. Burr
District Court Judge Retired
and Panel Member

ADDENDUM

A1 . . . . . USD 308 HUTCHINSON

A2 . . . . . USD 443 DODGE CITY

A3 . . . . . USD 500 KANSAS CITY

A4 . . . . . USD 229 BLUE VALLEY

A5 . . . . . USD 372 SILVER LAKE

USD 308 - HUTCHINSON

	FY2005 IN 2005$	FY2005 in 2012$	FY2009 in 2009$	FY2009 in 2012$	FY2012	FY2013
1. Enrollment 2/20/12	4781.0	4781.0	4781.0	4781.0	4781.0	4781.0
2. + At risk 4 year olds	28.0	28.0	28.0	28.0	28.0	28.0
3. Low enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
4. + High enrollment weighting	304.0	304.0	168.5	168.5	168.5	168.5
5. + Bilingual weighting	30.9	30.9	61.0	61.0	61.0	61.0
6. + Vocational weighting	115.7	115.7	115.7	115.7	115.7	115.7
7. + At risk weighting	279.6	279.6	1275.0	1275.0	1275.0	1275.0
8. + High Density at risk weighting	n.a.	n.a.	279.6	279.6	279.6	279.6
9. + Non-proficient student weighting	n.a.	n.a.	11.2	11.2	11.2	11.2
10. + New facilities	146.3	146.3	146.3	146.3	146.3	146.3
11. + Transportation weighting	9.3	9.3	9.3	9.3	9.3	9.3
12. + Virtual student weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
13. + Anciliary weighting	-0-	-0-	-0-	-0-	-0-	-0-
14. + Special Education weighting (d)	1025.6	1025.6	900.5	900.5	1048.1	1032.3
15. + Declining enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
16. + KAMS weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
17. + Cost of living weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
18. = Total Weighted Enrollment	6720.4	6720.4	7776.1	7776.1	7923.7	7907.9
19. x Base State aid per pupil	$3863	$4575	$4400	$4744	$3780	$3838
20. = Legal General Fund	$25,960,905	$30,745,830	$34,214,840	$36,889,818	$29,951,586	$30,350,520
21. Per pupil value (20 + 1)	$5430	$6431	$7156	$7716	$6265	$6348

USD NO. 443 - DODGE CITY

	FY2005 IN 2005$	FY2005 in 2012$	FY2009 in 2009$	FY2009 in 2012$	FY2012	FY2013
1. Enrollment 2/20/12	5994.0	5994.0	5994.0	5994.0	5994.0	5994.0
2. + At risk 4 year olds	74.5	74.5	74.5	74.5	74.5	74.5
3. Low enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
4. + High enrollment weighting	383.6	383.6	212.6	212.6	212.6	212.6
5. + Bilingual weighting	386.6	386.6	763.6	763.6	763.6	763.6
6. + Vocational weighting	121.1	121.1	121.1	121.1	121.1	121.1
7. + At risk weighting	441.8	441.8	2014.6	2014.6	2014.6	2914.6
8. + High Density at risk weighting	n.a.	n.a.	441.8	441.8	441.8	441.8
9. + Non-proficient student weighting	n.a.	n.a.	11.8	11.8	11.8	11.8
10. + New facilities	-0-	-0-	-0-	-0-	-0-	-0-
11. + Transportation weighting	415.0	415.0	415.0	415.0	415.0	415.0
12. + Virtual student weighting	n.a.	n.a.	4.0	4.0	4.0.	4.0
13. + Anciliary weighting	-0-	-0-	-0-	-0-	-0-	-0-
14. + Special Education weighting (d)	1293.1	1293.1	1135.3	1135.3	1321.5	1301.5
15. + Declining enrollment weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
16. + KAMS weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
17. + Cost of living weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
18. = Total Weighted Enrollment	9109.7	9109.7	11188.3	11188.3	11374.5	11354.5
19. x Base State aid per pupil	$3863	$4575	$4400	$4744	$3780	$3838
20. = Legal General Fund	$35,190,771	$41,676,878	$49,228,520	$53,077,295	$42,995,610	$43,578,571
21. Per pupil value of General Fund (20 ÷ 1)	$5871	$6953	$8213	$8855	$7173	$7270

USD 500 - KANSAS CITY

	FY2005 in 2005$	FY2005 in 2012$	FY2009 in 2009$	FY2009 in 2012$	FY2012	FY2013
1. Enrollment 2/20/12	18591.9	18591.9	18591.9	18591.9	18591.9	18591.9
2. + At risk 4 year olds	285.0	285.0	285.0	285.0	285.0	285.0
3. Low enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
4. + High enrollment weighting	1193.2	1193.2	661.4	661.4	661.4	661.4
5. + Bilingual weighting	722.4	722.4	1426.4	1426.4	1426.4	1426.4
6. + Vocational weighting	346.9	346.9	346.9	346.9	346.9	346.9
7. + At risk weighting	1637.6	1637.6	7467.5	7467.5	7467.5	7467.5
8. + High Density at risk weighting	n.a.	n.a.	1637.6	1637.6	1637.6	1637.6
9. + Non-proficient student weighting	n.a.	n.a.	36.7	36.7	36.7	36.7
10. + New facilities	87.3	87.3	87.3	87.3	87.3	87.3
11. + Transportation weighting	616.0	616.0	616.0	616.0	616.0	616.0
12. + Virtual student weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
13. + Anciliary weighting	-0-	-0-	-0-	-0-	-0-	-0-
14. + Special Education weighting (d)	4120.9	4120.9	3617.9	3617.9	4211.4	4147.7
15. + Declining enrollment weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
16. + KAMS weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
17. + Cost of living weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
18. = Total Weighted Enrollment	27,601.2	27,601.2	34,774.6	34,774.6	35,368.1	35,304.4
19. x Base State aid per pupil	$3863	$4575	$4400	$4744	$3780	$3838
20. = Legal General Fund	$106,523,436	$126,275,490	$153,008,240	$164,970,702	$133,691,418	$135,498,287
21. Per pupil value (20 + 1)	$5735	$6792	$8230	$8873	$7191	$7288

USD NO. 229 BLUE VALLEY						
	FY2005 in 2005$	FY2005 in 2012$	FY2009 in 2009$	FY2009 in 2012$	FY2012	FY2013
1. Enrollment 2/20/12	20,898.6	20,898.6	20,898.6	20,898.6	20,898.6	20,898.6
2. + At risk 4 year olds	-0-	-0-	-0-	-0-	-0-	-0-
3. Low enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
4. + High enrollment weighting	1321.0	1321.0	732.3	732.3	732.3	732.3
5. + Bilingual weighting	14.7	14.7	29.0	29.0	29.0	29.0
6. + Vocational weighting	320.5	320.5	320.5	320.5	320.5	320.5
7. + At risk weighting	114.0	114.0	519.8	519.8	519.8	519.8
8. + High Density at risk weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
9. + Non-proficient student weighting	n.a.	n.a.	33.9	33.9	33.9	33.9
10. + New facilities	416.0	416.0	416.0	416.0	416.0	416.0
11. + Transportation weighting	708.0	708.0	708.0	708.0	708.0	708.0
12. + Virtual student weighting	n.a.	n.a.	.5	.5	.5	.5
13. + Anciliary weighting	3952.3	3952.3	3952.3	3952.3	3952.3	3952.3
14. + Special Education weighting (d)	4934.1	4934.1	4331.9	4331.9	5042.5	4966.3
15. + Declining enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
16. + KAMS weighting	n.a.	n.a.	1.0	1.0	1.0	1.0
17. + Cost of living weighting	n.a.	n.a.	1628.1	1628.1	1628.1	1628.1
18. = Total Weighted Enrollment	32,679.2	32,679.2	33,571.9	33,571.9	34,282.5	34,206.3
19. x Base State aid per pupil	$3863	$4575	$4400	$4744	$3780	$3838
20. = Legal General Fund	$126,239,750	$149,507,340	$147,716,360	$159,265,094	$129,587,850	$131,283,779
21. Per pupil value of General Fund (20 ÷ 1)	$6041	$7154	$7068	$7621	$6201	$6282

USD 372 SILVER LAKE

	FY2005 in 2005$	FY2005 in 2012$	FY2009 in 2009$	FY2009 in 2012$	FY2012	FY2013
1. Enrollment 9/20/11	713.1	713.1	713.1	713.1	713.1	713.1
2. + At risk 4 year olds	6.0	6.0	6.0	6.0	6.0	6.0
3. Low enrollment weighting	245.8	245.8	245.8	245.8	245.8	245.8
4. + High enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
5. + Bilingual weighting	-0-	-0-	-0-	-0-	-0-	-0-
6. + Vocational weighting	10.8	10.8	10.8	10.8	10.8	10.8
7. + At risk weighting	10.0	10.0	45.6	45.6	45.6	45.6
8. + High Density at risk weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
9. + Non-proficient student weighting	n.a.	n.a.	1.0	1.0	1.0	1.0
10. + New facilities	-0-	-0-	-0-	-0-	-0-	-0-
11. + Transportation weighting	53.2	53.2	53.2	53.2	53.2	53.2
12. + Virtual student weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
13. + Anciliary weighting	-0-	-0-	-0-	-0-	-0-	-0-
14. + Special Education weighting (d)	155.5	155.5	136.5	136.5	158.9	156.5
15. + Declining enrollment weighting	-0-	-0-	-0-	-0-	-0-	-0-
16. + KAMS weighting	n.a.	n.a.	1.0	1.0	1.0	1.0
17. + Cost of living weighting	n.a.	n.a.	-0-	-0-	-0-	-0-
18. = Total Weighted Enrollment	1194.4	1194.4	1213	1213	1235.4	1233
19. x Base State aid per pupil	$3863	$4575	$4400	$4744	$3780	$3838
20. = Legal General Fund	$4,613,967	$5,464,380	$5,337,200	$5,754,472	$4,669,812	$4,732,254
21. Per pupil value (20 ÷ 1)	$6470	$7663	$7485	$8070	$6549	$6636