

NO. 13-109335-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

**LUKE GANNON,
by his next friends and guardians, *et al.*,**

Plaintiffs/Appellees/Cross-Appellants,

vs.

STATE OF KANSAS,

Defendant/Appellant/Cross-Appellee.

BRIEF OF CROSS-APPELLANT

Appeal from the District Court of Shawnee County, Kansas,
Honorable Judges Franklin R. Theis, Robert J. Fleming, and Jack L. Burr,
Case No. 10-c-1569

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NATURE OF THE CASE

This is a “school finance” lawsuit in which a “statute of this state has been held unconstitutional as a violation of Article 6 of the Kansas constitution pursuant to K.S.A. 2009 Supp. 72-64b03, and amendments thereto.” K.S.A. 60-2102(b)(1). As such, “[t]he appellate jurisdiction of the supreme court may be invoked by appeal as a matter of right.” *Id.*

Plaintiffs filed this lawsuit seeking declaratory and injunctive relief under eight separate counts, the following of which are pertinent to this appeal: (1) the State violated Article 6 of the Kansas Constitution; (2) the State failed to make capital outlay state aid equalization payments pursuant to K.S.A. 72-8814; (3) the State violated Plaintiffs’ substantive due process rights pursuant to Section 18 of the Bill of Rights of the Kansas Constitution; and (4) the State denied Plaintiffs’ equal protection of the laws guaranteed by Section 1-2 of the Bill of Rights of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution.

A three-judge panel, consisting of Honorable Franklin R. Theis, Honorable Robert J. Fleming, and Honorable Jack L. Burr (the “Panel”) issued a decision following a 16-day bench trial. R.Vol.14, pp.1720-1978 (Memorandum Opinion and Entry of Judgment (the “*Gannon* Decision”). The Panel found for Plaintiffs on two of eight counts alleged; it found “Plaintiffs have established beyond any question that the State’s K-12 educational system now stands as unconstitutionally funded,” that K.S.A. 72-8814 created an improper wealth disparity among school districts, and that the lack of capital outlay state aid equalization payments further contributed to the unconstitutional underfunding. R.Vol.14, pp.1947-48 (*Gannon* Decision, 228-29); R.Vol.14, pp.1952-53

(*Gannon* Decision, 233-34 (sustaining Plaintiffs’ Count Two alleging the unconstitutionality of K.S.A. 72-8814 and granting Plaintiffs equitable relief)). As relief, the Panel enjoined the State from: (1) taking any action that would result in funding less than the revenue that would be derived from a base state aid per pupil (or “BSAPP”) of \$4,492; (2) prorating the amount of supplemental general state aid provided to school districts pursuant to K.S.A. 72-6434 or otherwise funding supplemental general state aid less than what is provided for by statute; and (3) enforcing the current capital outlay funding statutes beyond July 1, 2013. R.Vol.14, pp.1964-68 (*Gannon* Decision, 245-49). The Panel also taxed costs to the State and denied Plaintiffs’ request for attorneys’ fees. *Id.* This appeal followed.

STATEMENT OF THE ISSUES

- (1) Whether this Court should retain jurisdiction of this case until the State wholly complies with its constitutional obligations.
- (2) Whether increasing the base state aid per pupil to \$4,492, consistent with the *Gannon* Decision, will result in the State’s compliance with Article 6 of the Kansas Constitution, even though the funding is not based on the actual costs of providing Kansas students with an education, or if additional funding is necessary.
- (3) Whether the right to an education is a “fundamental right” pursuant to the Kansas Constitution, the denial of which would support a finding that the State has denied Plaintiffs a substantive due process right in violation of Section 18 of the Bill of Rights of the Kansas Constitution and would support a finding that the State has denied Plaintiffs equal protection of the laws guaranteed by Section 1-2 of the Bill of Rights of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution.
- (4) Whether the State denied certain Plaintiffs equal protection of the laws guaranteed by Section 1-2 of the Bill of Rights of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution.
- (5) Whether the State has denied Plaintiffs a substantive due process right in violation of Section 18 of the Bill of Rights of the Kansas Constitution.

- (6) Whether the State should be required to make capital outlay state aid equalization payments pursuant to K.S.A. 72-8814.
- (7) Whether Plaintiffs are entitled to attorneys' fees.

STATEMENT OF THE FACTS

A. Identification of the Parties

Plaintiffs consist of students, parents of students, and school districts that represent all Kansas school children and school districts. R.Vol.20, p.283 (Lane Tr.Test. 283:3-9); R.Vol.22, p.922 (Stewart Tr.Test. 922:22-25); R.Vol.35, p.77 (Tr.Ex.1, 000153 (excerpt from *Caldwell v. State of Kansas*, Case No. 50616 (1972) (referring to plaintiffs “as representatives of a class composed of all public school pupils in Kansas”))).

Plaintiff Unified School District No. 259 (“U.S.D. 259” or “Wichita”) is a school district formed pursuant to state law located in Wichita, Kansas. R.Vol.79, p.5394 (Tr.Ex.238, ¶¶33, 37). It is the largest school district in Kansas, with just under 50,000 students. R.Vol.30, p.2495 (Allison Tr.Test. 2495:4-9). It is the largest district between St. Louis and Denver, Dallas and the Canadian border. *Id.* Wichita educates about 10 percent of the students in the State. *Id.*

Plaintiff Unified School District No. 308 (“U.S.D. 308” or “Hutchinson”) is a school district formed pursuant to state law located in Hutchinson, Kansas. R.Vol.79, p.5394 (Tr.Ex.238, ¶¶34, 37). Hutchinson faces “increasing issues with poverty, with increasing diversity, [and] with an increasing number of ESL students.” R.Vol.32, p.3133 (Kiblinger Tr.Test. 3133:16-24); R.Vol.54, p.2197 (Tr.Ex.117, 000096). ESL students are students who speak a language other than English in the home and that may not be able to speak, listen, read, and/or write in English. *See* R. Vol. 19, p.91 (Lane Tr. Test. 91:3-13 (defining the term “ELL” or “English language learners”)); R. Vol. 21,

p.670 (Sorenson Tr. Test. 670:15-23 (explaining that ELL students and ESL students are the same)).

Plaintiff Unified School District No. 443 (“U.S.D. 443” or “Dodge City”) is a school district formed pursuant to state law located in Dodge City, Kansas. R.Vol.79, p.5394 (Tr.Ex.238, ¶¶35, 37). Dodge City is a largely Hispanic school district; it is approximately 80% Hispanic and 56% ELL (or ESL). R.Vol.26, pp.1823-25 (Cunningham Tr.Test. 1823:25-1825:14); R.Vol.26, pp.1745-46 (Ortiz-Smith Tr.Test. 1745:14-1746:14); R. Vol. 21, p.670 (Sorenson Tr. Test. 670:15-23 (explaining ELL and ESL students are the same)). While more than half of Dodge City’s students are ELL, only 9.8% of the students in the State are. R.Vol.53, pp.2066-2184 (Tr.Ex.115). The State’s population of migrant students comprises 1.4% of the total population; in Dodge City, 14.4% of the population consists of migrant students. *Id.*

Plaintiff Unified School District No. 500 (“U.S.D. 500” or “Kansas City”) is a school district formed pursuant to state law located in Kansas City, Kansas. R.Vol.79, p.5394 (Tr.Ex.238, ¶¶36-37). Kansas City’s demographics are almost a mirror opposite of the rest of the State’s demographics with a 41% Hispanic, 38% African-American, and 13% White student population for the 2011-12 school year. R.Vol.19, pp.88-89 (Lane Tr.Test. 88:21-89:12); *compare* R.Vol.49, p.1577 (Tr.Ex.101, 000653) *with* R.Vol.52, p.1920 (Tr.Ex.110, 000134); *see also* R.Vol.101, p.7630 (Tr.Ex.389). The change in demographics in Kansas City is representative of “a change in the global society.” R.Vol.19, p.89 (Lane. Tr.Test. 89:6-12).

Plaintiffs Luke and Grace Gannon, by next friends and guardians, Jeff and Meredith Gannon; Jada and Jett Burgess, by 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; and Alexis and Brady Seeber, by next friends and guardians, David and Misty Seeber; are students at U.S.D. 259 and are citizens and residents of Kansas. R.Vol.79, pp.5391-92 (Tr.Ex.238, ¶¶1-9).

Plaintiffs 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, Daniel 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; and Quantez Walker, by next friend and guardian, Beulah Walker are students at U.S.D. 308 and are citizens and residents of Kansas. R.Vol.79, pp.5392-93 (Tr.Ex.238, ¶¶10-17).

Plaintiffs Marixsa Alvarez, by next friend and guardian, Bianca Alvarez; Priscilla and Valeria Del Real, by next friend and guardian, Norma Del Real; Tonatiuh Figueroa, by next friend and guardian, Adriana Figueroa; Dulce, Gisella, and Karol Herrera, by next friend and guardian, Eva Herrera; Miquela Shotgun, by next friend and guardian, Rebecca Fralick; and Alexi Treto, by next friend and guardian, Consuelo Treto are students at U.S.D. 443 and are citizens and residents of Kansas. R.Vol.79, p.5393 (Tr.Ex.238, ¶¶18-26).

Plaintiffs Ted Bynum, by next friend and guardian, Melissa Bynum; Brianna 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; and Natalie Walton, by next friend and guardian, Clara Osborne are students at U.S.D. 500 and are citizens and residents of Kansas. R.Vol.79, pp.5393-94 (Tr.Ex.238, ¶¶27-31).

B. The History of Educational Funding in Kansas

This is not the first effort by school districts and students to compel the State to provide adequate funding for education in Kansas. This is the lawsuit in a long, often complicated, and always controversial campaign to adequately fund public schools. The effort began in 1966 with the adoption of the current provisions in the Kansas Constitution. And, as the *Gannon* Panel noted, “the present case can[not] be well explained without reference to the past.” R.Vol.14, p.1726 (*Gannon* Decision, 7).

The adoption of Article 6 of the Kansas Constitution in 1966 occurred as follows:

The present text of Article 6, the education article, dates from amendments made in 1966. House Concurrent Resolution No. 537 stated the intent of the legislature in seeking amendment of the education article: [t]hat the Kansas legislative council is hereby directed to make a study of the scope, function, and organization of the state in supervising education to comply with the constitutional requirement of a uniform system of public schools[.]

The committee assigned to review and recommend changes to the education article stated that by including an article on education in the original Kansas Constitution “the people secure[d] themselves what is of first importance by placing binding responsibilities on the legislative, executive, and judiciary departments.” The committee further noted, “[t]he constitution of 1861 placed a responsibility on the legislature to establish a uniform system of schools,” and that “*equality of educational opportunity is a goal which has been generally accepted.*” (Emphasis added).

After several floor amendments, the current Education Article was finally adopted, submitted to a popular vote, and ratified by the people, all in 1966. A careful examination of the current text of the article reveals four, essential, clear, and unambiguous mandates from the people (the source of all power in our democratic form of government):

Section 1. Schools and related institutions and activities. The *legislature* shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools . . . which may be organized and changed in such manner as may be provided by law. (Emphasis added).

Section 2. State board of education and state board of regents. (a) The *legislature* shall provide for a state board of education which shall have general supervision of public schools . . . all the educational interests *of the state*, except educational functions delegated by law to the state board of regents. (Emphasis added).

Section 5. Local public schools. Local public schools under the *general supervision* of the state board of education shall be maintained, developed and operated by locally elected boards. When authorized by law, such boards may make and carry out agreements for cooperative operation and administration of educational programs under the *general supervision* of the state board of education, but such agreements shall be subject to limitation, change or termination by the legislature. (Emphasis added).

Section 6. Finance. (b) The legislature shall make suitable provision for finance of the educational interests of the state. *No* tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law. (Emphasis added).

R.Vol.35, p.84 (Tr.Ex.1, 000166 (excerpts from *Mock v. Kansas*, No. 91-CV-1009, slip op. at 491 (Kan. Dist. Ct. Shawnee Co., Oct. 14, 1991) (citing Education Amendments to the Kansas Constitution) (internal citations omitted))).

Challenges to the school finance legislation began almost immediately after the adoption of the education amendments:

At the time of the ratification of Article 6, school finance was controlled by the State School Foundation Fund Act. L.1965, ch. 402. This Act was the most comprehensive school finance legislation to that point in Kansas history

The School Foundation Fund Act and related school finance statutes were determined to be unconstitutional by the District Court of Johnson County in *Caldwell v. State*, case No. 50616 (Johnson County District Court, slip op. August 30, 1972). The court found that the law failed to provide equalization aid sufficient to offset the disparity in either tax effort or per pupil operating

expenditures, “thereby making the educational system of the child essentially the function of, and dependent on, the wealth of the district in which the child resides.”

Responding to this decision, the legislature enacted the School District Equalization Act (SDEA) in 1973. . . .

. . . In 1975, the constitutionality of the SDEA was challenged by numerous parties, including 41 unified school districts. The District Court of Chautauqua County found the Act unconstitutional. The legislature amended the Act, but the court did not hear further evidence and dismissed the case. On appeal, the Supreme Court reversed and remanded for further proceedings. *Knowles v. State Board of Education*, 219 Kan. 271, 547 P.2d 699 (1976). On remand, the case was transferred to the District Court of Shawnee County and the judge presiding over this division, the Honorable E. Newton Vickers, ruled the SDEA was constitutional. *Knowles v. State Board of Education*, 77CV251 (Shawnee County District Court, slip op. January 26, 1981).

The SDEA became the subject of litigation again in 1990 as several school districts and individuals, including several of the plaintiffs in this action, challenged the constitutionality of the statutes. On October 14, 1991, the Honorable Terry L. Bullock issued an opinion answering 10 questions which formed governing rules of law applicable to the challenges. *Mock v. State of Kansas*, 91CV1009 (Shawnee County District Court, slip op. October 14, 1991). The decision prompted the Governor and legislative leadership to appoint a task force to investigate legislative alternatives which would satisfy the guidelines in the decision. This task force issued a report recommending a new formula granting each district the same base state aid per pupil (BSAPP) and then allowing for certain adjustments for student needs and district size. Report of the Governor’s Task Force on Public School Financing (November 2, 1991).

In 1992, the legislature repealed the SDEA and enacted the School District Finance and Quality Performance Act. L. 1992, ch. 280.

R.Vol.35, p.91 (Tr.Ex.1, 000180 (excerpts from *Unified School District Number 229 v. State*, 256 Kan. 232, at 241-44 (1994) (“U.S.D. 229”))).

C. The Adoption of the Current Kansas School Finance System and Continuing Efforts to Force the State to Comply with Its Constitutional Obligations

The School District Finance and Quality Performance Act (“SDFQPA”), which comprises the current “school finance system,” was originally adopted in 1992 in response to the *Mock* litigation. R.Vol.35, p.91 (Tr.Ex.1, 000180 (excerpts from *U.S.D.*

229, 256 Kan. at 241-244)). The new legislation was challenged on a variety of grounds in *U.S.D. 229*, and the merits of a school finance case were reached by the Kansas Supreme Court for the first time. There, this Court upheld the SDFQPA as constitutional. R.Vol.35, p.100 (Tr.Ex.1, 000198 (excerpts from *U.S.D. 229, 256 Kan. at 275*)). The decision set the stage for the *Montoy* cases. *Id.*

The *Montoy* plaintiffs sued the State of Kansas, the Governor, members of the Kansas State Board of Education (“KSBE”), and the Commissioner of the Kansas State Department of Education alleging (1) a violation of Article 6 of the Kansas Constitution; (2) an equal rights violation under the Kansas Constitution; and (3) a substantive due process violation under the Kansas Constitution. R.Vol.35, p.101 (Tr.Ex.1, 000200 (excerpts from *Montoy v. State*, 275 Kan. 145, 146 (2003) (*Montoy I*))). In 2001, the district court dismissed the challenge just prior to trial, incorrectly finding that it was bound by *U.S.D. 229* and that the legislature had the ultimate responsibility for determining what is suitable financing. R.Vol.35, p.102 (Tr.Ex.1, 000202-03 (excerpts from *Montoy I*, 275 Kan. at 152-53)).

On appeal to the Kansas Supreme Court, Plaintiffs successfully argued the district court erred in dismissing their claims. In what ultimately became the first in a series of decisions in the *Montoy* cases, this Court reversed and remanded the district court’s decision. R.Vol.35, p.103 (Tr.Ex.1, 000204 (excerpts from *Montoy I*, 275 Kan. at 156)). Pivotal in that decision was the Court’s finding that “the issue of suitability is not stagnant.” R.Vol.35, p.102 (Tr.Ex.1, 000203 (excerpts from *Montoy I*, 275 Kan. at 153)).

On remand, following a bench trial, the district court held that the SDFQPA stood “in blatant violation of Article VI of the Kansas Constitution.” *Montoy v. State*, No. 99-

1738, 2003 WL 22902963, at *42 (Kan. Dist. Ct. Dec. 2, 2003). The State appealed that decision to the Kansas Supreme Court, and in *Montoy v. State*, 278 Kan. 769 (2005) (Montoy II), the Supreme Court held that the public school financing formula adopted by the Legislature had “failed to meet its [Article 6] burden.” R.Vol.35, p.104 (Tr.Ex.1, 000206 (excerpts from *Montoy II*, 278 Kan. at 771)). In that decision, the Court mandated increased funding for Kansas schools; found that the then-current financing formula increased disparities in funding; and determined the formula was not based on any cost analysis but was instead based on “political and other factors not relevant to education.” R.Vol.35, pp.104-05 (Tr.Ex.1, 000207-08 (excerpts from *Montoy II*, 278 Kan. at 775)). The Court withheld its formal opinion pending corrective action by the Legislature, stating “[w]e 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.” R.Vol.35, p.105 (Tr.Ex.1, 000208 (excerpts from *Montoy II*, 278 Kan. at 776)).

In response to *Montoy II*, the Legislature enacted House Bill 2247, and on June 3, 2005, the Supreme Court issued its Opinion (supplemental to *Montoy II*) regarding the constitutionality of that bill. R.Vol.35, p.110 (Tr.Ex.000218 (excerpts from *Montoy v. State*, 279 Kan. 817, 819 (2005) (Montoy IV))). The Court held the funding scheme was not in compliance with the *Montoy II* decision because it did not appropriately consider (1) actual costs of providing adequate education and (2) the equity of the distribution of that funding. R.Vol.35, p.110 (Tr.Ex.1, at 00218 (excerpts from *Montoy IV*, 279 Kan. at 818)). Thus, the Court ordered the Legislature to implement a minimum increase of \$285

million above the 2004-05 school year funding level for the 2005-06 school year. R.Vol.35, p.116 (Tr.Ex.1, at 00230 (excerpts from *Montoy IV*, 279 Kan. at 845)).

As a result, the Legislature again enacted changes to the school finance formula through Senate Bill 549 (“S.B. 549”), which effectively ended the litigation and, had the State made good on its promises, would have provided \$755.6 million in additional funding to schools. R.Vol.35, p.119 (Tr.Ex.1, 000237, 240 (excerpts from *Montoy v. State*, 282 Kan. 9, 18, 24 (2006) (Montoy V))). This Court found that the legislative process was in substantial compliance with its previous orders. R.Vol.35, p.121 (Tr.Ex.1, 000240 (excerpts from *Montoy V*, 282 Kan. at 24)). The Court dismissed the case without considering the constitutionality of S.B. 549 and specifically indicated its dismissal of the case was not to be interpreted as a determination that S.B. 549 was constitutional. R.Vol.35, p.119 (Tr.Ex.1, 000237 (excerpts from *Montoy V*, 282 Kan. at 18-19 (“The constitutionality of S.B. 549 is not before this court. It is new legislation and, if challenged, its constitutionality must be litigated in a new action filed in the district court.”)))).

The Supreme Court’s decision to dismiss the case was based on the assumption that the Legislature (1) had made genuine efforts to consider the costs of achieving adequate student outcomes across varied populations and settings in Kansas and (2) had gone to sufficient lengths to redesign the state school finance formula in ways that linked the funding to those costs. R.Vol.35, p.120 (Tr.Ex.1, 000239 (excerpts from *Montoy V*, 282 Kan. at 23 (“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.”)). Unfortunately, the State did not comply with the commitments it made to this Court in *Montoy*. R.Vol.14, p.1835 (*Gannon* Decision, 116 (“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.”)); R.Vol.14, p.1836 (*Gannon* Decision, 117 (“In FY2009, the BSAPP was at \$4400, which, due to a cut, was \$33 below the commitment represented to the *Montoy* Court.”)).

As a result of the *Montoy* cases, S.B. 549, the basis for the current school funding formula, was signed by the Governor on May 19, 2006. It “materially and fundamentally changed the way K-12 is funded [in Kansas].” R.Vol.35, p.119 (Tr.Ex.1, 000236-37 (excerpts from *Montoy V*, 282 Kan. 9)). This Court described the changes as follows:

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 (citing *Montoy II*, 278 Kan. at 774). S.B. 549, however, now provides that school districts are required to use LOB state aid moneys to fund basic educational expenses

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. 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.

Id.

D. Explanation of Current Funding Scheme

Here is how the foundation system currently works:

- a) Kansas school districts receive funds from the State in the form of General State Aid. The General State Aid that a school district receives comes in two parts -- State Financial Aid and Local Effort funds.
- b) The State Financial Aid component of a Kansas school district's General State Aid is calculated by multiplying the BSAPP by the school district's Adjusted Enrollment.
- c) BSAPP is set by Kansas Legislature and is subject to change by the Kansas Legislature and the Kansas State Board of Education.
- d) When calculating Adjusted Enrollment, school districts must first determine the number of Full-Time Equivalent ("FTE") students that are enrolled in their districts as of September 20th of that year.
- e) Once a school district knows the number of FTE students that have enrolled in its district, the school district must then apply a series of Enrollment Adjustments to determine its Adjusted Enrollment for the year. These adjustments are referred to as Enrollment Weightings.
- f) Kansas school districts must apply the following applicable Weightings to calculate Adjusted Enrollment:
 1. The Low Enrollment Weighting applies to school districts with a FTE enrollment under a certain level. The High Enrollment Weighting applies to all remaining school districts.

2. The Transportation Weighting compensates school districts that provide transportation to students residing more than 2.5 miles from the schools they attend.
 3. The Vocational Education Weighting compensates for the provision of vocational education; these funds must be used for vocational education.
 4. The Bilingual Education Weighting compensates for the provision of bilingual education; these funds must be used for bilingual education.
 5. The At-Risk Pupil Weighting is divided into three categories and are based upon the number of students qualifying for free meals under the National School Lunch Program (“NSLP”); these funds must be used for at-risk pupil programs, bilingual programs, vocational programs or pre-school at-risk programs.
 - i. The High Density At-Risk Weighting applies when at least half of a school district’s enrolled students receive free meals under the NSLP. It may also apply when less than half of students receive free meals if the district has an average of 212.1 or more students per square mile and more than 35% of students receive free meals under the NSLP.
 - ii. The Medium Density At-Risk Weighting applies when at least 40% but less than 50% of enrolled students receive free meals under the NSLP and the school district does not otherwise qualify for the High Density At-Risk Weighting.
 - iii. The Non-Proficient At-Risk Weighting applies to enrolled students whose state assessment scores in reading and mathematics are below proficient but only if the student is not eligible for free meals under the NSLP.
 6. The School Facilities Weighting compensates school districts for the costs associated with opening new school facilities. This weighting provides additional funds for two years but to qualify a school district must have used at least 25% of its State Financial Aid for the school year in which it receives the additional aid.
- g) The second component of a school district’s General State Aid is composed of Local Effort funds.
- h) If a school district’s Local Effort funds equal its State Financial Aid entitlements, the school district will not receive any General State Aid. If a school district’s Local Effort funds exceed its State Financial Aid entitlements, the excess funds are remitted to the State and are distributed to other school districts in the form of General State Aid.

- i) For those school districts entitled to General State Aid, the amount is calculated by subtracting the school district's Local Effort funds from its State Financial Aid entitlements.
- j) In addition to receiving State Financial Aid, Kansas school districts also have the authority to raise additional funds through the local option budget ("LOB") and may qualify for Supplemental General State Aid. Kansas school districts have the authority to raise LOB funds in any amount up to 31% of their State Financial Aid.

R.Vol.35, pp.8-26 (Tr.Ex.1, at 000015-52).

E. Events Between *Montoy* and *Gannon*

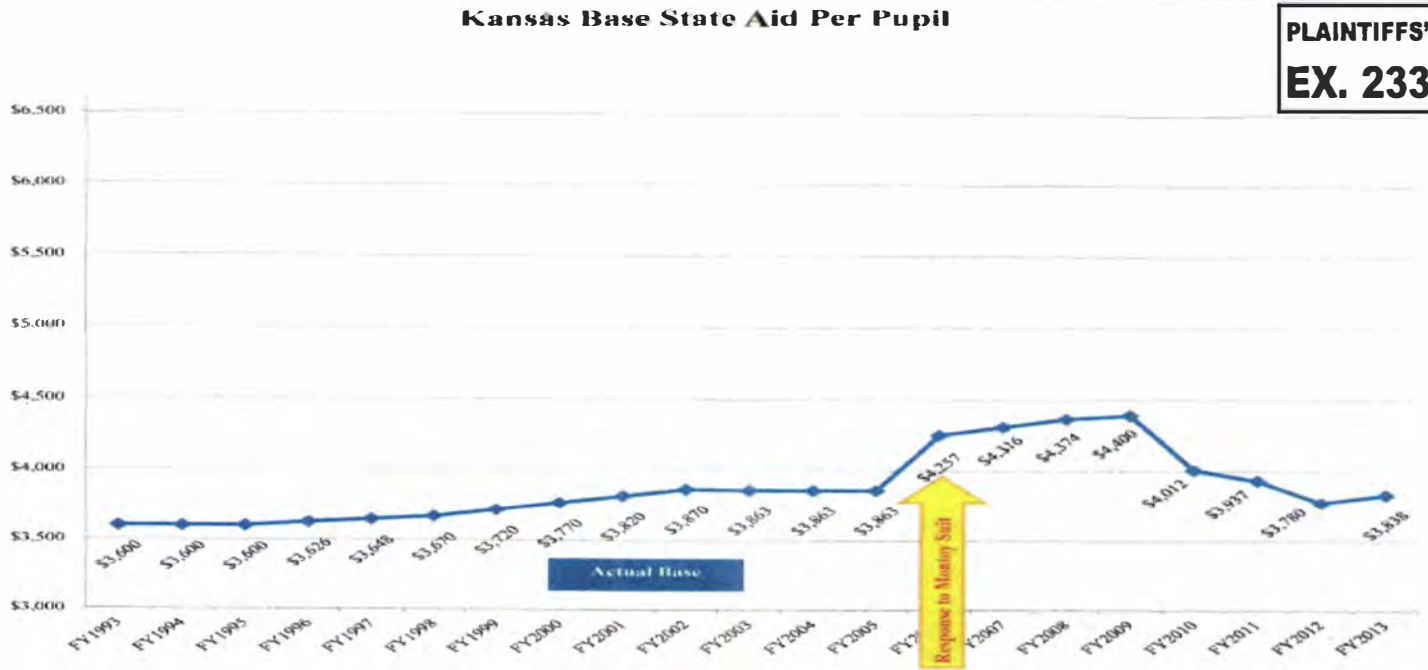
Following the adoption of S.B. 549, the *Montoy* case was dismissed. But, the battle regarding the proper funding of education in Kansas was not over. As the *Gannon* Panel noted, "[t]his case finds its genesis in the dismissal of *Montoy v. State . . .*" R.Vol.14, p.1726 (*Gannon* Decision, 7). The Legislature had adopted a phased-in funding plan over three years (fiscal years 2007 to 2009) in order to comply with its constitutional obligations. Had the State funded that plan, this matter would likely not have been brought before the Kansas Supreme Court again. Instead, the State failed to appropriate the money needed to fund the plan in subsequent years and then began a series of unilateral cuts to education in the spring of 2009. These cuts were "not in compliance with the commitment made in 2006 that resulted in dismissal" of the *Montoy* case. R.Vol.14, p.1835 (*Gannon* Decision, 116 ("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.)); R.Vol.14, p.1836 (*Gannon* Decision, 117 ("In FY2009, the BSAPP was at \$4400, which, due to a cut, was \$33 below the commitment represented to the *Montoy* Court.")). Thus, the current lawsuit was filed as yet another effort to force the State to meet its constitutional obligations.

S.B. 549 would have provided \$755.6 million in annual additional funding to schools. R.Vol.35, p.119 (Tr.Ex.1, at 00237 (excerpts from *Montoy V*, 282 Kan. at 18)). Between the time this Court released jurisdiction of *Montoy* and the *Gannon* case was filed, the State had made \$511 million in annual cuts to that additional funding. R.Vol.79, p.5486 (Tr.Ex.241); R.Vol.14, pp.1794-95 (*Gannon* Decision, 75-76 (indicating “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”)).

The \$511 million reduction in funds largely occurred through cuts to the BSAPP between fiscal years 2009 and 2012. R.Vol.79, p.5486 (Tr.Ex.241); R.Vol.14, pp.1794-95 (*Gannon* Decision, 75-76); R.Vol.23, p.1050 (Tallman Tr.Test. 1050:16-20); R.Vol.33, p.3328 (Dennis Tr.Test. 3328:1-8). These cuts are represented graphically in Trial Exhibit 233 (copied here). R.Vol.78, pp.5292-94. As a result of these cuts, the State not only broke its commitment to this Court, it also caused significant underfunding of Kansas education. R.Vol.14, p.1948 (*Gannon* Decision, 229 (“Plaintiffs have established beyond any question that the State’s K-12 educational system now stands as unconstitutionally underfunded.”); R.Vol.14, pp.1775, 1799 (*Gannon* Decision, 56, 80 (adopting ¶260 of Plaintiffs’ FOF/COL as true (“Public education in Kansas is currently underfunded.”)))); R.Vol.13, p.1659 (Plaintiffs’ FOF/COL ¶260). Following *Montoy*, school districts and this Court expected the base to increase to \$4,433 in 2009 and \$4,492 in 2010. R.Vol.79, p.5486 (Tr.Ex.241); R.Vol.23, p.1050 (Tallman Tr.Test. 1050:3-7). In reality, the base was further reduced; by 2012, the base had been reduced to \$3,780. R.Vol.79, p.5486 (Tr.Ex.241); R.Vol.23, p.1050 (Tallman Tr.Test. 1050:11-15). As

Plaintiffs' Trial Exhibit 233 clearly shows, the base had not been that low since fiscal year 2000 (*i.e.* – around the time the *Montoy* lawsuit was initiated).

**PLAINTIFFS'
EX. 233**



In addition to the base cuts, special education funding was cut, capital outlay equalization was eliminated, LOB equalization was underfunded, the Mentor Teacher Program was underfunded, Professional Development was not funded, the School Lunch Program was underfunded, and National Board Certification was underfunded. R.Vol.13, pp.1657-58 (Plaintiffs' FOF/COL ¶¶249, 251-59 (citing R.Vol.23, pp.1050-51, 1179-80; R.Vol.41, p.699; R.Vol.69, pp.3915-16; R.Vol.79, p.5486; R.Vol.81, pp.5589, 5593-94, 5596-97; R.Vol.82, p.5590)).

As a result of the cuts, each of the Plaintiff School Districts experienced a substantial reduction in funds. R.Vol.32, pp.2995-96 (Blakesly Tr.Test. 2995:6-2996:10); R.Vol.32, p.2931 (Hammond Tr.Test. 2931:13-18). Wichita, for instance, lost over \$50 million in funding. R.Vol.31, pp.2787-89 (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. R.Vol.85, pp.6036-37 (Tr.Ex.285); R.Vol.20, pp.429-30 (Mather Tr.Test. 429:6-430:7).

F. Increasing Demands Associated with Education in Kansas

As Plaintiffs clearly established at trial, the current Kansas school finance system is underfunded. R.Vol.14, p.1948 (*Gannon* Decision, 229 (“Plaintiffs have established beyond any question that the State’s K-12 educational system now stands as unconstitutionally underfunded.”); R.Vol.14, pp.1775, 1799 (*Gannon* Decision, 56, 80 (adopting ¶260 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1659 (Plaintiffs’ FOF/COL ¶260). At the same time, the demands associated with educating Kansas schoolchildren have continually increased. These increasing demands include the adoption of new standards, new assessments, new college entrance requirements, and rapidly changing demographics. These ever-increasing demands have only exacerbated underfunding. R.Vol.14, p.1888 (*Gannon* Decision, 169 (“[T]hese standards will increase the costs and expenditures necessary to provide the resources to meet those goals.”)); R.Vol.14, p.1877 (*Gannon* Decision, 158 (wherein the *Gannon* Panel made a factual finding that “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 result in compliance with the requirements of Article 6)).

1. Adoption of the Common Core Standards

Kansas has adopted the national Common Core Standards, which are significantly more rigorous than the current Kansas standards. R.Vol.14, p.1893 (*Gannon* Decision, 174 (adopting ¶¶366, 370 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1628 (Plaintiffs’ FOF/COL ¶174); R.Vol.13, p.1660 (Plaintiffs’ FOF/COL ¶370). There was no increased financial support given to the districts for compliance with these

more rigorous standards. R.Vol.19, pp.133-34 (Lane Tr.Test. 133:21-134:3); R.Vol.22, pp.792-93, 805-06 (Beech Tr.Test. 792:3-793:15, 805:16-806:16); R.Vol.116, p.15947 (Tr.Ex.422, at 78:7-11 (local school districts will be required to foot the bill for professional development for the Common Core standards on their own)).

At trial, Plaintiffs established there were increased costs associated with the implementation of the Common Core Standards. R.Vol.14, p.1888 (*Gannon* Decision, 169 (“[T]hese standards will increase the costs and expenditures necessary to provide the resources to meet those goals.”)); R.Vol.14, p.1955 (*Gannon* Decision, 236 (“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”)); R.Vol.20, p.453 (Mather Tr.Test. 453:15-22); R.Vol.26, p.1806 (Schaeffer Tr.Test. 1806:10-12). Since trial, Legislative Post Audit has confirmed the adoption of the Common Core standards will have an associated increased cost; it concluded “school districts could incur between \$32 million and \$60 million in real or opportunity costs to implement the Common Core standards.” See Addendum A, at LEG004027; Addendum B, at LEG003996, LEG003999, LEG004002-4005.¹ This study looks at the cost of implementation only; there has been no study completed to determine the costs of educating Kansas students in a manner which ensures that students actually meet these standards.

2. Waiver from No Child Left Behind Act

In 2001, the United States Congress adopted the No Child Left Behind Act, 20 U.S.C. §§ 6301, *et seq.* (“NCLB”). R.Vol.46, p.1250 (Tr. Ex. 72). In July 2012, Kansas

¹ Addenda A and B are both properly before this Court as legislative history. R.Vol.35, p.120 (Tr.Ex. 1, at 000238 (excerpts from *Montoy V*, 282 Kan. at 20)).

received a conditional waiver from certain federal NCLB requirements (“NCLB Waiver”). R.Vol.14, p.1890 (*Gannon* Decision, 171 (adopting ¶361 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1687 (Plaintiffs’ FOF/COL ¶361). The NCLB Waiver will increase demands on Kansas educators and students. R.Vol.14, p.1890 (*Gannon* Decision, 172 (adopting ¶365 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1688 (Plaintiffs’ FOF/COL ¶365). There was no increase in funding associated with these increased demands. *Id.*

At trial, no study had been conducted to determine whether the NCLB Waiver would increase the cost of educating Kansas students. R.Vol.116, pp.15918-20 (Tr.Ex.422, at 49:3-51:14). Nonetheless, Plaintiffs established the NCLB Waiver would increase those costs. R.Vol.14, p.1955 (*Gannon* Decision, 236 (“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”). Since trial, Legislative Post Audit has confirmed those costs will increase; it concluded “school districts will likely incur between \$34 million and \$63 million in real or opportunity costs to implement NCLB waiver’s four principles.” *See* Addendum A, at LEG004027; Addendum B, at LEG003996, LEG003999. This study looks at the cost of implementation only; there has been no study completed to determine the costs of educating Kansas students in a manner which ensures that students actually meet these standards.

3. Adoption of New Kansas Board of Regents Admission Requirements

The Kansas Board of Regents has adopted new admission requirements for students graduating from high school in 2015. R.Vol.14, p.1893 (*Gannon* Decision, 174

(adopting ¶390 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1695 (Plaintiffs' FOF/COL ¶390). These requirements are more rigorous than previous standards. R.Vol.14, p.1894 (*Gannon* Decision, 175 (adopting ¶392 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1696 (Plaintiffs' FOF/COL ¶392). These changes have increased costs associated with them. *Id.* (adopting ¶393 of Plaintiffs' FOF/COL as true); R.Vol.13, p.1696 (Plaintiffs' FOF/COL ¶393). There has been no study completed to determine the costs of educating Kansas students in a manner which ensures that students actually meet these standards.

4. Significant Changes in Kansas Demographics

There have been significant changes in the demographics of Kansas students between *Montoy* and *Gannon*. Between 2009 and 2012, total full-time enrollment in Kansas increased by more than 7,200 students. R.Vol.14, p.1786 (*Gannon* Decision, 67 (adopting ¶218 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1646 (Plaintiffs' FOF/COL ¶218). It is estimated that enrollment will significantly increase in upcoming years by approximately 5-6,000 students each year between 2011-12 and 2015-16. R.Vol.81, p.5621 (Tr.Ex.249, 000299); R.Vol.101, p.7625 (Tr.Ex.388, at 139825 (showing increased enrollment)).

Kansas is not only acquiring more students, it is also acquiring more students that are more expensive to educate. It is well-established that certain students, especially at-risk and ELL students, are more expensive to educate. R.Vol.14, pp.1786-87 (*Gannon* Decision, 67-68 (adopting ¶220 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1647 (Plaintiffs' FOF/COL ¶220). Student needs increase as demographics change. R.Vol.32, p.3214 (Kiblinger Tr.Test. 3214:3-7). Thus, these changing demographics increase the demand on educators. R.Vol.20, pp.282-83 (Lane Tr.Test. 282:22-283:2).

Almost half (47.6%) of the students in Kansas are economically disadvantaged, an all-time high in Kansas. R.Vol.14, p.1786 (*Gannon* Decision, 67 (adopting ¶219 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1646-47 (Plaintiffs' FOF/COL ¶219); R.Vol.49, p.1577 (Tr.Ex.101, 000653); R.Vol.49, p.1539 (Tr.Ex.91); R.Vol.51, p.1792 (Tr.Ex.107, at 138468); . In 2010-11, 9.8% of Kansas students were ELL students. R.Vol.14, p.1786 (*Gannon* Decision, 67 (adopting ¶219 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1646-47 (Plaintiffs' FOF/COL ¶219); R.Vol.49, p.1577 (Tr.Ex.101, 000653); R.Vol.49, p.1541 (Tr.Ex.93). This too is an all-time high in Kansas. R.Vol.51, p.1852 (Tr.Ex.108, at 141136).

Each of the Plaintiff School Districts is struggling to educate students in light of the changing demographics and with reduced funding. In Dodge City, currently, approximately 84-5% of students are at-risk and 12-13% are special education students. R.Vol.26, pp.1823-25 (Cunningham Tr.Test. 1823:25-1825:14). In Hutchinson, approximately two-thirds of the students qualify for free- and reduced- lunch. R.Vol.32, p.3039 (Davis Tr.Test. 3039:14-16); *see also* R.Vol.54, p.2197 (Tr.Ex.117, 000096). More than 75% of the students in Wichita qualify for free- and reduced- lunch. R.Vol.30, p.2495 (Allison Tr.Test. 2495:18-22). Kansas City struggles to educate a demographic that is almost a mirror opposite of the rest of the State's demographics. R.Vol.19, pp.88-89 (Lane Tr.Test. 88:21-89:12); *compare* R.Vol.49, p.1577 (Tr.Ex.101, 000653) *with* R.Vol.52, p.1920 (Tr.Ex.110, 000134); *see also* R.Vol.101, p.7630 (Tr.Ex.389).

G. The State's Underfunding Has Caused a Gap Between Resources and Demands

Despite the increasing demands and associated, escalating costs, educational funding in Kansas has decreased since 2008-09. *See e.g.* R.Vol.14, pp.1788-89 (*Gannon*

Decision, 69-70 (adopting ¶¶223, 226 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1648-49 (Plaintiffs' FOF/COL ¶¶223, 226). This has created a gap between the demands and resources in Kansas: while demands have gone up, available resources have decreased. R.Vol.14, p.1785 (*Gannon* Decision, 66 (adopting ¶215 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1645-46 (Plaintiffs' FOF/COL ¶215 (citing R.Vol.19, p.180; R.Vol.20, pp.253-55, 263; R.Vol.21, p.561; R.Vol.22, p.794; R.Vol.23, pp.1057-58, 1067-68; R.Vol.25, p.1551; R.Vol.27, pp.2051-52; R.Vol.30, p.2462; R.Vol.31, pp.2800, 2857-58, 2899-2900; R.Vol.32, pp.2937-38, 2997-98, 3021; R.Vol.50, p.1787; R.Vol.79, p.5389)).

H. The State's Underfunding Has Improperly Shifted the Burden to Fund Education to Local School Districts

The obligation to fund education belongs to the State and not local school districts. R.Vol.36, p.229 (Tr.Ex.5 (containing text of Article 6 of the Kansas Constitution (stating the legislature shall make suitable provision for the educational interests of the state) (emphasis added))); R.Vol.21, p.565 (Mather Tr.Test. 565:12-25). Despite this, the State's underfunding of education has forced local school districts to fund education. In fact, the State has significantly increased its reliance on local money to fund public education; "the reliance on the local option budget increased rather significantly from about 9 percent to almost 30 percent" between 1998 and 2012. R.Vol.23, pp.1007-08 (Tallman Tr.Test. 1007:20-1008:7); *see also* R.Vol.23, p.1040 (Tallman Tr.Test. 1040:1-13 (in 2000 LOBs only represented 9.2% of the total state general fund, while in 2012 that percentage nearly doubled to 17.3%)). In 2010-11, 35% of the total school revenue (\$1.959 billion) came from local revenue. R.Vol.9, p.1104

(State Opening FOF ¶73 (citing R.Vol.115, p.15304 (Tr.Ex.1185); R.Vol.115, p.15306-07 (Tr.Ex.1186))).

Kansas relies on local taxpayer money in various ways to fund the formula. Kansas collects 20 mills from every school district in order to fund the general fund. R.Vol.23, p.1169 (Dennis Tr.Test. 1169:23-25). Additionally, school districts can raise local money to support capital outlay expenditures and to fund the local option budget (“LOB”).

Because school funding relies in part of local funding, the State adopted certain safeguards within the system to provide equity in purchasing power among Kansas school districts. Thus, the school finance formula allows for “equalization” to effectively boost the buying power of the districts that have low property wealth. R.Vol.20, pp.460, 463 (Mather Tr.Test. 460:2-13, 463:17-24); R.Vol.22, pp.1002-03 (Tallman Tr.Test. 1002:20-1003:16).

Capital outlay state equalization aid is one mechanism to boost funding for lower valuation per pupil districts. R.Vol.22, pp.1002-03 (Tallman Tr.Test. 1002:20-1003:16). The districts are then able to use the capital outlay money raised locally, in addition to the State aid, to fund capital outlay costs. *Id.* The money raised is limited in its use; it cannot be used for general operating expenses, but it can be used for buildings, construction, repair, remodeling, and equipment. *Id.*

LOB equalization aid is another “equalizing” mechanism. It is not available to all school districts; it is only available to those districts determined by statute (K.S.A. 72-8814) to be lower valuation per pupil districts. R.Vol.20, p.461 (Mather Tr.Test. 461:14-25); R.Vol.35, p.55 (Tr.Ex.1, 000108 (containing text of K.S.A. 72-6434)). That

determination is made by ranking each of the districts by their assessed valuation per pupil and then identifying the districts at the 81.2 percentile. R.Vol.35, p.55 (Tr.Ex.1, 000108 (containing text of K.S.A. 72-6434)); R.Vol.41, p.674 (Tr.Ex.35 at 139393). Districts above the 81.2 percentile receive no additional state aid. *Id.* Each of the Plaintiff School Districts are entitled to receive LOB equalization aid. R.Vol.20, p.461 (Mather Tr.Test. 461:14-25); R.Vol.31, pp. 2789-90 (Jones Tr.Test. 2789:24-2790:24); R.Vol.32, pp.2928-29 (Hammond Tr.Test. 2928:16-2929:22); R.Vol.32, p.3000 (Blakesley Tr.Test. 3000:4-15). The state equalization aid portion of the LOB money is considered state money; the remainder of the LOB money remains local. R.Vol.23, pp.1165-67 (Dennis Tr.Test. 1165:12-1167:10).

The State, however, is no longer fully funding either equalization mechanism. LOB Supplemental General State Aid has been prorated and has not been fully funded since 2008-09. R.Vol.41, p.699 (Tr.Ex.36, at 142236). As of 2009-10, the State is not funding capital outlay state equalization aid at all. R.Vol.22, p.1002 (Tallman Tr.Test. 1002:17-19); R.Vol.20, p.463 (Mather Tr.Test. 463:5-23).

Forcing local school districts to fund education is impermissible because of the substantial wealth disparities between Kansas school districts. R.Vol.14, p.1860 (*Gannon* Decision, 141 (“[W]e 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.”)); R.Vol.14, p.1922-23(*Gannon* Decision, 203-04 (“[N]onpayment of school district capital outlay funds . . . leaves K.S.A. 72-8814 itself, unconstitutional as creating, and operating as, an inequitable funding disparity based solely on wealth . . .”)); R.Vol.14, pp.1952-53 (*Gannon* Decision, 233-34

(indicating elimination of capital outlay state aid equalization payments creates impermissible wealth-based disparity among school districts)); R.Vol.14, p.1860 (*Gannon* Decision, 141 (“Throughout, the litigation history concerning school finance in Kansas, wealth based disparities have been seen as an anathema, one to be condemned and disapproved . . .”). The wealth disparities are largely due to significant variations in assessed valuations among school districts. R.Vol.22, pp.1009-10 (Tallman Tr.Test. 1009:13-1010:11); R.Vol.98, pp.7337-43 (Tr.Ex.376); R.Vol.38, pp.385-89 (Tr.Ex.24). For instance, in 2010-11, there was a difference of \$444,596 per pupil between the district with the lowest assessed valuation per pupil (the Fort Leavenworth school district, U.S.D. 207, which had an assessed valuation per pupil of \$1,205) and the district with the highest assessed valuation per pupil (the Satanta school district, U.S.D. 507, which had an assessed valuation per pupil of \$445,801). R.Vol.38, pp.385, 389 (Tr.Ex.24, at 137684, 137688). Even among Plaintiff School Districts there is significant variation. *Id.* (listing following assessed valuations per pupil: Wichita - \$56,860; Hutchinson - \$41,739; Dodge City - \$31,546; Kansas City - \$37,167). This wealth variance also greatly affects how much money each district can raise with one mill of local property taxation. R.Vol.22, pp.1009-10 (Tallman Tr.Test. 1009:13-1010:11 (testifying that “if we relied on a system entirely based on property tax there would be **substantial differences** in ability to raise money among the school districts”) (emphasis added)); R.Vol.23, pp.1170-71 (Dennis Tr.Test. 1170:14-1171:18). For instance, in the Galena school district, U.S.D. 499, one mill raises approximately \$18-19,000. R.Vol.23, pp.1170-71 (Dennis Tr.Test. 1170:19-1171:18). However, in the Burlington school district, U.S.D. 244, one mill raises nearly \$350-400,000. *Id.*

I. The State's Underfunding Has Forced Plaintiff School Districts To Make Substantial Cuts to Necessary Resources and Programs

Kansas school districts are currently unable to provide necessary services, programs, materials, and facilities to students because of the State's underfunding. Administrators, principals, and teachers testified funding levels were not appropriate to allow them to meet the needs of the students in their district. *See e.g.* R.Vol.19, p.199 (Lane Tr.Test. 199:15-19); R.Vol.26, pp.1695-97 (Feist Tr.Test. 1695:8-1697:8). Funding levels are currently so low Plaintiff School Districts, and other districts, have had to (1) significantly reduce licensed staff and other positions; (2) reduce or freeze teacher salaries; and (3) make cuts to necessary programs (such as before and after school programs, all day kindergarten, extracurricular activities, fine arts, transportation services, summer school, professional development, and many others). R.Vol.13, pp.1666-69 (Plaintiffs' FOF/COL ¶ 288-89, 292-94, 296 (citing R.Vol.20, pp.254-62, 456-57; R.Vol.21, pp.690-96, 721-24; R.Vol.22, p.842; R.Vol.23, pp.1031, 1181-84, 1186-87, 1189-93; R.Vol.26, pp.1800-02, 1811-12; R.Vol.31, pp.2797-98; R.Vol.32, p.3177; R.Vol.41, p.673, R.Vol.41, p.697; R.Vol.42, p.801; R.Vol.64, p.3275; R.Vol.72, p.4369; R.Vol.82, pp.5740-44, 5763-69; R.Vol.83, pp.5770-73, 5806-09, 5815-16; R.Vol.85, pp.6011-23, 6025-35, 6039-49; R.Vol.101, pp.7634-36)).

Reducing licensed staff has a negative impact on the quality of education available to Kansas students. R.Vol.26, pp.1834-35 (Cunningham Tr.Test. 1834:10-1835:18). Because enrollment has continued to increase, educators are now being forced to educate a higher number of students with the same number (and, in some cases, less) staff. *Id.* This and other factors cause class sizes to increase. *Id.*; R.Vol.22, p.788 (Beech Tr.Test. 788:10-20). Smaller class sizes are more desirable because “[a]nytime

class sizes can be small, it allows for more individualized attention to those students.” R.Vol.22, p.790 (Beech Tr.Test. 790:9-14; R.Vol.28, p.2295 (Hanushek Tr.Test. 2295:14-20 (agreeing that there is evidence that class size may make a difference, especially in kindergarten and first grade)); R.Vol.19, p.199 (Lane Tr.Test. 199:2-3 (discussing the benefits of lower class sizes)).

Freezing teacher salaries has a negative effect on the quality of education available to Kansas public school students. It causes a massive loss of teachers for those schools districts that have to freeze salaries and are then less competitive than neighboring schools. *See e.g.*, R.Vol.21, pp.696-97 (Hudson Tr.Test. 696:21-697:8); R.Vol.22, pp.791-92 (Beech Tr.Test. 791:4-792:1). It increases already existing problems with retaining experienced or quality teachers. R.Vol.20, p.450 (Mather Tr.Test. 450:12-24). For example, Kansas City has tracked teachers who leave the school district and determined that “a good percentage of them are going to other schools.” R. Vol.21, p.698 (Hudson Tr.Test. 698:17-23). Moreover, some of those schools are able to pay teachers to break their contracts mid-year. R. Vol.21, p.698-700 (Hudson Tr.Test. 698:24-700:3); R. Vol. 21, p.701-03 (Hudson Tr.Test. 701:14-703:19). There is an estimated salary differential of between \$4,000 and \$10,000 between Kansas City and some of its neighboring school districts. R. Vol. 21, p.701-03 (Hudson Tr.Test. 701:14-703:19).

J. Kansas Students are Not Receiving a “Suitable Education” Due to the State’s Underfunding

The Legislature, the KSBE, and this Court have already put a substantial amount of effort into determining what defines a “suitable education.” R.Vol.14, pp.1867-68 (*Gannon* Decision, 148-49 (referring to “the standards adopted by the Legislature and the

State Board of Education that define what the *Montoy* Court accepted, and what is not here challenged, as the measure of a “suitable education”) (emphasis added)); R.Vol.35, p.102 (Tr.Ex.1, 000203 (excerpts from *Montoy I*, at 153 (citing *U.S.D. 229*, 256 Kan. at 258 (stating “the ultimate question on suitability must be one for the court”) (emphasis added)))).

This “suitable education” has been defined as one that meets the requirements of K.S.A. 72-1127(c). R.Vol.41, p.707 (Tr.Ex.39 (containing text of K.S.A. 72-1127)). To provide students with a suitable education, a Kansas education must allow:

1. Development of sufficient oral and written communication skills which enable students to function in a complex and rapidly changing society;
2. [A]cquisition of sufficient knowledge of economic, social and political systems which enable students to understand the issues that affect the community, state and nation;
3. [D]evelopment of students’ mental and physical wellness;
4. [D]evelopment of knowledge of the fine arts to enable students to appreciate the cultural and historical heritage of others;
5. [T]raining or preparation for advanced training in either academic or vocational fields so as to enable students to choose and pursue life work intelligently;
6. [D]evelopment of sufficient levels of academic or vocational skills to enable students to compete favorably in academics and the job market; and
7. [N]eeds of students requiring special education services.

Id. (emphasis added).

Additionally, a constitutional school finance formula must be funded to assure “outputs.” R.Vol.35, p.115 (Tr.Ex.1, 000229 (excerpts from *Montoy IV*, 279 Kan. at 84 (“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.") (emphasis added)). A study of costs that only considers "inputs," such as the cost of programs mandated by state statute in accrediting schools, does not "demand consideration of the costs of 'outputs'" and "is doomed to be incomplete." *Id.* Thus, while accreditation standards must be considered as a base measurement, they are not an accurate and complete measure of whether students are receiving a "suitable education." R.Vol.19, p.124 (Lane Tr.Test. 124:4-10). And, with significant numbers of students graduating from Kansas schools unprepared for college and/or a career, it is not enough for the State to focus solely on inputs (*i.e.* - assert school districts are accredited and, thus, the State is meeting its constitutional obligations). *Infra* Statement of the Facts §§I, J.

There are multiple inputs and outputs available to educators to determine whether students are receiving a "suitable education" that should be considered when determining "actual cost" of providing an education. These measures include (1) performance on assessments; (2) performance on college entrance exams, such as the ACT; (3) graduation rates; (4) remediation rates; (5) whether the education complies with state statutes and Board of Education regulations; and (6) whether the education prepares students for college and/or career. The evidence overwhelmingly supports that Kansas students are not receiving a "suitable education" according to any of these factors.

1. Recent Performance on Kansas, National, and District Assessments Indicates Kansas Students Are Not Receiving a "Suitable Education"

Performance on assessments is one measure of whether Kansas students are receiving a "suitable education." R.Vol.19, pp.117-18 (Lane Tr.Test. 117:18-118:4);

R.Vol.19, pp.173-75 (Lane Tr.Test. 173:7-175:12). These include, in addition to the Kansas assessments, the National Assessment of Educational Progress (or “NAEP”), and district assessments, such as Measures of Academic Progress. R.Vol.19, pp.174-175, 205 (Lane Tr.Test. 174:22-175:12, 205:3-10). Eventually, Kansas student achievement will be measured by performance on Common Core assessments. R.Vol.20, p.345 (Lane Tr.Test. 345:8-20).

The Legislature requires the KSBE “design and adopt a school performance accreditation system based upon improvement in performance that reflects high academic standards and is measurable.” R.Vol.42, p.755 (Tr.Ex.47 (citing K.S.A. 72-6439)). To comply with the State’s constitutional duties, schools must meet the accreditation requirements and students must achieve an “improvement in performance.” R.Vol.35, p.104 (Tr.Ex.1, 000207 (citing *Montoy II*, at 773)). That “improvement in performance” must (1) reflect high academic standards and (2) be measurable. *Id.* Currently, the Quality Performance Accreditation (“QPA”) framework, adopted by the State, provides the accreditation requirements in Kansas. *See* R.Vol. 19, p. 114-15 (Lane Tr. Test. 114:17-115:1); R.Vol.42, p. 807-45 (Tr.Ex. 54).

This Court has already determined that, through the adoption of K.S.A. 72-6439, “the legislature has imposed criteria for determining whether it has made suitable provision for the finance of education.” R.Vol.35, p.104 (Tr.Ex.1, 000207 (excerpts from *Montoy II*, 278 Kan. at 773)); R.Vol.42, p.755 (Tr.Ex.47 (containing text of K.S.A. 72-6439)). The *Montoy* Court accepted K.S.A. 72-6439 “as a standard of suitability” and found it “to be consistent with Article 6, § 6(b)’s intent.” R.Vol.14, p.1877 (*Gannon* Decision, 158). Notably, in the wake of *Montoy IV*, the State did not amend this

requirement. R.Vol.42, p.755 (Tr.Ex.47). Performance on statewide assessments is clearly an aspect of a “suitable education” and it is the Legislature who linked the two. R.Vol.35, p.104 (Tr.Ex.1, 000207 (excerpts from *Montoy II*, 278 Kan. at 773)); R.Vol.42, p.755 (Tr.Ex.47 (containing text of K.S.A. 72-6439)).

Recent performance on Kansas assessments indicates that Kansas students are not receiving a “suitable education” that meets the Legislature’s own requirements. While, overall, the State made adequate yearly progress (or “AYP”) in 2011-12 according to preliminary data, only two subgroups (White and Asian) met AYP on reading assessments. R.Vol.105, p.8299 (Tr.Ex.412). Eight subgroups did not. *Id.* Only four subgroups met AYP on math assessments; six subgroups did not. *Id.* Had the State not been granted the NCLB Waiver for the 2011-12 school year, the State, as a whole, would not have made AYP in either math or reading. R.Vol.105, p.8300 (Tr.Ex.413). Only one subgroup (White) would have met AYP in reading and only two subgroups (White and Asian) would have the met AYP in math. *Id.*

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. R.Vol.105, p.8313 (Tr.Ex.416).

Prior to the release of the 2011-12 preliminary data, Kansas data showed that, generally, achievement scores for all students were slightly increasing. *See e.g.* R.Vol.51, pp.1796, 1804 (Tr.Ex.107, at 138472, 138480). However, it is generally accepted that averages can hide problems with achievement among subgroups. R.Vol.14, pp.1877-78, 1880 (*Gannon* Decision, 158-59, 161 (adopting ¶403 of Plaintiffs’

FOF/COL as true)); R.Vol.13, p.1699 (Plaintiffs' FOF/COL ¶403); R.Vol.27, pp.1969-70 (Frank Tr.Test. 1969:18-1970:15); R.Vol.32, p.3209 (Kiblinger Tr.Test. 3209:10-24). “[W]hen you take the average of all kids in Kansas where some kids do exceptionally well, it tends to disguise or mask subgroup problems.” R.Vol.14, pp.1877-78, 1880 (*Gannon* Decision, 158-59, 161 (adopting ¶403 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1699 (Plaintiffs' FOF/COL ¶403); R.Vol.27, pp.1969-70 (Frank Tr.Test. 1969:18-1970:15).

An example of how “averages hide the problem” can be seen in 2010-11 assessment data. R.Vol.14, pp.1877-78, 1880 (*Gannon* Decision, 158-59, 161 (adopting ¶405 of Plaintiffs' FOF/COL as true)). There, 12.2% of all students in the State scored below proficient in reading. *Id.*; R.Vol.50, pp.1740-62 (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 are not receiving a “suitable education.” R.Vol.14, pp.1877-78, 1880 (*Gannon* Decision, 158-59, 161 (adopting ¶405 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1699 (Plaintiffs' FOF/COL ¶405).

The results of the State Math Assessments for the 2010-11 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. R.Vol.14, pp.1877-78, 1881

(*Gannon* Decision, 158-59, 162 (adopting ¶406 of Plaintiffs’ FOF/COL as true)); R.Vol.50, pp.1763-86 (Tr.Ex.104). This is compared to the 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. *Id.* When the results are narrowed to just those Grade 11 Math scores, 40.3% of African-American students, 38.6% of ELL students, 28.9% of Hispanic students, and 28.5% of Free/Reduced Lunch students scored below proficient. R.Vol.14, pp.1877-78, 1881 (*Gannon* Decision, 158-59, 162 (adopting ¶406 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1699-1700 (Plaintiffs’ FOF/COL ¶406); R.Vol.50, p.1788 (Tr.Ex.106). In fact, 17.4% of all 11th grade students in the state scored below proficient in math. *Id.*

Clearly, the achievement gap still exists and “is still a challenge for Kansas.” R.Vol.14, pp.1877-78, 1880 (*Gannon* Decision, 158-59, 161 (adopting ¶404 of Plaintiffs’ FOF/COL as true)); R.Vol.27, p.2076 (Neuenswander Tr.Test. 2076:23-25). Kansas cannot become complacent about the achievement gap in light of reductions of the gap. *Id.*; R.Vol.23, p.1132 (Tallman Tr.Test. 1132:2-9 (just because Kansas does well on closing the gap should not be an incentive to give up on narrowing it further)).

In 2010-11, 211 public schools did not make AYP. R.Vol.14, pp.1877-78, 1881 (*Gannon* Decision, 158-59, 162 (adopting ¶407 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1700 (Plaintiffs’ FOF/COL ¶407); R.Vol.49, pp.1542-49 (Tr.Ex.94). The State should not be satisfied when nearly 15% of its schools cannot make AYP. *Id.* Moreover, in that same year, more than one-third of Kansas school districts did not make

AYP. R.Vol.14, pp.1877-78, 1881 (*Gannon* Decision, 158-59, 162 (adopting ¶407 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1700 (Plaintiffs' FOF/COL ¶407); R.Vol.49, pp.1542-49 (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. R.Vol.14, pp.1877-78, 1881 (*Gannon* Decision, 158-59, 162 (adopting ¶407 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1700 (Plaintiffs' FOF/COL ¶407).

As a district, Wichita was “on corrective action” during the 2010-11 school year. R.Vol.14, pp.1877-78, 1881-82 (*Gannon* Decision, 158-59, 162-63 (adopting ¶408 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1700 (Plaintiffs' FOF/COL ¶408); R.Vol.30, p.2499 (Allison Tr.Test. 2499:5-7); R.Vol.55, pp.2328-46 (Tr.Ex.119); R.Vol.49, p.1550 (Tr.Ex.95, 000055). A district is “on corrective action” or “in corrective action status” when it is “on improvement” for three or more years. R.Vol.14, pp.1877-78, 1881-82 (*Gannon* Decision, 158-59, 162-63 (adopting ¶408 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1700-01 (Plaintiffs' FOF/COL ¶408). A district is “on improvement” when it fails to meet AYP for two consecutive years. *Id.*; R.Vol.19, pp.153-54 (Lane Tr.Test. 153:23-154:6); R.Vol.49, p.1550 (Tr.Ex.95, 000055). As of trial, Wichita had been on improvement for five years and had completed its third year on corrective action. R.Vol.14, pp.1877-78, 1881-82 (*Gannon* Decision, 158-59, 162-63 (adopting ¶408 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1700-01 (Plaintiffs' FOF/COL ¶408); R.Vol.30, p.2499 (Allison Tr.Test. 2499:1-4). To move off of corrective action, Wichita would need to meet the district criteria for AYP. R.Vol.14, pp.1877-78, 1881-82 (*Gannon* Decision, 158-59, 162-63 (adopting ¶408 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1700-01 (Plaintiffs' FOF/COL ¶408); R.Vol.30, p.2499 (Allison Tr.Test.

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.” R.Vol.14, pp.1877-78, 1881-82 (*Gannon* Decision, 158-59, 162-63 (adopting ¶408 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1700-01 (Plaintiffs’ FOF/COL ¶408); R.Vol.30, p.2507-08 (Allison Tr.Test. 2507:24-2508:1). During the 2010-11 school year, the Wichita school district had 12 schools on improvement. R.Vol.14, pp.1877-78, 1881-82 (*Gannon* Decision, 158-59, 162-63 (adopting ¶408 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1700-01 (Plaintiffs’ FOF/COL ¶408); R.Vol.49, p.1552 (Tr.Ex.95, 000057). Although the NCLB Waiver will nullify previous sanctions for failing to meet AYP, this evidence does not alter the fact that Wichita has failed to meet the AYP goals set for it, pursuant to NCLB and QPA, for at least the last five years. R.Vol.14, pp.1877-78, 1881-82 (*Gannon* Decision, 158-59, 162-63 (adopting ¶408 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1700-01 (Plaintiffs’ FOF/COL ¶408).

In 2010-11, prior to the NCLB Waiver, Wichita students did not meet AYP on either the reading or math assessments. R.Vol.14, pp.1877-78, 1882 (*Gannon* Decision, 158-59, 163 (adopting ¶409 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1701 (Plaintiffs’ FOF/COL ¶409) R.Vol.54, pp.2316-27 (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%. R.Vol.14, pp.1877-78, 1882 (*Gannon* Decision, 158-59, 163 (adopting ¶409 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p. (Plaintiffs’ FOF/COL ¶409); R.Vol.54, p.2316 (Tr.Ex.118, 000029). The total number of students within the subgroups making AYP was much lower. R.Vol.14, pp.1877-78, 1882 (*Gannon* Decision, 158-59, 163 (adopting ¶409 of Plaintiffs’ FOF/COL as true));

R.Vol.13, p.1701 (Plaintiffs' FOF/COL ¶409). Only 60.7% of ELL students met AYP; almost 40% of ELL students did not. *Id.*; R.Vol.54, p.2320 (Tr.Ex.118, 000033). 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.*

Wichita students similarly did not make AYP on the math assessments. R.Vol.14, pp.1877-78, 1882 (*Gannon* Decision, 158-59, 163 (adopting ¶410 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1701 (Plaintiffs' FOF/COL ¶410); R.Vol.54, pp.2316-27 (Tr.Ex.118). On the math assessments, only 70.2% of all students met AYP; the annual target was 82.3%. R.Vol.14, pp.1877-78, 1882 (*Gannon* Decision, 158-59, 163 (adopting ¶410 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1701 (Plaintiffs' FOF/COL ¶410); R.Vol.54, p.2322 (Tr.Ex.118 at 000035). 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. *Id.* Only 56.6% of African-American students made AYP in math, meaning that 43.4% did not. *Id.*

In *Montoy*, the Court found it significant that one-third to one-half of students were floundering. *See e.g.* R.Vol.48, p.1468 (Tr.Ex.88). However, based on Wichita's 2010-11 reading and math results, that is still the case for many students. Wichita's preliminary test scores reveal that the district struggled to meet the assessment goals set for the district by the State in 2011-12. R.Vol.105, pp.8314-33 (Tr.Ex.417). Those preliminary results reveal that: (1) had the State not received the NCLB Waiver, Wichita would not make AYP next year; (2) fewer schools will attain AYP in 2012 when the results are compared to 2011; (3) fewer schools will meet the criteria for reading and

mathematics in 2012 when the results are compared to 2011; (4) Wichita reading scores showed a decline of 0.5% between 2011 and 2012; (5) the district was 11.7% below the annual reading target of 86%; (6) had the State not received the partial NCLB Waiver for 2011-12 (allowing them to use the 2010-11 annual targets), Wichita would have been nearly 15% below the annual reading target (which would have been 90.7%); (7) Wichita was 10.5% below the annual math target; (8) Wichita did not meet the QPA criteria for science in 2012 due to the performance of 5 subgroups. *Id.*

As a district, Kansas City was “on corrective action” during the 2010-11 school year. R.Vol.52, p.1920 (Tr.Ex.110, 000134); R.Vol.49, p.1551 (Tr.Ex.95, 000056). Similar to a district, a school can also be identified as “on improvement” when it fails to meet AYP for two consecutive years. R.Vol.19, pp.156-57 (Lane Tr.Test. 156:24-157:12); R.Vol.49, p.1550 (Tr.Ex.95, 000055). During the 2010-11 school year, Kansas City had nine schools on improvement. R.Vol.19, pp.127-28 (Lane Tr.Test. 127:24-128:2); R.Vol.49, p.1550 (Tr.Ex.95, 000055). These nine schools are not meeting QPA standards and would have been subject to sanctions. R.Vol.19, pp.127-28 (Lane Tr.Test. 127:24-128:2); R.Vol.49, pp.1552-53 (Tr.Ex.95, 000057-58). Although the NCLB Waiver will nullify previous sanctions for failing to meet AYP, Kansas City, like Wichita, has failed to meet the AYP goals set for them, pursuant to the NCLB and QPA, for several consecutive years. Significant numbers of students in Kansas City are not meeting the AYP goal in reading or math. R.Vol.52, p.2039 (Tr.Ex.111); R.Vol.52, p.2040 (Tr.Ex.112); R.Vol.53, pp.2042-65 (Tr.Ex.114).

As a district, Dodge City was “on improvement” during the 2010-11 school year and did not make AYP that year. R.Vol.53, p.2066 (Tr.Ex.115, 000115); R.Vol.19,

pp.153-54 (Lane Tr.Test. 153:23-154:6); R.Vol.49, p.1551 (Tr.Ex.95, 000056). In 2010-11, prior to the NCLB Waiver, Dodge City students did not meet AYP on either the reading or math assessments. R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶416 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1703 (Plaintiffs' FOF/COL ¶416); R.Vol.53, pp.2185-96 (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%. R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶416 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1703 (Plaintiffs' FOF/COL ¶416); R.Vol.53, p.2185 (Tr.Ex.116, 000053). Only 74.1% of ELL students met AYP, which means that one-quarter (25.9%) did not. R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶416 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1703 (Plaintiffs' FOF/COL ¶416); R.Vol.53, p.2189 (Tr.Ex.116, 000057). On the math assessments, only 65.2% of Dodge City's African-American population met AYP. R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶416 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1703 (Plaintiffs' FOF/COL ¶416); R.Vol.53, p.2196 (Tr.Ex.116, 000064). That means more than one-third (34.8%) of the African-American students in Dodge City did not. *Id.* Although the NCLB Waiver will nullify previous sanctions for failing to meet AYP, this evidence clearly demonstrates that Dodge City has failed to meet the AYP goals set for them, pursuant to the NCLB and QPA, for several consecutive years.

As a district, Hutchinson was "on improvement" during the 2010-11 school year and did not make AYP that year. R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶417 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1703-04

(Plaintiffs' FOF/COL ¶417); R.Vol.32, p.3137 (Kiblinger Tr.Test. 3137:14-15); R.Vol.54, p.2197 (Tr.Ex.117, 000096). Based on preliminary assessment data, it appears that Hutchinson will once again not make AYP and would, under the former law, remain "on improvement." R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶417 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1703-04 (Plaintiffs' FOF/COL ¶417); R.Vol.32, p.3137 (Kiblinger Tr.Test. 3137:19-3138:10). During the 2010-11 school year, the Hutchinson school district had two schools on improvement. R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶417 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1703-04 (Plaintiffs' FOF/COL ¶417); R.Vol.49, p.1552 (Tr.Ex.95, 000057). These two schools would, under the former law, be subject to sanctions. R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶417 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1703-04 (Plaintiffs' FOF/COL ¶417); R.Vol.49, p.1552 (Tr.Ex.95, 000057). Although the NCLB 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. R.Vol.14, pp.1877-78, 1883 (*Gannon* Decision, 158-59, 164 (adopting ¶417 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1703-04 (Plaintiffs' FOF/COL ¶417).

In 2010-11, prior to the NCLB Waiver, one-quarter (25.2%) of Hutchinson ELL students did not meet AYP on the reading assessments. R.Vol.14, pp.1877-78, 1883-84 (*Gannon* Decision, 158-59, 164-65 (adopting ¶418 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1704 (Plaintiffs' FOF/COL ¶418); R.Vol.55, p.2451 (Tr.Ex.120, 000045 (stating that only 74.8% of ELL students did meet AYP)). Almost one-third (31.5%) of

the ELL students in Hutchinson did not meet AYP in math. R.Vol.14, pp.1877-78, 1883-84 (*Gannon* Decision, 158-59, 164-65 (adopting ¶418 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1704 (Plaintiffs’ FOF/COL ¶418); R.Vol.55, p.2457 (Tr.Ex.120, 000051). Preliminary data for Hutchinson also indicates achievement scores are declining among subgroups and that the achievement gap is beginning to widen. *See e.g.* R.Vol.32, pp.3146-49, 3209-10 (Kiblinger Tr.Test. 3146:14-3149:7; 3209:25-3210:6); R.Vol.115, p.15353 (Tr.Ex.1209); R.Vol.107, pp.8769-71 (Tr.Ex.419).

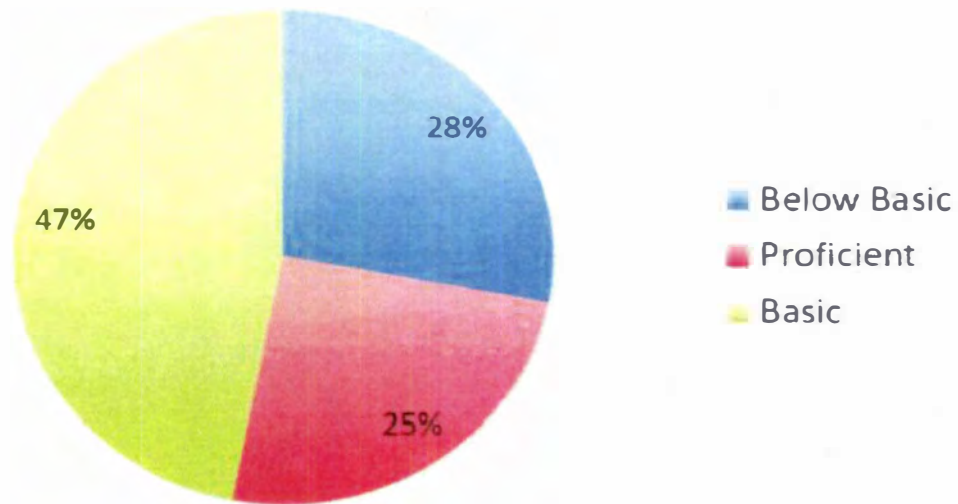
Results on NAEP similarly show that Kansas students are not receiving a “suitable education.” NAEP is the only national assessment that measures what students know and can do in various subject areas. R.Vol.14, pp.1877-78, 1884 (*Gannon* Decision, 158-59, 165 (adopting ¶420 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1704 (Plaintiffs’ FOF/COL ¶420); R.Vol.47, pp.1421-22 (Tr.Ex.85); R.Vol.19, p.183 (Lane Tr.Test. 183:9-21). Although NAEP and Kansas assessment results cannot be compared, NAEP does allow for a comparison of Kansas students to students in other states. R.Vol.14, pp.1877-78, 1884 (*Gannon* Decision, 158-59, 165 (adopting ¶421 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1704-05 (Plaintiffs’ FOF/COL ¶421); R.Vol.47, pp.1421-22 (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. R.Vol.14, pp.1877-78, 1884 (*Gannon* Decision, 158-59, 165 (adopting ¶421 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1704-05 (Plaintiffs’ FOF/COL ¶421); R.Vol.47, pp.1421-22 (Tr.Ex.85); R.Vol.19, p.183 (Lane Tr.Test. 183:9-21). For this reason, it is another tool available to determine whether Kansas students are receiving a “suitable education.” R.Vol.14, pp.1877-78, 1884 (*Gannon* Decision, 158-59,

165 (adopting ¶421 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1704-05 (Plaintiffs' FOF/COL ¶421); R.Vol.41, p.707 (Tr.Ex.39 (stating a suitable education must allow students to compete favorably in academics and job market)).

NAEP results reveal an achievement gap similar to the one that exists on Kansas state assessment results. R.Vol.14, pp.1877-78, 1884-85 (*Gannon* Decision, 158-59, 165-66 (adopting ¶423 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1705 (Plaintiffs' FOF/COL ¶423). 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. R.Vol.14, pp.1877-78, 1884-85 (*Gannon* Decision, 158-59, 165-66 (adopting ¶423 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1705 (Plaintiffs' FOF/COL ¶423); R.Vol.56, pp.2464-65 (Tr.Ex.122). The white students in Kansas fared better, with only 24% of them testing below basic. *Id.* Approximately one in every five white students who participated on this NAEP assessment scored below basic. *Id.* 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.*

Based on the 2009 reading proficiency scores graphically represented in Tr.Ex.121 (R.Vol.56, pp.2459-2463 (copied here)), Governor Brownback, then U.S. Senator, stated, "As you can see from this graph, 28% of our students are below basic levels according to [NAEP] scores. That number is far too high. Only 25% of our students are reading proficiently. That number is far too low." R.Vol.56, pp.2459-63 (Tr.Ex.121).

Reading Proficiency of Kansas Students (2009)



Source: NAEP

2. Recent Performance on College Entrance Exams, Such as the ACT, Indicates Kansas Students Are Not Receiving a “Suitable Education”

Performance on the ACT is another measure of whether Kansas students are receiving a “suitable education.” R.Vol.19, pp.159-60 (Lane Tr.Test. 159:10-160:4); R.Vol.25, p.1574 (Tompkins Tr.Test. 1574:11-21 (stating that requiring a student to take the ACT is a tool for school districts to use to ensure that students are college and career ready)); R.Vol.115, p.15550 (Tr.Ex.1300, at 23 (referring to the ACT as another measure to determine whether students are college and career ready)); R.Vol.19, pp.159-60 (Lane Tr.Test. 159:12-160:10 (testifying that Kansas City received a waiver allowing students to take the ACT in lieu of state assessments to increase the number of graduates that are college and career ready)). Recent ACT performance indicates Kansas students are not receiving a “suitable education.” In Kansas, to enroll in a state university, a student must receive a score of 21 on the ACT. R.Vol.14, pp.1877-78, 1885 (*Gannon* Decision, 158-59, 166 (adopting ¶425 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1706 (Plaintiffs’

FOF/COL ¶425); R.Vol.46, p.1218 (Tr.Ex.66); R.Vol.19, p.160-61 (Lane Tr.Test. 160:25-161:6). The average ACT score in the Kansas City school district is a 17. R.Vol.14, pp.1877-78, 1885 (*Gannon* Decision, 158-59, 166 (adopting ¶425 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1706 (Plaintiffs' FOF/COL ¶425); R.Vol.19, p.160-61 (Lane Tr.Test. 160:25-161:6).

ACT has set College Readiness Benchmarks to determine student readiness for typical first-year courses. R.Vol.14, pp.1877-78, 1885 (*Gannon* Decision, 158-159, 166 (adopting ¶426 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1706 (Plaintiffs' FOF/COL ¶426); R.Vol.45, p.1165 (Tr.Ex.62, 000004). 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.* A significant number of Kansas high school graduates are not ready for college-level coursework as measured by these benchmarks. R.Vol.14, pp.1877-78, 1885-86 (*Gannon* Decision, 158-59, 166-67 (adopting ¶427 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1706-07 (Plaintiffs' FOF/COL ¶427); R.Vol.61, p.3028 (Tr.Ex.145, at KBOR000028). In fact, only 26% of Kansas high school graduates meet the ACT Benchmarks in English, Math, Reading, and Science. *Id.* According to the ACT Benchmark scores, Kansas student preparation for math and science is low. R.Vol.14, pp.1877-78, 1886 (*Gannon* Decision, 158-59, 167 (adopting ¶431 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1707 (Plaintiffs' FOF/COL ¶431); R.Vol.64, p.3313 (Tr.Ex.167, 000050). This “is alarming, given the high demand for science- and math-intensive careers such as nursing, pharmacy, and teaching.” *Id.*

The ACT Benchmarks also show an achievement gap. R.Vol.14, pp.1877-78, 1886 (*Gannon* Decision, 158-59, 167 (adopting ¶428 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1707 (Plaintiffs’ FOF/COL ¶428); R.Vol.64, p.3294 (Tr.Ex.166, at SIG-ACT000069). 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.* While 34% of Kansas students pass the benchmarks in College Biology, only 9% of African-American students do. R.Vol.14, pp.1877-78, 1886 (*Gannon* Decision, 158-59, 167 (adopting ¶429 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1707 (Plaintiffs’ FOF/COL ¶429); R.Vol.64, p.3295 (Tr.Ex.166, 000070). Only 40% of African-American students meet the benchmarks in College English Composition, as compared to 79% of White students. R.Vol.14, pp.1877-78, 1886 (*Gannon* Decision, 158-59, 167 (adopting ¶430 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1707 (Plaintiffs’ FOF/COL ¶430); R.Vol.64, p.3294 (Tr.Ex.166, 000069).

3. Recent Graduation Rates Indicate Kansas Students Are Not Receiving a “Suitable Education.”

Graduation rates are yet another measure of whether Kansas students are receiving a “suitable education.” R.Vol.23, p.1074 (Tallman Tr.Test. 1074:8-17 (discussing both AYP standards and graduation rates as a performance measure under Kansas’ QPA)); R.Vol.116, p.15892-93 (Tr.Ex.422, at 23:4-25:4 (stating graduation rates are measured to determine a school’s accreditation status)); R.Vol.24, p.1223 (Baker Tr.Test. 1223:11-25 (discussing graduation rates as “measuring stick” for determining student achievement)); R.Vol.51, p.1826 (Tr.Ex.107, at 138502 (referring to graduation rates as another measure of student achievement)); R.Vol.42, p.809 (Tr.Ex.54, at 002857 (stating graduation requirements are a part of the QPA)). “Graduation rates are a

fundamental indicator of whether or not the nation's public school system is doing what it intended to do: enroll, engage and educate youth to be productive members of society.” R.Vol.45, pp.1178-79 (Tr.Ex.63). And the graduation rates of Kansas indicate that its students are not receiving a “suitable education.” Hutchinson Superintendent Dr. Kiblinger summarized the importance of graduating from high school at trial:

Well, as I said, we've got to have students who are ready for college and career when they exit high school. There really are not any kinds of jobs available for a student without a high school diploma, when he or she exits high school, that will pay any kind of a living wage. So you know, when we have one out of five kids, basically, who is not graduating with a high school diploma, that's completely unacceptable. I mean, the long term costs to society make me shudder when I think about them . . . we have failed those kids.

R.Vol.32, pp.3154-55 (Kiblinger Tr.Test. 3154:24-3155:10).

Between 2010 and 2011, graduation rates significantly declined, partially due to a new formula used for calculating rates. R.Vol.51, pp.1827-28, 1847 (Tr.Ex.107, at 138503-04, 138523). However, the new formula is a better indicator of the actual rate. R.Vol.14, pp.1877-78, 1886 (*Gannon* Decision, 158-59, 167 (adopting ¶432 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1707 (Plaintiffs' FOF/COL ¶432); R.Vol.45, pp.1178-79 (Tr.Ex.63). In 2011, there were a significant number of Kansas students who did not graduate in either 4 years (19.3%) or 5 years (24.8%). R.Vol.14, pp.1877-78, 1886-87 (*Gannon* Decision, 158-59, 167-68 (adopting ¶433 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1707-08 (Plaintiffs' FOF/COL ¶433); R.Vol.49, pp.1577-1695 (Tr.Ex.101). In Kansas City, 18% of the students overall did not graduate within 5 years. R.Vol.14, pp.1877-78, 1886-87 (*Gannon* Decision, 158-59, 167-68 (adopting ¶433 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp. 1707-08 (Plaintiffs' FOF/COL ¶433); R.Vol.20, pp.227-28 (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. R.Vol.14, pp.1877-78, 1886-87 (*Gannon* Decision, 158-59, 167-68 (adopting ¶433 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1707-08 (Plaintiffs' FOF/COL ¶433); R.Vol.59, pp.2798-2804 (Tr.Ex.135).

“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 [exist] . . . these same student sub-groups experience graduation rates five to ten percent lower than the state average.” R.Vol.14, pp.1877-78, 1887 (*Gannon* Decision, 158-59, 168 (adopting ¶435 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1708 (Plaintiffs' FOF/COL ¶435); R.Vol.59, p.2755 (Tr.Ex.132 at 002762). These rates prompted the Kansas Association of School Boards to conclude: “[t]oo many students still drop-out of school, or graduate without all the skills required for college, careers and citizenship.” R.Vol.68, pp.3761-62 (Tr.Ex.193); R.Vol.14, pp.1877-78, 1887 (*Gannon* Decision, 158-59, 168 (adopting ¶434 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1708 (Plaintiffs' FOF/COL ¶434).

There is a 37% gap between the percentage of white students graduating in Kansas (78%) and the number of Hispanic students (41%). R.Vol.14, pp.1877-78, 1887 (*Gannon* Decision, 158-59, 168 (adopting ¶436 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1708 (Plaintiffs' FOF/COL ¶436); R.Vol.45, pp.1178-79 (Tr.Ex.63). Recent data shows that only two-thirds of the Hispanic students enrolled in Dodge City actually graduate. R.Vol.14, pp.1877-78, 1886-87 (*Gannon* Decision, 158-59, 168 (adopting

¶437 of Plaintiffs' FOF/COL as true)); R.Vol.83, p.5865 (Tr.Ex.270, at 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. R.Vol.14, pp.1877-78, 1887 (*Gannon* Decision, 158-59, 168 (adopting ¶437 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1708 (Plaintiffs' FOF/COL ¶437); R.Vol.26, pp.1746-47 (*Ortiz-Smith* Tr.Test. 1746:15-1747:19).

4. College Remediation Rates Indicate Kansas Students Are Not Receiving a "Suitable Education"

Remediation rates are one more measure of whether Kansas students are receiving a "suitable education." Remedial courses (sometimes referred to as "developmental courses") are available to Kansas students who will have difficulty with college-course material. R.Vol.25, p.1576 (*Tompkins* Tr.Test. 1576:2-10). Remediation rates are an effective measure of whether students received necessary skills in high-school and are entering college prepared. R.Vol.63, p.3141 (Tr.Ex.150, 000059 ("the vast majority of students who take remedial courses in college do so to gain the skills and knowledge they should have gotten in high school and which are necessary for them to succeed in "regular" college classes"))).

A staggering 82% of students who take three or more remedial courses do not complete their postsecondary education. R.Vol.81, p.5664 (Tr.Ex.251, at 142845). Fifty-five percent of students who take one remedial course do not. *Id.* Students who enroll in a remedial reading course are 41% more likely to drop out of college. R.Vol.63, p.3142 (Tr.Ex.150, 000060). The more remedial courses a student must take at the postsecondary level, the less the chances that student will complete a degree. R.Vol.62, p.3135 (Tr.Ex.149, 000180).

Fourteen percent of the students who attend Kansas universities are in remedial courses. R.Vol.25, p.1576 (Tompkins Tr.Test. 1576:19-22). That number is higher for community college students, of which 18.7% take remedial courses. R.Vol.81, p.5664 (Tr.Ex.251, at 142845). These numbers indicate that Kansas students are not receiving a suitable education in high school.

5. Kansas Students Graduating from High School Who Are Not College And/Or Career-Ready Are Not Receiving A Suitable Education

The State has “a responsibility to [its] students to ensure they leave high school prepared for success in both college and career.” R.Vol.58, p.2675 (Tr.Ex.129, at 146206); Neueswander Tr.Test. 2166:25-2167:8; R.Vol.56, p.2462 (Tr.Ex.121, 000006 (in which Governor Brownback, then U.S. Senator, states, “Our high school graduates need to be ready to go to college, technical schools – or have the skills necessary to go to work.”)). This is consistent with the KSBE’s stated goal to “[e]nsure that all students meet or exceed high academic standards and are prepared for their next steps (e.g. the world of work and/or post-secondary education)” and the Kansas State Department of Education’s statement that, “[a]ll students must be assured that upon graduating from Kansas high schools, they possess the knowledge and skills that afford them access to any succeeding level of education, work, or other opportunity after high school.” R.Vol.81, p.5654 (Tr.Ex.251 at 142835); R.Vol.42, p.809 (Tr.Ex.54, at 002857). And, “[t]he mission of the Kansas State Board of Education is to prepare Kansas students for lifelong success through rigorous academic instruction, 21st century career training, and character development according to each student’s gifts and talents.” R.Vol.56, p.2676 (Tr.Ex.129, at 146207); R.Vol.59, p.2821 (Tr.Ex.136, at 141213 (“We need all our students to have the skills, knowledge and expertise for the 21st century.”)).

Preparation for a career often means preparation for college. R.Vol.41, p.752 (Tr.Ex.46, at 141440 (stating “[a] high school diploma is not sufficient to compete in the current or future workforce”)). A high school diploma is simply not sufficient to compete in the current or future workforce. *Id.*; R.Vol.28, pp.2164-65 (Neuenswander Tr.Test. 2164:12-2165:6 (stating “the high school diploma does not carry the value that it used to”)). Even the State has acknowledged that “[i]ncreasing the number of successful higher education graduates is critical to our state’s future.” R.Vol.63, pp.3176-77 (Tr.Ex.153).

The insufficiency of the high school diploma is especially true of 21st century career training, which usually requires some amount of postsecondary education. R.Vol.25, pp.1582-83 (Tompkins Tr.Test. 1582:23-1583:5 (testifying that, for a growing number of adults in Kansas, a college education and/or postsecondary education is essential in the 21st century)); R.Vol.25, pp.1580-81 (Tompkins Tr.Test. 1580:3-1581:3 (explaining the importance of post-secondary education in the 21st century)). This is largely due to changing job requirements in the last fifty years. *See e.g.* R.Vol.62, p.3115 (Tr.Ex.149, 000160 (graphically illustrating changing job requirements between 1955 and 2010; showing that, in 2010, 68% of jobs are “skilled”)); R.Vol.56, p.2462 (Tr.Ex.121, 000006 (“We also need to increase the percentage of high school graduates who are college or career ready. All of us know that the world is changing and high school graduates today not only need their degree, but also need skills to succeed in the global marketplace.”)). Occupations requiring postsecondary education are expected to account for nearly half of all new jobs from 2008 to 2018. R.Vol.149, p.3121 (Tr.Ex.149, 000166). It is estimated that 64% of all jobs in Kansas will require some postsecondary

training beyond high school in 2018. R.Vol.65, p.3366 (Tr.Ex.170, 000067). Currently, only 42% of Kansans have an associate or bachelor degree. R.Vol.64, p.3279 (Tr.Ex.165, 000004).

The State has adopted college and career readiness as a standard of whether it is providing its students with a “suitable education.” R.Vol.41, p.707 (Tr.Ex.39 (legislature has established that a suitable education in Kansas must be designed to, among other things, enable students to choose and pursue work intelligently and to enable students to compete favorably in academics and the job market pursuant to K.S.A. 72-1127)); R.Vol.19, p.162 (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)); R.Vol.59, p.2821 (Tr.Ex.136, at 141213); R.Vol.28, pp.2144-45 (Neuenswander Tr.Test. 2144:14-2145:12 (K.S.A. 72-1127 requires schools have a curriculum that allows students to be able to get into college or to pursue a career)); R.Vol.42, pp.773-96 (Tr.Ex.52 (college and career ready students is key priority of the Kansas Education Committee)); R.Vol.19, pp.162-63 (Lane Tr.Test. 162:24-163:8 (Kansas Education Committee “absolutely” considered college and career readiness as a standard of whether students are receiving a “suitable education”)); R.Vol.30, pp.2500-01 (Allison Tr.Test. 2500:24-2501:4 (school districts also must consider “what they’re supposed to have from a knowledge standpoint, that they are career or college ready”)); R.Vol.32, pp.3154-55 (Kiblinger Tr.Test. 3154:24-3155:10 (“[W]e’ve got to have students who are ready for college and career when they exit high school.”)). An education in Kansas cannot be suitable if it fails to prepare students for college and career.

Additionally, an education in Kansas cannot be suitable if it fails to prepare students for college and career because “outputs are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the legislature.” R.Vol.35, p.115 (Tr.Ex.1, 000229 (citing language from *Montoy IV*, 279 Kan. at 843 (emphasis added))). College and career readiness is clearly an output that must be considered to provide students with a “constitutionally adequate education.” See e.g., R.Vol.30, p.2651 (Allison Tr.Test. 2651:6-15 (listing various educational outputs, including college and career readiness)); R.Vol.28, pp.2170-71 (Neuenswander Tr.Test. 2170:16-2171:10 (whether students can enter college or a career is one of the outputs currently considered by the State)); R.Vol.24, pp.1221-22 (Baker Tr.Test. 1221:6-1222:8); R.Vol.24, p.1223 (Baker Tr.Test. 1223:6-10).

Currently, all Kansas students are not receiving a suitable education. All students do not graduate ready for college and career. R.Vol.25, pp.1575-76 (Tompkins Tr.Test. 1575:23-1576:1 (stating that some Kansas students are not prepared to attend Regents universities)); R.Vol.26, pp.1857-58 (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.”)); R.Vol.26, pp.1700-01 (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)); R.Vol.26, p.1753 (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)); R.Vol.14, pp.1894-95 (*Gannon* Decision, 175-76 (adopting ¶451 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1711-12 (Plaintiffs' FOF/COL ¶451). For instance, in Kansas City, only 34% of students attend college and less than 11% graduate from college. R.Vol.19, pp.159-60 (Lane Tr.Test. 159:12-160:10); R.Vol.14, p.1895 (*Gannon* Decision, 176 (adopting ¶451 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1711-12 (Plaintiffs' FOF/COL ¶451).

The State is not failing to meet its constitutional obligation by just one or two students, or even five percent of students. R.Vol.14, p.1895 (*Gannon* Decision, 176 (adopting ¶453 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1712 (Plaintiffs' FOF/COL ¶453). The State is failing to meet its constitutional obligation with regard to a significant number of Kansas students. R.Vol.116, pp.15971-73 (Tr.Ex.422, at 102:8-104:2 (testifying that thousands of students in Kansas are not meeting standards on the state assessments)); R.Vol.14, p.1895 (*Gannon* Decision, 176 (adopting ¶453 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1712 (Plaintiffs' FOF/COL ¶453). For instance, a significant number of Kansas students (12.2%) scored below proficiency in reading in 2010-11. R.Vol.50, pp.1740. In math, 14.6% scored below proficient in 2010-11. R.Vol.50, pp.1763; R.Vol.116, pp.15971-73; R.Vol.14, p.1895; R.Vol.13, p.1712. Almost one-third of African-American students in the State scored below proficient on math assessments in 2010-11. R.Vol.50, pp.1773; R.Vol.14, p.1895; R.Vol.13, p.1712. Almost one-fifth of all 11th grade students scored below proficient in 2010-11 on math assessments. R.Vol.50, p.1788; R.Vol.14, p.1895; R.Vol.13, p.1712. In 2011, more than one-fifth of Kansas students did not graduate in either 4 years or 5 years. R.Vol.49, pp.1577; R.Vol.14, p.1895; R.Vol.13, p.1712.

A significant number of Kansas high school graduates are not ready for college-level coursework as measured by ACT Benchmarks. R.Vol.61, p.3028 (Tr.Ex.145, 000028). Only 26% of Kansas high school graduates are college-ready in English, Math, Reading, and Science. *Id.*; R.Vol.25, pp.1575-76 (Tompkins Tr.Test. 1575:23-1576:1 (some Kansas students not prepared to attend Regents universities)). In Kansas City, only 34% of students attend college and less than 11% graduate from college. R.Vol.19, pp.159-60 (Lane Tr.Test. 159:12-160:10). Employers estimate that almost half (45%) of high school graduates lack the skills necessary to advance in careers. R.Vol.81, p.5664 (Tr.Ex.251, at 142845).

6. Kansas' Failure to Comply with the Requirements of K.S.A. 72-6439 Indicates Kansas Students Are Not Receiving a "Suitable Education"

The Kansas Supreme Court determined that, through K.S.A. 72-6439, "the legislature has imposed criteria for determining whether it has made suitable provision for the finance of education." R.Vol.35, p.104 (Tr.Ex.1, 000207 (citing *Montoy II*, at 773)). A "suitable education" must achieve an "improvement in performance" that reflects high academic standards. *Id.*; R.Vol.42, p.755 (Tr.Ex.47). The current standards in Kansas, under QPA, do not reflect "high academic standards." R.Vol.42, p.856 (Tr.Ex.57); R.Vol.43, pp.857-1043 (Tr.Ex.58). Kansas English/Language Arts standards are "mediocre" and received a 'C.' R.Vol.43, p.925 (Tr.Ex.58, at 002114). Kansas Math standards received an 'F' and were characterized as "among the worst in the country." *Id.* at R.Vol. 43, p.926 (Tr.Ex.58, at 2117). Moreover, Kansas standards are low compared to other states. R.Vol.48, pp.1452-55 (Tr.Ex.86, 000028-31).

Moreover, students are not achieving "improvement in performance." Rates of improvement on state assessments have significantly decreased. From 2000 to 2005,

Kansas students “showed high rates of improvement” on math and reading assessments. R.Vol.115, p.15614 (Tr.Ex.1300, at 87). In 2006, there was a “sharp decline” in math assessment scores, which the State attributes to the introduction of new assessments in that year. *Id.* However, from 2008 forward, the rate of improvement fell from 37 points per year (if 2006 data is excluded) to only 13 points per year. *Id.* Similarly, the rates of improvement on reading assessments decreased between 2007 and 2011. R.Vol.115, pp.15613-14 (Tr.Ex.1300, at 86-87). In 2010, improvement stopped on reading assessments, and declined on math assessments. *Id.* While the percentages of students who meet standards may have improved over time, that growth has significantly slowed and is actually declining.

Between 2010-11 and 2011-12, the percent of all students meeting AYP on Kansas reading assessments decreased. R.Vol.105, pp.8307-12 (Tr.Ex.415). It also decreased for the following subgroups: free/reduced lunch, Hispanics, ELL students, and African-Americans. *Id.* Comparatively, the number of students meeting AYP has slightly increased each year since 2004-05. *Id.* However, between 2010-11 and 2011-12, the percent of all students meeting AYP on Kansas math assessments increased by less than 1%. R.Vol.105, pp.8301-06 (Tr.Ex.414). Comparatively, between 2005-06 and 2006-07 (when the school districts were able to put to use increased funds pursuant to *Montoy*), the percent of all students meeting AYP increased by 5.4%. *Id.*

7. It is Highly Unlikely Kansas Will Meet New Standards Adopted by NCLB Waiver and Will Not Be Able to Provide Its Students With a Suitable Education

Kansas is already struggling to meet the standards set forth by the State, but now those standards have increased. *Supra* Statement of the Facts §I. The State adopted a

new Assessment Performance Index (“API”) as part of the NCLB Waiver. R.Vol.115, pp.15609-10 (Tr.Ex.1300, at 82-83); R.Vol.116, pp.15906-07 (Tr.Ex.422, at 37:17-38:8). The API will replace AYP. *Id.* The purpose of the API is to focus on all students and not “just the percent of students at proficient or above.” R.Vol.115, p.15609 (Tr.Ex.1300, at 82). Using current information regarding student performance on assessments, R.Vol.50, p.1788 (Tr.Ex.106), Plaintiffs mapped out the performance of subgroups using the API. R.Vol.13, p.1711 (at ¶449 of Plaintiffs’ FOF/COL) (copied below). The results show that all subgroups except for white students will be below standard according to the API. *Id.*

2011 State Assessment Grade 11 math (Plaintiffs's Exhibit 106) using new Assessment Performance Index													
		Example per KSDE			All students			White students			Free and reduced students		
		Number of students	Points per student	Total points	Number of students	Points per student	Total points	Number of students	Points per student	Total points	Number of students	Points per student	Total points
Exemplary	Meet:	15.0	1000.0	15000.0	18.9	1000.0	18900.0	22.4	1000.0	22400.0	8.8	1000.0	8800.0
Exceeds standard	standard or above	22.0	750.0	16500.0	26.1	750.0	19575.0	28.5	750.0	21375.0	19.6	750.0	14700.0
Meets standard		20.0	500.0	10000.0	36.5	500.0	18250.0	35.2	500.0	17600.0	41.5	500.0	20750.0
Approaching standard	Below standard	7.0	250.0	1750.0	10.1	250.0	2525.0	8.1	250.0	2025.0	15.4	250.0	3850.0
Academic warning		2.0	0.0	0.0	7.3	0.0	0.0	4.9	0.0	0.0	13.1	0.0	0.0
Total points for district				43250.0			59250.0			63400.0			48100.0
Divided by total students		66.0		66.0	98.9		98.9	99.1		99.1	98.4		98.4
API (assessment performance index)				66.3			69.1			63.8			48.3
		Hispanic			English language learners			African American students					
		Number of students	Points per student	Total points	Number of students	Points per student	Total points	Number of students	Points per student	Total points			
Exemplary	Meet:	7.6	1000.0	7600.0	4.8	1000.0	4800.0	4.8	1000.0	4800.0			
Exceeds standard	standard or above	19.8	750.0	14850.0	14.7	750.0	11025.0	14.0	750.0	10500.0			
Meets standard		42.4	500.0	21200.0	39.9	500.0	19950.0	38.5	500.0	19250.0			
Approaching standard	Below standard	15.7	250.0	3925.0	19.4	250.0	4850.0	18.7	250.0	4675.0			
Academic warning		13.2	0.0	0.0	19.2	0.0	0.0	21.6	0.0	0.0			
Total points for district				47575.0			40625.0			39225.0			
Divided by total students		98.7		98.7	98.0		98.0	97.6		97.6			
API (assessment performance index)				48.0			41.5			40.9			

K. Subpar Achievement Can Be Attributed to Underfunding

Article 6 of the Kansas Constitution requires the Kansas Legislature to consider “whether students are provided a suitable education” in “crafting a suitable formula for financing public education.” R.Vol.35, pp.105, 118 (Tr.Ex.1, 000208, 234 (excerpts

from *Montoy II*, at 775 and *Montoy V*, 282 Kan. at 10)). Moreover, overwhelming evidence links student performance to increased funding.

First, the *Gannon* Panel made a factual finding that student performance is linked to funding and rejected the State's arguments otherwise. R.Vol.14, pp.1869-88 (*Gannon* Decision, 150-69). In so finding, the *Gannon* Panel stated, "Here, we disagree substantially with the above suggested findings advanced by the Defendant We find the truth of the matter is contrary to the State's assertions." R.Vol.14, p.1877 (*Gannon* Decision, 158).

Second, the most recent cost study conducted, provided by the State itself, found "a 1% increase in district performance outcomes was associated with a .83% increase in spending – almost a one-to-one relationship." R.Vol.14, pp.1646-47 (*Gannon* Decision, 61-62 (adopting ¶199 of Plaintiffs' FOF/COL as true)); R.Vol.13, pp.1637-38 (Plaintiffs' FOF/COL ¶199).

Third, actual experiences of Kansas schools demonstrate the importance of funding in increasing student performance. Kansas City's Emerson Elementary presents the most compelling evidence of the link between student performance and increased funding. Emerson is "a remarkable story." R.Vol.20, p.218 (Lane Tr.Test. 218:6-7, 218:15-16). Three years ago, Emerson Elementary was declared the lowest performing elementary school in Kansas. R.Vol.20, p.217 (Lane Tr.Test. 217:2-10). The demographic make-up consists of 50% African-American students and 48% Hispanic students; there are very few Caucasian students. R.Vol.20, p.217 (Lane Tr.Test. 217:19-22). After an infusion of more than \$4 million and the implementation of extreme, costly interventions, the school completely turned around. R.Vol.20, pp.216-22 (Lane Tr.Test.

216:21-222:24); R.Vol.20, p.408 (Mather Tr.Test. 408:12-24). Now, more than 85% of Emerson's students are meeting or exceeding expectations on assessments. R.Vol.20, p.218 (Lane Tr.Test. 218:2-7). Superintendent Lane testified "If we had the resources to do that in all of our school[s], we are confident that we could close this gap and improve our achievement." R.Vol.20, p.218 (Lane Tr. Test. 218:2-7); R.Vol.20, p.284 (Lane Tr.Test. 284:9-21); R.Vol.20, pp.216-22 (Lane Tr.Test. 216:21-222:24).

Students who are currently not proficient need additional resources to become proficient (and thus receive a "suitable education"). R.Vol.19, pp.198-99 (Lane Tr.Test. 198:21-199:11). These students need additional tutoring, mentoring, and other targeted interventions. *Id.* But, targeted interventions cost money. R.Vol.20, p.327 (Lane Tr.Test. 327:1-7); R.Vol.20, p.232 (Mather Tr.Test. 449:6-25); R.Vol.20, pp.252-53 (Lane Tr.Test. 252:21-253:10). And it is these targeted interventions that school districts have had to eliminate as a result of funding cuts. R.Vol.13, pp.1714-15 (Plaintiffs' FOF/COL ¶458 (citing R.Vol.20, pp.254-62; R.Vol.21, p.600, 639; R.Vol.22, pp.784, 788-89, 795, 907-09, 962; R.Vol.26, pp.1714-15, 1751-52)). Because of cuts in these areas, student achievement is declining.

Moreover, subpar achievement correlates to the decrease in funding. Between 2010-11 and 2011-12, the percent of all students meeting AYP increased by .less than 1%. R.Vol.105, pp.8301-06 (Tr.Ex.414). Between 2005-06 and 2006-07 (when the school districts were able to put to use increased funds pursuant to *Montoy*), the percent of all students meeting AYP increased by 5.4%. *Id.* Since the cuts began in 2009-10, the increases in the percentage of students meeting AYP year-to-year has dramatically decreased. *Id.* This data has caused educators to conclude that there is a correlation

between subpar achievement and the decrease in funding. R.Vol.86, pp.6102-27 (Tr.Ex.291 (“We are working on the momentum that we have created. We cannot continue to make cuts and expect this growth.”) (emphasis added)). R.Vol.81, p.5691 (Tr.Ex.251, at 142872 (“What sits in our classrooms today, is the future of tomorrow. There is no tomorrow if dollars are cut and school doors are closed.”) (emphasis added)); *see also* R.Vol.87, p.6246 (Tr.Ex.294, at 141291 (stating “[d]ollars spent on education today translate into investment and returns on our investments for our future”)). R.Vol.45, p.1212 (Tr.Ex.65 at 145591 (stating, for example, “[a]t this time with budget difficulties, increasing the requirements would only put some schools in a more difficult position”)).

Finally, the State itself has indicated that there is a correlation between subpar achievement and the decrease in funding. Rates of improvement on state assessments have significantly decreased and, in its application for the NCLB Waiver, the State attributed the decreases to “the staff and budget cuts taking place in Kansas in 2010.” R.Vol.115, p.15614 (Tr.Ex.1300, at 87). Even the State’s leading expert witness, Dr. Eric Hanushek, reluctantly admitted: “The money [spent on education] is obviously important at some level. You have to have funds to have teachers in schools.” R.Vol.14, p.1781 (*Gannon* Decision, 62 (adopting ¶200 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1638 (Plaintiffs’ FOF/COL ¶200).

L. The State Has Failed to Ascertain the Actual Costs of Educating Kansas School Students

The Kansas school finance system has never been funded based on the known or knowable cost of providing a constitutionally suitable education. R.Vol.65, pp.3424-53 (Tr.Ex.173); R.Vol.65, pp.3454-61 (Tr.Ex.174); R.Vol.22, pp.777-78 (Winn Tr.Test.

777:5-778:8); R.Vol.30, pp.2445-47 (Hensley Tr.Test. 2445:25-2446:18, 2447:4-20). When the SDFQPA was adopted in 1992, there was no consideration given to what it cost school districts to provide students with a suitable education. *Id.* Instead of considering the actual costs of providing a suitable education to students, the State has consistently funded public schools based on political compromise and the amounts of funds perceived to be available for appropriation. *Id.*; R.Vol.38, p.411 (Tr.Ex.28, 000023 (stating the amount of school finance is determined annually and usually based on “what the Legislature decided it could afford”)).

Even the State has acknowledged that, in funding public education in Kansas, the only determining factor in how much money the school districts receive is how much the legislature determines to appropriate to the relevant funds. R.Vol.9, p.1105 (State Opening FOF ¶77 (BSAPP is calculated by working backwards from the General Fund appropriation and assuming a full time enrollment)); R.Vol.9, p.1106 (State Opening FOF ¶79 (whether LOB equalization is fully equalized or prorated is determined based on how much money is appropriated)); R.Vol.22, pp.755, 777-78 (Winn Tr.Test. 755:22-25, 777:5-778:8 (Legislature made its school funding decisions by determining what amount of money they were going to spend on schools and “that was it”)).

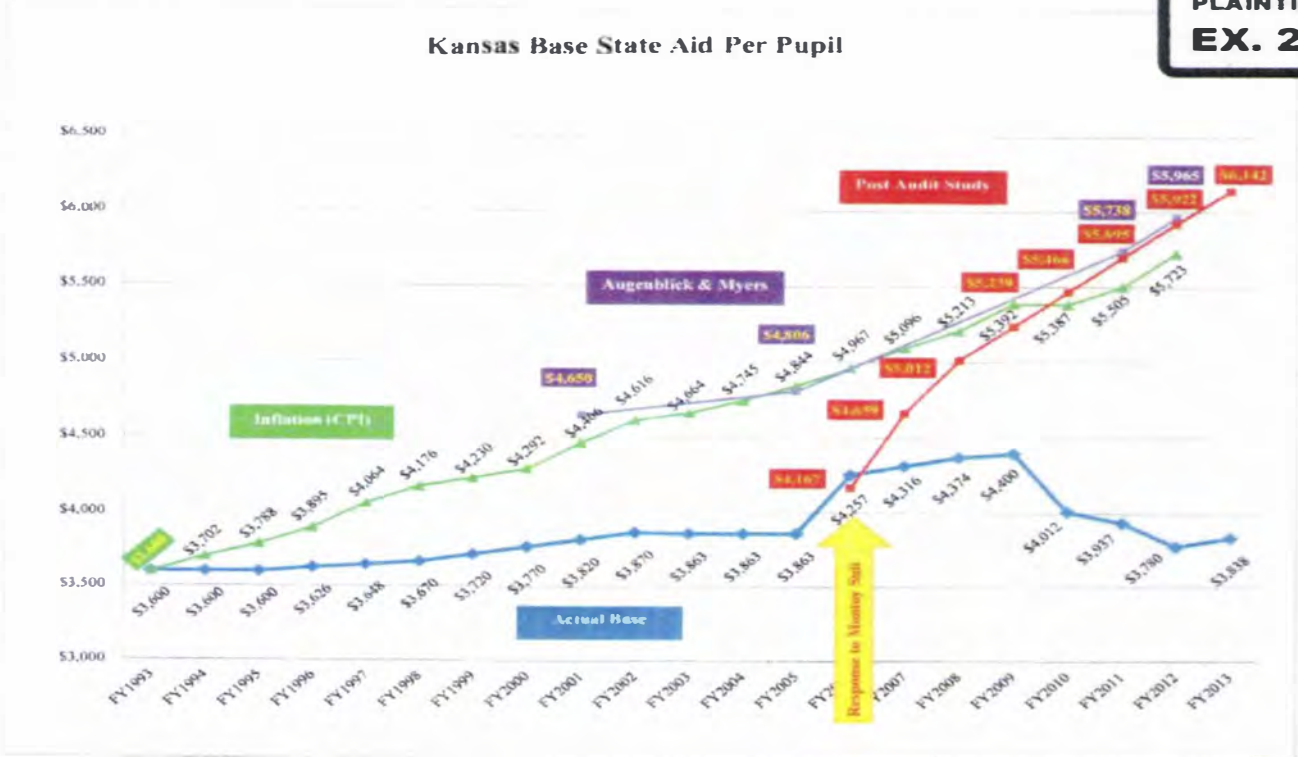
Aside from study updates requested by Plaintiffs, there is no current study evaluating the actual cost of delivering a “suitable education” to Kansas students. R.Vol.14, p.1775 (*Gannon* Decision, 56 (adopting ¶185 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1631-32 (Plaintiffs’ FOF/COL ¶185); R.Vol.27, p.2112 (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. R.Vol.22, pp.988-89 (Tallman Tr.Test. 988:22-989:16); R.Vol.23, pp.1060-61 (Tallman Tr.Test. 1060:23-1061:6); R.Vol.25, pp.1631-32 (Myers Tr.Test. 1631:4-1632:7 (the State has not asked him to update the cost study previously performed)); R.Vol.14, p.1895 (*Gannon* Decision, 56 (adopting ¶185 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1631-32 (Plaintiffs’ FOF/COL ¶185).

When the Legislature began making its recent cuts to the base, they did not consider costs. R.Vol.30, pp.2467-70 (Hensley Tr.Test. 2467:7-2468:14, 2469:15-2470:11); R.Vol.22, pp.755, 777-78 (Winn Tr.Test. 755:22-25; 777:5-778:8). They simply considered what they needed to do to reduce funding to education. *Id.* There is no evidence the State made the cuts because the cost of educating Kansas students had decreased; to the contrary, since *Montoy*, the costs of educating Kansas students has only increased. R.Vol.14, pp.1792-93 (*Gannon* Decision, 73-74 (adopting ¶233 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1652 (Plaintiffs’ FOF/COL ¶233 (citing R.Vol.19, p.180; R.Vol.20, pp.253-55, 263; R.Vol.21, p.561; R.Vol.22, p.794; R.Vol.23, pp.1057-58, 1067-68; R.Vol.25, p.1551; R.Vol.27, pp.2051-52; R.Vol.30, p.2462; R.Vol.31, pp.2800, 2857-58, 2899-2900; R.Vol.32, pp.2937-38, 2997-98, 3021; R.Vol.42, p.762; R.Vol.50, p.1787; R.Vol.79, p.5389)). In fact, the *Gannon* Panel concluded, “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 result in compliance with the requirements of Article 6. R.Vol.14, p.1877 (*Gannon* Decision, 158).

Further illustrating that the State was not making cuts because the cost of educating Kansas students had decreased: before and during the time the cuts were made, the KSBE, 2010 Commission, A&M Study, and LPA study recommended the base be increased or remain stable. R.Vol.14, p.1837 (*Gannon* Decision, 118 (“Educators, state and local education officials, and even the Legislature’s own established commission recommended to the contrary of what was done.”)); R.Vol.14, p.1779 (*Gannon* Decision, 60 (adopting ¶191 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1633-34 (Plaintiffs’ FOF/COL ¶189 (citing R.Vol.66, pp.3541-99; R.Vol.68, p.3712, 3723, 3727-32, 3735, 3738-40, 3752, 3743, 3764-3836; R.Vol.69, pp.3898-99; R.Vol.71, p.4206; R.Vol.72, pp.4254-60; R.Vol.78, pp.5364-88)).

The recommendations by these entities are represented graphically in Trial Exhibit 236 (copied below). R.Vol.78, pp.5364-5388; *see also* R.Vol.14, p.1778 (*Gannon* Decision, 59 (adopting ¶190 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp. 1634-35 (Plaintiffs’ FOF/COL ¶190). Additionally represented is an indication of how the base would increase over time based on inflation using the Consumer Price Index (“CPI”). *Id.* Kansas law required that school districts receive an increase in state aid for the 2009-10 school year based on CPI. R.Vol.35, p.61 (Tr.Ex.1, 000121 (containing text of K.S.A. 72-64c04, which did not expire until June 30, 2010)); R.Vol.99, pp.7384-86 (Tr.Ex.380 (showing that the CPI increase should have increased the base to \$4,444 for FY09, not reduced it to \$4,400)).



The State ignored each of the recommendations and information provided to it, including the recommendations of its own commission, the 2010 Commission, which was established by the Legislature in 2005 to monitor, evaluate, and make recommendations regarding various aspects of the SDFQPA and QPA. R.Vol.36, p.233-34 (Tr.Ex. 8); R.Vol.14, p.1779 (*Gannon* Decision, 60 (adopting ¶191 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1635 (Plaintiffs’ FOF/COL ¶191); R.Vol.14, p.1837 (*Gannon* Decision, 118 (“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 . . . wholly disregarded the considerations required to demonstrate a compliance with Article 6, §6(b).”). According to Senator Hensley, none of the recommendations of the A&M study, the LPA study, the KSBE, or the 2010 Commission were taken into consideration when making cuts to the base.

R.Vol.30, pp.2467-70 (Hensley Tr.Test. 2467:7-2468:14, 2469:15-2470:11); R.Vol.30, pp.2458-60, 2467-68 (Hensley Tr.Test. 2458:16-2460:24, 2467:24-2468:14 (“[M]y opinion is that we [the Legislature] conduct studies and then routinely ignore them.”)); R.Vol.22, pp.774-75, 778 (Winn Tr.Test. 774:14-775:2, 778:5-18); R.Vol.33, pp.3262, 3268 (Chronister Tr.Test. 3262:20-24, 3268:6-10 (stating the Legislature ignored various reports provided by the 2010 Commission)).

In determining how much money to appropriate for supplemental state, 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 a suitable education to Kansas school students. R.Vol.65, pp.3424-53 (Tr.Ex.173); R.Vol.65, pp.3454-61 (Tr.Ex.174); R.Vol.22, pp.777-78 (Winn Tr.Test. 777:5-778:8); R.Vol.30, pp.2445-47 (Hensley Tr.Test. 2445:25-2446:18, 2447:4-20); R.Vol.14, pp.1779-80 (*Gannon* Decision, 60-61 (adopting ¶194 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1636 (Plaintiffs’ FOF/COL ¶194). The only conclusion that can be reached from the evidence – and the conclusion that the *Gannon* Panel did reach – is that the State did not, in funding Kansas public education, comply with its constitutional obligation and consider the actual costs of providing a suitable education to Kansas students. R.Vol.14, p.1702 (*Gannon* Decision, 117 (“In truth, and in fact, it appears that the Kansas Legislature . . . wholly disregarded the considerations required to demonstrate a compliance with Article 6, §6(b).”)).

M. Summary of Recent Estimates to Ascertain Costs of Educating Kansas School Students

Cost studies commissioned by the State during the *Montoy* litigation, and updated at the request of Plaintiffs for this litigation, indicate the base should be set significantly

higher than the current statutory base of \$4,492. R.Vol.79, p.5389 (Tr.Ex.237) R.Vol.14, pp.1803-04 (*Gannon* Decision, 84-85).

For instance, in 2001, the State commissioned the Augenblick and Myers (A&M) study “to determine the cost of a suitable education for Kansas children.” R.Vol.14, p.1799 (*Gannon* Decision, 80 (adopting ¶¶261-62 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1659 (Plaintiffs’ FOF/COL ¶¶261-62). The A&M Study concluded that the BSAPP should have been set at \$4,650 for the 2001-02 year. R.Vol.14, p.1800 (*Gannon* Decision, 81 (adopting ¶264 of Plaintiffs’ FOF/COL as true); R.Vol.13, p.1659 (Plaintiffs’ FOF/COL ¶264). Updates of the A&M study indicate that the base should have been **\$5,965 for the 2011-12 year.** R.Vol.14, p.1777 (*Gannon* Decision, 58 (adopting ¶189(c) of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1634 (Plaintiffs’ FOF/COL ¶189(c)).

In 2005, the State commissioned another study, charging the Legislative Post Audit (“LPA”) with conducting “a professional cost study analysis to estimate the costs of providing programs and services required by the law.” R.Vol.14, pp.1799, 1801 (*Gannon* Decision, 80, 82 (adopting ¶¶261, 269 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1659-60 (Plaintiffs’ FOF/COL ¶¶261, 269). The LPA study concluded that the base state aid should be set at \$4,167 for 2005-06 and \$4,659 for 2006-07. R.Vol.14, p.1801 (*Gannon* Decision, 82 (adopting ¶270 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1660 (Plaintiffs’ FOF/COL ¶270). In 2006, the LPA projected costs out to 2013-14 in 2006-07 dollars. R.Vol.14, pp.1777, 1801 (*Gannon* Decision, 58, 82 (adopting ¶¶189(d), 271 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp. 1634, 1661 (Plaintiffs’ FOF/COL

¶¶189(d), 271). The estimates indicated that the base would need to be **\$6,142 in 2012-13; and \$6,365 in 2013-14.** *Id.*

These cost studies, and their updates, show the base should be significantly higher than the current statutory base of \$4,492. R.Vol.14, pp.1803-04 (*Gannon* Decision, 84-85 (adopting ¶277 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1662-63 (Plaintiffs' FOF/COL ¶277); R.Vol.79, p.5389 (Tr.Ex.237). These cost studies are reasonable estimates of the actual cost of providing a suitable education. R.Vol.14, p.1804 (*Gannon* Decision, 85 (adopting ¶278 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1663 (Plaintiffs' FOF/COL ¶278).

ARGUMENTS AND AUTHORITIES

A. This Court Should Retain Jurisdiction Until the State Wholly Complies With its Constitutional Obligations

History shows the State has been unwilling to meet its burden under the Constitution for almost as long as the burden has existed. *Supra* Statement of the Facts §§B, C. And, the State's continual maneuvering to avoid a court determination of inadequate funding has exacerbated funding problems and created a never-ending, unconstitutional status quo: any Constitutional and statutory duties are avoided and the situation continues for each successive generation of Kansas kids. R.Vol.96, p.7090 (Tr.Ex.363, at 000014). Instead, the Legislature merely changes the law without addressing the underlying inadequate funding, and then feigns "good faith compliance" and "mootness" in order to stay one budget year ahead of a court determination of unconstitutionality. *Id.* As Plaintiffs have pointed out:

A distinct pattern has emerged over the past fifty years and almost every school finance case follows it: First, affected individuals and districts challenge the legislature's failures; the court, now called to assess the legislature's actions

(or lack thereof) indicates that the legislation will be overturned; before the court can do so, the legislature adopts new legislation; finally, the courts accept the legislative response as a “good-faith effort to solve constitutional problems” and releases its jurisdiction over the case.

R.Vol.96, p.7090 (Tr.Ex.363, at 000014).

It is important to consider this history in light of recent efforts to adopt new legislation in place of the current school finance system. *See e.g.* R.Vol.81, p.5638-41 (Tr.Ex.250, at 143068-71 (describing Governor Brownback’s Excel in Education Funding Plan, which assumes the current formula is broken and proposes a system overhaul)); R.Vol.94, p.6873 (Tr.Ex.344, 000228 (same)). There is no need for an overhaul of the current school finance system. Aside from the State’s failure to fund the formula, there has been no determination that the current school finance system is unconstitutional. As the *Gannon* Panel explained:

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.

R.Vol.14, pp.1961-62 (*Gannon* Decision, 242-43 (emphasis added)); R.Vol.14, p.1949 (*Gannon* Decision, 230 (stating “the systemic failure lies in the reduction of the BSAPP”)).

If the Legislature is allowed to adopt new legislation in an effort to dodge a finding of unconstitutionality – as Plaintiffs predict it will attempt to do – an all-too-

familiar situation will repeat itself: this Court will be torn between retaining jurisdiction and analyzing the new statute or dismissing the case and allowing a new set of inadequately educated plaintiffs to challenge the new funding plan in the future. R.Vol.96, p.7092 (Tr.Ex.363, 000018).

Additionally, in the past, the State has had no qualms with making representations to the Court in order to seek dismissal of a school funding case and then defaulting on those commitments. R.Vol.14, p.1835 (*Gannon* Decision, 116 (“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.”)); R.Vol.14, p.1836 (*Gannon* Decision, 117 (“In FY2009, the BSAPP was at \$4400, which, due to a cut, was \$33 below the commitment represented to the *Montoy* Court.”)). For these reasons, to finally achieve constitutionality, this Court must retain jurisdiction over the matter until the State fulfills its constitutional obligations.

B. Increasing Base State Aid Per Pupil to \$4,492 Will Not Result in the State’s Compliance With Article 6 of the Kansas Constitution; Additional Funding is Necessary

1. Scope of Appeal and Standard of Review

In the Panel’s Order, the Panel attributed great significance to the State’s failure to consider the actual costs of providing a suitable education to Kansas school children, especially in light of recent directive from the Kansas Supreme Court to do so. The *Gannon* Panel was quite critical of the State’s actions, noting “[s]lashing costs without first determining the best methods to [produce educational value] 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.” R.Vol.14, p.1828 (*Gannon* Decision, 109);

R.Vol.14, pp.1836-37 (*Gannon* Decision, 117-18 (“[W]e 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.”)); R.Vol.14, p.1837 (*Gannon* Decision, 118 (“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 . . . wholly disregarded the considerations required to demonstrate a compliance with Article 6, § 6(b).”)).

Despite the Panel’s clear conclusion that the State failed to consider the actual costs, the *Gannon* Panel inexplicably remedied that failure by ordering the Legislature to set the base at \$4,492. There is no evidence in the record suggesting that a base of \$4,492 will fund the actual costs of providing Kansas schoolchildren with a suitable education; in fact, the *Gannon* Panel acknowledged that the costs were probably higher. R.Vol.14, p.1963 (*Gannon* Decision, 244 (“[W]e 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.”)). With regard to Count One of Plaintiffs’ Petition, Plaintiffs do not seek to disturb the Court’s finding that the current funding levels violate Article 6 of the Kansas Constitution. R.Vol.14, p.1948 (*Gannon* Decision, 229 (“[W]e 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.”)). Rather, Plaintiffs appeal the Panel’s remedy. R.Vol.14, pp.1964-66 (*Gannon* Decision, 245-47).

2. Article 6 of the Kansas Constitution Does Not Solely Assign Responsibility of Kansas Education to the Kansas Legislature

The Kansas Constitution provides that “[t]he legislature shall provide for a state board of education which shall have general supervision of public schools, educational institutions and all the educational interests of the state except educational functions delegated by law to the state board of regents.” R.Vol.35, p.40 (Tr.Ex.1, 000080 (containing text of Article 6 of the Kansas Constitution)). The Court has defined the KSBE’s “general supervision” power to mean “something more than to advise but something less than to control.” *See State ex rel. Miller v. Bd. of Educ.*, 212 Kan. 482, 492 (1973). As part of its duties of “general supervision,” the KSBE has “the power to inspect, to superintend, to evaluate, and to oversee for direction.” *Id.* at 490-91. Clearly, there is a shared responsibility for the educational interests of the State, which most certainly includes determining what constitutes a “suitable education.”

Moreover, the Supreme Court has held that the constitutional powers of the KSBE are “self executing” such that “the legislature could not thwart [this] provision.” *See State ex rel. Miller*, 212 Kan. at 489. The Kansas Constitution and “the statutes of this state” “endow the state board with authority to supervise the public schools and to adopt regulations for that purpose.” *Id.* The KSBE does not rely on legislation to implement its general supervisory powers. And, there are limits to how far the legislature can intrude upon the KSBE’s duties. “Where a constitutional provision is self-executing the legislature may enact legislation to facilitate or assist in its operation, but whatever legislation is adopted must be in harmony with and not in derogation of the Constitution.”

U.S.D. No. 443 v. Kansas State Board of Education, 266 Kan. 75, 96 (1998) (citing *State ex rel. Miller*, 212 Kan. at 488). This Court has made clear the legislature does not have sole power to determine what is a constitutional education under the Kansas Constitution.

The State Board has the responsibility, among other things, to prescribe certain courses, approve educational material for use in those courses, and provide a community service program to be offered at all accredited high schools. R.Vol.41, p.714 (Tr.Ex.45 (granting the school board authority to prescribe courses of study and to approve educational material for use in those courses)); R.Vol.42, p.756 (Tr.Ex.48 (outlining board's responsibility regarding personal financial literacy programs)); R.Vol.42, p.757 (Tr.Ex.49 (requiring that the board provide for a course of instruction in Kansas history and government and for a community service program to be offered to all accredited high schools)). The State itself has determined that all accredited schools in Kansas are required to teach the subjects and areas of instruction adopted by the KSBE and every accredited high school in the State is required to teach the subjects and areas of instruction necessary to meet the graduation requirements adopted by the KSBE; further evidencing that the State has incorporated the Board's regulations regarding accreditation and graduation requirements as part of their own definition of a "suitable education." R.Vol.35, pp.47 (Tr.Ex.1, 000093-94 (citing K.S.A. 72-1127)); R.Vol.19, pp.112-14 (Lane Tr.Test. 112:25-114:9 (stating the State Board of Education also has input in the definition of a "suitable education")); R.Vol.41, p.713 (Tr.Ex.44 (requiring the state board of education to adopt and maintain standards and regulations regarding certain areas of public education, including educational materials, courses of study and curriculum, and accreditation requirements)). An education cannot be "suitable" if it is

not meeting the requirements set forth by the State Board. R.Vol.19, pp.112-14 (Lane Tr.Test. 112:25-114:9 (stating the State Board of Education also has input in the definition of a “suitable education”)).

The Legislature’s most recent actions have not been adopted in harmony with the Constitution; they have been in derogation of the constitutional obligations of Article 6. *See e.g., U.S.D. No. 443*, 266 Kan. at 96. The Legislature has refused to provide funding at levels that allows the KSBE to comply with its constitutional obligations to supervise public schools.

To comply with the Constitution, it is imperative that the actions of all parties “respect [both] the Legislature’s constitutional responsibility to provide for the suitable finance of education for Kansas students [and] the State Board’s constitutional responsibility for the general supervision of schools, which includes accrediting schools, providing for academic standards and the licensure of teachers.” *See Addendum C*, at KSBE002286.² To this end, the Legislature must fund all aspects of a “suitable education,” including those mandated by the KSBE. The State cannot choose to fund only those portions of a “suitable education” that it wants to fund. To do so improperly imposes on the Board’s obligations and the mandates of the Kansas Constitution. *See e.g. Colorado Interstate Gas Co. v. Bd. of Morton Cty. Cmm’rs*, 247 Kan. 654, 659 (1990) (“It is clear that legislation which would defeat or even restrict a self-executing mandate of the constitution is beyond the power of the legislature.”); *see also State ex rel. Miller*, 212 Kan. at 488-489 (stating the Legislature cannot thwart a self-executing provision of the Constitution).

² Addendum C is properly before this Court as legislative material. R.Vol.35, p.120 (Tr.Ex. 1, at 000238 (excerpts from *Montoy V*, 282 Kan. at 20)).

3. State's Constitutional Obligation to Consider Actual Costs of Providing Suitable Education

Article 6 of the Kansas Constitution requires the Legislature to “make suitable provision for the finance of the educational interests of the state.” R.Vol.35, p.40 (Tr.Ex.1, 000080 (containing text of Kansas Constitution, Article 6)). It also requires that the legislature “provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.” *Id.* The *Montoy* cases are “the ‘template’ for demonstrating compliance, even, perhaps, threshold compliance, with the constitutional mandate expressed in Article 6, § 6(b) of the Kansas Constitution.” R.Vol.14, pp.1759-60 (*Gannon* Decision, 40-41). And, the *Montoy* cases clearly require the Kansas Legislature to consider “the actual costs of providing a constitutionally suitable education.”

In *Montoy*, the Supreme Court held that in the context of Article 6 of the Kansas Constitution, “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.” R.Vol.35, p.118 (Tr.Ex.1, 000234 (excerpts from *Montoy V*, 282 Kan. at 10 (citing *Montoy II*, 278 Kan. at 775))); *see also* R.Vol.14, p.1770 (*Gannon* Decision, 51 (“Costs, along with the equity of distributing funds to the need evidenced, are a ‘critical factor’ to be considered.”)); R.Vol.14, p.1767 (*Gannon* Decision, 48 (“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.”)). The Supreme Court determined that the State must not only consider

the actual costs of education, but must base educational funding formulas on considerations of such actual costs. R.Vol.14, p.118 (Tr.Ex.1, 000234 (excerpts from *Montoy V*, 282 Kan. at 12 (stating H.B. 2247 “failed to provide constitutionally suitable funding for public education because the changes were not based on considerations of the actual costs of providing a constitutionally adequate education and exacerbated existing funding inequities”))). The actual costs must be considered in each aspect of the formula, and not just the formula as a whole. R.Vol.35, p.118 (Tr.Ex.1, 000234 (excerpts from *Montoy V*, 282 Kan. at 11 (citing *Montoy II*, 278 Kan. at 775 (“The parties were directed to address whether the actual costs of providing a suitable education were directed to address whether the actual costs of providing a suitable education were considered with respect to each component of the formula, as well as the formula as a whole. . . .”)))).

The *Gannon* Panel echoed the *Montoy* Court, stating:

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 of 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.

R.Vol.14, p.1636 (*Gannon* Decision, 51). These requirements, espoused in *Montoy*, are “the ‘brightlines’ necessary to reflect . . . presumptive legislative compliance with Article 6, § 6(b)’s mandate for ‘suitable provision for finance.’” R.Vol.14, pp.1762-63 (*Gannon* Decision, 43-44).

As the *Gannon* Panel noted:

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 that 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.

. . . . 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.

R.Vol.14, p.1771 (*Gannon* Decision, 52). This legal proposition is supported by the facts; there is overwhelming evidence linking student performance to increased funding. *Supra* Statement of the Facts §J.

Despite clear instruction from this Court that the actual costs of providing a constitutionally suitable education must be considered, there was no cost-based budgeting system used to arrive at the current funding levels. *Supra* Statement of the Facts §K; R.Vol.14, p.1836 (*Gannon* Decision, 117 (“[W]e must conclude that the Legislature could not have possibly considered the actual costs of providing an Article 6, § 6(b) suitable education.”)). In fact, the State has commissioned no study of the actual costs of providing a “suitable education” to Kansas students since *Montoy*. *Supra* Statement of the Facts §K; R.Vol.14, p.1641 (*Gannon* Decision, 56 (adopting ¶185 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1631-32 (Plaintiffs’ FOF/COL ¶185). Moreover, the *Gannon* Panel made a factual finding that the evidence showed that there was a need for “increases in funding.” R.Vol.14, p.1936 (*Gannon* Decision, 217 (“[T]hese 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.”)); R.Vol.14, p.1877 (*Gannon* Decision, 158 (“[T]here is simply no reliable evidence advanced by the State that indicates that a *reduction in funds available* to the K-12 school system” would result in compliance with the requirements of Article 6.)); R.Vol.14, p.1962 (*Gannon*

Decision, 243 (“All the underfunding noted flies in the face of overwhelming evidence that costs not only have not abated, but, rather, most probably, increased.”).

And, the Kansas Supreme Court has already determined that a financing formula is “not based upon actual costs to educate children” when it is “based on former spending levels and political compromise.” R.Vol.35, p.104 (Tr.Ex.1, 000207 (citing *Montoy II*, at 774-74)). But, that is exactly what the State admits to doing. *Supra* Statement of the Facts §K. Because the State has determined the funding of public schools based on the amounts available and political compromise, the actions of the Legislature are unconstitutional. R.Vol.35, p.104 (Tr.Ex.1, 000207 (citing *Montoy II*, at 774-74)).

While the *Gannon* Panel chastised the State’s failure to consider the actual costs of providing an education, R.Vol.14, p.1702 (*Gannon* Decision, 117), the *Gannon* Panel inexplicably only ordered the BSAPP be set at \$4,492. R.Vol.14, pp.1964-66 (*Gannon* Decision, 245-47). This is the statutory base pursuant to K.S.A. 72-6410(b). R.Vol.35, p.49 (Tr.Ex.1, 000098 (containing text of K.S.A. 72-6410)). This statute has not been amended since 2008. *Id.* Even if the State could establish the \$4,492 base set for 2013-14 was a cost-based decision at that time, there is no information that it remains an accurate representation of what it currently costs to educate Kansas students and overwhelming evidence to the contrary.

It is well-established that “the cumulative result” of “societal and legislative changes” can result in “a financing formula which does not make suitable provision for finance of public schools, leaving them inadequately funded.” R.Vol.35, p.104 (Tr.Ex.1, 000207 (excerpts from *Montoy II*, at 772-73)). And, there have been significant societal

and legislative changes since *Montoy* that significantly affect the level of funding needed to educate Kansas schoolchildren. *Supra* Statement of the Facts §E.

In appealing the Panel’s Order, Plaintiffs do not seek to perpetuate the current inequities and inadequacies within the current system by “hoping” \$4,492 will cover the actual cost of providing Kansas students with a suitable education. *See e.g.* R.Vol.14, p.1773 (*Gannon* Decision, 54 (“If goals are to be reached their costs need to be known. The consequence of mere denial or guess is far too severe.”)). Allowing the State to only fund to \$4,492 assumes educational funding has been stagnant since that level was set at the end of *Montoy*. But, “[t]he issue of [the suitability of the school finance system] is not stagnant; past history teaches that this issue must be closely monitored.” R.Vol.35, p.102 (Tr.Ex.1, 000203 (excerpts from *Montoy I*, 275 Kan. at 153 (emphasis added))).

Because the State has failed to analyze the actual costs of providing a suitable education to Kansas schoolchildren, the only evidence before this Court regarding the actual costs of doing so are the LPA and A&M updates commissioned by Plaintiffs. *Supra* Statement of the Facts § K. The *Gannon* Panel entered a factual finding that these studies were valid, stating:

[W]e 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. . . . Certainly, the recommendations reflected by the cost studies could support a finding for a higher value for the BSAPP . . .

R.Vol.14, pp.1957-58 (*Gannon* Decision, 238-39); *see also* R.Vol.14, p.1828 (*Gannon* Decision, 109 (“[S]imply no evidence has been advanced to impeach the underpinnings of those studies nor the costs upon which they were based.”)); R.Vol.14, p.1869 (*Gannon* Decision, 150 (“[N]o evidence has been presented that would act to impeach the

reliability of the A&M cost study[.]”). Factual findings of the district court are granted extreme deference on appeal. The appellate court does not re-determine questions of fact. See *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775 (2003). And, “a general finding of fact by the district court raises a presumption that it found all facts necessary to sustain and support the judgment rendered.” *Cason v. Geis Irrigation Co.*, 211 Kan. 406, 412 (1973).

Therefore, Plaintiffs ask this Court to require the State to fund education at a level no lower than the average cost study base of \$5,944. R.Vol.79, p.5389 (Tr.Ex.237 (A&M recommendation for FY2012 was \$5,965 and LPA recommendation for FY2012 was \$5,922, the average of which is \$5,944)).

C. The Right to an Education is a Fundamental Right

1. Scope of Appeal and Standard of Review

Because the *Gannon* Panel did not address whether education is a fundamental right in Kansas, see R.Vol.14, p.1938 (*Gannon* Decision, 219), it found no violation of Plaintiffs’ constitutional rights to substantive due process and equal protection. R.Vol.14, pp.1937-41 (*Gannon* Decision, 218-22 (denying both claims)). Plaintiffs request this Court address the issue of whether education is a fundamental right and reverse *Gannon* Panel’s finding that (1) the State did not deny Plaintiffs equal protection of the laws guaranteed by Section 1-2 of the Bill of Rights of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution; and (2) the State did not deny Plaintiffs a substantive due process right in violation of Section 18 of the Bill of Rights of the Kansas Constitution. This Court should exercise a *de novo* standard of review. See *Lemuz v. Fieser*, 261 Kan. 936, 943 (1997) (citing *State v. Mertz*, 258 Kan.

745, 748 (1995)) (“Determining whether a statute violates the Constitution is a question of law. This Court may exercise an unlimited de novo standard of review.”).

2. Education is a Fundamental Right Under the Kansas Constitution

Education is a fundamental right under the Kansas Constitution, as evidenced by the following:

The first indication that education is a fundamental right is the most obvious: the Kansas Constitution says it is. The U.S. Supreme Court has explained that the test for determining whether a right is “fundamental” within the meaning of a constitution depends upon whether such a right is “explicitly or implicitly” guaranteed by the written document:

[T]he key to discovering whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

San Antonio School District v. Rodriguez, 411 U.S. 1, 33-34 (1973).

While *Rodriguez* found no “right to education explicitly or implicitly guaranteed by the [federal] Constitution,” the same cannot be said of the Kansas Constitution. Under the Kansas Constitution, the right to education is not only explicit, the constitution imposes a mandatory duty upon the legislature to provide it. R.Vol.35, p.40 (Tr.Ex.1, 000080 (containing text of Kansas Constitution, Article 6) (“The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities.”)); R.Vol.35, p.40 (Tr.Ex.1, 000080 (containing text of Kansas Constitution, Article 6) (“The legislature shall make suitable provision for finance of the educational interests of the

state.”)); R.Vol.35, pp.106-07 (Tr.Ex.1, 000211-212 (excerpts from *Montoy II*, 278 Kan. at 776H (Beier, concurring, and Davis, joining) (“[I]f we were to regard *Rodriguez* as controlling on the method for determining the existence of a fundamental right to an education, our Kansas Constitution’s explicit education provisions would settle the matter in favor of holding that such a right exists.”)); R.Vol.35, p.105 (Tr.Ex.1, 000209 (excerpts from *Montoy II*, 278 Kan. at 776A (Beier, concurring, and Davis, joining) (“If we were to apply the United States Supreme Court’s straightforward pattern of analysis from *Rodriguez*, we would need to look no further than the mandatory language of [Article 6, § 1 and Article 6, § 6]. Because they explicitly provide for education, education is a fundamental right.”))).

Second, four of the seven justices on the Kansas Supreme Court when *Montoy* was decided in 2005 and 2006 would have held that education was a fundamental right under the Kansas Constitution. R.Vol.35, p.121 (Tr.Ex.1, 000241 (excerpts from *Montoy V*, 282 Kan. at 27 (Rosen, concurring) (“Every child in Kansas has a fundamental right to an education guaranteed by the Kansas Constitution.”)); R.Vol.35, p.105 (Tr.Ex.1, 000208) (excerpts from *Montoy II*, 278 Kan. at 776A (Beier, concurring, and Davis, joining) (“I write separately only because I disagree with the holding of *U.S.D. No. 229 v. State* that education is not a fundamental right under the Kansas Constitution. I believe it is.” (citation omitted))); R.Vol.35, p.105 (Tr.Ex.1, 000208 (excerpts from *Montoy II*, 278 Kan. at 776N (Luckert, concurring) (“I would find that education is a fundamental right under the Kansas Constitution.”)); R.Vol.14, p.1740 (*Gannon* Decision, 21 (“[A] significant minority of the Court in *Montoy II* . . . thought the right to education in Kansas was a fundamental right”))).

Third, the following factors indicate education is a fundamental right in Kansas: “[1] the language of a state’s education clause [,] [2] the relationship of that clause to the state constitution as a whole, [3] the state’s particular constitutional history, and [4] any perception that the framers intended education to be a fundamental right.” R.Vol.35, p.107 (Tr.Ex.1, 000212 (excerpts from *Montoy II*, 278 Kan. at 776H (Beier, concurring, and Davis, joining) (citing *U.S.D. No. 229*, slip op. at 85-92))). As Justice Beier explained in her concurring opinion:

In Kansas, all of these factors support the existence of a fundamental right to education.

First, the language of the education article is mandatory Neither the provision of progressive educational improvement nor the financing of it is optional.

Second, the education article’s relationship to the constitution as a whole emphasizes its centrality to the document’s overall design. Only five articles precede it. Each of the first three [articles] outlines one of the three branches of government. The fourth and fifth deal with elections and suffrage, without which the three branches could not be populated. Next comes education; once the branches are established and their seats filled, it appears education is the first thing on the agenda of the new state. . . . Our constitution not only explicitly provides for education; it implicitly places education first among the many critical tasks of state government.

Third, our state’s constitutional history reinforces the importance of education even before statehood [P]ublic schools were significant components of life on the prairie that would become Kansas.

[W]hen Article 6 was amended to its current form[,] [t]he amendment re-affirmed “the inherent power of the legislature – and through its members, the people – to shape the general course of public education and provide for its financing.” The amendment also revamped administration of the consolidated state system of education, but it did nothing to undercut any individual right to education. In fact, it strengthened the language outlining the legislature’s responsibilities. . . .

Finally, indications are that the framers of our constitution intended education to be a fundamental right. Education was central to Kansas settlers, both pro and antislavery. Early proposed constitutions and the ultimate

documents . . . “reveal the educational spirit of the Kansas pioneer.” Statutes since 1858 enumerated subjects that must be taught in the common schools; after that time, curriculum has been marked by continuous expansion and enrichment. . . . And the original and amended constitution not only devoted an entire article to the establishment and finance of a public education system, the placement of that article and its resulting emphasis suggest that education was considered a high, if not first, priority of state government.

R.Vol.35, p.107 (Tr.Ex.1, 000212-13 (excerpts from *Montoy II*, 278 Kan. at 776H – 776L (Beier, concurring, and Davis, joining) (internal citations omitted))).

Finally, Kansas Supreme Court opinions evidence that the “suitability” provisions of Article 6 of the Kansas Constitution create an individual right. In *Montoy*, the Kansas Supreme Court plainly spoke of an individual “constitutional right to the opportunity for a sound basic education.” R.Vol.35, p.116 (Tr.Ex.1, 000230 (excerpts from *Montoy IV*, 279 Kan. at 845 (quoting *Hoke Cty Bd. of Educ. v. State*, 358 N.C. 605, 616, 599 S.E.2d 365 (2004)))).

For these reasons, Plaintiffs ask this Court to settle this issue once and for all and establish that education is a fundamental right in Kansas.

D. The State Denied Plaintiffs’ Equal Protection of the Law Guaranteed by Section 1 - 2 of the Bill of Rights of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution.

1. Scope of Appeal and Standard of Review

The *Gannon* Panel indicated that Plaintiffs’ evidence could not sustain a finding that the State denied Plaintiffs equal protection of the law for four reasons. First, as already discussed above, the *Gannon* Panel found no authority for the proposition that education is a fundamental right. *Supra* Arguments and Authorities §C.1. It is. *Id.* Second, the *Gannon* Panel determined that there was no evidence the State acted with deliberate intent. R.Vol.14, p.1940 (*Gannon* Decision, 221). It did. Third, the *Gannon* Panel determined that Plaintiffs could not establish a claim because of a “lack of

identifying characteristics of, or circumstances attributable to, the named student Plaintiffs.” *Id.* But, such an identification is not necessary here. Finally, the *Gannon* Panel determined that the Individual School Districts, if they had standing to bring a claim, did not have standing to bring a claim on behalf of the Individual Plaintiffs. R.Vol.14, pp.1940-41 (*Gannon* Decision, 221-22). They did.

Plaintiffs request this Court reverse the decision of the *Gannon* Panel in finding that the State did not deny Plaintiffs’ equal protection of the law . It did. Whether the State acted unconstitutionally is a question of law and this Court may exercise an unlimited *de novo* standard of review. *See Lemuz*, 261 Kan. at 943.

2. This Court Should Apply a Strict Scrutiny Standard to Determine the State Violated the Plaintiffs’ Equal Protection

The Kansas Constitution guarantees, “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” Kansas Const., Bill of Rights § 1. Kansas courts construe this provision to guarantee equal protection of the laws and substantive due process rights to citizens of the State. *See Stephens v. Snyder Clinic Ass’n*, 230 Kan. 115, 127-28 (1981). The constitutional guarantee of equal protection “emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable.” *Ross v. Moffitt*, 417 U.S. 600, 608 (1974); *see also Peterson v. Garvey Elevators, Inc.*, 252 Kan. 976, 981 (1993).

“Traditionally, when analyzing an equal protection claim, the United States and Kansas Supreme Courts employ three levels of scrutiny: strict scrutiny, intermediate scrutiny, and the rational basis test.” *State v. Limon*, 280 Kan. 275, 283 (2005) (citing *Chiles v. State*, 254 Kan. 888, 891-92 (1994)). The Kansas Supreme Court has explained

that “strict scrutiny” applies “in cases involving classifications such as race and fundamental rights guaranteed by the . . . Constitution.” *Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 775 (1992) (emphasis added). Strict scrutiny requires the State to demonstrate “that the classification is necessary to serve a compelling state interest.” *Id.* Because education is a fundamental right, the “strict scrutiny” analysis is applicable. *Supra* Arguments and Authorities §C.2.; R.Vol.14, p.1740 (*Gannon* Decision, 21 (“We, note, however, a significant minority of the Court in Montoy II (3 of 7) thought the “strict scrutiny” test for 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.’”)).

3. The State Acted with Deliberate Intent in Denying Plaintiffs’ Equal Protection of the Law

Plaintiffs established the State exercised deliberate indifference to the students’ constitutional rights and ignored a pattern of underlying constitutional violations in a manner that would support a finding that the State has denied certain students equal protection of the law. Nonetheless, the *Gannon* Panel concluded Plaintiffs failed to establish deliberate intent. R.Vol.14, p.1940 (*Gannon* Decision, 221 (“[F]or 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 We find no such intent displayed by the evidence before us.”)).

In analyzing Plaintiffs’ claims, the proper standard is whether the State acted with deliberate indifference. *See e.g. Distiso v. Cook*, 691 F.3d 226, 240-41 (2d. Cir. Aug. 21, 2012) (holding that “deliberate indifference” can be the basis for claiming denial of equal protection); *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2d. Cir. 1999) (applying

deliberate indifference standard to allegations of violations of student's equal protection rights); *G.D.S. v. Northport-East Northport Union Free Sch. Dist.*, 2012 U.S. Dist. LEXIS 182976, 23 (E.D.N.Y. Dec. 22, 2012).

Regardless, the State's pattern of underlying constitutional violations establishes the intent required to sustain a claim for an equal protection violation. The State knew, from its own data, previous court rulings, and studies connecting the money spent to performance results that the State (1) had to provide funding that was connected to the actual costs of providing a suitable education and (2) that it was not doing so. The State knew that, not only was it not providing enough funding, but the cost of a constitutionally suitable education was increasing. In the face of this evidence, the State made an irrational and unreasonable decision: it chose to cut funding. The *Gannon* Panel concluded the underfunding of education in Kansas was knowing and deliberate. R.Vol.14, p.1867 (*Gannon* Decision, 148 (the State had acted with "what appears now to be an obvious and continuing pattern of disregard of constitutional funding obligations under Article 6")).

Moreover, when the State cut funding, it knew certain students were more expensive to educate. R.Vol.14, pp.1786-87 (*Gannon* Decision, 67-68 (adopting ¶220 of Plaintiffs' FOF/COL as true)); R.Vol.13, p.1647 (Plaintiffs' FOF/COL ¶220). Because of the multiplier effect that the BSAPP has on providing funding for those students, the State also knew that cutting the BSAPP would have a more drastic effect on those students. And it knew that certain school districts lacked the ability to offset those cuts with local dollars and that those school districts would suffer increased harm. As a direct result of the State's actions, some school districts can provide some students with a

suitable education. *Supra* Statement of the Facts §§I, J. But, some school districts cannot. *Id.* Some school districts are unable to even meet AYP, one of the most basic indicators of whether that school district is providing its students with a suitable education. *Id.* And, a significant number of students are not receiving a suitable education. *Id.* Thus, clearly, the State took action against certain students and certain school districts and, in doing so, denied those students their fundamental right to a suitable education. *See e.g. Rubio v. Turner Unified School Distr. No. 202*, 453 F. Supp.2d 1295, 1303-1304 (D. Kan. 2006).

4. There is Sufficient Evidence in the Record Regarding Individual Plaintiffs to Conclude that the State Has Denied the Individual Plaintiffs Equal Protection of the Law

There is sufficient evidence in the record regarding the individual Plaintiffs to determine whether they were denied equal protection of the law. But, there are no identifying characteristics or individualized circumstances at issue here. “The Equal Protection Clause is triggered when the government treats someone differently than another who is similarly situated.” *See Rubio*, 453 F. Supp.2d at 1304. In this situation, some Kansas school children are receiving a suitable education while others are not. Thus, the only identification of the individual Plaintiffs necessary to determine whether they were denied equal protection is whether they are Kansas students who were denied an education. *Id.* There is certainly a wealth of evidence in the record to establish that.

The legislative duty imposed by the Kansas Constitution is a duty *to each school child of Kansas, equally*. R.Vol.35, p.86 (Tr.Ex.1, 000171 (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009)); R.Vol.35, p.84 (Tr.Ex.1, 000167 (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009) (citing *Provance v. Shawnee Mission U.S.D. No. 512*,

231 Kan. 636, 643 (1982), which stated “[t]he ultimate State purpose in offering a system of public schools is to provide an environment where quality education can be afforded to all” (emphasis added)). And, the individual Plaintiffs in this lawsuit are representative of all students in their district and all students in the State of Kansas. R.Vol.20, p.283 (Lane Tr.Test. 283:3-9 (stating Individual Plaintiffs are representative of students in U.S.D. 500)); R.Vol.22, p.922 (Stewart Tr.Test. 922:22-25 (stating issues related to funding affect every student in Wyandotte High School)); R.Vol.35, p.77 (Tr.Ex.1, 000153 (“[T]he court finds that the plaintiffs, Michele Caldwell and Michael Caldwell, minors by and through James Caldwell, their father and next friend as representatives of a class composed of all public school pupils in Kansas.”) (emphasis added)); R.Vol.35, p.77 (Tr.Ex.1, 000153 (excerpt from *Caldwell v. State of Kansas*, Case No. 50616 (1972))); R.Vol.35, p.101 (Tr.Ex.1, 000200 (“[N]umerous students representing African-American, Hispanic, and disabled groups, along with two large school districts, sued the State of Kansas . . .”)); R.Vol.35, p.101 (Tr.Ex.1, 000200 (excerpt from *Montoy I*, 275 Kan. at 146)).

Moreover, the State is not excused or exempted from its constitutional obligations because a student is difficult to educate or struggles with outside factors that influence his or her achievement. *See* R.Vol. 35, p.84 (Tr.Ex.1, 000167 (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009) (citing *State v. Smith*, 155 Kan. 588, 595 (1942) (“The general theory of our educational system is that every child in the state, without regard to race, creed, or wealth shall have the facilities for a free education”)) (emphasis added)))). Rather, the “[school district’s] expectations are the same across the board for all of [their] students.” R.Vol.26, p.1700 (Feist Tr.Test. 1700:17-18).

Even the *Gannon* Panel acknowledged that the State's underfunding of education does not harm only those students who are "underachieving," stating:

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.

R.Vol.14, pp.1908-09 (*Gannon* Decision, 189-90); *see also* R.Vol.26, pp.1700-01 (Feist Tr.Test. 1700:17-1701:4 (stating "due to the fact that we have not been able to offer all of the courses that we have in the past, I feel like perhaps some of our best and brightest students in our building have not been able to have some of the advantages that they've had in the past to be as well prepared for college, because we've made some very direct cuts in those programs so that we can put more money into working with students who are struggling more."))).

Because the record clearly indicates that students within Kansas and within each of the Plaintiff School Districts are not receiving equal access to a constitutional education, Plaintiffs have met their burden to establish that the State has denied the Individual Plaintiffs equal protection of the law.

E. The State Denied Plaintiffs a Substantive Due Process Right in Violation of Section 18 of the Bill of Rights of the Kansas Constitution.

1. Scope of Appeal and Standard of Review

In its Decision, the *Gannon* Panel found the State did not deny Plaintiffs substantive due process violation for three reasons. First, as already discussed above, the

Gannon Panel found no support for the proposition that education is a fundamental right in Kansas. *Supra* Arguments and Authorities §C.1. It is. *Id.* Second, the *Gannon* Panel determined that Plaintiff School Districts “do not hold a status as individuals,” thus precluding the school districts from seeking a remedy pursuant to Section 18 of the Bill of Rights of the Kansas Constitution. R.Vol.14, p.1938 (*Gannon* Decision, 219). They do. Finally, the *Gannon* Panel determined that there was “inadequate evidence before [the] Court about the individually named Plaintiffs other than their names and schools of attendance . . . 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.” R.Vol.14, pp.1938-39 (*Gannon* Decision, 219-20). Such evidence is not necessary.

Plaintiffs request this Court reverse the decision of the *Gannon* Panel in finding the State did not deny Plaintiffs a substantive due process right in violation of Section 18 of the Bill of Rights of the Kansas Constitution. Whether the State acted unconstitutionally is a question of law and this Court may exercise an unlimited *de novo* standard of review. *See Lemuz*, 261 Kan. at 943.

2. Because Education is a Fundamental Right, Denying that Right to “Persons” Would Result in a Violation of Section 18 of the Bill of Rights of the Kansas Constitution

Plaintiffs allege both violations of due process and equal protection. As stated by the Kansas Supreme Court:

The difference between the constitutional concepts of due process and equal protection is that due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation are treated, while equal protection emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably

indistinguishable. The test in determining the constitutionality of a statute under due process or equal protection weighs almost identical factors.

Chiles v. State, 254 Kan. at 902 (citing *Clements v. United States Fidelity & Guaranty Co.*, 243 Kan. 124, 127 (1988)) (internal citations omitted). In addressing whether the State's actions violate provisions related to equal protection, this Court "implicitly will have determined if the statute violates due process." *Id.* (citing *Peterson v. Garvey Elevators, Inc.*, 252 Kan. at 981). In other words, if the State's actions with regard to the school finance system violated the Kansas Constitution on equal protection grounds, which they did, the actions also violated Plaintiffs' constitutional right to due process. *Supra* Arguments and Authorities § D.

However, even if Plaintiffs could not establish an equal protection violation, which they clearly can, this Court should still reverse the decision of the *Gannon* Panel under applicable law:

When a statute is attacked as violative of due process, the test is whether the legislative means selected has a real and substantial relation to the objective sought. This rule has been restated in terms of whether the regulation is reasonable in relation to its subject and is adopted in the interest of the community.

Chiles, 254 Kan. at 902 (citing *Clements*, 243 Kan. at 127).

The *Gannon* Panel has already determined that the school finance scheme does not have any real and substantial relation to the objective sought. R.Vol.14, p.1867 (*Gannon* Decision, 148 (the State had acted with "what appears now to be an obvious and continuing pattern of disregard of constitutional funding obligations under Article 6")); R.Vol.14, p.1877 (*Gannon* Decision, 158 ("[T]here is simply no reliable evidence advanced by the State that indicates that a *reduction in funds available* to the K-12 school system" would result in compliance with the requirements of Article 6.)). Therefore, this

Court should reverse the ruling of the *Gannon* Panel in finding that Plaintiffs had not established that they were denied a substantive due process right.

3. Kansas School Districts Have a Remedy, as Persons, Under Section 18 of the Bill of Rights of the Kansas Constitution

Section 18 of the Bill of Rights of the Kansas Constitution provides that “[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.” R.Vol.35, p.41 (Tr.Ex.1, 000081 (containing text of Section 18 of the Bill of Rights)). Contrary to the *Gannon* Decision, Plaintiff School Districts hold the necessary status as “persons” to allow a finding that the State violated Plaintiffs substantive due process rights. The Tenth Circuit has already addressed whether a school district is a “person,” under §1983; they are. *Stoddard v. School District No. 1, Lincoln County, Wyoming*, 590 F.2d 829, 835 (10th Cir. 1979) (citing *Monell v. New York City Dep’t of Social Serv.*, 436 U.S. 658 (1978) (holding that a “local government” may constitute a “person” under 42 U.S.C. § 1983)). The Tenth Circuit, in *Stoddard*, explained:

[T]he trial judge initially entered judgment against the District in accord with such verdict. However, this judgment was later set aside on the ground that the District was not a “person” within the meaning of 42 U.S.C. § 1983. That particular matter has now been resolved by *Monell v. New York City Dep’t of Social Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In that case the Supreme Court held that “local government” may constitute a “person,” under 42 U.S.C. § 1983.

Stoddard, 590 F.2d at 834-35. The reasoning of *Monell* and *Stoddard*, which applied to the language of 42 U.S.C. § 1983, is equally applicable when interpreting the language of the Kansas Constitution because Kansas courts have generally interpreted provisions of the Kansas Bill of Rights consistent with the interpretation given the individual rights provisions of the United States Constitution. *See Snyder v. State*, 33 Kan. App. 2d 694,

698-99 (2005) (citing cases). Because these school districts would be considered persons under the United States Constitution, they should also be considered persons under the Kansas Bill of Rights.

4. There is Sufficient Evidence in the Record Regarding Individual Plaintiffs to Conclude that the State Has Denied the Individual Plaintiffs' Due Process

There is sufficient evidence in the record regarding the individual Plaintiffs to determine that their due process rights were violated. *Supra* Arguments and Authorities §D.4. The record clearly indicates that students within Kansas and within each of the Plaintiff School Districts are not receiving access to a constitutional education, and Plaintiffs have met their burden to establish a due process violation.

F. The Panel Erred by Failing to Direct the State to Make Capital Outlay State Aid Equalization Payments Pursuant to K.S.A. 72-8814.

1. Standard of Review

Whether Plaintiffs are entitled to capital outlay state aid equalization payments is a question of law and this Court has unlimited *de novo* review. *See Lemuz*, 261 Kan. at 943. Because the record clearly indicates that students within Kansas and within each of the Plaintiff School Districts are not receiving access to a constitutionally adequate education, Plaintiffs have met their burden to establish that the State has denied Plaintiffs due process.

2. The Capital Outlay State Aid Fund is Exempt From Lapsing

The Court concluded in part that Plaintiffs could not seek an order of mandamus regarding capital outlay equalization payments for fiscal year 2011-12 to date because no funds were specifically authorized and made available through the appropriation process. R.Vol.14, p.1921 (*Gannon* Decision, 202). However, the Panel differentiated fiscal year

2009-10 because the legislature appropriated a “no limit” authority on expenditures from that fund. R.Vol.14, p.1923 (*Gannon* Decision, 204). Nonetheless, the *Gannon* Panel still refused to order the Legislature to make capital outlay equalization payments to school districts for fiscal year 2009-10 because “there was never a transfer request for, or certification from, the Kansas State Board of Education concerning those funds for that fiscal year.” R.Vol.14, p.1744 (*Gannon* Decision, 25); R.Vol.14, p.1923 (*Gannon* Decision, 204 (“[W]e 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.”)).

This finding by the *Gannon* Panel is plainly incorrect and clearly erroneous. On September 22, 2010, the Commission of Education, Dale M. Dennis, on behalf of the KSBE, certified to Kent Olson, the Director of Accounts and Reports, the entitlements of school districts for computation of the School District Capital Outlay State Aid Program. R.Vol.79, pp.5454-60 (Tr.Ex. 240 at 000786-92). This certification was clearly referenced in Plaintiffs’ [Proposed] Final Findings of Fact and Conclusions of Law. R.Vol.13, p.1675 (Plaintiffs’ FOF/COL ¶ 315).

Thus, whether Plaintiffs’ Notice of Claims were sufficient to act as an encumbrance is irrelevant. Nonetheless, on June 30, 2010, Plaintiffs had already made a viable claim for the funds. R.Vol.96, p.7093 (Tr.Ex.363, 000020).

In fact, the *Hicks* case, cited by the *Gannon* Panel, provides support for Plaintiffs’ position. The Court stated,

The auditor suggests that there is no money in the grain inspection fee fund to pay this claim. We assume that this is because the books for the fiscal year ending June 30, 1915 have been closed, and that any balances then existing in that fund have reverted to the general revenue funds of the state. But the books

were open when the petitioner filed this action. That crystallized the status of the fund as of that date, and if there were moneys in the grain inspection fee fund at that time, the closing of the books will not bar the petitions. There is no magic in bookkeeping. **Books which have been closed in derogation of a lawful outstanding claim which had been provided for by the Legislature must be reopened and the claim paid . . .**

Hicks v. Davis, 97 Kan. 312, 154 P. 1030, 1032 (1916), *rehearing denied* 97 Kan. 662 (1916). In Plaintiffs' Notice of Claims (Trial Exhibit 363), which is a statutorily-required prerequisite to filing a lawsuit alleging a violation of Article 6 of the Kansas Constitution, Plaintiffs crystallized the status of the funds to be dedicated to making the capital outlay state aid equalization payments. *Id.*; *see also* R.Vol.35, p.61 (Tr.Ex.1, 000120 (containing text of K.S.A. 72-64b02 (requiring that “[b]efore commencing an action . . . a party alleging a violation of article 6 of the Kansas constitution shall file a written notice as provided in this section”))).

Finally, the *Gannon* Panel was incorrect in asserting that the appropriation of the school district capital outlay state aid fund lapsed. R.Vol.14, p.1924 (*Gannon* Decision, 205 (internal citations omitted)). The “school district capital outlay state aid fund for distribution to school districts pursuant to K.S.A. 72-8814” is a revenue transfer, appropriated with “no limit” pursuant to the 2009 Session Laws (Ch. 124, Sec. 149). R.Vol.35, pp.67-70 (Tr.Ex.1, 000133-38). Such funds are exempt from lapsing. R.Vol.95, p.6932 (Tr.Ex.352, at 004019 (indicating, for special revenue fund with no limit, “[l]apsing would not apply because there is no control on the fund”)). Since only those appropriations that have lapsed revert back and become unappropriated, the exempt capital outlay state aid fund should not have been reappropriated. R.Vol.95, p.6948 (Tr.Ex.352, at 004050 (definition of “Lapse”)); R.Vol.95, p.6932 (Tr.Ex.352, at 004019 (indicating, for special revenue fund with no limit, re-appropriations are irrelevant and

“[l]apsing would not apply because there is no control on the fund”). And since capital outlay was appropriated for “no limit” during the 2009-10 fiscal year, all of the capital outlay state aid fund was available to be spent, despite the fact that the 2009-10 fiscal year had ended. R.Vol.95, p.6949 (Tr.Ex.352, at 004052 (definition of “Reappropriation”)).

For these reasons, this Court should reverse the finding of the *Gannon* Panel and issue an order requiring the State to make the payments required by K.S.A. 72-8814 for the fiscal year 2009-10.

3. Governor Parkinson Did Not Remove Capital Outlay State Aid Funding Through the Allotment Process and, If He Did, Such a Removal Was Improper.

The *Gannon* Panel further held that Plaintiffs were not entitled to the payments required by K.S.A. 72-8814 because “Governor Parkinson’s allotment of educational funds in November of 2009 was properly exercised.” R.Vol.14, at p.1925 (*Gannon* Decision, 206). However, Governor Parkinson never actually removed the funds by allotment.

Trial Exhibit 353 (R.Vol.95, pp.6964-66) “is the only place that the Governor’s allotment addresses the capital outlay equalization funds.” R.Vol.104, pp.8239-42 (Tr.Ex.409, Goossen Depo., at 155:7-158:22). Trial Exhibit 353 does not remove the capital outlay state aid equalization payments by allotment. R.Vol.95, pp.6964-66 (Tr.Ex.353). Mr. Goossen, the former Director of Accounts and Reports, in his deposition, was asked the following question: “[D]oes [the letter] say the transfer does not need to be made?” He responded, “It does not say that.” R.Vol.104, p.8220 (Tr.Ex.409, Goossen Depo., at 136:5-14).

And, even if Governor Parkinson did remove the funds by allotment, such a removal was improper. The *Gannon* Panel concluded, “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” R.Vol.14, p.1925 (*Gannon* Decision, 206). But, the allotment was clearly exercised against the demand transfer. Otherwise, there is no viable explanation as to why the demand transfer was never made. R.Vol.14, p.1923 (*Gannon* Decision, 204 (indicating that notwithstanding an appropriation of “no limit” authority on expenditures within the capital outlay state aid fund, “no funds ever arrived at or were placed in [the fund]”)). And, a demand transfer cannot be subject to a Governor’s allotment, pursuant to an opinion of the Kansas Attorney General, because “their claims against general fund moneys are not made pursuant to appropriations.” R.Vol.98, pp.7262-63 (Tr.Ex.372, 000052 (citing Kansas Attorney General Opinion No. 82-160, 1982 WL 187649, at *11 (July 26, 1982))). If funds were not removed in the allotment process (they were not), the funds were available to be encumbered on June 17, 2010. Therefore, this Court should reverse the decision of the *Gannon* Panel.

G. The *Gannon* Panel Improperly Denied Plaintiffs Attorneys’ Fees Related to Plaintiffs’ Class Actions Claims

1. Scope of Appeal and Standard of Review

In the *Gannon* Decision, the Panel denied Plaintiffs’ request for attorneys’ fees. R.Vol.14, p.1968 (*Gannon* Decision, 249). When the trial court “has authority to grant attorney fees, its decision is reviewed under an abuse of discretion standard.” *In re*

Strieby, 45 Kan. App. 2d 953, 972-973 (2011) (citing *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 572, 215 P.3d 561 (2009)).

2. The Gannon Panel Improperly Denied Plaintiffs Attorneys' Fees Related to Plaintiffs' Class Action Claim

The *Gannon* Panel did not indicate its reason for denying attorneys' fees, it simply denied them. R.Vol.14, p.1968 (*Gannon* Decision, 249). However, as established above, Plaintiffs were entitled to judgment in their favor with regard to their class claim that school districts were entitled to capital outlay state aid equalization payments pursuant to K.S.A. 72-8814. *Supra* Arguments and Authorities §F. If a class action is successful, courts may use their equitable powers to award fees. *See e.g.* Kansas Attorney General Opinion No. 94-47 (April 8, 1994).³ Counsel may be reimbursed reasonable attorneys' fees so long as the fees are assessed against the entire fund. *Id.* Therefore, because Plaintiffs were successful with regard to their class action claim at the lower level, and because they are entitled to damages as a result of that claim, Plaintiffs also seek an order granting Plaintiffs attorneys' fees.

3. This Court Should Exercise Its Inherent Power to Issue Sanctions and Award Plaintiffs' Attorneys' Fees

This Court has inherent power to sanction a party based on that party's conduct in bad faith, regardless of statutory provisions. *See e.g., Schoenholz v. Hinzman*, 295 Kan. 786, 787 (2012) (citing *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 926 (2006)) (courts have inherent powers to impose sanctions for bad-faith conduct, irrespective of statutory provisions).

As Plaintiffs have shown, the State has acted in bad faith by continually dodging its constitutional obligation to properly fund education in Kansas. *Supra* Arguments and

³ Available at <http://ksag.washburnlaw.edu/opinions/1994/1994-047.htm>.

Authorities §A; R.Vol.14, p.1867 (*Gannon* Decision, 148 (the State had acted with “what appears now to be an obvious and continuing pattern of disregard of constitutional funding obligations under Article 6”)). Despite the clear directive from *Montoy* that the school finance formula must be based on the actual costs of providing an education to a Kansas student, the State has failed to commission any study attempting to identify those costs. *Supra* Statement of the Facts §§K, L; Arguments and Authorities §B; R.Vol.14, pp.1836-37 (*Gannon* Decision, 117-18 (“[W]e 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.”)); R.Vol.14, p.1837 (*Gannon* Decision, 118 (“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 . . . wholly disregarded the considerations required to demonstrate a compliance with Article 6, § 6(b).”)). Allowing the State to continue this behavior without sanction will reward them for failing to meet its constitutional obligations. Therefore, this Court should exercise its inherent power to sanction the State and award Plaintiffs’ attorneys’ fees.

CONCLUSION

For reasons stated above, Plaintiffs request this Court: (1) order the State to fund education at a level no lower than a base state aid per pupil of \$5,944; (2) determine education is a fundamental right; (3) reverse the *Gannon* Panel’s decision that the State did not deny Plaintiffs their substantive due process rights in violation of § 18 of the Kansas Constitution; (4) reverse the *Gannon* Panel’s decision that the State did not deny

Plaintiffs equal protection of the law as guaranteed by §§1-2 of the Bill of Rights of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution; (5) require the State to make capital outlay state aid equalization payments pursuant to K.S.A. § 72-8814; and (6) award Plaintiffs attorneys' fees.

Dated this 15th day of May, 2013.

Respectfully submitted,

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ADDENDA

- A. **Addendum A:** Legislative Post Audit Performance Audit Report Highlights: K-12 Education: Estimating Potential Costs Related to Implementing the No Child Left Behind Waiver in Kansas, dated December 2012

- B. **Addendum B:** Performance Audit Report: Estimating Potential Costs Related to Implementing the No Child Left Behind Waiver in Kansas, A Report to the Legislative Post Audit Committee By the Legislative Division of Post Audit, dated December 2012

- C. **Addendum C:** Letter from Jana Shaver, Chairman, Kansas State Board of Education, to Kansas Legislators

ADDENDUM A:
LEGISLATIVE POST AUDIT PERFORMANCE AUDIT REPORT HIGHLIGHTS



Legislative Post Audit Performance Audit Report Highlights

K-12 Education: Estimating Potential Costs Related to Implementing the No Child Left Behind Waiver in Kansas

Report Highlights

December 2012 • R-12-017

Summary of Legislator Concerns

Legislators want to know both the short- and long-term potential costs of implementing the Common Core standards and other requirements of the No Child Left Behind waiver.

Background Information

To implement the NCLB waiver, KSDE and school districts will incur two types of costs—real costs and opportunity costs.

- Real costs refer to out-of-pocket expenditures for goods or services.
- Opportunity costs refer to the value of alternatives that must be foregone to pursue other options. For example, a school district may decide to devote two hours of a regularly scheduled professional development day to train teachers on the new Common Core standards. That will not necessarily cost the school district any new money, but it will lose the opportunity to train on other topics.

QUESTION: What Are the Potential Costs of Implementing the NCLB Waiver in Kansas K-12 Schools Over the Next Several Years?

- The NCLB waiver has four principles that states must agree to. These are: (1) adopting college and career-ready academic standards; (2) assessing student and school performance; (3) assessing teacher and principal performance; and (4) reducing duplicate reporting and paperwork.
- Over the next five years, school districts will likely incur between \$34 million and \$63 million in real or opportunity costs to implement the NCLB waiver's four principles, but the Kansas State Department of Education (KSDE) might actually reduce its expenses.
 - Most of the estimated costs for school districts are attributable to implementing the college and career-ready standards (Common Core standards).
 - School district officials should be able to take steps to mitigate most of the real (out-of-pocket) costs of implementing the NCLB waiver's principles.
 - KSDE likely will incur minimal costs to implement the NCLB waiver and may achieve some future savings.

Findings Related to Principle 1 (College and Career Readiness)

- KSDE adopted the Common Core standards in 2010 and these standards meet the waiver's college and career-readiness principle.
- We estimate school districts could incur between \$32 million and \$60 million in real or opportunity costs to implement the Common Core standards.
 - We estimate that new instruction materials aligned to the Common Core standards would cost school districts an additional \$30 million to \$50 million over the next two years, but this amount does not have to be entirely out of pocket.
 - We estimate school districts could also incur between \$2 million and \$10 million in real or opportunity costs in the next year to train teachers on the new standards.
- KSDE likely will not incur any significant costs to implement the Common Core standards.
- Our estimate of the total costs of implementing the Common Core standards in Kansas is significantly lower than other studies' estimates in two main areas:
 - Our estimate of teacher training costs is lower because other studies likely have overestimated the number of teachers who will need Common Core training and the number of training hours that teachers will need.
 - Technology costs, which may be significant in many states, should not be an issue in Kansas because nearly all student assessments already are taken online.

Findings Related to Principle 2 (Assessing Student and School Performance)

- Kansas has developed four annual measurable objectives as a way to assess student and school performance.
- Neither KSDE nor school districts should incur any significant additional costs to assess student and school performance.
- KSDE could save as much as \$3 million per year by not having to develop student assessment tests.

Findings Related to Principle 3 (Teacher and Principal Evaluation Systems—“KEEP” or an Alternative)

- KSDE has developed an electronic teacher and principal evaluation system (KEEP) to meet the requirements of principle 3. School districts have the option not to use the KEEP system, but any alternative system must meet federal waiver requirements.
- We estimate school districts could incur up to \$3 million in costs to train teachers and administrators to use the new evaluation systems.
- KSDE should incur minimal costs to refine and maintain the KEEP teacher and principal evaluation system and to train school district staff how to use it.

Findings Related to Principle 4 (Reducing Duplicate Reporting and Paperwork for School Districts)

- Neither KSDE nor school districts should incur any additional costs to reduce unnecessary reporting and paperwork.

SUMMARY OF RECOMMENDATIONS

- This report had no recommendations.

AGENCY RESPONSE

The Kansas State Department of Education expressed no opinion about the report's findings.

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By law, individual legislators, legislative committees, or the Governor may request an audit, but any audit work conducted by the Division must be approved by the Legislative Post Audit Committee, a 10-member committee that oversees the Division's work. Any legislator who would like to request an audit should contact the Division directly at (785) 296-3792.

Passed by Congress in 2001, the federal NCLB Act imposed a number of performance targets on schools that receive federal funds. The NCLB Act's performance targets have been viewed by some legislators, educators, and policymakers as controversial. In 2011, the U.S. Department of Education offered a waiver that provided states and schools with an alternative way to meet some of the NCLB performance targets.

In July 2012, Kansas received a waiver from the U.S. Department of Education exempting it from certain No Child Left Behind (NCLB) requirements. As of October 2012, Kansas was one of 34 states to receive a NCLB waiver.

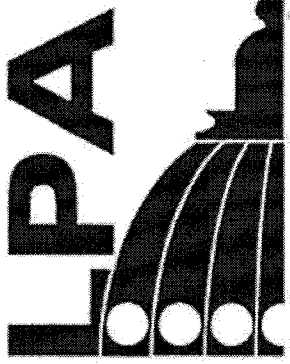
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ADDENDUM B:
PERFORMANCE AUDIT REPORT



PERFORMANCE AUDIT REPORT

K-12 Education: Estimating Potential Costs Related to Implementing the No Child Left Behind Waiver in Kansas

**A Report to the Legislative Post Audit Committee
By the Legislative Division of Post Audit
State of Kansas
December 2012**

R-12-017

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Legislative Post Audit Committee

Legislative Division of Post Audit

THE LEGISLATIVE POST Audit Committee and its audit agency, the Legislative Division of Post Audit, are the audit arm of Kansas government. The programs and activities of State government now cost about \$14 billion a year. As legislators and administrators try increasingly to allocate tax dollars effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by Legislative Post Audit helps provide that information.

We conduct our audit work in accordance with applicable government auditing standards set forth by the U.S. Government Accountability Office. These standards pertain to the auditor's professional qualifications, the quality of the audit work, and the characteristics of professional and meaningful reports. The standards also have been endorsed by the American Institute of Certified Public Accountants and adopted by the Legislative Post Audit Committee.

The Legislative Post Audit Committee is a bipartisan committee comprising five senators and five representatives. Of the ten members, the two majority caucuses each have three members, while the two minority caucuses each have two members.

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for performance audits through the chair or any other member of the committee. Copies of all completed performance audits are available from the division's office.

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December 6, 2012

To: Members, Legislative Post Audit Committee

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Senator Terry Bruce
Senator Anthony Hensley
Senator Laura Kelly
Senator Dwayne Umbarger

Representative Peggy Mast, Vice-Chair
Representative Tom Burroughs
Representative John Grange
Representative Ann Mah
Representative Virgil Peck Jr.

This report contains the findings, conclusions, and recommendations from our completed performance audit, *K-12 Education: Estimating Potential Costs Related to Implementing the No Child Left Behind Waiver in Kansas*. The audit was requested by the House Appropriations Committee. We would be happy to discuss the findings or any other items presented in this report with any legislative committees, individual legislators, or other State officials.

Sincerely,

Scott Frank
Legislative Post Auditor

This audit was conducted by Joe Lawhon, Brad Hoff, and Alex Gard. Chris Clarke was the audit manager. If you need any additional information about the audit's findings, please contact Joe Lawhon at the Division's offices.

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K-12 Education: Estimating Potential Costs Related to Implementing The No Child Left Behind Waiver in Kansas

The Common Core Standards Initiative is an effort to establish a shared set of educational standards for the K-12 subjects of English and mathematics—based on input from teachers, experts, parents, and school administrators. Proponents say the standards are intended to help ensure that students receive a high quality education across schools and states and that the standards could facilitate greater opportunities for educators to share experiences and best practices.

Although the Common Core Standards Initiative was originally a state-led effort, President Obama has promoted the standards at the federal level. Specifically, the President offered states a waiver in September 2011 that would exempt them from certain requirements of the current federal No Child Left Behind (NCLB) law, in exchange for adopting college and career-ready standards (such as the Common Core standards) and several other requirements. Critics of the waiver argue the President should not have acted without action by Congress. They also argue the federal government does not have the authority to impose a national curriculum, and that adopting the standards could be challenged in the courts.

As of September 2012, 45 states (including Kansas) had adopted the Common Core standards and 44 states had applied for the NCLB waiver. Additionally, the California State Board of Education estimated that it will cost California between \$2.4 billion and \$3.1 billion to fund the programs the waiver requires.

Kansas legislators want to know both the short- and long-term potential costs of implementing the Common Core standards and other requirements of the NCLB waiver.

This performance audit answers the following question:

What are the potential costs of implementing the NCLB waiver in Kansas K-12 schools over the next several years?

To understand the commitments that Kansas made through its waiver application, we reviewed Kansas law, Kansas' NCLB waiver application, and information about the NCLB law, the Common Core standards, and Kansas' current education requirements. We also spoke with Kansas Department of

Education (KSDE) officials and reviewed pertinent materials, such as agency contracts with vendors involved in student testing activities.

To estimate the costs KSDE and local school districts may incur in the next five years, we reviewed cost studies prepared by public policy organizations and other states, KSDE financial and operational data, and spoke with KSDE officials. We also spoke with officials representing 12 school districts about the actions their districts have taken or plan to take to achieve the requirements of the NCLB waiver. In addition, we spoke with U.S. Department of Education officials about the waiver's requirements and potential funding. Based on available information, we estimated the costs that could be incurred by KSDE and school districts from fiscal year 2013 through fiscal year 2017.

A copy of the scope statement the Legislative Post Audit Committee approved for this audit is included in *Appendix A*. The approved scope statement had two questions. For reporting purposes, we collapsed those two questions into one.

We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusion based on our audit objectives. We think the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Our findings begin on page 9, following an overview of the NCLB law and Kansas' NCLB waiver application.

Overview of the No Child Left Behind Waiver

In 2012, Kansas Received a Waiver From the U.S. Department of Education Exempting it From Certain No Child Left Behind (NCLB) Requirements

Congress first passed the Elementary and Secondary Education Act in 1965. The law, which was designed to provide federal aid to schools that serve disadvantaged students, has been reauthorized and modified over the years. When Congress reauthorized the act in 2001, it became known as the No Child Left Behind Act.

Passed by Congress in 2001, the federal No Child Left Behind (NCLB) Act imposed a number of performance targets on schools that receive federal funds. The NCLB Act contained several provisions that were designed to improve student achievement while holding states and schools accountable for student progress. Those measures are described in *Figure OV-1* on page 4. Some of the more significant provisions included establishing academic progress targets (“Adequate Yearly Progress” or AYP), annual testing requirements, and annual school report cards.

The NCLB provisions apply to all schools (public or private) that receive federal funding or services under NCLB. Schools that do not receive federal funding or services under NCLB (including many private schools and home schools) do not have to adhere to the requirements.

The 2001 NCLB Act’s performance targets have been viewed by some legislators, educators, and policymakers as controversial. Many officials contend the act significantly shifted control of K-12 education to the federal government and away from state and local officials. The act also required states and local schools to meet certain academic targets or face sanctions. Two of the more controversial aspects of the law are described below and on the following page:

- **The steadily increasing Adequate Yearly Progress (AYP) benchmark was viewed as unreasonable because it required 100% of students to be proficient by 2014.** Proficiency means that a student is capable of successfully completing tasks designed for his or her grade level. Critics of NCLB have contended this AYP benchmark was impossible to achieve because the law did not make enough special provisions for subgroups, such as students with disabilities, to meet the target. In addition, they contended that because the target was so difficult to achieve, schools and states were increasingly classified as “failing” each year.
- **Schools faced sanctions for failing to meet the controversial benchmark.** Some of the initial sanctions were relatively mild, such as allowing parents to transfer their children to other public schools and a school having to spend 10% of its federal (Title I) funding on teacher professional development. However, if a school

repeatedly failed to make AYP, the sanctions became progressively more severe, and could include replacing some school staff or having the state takeover the school. Officials contended it was unfair to impose a sanction for failing to achieve what they considered an unreachable goal.

Figure OV-1

The 2001 No Child Left Behind (NCLB) Act Contains Six Significant Provisions for Assessing and Improving Student Academic Performance

The NCLB Act includes six significant provisions that were intended to improve student achievement while holding states and schools accountable for student progress. Those measures include:

- **Academic progress:** States, school districts, and individual school buildings each had academic progress targets (known as adequate yearly progress or AYP) they were required to meet to retain federal (Title I) funding. These targets were calculated through a complex formula, but all states were required to have 100% of their students reach proficiency in reading and math by the 2013-2014 school year. Individual school districts and buildings also had to meet targets for certain demographic groups (such as special education students) as well as in their overall student body. If a school building missed any of the targeted achievement levels, it could be sanctioned—ranging from being placed in a probationary status and receiving technical assistance to mandated personnel changes and state takeover of the school.
- **Annual testing:** States were required to test 3rd through 8th grade students once a year in reading and math, and at least once during grades 10 through 12. States also were required to test students in science at least once during elementary school, once during middle school, and once during high school.
- **Annual report cards:** States were required to provide the public with performance (student achievement) data showing test scores for the entire state as well as by school district. In addition, school districts were required to provide test scores by building. This information can be found on KSDE's website (<http://www.ksde.org/Default.aspx?tabid=403>).
- **Teacher qualification:** Teachers in core content areas had to be certified and proficient in his or her subject area. Paraprofessionals also had new education requirements—having to show knowledge in their teaching area, completed two years of college education, or received an associate's degree.
- **Reading First:** The Reading First program was a competitive grant program designed to help states and school districts create early reading programs in primarily high-poverty areas.
- **Funding changes:** The funding formula for Title I funds (funds designed to help disadvantaged children) was changed to allow money to be given to school districts with larger percentages of disadvantaged children.

In 2011, the U.S. Department of Education offered a waiver that provided states and schools with an alternate way to meet some of the NCLB performance targets. The NCLB Act requires academic performance to be measured against AYP targets which, as mentioned above, were viewed by many as nearly impossible to attain. Instead of having to meet the controversial AYP targets, the waiver offered states another way to measure performance. The waiver has four main principles that states must implement, as described below.

- *Principle 1: College and career-ready expectations for all students*—States must adopt new K-12 academic standards in math and English that fulfilled the “college and career-ready” component. States could develop their own academic standards or adopt the Common Core standards to meet this requirement.
- *Principle 2: State-developed differentiated recognition, accountability, and support*—States must develop new ways to measure student and school performance. These will focus on student achievement, student growth, and closing the gap between low and high performing students.
- *Principle 3: Supporting effective instruction and leadership*—States must develop new ways to annually evaluate teachers based, in part, on student assessment test results.
- *Principle 4: Reducing duplication of effort and unnecessary paperwork*—States must find ways to minimize and eliminate redundancy and unnecessary paperwork for school district staff.

As of October 2012, Kansas was one of 34 states to receive a NCLB waiver. President Obama announced the NCLB waiver requirements in September 2011. In February 2012, the Department of Education (KSDE) submitted its waiver application after receiving authorization from the State Board of Education. The application described actions that KSDE and school districts would take to meet the waiver’s requirements. Kansas’ waiver was conditionally approved in July 2012.

Neither KSDE nor school districts will receive additional federal funds to implement the NCLB waiver requirements. We spoke with U.S. Department of Education and KSDE officials to determine whether Kansas would receive additional federal funds to implement the NCLB waiver. None of these officials indicated Kansas would receive additional funds for that purpose.

However, federal officials said the waiver relaxes some restrictions regarding how KSDE and school districts can spend other federal funds they already receive.

Kansas Had Initiated Several Actions Before the Waiver Was Offered That Either Met or Conditionally Met NCLB Waiver Requirements

As mentioned on page 5, the NCLB waiver was officially offered to states in September 2011. KSDE officials had taken several actions before that time, as described below, which ultimately fulfilled certain waiver requirements.

The Kansas State Board of Education formally adopted the Common Core standards in October 2010, which met the college and career-ready requirements of the waiver's first principle. Kansas was already scheduled to review its standards for math and English in or around 2010 (all academic standards are reviewed on a cyclical basis.) As part of the review process, KSDE officials identified the Common Core standards as a set of college and career-ready standards that they thought would provide clear expectations for Kansas students.

The National Governors Association and the Council of Chief State School Officers coordinated the development of the Common Core standards. Teachers, school administrators, and education experts collaborated to develop the standards which were finalized in 2010. The standards are internationally benchmarked and, according to KSDE officials, are more rigorous than the previous standards.

The key provisions of the new English standards will require students to:

- expand their vocabulary
- read more non-fiction literature
- expand their verbal and written skills
- provide support for their answers

The key provisions of the new math standards will require students to:

- learn certain math concepts at an earlier age
- display critical thinking concepts
- provide support for their answers

According to KSDE officials, the Common Core standards will require students to display higher levels of literacy and also display a deeper level of understanding of the subject areas.

Lastly, as of November 2012, the National Governors Association and the Council of Chief State School Officers are not planning to develop standards for other subjects. Instead, they are focused on implementing the new math and English Common Core standards.

In 2005, KSDE began using the KIDS system, a longitudinal database that allows the department to evaluate individual student performance over time. Under the waiver's second principle, states are required to develop alternative indicators of student and school performance to replace the proficiency measures of Adequate Yearly Progress. One of those indicators measures student academic growth—how much progress students make from one year to the next. A key part of being able to measure student growth across all school districts is having longitudinal databases, like the KIDS system, that track individual student data over time.

In 2010, KSDE began developing a new statewide teacher and principal evaluation system which provisionally fulfilled the requirements of the waiver's third principle. According to KSDE officials, school districts were looking for a better tool to evaluate personnel. In response, KSDE staff developed a uniform evaluation system (known as the Kansas Educator Evaluation Protocol, or KEEP) that all school districts could use to evaluate staff. To meet the NCLB waiver requirements, KSDE staff had to modify that system to link teachers' and principals' performance with student performance. KSDE officials told us that KEEP should be fully operational by the start of the 2014-2015 school year.

KSDE actions to reduce duplication and eliminate unnecessary paperwork for school districts, which began in 2005, fulfilled the requirements of the waiver's fourth principle. KSDE streamlined data collection by creating a system which integrates data from existing sources. This system allows KSDE to use previously submitted data, instead of asking the school districts to resubmit it. For example, now school districts only have to submit teacher and student demographic data to KSDE one time, instead of each time a federal form needs to be completed. KSDE also established a data oversight board that actively considers data collection issues during software development and design.

What Are the Potential Costs of Implementing the NCLB Waiver in Kansas K-12 Schools Over the Next Several Years?

Answer in Brief:

School districts will likely incur between \$34 million and \$63 million in real or opportunity costs over the next five years to implement the principles of the NCLB waiver, but KSDE will incur little cost and may achieve savings during that time (p. 9). We estimate school districts could incur between \$32 million and \$60 million in real or opportunity costs to implement the Common Core standards (Principle 1) and KSDE likely will not incur any significant costs (p. 15). Our estimate of the total cost to implement the Common Core standards in Kansas is significantly lower than other studies' estimates to implement those standards (p. 18).

Neither KSDE nor school districts should incur any significant costs to assess student and school performance (Principle 2) and KSDE could save about \$3 million per year by not having to develop student assessment tests (p. 21). We estimate school districts could incur costs of up to \$3 million to train teachers and administrators to use the new evaluation systems (Principle 3), but KSDE's costs should be minimal (p. 23). Lastly, neither school districts nor KSDE should incur any additional costs to reduce unnecessary reporting and paperwork (Principle 4) (p. 24).

These and other findings are discussed in the sections that follow.

OVERARCHING FINDINGS RELATED TO THE NCLB WAIVER

Over the Next Five Years School Districts Will Likely Incur Between \$34 Million and \$63 Million in Real or Opportunity Costs To Implement the NCLB Waiver, But KSDE Might Actually Reduce its Expenses

To obtain an exemption from the original Adequate Yearly Progress (AYP) performance measures and qualify for the No Child Left Behind (NCLB) waiver, states must implement four primary principles. A summary of each principle and how it will be implemented in Kansas is shown in **Figure 1-1** on page 10. As the figure shows, Kansas had either completed actions, or was in the process of taking actions, that met most of the NCLB waiver's principles prior to the waiver becoming available in 2011.

To estimate the costs of implementing the four principles of the NCLB waiver for both the Department of Education (KSDE) and school districts, we talked to KSDE and school district officials, reviewed KSDE financial, student enrollment and teacher staffing data, and reviewed studies conducted by other states and public policy organizations. **Appendix B** provides details about our assumptions and analyses.

Figure 1-1 Summary of the Four Principles of the NCLB Waiver and How Kansas Intends to Implement Them	
NCLB Waiver Principle	Implementation Plan
<p>Principle #1: College and Career-Ready Expectations for All Students - Adopt college and career-ready standards in math and English to ensure students are prepared for college or the workforce upon graduation.</p>	<p>In October 2010, the State Board of Education adopted college and career-ready standards known as the Common Core standards. The standards are to be implemented in the classroom no later than the 2013-2014 school year.</p>
<p>Principle #2: State-Developed Differentiated Recognition, Accountability, and Support - Establish an accountability system to identify both low- and high-performing schools using student state assessment test results.</p>	<p>Kansas developed four annual measurable objectives focused on the following areas:</p> <ul style="list-style-type: none"> * <u>student achievement</u> - measures performance level of students on the student assessment tests * <u>student growth</u> - measures whether students improve their academic performance annually * <u>closing the achievement gap</u> - measures whether schools are reducing the gap between its highest and lowest performing students * <u>increasing proficiency</u> - measures whether the school is reducing the number of non-proficient students <p>These objectives are designed to improve student achievement, school performance, and increase the quality of instruction in the classroom.</p>
<p>Principle #3: Supporting Effective Instruction and Leadership - Develop a teacher and principal evaluation system that uses student performance on the state assessment test as one way to evaluate a teacher's or principal's performance.</p>	<p>In 2010, KSDE started to develop a teacher and principal evaluation system. The system, known as the Kansas Educator Evaluation Protocol (KEEP), is currently being piloted by several school districts. The goal is to have KEEP fully operational by the 2014-2015 school year. School districts have the option whether or not to use the KEEP system, but any alternative system must meet federal waiver requirements.</p>
<p>Principle #4: Reducing Duplication of Effort and Unnecessary Paperwork - Implement standards to reduce duplicate and unnecessary reporting for school districts, such as removing state reporting requirements that have minimal or no impact on student outcomes.</p>	<p>KSDE had already taken several actions to address this principle before applying for the NCLB waiver. These actions include creating a system to integrate data from existing source collections, and actively considering data collection issues during software design and development.</p>
<p>Source: LPA review of NCLB waiver and KSDE documents.</p>	

To implement the requirements of the NCLB waiver, KSDE and school districts will incur two types of costs—real costs and opportunity costs:

- **Real costs refer to out-of-pocket expenditures for goods or services.** For example, when a school district writes a check for \$100 to purchase a textbook, it incurs a real cost of \$100. Similarly, if a district pays a \$200 registration fee to have a teacher attend a training session, it incurs a real cost of \$200.
- **Opportunity costs refer to the value of alternatives that must be foregone to pursue other options.** In such situations, there are no additional out-of-pocket payments (real costs) but the school or state must give up other opportunities. For example, a school district may decide to devote two hours of a regularly scheduled professional development day to train teachers on the new Common Core standards. That will not necessarily cost the school district any additional money, but it will have to forego the opportunity to use that time on other types of training, such as teaching techniques or anti-bullying.

The true opportunity cost is the value of the foregone opportunity (for example, the value of training options that must be foregone in order to train teachers on new standards). However, because it is extremely difficult to estimate the value of the foregone opportunities, we used proxy measures such as salaried staff time or textbook costs.

Figure 1-2 on page 12 shows the estimated costs that school districts and KSDE will incur during the five-year period ending in fiscal year 2017. As the figure shows, school districts will incur nearly all of the costs to implement the NCLB waiver, and those costs could range from about \$34 million to \$63 million in real or opportunity costs. Conversely, the figure shows that KSDE will incur minimal costs to implement the NCLB waiver, and may save several million dollars.

Most of the estimated costs for school districts are attributable to implementing college and career-ready standards (Common Core standards). This is shown in *Figure 1-2* on the next page. The Common Core costs include \$30 million to \$50 million for new textbooks and \$2 million to \$10 million for additional teacher training. We estimated school districts will incur costs of a few million dollars to implement the remaining principles of the NCLB waiver. We discuss the costs associated with implementing the Common Core standards more thoroughly in the section on Principle 1, beginning on page 14.

Figure 1-2
Estimated Future State and Local Real and Opportunity Costs (a) of
Implementing Common Core (Principle 1)
and Complying with Other NCLB Waiver Requirements (Principles 2-4)

	Year 1 (FY 2013)	Year 2 (FY 2014)	Year 3 (FY 2015)	Year 4 (FY 2016)	Year 5 (FY 2017)	5-Year Cumulative Total (b) (c)
Principle #1: College and Career-Ready Expectations for All Students						
KSDE	---	---	---	---	---	---
All School Districts	\$2 million to \$10 million	\$15 million to \$25 million	\$15 million to \$25 million	---	---	\$32 million to \$60 million
Principle #2: State-Developed Differential Recognition, Accountability, and Support						
KSDE	< \$50,000	---	(\$3 million)	(\$3 million)	(\$3 million)	(\$9 million)
All School Districts	---	---	---	---	---	---
Principle #3: Supporting Effective Instruction and Leadership						
KSDE	< \$50,000	< \$50,000	< \$50,000	< \$50,000	< \$50,000	\$50,000
All School Districts	---	\$2 million to \$3 million	---	---	---	\$2 million to \$3 million
Principle #4: Reducing Duplication of Effort and Unnecessary Burden						
KSDE	---	---	---	---	---	---
All School Districts	---	---	---	---	---	---
Total Costs of All Principles						
KSDE	< \$50,000	< \$50,000	(\$3 million)	(\$3 million)	(\$3 million)	(\$9 million)
All School Districts	\$2 million to \$10 million	\$17 million to \$28 million	\$15 million to \$25 million	---	---	\$34 million to \$63 million

(a) These types of costs are defined in the text on page 11.

(b) Totals may not add due to rounding.

(c) Costs are based on a set of assumptions. Different assumptions will yield different results. Assumptions and detailed methodology are described in Appendix B.

Source: LPA Analysis and KSDE cost estimates.

School district officials should be able to take steps to mitigate most of the real (out-of-pocket) costs of implementing the NCLB waiver’s principles. As mentioned above, it could cost school districts between \$34 million and \$63 million over the next five years to implement the provisions of the NCLB waiver. Depending on the decisions that school districts make, they may be able to minimize or eliminate the out-of-pocket portion of these costs. For example, by delaying textbook purchases for other subjects, school district officials would be able to minimize out-of-pocket expenditures for English and math textbooks that are aligned with the Common Core standards. Similarly, by incorporating training on the Common Core standards into existing teaching training days, school district officials can

eliminate the out-of-pocket expense of hiring substitute teachers for their classrooms. However, school districts would incur the opportunity costs associated with these decisions (such as using older textbooks in other subjects and foregoing training on other topics).

KSDE likely will incur minimal costs to implement the NCLB waiver and may achieve some future savings. As *Figure 1-1* indicates on page 10, KSDE has already taken several actions that satisfy the NCLB waiver's requirements. In addition, KSDE officials identified several reasons why their agency should incur minimal costs going forward. For example, KSDE officials told us they will not have to collect new data to comply with the waiver's requirements. Also, KSDE recoups the costs that it incurs for hosting summer training sessions (known as Summer Academies) from school districts. Overall, KSDE officials indicated they will have to take very few new actions to meet the waiver's requirements.

Further, KSDE may be able to achieve future savings because it may no longer have to hire contractors to write and develop student assessment tests. Currently, KSDE pays about \$3 million per year for assessment test development. Instead, the state may use student assessment tests developed and administered in cooperation with the federally-funded SMARTER Balanced consortium. These tests would be developed for Kansas at no cost. These potential cost savings are described in greater detail on page 21 of this report.

KSDE and school districts incurred some costs that could be classified as implementation costs before the NCLB waiver was approved. As noted in the Overview, Kansas' waiver was conditionally approved in July 2012. Prior to that time, KSDE and school district officials were taking certain actions to prepare themselves for the new requirements. For example, KSDE provided training at its 2011 and 2012 Summer Academies that was designed to help educators understand the Common Core standards and identify ways to apply the standards in classroom instruction. The total cost that school districts incurred to send staff to these training sessions likely ranged between \$400,000 and \$700,000.

In this audit, we did not attempt to identify all previously incurred costs that could be classified as implementation costs. Instead we focused on future costs for fiscal years 2013-2017. That is because the approved scope statement for this audit asked for an estimate of implementation costs going forward for the next five years.

Figure 1-3

Adopting the Common Core Standards Has Both Potential Advantages and Disadvantages

Although 45 states have adopted the Common Core standards, the standards have both proponents and opponents. One criticism that has been raised about the Common Core standards is that states should set their own standards, not the federal government. The Common Core standards are not a mandatory set of standards and states are not required to adopt them. Rather, the NCLB waiver requires college and career-ready standards. This requirement could be met by adopting the Common Core standards or another set of standards. Finally, the decision on which standards will be used in a state is left up to each state.

Below is a list of some potential advantages and disadvantages of the Common Core standards. We developed this list by talking to KSDE and school district officials, reviewing studies conducted by public policy organizations, and reading articles about what changes the Common Core standards will bring to education.

Proponents of the Common Core standards say:

- Students will be better prepared for college and the workforce upon graduating from high school.
- Common Core standards provide teachers with quality learning targets because the expectations of students are very clear.
- Because so many states adopted the Common Core standards, teachers from different states will be able to share lesson plans and ideas with each other because they are teaching the same standards. As a result, textbook costs may decrease.
- States could save significant amounts of money by using assessment tests developed by either of the two federally-funded consortiums. These tests are developed at no cost to states.

Opponents of the Common Core standards say:

- Some states will need to invest significant amounts of money to update their technology in order to administer online student assessment tests.
- It will take a significant amount of time to train teachers about the Common Core standards and how to implement them in the classroom.
- Students will have to learn material at a quicker pace because the Common Core standards are more rigorous than previous standards.
- Districts will have to purchase new textbooks and teaching materials, and adjust curriculum.

FINDINGS RELATED TO PRINCIPLE 1 (COLLEGE AND CAREER READINESS)

Kansas Adopted the Common Core Standards Which Comply With Principle 1 of the NCLB Waiver

As discussed in the overview, the Kansas State Board of Education adopted the Common Core standards in October 2010, and the U.S. Department of Education has recognized the Common Core standards as college and career-ready standards that meet Principle 1 requirements of the NCLB waiver. The Common Core standards are designed to help ensure that students are prepared as they enter college or the workforce after high school graduation, and are intended to establish consistent academic standards between states. As of September 2012, 45

states, including Kansas, have adopted the Common Core standards.

The Common Core standards have both supporters and detractors. We talked to KSDE and school district officials, and reviewed articles and studies to identify some of the arguments for and against the standards. Those arguments are summarized in *Figure 1-3* on page 14. The proponents of the standards contend they will better prepare students for college and the workforce. Opponents argue the change will require a significant amount of time to train teachers how to implement the new standards in the classroom. In this audit, we have only estimated the cost of implementing the Common Core standards. We did not attempt to assess the merits of the standards.

We Estimate School Districts Could Incur Between \$32 Million and \$60 Million in Real or Opportunity Costs to Implement the Common Core Standards

By reviewing other studies, and talking with Kansas educators, we identified two potential costs school districts might incur when implementing the Common Core standards. Because the new standards focus on math and English, the curriculum in these two areas will need to change. As a result, school districts will likely purchase new instructional materials that align with the Common Core standards. Schools districts will also have to train teachers about the new standards and how to implement them.

As *Figure 1-4* below shows, we estimate school districts could incur between an estimated \$32 million and \$60 million in real or opportunity costs over a five-year period to purchase instructional materials and provide training to teachers.

**Figure 1-4
Estimated Real and Opportunity Costs
School Districts Could Incur Through FY 2015
To Implement Principle 1**

Major Cost Area	Year 1 (FY 2013)	Year 2 (FY 2014)	Year 3 (FY 2015)	5-Year Cumulative Total (a)
Textbooks	---	\$15 million to \$25 million	\$15 million to \$25 million	\$30 million to \$50 million
Professional Development	\$2 million to \$10 million	---	---	\$2 million to \$10 million
Total Costs	\$2 million to \$10 million	\$15 million to \$25 million	\$15 million to \$25 million	\$32 million to \$60 million

(a) Costs are based on a set of assumptions. Different assumptions will yield different results. Assumptions and detailed methodology are described in Appendix B.
Source: LPA Analysis and KSDE cost estimates.

Purchasing new instructional materials over the next two years that are aligned to the Common Core standards accounts for most of the estimated implementation costs. In our analysis, we assumed school districts would purchase new math and English workbooks and textbooks for their K-12 students that align with the Common Core standards. We spread these costs over two years, but in essence purchasing new materials is a one-time cost.

- **We estimate Common Core textbooks and materials would cost school districts an additional \$30 million to \$50 million over the next two years, but this amount does not have to be entirely out of pocket.** School districts can take steps to mitigate the out-of-pocket costs related to replacing math and English textbooks. Most textbooks, regardless of subject, are replaced periodically. In fact, KSDE financial data show that, in recent years, Kansas school districts spent close to \$30 million each year on new and replacement instructional materials. That translates to about \$60 million over a two-year period, statewide. When faced with the task of replacing all math and English books in the next few years, school districts will have choices, as described below:
 - If school districts purchase new Common Core textbooks and materials and continue to replace the books and materials for other subjects as usual, they would spend an additional \$30 million to \$50 million out of pocket.
 - Conversely, if school districts forego purchasing books and materials for other subjects and only purchase Common Core materials, they would incur little, if any, additional out-of-pocket costs. By foregoing the acquisition of other subjects' textbooks, however, students will have to use older materials in other subjects. We estimated the opportunity cost for this choice would be about \$30 million to \$50 million.

Several school district officials told us they are currently delaying the purchase of math and English textbooks. Officials cited budget concerns as the primary reason for the delay. Other officials told us they are waiting for new textbooks aligned with the Common Core standards to be published before making any decisions.

This estimate of the costs to purchase textbooks and instructional materials is similar to the estimated costs for the same materials cited by a national study on the Common Core standards. The Pioneer Institute, a public policy organization, estimated Kansas school districts might incur \$30 million in costs over a seven-year period to purchase Common Core textbooks and instructional materials.

- **School districts may have other options for obtaining instructional materials that involve collaboration and sharing.** KSDE officials told us the Common Core standards will enable school districts to make better use of free web-based resources. These free resources may include curriculum guides and other educational materials borrowed from educators in other states that have adopted the Common Core standards. In addition, some school district officials mentioned they are considering switching

from paper-based textbooks to using more technological resources and possibly purchasing iPads for students to use instead of the traditional hardcover textbooks. We did not attempt to estimate the effect of these options on costs.

We estimate school districts could also incur between \$2 million and \$10 million in real or opportunity costs in the next year to train teachers on the new standards. State law provides that the academic standards for subject areas like math and English are to be reviewed on a cyclical basis, approximately every seven years. The academic standards for math and English were reviewed in 2003 and 2004, respectively, and were scheduled to be reviewed again in or around 2010. These reviews were completed with the adoption of the Common Core standards in October 2010.

Any time academic standards are changed, teachers need to be trained on how to apply the new standards in the classroom. Most officials we talked to indicated the ongoing change to the Common Core standards represents a larger and more difficult change for teachers and administrators than prior changes to these standards. Both KSDE and school district officials told us the new Common Core standards are more rigorous, the standards will require the adoption of new teaching strategies, and some material will be covered in different grade levels.

As with textbook purchases, depending on school district decisions about how to provide this training, the actual out-of-pocket costs will vary. Based on our review of other studies and talking with school district officials, we estimated teachers would need two additional training days on the Common Core standards. School districts already have several teacher training days factored into the school year. The training provided during these days covers academic standards, as well as other topics such as technology and bullying prevention. The mix of training will vary from district to district, based on its needs.

School districts' potential out-of-pocket costs will vary depending on whether the Common Core training replaces training on other topics, or is provided in addition to training on other topics.

- **School districts may incur between \$2 million and \$5 million in one-time real costs if they add new training days to the schedule.** Under this scenario, school districts would add two days of training for all math and English teachers to the planned training schedule. School districts would have to hire substitute teachers to cover for the regular teachers during the additional training days. KSDE officials contended this scenario is very unlikely. They indicated that because of budget constraints, school districts are cutting training days, not adding training.

- **School districts would incur few out-of-pocket costs if they incorporate the Common Core training into existing training days.** Under this scenario, school districts would provide two days of Common Core training within existing teacher training days. This scenario would not require school districts to hire substitutes, and results in no out-of-pocket costs. Additionally, if the two days of training replaces planned training on academic standards, the school districts would incur no opportunity cost. However, if the two days of training replaces planned training on other topics, the districts would lose the opportunity to provide training on other topics. We calculated the opportunity cost of the foregone training to be \$5 million to \$10 million at most.

KSDE Likely Will Not Incur Any Significant Costs to Implement the Common Core Standards

Since the Common Core standards were adopted in 2010, KSDE officials have been preparing for the change in standards and providing training and resources to school districts. The Common Core standards are scheduled to be implemented in Kansas classrooms no later than the 2013-2014 school year. To date, KSDE has incurred some costs for staff time to update the online training modules for the Common Core standards. According to KSDE officials, these costs were minimal and KSDE used existing resources.

Further, KSDE staff host Summer Academies for teacher training and in recent years the academies have focused on the Common Core standards. However, participants pay registration fees, and those fees cover KSDE's costs. In the future, KSDE will continue to pass the costs of its Summer Academies on to school districts.

Our Estimate of the Total Cost of Implementing the Common Core Standards in Kansas is Significantly Lower Than Other Studies' Estimates

At least two national studies have reported that Kansas will incur between \$100 million and \$180 million in total costs to implement the Common Core standards over a period of three to seven years. As noted earlier, our results suggest that the implementation costs will be much lower—between \$30 million and \$60 million over the next five years—and school districts will have choices to limit the amount that must come out of pocket. In reviewing these studies and comparing them to our results, there appear to be two primary areas where our cost estimates differ: teacher training and technology costs.

Although teacher training costs will be incurred, our estimate of those costs is significantly lower than other studies have suggested. One of the main cost components of implementing the Common Core standards is training teachers on the new content. This is included in our analysis, but our estimate differs from the estimates in the other studies for the following reasons listed on the next page.

- **Other studies appear to have overestimated the number of teachers in Kansas who will need Common Core training.** For example, a widely cited study conducted by the Pioneer Institute included all K-12 teachers when estimating the total costs of providing Common Core training to teachers. However, because the Common Core standards affect only math and English, it should not be necessary for all teachers to attend Common Core training. Based on discussions with KSDE officials and our review of an analysis conducted by the non-partisan Montana Legislative Fiscal Division, we estimated that only 63% of all Kansas teachers would need training on the Common Core standards. This would include all elementary school teachers, as well as middle and high school teachers who teach math and English.
- **We also estimate that each teacher will need fewer hours of training on the Common Core standards than other studies have assumed.** National studies conducted by the Thomas B. Fordham Institute and the Pioneer Institute both estimated that it would cost about \$2,000 per teacher for training on the Common Core standards (80 hours of additional training for each teacher). Based on our review of the Fordham and Pioneer studies, the Montana Legislative Fiscal Division's analysis, and our discussions with KSDE and school district officials, it appears unlikely that school districts in Kansas will dedicate this much additional training time to the Common Core standards. The Fordham study acknowledges that this estimate is at the high-end of its cost spectrum, and both studies rely significantly on rough estimates provided by California officials.

Rather, we concluded that 16 hours of training (two full days) on the new standards is a better estimate of what will be needed. This is in part because KSDE has already provided many two- and three-day Summer Academy sessions on the Common Core standards, and supplemental information is already available to educators through online training modules. However, even if this estimate is proven to be understated and districts end up dedicating three or four days to training, it would have only a marginal effect on our estimate of the total cost of implementing the Common Core standards.

Our estimate of the total cost of implementing the Common Core standards is significantly lower than the estimates in the Fordham Institute study and Pioneer Institute study because of these differences in assumptions. We estimated total training costs could range between \$2 million and \$10 million. On the other hand, the Fordham Institute estimated one-time teacher training costs ranging between \$60 million and \$70 million, while the Pioneer Institute estimated those costs at about \$70 million.

Technology costs, which may be significant in many states, should not be much of an issue in Kansas because most student assessments already are taken online. The NCLB waiver does not explicitly require online student assessments, but it is likely the assessments aligned with the Common Core standards will be administered online. Currently, many states use

little, if any, online testing and a shift to this type of testing will likely result in significant costs for those states. The Pioneer Institute study suggested this shift will require many states to incur costs to update their technological infrastructure. For example, school districts will need to purchase additional computers and increase their bandwidth. Pioneer Institute estimated these costs to be between \$70 million and \$80 million for Kansas.

It is unlikely Kansas will incur these additional technology costs because nearly all Kansas student assessment tests are currently administered online. In fact, KSDE policy requires schools to administer the assessments online. This requirement started a few years ago.

It is important to note that modified student assessment tests (aligned with the Common Core standards) will not be administered until the 2014-2015 school year. KSDE officials told us they expect the new assessment tests will be administered in nearly the same way as the current assessments. They acknowledged the new assessments will include more than just multiple-choice questions. The new assessment tests will require students to demonstrate both analytical and problem solving skills in answering the questions, but they think these changes will not result in significant costs to the state or school districts.

Lastly, in the future as technology changes and other advancements are made, it is possible that the method by which student assessment tests are delivered and scored could change. It is possible that such changes may require the state or school districts to incur costs. However, because these possibilities are only speculative, we did not try to estimate what they would cost.

FINDINGS RELATED TO PRINCIPLE 2 (ASSESSING STUDENT AND SCHOOL PERFORMANCE)

Kansas Has Developed Four Annual Measurable Objectives as a Way to Assess Student and School Performance

Principle 2 of the NCLB waiver requires each state to develop its own accountability system designed to improve student achievement, school performance, and increase the quality of classroom instruction. KSDE's system consists of four annual measurable objectives—student achievement, student growth, reducing the achievement gap between the highest and lowest performing students, and decreasing the number of non-proficient students. The U.S. Department of Education accepted these new objectives in approving Kansas' NCLB waiver. These measurable objectives were described in *Figure 1-1* on page 10.

As is the case with the current Adequate Yearly Progress (AYP) target, KSDE staff will determine whether these new objectives are met using student assessment test scores. KSDE officials told us they will use the accountability system to determine which schools show year-to-year improvement and to identify and recognize high-performing schools. Officials will use the accountability system to identify low-performing schools. Then, KSDE staff will provide technical assistance to schools to help improve students' test scores.

Neither KSDE nor School Districts Should Incur Any Significant Additional Costs to Assess Student and School Performance

KSDE and school district officials told us they do not expect school districts to incur any significant costs to implement Principle 2 requirements. School districts do not pay for the student assessment tests and schools already have the capability for online testing. As mentioned earlier, KSDE policy requires school districts to administer the assessments online. Several school district officials told us they do not plan to purchase any new technology for assessment tests, while a few others told us they were not sure. A few school district officials also told us they plan to train staff about the change in assessment tests, but they indicated these costs would be minimal.

KSDE officials told us they do not expect their agency to incur any significant costs to implement Principle 2 requirements. That is because KSDE staff already collect the data that will be used to calculate and evaluate the annual measurable objectives for each school. KSDE officials expect the computer software changes to be minimal and told us they do not plan to hire new programming staff.

KSDE Could Save as Much as \$3 Million Per Year by Not Having to Develop Student Assessment Tests

KSDE currently contracts with a private vendor to develop the statewide English and math assessment tests. Overall, this costs the state an estimated \$3 million a year. Because Kansas adopted the Common Core standards, new assessment tests will have to be formulated to coincide with the change in curriculum. KSDE officials anticipate that school districts will begin using the newly developed student assessment tests in the 2014-2015 school year.

The change to the Common Core standards may allow Kansas to acquire new student assessments at little to no cost and may yield cost savings. Presently, two state-led consortiums are developing student assessment tests aligned with the Common Core standards. One consortium is the SMARTER Balanced Assessment Consortium and the other is the Partnership for Assessment of Readiness for College and Careers (PARCC). Both consortiums are federally funded, and as a result, will develop student assessment tests for KSDE at little to no cost.

Choosing one of these options could potentially yield cost savings of up to \$3 million per year.

KSDE officials currently are considering student assessment tests developed by the SMARTER Balanced Assessment Consortium. However, as of October 2012, no final decision had been made.

FINDINGS RELATED TO PRINCIPLE 3 (TEACHER AND PRINCIPAL EVALUATION SYSTEM – “KEEP”)

KSDE Has Developed an Electronic Teacher and Principal Evaluation System to Meet the Requirements of Principle 3

Principle 3 of the NCLB waiver requires states to develop guidelines for an evaluation system which measures teachers’ and principals’ performance. These evaluations must include a component that is based on student performance. In 2010, KSDE officials started to develop an internet-based evaluation system known as Kansas Educator Evaluation Protocol (KEEP). When fully implemented, school districts will be able to use this system to satisfy this waiver requirement. As of the 2012-13 school year, KEEP was being piloted by several school districts, and KSDE officials told us it should be fully operational by the 2014-2015 school year. More information on the KEEP system is provided in *Figure 1-5* below.

It is important to note KSDE staff were developing the KEEP system before Kansas’ NCLB waiver request was submitted. Consequently, some of the implementation costs were likely to be incurred regardless of the waiver’s status.

Figure 1-5

KSDE’s Kansas Educator Evaluation Protocol (KEEP) System Conditionally Satisfies NCLB Waiver Requirements

KSDE staff began developing the KEEP evaluation system in 2010 in response to requests from numerous school districts across the state. The goal was to create a quality instrument for evaluating teachers and principals.

Through the KEEP system, all teachers and principals will set an overall goal and subsidiary goals for themselves, their classroom, their students, or their school. All goals will be reviewed and adjusted through discussions between the teacher or principal and their supervisor before they are ultimately set. For every goal, the teacher or principal will be asked to include data or feedback—called “articles of evidence”—into the system so he or she can later be evaluated based on the accumulated evidence.

At the time of the waiver application, KSDE had not decided exactly how student performance would be linked to teacher and principal evaluations. The U.S. Department of Education granted Kansas’ waiver on a conditional basis until KSDE can demonstrate how this will work. KSDE has created a workgroup to resolve this issue and plans to have a solution by early 2013.

Finally, school districts are not required to use the KEEP system but must have an evaluation system that meets waiver requirements. The KEEP system is being provided to school districts at no charge. However, school district officials can opt to develop their own system, or use another system developed by a third-party. In either case, that system will be developed at the school district's own expense, and we did not attempt to estimate any such development costs. KSDE officials told us they are trying to assemble a panel of volunteers from the education community to evaluate any proposed systems and determine whether they meet the waiver's criteria.

We Estimate School Districts Could Incur Up to \$3 Million in Costs to Train Teachers and Administrators to Use the New Evaluation Systems

To estimate future costs for this principle, we spoke with KSDE and school district officials, reviewed KSDE teacher and principal FTE and salary data, and reviewed other states' studies. The costs we identified will be incurred to train educators about how to use any new evaluation system, and are one-time costs.

School district officials can take steps to mitigate the potential \$2 million of out-of-pocket costs. As with the other principles, our cost estimates vary depending on what course of action school districts take. In this case, the training for the new evaluation systems can either be additional training days, or can be absorbed within existing scheduled training days, as described on the next page.

- **School districts may incur about \$2 million in one-time real costs if they add new training days.** Under this scenario, school districts would add one half-day of training to teachers' existing schedules. School districts would have to hire substitute teachers to cover the absent teachers' classrooms.
- **School districts would incur few out-of-pocket costs if this training occurred during existing training days, but the district would have opportunity costs of \$3 million.** Under this scenario, school districts would allocate one half-day of existing training to cover KEEP or new evaluation systems. In this scenario, no substitute teachers would be hired, but the districts would lose the opportunity to cover other topics, such as teaching techniques for struggling learners.

KSDE Should Incur Minimal Costs to Refine and Maintain a Teacher and Principal Evaluation System and Train School District Staff How to Use It

KSDE will incur some costs to train school district staff and maintain the KEEP system, but those costs should be minimal. We estimate those costs should be less than \$50,000 over the next five years. These costs are a combination of real and opportunity costs. KSDE will incur real costs, such as travel and room rental, for conducting training workshops. KSDE will also incur opportunity costs for the time staff spend working on KEEP instead of other projects.

As mentioned on page 23, KSDE is also responsible for reviewing evaluation systems for school districts that do not use KEEP. This activity will not cause KSDE to incur expense because KSDE is going to rely on volunteers from school districts to review these alternative systems.

FINDINGS RELATED TO PRINCIPLE 4 (REDUCING DUPLICATE REPORTING AND PAPERWORK FOR SCHOOL DISTRICTS)

Neither KSDE nor School Districts Should Incur Any Additional Costs to Reduce Unnecessary Reporting and Paperwork

Principle 4 of the NCLB waiver requires states to implement standards which help reduce paperwork and reporting duplication. KSDE officials told us that unlike Kansas, some states conduct student assessment tests on paper or require school districts to submit duplicative information to their KSDE counterparts. They added this principle is focused at state-level education agencies, not school districts.

The U.S. Department of Education determined KSDE's ongoing efforts were sufficient to satisfy waiver requirements.

As mentioned in the Overview, KSDE began efforts in 2005 intended to reduce the amount of time that school district staff spent accumulating and submitting extraneous data. Because these actions have already been implemented, no new costs will be incurred by KSDE in the next five years. Examples of the KSDE's efforts in this area are described below.

- **KSDE created a master data management system to eliminate duplicate data requests.** For example, KSDE can have a student's name, address, and other personal and academic information stored in a single location. When a child enrolls in a new program, school district officials do not have to resubmit that basic data. KSDE currently uses this approach for several datasets including student, teacher, and assessment data.
- **KSDE has a policy that staff consider master data management issues during design and development of new software.** In 2007, KSDE implemented a policy to actively consider concerns about unnecessary data collection or duplication of effort during the design and development phases of new software. This procedure is designed to reduce the likelihood that new systems or software features will be built to collect data which is already collected by another existing system.
- **KSDE has a system to crosswalk specific KSDE data elements to a common set of definitions.** This crosswalk does not change any of the data KSDE collects, but rather allows KSDE to identify areas where duplicative data collections are taking place which might otherwise be overlooked. It also allows comparisons between Kansas' data and those of other states.

- **KSDE established a data governance board (data steward workgroup).** This workgroup was established in 2006 and is made up of KSDE employees. Each member oversees or administers a major KSDE dataset, such as student meal counts, student demographic data, or student assessment data. The workgroup meets regularly to discuss data collection and reporting issues. Regular meetings are intended to reduce the risk that duplicate data are collected because the stewards of the datasets will have increased knowledge of other collection systems occurring throughout the agency. The workgroup is chaired by KSDE's Information Technology Director.

Conclusion

Various studies have reported that Kansas and other states will incur significant costs to implement the Common Core standards and the federal No Child Left Behind waiver. Although our estimates of the implementation costs are lower than others have shown, they are not insignificant. Further, nearly all of these costs will be incurred by local school districts. School districts do have some options available to them that could be used to minimize the need for additional spending, such as delaying textbook purchases and foregoing other professional development topics. These tradeoffs should not be trivialized, but in a time of tight budgets, there will at least be some options.

Recommendations

None

APPENDIX A

Scope Statement

This appendix contains the scope statement approved by the Legislative Post Audit Committee for this audit July 10, 2012. The audit was requested by the House Appropriations Committee.

K-12 Education: Estimating Potential Costs Related to Implementing The No Child Left Behind Waiver in Kansas

The Common Core Standards Initiative is an effort to establish a shared set of educational standards for K-12 English and mathematics based on input from teachers, experts, parents, and school administrators. Proponents say that the standards are intended to help ensure that students receive a high quality education consistently across schools and states and they could facilitate greater opportunities for educators to share experiences and best practices.

Although the Common Core Standards Initiative was originally a state-led effort, President Obama has promoted the standards at the federal level. Specifically, the President offered states a waiver in September 2011 that would exempt them from certain requirements of the current federal No Child Left Behind law, in exchange for adopting the Common Core Standards and several other requirements. Critics of offering the waiver in order to implement the standards argue that the President should not have acted without action by Congress, that the federal government does not have the authority to impose a national curriculum, and that adopting the standards could be challenged by the courts.

As of February 2012, 45 states (including Kansas) had adopted the Common Core Standards, though only eleven states have applied for the No Child Left Behind waiver. Additionally, the California State Board of Education estimates that it will cost the state between \$2.4 and 3.1 billion to fund the programs the waiver requires.

Legislators would like to know both the short- and long-term potential costs of implementing the Common Core Standards and other requirements of the No Child Left Behind waiver in Kansas.

A performance audit in this area would address the following questions:

- 1. What are the potential costs of implementing Common Core Standards in Kansas K-12 schools over the next several years?** To answer this question, we would identify any requirements of the Common Core Standards and determine how those differ from Kansas' current education standards. We would also talk with officials from the Department of Education and school districts, as well as other experts to determine what information is available about the standards that would help estimate costs related to their implementation. Specifically, we would try to determine how implementing the standards might affect costs related to curriculum changes and any other relevant cost factors. We would also talk to other states that have estimated costs related to the implementation of the standards to determine what methodology they used. Based on that cumulative work and using available information, we would estimate how much

it might cost Kansas to implement the standards over a one, three, and five year period. We would perform additional work in this area as necessary.

2. **What are the potential costs of implementing other requirements of the No Child Left Behind waiver in Kansas K-12 schools over the next several years?** To answer this question, we would identify any requirements of the No Child Left Behind waiver (NCLB) besides the Common Core Standards and determine how those differ from Kansas' current education standards, and what additional programs would be needed. We would perform work similar to that described in Question 1 to identify what information is available to help us estimate the costs of implementing any additional requirements we identify. Using that information, we would estimate costs over a one, three, and five year period. We would perform additional work in this area as necessary.

Estimated Resources: 3 LPA staff

Estimated Time: 5 months (a)

- (a) *From the audit start date to our best estimate of when it would be ready for the committee. This time estimate includes a two-week agency review period.*

APPENDIX B

Detailed Cost Estimate Methodology

This appendix contains a detailed description of the methodology, assumptions, and limitations of our work to estimate the costs that KSDE and school districts will incur in the next five years to implement the requirements of Kansas' NCLB waiver.

GENERAL COST ESTIMATE APPROACH

Like other states, Kansas' NCLB waiver is comprised of four parts, referred to as principles. For each principle, we identified the primary cost drivers relevant to KSDE's and school district's implementation of the waiver. We then worked with KSDE and school district staff to acquire sufficient information to allow us to develop a cost estimate for each cost driver. In some cases, we had to make assumptions about future actions and costs. Finally, we reviewed the results of our analyses with KSDE officials as appropriate.

- **Overall, we assumed that school districts and KSDE would not make significant changes to the way they currently operate.** For example, we estimated the costs of purchasing new textbooks for K-12 students based on school districts' historical spending levels. We did not develop cost estimates that would reflect alternative decisions such as school districts using iPads or online resources instead of hard copy textbooks.
- **We focused our analysis on the net new costs that KSDE and school districts would incur to fulfill the NCLB's waiver requirements.** For example, school districts purchase new textbooks and instructional materials every year. Recently, this amount was about \$30 million per year. We tried to estimate the amount school districts would need to spend to acquire new math and English textbooks aligned with the Common Core standards that exceeds the \$30 million amount that districts have historically spent.
- **We acknowledge that school districts and KSDE have already incurred some costs that could be attributed to actions taken to implement the NCLB waiver.** For example, we estimated that school districts may have spent up to \$700,000 to send staff to Summer Academies where training on the Common Core standards was provided. We did not attempt to identify all these previously incurred costs, and instead focused on future costs that would be incurred between fiscal years 2013 and 2017.

In the following sections, we describe our calculations and important assumptions for each principle.

PRINCIPLE 1: COLLEGE AND CAREER READINESS (COMMON CORE STANDARDS)

For this principle, we identified three primary cost drivers related to implementing the Common Core standards:

- purchasing new instructional materials
- training teachers
- purchasing new technology

Cost Driver 1A: Purchasing New Instructional Materials

This is a cost driver because school districts will likely have to purchase new instructional materials such as textbooks that are aligned with the Common Core standards.

Our Approach

To estimate the potential costs that school districts could incur to acquire grade-appropriate instructional materials under the waiver, we:

- **Determined the statewide total for the amounts that school districts reported to KSDE as being spent on instructional materials for the 2009-2010 and 2010-2011 school years.** We used KSDE school district expenditure data as the source for this information. We performed limited work to assess the reasonableness of the school expenditure data and concluded that it appeared reasonable for our purposes. We determined that school districts' total expenditures for purchasing instructional materials were \$29.5 million for the 2009-10 school year and \$28.4 million for the 2010-2011 school year. For ease of reporting, we used an average of \$60 million over two years.
- **Determined the number of students in each grade.** We used KSDE K-12 headcount enrollment data by grade level as the source of this information. We performed limited work to assess the reasonableness of the student headcount data and concluded that it appeared reasonable for our purposes. We determined that school districts' K-12 student headcount was 461,883 for the 2010-2011 school year and 462,758 for the 2011-12 school year.
- **Determined the estimated cost of purchasing individual textbooks in math and English.** We reviewed studies prepared by entities such as the Thomas B. Fordham Institute, Pioneer Institute, and the Montana Legislative Fiscal Division. Textbooks costs in these studies ranged from \$50 to \$135 per student. A non-partisan Montana Legislative Fiscal Division study seemed most beneficial to us because it assigned different textbook costs based on grade and subject. To develop these cost estimates, Montana officials contacted textbook publishing companies. In our analyses, we used several different cost figures as explained below.
- **Estimated the statewide total cost of purchasing new textbooks.** We used the information described above to develop this estimate.

Our Scenarios

Ultimately, we developed an estimate of the costs of replacement textbooks for math and English. Again, our estimates are for additional costs above and beyond what school districts typically spend. We evaluated cost estimates under two different scenarios:

- **Scenario 1: School districts purchased a new math and English textbook for each student and also purchased new textbooks for other subjects such as science and history in school years 2013-14 and 2014-15.** In this scenario, only real costs would be incurred.
- **Scenario 2: School districts purchased a new math and English textbook for each student, and did not purchase new textbooks for any other subjects in school years 2013-14 and 2014-15.** In this scenario, school districts would incur both a real cost and an opportunity cost. The real cost would be the amount paid to vendors to purchase only math and English textbooks. The opportunity cost would be the cost of not replacing other subjects' textbooks. We calculated this opportunity cost by analyzing how much districts had previously spent replacing other subjects' textbooks.

Major Assumptions

To develop our estimates, we assumed the following:

- **School districts would replace English and math instructional materials over a two-year period.** We assumed school districts would purchase half of the textbooks in school year 2013-14 and the remainder in school year 2014-15.

Note: School district officials told us they consider several factors when deciding whether to purchase new instructional materials. These factors include:

- The availability of funds
- The availability of other instructional materials to supplement the district's textbooks
- The physical condition of the district's textbooks
- Whether the textbooks align with academic standards

In conducting our analysis, we assumed school districts would have sufficient funding to purchase the textbooks, and that school districts would want to acquire new English and math textbooks that align with the Common Core standards. We also assumed that textbooks that align with the Common Core standards will soon become available.

- **Every K-11 student would receive a new math workbook or textbook.** The purchase price that we used for each student's math workbook or textbook is based on grade level and is listed below:

- Grades K-1: \$28 (workbook, not textbook)
- Grades 2-5: \$83
- Grades 6-8: \$96
- Grades 9-11 \$120 (see note below)

Note: Kansas State Board of Education policy requires students to complete three years of math to graduate from high school. Because we could not determine the number of students who take a fourth year of math in high school, we did not estimate any costs for math textbooks for 12th grade students.

- **Every K-12 student would receive a new English workbook or textbook.** The purchase price that we used for each student's English workbook or textbook is based on grade level and is listed below:

- Grades K-1: \$16 (workbook, not textbook)
- Grades 2-5: \$47
- Grades 6-8: \$56
- Grades 9-12: \$70

Cost Driver 1B: Training Teachers on the Common Core Standards

This is a cost driver because school districts will need to train their teachers on the requirements of the Common Core standards and how to apply them in the classroom.

Our Approach

To estimate the potential costs that school districts would incur to train teachers on the requirements and content of the Common Core standards, as well as how to apply them in the classroom, we:

- **Estimated the number of K-12 teachers who would need to be trained on the Common Core standards.** Because teacher headcount data were not readily available, we used teacher FTE data. We gathered KSDE teacher FTE data for the 2010-2011 and 2011-2012 school years. We performed limited work to assess the reasonableness of the personnel data, and we concluded that it appeared reasonable for our purposes. Because only math, English, and special education teachers would need to attend Common Core training, we estimated the number of teachers who would attend such training. We assumed 63% of all teachers would attend the Common Core training. This percentage was used in the Montana Legislative Fiscal Division study to estimate Common Core training costs. It also appeared to us to be a reasonable estimate of the percentage of Kansas teachers who teach only math, English, and special education.
- **Estimated the cost of a substitute teacher to be \$75 per day.** To develop this amount, we sought input from KSDE and school district officials. Also, we noted the Montana Legislative Fiscal Division used this amount in its analyses.

Our Scenarios

Ultimately, we developed an estimate of the costs that school districts would incur under two scenarios:

- **Scenario 1: School districts would add two days to their teacher training schedule to cover the Common Core standards.** This action would require hiring substitute teachers to cover for the regular teachers during the additional training days. In this scenario, only real (out-of-pocket) costs would be incurred. The real costs would be the total amount paid to substitute teachers.
- **Scenario 2: School districts would reallocate two days of previously scheduled training to cover the Common Core standards.** Usually this training occurs during a time when students are not in school. As a result, no substitute teachers would be needed. In this scenario, school districts would have no real costs. Additionally, if the two days of training replaces planned training on academic standards, the school district would incur no opportunity cost. However, if the two days of training replaces planned training on other topics, the districts would lose the opportunity to provide training on other topics.

Major Assumptions

To develop our estimates, we assumed the following:

- **In all, 63% of K-12 teachers would attend training on the Common Core standards.** Our method for arriving at the 63% figure was described above.
- **Teachers and administrators would need two days of training on the Common Core standards.** Based on our review of other studies, such as the Montana Legislative Fiscal Division study which had used a range of one to three days, and talking with school district officials, we estimated teachers would need two additional training days on the Common Core standards.

Cost Driver 1C: New Technology

This is a potential cost driver because it is likely that the student assessment tests aligned with the Common Core standards will be administered online.

Currently, many states use little, if any, online testing and a shift to online testing will likely result in significant costs for those states. It is unlikely Kansas will incur these additional technology costs because nearly all Kansas student assessment tests are currently administered online. KSDE policy requires student assessment tests to be administered online and school

district officials told us they do not expect to incur significant costs because of the change to the Common Core student assessment tests.

PRINCIPLE 2: ASSESSING STUDENT AND SCHOOL PERFORMANCE

There are several potential cost drivers for this principle. However, we did not identify any issues that would cause KSDE or school districts to incur significant costs. A listing of the potential cost drivers and the reason(s) why KSDE or school districts will not incur significant costs is presented below.

- **Changes to the way student assessment tests are developed:** KSDE or school districts will not incur costs because KSDE currently contracts for the development of year-end student assessment tests. If KSDE decides to use either of the assessments developed by federally-funded consortiums, it is possible that KSDE could actually save about \$3 million a year. The consortiums are developing student assessment test questions for KSDE at no cost.
- **Changes to how student assessment tests are administered:** We talked to KSDE and Kansas Association of School Board officials who told us that all student assessments are taken online. That is because KSDE policy requires student assessment tests to be administered online, unless accommodations are made for a student with special needs or learning disabilities. KSDE officials told us they do not anticipate any significant costs because Kansas already administers student assessment tests online. Further, school districts do not currently pay for the student assessment tests, and KSDE officials do not expect this to change.
- **Changes to how student assessment test scores are compiled:** Currently, KSDE staff contract with the University of Kansas to compile test scores. KSDE staff told us they do not anticipate there will be any changes to how assessment test scores are compiled with the NCLB waiver.
- **Changes to how student assessment tests are analyzed:** Because KSDE already collects the data they will need to calculate the four new annual measurable objectives and have no plans to hire new staff, KSDE does not anticipate incurring any significant costs in this area.

PRINCIPLE 3: TEACHER EVALUATION SYSTEM –KEEP

For this principle, we identified one primary cost driver: training teachers and principals about the new personnel evaluation system. The development of this system began several years ago, and, as a result, the majority of the costs—time and resources to develop the system—have already been incurred. Our analysis focused on future costs to implement the system and to assess student performance as required by the waiver.

Cost Driver 3A: Training Educators How to Use the “KEEP” or an Alternative System

This is a cost driver because school district personnel will have to become acclimated to a new evaluation system. The evaluation system must include a component that is based on student performance. KSDE began developing an internet-based system known as Kansas Educator Evaluation Protocol (KEEP). Districts can either use that system, opt to develop their own system, or use another system developed by a third-party. Any alternative systems must meet waiver requirements.

Our Approach

To estimate the potential costs that school districts would incur to train staff how to use the KEEP, or an alternative, system, we:

- **Estimated the number of teachers and principals who would need to be trained on a teacher evaluation system, KEEP or an alternative system.** We determined the number of K-12 teachers and principals for the 2010-2011 and 2011-2012 school years using KSDE teacher FTE data. We performed limited work to assess the reasonableness of the personnel data, and we concluded that it appeared reasonable for our purposes. Because teacher headcount data were not readily available, we used teacher FTE data.
- **Determined the cost of a substitute teacher.** We used the same method as described above in Principle 1, resulting in a cost of \$37.50 per half day.
- **Determined the average daily pay of teachers and principals.** We calculated the average contracted teacher salary for 2011-2012, using KSDE licensed personnel data. We calculated the average principal salary in the same way. We did not include benefits or supplemental pay because they should not be affected.

Our Scenarios

Ultimately, we developed an estimate of the costs that school districts would incur under two scenarios:

- **Scenario 1: School districts would add a half-day to their teacher training schedule to cover the new evaluation system.** We assumed school districts would use substitute teachers to cover for their regular teachers while they attended the training. We also assumed that when a principal attended these sessions, school districts would not need to hire a substitute principal. In this scenario, both real (out-of-pocket) costs and opportunity costs would be incurred. The real costs would be the amounts paid for substitute teachers. The opportunity costs would be the costs of the principals' time.
- **Scenario 2: School districts would reallocate a half-day of previously scheduled training to cover the new evaluation system.** In this scenario, no substitute teachers would be needed and only opportunity costs for the cost of the training time would be incurred. That is because the training would cover the new evaluation systems instead of other topics, such as bullying prevention.

Major Assumptions

To develop our estimates, we assumed the following:

- **It would take about one half-day to train school district education staff how to use the KEEP system or an alternative evaluation system.** The timeframe is consistent with the number of hours KSDE official budgeted for its training sessions on the KEEP system. We assumed staff in all school districts would have to be trained. To the extent that a school district is already using an alternative system that meets the waiver requirements, this estimated cost would be overstated.

PRINCIPLE 4: REDUCING DUPLICATE REPORTING AND PAPERWORK FOR SCHOOL DISTRICTS

For this principle, we did not identify any significant cost drivers. That is because KSDE staff will continue to operate in the same way as they were before the NCLB waiver was approved.

KSDE's efforts that are applicable to this principle have been underway since 2005. As a result, neither we nor KSDE staff anticipate the department will incur any future costs in this area.

According to KSDE, school districts will not incur costs because they will not have to report any new information to KSDE for this principle. As a result, we do not anticipate any future costs in this area for school districts.

APPENDIX C

Agency Response

On November 16, 2012 we provided copies of the draft audit report to the Kansas Department of Education. Its response is included as this Appendix.



Office of the Commissioner

785-296-3202
785-291-3791 (fax)

120 SE 10th Avenue • Topeka, KS 66612-1182 • www.ksde.org

November 29, 2012

Mr. Scott Frank
Legislative Post Auditor
Legislative Division of Post Audit
800 SW Jackson, Suite 1200
Topeka, KS 66612-2212



Dear Mr. Frank,

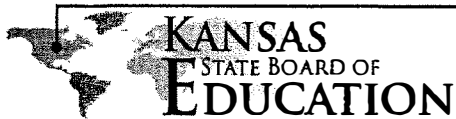
Thank you for the opportunity to review the performance audit, *K-12 Education: Estimating Potential Costs Related to Implementing the No Child Left Behind Waiver in Kansas*. We are appreciative of the cooperative and collaborative approach in which the audit was performed.

Please let me know if you need additional information or if we can assist your office further in completing the report.

Sincerely,

Dr. Diane M. DeBacker
Commissioner of Education
Kansas State Department of Education

ADDENDUM C:
LETTER FROM JANA SHAVER, CHAIRMAN, KSBE, TO KANSAS LEGISLATORS



Janet Waugh
District 1

Steve Roberts
District 2

John W. Bacon
District 3

Carolyn L. Wims-Campbell
District 4

Sally Cauble
District 5

Deena Horst
District 6

Kenneth Willard
District 7

Kathy Busch
District 8

Jana Shaver
District 9

Jim McNiece
District 10

Great students. Great teachers. Great leaders. Great citizens.

Dear (Kansas Legislator),

I am writing on behalf of the State Board of Education to share the concerns that have surfaced among our members with regard to some of the bills being considered in the Legislature this session. Our specific concern is that there appear to be instances where the State Board's constitutional authority is being infringed upon.

We respect the Legislature's constitutional responsibility to provide for the suitable finance of education for Kansas students. We ask that our legislators likewise respect the State Board's constitutional responsibility for the general supervision of schools, which includes accrediting schools, providing for academic standards and the licensure of teachers.

Our Board takes seriously our responsibility to Kansas students and schools and the decisions we make come after considerable thought and deliberation. We understand you exercise the same care in the decisions you make. We are hopeful we can continue to work together in fulfilling our respective responsibilities for the benefit of the people of Kansas.

Respectfully,

Jana Shaver

Chairman, Kansas State Board of Education

120 SE 10th Avenue, Topeka, KS 66612 • (785) 296-3203 • FAX (785) 291-3791 • www.ksde.org
An Equal Employment/Educational Opportunity Agency

KSBE002286

APPENDIX: SELECT TRIAL EXHIBITS

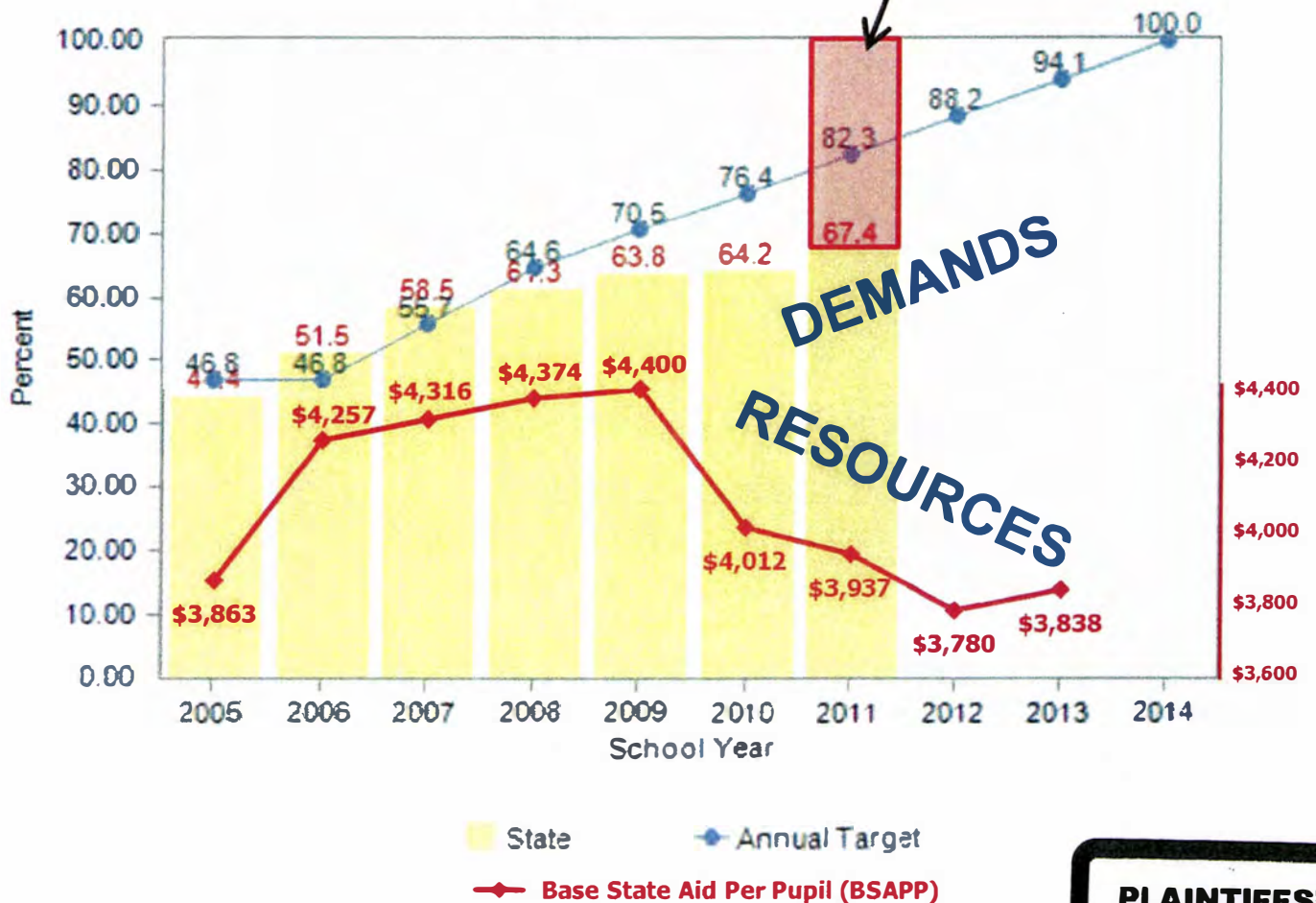


State Adequate Yearly Progress - Assessment Performance - African Americans

32.6% of all African American students in the state score below proficiency on state assessments. This is 11,569 kids.

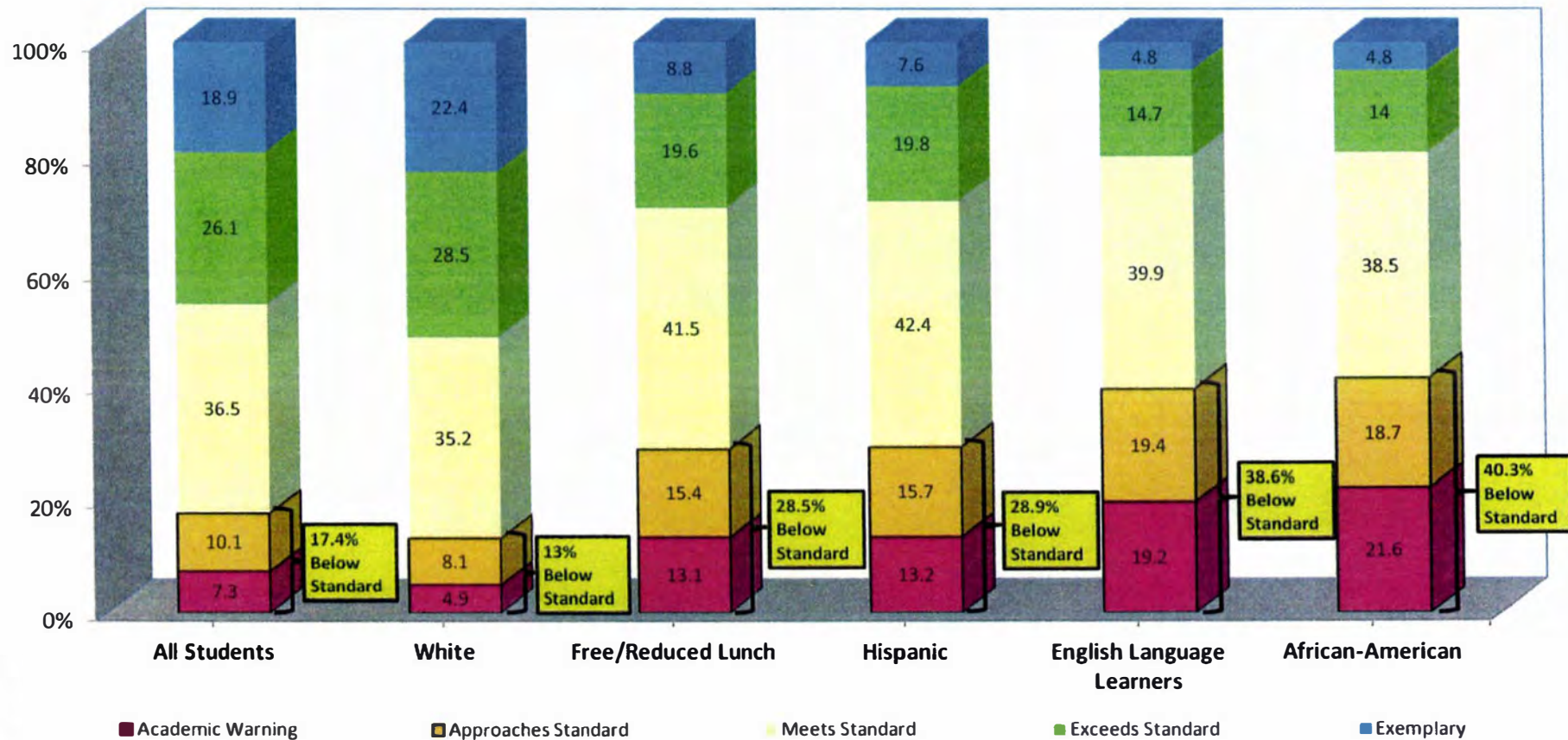
The graph shows the state's progress in meeting the annual targets for Performance on the Math Assessment. The given school, district, or state did not make AYP in this area.

Math Assessments



PLAINTIFFS' EX. 105

The Achievement Gap 2011 State Assessment: Grade 11 Mathematics



Data from KSDE Report Card 2010-2011

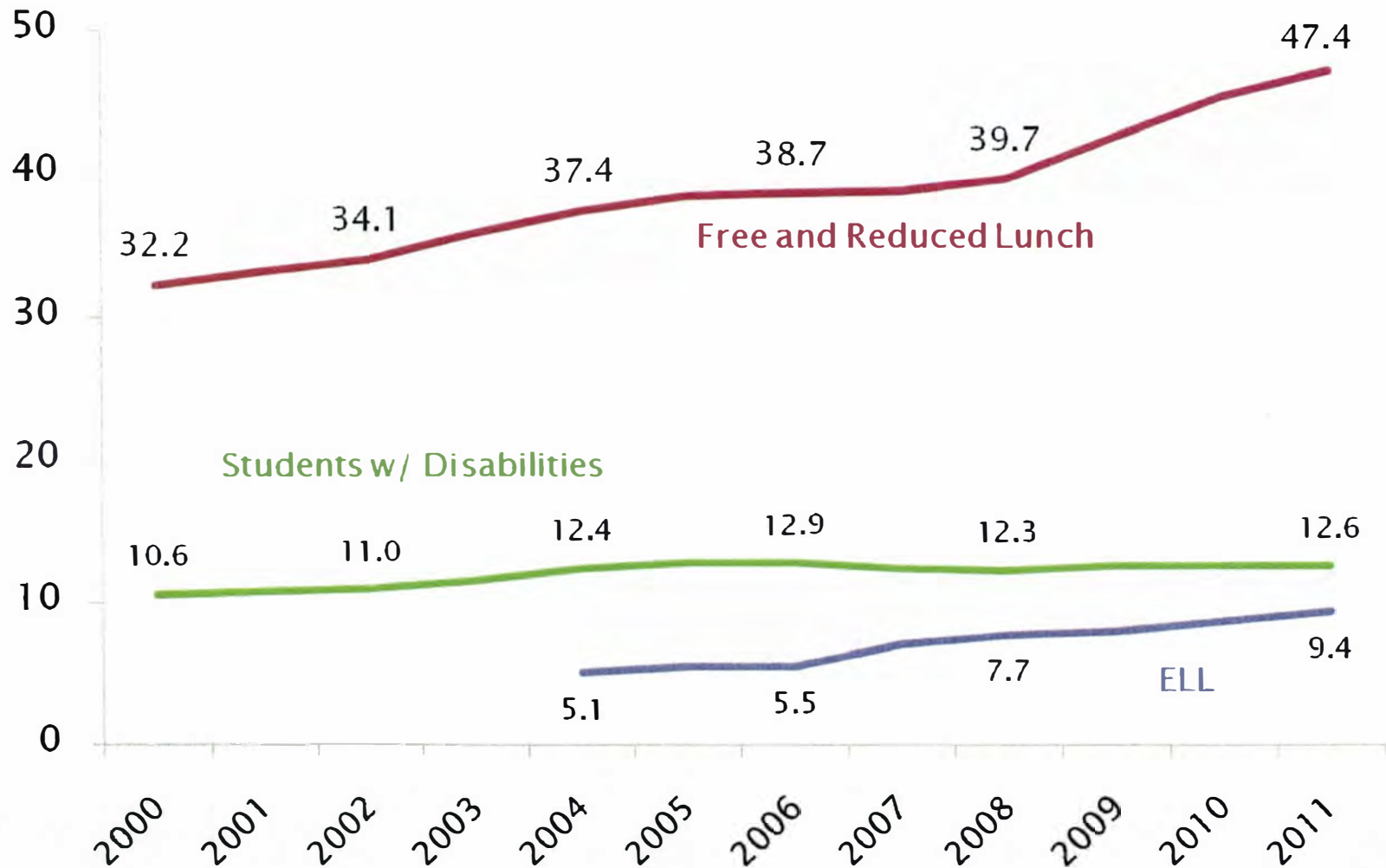
PLAINTIFFS'
EX. 106

990090

ACHIEVEMENT000672

Kansas Student Population Trends

(Percent of K-12, September Unaudited Enrollment, Public Schools)



PLAINTIFFS'
EX. 107

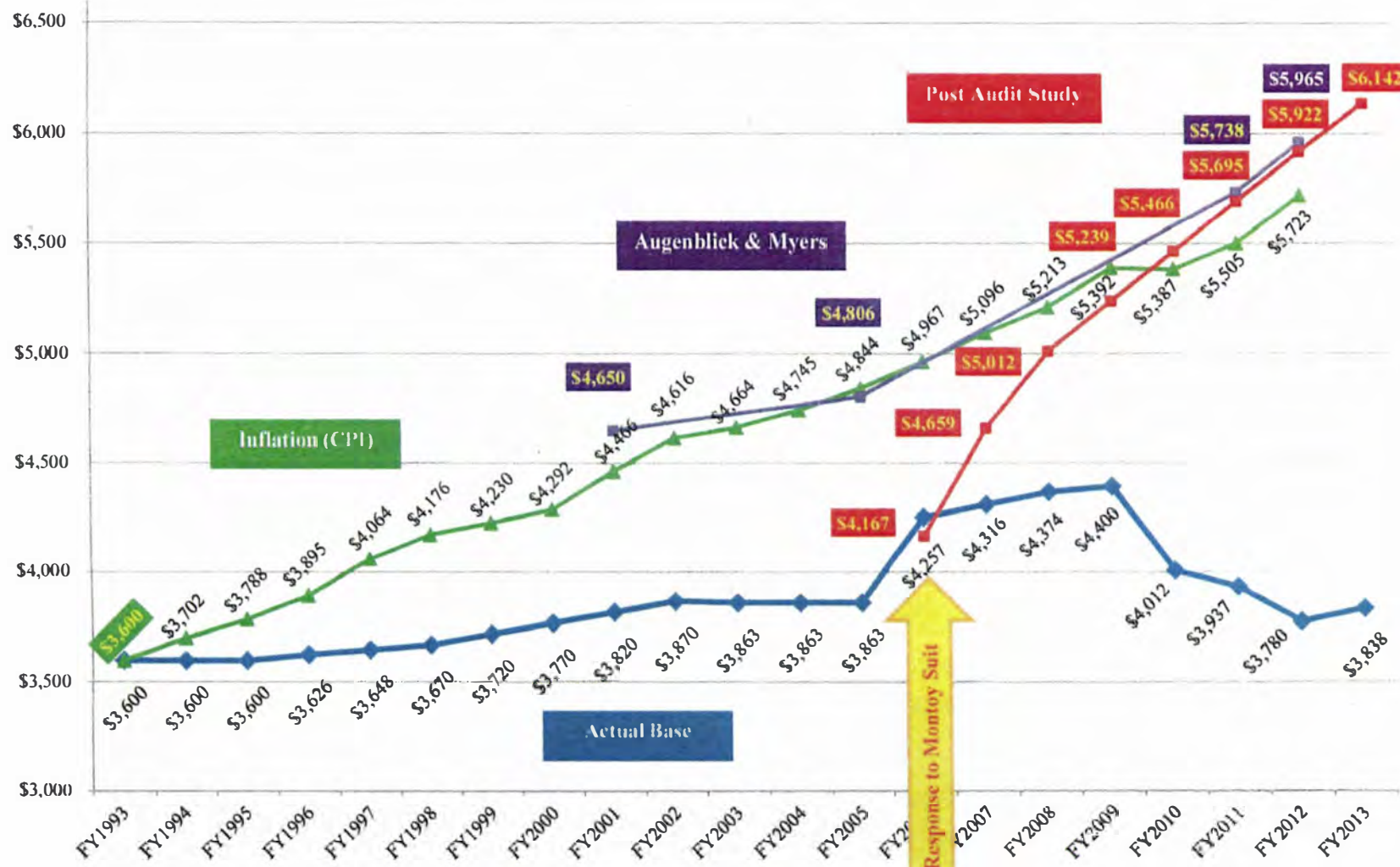
Kansas Base State Aid Per Pupil



■ Actual Base: from Kansas Fiscal Facts (L.E.G003707) & S1294

PLAINTIFFS'
EX. 233

Kansas Base State Aid Per Pupil



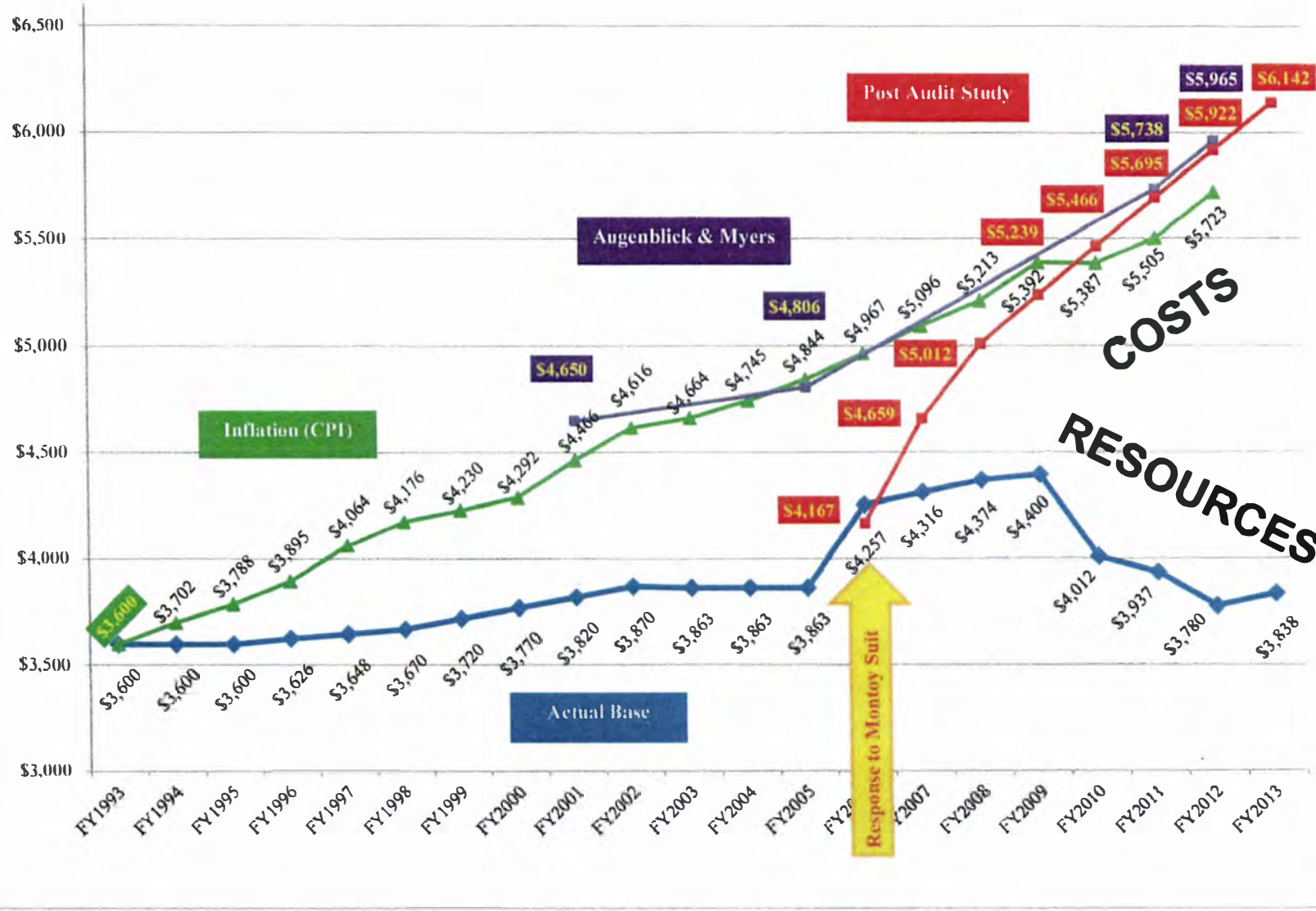
■ Actual Base: from Kansas Fiscal Facts (LEG003707) & SB294

■ Inflation (CPI): from U.S. Department of Labor - All Urban Consumers - Kansas City, MO-KS - All Items, Base of 3600 adjusted for inflation each year (BL5000001-4)

■ Augenblick & Myers: from May 2002 Study (LEG001414), June 2005 Update (LEG003516), October 2011 Update (EXP-MYERS000073), all amounts direct from reports except 2012 adjusted for inflation

■ Post Audit Study: from January 2006 Cost Study (USD443 001586), January 17, 2006 Memo (LEG003410), all amounts direct from reports. 2007 through 2012 amounts are in 2007 dollars

Kansas Base State Aid Per Pupil



■ Actual Base: from Kansas Fiscal Facts (LEG003707) & SB294
■ Inflation (CPI): from U.S. Department of Labor - All Urban Consumers - Kansas City, MO-KS - All Items, Base of 3600 adjusted for inflation each year (BLS000001-4)
■ Augenblick & Myers: from May 2002 Study (LEG001414), June 2005 Update (LEG003516), October 2011 Update (EXP-MYERS000073), all amounts direct from reports except 2012 adjusted for inflation
■ Post Audit Study: from January 2006 Cost Study (USD443 001586), January 17, 2006 Memo (LEG003410), all amounts direct from reports. 2007 through 2012 amounts are in 2007 dollars

BASE & CUTS

PLAINTIFFS'
EX. 241

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

989494

2005-06	1 st YEAR MONTROY MONEY
2006-07	1 st YEAR OF 3 YEAR PLAN
2007-08	2 nd YEAR OF 3 YEAR PLAN
2008-09	{ 3 rd YEAR OF 3 YEAR PLAN 1 st YEAR OF CUTS
2009-10	CUTS
2010-11	CUTS
2011-12	CUTS
2012-13	MODEST INCREASE

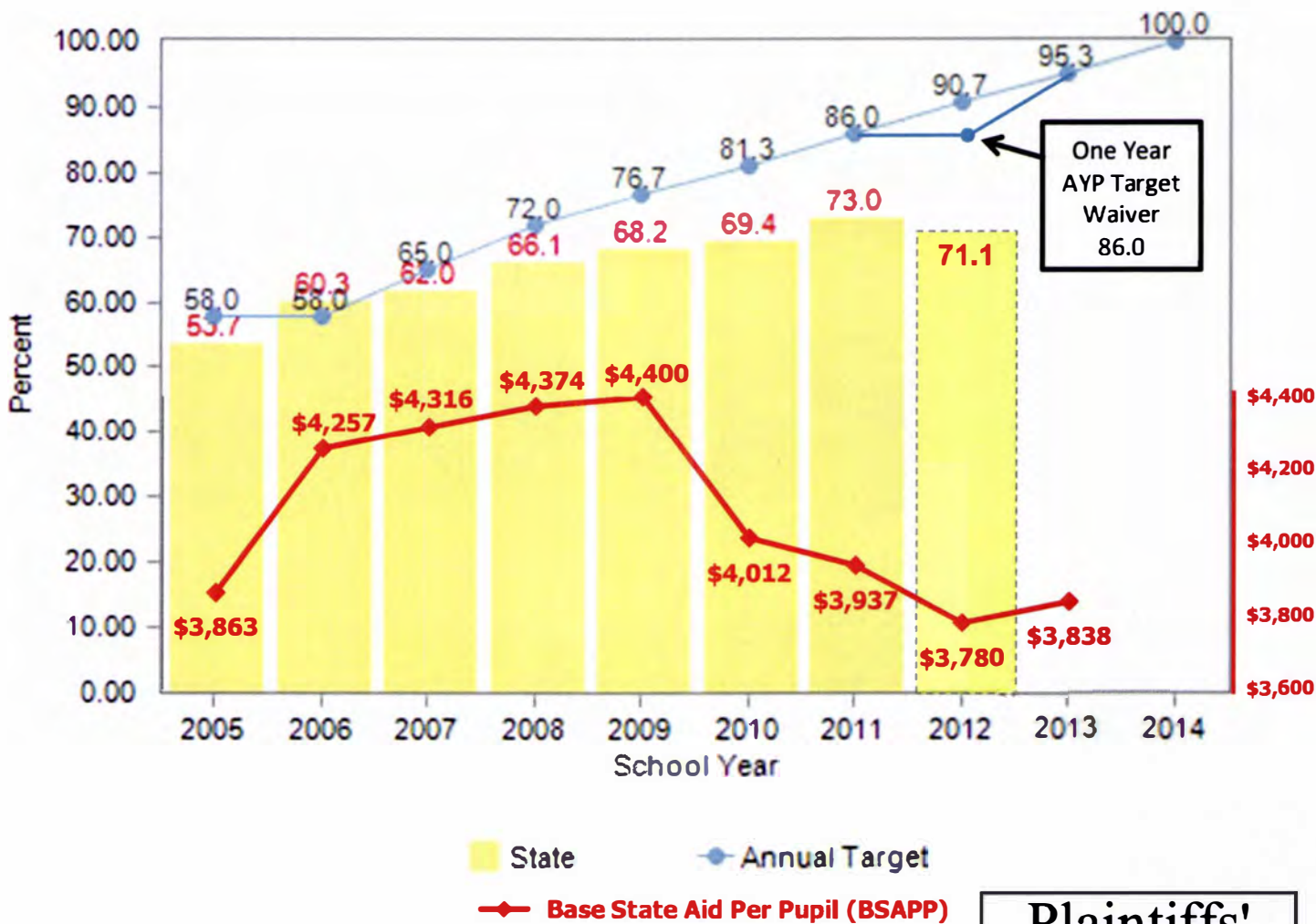
Plaintiffs'
Ex. 411



State Adequate Yearly Progress - Assessment Performance - African Americans

The graph shows the state's progress in meeting the annual targets for Performance on the Reading Assessment. The given school, district, or state did not make AYP in this area.

Reading Assessments



**Plaintiffs'
Ex. 416**

