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.

RESPONSE BRIEF OF APPELLEES/CROSS-APPELLANTS

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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STATEMENT OF THE ISSUES

During closing arguments, Judge Theis asked counsel for the State: "I don't think we're here to decide whether *Montoy* was correct, are we?" In response, Mr. Chalmers stated, "No. I agree. And I would not ask the Court to overrule *Montoy* . . . ." R.Vol.34, p.52. This is consistent with the frequently quoted sentiment that, "In life, there are no do-overs." Apparently, however, the State now takes a different position. In this appeal, the State asks for a "do-over" on *Montoy* and other long-standing school finance precedent in Kansas. But, as the State admitted at trial, there is no need to decide *Montoy* again.

The 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. The State has not complied with those brightlines, and in doing so, violates the Kansas Constitution. R.Vol.14, p.1948 ("Plaintiffs have established beyond any question that the State's K-12 educational system now stands as unconstitutionally underfunded."). The only "issue" that remains with regard to the State's violation of Article 6 of the Kansas Constitution is the determination of the proper remedy to rectify the State's unconstitutional actions. *See e.g.* Brief of Cross-Appellant, filed May 15, 2013, at p.2 ¶2. Thus, Plaintiffs disagree with the issues listed in the State's Statement of the Issues; the only issues necessary to the disposition of the appeal are those listed within the Brief of Cross-Appellant, at p.2.

STATEMENT OF THE FACTS

Because of the incomplete, and often incorrect, Statement of the Facts provided by the State, Plaintiffs offer the following additional information pertinent to the issues raised in the Brief of Appellant.

I. Kansas Students are Not Receiving a "Suitable Education" Because of the State's Underfunding of Education

The State contends that "Kansas kids are doing well." State's Brief, at 38. Plaintiffs agree that some Kansas students are performing well. However, this case is about those students that are not. And, there are a substantial number of Kansas students who are not performing well. Plaintiffs incorporate herein §J of the Brief of Cross-Appellant ("Kansas Students Are Not Receiving a "Suitable Education" Due to the State's Underfunding"), at pp. 29-57, which contains a plethora of evidence regarding the subpar performance of a significant number of Kansas students across multiple measures of achievement. For instance, the trial record shows:

- More than one-third of African-American students (32.6% or 11,569 students) in the State scored below proficient on the State Math Assessments for the 2010-11 school year. R.Vol.14, pp.1877-78, 1881; R.Vol.50, pp.1763-86.
- When the results are narrowed to just those students in Grade 11, 40.3% of African-American students, 38.6% of English language learners (or "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; R.Vol.13, p.1699-1700; R.Vol.50, p.1788.
- 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 National Assessment of Educational Progress ("NAEP") 4th grade reading test. R.Vol.14, pp.1877-78, 1884-85; R.Vol.13, p.1705; R.Vol.56, pp.2464-65.

- Only 26% of Kansas high school graduates are college-ready in English, Math, Reading, and Science as measured by ACT Benchmarks. R.Vol.61, p.3028.
- Employers estimate that almost half (45%) of high school graduates lack the skills necessary to advance in careers. R.Vol.81, p.5664.

Moreover, the State claims that new standards adopted by the State are achievable and that there is no evidence that Kansas students will be unable to meet those standards. State's Brief, at 15. However, it is highly unlikely that Kansas students will be able to meet the new standards adopted by the State. Brief of Cross-Appellant, Statement of the Facts §J.7. at pp.56-57. The evidence shows that all subgroups except for white students will be below standards according to the new Assessment Performance Index. *Id.*

All Kansas students are clearly not "doing well" by any measure, including performance on assessments, performance on college entrance exams, graduation rates, and remediation rates. Brief of Cross-Appellant, Statement of the Facts §J, at pp.29-57. Most significantly, however, the evidence shows Kansas students are not graduating from high school prepared to attend college and/or start a career. *Id.* at 50-55. It is this subpar achievement, and not the desire for "more money," that motivated the filing of the *Gannon* lawsuit.

II. School Spending in Kansas is Not At Record Levels

The increased costs and demands on Kansas schools combined with decreased funding have put the current school finance system in violation of Article 6 of the Kansas Constitution. Brief of Cross-Appellant, Statement of the Facts §F, at pp.19-23; §G, at pp. 23-24. Yet, the State contends that school spending in Kansas is at "record levels" and suggests this means the State is funding education at an adequate level. State's Brief, at 2-3. At the same time the State brags about its "record-level funding," Dale Dennis, the Deputy Commissioner of Education, indicates to the Commissioner of Education, Dr. Diane DeBacker, that the State Board of Education will need an additional $643,731,000 in order to fund education at the level required by state law. *See* Addendum A, May 24, 2013 Memorandum regarding Legislative Matters (indicating that it will require $433,280,000 in additional costs to increase the base to $4,492 for 2014-15, it will require $113,070,000 in additional costs to provide supplemental general state aid at 100%, it will require $72,181,000 in additional costs to fund special education, and it will require $25,200,000 in additional costs to fund capital outlay state aid).

The State, trying to somehow justify its unconstitutional actions, engages in a not so subtle sleight of hand to claim constitutional compliance. In stating school spending is at "record levels," the State provides this Court with information regarding the total money appropriated, including "special education, general state aid, supplemental general state aid, discretionary grants, KPERS, pre-kindergarten, parent education and miscellaneous items." *Id.* at 2. The sleight of hand has several flaws.

First, focusing only on total expenditures – as opposed to per pupil expenditures – the State fails to take into account factors that would necessitate the State spending an

increased amount on education. R.Vol.13, p.1646. The State acknowledges that, despite an increase in enrollment and an increase in the number of students who qualified for weightings, the total amount of money appropriated by the Legislature did not increase between 2009 and 2013. R.Vol.11, pp.1335, 1350-51. And, while total expenditures have decreased, the costs of educating Kansas students have increased and there are simply more students to educate. For this reason, per pupil spending is a much more accurate method for considering the suitability of the amount of money spent on education.

Between 2009 and 2012, total full-time enrollment in Kansas increased by more than 7,200 students. R.Vol.13, p.1646; R.Vol.115, p.15307. The total weighted enrollment increased by 38,678.6 students (or 6%). R.Vol.13, p.1646; R.Vol.13, pp.5487-94 (total in column O). Weighted enrollment in each of the four Plaintiff School Districts increased. *Id.* (highlighted information shows, between 2009 and 2012, Wichita had a 7.5% increase in weighted enrollment, Dodge City had a 12.3% increase in weighted enrollment, Hutchinson had a 12.1% increase in weighted enrollment, and Kansas City had a 7.3% increase in weighted enrollment).

Currently, nearly half of the students (47.6%) in Kansas are economically disadvantaged. R.Vol.14, p.1786; R.Vol.13, pp.1646-47; R.Vol.49, p.1577; R.Vol.49, p.1539. This represents 226,911 Kansas students, which is an all-time high. R.Vol.14, p.1786; R.Vol.13, pp.1646-47; R.Vol.49, p.1539; R.Vol.51, p.1792; R.Vol.22, pp.1005-06, 1009; R.Vol.101, p.7603. Kansas has also experienced an increase in the number of ELL students. R.Vol.14, p.1786; R.Vol.13, pp.1646-47; R.Vol.51, p.1792. In 2010-11, 9.8% of the students were ELL students. R.Vol.14, p.1786; R.Vol.13, pp.1646-47;

R.Vol.49, p.1577; R.Vol.49, p.1541. This too is an all-time high in Kansas. R.Vol.51, p.1852. These students (economically disadvantaged and ELL) are among those that are generally considered to be more expensive to educate. R.Vol.14, pp.1786-87; R.Vol.13, p.1647. In sum, although school districts were required to teach more students <u>and</u> were required to teach more of the students that cost more to educate, the amount appropriated by the Legislature did not increase during this time period and, at some points, actually decreased. R.Vol.13, p.1647; R.Vol.9, p.1095.

Even if the State had increased total funding to address the increased enrollment or if enrollment had stayed stable, the increasing demands on students and school districts alone increased the cost of providing students with a "suitable education." Brief of Cross-Appellants, Statement of the Facts §F, at pp.19-23. These increasing demands include the State's adoption of the Common Core standards, the waiver the State received from the No Child Left Behind Act, and the adoption of the new Kansas Board of Regents admission requirements – all three of which have increased the cost of educating Kansas students. *Id.* Yet, despite the increasing demands and associated costs, total expenditures in Kansas decreased by $79,687,661 between 2008-09 and 2010-11. R.Vol.13, p.1648; R.Vol.115, p.15307 (showing total expenditures of $5,587,044,331 in 2010-11 compared with $5,666,731,992 in 2008-09).

Third, the use of total expenditures as a measure of money available to school districts is inaccurate because – as the State acknowledges – "looking at all expenditures includes a variety of expenditures which are not believed to affect student performance." R.Vol.13, p.1649; R.Vol.9, p.1111. For instance, the use of total expenditures includes KPERS costs that "pass-through" a district's budget. R.Vol. 22, pp.992-93. These

KPERS funds are not available to the districts to spend and are not available for use in the classroom. *Id.*; R. Vol. 23, pp.1041-42. In 2012, KPERS represented 6% of the education budget; it only represented 2.3% of the budget in 2000. R. Vol. 23, p.1040. There are other expenditures included in the total expenditures – such as capital outlay, bond and interest, transportation, and food services – that are not available for use in the classroom. R. Vol. 23, p.1026. Increased expenditures in these areas do not always mean that the State spent any additional money on education in Kansas; the numbers mislead. R. Vol. 23, pp.1036-38.

Even ignoring the flaws in looking at total expenditures, however, does not change one significant fact: by <u>all</u> measures, funding for education <u>decreased</u> between 2008-09 and 2010-11. R.Vol.13, p.1649. During that time period, total expenditures in Kansas decreased by $79,687,661. R.Vol.115, p.15307 (showing total expenditures of $5,587,044,331 in 2010-11 compared with $5,666,731,992 in 2008-09). There were over $511 million in cuts to the base between fiscal year 2009 and fiscal year 2012. R.Vol.78, pp.5292-94; R.Vol.79, p.5486; R.Vol.23, p.1050; R.Vol.33, p.3328. The BSAPP was $3,863 for 2004-2005. R.Vol.41, pp.669-70. The base for 2008-09 was $4,400. *Id.* The base for 2011-12 was $3,780. *Id.* This represents a per pupil reduction of $83 since 2004-05 (when the *Montoy* Court found that the funding was unconstitutional) and reduction of $620 per pupil from the 2008-09 peak. *Id.* Each of the Plaintiff School Districts experienced a substantial reduction in funds due to the cuts. R.Vol.32, pp.2995-96; R.Vol.32, p.2931. Wichita lost in excess of $50 million in funding, including its losses in capital outlay state equalization aid. R.Vol.31, pp.2787-89. Kansas City experienced a reduction in funds of $8.7 million. R.Vol.20, pp.429-30; R.Vol.85,

pp.6036-37 (budget reductions to the Kansas City school district have totaled $43.3 million in five years).

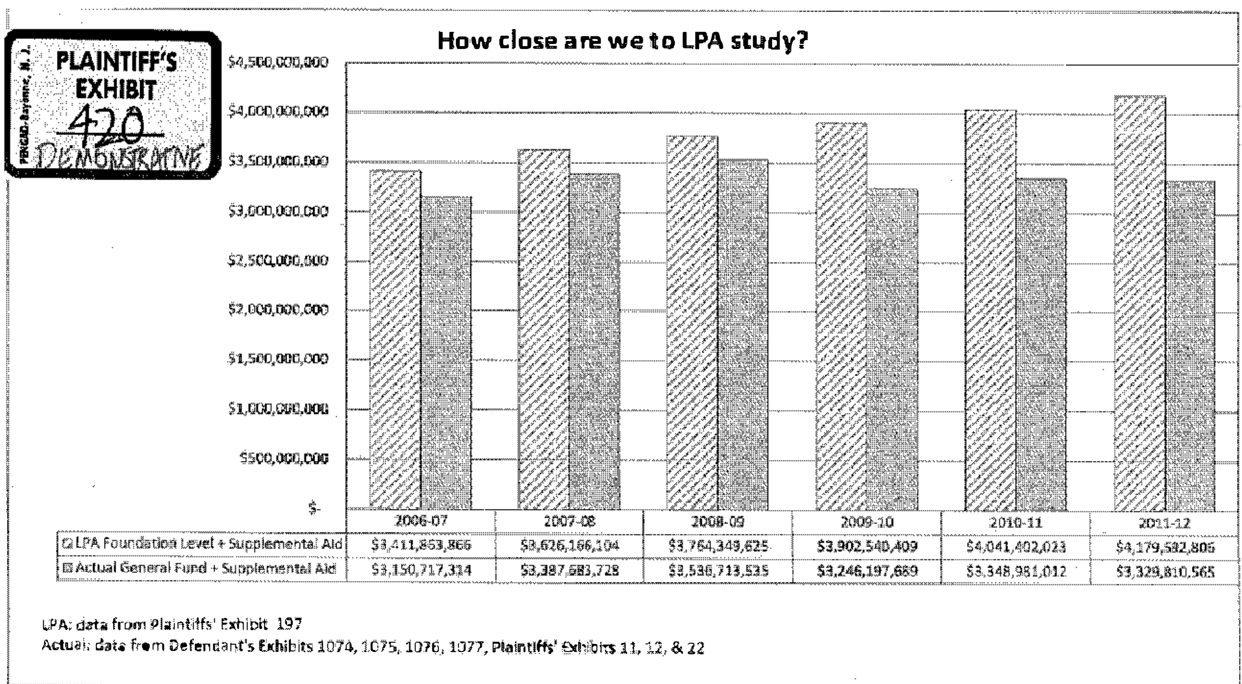
At trial, the State used a calculated "operational expenditures" for comparing spending over time. R.Vol.9, pp.1111-13. Based on those calculations, the statewide per pupil operational expenditures have decreased. R.Vol.9, p.1112. Since the *Montoy* funding peak in 2008-09, the statewide per pupil operational expenditures decreased by $395 per pupil. *Id.* Based on those calculated "operational expenditures," district per pupil operational expenditures also decreased for each of the Plaintiff School Districts. R.Vol.9, p.1112. Between 2008-09 and 2010-11, the per pupil operational expenditures have decreased as follows: (1) Wichita (USD 259)'s expenditures decreased by $300 per pupil; (2) Hutchinson (USD 308)'s expenditures decreased by $262 per pupil; (3) Dodge City (USD 443)'s expenditures decreased by $458 per pupil; and (4) Kansas City (USD 500)'s expenditures decreased by $489 per pupil. *Id.*

Thus, in spite of the State's claims regarding "record-level funding," the facts show educational funding decreased between the time the *Montoy* litigation ended and the *Gannon* trial occurred. And, the State will need an additional $643,731,000 in order to fund education at the level required by state law for 2014-15. *See* Addendum A, May 24, 2013 Memorandum regarding Legislative Matters. The State's arguments regarding funding levels should be disregarded.

III. Operational Funding is Well Below Levels Suggested by the LPA Study

The State argues current operational spending is at levels that approximate the foundation operational funding suggested by LPA. State's Brief, at 5-8. This is not supported by the evidence, which shows that the current funding levels are well below

those suggested by the LPA study. R.Vol.13, p.1650; R.Vol.107, pp.8772-74. The *Gannon* Panel adopted as true the information provided by Plaintiff that "the current funding levels are well below those suggested by the LPA study." R.Vol. 14, pp.1774-75, 1790 (*Gannon* Decision, at 55-56, 71) (Trial Exhibit 420 (copied below) was re-printed within the text of the *Gannon* Decision). In adopting this information as true, the *Gannon* Panel rejected the State's evidence that operational funding was consistent with the funding levels required by the LPA.



	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
LPA Foundation Level + Supplemental Aid	$3,411,853,866	$3,626,166,104	$3,764,349,625	$3,902,540,409	$4,041,402,023	$4,179,582,806
Actual General Fund + Supplemental Aid	$3,150,717,314	$3,387,683,728	$3,536,713,535	$3,246,197,689	$3,348,981,012	$3,329,810,565

Based on a comparison of the actual General Fund and Supplemental (LOB) State Aid, the State's funding was approximately $850 million short of the LPA estimates (in 2006-07 dollars) for 2012. R.Vol.13, p.1650; R.Vol.107, pp.8772-74 (Tr. Ex. 420). When adjusted using a 3% inflation rate, the State has funded <u>$1.5 billion less than the LPA estimates for 2012</u>. R.Vol.13, p.1650; R.Vol.107, pp.8772-74 (Tr. Ex. 420).

The comparison above shows that current expenditures do not meet the projected LPA Study estimates for 2012. But the actual costs of providing an education in Kansas

in 2012 were higher than the LPA estimates for 2012. The LPA study was only designed to estimate costs for 2006 and 2007. R.Vol.13, p.1651; R.Vol.9, pp.1098-99, 1114-15. The LPA study acknowledged that "the estimate base-level cost of meeting standards will continue to increase significantly in future years, because the standards adopted by the Board increase each year until 2013-14." R.Vol.13 p.1652; R.Vol.70, p.3953. Comparing the standards during the years these studies were conducted to the current standards shows that the demands associated with the standards have continuously increased over time. R.Vol.13, p.1652; *compare* R.Vol.71, p.4130 *with* R.Vol.46, p.1219; *compare* R.Vol.70, p.4171 *with* R.Vol.46, p.1253-75; *see also* Brief of Cross-Appellants, Statement of the Facts §F, at pp.19-23.

And, because the steady increase in free lunch students was not calculated in the estimates, "the overall outcomes-based estimates likely are understated." R.Vol.13, p.1651; R.Vol.66, pp.3531-35. Thus, the funding shortage between what the State is currently funding and what the LPA Study predicted is likely much higher. The State is not funding education at the levels suggested by the LPA Study.

IV. Local Taxpayers Simply Cannot Shoulder the Burden of the State's Failures

Many local school districts are unable to pass elections to increase the amount of local money that the school district raises. *See e.g.* R.Vol.13, pp.1672-73; R.Vol.93, p.6723 (outlining various failed elections in 2011); R.Vol.20, pp.280-81 (stating only one election has passed in the last 40 years); R.Vol.98, pp.7344-45. In Dodge City, for instance, voters were aware of the need for additional facilities, but were unwilling to levy additional taxes to fund them. R.Vol.13, pp.1672-73; R.Vol.83, pp.5810-12; R.Vol.83, pp.5817-26.

Moreover, local school district boards are very aware of the wealth of their district and take that into consideration when determining whether to raise local mill levies. As testified to by Superintendent Lane:

> We have not gone out for the referendum to raise the LOB to 31 percent because we're very much aware that in a community where most of your children live in poverty, where the median income is less than 38,000 a year, it's not impossible but highly unlikely that the voters, who are very passionate and supportive of what we do in schools, can afford to increase their taxes at all. <u>So the board is committed to not asking for another general obligation bond and promised that to the voters prior to the passage of that last bond issue</u>.

R.Vol.20, p.281 (emphasis added); R.Vol.13, p.1673; *see also* R.Vol.20, p.522 (discussing the same issue in the context of capital outlay equalization).

V. <u>The Importance of Maintaining Cash Balances</u>

The State contends that school districts have hoarded untapped resources and unspent reserves that should be considered part of their overall funding. State's Brief, at 9. They argue that these resources should somehow count against the Plaintiff School Districts and that this Court should assume because school districts "hoard" this money, resources are abundant. *Id.* ("[A]lthough the Plaintiff Districts argue for more money, the evidence in the record shows that the Districts have been holding onto substantial amounts of unspent funds."). In so stating, the State attempts to paint the school districts in a negative light while failing to provide this Court with information regarding why (1) the total cash balances appear to be larger than they actually are and (2) why it is critical that the districts maintain cash balances.

Cash balances exist for several reasons. One significant reason that school districts maintain cash balances is to cover expenses prior to receiving the first state aid payment in October. R.Vol.13, p.1643; R.Vol.93, pp.6743-57 (school districts' cash

balances are necessary so they can continue to operate if state aid payments are late, so they can cover special education costs until state aid is paid in October and as an accumulation of funds for specific purposes); R.Vol.94, pp.6886-90 (cash balances are a necessary part of cash management and help schools cover expenses prior to receiving first state aid payment in October); R.Vol.94, pp.6874-76; R.Vol.94, pp.6877-80; R.Vol.101, p.7608; R.Vol.94, pp.6799-6815 (reasons for school district cash balances include having money to make fall bond and interest payments, prepare for large capital outlay purchases, and to pay four months of special education expenses prior to receiving first state aid payment in October). In fact, the State Board encourages districts to maintain cash balances. *Id.*

Most of the funds included within the "unencumbered cash balances" are "already committed for certain purposes." R.Vol.13, p.1643; R.Vol.94, p.6828. The truly unencumbered portion of the cash balance is "less than the money ***not actually paid*** by the state by the end of the year, but [that] school districts [are] required to book by June 30." *Id.* (emphasis in original). In most cases, the portion of the cash balances not already committed for a certain purpose equals almost exactly one month's operating costs. R.Vol.13, pp.1643-44; R.Vol.94, p.6828. Because school districts must have cash balances to support the budget when state payments are late, it is imperative that they have money available to support their operating costs. R.Vol.13, pp.1643-44; R.Vol.93, pp.6791-98; R.Vol.101, p.7608 (forced cash balances due to late state payments); R.Vol.94, p.6885 (showing the State's payment schedule and that districts must plan to receive late payments). Certain school districts have even less money available; Wichita's contingency reserve fund, for instance, had only 8 days of operating cash at

one point. R.Vol.13, pp.1643-44; R.Vol.93, pp.6791-98. The results of not having access to financial reserves would be detrimental to Kansas students. R.Vol.13, p.1644. The results range from lowered bond ratings to school closings. R.Vol.13, p.1644; R.Vol.23, pp.1184-85 (testifying that districts have had their bond ratings lowered); R.Vol.93, pp.6724-25 (same); R.Vol.93, pp.6729-30 (citing lack of access to financial reserves as reason for furloughs in Kansas courts); R.Vol.94, pp.6872-73.

Rather than hoarding "substantial amounts of unspent funds," as the State suggests, school districts use cash balances to maintain money available to support their operating costs, especially in the face of the Legislature's requirement that the school districts account for money that the school districts have not actually received.

VI. Less than Full Funding of Supplemental State Aid and Elimination of Capital Outlay State Aid Has Created Unequal Educational Opportunities

The State contends that there is no evidence that less than full funding of supplemental state aid has created unequal educational opportunities. State's Brief, at p.22. It incorrectly states, "no evidence was presented that any of the Plaintiff Districts or any other district is unable to provide the opportunity for basic public education described in the State's education standards and accreditation regulations because it is unable to raise its LOB mill levy and the Panel made no such finding." State's Brief, at p.23. The State makes similar arguments regarding the elimination of capital outlay state aid payments. State's Brief, at p.23-24.

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, at pp. 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, at p. 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 State even acknowledges that "state equalization aid" "substantially diminishes the effects of wealth disparities among districts." State's Brief, at 4.

The wealth disparities are largely due to significant variations in assessed valuations among school districts. R.Vol.22, pp.1009-10; R.Vol.98, pp.7337-43; R.Vol.38, pp.385-89. 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. 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 ("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. For instance, in the Galena school district, U.S.D. 499, one mill raises approximately $18-19,000. R.Vol.23, pp.1170-71. However, in the Burlington school district, U.S.D. 244, one mill raises nearly $350-400,000. *Id.*

These differences in wealth affect the education of Kansas school children in numerous ways. R.Vol.13, p.1672. They create salary differentials among districts. *Id.*; R.Vol.20, pp.264-65. They cause teacher migration from high poverty to high wealth districts, and create problems for districts attempting to retain quality teachers. R.Vol.13, p.1672; R.Vol.21, pp.696-97; R.Vol.83, pp.5774-77; R.Vol.83, pp.5778-79; R.Vol.83, pp.5780-97. And, they cause some local school districts to be unable to pass elections to increase the amount of local money that the school district raises. R.Vol.13, pp.1672-73; R.Vol.93, p.6723 (outlining various failed elections in 2011); R.Vol.20, pp.280-81 (stating only one election has passed in the last 40 years); R.Vol.98, pp.7344-45. In Dodge City, for instance, voters were aware of the need for additional facilities, but were unwilling to levy additional taxes to fund them. R.Vol.13, pp.1672-73; R.Vol.83, pp.5810-12; R.Vol.83, pp.5817-26. One significant reason cited by the voters was "the perceived potential loss of State equalization for capital projects." *Id.*

Clearly, the State's less than full funding of supplemental state aid and elimination of capital outlay state aid has created unequal educational opportunities. And, despite the *Gannon* Panel's finding of unconstitutionality, the State has *extended* its unconstitutional failure to fund capital outlay state aid to fiscal years 2015 and 2016. *See* S.B. 171, §265. Without this Court's intervention, the State seems likely to continue to

create and sustain the unconstitutional unequal educational opportunities to Kansas schoolchildren caused by its underfunding of schools.

ARGUMENTS AND AUTHORITIES

I. Introduction

A thorough examination of the issues is important to this Court's ruling. Likewise, it is important to consider what this case is not about.

This case is not about "more money." Plaintiffs in this matter are not merely demanding increased funding. To the contrary, Plaintiffs demand increased student achievement. Plaintiffs demand the Legislature make suitable provision for the financing of education in a manner that reflects the actual costs of providing that education. Plaintiffs demand equity in the distribution of that funding. Educational improvement, consideration of the costs of achieving that improvement, and equity in distribution of the funding are all required by Article 6 of the Kansas Constitution and *Montoy v. State*. In sum, Plaintiffs demand that the Kansas Legislature fulfill its constitutional obligations. To contend that Plaintiffs are greedily seeking money only, when an independent three-judge panel found that the State's actions were "immensely and irretrievably destructive of our children's future," should be seen for what it is – a tactic to reframe and distract this Court from an issue critical to the school children of Kansas. R.Vol. 14, p.1828 (*Gannon* Decision, at p.109). Frankly, framing the issues in this case around the notion that Plaintiffs are insatiable money-seeking machines is offensive.

Moreover, this case is not about – or at least should not be about – re-litigating *Montoy* and other Kansas precedent. For instance, the State urges this Court to find that the issues presented in this litigation are nonjusticiable. In so arguing, the State –

intentionally or otherwise – completely disregards the holdings in *Montoy*. The *Montoy* court already decided this issue was justiciable when it delineated specific standards for determining whether the Legislature's actions were in compliance with the Kansas Constitution. In delineating those standards, the *Montoy* Court interpreted and defined a suitable education. R.Vol. 14, pp.1867-68 (*Gannon* Decision, at pp. 148-149 (referring to "the standards adopted by the Legislature and the State Board of Education that define what the *Montoy* Court accepted, <u>and what is not here challenged</u>, as the measure of a "suitable education") (emphasis added)). It also made clear that the State is obligated to consider the actual cost of providing an education to Kansas school students in determining and establishing a school funding scheme. R.Vol. 14, p.1770 (*Gannon* Decision, at p.51 ("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 evidence, are a 'critical' factor to be considered.")). Those issues do not need to be re-litigated by this Court. The State acknowledged as much at trial. R.Vol.34, p.52 (in which counsel for the State indicates "I would not ask the Court to overrule *Montoy*").

After careful consideration of the issues raised by the State in its opening brief, it is abundantly clear that much of the work the State asks this Court to do has already been done. Instead of determining whether *Montoy* got it right, this Court should focus on the proper remedy to rectify the State's unconstitutional actions.

II. Article 6 of the Kansas Constitution Does Not Solely Assign Constitutional Responsibility for Public Education to the Kansas Legislature

Throughout the brief, the State makes several arguments that assume the Kansas Legislature has sole responsibility for public education in Kansas. This is not the case. While the Kansas Constitution does assign partial responsibility to the Legislature, that responsibility is shared among the Legislature, the State Board of Education, and the local public school boards. And, the Legislature's obligations are mostly directed at providing for and funding a suitable education, not defining what that suitable education should be. If this Court should be deferential to any entity in determining what defines a suitable education, it should be deferential to the State Board which – as explained more fully below – has the constitutional obligation to oversee Kansas public schools.

Article 6 of 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." Kansas Constitution, Article 6, §2. The Kansas Constitution places at least part of the constitutional responsibility regarding the educational interests of Kansas on the Kansas State Board of Education. This Court has defined the State Board'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 State Board has "the power to inspect, to superintend, to evaluate, and to oversee for direction." *Id.* at 490-91. The Supreme Court has held that the constitutional powers of the State Board are "self executing" such that "the legislature could not thwart [this] provision." *See State ex rel. Miller,* 212 Kan. at 489. As such,

there are limits to how far the legislature can intrude upon the State Board'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).

Moreover, the Kansas Constitution very clearly puts a constitutional obligation on local public school boards to "establish, operate, and maintain" schools. *See Unified School District Number 229 v. State,* 256 Kan. 232, 253 (1994) ("U.S.D. 229") (relying on language of Article 6, §5 of the Kansas Constitution); *U.S.D. No. 380 v. McMillen,* 252 Kan. 451, 464 (1993) (indicating that local school boards have a constitutional duty to "maintain, develop, and operate the local public school system"). In interpreting this language, the Kansas Supreme Court has indicated that the Kansas Legislature does not have "carte blanche over the duties and actions of local school boards." *Id.* Instead, "[t]he respective duties and obligations vested in the legislature and the local school boards by the Kansas Constitution must be read together and harmonized so both entities may carry out their respective obligations." *Id.* (emphasis added).

Thus, it is clear that the Kansas Constitution places constitutional obligations regarding education with three entities: the Kansas Legislature, the State Board of Education, and local public school boards. By no means is the Kansas Legislature the sole entity with constitutional obligations regarding the educational interests of the State. Despite this, the State has asked this Court not to "enter the political fray" with regard to the "complex task of creating, administering and supervising K-12 education." State's Brief, at 39. But in doing so, the State explicitly asks this Court to ignore the

constitutional obligations of the State Board of Education, the Plaintiff School Districts, and other local school boards.

By underfunding education in Kansas, the Legislature has acted in derogation of the Kansas Constitution. It has undermined the ability of the State Board and the local boards – each consisting of members elected by the people – to carry out their responsibilities. And, it has improperly assumed and asserted that it has the sole constitutional authority for the educational interests of the State. Because this is not the only instance of the Legislature encroaching on the control of the State Board and/or local school boards, *see* Addendum B, June 6, 2013 Letter to Kansas Attorney General from Commissioner of Education,[1] it is imperative that this Court instruct the Legislature that it was not assigned sole constitutional obligations or powers with regard to public education in Kansas.

III. This Court Has the Authority to Interpret the Kansas Constitution

One question is dispositive of this appeal: Is the State, through its Legislature, in compliance with the constitutional obligations of Article 6 of the Kansas Constitution? Rather than risk an answer to this question, the State attempts to argue – for the first time – that the Kansas Supreme Court has no authority to answer it. The State's position is supported by members of the Kansas Legislature, who have publicly stated that the Kansas Legislature may decide to defy an order by this Court to increase school funding. *See* Addendum D: Dion Lefler, *Senate President Susan Wagle: 2013 Legislative Session*

[1] Addendum B is a letter from the Commissioner of Education requesting "prompt interpretive guidance" from the Attorney General regarding the adoption of H.B. 2319. The Commissioner takes the position that H.B. 2319 "infringes upon the [Kansas State Board of Education]'s constitutional authority specifically granted to the [Kansas State Board of Education] and the judicially interpreted mandate to provide general supervision over school districts."

Could Be Even Worse, THE WICHITA EAGLE (June 5, 2013)[2]; Addendum E: Roy Wenzl, *Namesake Father in School Financing Case Driven by Helping Children*, THE WICHITA EAGLE (June 8, 2013).[3] One legislator, Rep. Steve Brunk, went so far as to indicate that "there's a mood [in the Senate and the House] to give the courts the finger." *See* Addendum E. Such an intentionally defiant and extreme position is directly at odds with precedent of this Court, the Kansas Constitution, and the separation of powers doctrine.

As the State points out in its briefing, under the "separation of powers" doctrine, "the legislative power is the power to make, amend, or repeal laws" and "the judicial power is the power to interpret and apply the laws in actual controversies." State's Brief, at 94 (citing *State ex. Rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 59 (1984)). Moreover, the purpose of the doctrine is to avoid "a dangerous concentration of power" "through the checks and balances each branch of government has against the other." *Id.* (citing *Stephan*, 236 Kan. 45 at 59). Thus, it is only if this Court is given the opportunity to "interpret and apply" the provisions of Article 6 of the Kansas Constitution that full effect will be given to the separation of powers doctrine. *See e.g. Van Sickle v. Shanahan*, 212 Kan. 426, 440 (1973) ("the judicial power is the power to interpret and apply the laws in actual controversies").

While the State contends that it is the *Gannon* Panel who has violated the separation of powers doctrine, *see* State's Brief, at 94-97, it is in fact the State who tramples on the proper delineation of powers between the three governmental branches. For instance, the State suggests that the Legislature should be given the authority to <u>interpret</u> the meaning of Article 6. State's Brief, at 43. But the ability to interpret law is

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[2] Also available at http://www.kansas.com/2013/06/05/2834156/wagle-2014-session-could-be-even.html.
[3] Also available at
http://m.kansas.com/wichita/db_108691/contentdetail.htm?contentguid=lZG1MxrE&full.

clearly reserved for the judiciary under the separation of powers doctrine. *Van Sickle*, 212 Kan. at 440 ("the judicial power is the power to interpret and apply the laws in actual controversies").

Interpreting constitutional provisions is the function and duty of this Court. *See State v. Nelson*, 210 Kan. 439, 445 (1972). And, the constitutional provisions at issue in this lawsuit have already been interpreted. In *Montoy v. State*, this Court – taking its obligations seriously – thoroughly examined the standard for determining whether the SDFQPA violates Article 6 of the Kansas Constitution. *Infra* Arguments and Authorities §IV. The Court's interpretation of Article 6 within the *Montoy* decision is "equally as controlling upon the legislature of the state as the provisions of the constitution itself." *See State v. Nelson*, 210 Kan. 439, 445 (1972). Therefore, this Court should give no credence to the State's newly-raised argument that it must entirely refrain from determining whether the Kansas Legislature is complying with its constitutional obligations.

The State contends that "[a]sking the wrong question produces the wrong answer." State's Brief, at 36. Plaintiffs agree. When deciding the issue raised in this appeal, the correct question to ask is, "Is the Legislature complying with the requirements of Article 6 of the Constitution, as interpreted and applied in *Montoy v. State*?"

IV. *Montoy* Clearly Delineated the Standards for Determining Whether an Article 6 Violation Occurred

Article 6 of the Kansas Constitution requires the Legislature to "make suitable provision for the finance of the educational interests of the state." Kansas Constitution, Article 6, §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.* at §1. 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.

In *Montoy*, the Supreme Court squarely addressed and interpreted what Article 6 of the Kansas Constitution requires of the Legislature. The *Montoy* Court stated:

> Before determining whether there is substantial competent evidence to support these findings, we must examine the standard for determining whether the current version of the SDFQPA makes suitable provision for the finance of public school education. The concept of "suitable provision for finance" encompasses many aspects. First and perhaps foremost it must reflect a level of funding which meets the constitutional requirement that 'the legislature shall provide for intellectual, educational, vocational, and scientific ***improvement*** by establishing and maintaining public schools . . . .
>
> [The Court should also consider] what the legislature had defined as suitable education . . . .
>
> Furthermore, in determining if the legislature has made suitable provision for the finance of public education, there are other factors to be considered in addition to whether students are being provided a suitable education . . . .
>
> It is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula constitutionally stable. The equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs, are critical factors for the legislature to consider in achieving a suitable formula for financing education.

Montoy v. State, 278 Kan. 769, 773-775 (2005)("Montoy II")(underlined emphasis added, italics in original).

The State acknowledges that *Montoy* clearly set forth the standards for determining whether it is in compliance with Article 6, but focuses on only one aspect of what *Montoy* required: whether schools meet the State's accreditation requirements. State's Brief, at 56, 65 (stating "*Montoy* imposed the Legislature's criteria for determining whether suitable provision had been made for the finance of education"). However, in determining whether the State is in compliance with Article 6 of the Kansas Constitution, this Court should consider all of the factors outlined in *Montoy*, including (1) whether the funding meets the constitutional requirements of Article 6, §1; (2) whether the funding provides students with a suitable education (and not just whether schools meet the State's accreditation requirements); (3) the equity with which the funds are distributed; and (4) the actual costs of providing the required education. *Montoy II*, at 773-775.

A. The "Actual Cost" Requirement

Surprisingly, the State contends that the *Montoy* Court only intended "actual costs" to be considered in determining a remedy for violations of Article 6 of the Kansas Constitution and "not [when] assessing whether plaintiffs proved a violation of Article 6." State's Brief, at 69. No reading of *Montoy* supports such a conclusion. The *Montoy* Court specifically indicated that "actual costs" were one of the "other factors to be considered in addition to whether students are being provided a suitable education" when "determining whether the . . . SDFQPA makes suitable provision for the finance of public school education." *Montoy II*, 278 Kan. at 773-774. "The *Montoy* [*V*] 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." R.Vol.14, p.1767 (*Gannon* Decision, at p.48).

Instead, 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. *Montoy v. State*, 282 Kan. 9, 12 (2006)("Montoy V")(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"). And, the actual costs must be considered in each aspect of the formula, and not just the formula as a whole. *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 considered with respect to each component of the formula, as well as the formula as a whole. . . .")).

The *Montoy* Court also made clear that, in financing the educational interests of Kansas, the State must consider the actual costs of both inputs and outputs. A constitutional school finance formula must be funded to assure "outputs." *Montoy v. State*, 279 Kan. 817, 843 (2005)("Montoy IV"). "Without consideration of outputs, any study conducted by post audit is doomed to be incomplete. Such outputs are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the legislature." *Id.* (emphasis added) ("It also appears that the study contemplated by H.B. 2247 is deficient because it will examine only what it costs for education "inputs" . . . It does not appear to demand consideration of the costs

of "outputs."). This requirement comes directly from the language of Article 6, §1 of the Kansas Constitution. *Id.*

That the Legislature must base the funding on the actual costs of providing the required education is not only dictated by *Montoy*, but also is consistent with the plain language of Article 6 of the Kansas Constitution. 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, at p.52).

This "plain language" of the Constitution – requiring the consideration of actual costs when funding education – is consistent with overwhelming evidence linking improved student performance to increased funding. It should be noted that even a lack of evidence linking improved student performance to increased funding would not eradicate the constitutional requirement that the State must base educational funding formulas on the actual cost of the inputs and outputs associated with achieving a suitable education. The State's obligation under the Kansas Constitution has multiple parts; it cannot escape its obligation to fund education so long as Kansas students are performing suitably. Thus, any irrational opinion allegedly held by some legislators that money in education does not matter should have no bearing on this appeal. Nonetheless, ample evidence exists linking 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, at pp. 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, at p.158). 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).

Second, the most recent cost study conducted, provided for 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; R.Vol.13, pp.1637-38.

Third, actual experiences of Kansas schools demonstrate how additional funding increases 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. Three years ago, Emerson Elementary was declared the lowest performing elementary school in Kansas. R.Vol.20, p.217. 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; R.Vol.21, p.408. Now, more than 85% of Emerson's students are meeting or exceeding expectations on assessments. R.Vol.20, p.218. 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; R.Vol.20, p.284; R.Vol.20, pp.216-22.

Fourth, subpar achievement in Kansas correlates with 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. 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 ("We are working on the momentum that we have created. <u>We cannot continue to make cuts</u> and expect this growth.") (emphasis added); R.Vol.81, p.5691 ("What sits in our classrooms today, is the future of tomorrow. <u>There is no tomorrow if dollars are cut and school doors are closed</u>.") (emphasis added); R.Vol.87, p.6246 ("Dollars spent on education today translate into investment and returns on our investments for our future"); R.Vol.45, p.1212 (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. 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; R.Vol.13, p.1638.

In funding education in Kansas, the State must base the funding formula on the actual cost of the inputs and outputs associated with achieving a suitable education. As the *Gannon* Court clearly found – and as the evidence shows – it has not done so. *Infra* Arguments and Authorities §V.

B. The "Suitable Education" Requirement

In determining whether the State has complied with its Article 6 obligations, the *Montoy* Court clearly set forth that the Court should examine "what the legislature had defined as suitable education." *Montoy II*, at 773-775. Surprisingly, despite this clear direction from *Montoy*, the State contends that the Kansas Constitution "does not require a 'suitable,' 'adequate,' or 'uniform' education" "unlike a number of state constitutions." State's Brief, at 36. Such a conclusion completely – and impermissibly – ignores the findings of *U.S.D. 229* and *Montoy*. *See State v. Nelson*, 210 Kan. 439, 445 (1972) ("It is the nature of the judicial process that the construction becomes equally as controlling upon the legislature of the state as the provisions of the constitution itself."). This Court has already concluded, "[t]he standard most comparable to the Kansas constitutional requirement of 'suitable' funding is a requirement of adequacy found in several state constitutions." *See U.S.D. 229*, 256 Kan. at 256. There is clearly a requirement of "suitability" within the language of the Kansas Constitution and that language has been compared to the requirement of adequacy found in several state constitutions.

Moreover, the State's claims that there is no requirement of "suitability" within the language of the Kansas Constitution is inconsistent with legislation adopted by the

Legislature itself. Following *Montoy*, the Legislature enacted K.S.A. 46-1225, in which a study was commissioned "to determine the cost of a suitable education" that "will fulfill the state's obligation to provide a suitable education for Kansas children." R.Vol.35, p.43 (containing text of K.S.A. 46-1225) (emphasis added). At best, it is disingenuous for the State to now pretend that it did not understand there was a "suitability" requirement within the Kansas Constitution.

The State not only contends that a suitable education is not required, but it also suggests that there is no clear meaning of the term "suitable." Interpreting the meaning of "suitable" is not for the legislature, as the State suggests. State's Brief, at 43. Instead, consistent with established Kansas precedents, courts must ultimately determine the definition of "suitable." *Montoy v. State,* 275 Kan. 145, 153 (2003)("Montoy I")(relying on *U.S.D. 229*, 256 Kan. at 258) (stating "the ultimate question on suitability must be one for the court"). And, in so determining, if this Court should be deferential to any entity in determining what defines a suitable education, it should be deferential to the State Board, which has the constitutional obligation to oversee Kansas public schools. *Supra* Arguments and Authorities §II. The Legislature's constitutional obligations with regard to the educational interests of Kansas' school children are directed at providing for and funding a suitable education, not defining what that suitable education should be. *Id.*

In *U.S.D. 229*, this Court indicated, "Through the quality performance accreditation standards, the [SDFQPA] provides a legislative and regulatory mechanism for judging whether the education is 'suitable.'" *U.S.D. 229*, 256 Kan. at 257. In so stating, it made clear that the term "suitable" is in fact definable and measurable for purposes of determining Article 6 violations. *See also Edgewood Indep. School Dist. v.*

Meno, 917 S.W.2d 717, 754-755 (Tex. 1995) (concluding that the term "suitable," although "elastic" still allows the Court to determine whether the Texas Legislature is providing students with a suitable education). While the basic premise remains true – that a "suitable education" is a definable and measurable goal – the mechanisms for judging whether an education is "suitable" have morphed through actions of the *Montoy* court, the Legislature, the State Board of Education, and local school boards. Nonetheless, there is no need for this Court to re-define a "suitable education." R. Vol. 14, pp. 1867-68 (*Gannon* Decision, at 148-149 (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)). "It is a fundamental rule of appellate procedure that issues not raised before the trial court cannot be raised on appeal." *Miller v. Bartle*, 283 Kan. 108, 119 (2007)(*citing Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003)).

For almost twenty years, the Kansas Legislature has defined a "suitable education" as one that complies with the *Rose* factors. The *Rose* factors – originally set forth in *Rose v. Council for Better Education*, 790 S.W.2d 186, 212 (Ky. 1989) – were first compared to the goals of an education set forth by the Kansas Legislature in *U.S.D. 229*. There, this Court stated:

> One of the most frequently cited definitions of an adequate education was one proffered by the Kentucky Supreme Court when it iterated six goals of educations: (1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (2) sufficient knowledge of economic, social, and political systems to enable the student to understand the issues that affect the community, state, and nation; (3) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (4) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (5) sufficient training or preparation for advanced training in either academic

> or vocational fields so as to enable each child to choose and pursue life work intelligently; and (6) sufficient skills to enable public school students to compete favorably with their counterparts in surrounding states whether competing in academics or the job market.
>
> . . .
>
> The definitions in *Hunt, Rose,* and *Abbott* bear striking resemblance to the ten statements or goals enunciated by the Kansas legislature in defining the outcomes for Kansas schools, which includes the goal of preparing the learners to live, learn, and work in a global society. Through the quality performance accreditation standards, the Act provides a legislative and regulatory mechanism for judging whether the education is suitable.

U.S.D. 229, 256 Kan. at 257 (emphasis added). The *Rose* factors are almost identical to the requirements of an education currently enumerated in K.S.A. 72-1127(c). *Compare U.S.D.* 229, 256 Kan. at 257 (listing *Rose* factors) *with* K.S.A. 72-1127 *and compare* R.Vol.41, p.706 (Plaintiffs' Trial Exhibit 38) *with* R.Vol.41, p.707 (Plaintiffs' Trial Exhibit 39). Thus, 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.

K.S.A. 72-1127(c) (emphasis added).

Additionally, a constitutional school finance formula must be funded to assure "outputs." *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.

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:

Performance on assessments. Performance on assessments – including Kansas assessments, the National Assessment of Educational Progress (or "NAEP"), district assessments, and eventually the Common Core assessments – is one measure of whether Kansas students are receiving a "suitable education." Brief of Cross-Appellant, at Statement of the Facts §J.1., pp.31-44. The Legislature requires the State Board to "design and adopt a school performance accreditation system based upon improvement in performance that reflects high academic standards and is measurable." K.S.A. 72-6439. That "improvement in performance" must (1) reflect high academic standards and (2) be measurable. *Montoy II*, at 773. 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." *Montoy II*, 278 Kan. at 773. 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. K.S.A. 72-6439. Performance on statewide assessments is clearly an aspect of a "suitable education" and it is the Legislature that linked the two. *Montoy II*, 278 Kan. at 773; K.S.A. 72-6439.

Performance on college entrance exams, such as the ACT. Performance on the ACT is another measure of whether Kansas students are receiving a "suitable education." Brief of Cross-Appellant, Statement of the Facts §J.2., at pp.44-46.

Graduation rates. Graduation rates are yet another measure of whether Kansas students are receiving a "suitable education." Brief of Cross-Appellant, Statement of the Facts §J.3., at pp.46-49. "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.

Remediation rates. Remediation rates are one more measure of whether Kansas students are receiving a "suitable education." Brief of Cross-Appellant, Statement of the Facts §J.4., at pp. 49-50.

Whether the education prepares students for college and/or career. In order to provide Kansas students with a "suitable education," the State must prepare them for college and/or career. Brief of Cross-Appellant, Statement of the Facts §J.5., at pp.50-55. The State has adopted college and career readiness as a standard of whether it is

providing its students with a "suitable education." K.S.A. 72-1127; R.Vol.19, p.162; R.Vol.59, p.2821; R.Vol.28, pp.2144-45; R.Vol.42, pp.773-96; R.Vol.19, pp.162-63; R.Vol.30, pp.2500-01; R.Vol.32, pp.3154-55. As such, 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; R.Vol.28, pp. 2166-67; R.Vol.56, p.2462 (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 Kansas State Board of Education'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; R.Vol.42, p.809. 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; R.Vol.59, p.2821 ("We need all our students to have the skills, knowledge and expertise for the 21st century."). An education in Kansas cannot be suitable if it fails to prepare students for college and career.

C. <u>The "Equity" Requirement</u>

It is apparent from the State's briefing that the State believes that it can distribute funds inequitably so long as that inequitable distribution does not affect whether Kansas

schools are able to be accredited. State's Brief, at 22-24 (arguing that the *Gannon* Panel failed to make findings that the State's proration of supplemental general state aid and elimination of capital outlay state aid caused Plaintiff School Districts to be "unable to provide the education required under Kansas accreditation regulations and statutes"). However, the State's obligation under Article 6 of the Kansas Constitution requires consideration of the equity with which the funds are distributed, *Montoy II*, at 773-775; the State cannot escape this obligation by showing it is meeting accreditation requirements. In determining whether the State is in compliance with Article 6 of the Kansas Constitution, this Court should consider all of the factors outlined in *Montoy*, including (1) whether the funding meets the constitutional requirements of Article 6, §1; (2) whether the funding provides students with a suitable education; (3) the equity with which the funds are distributed; and (4) the actual costs of providing the required education. *Montoy II*, at 773-775 (emphasis added).

Justice Rosen made this point clear in his concurring opinion in *Montoy V* in which he wrote about a "concern [which] may be relevant in any subsequent challenge to the funding formula." *Montoy V*, 282 Kan. at 31 (Rosen, J., concurring). Justice Rosen discussed his concern in the context of LOB equalization. But his concern applies with equal force in the context of capital outlay equalization, particularly considering that, like LOB equalization, entitlement to capital outlay equalization is dependent upon a school district levying a local tax. Justice Rosen explained,

> [S]o long as the legislature allows the LOB to remain an optional funding source rather than a mandatory one, my concern may be relevant in any subsequent challenge to the funding formula as amended by S.B. 549. In the school districts that receive less than the base level of state funding and which would have been eligible for equalizing LOB state aid but do not adopt an LOB at all, or adopt an LOB in an amount lower than the

> amount necessary to generate the funding shortfall, the State is arguably still responsible for providing constitutionally adequate funding. If other school districts begin opting out in part or in full of the LOB funding, the equitable distribution of state funding may be at risk. **Such heavy dependence on a local contribution has historically caused disparity and equity concerns which have led to Kansas school finance litigation, including this case. We must never again allow a funding scheme that makes the quality of a child's education a function of his or her parent's or neighbors' wealth**.
>
> The inclusion of equalizing LOB state aid in S.B. 549 provides an essential financial log in keeping afloat the raft of adequate funding for the education of Kansas children. However, if local communities at some future time decide to remove that log, the delicate raft will have a difficult time remaining afloat, and, again, the constitutional right of all Kansas children to a suitably funded education could soon find itself imperiled.

Montoy V, 282 Kan. at 31 (Rosen, J., concurring) (emphasis added).

D. The State's Newly Created Article 6 Rational Basis Test is Not the Proper Test to Determine Whether the State Has Met Its Constitutional Obligations

This Court's role is to assure that "each component of the [funding] formula," and "the overall funding" are all "[in] compliance with Article 6, §6 of the Kansas Constitution." *Montoy II*, at 839-40 (emphasis added). The proper test for determining whether the State complied with its Article 6 obligations is the clearly-defined test set forth in *Montoy*. *Supra* Arguments and Authorities §IV. The State does not want this Court applying that test, presumably because the State admits it did not follow the guidance of *Montoy* and instead "us[ed] traditional techniques for determining the level of funding for governmental services." State's Brief, at 63. Instead, the State urges this Court to ignore the *Montoy* standards and instead apply what they call a rational basis test. In doing so, the State has asked this Court to turn a blind eye to its activity and assume that it is doing what it is required to do under *Montoy* – even in the face of overwhelming evidence to the contrary. Regardless, there simply is no support for the

State's position that this Court should review the State's violation of Article 6 under a rational basis standard.

Despite the State's contentions otherwise, *U.S.D. 229* did not apply a rational basis standard to determine whether the State violated Article 6 of the Kansas Constitution. A careful reading of the case clearly reveals the Court only applied the rational basis analysis in the context of the alleged equal protection violation. In fact, in *U.S.D. 229*, this Court had already fully addressed whether an Article 6, Section 6 violation occurred before it even defined the "rational basis" standard. *Unified School District Number 229 v. State,* 256 Kan. 232, 259 (1994) ("U.S.D. 229") (concluding that no Article 6, Section 6 violation occurred; determining whether an equal protection violation occurred; and there, for the first time, defining the "rational basis" test). Instead, in determining whether there was an Article 6 violation, *U.S.D. 229* enunciated the following standard: "This court . . . must determine if the legislation so clearly violates a constitutional prohibition as to place it beyond legislative authority." *U.S.D. 229*, 256 Kan. at 237. When making that determination, "the issue for judicial determination [in an Article 6, Section 6 challenge] [is] whether the Act provides suitable financing . . . ." *Id.* at 254 (emphasis added).

In reaching its decision, *U.S.D. 229* did not define "suitable financing" and instead relied on "the standards enunciated by the legislature and the state department of education." *U.S.D. 229*, 256 Kan. at 257. At the same time, "it asserted that the ultimate question on suitability must be one for the court." *Montoy I*, 275 Kan. 145, 153 (citing *U.S.D. 229*, 256 Kan. at 257-58). While *U.S.D. 229* did not determine what Article 6 requires (*i.e.* – did not define the constitutional phrase "make suitable provision for

finance of the educational interests of the state"), *Montoy* did. *Supra* Arguments and Authorities §IV. Clearly, in determining whether the State is in compliance with Article 6 of the Kansas Constitution, this Court should consider (1) whether the funding meets the constitutional requirements of Article 6, §1; (2) whether the funding provides students with a suitable education; (3) the equity with which the funds are distributed; and (4) the actual costs of providing the required education. *Id.* There simply is no indication from *U.S.D. 229* or *Montoy* that this Court should apply a rational basis review.

Moreover, even if the Kansas Supreme Court had not already determined the standard of review, the concept of "rational basis" does not fit into the context of Article 6, §6 of the Kansas Constitution. As stated in *Neeley v. W. Orage – Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005), rehearing denied, 2005 Tex. LEXIS 966 (Tex. 2005):

> [T]he phrase, "rational basis," is more often associated with the minimal requirement a classification must meet to be consistent with the constitutional guarantee of equal protection when no suspect class or fundamental right is involved. In that context, the idea is that the government is permitted to give classes disparate treatment, notwithstanding the constitutional guarantee, as long as it has a rational basis for doing so. The same idea does not fit in the context of article VII, section 1 [the provision of the Texas Constitution applicable to Texas' system of school finance]. That provision does not allow the Legislature to structure a public school system that is inadequate, inefficient, or unsuitable, regardless of whether it has a rational basis or even a compelling reason for doing so.

(emphasis added).

The analysis applied by the Texas courts is equally applicable here. Even if the Legislature's actions were found to have met the "rational basis" test, if those actions are not consistent with the requirements of Article 6, then the Legislature's actions clearly violate a constitutional prohibition, and are therefore beyond the Legislature's authority,

"rational basis" or no. *See U.S.D. 229*, 256 Kan. at 237 (applying the standard enunciated in *U.S.D. 229* for determining whether an Article 6 violation occurred).

V. <u>The Panel Properly Concluded the State Failed to Base the SDFQPA on the Actual Costs of Providing Kansas Students with a Suitable Education</u>

After considering the evidence presented by both parties at trial, the *Gannon* Panel concluded, "[i]n truth, and in fact, it appears that the Kansas Legislature . . . wholly disregarded the considerations required to demonstrate a compliance with Article 6, §6(b)." R.Vol.14, p.1702 (*Gannon* Decision, at p. 117). The Panel further stated that it "must conclude that the Legislature could not have possibly considered the actual costs of providing an Article 6, §6(b) suitable education." R.Vol.14, p.1836 (*Gannon* Decision, at p.117. In this appeal, the State contends that this Court should disregard these factual findings of the *Gannon* Panel on several bases. Perhaps the most telling argument of the State is that its decisions can be based upon "<u>rational speculation unsupported by evidence or empirical data</u>." State's Brief, at p.69 (emphasis added). In essence, the State asks this Court to turn a blind eye to its activity and assume that it considered the actual costs as required by *Montoy* – even in the face of overwhelming evidence to the contrary. Each of the State's arguments should be disregarded and this Court should give extreme deference to the *Gannon* Panel's finding that the State failed to consider the actual costs of educating Kansas students when funding education.

First, in apparent acknowledgment that the State did not consider the actual costs, the State argues its decisions can be based upon "rational speculation unsupported by evidence or empirical data." State's Brief, at p.69. In so arguing, the State relies on two cases – *Downtown Bar & Grill, L.L.C. v State* and *Cardarella v. Overland Park* – that apply a rational basis test. State's Brief, at p.69; 294 Kan. 188, 193-194 (2012) ("We

agree that the appropriate standard is the rational basis test."); 228 Kan. 698, at 701-702 (1980) ("The guarantee of due process demands only that the statute shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the objective sought to be obtained."). The rational basis test is not applicable in this situation, and – because these cases both apply the wrong constitutional standard – these cases are inapposite. *Supra* Arguments and Authorities §IV.D. Moreover, even if the State were entitled to rely on unsupported speculation in funding education in Kansas, there is simply no way that it could rationally speculate that decreased funding would result in a constitutional school funding scheme. R.Vol.14, p.1877 (*Gannon* Decision, at p.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.)

Second, the State argues that "the Panel improperly ignored other substantial sources of revenue available to Kansas schools, particularly LOB and federal funding." State's Brief, at 67. The State jumps to this incorrect conclusion because "[t]he evidence was that the funding provided and actual expenditures are in alignment with the "actual cost" calculations and recommendations of the LPA Study." *Id.* However, the *Gannon* Panel did not ignore this evidence in this regard – it simply **rejected** the State's evidence. *Supra* Statements of the Facts §III. 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).

Moreover, in reaching its conclusion that the State failed to consider the actual costs of providing Kansas students with a suitable education, the *Gannon* Panel had before it <u>and relied on</u> an overwhelming amount of evidence showing that the Kansas school finance system has <u>never</u> been funded based on the known or knowable cost of providing a constitutionally suitable education. Brief of Cross-Appellant, Statement of the Facts §L, at pp. 60-65; *Cason v. Geis Irrigation Co.*, 211 Kan. 406, 412 (1973) ("[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.").

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. Brief of Cross-Appellant, Statement of the Facts §L, at pp. 60-65; R.Vol.65, pp.3424-53; R.Vol.65, pp.3454-61; R.Vol.22, pp.777-78; R.Vol.30, pp.2445-47. More recently, when the Legislature began making its cuts to the base, it did not consider costs. R.Vol.30, pp.2467-70; R.Vol.22, pp.755, 777-78. In determining how much money to appropriate for supplemental state aid, how much money to appropriate to the General Fund, and whether to reduce the money appropriated to the General Fund, the State did not consider the actual costs of providing a suitable education to Kansas school students. R.Vol.65, pp.3424-53; R.Vol.65, pp.3454-61; R.Vol.22, pp.777-78; R.Vol.30, pp.2445-47; R.Vol.14, pp.1779-80; R.Vol.13, p.1636.

There is no evidence the State made the cuts because the cost of educating Kansas students had decreased; to the contrary, since *Montoy*, the evidence is so overwhelming as to be undisputed that the costs of educating Kansas students has increased. R.Vol.14, pp.1792-93; R.Vol.13, p.1652; 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. 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, at p.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, at p.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, at p.243 ("All the underfunding noted flies in the face of overwhelming evidence that costs not only have not abated, but, rather, most probably, increased.")). This evidence caused the *Gannon* Panel to properly conclude 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. R.Vol.14, p.1877 (*Gannon* Decision, at p.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 State Board, 2010 Commission, A&M Study, and LPA study recommended the base be increased or remain stable. R.Vol.14, p.1837; R.Vol.14, p.1779; R.Vol.13, pp.1633-34; R.Vol.66, pp.3541-99; R.Vol.68, pp.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 State ignored each of these recommendations, 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, pp.233-34; R.Vol.14, p.1779; R.Vol.13, p.1635. According to various legislators, none of the recommendations of the A&M study, the LPA study, the State Board, or the 2010 Commission were taken into consideration when making cuts to the base. R.Vol.30, pp.2467-70; R.Vol.30, pp.2458-60, 2467-68; R.Vol.22, pp.774-75, 778; R.Vol.33, pp.3262, 3268. Instead, the Legislature simply considered what it needed to do to reduce funding to education. *Id.*

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.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).")).

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 (stating the amount of school finance is determined annually and usually based on "what the Legislature decided it could afford"). 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." *Montoy II*, 278 Kan. at 774-74; *Montoy IV*, 279 Kan. at 818. But, that is exactly what the State admits to doing: 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 (BSAPP is calculated by working backwards from the General Fund appropriation and assuming a full time enrollment); R.Vol.9, p.1106 (whether LOB equalization is fully equalized or prorated is determined based on how much money is appropriated); R.Vol.22, pp.755, 777-78 (Legislature made its school funding decisions by determining what amount of money they were going to spend on schools and "that was it"); *see also* State's Brief, at pp.63-64 (indicating funding is based on historical spending and available sources of revenue). 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. *Montoy II*, at 774-74.

Finally, the State relies on its incorrect factual conclusion that "Kansas public K-12 schools are receiving funds *at record levels*" to argue that this Court should overturn the decision of the *Gannon* Panel. State's Brief, at 64. The State makes this claim at the same time that Dale Dennis, the Deputy Commissioner of Education, has indicated the State Board of Education will need an additional $643,731,000 in order to fund education at the level required by state law. *Supra* Statements of the Facts §II; Addendum A, May 24, 2013 Memorandum regarding Legislative Matters. The State Board, under its constitutionally-derived authority and obligation to provide general supervision of schools in Kansas, continues to seek funding increases from the legislature to ensure that

the funding that is currently required to be spend under formulas currently in state law are properly funded. *See* Addendum C: Peter Hancock, *State Education Board Seeks $656 Million Funding Increase*, THE SHAWNEE DISPATCH (July 10, 2013)[4]. The State Board seeks $443 million that would come from raising the base funding formula to the statutory amount of $4,492 per pupil; $113 million from fully funding the subsidy the state pays to help fund the local option budgets of less wealthy districts; $72 million for full funding of state aid for special education, and $25 million to fully fund the program that subsidizes the capital outlay budgets of less wealthy districts. *See* Addendum C. These requests are consistent with the *Gannon* Panel's order that the State fund the base funding formula to the statutory amount of $4,492 per pupil, and fully fund the local option budget subsidy and capital outlay state aid equalization subsidy. R.Vol. 14, p. 1964-67 (*Gannon* Decision, at p. 245-248.) The State's claims that it is funding education at record levels should be disregarded. *Supra* Statements of the Facts §II.

VI. <u>The State Has No Excuse For its Failure to Base the SDFQPA on the Actual Costs of Providing Kausas Students with a Suitable Education</u>

To the extent the State seeks to claim that it failed to consider the actual costs of providing Kansas students with an education because of to a lack of available funding, those claims must be disregarded. As early as 2005, the State knew that it would not be able to fully fund what it promised in the *Montoy* three-year plan without substantial budgetary shortfalls. R.Vol.13, p.1653; R.Vol.30, pp.2451-55; R.Vol.23, pp.1069-70; R.Vol.88, p.6323; R.Vol.88, p.6324; R.Vol.88, p.6325; R.Vol.101, pp.7639-47. The State was aware that, unless Kansas revenues increased, education would be

[4] Also available at http://www.shawneedispatch.com/news/2013/jul/10/state-education-board-seeks-656-million-funding-in/

underfunded. *Id.*; R.Vol.27, pp.2109-10. And it was aware of this fact <u>before</u> the recession began. R.Vol.13, p.1653; R.Vol.30, pp.2455-56. Kansas was facing budget problems even in the absence of the recession. R.Vol.13, p.1653; R.Vol.89, pp.6326-27. Despite the State's awareness of these looming budgetary problems, the State took no efforts to increase revenues and instead enacted tax cuts and decreased educational funding. R.Vol.13, pp.1653-54; R.Vol.23, p.1070; R.Vol.101, pp.7639-47 ("[T]he school finance bill that will become law . . . is projected to leave the state with a $422 million budget deficit by mid-2008 . . . [m]eanwhile, the legislature finished its session by passing a bill that would eliminate property taxes on new business machinery and equipment"); R.Vol.78, pp.5292-94.

In the last legislative session concluded before the ***Gannon*** trial, Kansas had excess funds in the state general fund and because of this significant ending balance, it was able to slightly increase the BSAPP. R.Vol.13, p.1654; R.Vol.30, pp.2462-63. But, recent tax cuts have reduced Kansas revenue by a billion dollars. R.Vol.13, p.1654; R.Vol.29, p.2424. This is an amount significantly similar to the amount needed to fund education to a more suitable level. *Id.* (stating the "proposition was [the State] needed 1.2 billion more in education" last year, which is roughly equal to the amount of the tax cuts). The State has enacted these tax cuts despite its awareness of the effect of reducing the revenue of Kansas on education funding. R.Vol.13, p.1654; R.Vol.93, p.6716-18 (stating that because of a "tax-cutting binge" Kansas was not "able to spend the money that we need to spend on education"); R.Vol.88, p.6263 (acknowledging that reducing corporate income taxes comes at the cost of maintaining high-quality schools). As a result of the tax cuts, the predicted state general fund balance for the fiscal year 2013-14

is negative $242 million and that negative balance gets larger every year. R.Vol.13, p.1654; R.Vol.88, pp.6307-15. School districts are once again in the position of being threatened with decreased educational funding "if history repeats itself." R.Vol.13, p.1654; R.Vol.27, p.2110.

After considering all of this evidence, the *Gannon* Panel reached the only conclusion that could be reached:

> It seems completely illogical that the State can argue that a reduction in education funding was necessitated by the downturn in the economy and the state's diminishing resources and at the same time cut taxes further, thereby further reducing the sources of revenue on the basis of a hope that doing so will create a boost to the state's economy at some point in the future. It appears to us that the only certain result from the tax cut will be a further reduction of existing resources available and from a cause, unlike the "Great Recession" which had a cause external to Kansas, that is homespun, hence, self-inflicted.

R.Vol. 14, pp. 1945-46 (*Gannon* Decision, at pp. 226-27).

Moreover, the State has also continued to reduce its borrowing in the form of yearly certificates of indebtedness. In Fiscal Year 2012, the certificate of indebtedness approved by the State Finance Council was $600 million; in Fiscal Year 2013, it was $400 million. For Fiscal Year 2014, the State Finance Council has approved a $300 million certificate. *See* Jim McLean, *Finance Council Approves $300 Million in Borrowing to Steady State Cash Flow*, KHI NEWS SERVICE (June 25, 2013).[5] While Governor Brownback has asserted that the falling size of those certificates indicates the "improv[ing] … fiscal situation of the state" the effect of these changes is that the State paid off roughly $100 million of its borrowings at the expense of the schools in 2013 and $200 million of its borrowing the year before. *Id.* As the *Gannon* Panel concluded, the

[5] Available at http://www.khi.org/news/2013/jun/25/finance-council-approves-300-million-borrowing-ste/

State cannot be allowed to claim diminishing resources when, through tax cuts and debt payoffs, the State reduces the amount of funding available to schools and adds insult to injury by stating it is able to do so because of the "improved fiscal situation." The lack of school funding is a "self-inflicted" wound, just as the *Gannon* Panel found.

VII. Plaintiffs Have Standing to Assert an Article 6 Violation

Given the flaws in the State's position on adequacy, it is not surprising that the State attempts to divert the Court's attention through raising a lack of standing defense at this late date. Plaintiffs do not dispute that standing is an important jurisdictional issue; Plaintiffs do, however, dispute it is an issue in this case. Here, standing is merely a "red herring" used to distract this Court from the bigger issue: whether the State is meeting its constitutional obligations. Nonetheless, it is clear that the Plaintiffs have standing to assert an Article 6 violation.

The State suggests that this Court should disregard the fact that this issue has not been raised before in other Kansas cases pre-dating *Gannon.* However, this Court should look to the history of school finance litigation in Kansas because it makes clear that Plaintiffs have standing to bring this suit. And, Kansas courts have addressed this issue before. The standing argument was first dismissed by Judge Bullock in *Mock v. State.* There, the State similarly raised the issue of whether "school district plaintiffs lack[ed] standing to raise the issues presented." R.Vol.35, p.83 (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009, 31 Washburn L.J. 489 (1991)). Judge Bullock dismissed the argument, stating the issue was "moot" because "the legislative duty [pursuant to Article 6 of the Kansas Constitution] inures to the benefit of all Kansas school children, some of whom are Plaintiffs in these consolidated cases." R.Vol.35, p.87.

Finally, as the State acknowledges, standing is an issue that can be raised by a court *sua sponte*. State's Brief, at 28. If a court may raise the issue on its own motion and the issue is a jurisdictional issue that can strip the court of its ability to entertain the action, it begs the following questions:

- In *Caldwell v. State*, the District Court of Johnson County determined the School Foundation Fund Act and related school finance statutes were unconstitutional. R.Vol.35, pp.77-80 (containing text of *Caldwell v. State of Kansas*, Case No. 50616 (1972)). **Why did the district court not raise the issue of standing in the opinion?**

- Seven Supreme Court justices and one district court judge considered whether the Kansas School District Equalization Act of 1973 violated the Kansas Constitution in *Knowles v. State Board of Education. See* 219 Kan. 271, 547 P.2d 699 (1976); Case No. 77-cv-251 (Shawnee County District Court, slip op. January 26, 1981). **Why did none of the eight judges involved raise the issue of standing?**

- In *Mock v. State*, Judge Bullock dismissed the standing argument raised by the State because "the legislative duty [pursuant to Article 6 of the Kansas Constitution] inures to the benefit of all Kansas school children, some of whom are Plaintiffs in these consolidated cases." R.Vol.35, pp.83-88 (containing text of *Mock v. State of Kansas*, No. 91-cv-1009, 31 Washburn L.J. 489 (1991)); *id.* at R.Vol.35, p.87. **Why did Judge Bullock not conclude otherwise?**

- Seven Supreme Court justices and one district court judge considered whether the SDFQPA violated the Kansas Constitution in *Unified School District Number 229 v. State,* 256 Kan. 232, at 241-44 (1994). **Why did none of the eight judges involved raise the issue of standing?**

- The *Montoy* case was considered by the Kansas Supreme Court on five separate occasions. *See Montoy v. State*, 275 Kan. 145 (2003) ("Montoy I"); 278 Kan. 769 (2005) ("Montoy II"); 278 Kan. 765 (2005) ("Montoy III"); 279 Kan. 817 (2005) ("Montoy IV"); and 282 Kan. 9 (2006) ("Montoy V"). **Why did none of the eleven judges involved raise the issue of standing?**

- A three judge panel in *Gannon v. State* determined the SDFQPA was in violation of the Kansas Constitution. **Why did none of the three judges involved raise the issue of standing?**

As the State contends, standing is a serious issue that would strip this Court of jurisdiction to hear this case. At least 20 different judges in Kansas, including 12 Supreme Court Justices, have considered cases in which school districts and individual students challenged the constitutionality of school funding decisions. The issue has reached the Kansas Supreme Court at least seven times. The State would have this Court believe that all of the previous cases merely overlooked the standing issue raised by State in this appeal. That is simply not the case. Rather, for the reasons identified below, Plaintiffs have standing to assert this lawsuit and this Court should focus on the merits of this case.

A. <u>School Districts Have Standing</u>

Preliminarily, the Legislature itself has already recognized and acknowledged that school districts have standing to assert a lawsuit regarding the constitutionality of the SDFQPA. In 2005, the Legislature adopted the School Finance Litigation Act. K.S.A. 72-64b01 to 72-64b04. Among other things, the Act required that a party alleging a violation of Article 6 of the Kansas Constitution provide written notice prior to

commencing an action and established the requirement for the appointment of the three-judge panel once a petition alleging a violation of Article 6 is filed. *See e.g.*, K.S.A. 72-64b02, 72-64b03. Within the Act, the Legislature adopted the following:

> No school district shall expend, use or transfer any moneys from the general fund of the district for the purpose of engaging in or supporting in any manner any litigation by the school district or any person, association, corporation or other entity against the state of Kansas, the state board of education, the state department of education, other state agency or any state officer or employee regarding the [SDFQPA] or any other law concerning school finance . . . . Nothing in . . . this section . . . shall be construed as prohibiting the expenditure, use or transfer of moneys from the supplemental general fund . . . .

K.S.A. 72-64b01. If school districts did not have standing to assert a claim against the State of Kansas, there would be no need for the Legislature to adopt a statute prohibiting the use of State money (as opposed to local funds) by the school district for the purposes of engaging in the lawsuit. *See e.g.*, *Hawley v. Dept. of Agriculture*, 281 Kan. 603, 631 (2006) ("There is a presumption that the legislature does not intend to enact useless or meaningless legislation.").

And, Plaintiffs can show they have standing under each prong of the applicable standing test: (1) they suffered an injury that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged action; and (3) the injury is redressable by a favorable ruling. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896-897 (2008). In the State's challenge to standing, it is not clear which prong of the standing test the State purports that the Plaintiff School Districts fail to meet. Nonetheless, because the Plaintiff School Districts suffered an injury traceable to the State's constitutional violation **and** that injury would be redressable by a favorable

ruling, the Plaintiff School Districts clearly have standing to assert a constitutional violation of Article 6.

Plaintiff School Districts have suffered an actual, concrete injury: an inability to comply with their constitutional obligations pursuant to Article 6 of the Kansas Constitution. This has manifested itself in an inability to provide students with a suitable education, an inability to comply with federal and state requirements, and an inability to fund necessary educational programs. Local school boards have the <u>constitutional obligation</u> to "establish, operate, and maintain" schools. ***Supra*** Arguments and Authorities§II. The State's actions are significantly undermining the Plaintiff School Districts' ability to meet that constitutional obligation, as clearly established at trial:

<u>Kansas City (U.S.D. No. 500)</u>:

- Superintendent Lane testified that the students of Kansas City, Kansas are not being provided with a suitable education. R.Vol.19, pp.86-87 ("You know, it keeps me up at night, frankly, to know that almost four out of every ten kids are not meeting the expectations that we have set for them . . . ."). More than 35% of the Kansas City students are not able to meet the standards prescribed by the State. *Id.* With additional resources, Superintendent Lane was "confident that [Kansas City, Kansas] children would do very well." R.Vol.20, pp.216-22, 283-84.

- As a district, Kansas City was "on corrective action" during the 2010-11 school year. R.Vol.52, p.1920; R.Vol.49, p.1551. During the 2010-11 school year, Kansas City had nine schools on improvement. R.Vol.19, pp.127-28; R.Vol.49, p.1550. These nine schools are not meeting QPA standards and would have been subject to sanctions. R.Vol.19, pp.127-28; R.Vol.49, pp.1552-53.

- Significant numbers of students in Kansas City are not meeting the AYP goal in reading or math. R.Vol.52, p.2039; R.Vol.52, p.2040; R.Vol.53, pp.2042-65.

- The average ACT score in the Kansas City school district is a 17. R.Vol.14, pp.1877-78, 1885; R.Vol.13, p.1706; R.Vol.19, pp.160-61. To enroll in a state university in Kansas, a student must receive a score of 21 on the ACT. R.Vol.14, pp.1877-78, 1885; R.Vol.13, p.1706; R.Vol.46, p.1218; R.Vol.19, p.160-61.

- In Kansas City, 18% of the students overall did not graduate within 5 years. R.Vol.14, pp.1877-78, 1886-87; R.Vol.13, pp.1707-08; R.Vol.20, pp.227-28.

- In 2010-11, 37.1% of Kansas City students did not graduate within 4 years. R.Vol.14, pp.1877-78, 1886-87; R.Vol.13, pp.1707-08; R.Vol.59, pp.2798-2804.

- In Kansas City, only 34% of students attend college and <u>less than 11%</u> graduate from college. R.Vol.19, pp.159-60; R.Vol.14, p.1895; R.Vol.13, pp.1711-12.

<u>Wichita (U.S.D. No. 259)</u>

- Superintendent Allison testified that Wichita does not have the resources to provide all of its students with a suitable education. R. Vol. 30, p.2503. He additionally testified that the district could do so with more resources. R. Vol. 30, p.2560.

- As a district, Wichita was "on corrective action" during the 2010-11 school year. R.Vol.14, pp.1877-78, 1881-82; R.Vol.13, p.1700; R.Vol.30, p.2499; R.Vol.55, pp.2328-46; R.Vol.49, p.1550. 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; R.Vol.13, pp.1700-01; R.Vol.30, p.2499. To move off of corrective action, Wichita would need to meet the district criteria for AYP. R.Vol.14, pp.1877-78, 1881-

82; R.Vol.13, pp.1700-01; R.Vol.30, p.2499. Based on preliminary data, Wichita is going to continue to be a district "on corrective action." R.Vol.14, pp.1877-78, 1881-82; R.Vol.13, pp.1700-01; R.Vol.30, p.2507-08.

- During the 2010-11 school year, Wichita had 12 schools on improvement. R.Vol.14, pp.1877-78, 1881-82; R.Vol.13, pp.1700-01; R.Vol.49, p.1552.

- 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; R.Vol.13, pp.1700-01.

- 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; R.Vol.13, p.1701; R.Vol.54, pp.2316-27. Only 74.8% of students met the annual target for that year on the reading assessments. R.Vol.14, pp.1877-78, 1882; R.Vol.13, p.1701; R.Vol.54, p.2316. The total number of students within the subgroups making AYP was much lower. R.Vol.14, pp.1877-78, 1882; R.Vol.13, p.1701. Only 60.7% of ELL students met AYP; almost 40% of ELL students did not. *Id.*; R.Vol.54, p.2320. 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; R.Vol.13, p.1701; R.Vol.54, pp.2316-27. 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; R.Vol.13, p.1701; R.Vol.54, p.2322. 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 <u>not</u>. *Id.*

- 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. 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.*

- In 2010-11, 33.8% of Wichita students did not graduate within 4 years. R.Vol.14, pp.1877-78, 1886-87; R.Vol.13, pp.1707-08; R.Vol.59, pp.2798-2804.

<u>Dodge City</u>

- Superintendent Cunningham testified that Dodge City did not have the resources available to provide a suitable education to all of its students. He stated, "Our Board of Education has set a goal that we [are] supposed to produce all our students as being capable and contributing citizens in our world. And we don't believe that the resources we have right now are adequate to be able to do that for all students." R. Vol. 26, pp.1836-37; R. Vol. 26, pp.1857-58; *see also* R. Vol. 26, p.1753.

- 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; R.Vol.19, pp.153-54; R.Vol.49, p.1551.

- 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; R.Vol.13, p.1703; R.Vol.53, pp.2185-96. Only 79.8% of students met AYP on the reading assessments. R.Vol.14, pp.1877-78, 1883; R.Vol.13, p.1703. Only 74.1% of ELL students met AYP, which means that one-quarter (25.9%) did not. R.Vol.14, pp.1877-78, 1883; R.Vol.13, p.1703; R.Vol.53, p.2189. On the math assessments, only 65.2% of Dodge City's African-American population met AYP. R.Vol.14, pp.1877-78, 1883; R.Vol.13, p.1703; R.Vol.53, p.2196. That means more than one-third (34.8%) of the African-American students in Dodge City did not. *Id.*

- 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; R.Vol.83, p.5865. 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; R.Vol.13, p.1708; R.Vol.26, pp.1746-47.

Hutchinson

- Superintendent Kiblinger testified that the amount of resources that the State is providing is not sufficient to provide a suitable education to all Hutchinson students. R. Vol. 32, p.3154.

- 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; R.Vol.13,

pp.1703-04; R.Vol.32, p.3137; R.Vol.54, p.2197. 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; R.Vol.13, pp.1703-04; R.Vol.32, pp.3137-38.

- During the 2010-11 school year, the Hutchinson school district had two schools on improvement. R.Vol.14, pp.1877-78, 1883; R.Vol.13, pp.1703-04; R.Vol.49, p.1552. These two schools would, under the former law, be subject to sanctions. R.Vol.14, pp.1877-78, 1883; R.Vol.13, pp.1703-04; R.Vol.49, p.1552.

- 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; R.Vol.13, pp.1703-04.

Additionally, because of the State's underfunding, Kansas school districts are currently unable to provide necessary services, programs, materials, and facilities to students. Funding levels are currently so low Plaintiff School 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). Brief of Cross-Appellant, Statement of the Facts §I, at pp.28-29.

As shown above, each of the districts have an injury that would be redressable by a favorable ruling; each district has indicated that with additional resources, it would be able to provide its students with a suitable education. But the Plaintiff School Districts have no ability to raise additional funds; while the Plaintiff School Districts can be liable

under the plain constitutional language for failing to uphold their constitutional obligations, they can only look to the Legislature for the actual funding needed to carry out their responsibilities. *U.S.D. 229*, 256 Kan. at 252 (stating that the "suitable financing" responsibility rests entirely with the Legislature).

The Legislature's refusal to comply with Article 6 of the Kansas Constitution has stripped the Plaintiff School Districts of their ability to provide their students with a suitable education and completely hindered their ability to meet their constitutional obligations. The State contends school districts have no standing to assert an Article 6 violation for this conduct. If school districts are constitutionally obligated to establish, operate, and maintain schools, who is better suited than the school districts themselves to assert this cause of action? *Cf. Society Hill Towers Owners' Assn. v. Rendell*, 210 F.3d 168, 176 (3d Cir. 2000) ("If the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this UDAG grant."). It makes no sense that Plaintiff School Districts – given their constitutional obligations – have no cause of action to rectify the State's failures.

Although the Plaintiff School Districts can clearly meet the standing requirement under Kansas law and although previous Kansas cases making clear that school districts have standing to assert Article 6 claims, the State urges this Court to determine otherwise. In making this argument, the State does not attack any specific prong of the standing requirement and more generally attacks whether the Plaintiff School Districts can assert a claim within the range of interests protected by the law at issue. *See e.g.*, State's Brief, at 33 ("Kansas districts have no duty within the constitutionally-protected zone."). The

State attempts to make this showing by relying on *Oklahoma Ed. Ass'n v. State ex rel. Oklahoma Leg.*, 158 P.3d 1058 (Ok. 2007).

In *Oklahoma Ed. Ass'n,* the Oklahoma Supreme Court, in analyzing Oklahoma's constitutional language, concluded that school districts did not have standing to assert a cause of action under the Oklahoma Constitution. In doing so, the Oklahoma Supreme Court determined,

> We do not find that either of these two constitutional provisions [at issue] places any duty on local school districts, school boards, or school employees to maintain or establish public schools . . . . Simply, the plaintiffs have failed to allege any facts that would support a finding that the plaintiff school districts . . . have an interest which is within a constitutionally protected zone, the third prong of the test for establishing standing.

Id. at 1065. The decision turned on **whether the Oklahoma Constitution placed a duty to maintain or establish public schools on the local school districts**. *Id.*; *see also* State's Brief, at 33 (indicating that the *Oklahoma Ed. Ass'n* case found "that the [Oklahoma] constitution placed no duty on the school districts").

Interestingly, the State claims that "[s]imilar to the Oklahoma Constitution," "Kansas districts have no duty within the constitutionally-protected zone." State's Brief, at 33. However, such a conclusion is completely at odds with the plain language of the Kansas Constitution. The Kansas Constitution very clearly puts a constitutional obligation on local school districts to "establish, operate, **and** maintain" schools. *See U.S.D. 229*, at 253 (emphasis added) (relying on language of Article 6, §5 of the Kansas Constitution); *McMillen*, 252 Kan. at 464 (indicating that local school boards have a constitutional duty to "maintain, develop, and operate the local public school system"). While the Oklahoma Constitution only gave constitutional obligations regarding the

establishment and maintenance of Oklahoma schools to the Oklahoma Legislature, that is not what the Kansas Constitution did. Instead, the Kansas Constitution placed the constitutional obligation with the State Board of Education, locally elected school boards, and the Kansas Legislature. *U.S.D. 229*, at 253 (citing *McMillen*, 252 Kan. at 464); *supra* Arguments and Authorities §II. And, the Kansas Supreme Court has indicated that – because of the language within the Kansas Constitution – the Kansas Legislature does not have "carte blanche over the duties and actions of local school boards." *Id.* Instead, "[t]he respective duties and obligations vested in the legislature and the local school boards by the Kansas Constitution must be read together and harmonized so both entities may carry out their respective obligations." *Id.* (emphasis added). Therefore, Kansas school districts – unlike Oklahoma school districts – clearly have an interest in a constitutionally protected zone.

Finally, the State suggests that school districts cannot have standing because of their status as political subdivisions of the State. The State claims that "[f]inding that the school districts have standing here could open the door to any number of claims by a state agency or political subdivisions against 'the State' for reductions or changes in the appropriations the Legislature and the Governor make to such entities." State's Brief at 33-34. First, the risk of other political subdivisions filing claims against the State is rare because most do not have the unique constitutional obligations placed upon school districts by Article 6. Second, there is nothing about the fact that school districts are a political subdivision of the State that automatically strips them of standing. As this Court stated in *Bd. of Ed. of U.S.D. No. 443 v. Kansas State Bd. of Educ.*, 266 Kan. 75, 83 (1998):

> Here, the State Board contends that USD 443 has no standing, since it is created by the legislature as a political subdivision of the State, to challenge whether the State impaired a contract with USD 443. *U.S.D. No. 380 v. McMillen*, 252 Kan. 451, 845 P.2d 676 (1993), however, permitted U.S.D. 380 to challenge whether it was denied the protection of the Kansas Constitution even though it was a political subdivision of the State. Therefore, although a school district's duties are not self-executing, but dependent upon statutory enactment of the legislature, this does not mean that the school district is stripped of the right to challenge the statute's constitutionality, nor is it removed from the protection of the constitution.

Because the Plaintiff School Districts can demonstrate standing under the applicable test and have an interest within the constitutionally protected zone, this Court should determine the Plaintiff School Districts have standing to assert a claim.

B. School Districts Have Standing to Assert a Claim on Behalf of Each of Their Students

Importantly, school districts have standing based on their own personal stake in the outcome of this lawsuit. ***Supra*** Arguments and Authorities §VII.A; ***Hartman*** *v. City of Mission*, 43 Kan. App. 2d 867, 868 (2010) ("Only a person who has alleged a personal stake in the outcome of the controversy has standing."). Moreover, the Plaintiff School Districts have standing to assert how the State's violation of Article 6 of the Kansas Constitution has affected the students within each district, including the individual Plaintiffs.

An association, such as the Plaintiff School Districts, has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief requested require the participation of the individual members. *See Friends of Bethany Place v. City of Topeka*, 43 Kan. App. 2d 182, 199 (2009) (citing *NEA-Coffeyville v. U.S.D. No. 445*, 268 Kan. 384, 387, 996 P.2d 821

(2000)). Because each of those requirements are met here, Plaintiff School Districts have standing to assert claims on behalf of their students.

"[S]tanding is a threshold issue to be decided without regard to the merits of the action." *Bd. of Sumner v. City of Mulvane*, 43 Kan. App. 2d 500, 515 (2010); *Society Hill Towers Owners' Assn. v. Rendell*, 210 F.3d 168, 176 (3d Cir. 2000) (indicating the City's standing argument "conflates issues of standing and questions of proof"). Consistent with this case law, the determination of whether an association's members have standing to sue individually does not require an exhaustive, in-depth analysis. *See e.g. NEA-Coffeyville*, 268 Kan. 384, 387 (2000) (concluding, without engaging in factual determination, that members would have individual standing); *Tri-County Concerned Citizens v. Bd. of Cty. Cmm'rs of Harper County*, 32 Kan. App. 2d 1168, 1174-75 (2004) (same).

The State contends Plaintiff School Districts may not assert the rights of their students because "no evidence was presented at trial to support the standing of individual students and parents." State's Brief, at 33-34. Yet, it is clear that the students who attend the Plaintiff School Districts would have standing to sue individually. *Infra* Arguments and Authorities §VII.C. Moreover, to meet the associational standing requirements, the Plaintiff School Districts must only show "that one or more of its members are injured." *See 312 Education Assoc. v. U.S.D. No. 312*, 273 Kan. 875, (2002). Each of the Plaintiff School Districts have shown ample evidence that a significant number of students within their district are not receiving a suitable education. *Supra* Arguments and Authorities §VII.A. Because one or more students within each Plaintiff School District are clearly

not receiving a suitable education, the Plaintiff School Districts can establish the first prong of the associational standing test.

Plaintiff School Districts can also meet the second prong of the associational standing test because the interests they seek to protect – the educational interests of the students within their district – are germane to their purpose. The very purpose of the constitutional language adopted in Article 6 requiring the creation of local public schools was to "provide constitutional guarantees of local control of local schools." *U.S.D. 229*, 256 Kan. at 241 (citing Kansas Legislative Council, *The Education Amendment to the Kansas Constitution*, p.iii (Publication No. 256, December 1965). It is nonsensical that the educational interests of those students within the local schools are not germane to the purpose of the local school district.

Finally, Plaintiff School Districts can show that neither the relief requested nor their claims require the participation of individual students and/or parents. With regard to whether the relief requested requires the participation of the individual members, the "crucial standing test" is "whether the relief requested inures to the benefit of the members of the association actually injured." *312 Education Assoc. v. U.S.D. No. 312*, 273 Kan. 875, 885 (2002). Here, the answer is clearly yes. Generally, when an association is seeking a declaration, injunction, or other prospective relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually granted." *312 Education Assoc. v. U.S.D. No. 312*, 273 Kan. 875, 885 (2002) (citing *Warth v. Seldin*, 422 U.S. 490 (1975)). With regard to the alleged violation of Article 6 of the Kansas Constitution, that is the only relief Plaintiffs have sought.

Similarly, the claim presented by Plaintiff School Districts does not require the participation of the individual members. It is not necessary to "examine evidence particular to individual [plaintiffs]" "in order to resolve plaintiffs' claims." *See e.g. 312 Education Assoc. v. U.S.D. No. 312*, 273 Kan. 875, 885 (2002). In arguing otherwise, the State is basically indicating that in order to establish standing, the Plaintiff School Districts must provide a name and social security number for each of the students within each of the Plaintiff School Districts who are not receiving a suitable education. Because the constitutional obligation is an obligation to <u>all</u> students and because <u>all</u> students are not receiving a suitable education, there is no need to look at evidence particular to any individual Plaintiff. R.Vol.35, p.87 (containing excerpts from *Mock v. State*, No. 91-cv-1009) (in which Judge Bullock dismissed the State's standing argument in *Mock v. State*, stating the issue was "moot" because "the legislative duty [pursuant to Article 6 of the Kansas Constitution] inures to the benefit of all Kansas school children, some of whom are Plaintiffs in these consolidated cases").

Evidence of the effects of underfunding on all school districts and thus all schoolchildren does exist on this Record. For example, almost every district must cut teacher salaries or positions. R.Vol.23, p. 1053. Districts must also close buildings. R. Vol.23, p. 1053. An entire slate of programs must be cut or reduced due to underfunding, including Before School, After School, Summer School, Fine Arts, Language Arts, Career & Technical Education. R.Vol.88, p. 6264-97 (Plaintiffs' Trial Exhibit 296); R.Vol.82, p. 5753-62 (Plaintiffs' Trial Exhibit 254). These cuts to an extremely broad range of programs effect every Kansas child's education.

From these types of evidence, the *Gannon* Panel, much like the *Montoy* Court, was easily able to conclude that the State violated its constitutional obligations based on aggregate data and without ever having to examine evidence particular to any individual plaintiffs. The Plaintiff School Districts should not be required to essentially prove the merits of their claim by providing evidence of particularized harm to each individual child affected by the State's unconstitutional actions in order to establish standing. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing 'in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal,'" (*quoting Warth v. Seldin*, 422 U.S. 490, 500 (1975)) (alteration in original)); *H.L. v. Matheson*, 450 U.S. 398, 430 (1981) ("[S]tanding is a jurisdictional issue, separate and distinct from the merits.).

Because Plaintiff School Districts meet each prong of the associational standing test, Plaintiff School Districts can assert a claim on behalf of their students.

C. **<u>Individual Plaintiffs Have Standing</u>**

"Standing is a question of whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Harrison v. Long*, 241 Kan. 174, 177 (1987) (citing *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)). Thus, to have standing, the individual Plaintiffs will be required to show that they "personally suffered some injury and that there was some causal connection between the claimed injury and the challenged conduct." *Id.* They must show that they have "a sufficient stake in the justiciable controversy to obtain judicial resolution of the controversy." *Id.*

The State contends that the individual Plaintiffs cannot meet this burden. Interestingly, the State contends "Plaintiffs presented no evidence that the individual student/parent plaintiffs were deprived of anything." State's Brief, at 39. To the contrary, Plaintiffs presented ample evidence of the damages caused by the underfunding of education. *Supra* Statements of the Facts §I; Brief of Cross-Appellant, Statement of the Facts §J, at pp.29-57.

Moreover, the State's standing arguments ignore the fact that the legislative duty imposed by the Kansas Constitution is a duty *to each school child of Kansas, equally*. R.Vol.35, p.86 (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009); R.Vol.35, p.84 (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; R.Vol.22, p.922; R.Vol.35, p.77 ("[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 (excerpt from *Caldwell v. State of Kansas*, Case No. 50616 (1972)); R.Vol.35, p.101; *Montoy I,* 275 Kan. at 146.

Moreover, the State's underfunding of education does not harm only those students who are "underachieving":

> 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.")).

Judge Bullock dismissed the State's standing argument in *Mock v. State*, stating the issue was "moot" because "the legislative duty [pursuant to Article 6 of the Kansas Constitution] inures to the benefit of all Kansas school children, some of whom are Plaintiffs in these consolidated cases." R.Vol.35, p.87 (containing excerpts from *Mock v. State*, No. 91-cv-1009). That legislative duty has not changed. Each of the individual Plaintiffs, who are Kansas school children, have standing to assert this lawsuit. The State's arguments improperly conflate the merits of the case with the issue of standing. *See Bd. of Sumner v. City of Mulvane*, 43 Kan. App. 2d 500, 515 (2010) ("[S]tanding is a threshold issue to be decided without regard to the merits of the action."); *Society Hill Towers Owners' Assn. v. Rendell*, 210 F.3d 168, 176 (3d Cir. 2000) (indicating the City's standing argument "conflates issues of standing and questions of proof").

VIII. Whether the Legislature Has Complied with its Constitutional Obligations is a Justiciable Question

With no other defenses available, the State also raises a justiciability defense. The State suggests that this Court would be rogue if it determines that the issues raised in this appeal are justiciable. State's Brief, at 35-39. But, "the vast majority of jurisdictions 'overwhelmingly' have concluded that claims that their legislatures have not fulfilled their constitutional responsibilities under their education clauses are justiciable." *Davis v. State*, 804 N.W.2d 618, 641 n.34 (S.D. 2011) (citing *Conn. Coal. for Justice in Educ. Funding v. Rell*, 990 A.2d 206, 225 n.24 (Conn. 2010) (citing decisions from Kentucky, Massachusetts, Idaho, Colorado, Indiana, Montana, North Carolina, Ohio, and Texas)). And, as Plaintiffs put forth earlier, the reason many states so find is because it is the province and duty of the judiciary to interpret the [state constitution] and say what the law is." *Lobato v. State*, 218 P.3d 358, 372 (Colo. 2009); *see also supra* Arguments and Authorities §III. When the Legislature exceeds its constitutional authority, "courts cannot reject as 'no law suit' a bona fide controversy." *Baker v. Carr*, 369 U.S. 186, 217 (1962). As *Baker* makes clear, there is a distinction between a "political question" and a "political case." *Id.* Just because the issues raised in this appeal are "political" in nature does not mean that this Court should abstain from resolving them.

Nonetheless, based on *Baker*, the State attempts to argue that the questions presented in this litigation are non-justiciable. For the reasons stated below, each of the State's arguments in this regard fails.

A. The Kansas Constitution Does Not Commit the Educational Interests of Kansas Solely to the Legislature

The State contends that this lawsuit is non-justiciable under the *Baker* line of cases because "Article 6 demonstrates a clear 'textual commitment' of questions about the amount of school funding, and appropriations for school funding, to the Legislature." State's Brief, at 35-36. Here, the text of the Kansas Constitution clearly did not commit the issue solely to the Legislature. Rather, in Kansas, the Constitution itself places constitutional duties on the State Board and the local school boards. *Supra* Arguments and Authorities §II.

Despite this, the State urges this Court to apply *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 273 Neb. 531, 731 N.W. 2d 164 (2007) and determine that the issues in *Gannon* are non-justiciable. But, there is a significant difference between the language of the Nebraska Constitution and the language of the Kansas Constitution that precludes a finding of non-justiciability by this Court: "Nebraska's constitutional history shows that the people of Nebraska have repeatedly left school funding decisions to the Legislature's discretion." *Id.* at 550. That, however, is not the case in Kansas.

While the Nebraska Constitution explicitly states that all funds "for the support and maintenance of the common schools" shall be used "as the Legislature shall provide," *see Heineman*, 273 Neb. at 551, the Kansas Constitution requires the Legislature fund schools in a manner that allows the State Board and the local school districts to carry out their constitutional obligations. *Supra* Arguments and Authorities §II. Again, the Kansas Constitution has not committed this issue to the Legislature.

Moreover, when a constitutional "duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards," courts will find that the issues are justiciable. *See Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989). As seen below, the duty of the Legislature is not unconditional and is instead subject to judicially discoverable and manageable standards.

B. <u>Article 6 Violations Are Subject to Judicially-Discoverable and Manageable Standards</u>

The State contends that this lawsuit is nonjusticiable "because there are no judicially-discoverable and manageable standards" applicable to determine whether the State violated Article 6 of the Kansas Constitution. State's Brief, at 37. Here, however, "[t]here are sufficient historical precedents to delineate judicially discoverable and manageable standards for resolving the issues at bar." *See Van Sickle*, 212 Kan. at 439. Those standards, articulated in *Montoy*, are the standards that should guide this Court throughout this appeal. *Supra* Arguments and Authorities §IV.

Despite the fact that the *Montoy* Court set forth clear standards for determining when a violation of Article 6 occurred, the State contends those standards are "ambiguous." *See e.g.* State's Brief, at 47 ("'Actual costs,' like 'suitable,' is an inherently ambiguous and manipulable concept."). But, nothing about allegedly "ambiguous" constitutional language forbids this Court from resolving the issues within this case.

In determining that school finance issues were justiciable in Texas, the Texas Supreme Court stated:

> By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge."

> While these admittedly are not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions . . . If the system is not "efficient" or not "suitable," the legislature has not discharged its constitutional duty and it is *our* duty to say so.

Edgewood Indep. School Dist. v. Meno, 917 S.W.2d 717, 735-736 (Tex. 1995) (citing *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989) (emphasis added).

Although the "suitable" language in the Kansas Constitution differs from language within the Texas Constitution, it is clear from *Edgewood* that imprecise or ambiguous constitutional terms do not make this issue a non-justiciable one. And the law is the same in Kansas. Nothing about "ambiguous" constitutional language forbids this Court from resolving the issues within this case. Rather, when constitutional language is "ambiguous," Kansas courts can rely on "the various tools of statutory construction" or "legislative history" to aid them in applying the law to the facts. *See e.g. In re E.R.*, 40 Kan. App. 2d 986, 987 (2008); *Most Worshipful Grand Lodge v. Bd. of Shawnee Cty*, 259 Kan. 510, 517-518 (1996); *Colorado Interstate Gas v. Bd. of Morton Cty. Cmm'rs*, 247 Kan. 654, 656-660 (1990). In fact, as acknowledged in *U.S.D. 229,* when constitutional mandates require "that education be suitable, sufficient, appropriate, or adequate" – each of which is an "amorphous" concept – it is the duty of the court to "mold[] tests by which to assess the level of funding." *U.S.D. 229*, 256 Kan. at 257.

And, that is exactly what the *Montoy* Court did: it interpreted and defined the standards applicable to determining when the SDFQPA violates Article 6 of the Kansas Constitution. *Supra* Arguments and Authorities §IV. That standard, which requires a court to consider (1) whether the funding meets the constitutional requirements of Article

6, §1; (2) whether the funding provides students with a suitable education; (3) the equity with which the funds are distributed; and (4) the actual costs of providing the required education, is both judicially-discoverable and manageable. *Id.* Based on the historical precedent in *Montoy*, this Court can "delineate judicially discoverable and manageable standards for resolving the issues at bar." *See Van Sickle*, 212 Kan. at 439.

C. This Court Can Determine Whether the Legislature Has Complied with the Kansas Constitution Without Expressing a Lack of Respect to the Legislature

The State contends that this lawsuit is nonjusticiable because "it is impossible on this record to affirm the Panel without 'expressing a lack of the respect due coordinate branches of government.'" State's Brief, at 37-38. In *Heineman*, the Nebraska Supreme Court considered this issue and determined, "[w]e could not hold that the Legislature's expenditures were inadequate without invading the legislative branch's exclusive realm of authority. In effect, we would be deciding what spending issues have priority." 273 Neb. at 554. That issue is of no concern here, however, because the Legislature has clearly indicated that "[t]he appropriation of moneys necessary to pay general state aid and supplemental general state aid under the [SDFQPA] . . . shall be given first priority in the legislative budgeting process." K.S.A. 72-64c03 (emphasis added). Thus, the courts do not have to decide what spending issues have priority; the Legislature has already itself determined that school finance should be given first priority. This Court must only determine whether the Legislature has complied with the mandates of the Constitution. Thus, contrary to what the State asserts, this Court is not disrespecting the Legislature or ordering it not to exercise its core powers. It is merely holding the Legislature to the Kansas Constitution and to the law that it adopted.

And defining the language of Article 6, as the Court did in *Montoy*, does not express a lack of respect for coordinate branches of government because "[t]his task falls within the "'province and duty of the judicial department to say what the law is.'" *National Labor Relations Board v. New Vista Nursing and Rehabilitation*, No. 11-3440, 2013 WL 2099742 at *10 (3d Cir. May 16, 2013), *quoting Zivotosky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012), *quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)). This "duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotosky*, 132 S. Ct. at 1428 (citations omitted).

Fourth, the State contends that there is a risk for "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." State's Brief, at 38. However, this Court is now tasked with interpreting the State's Constitution and applying it to the facts at hand; a task well within the "province and duty of the judicial department" and a task that will result in a final and binding decision of this Court. The only possible risk of "multifarious pronouncements" would be if the State, through the Governor and Legislature, decided to act in contempt and defiance of this Court's final adjudication of the issues of constitutional interpretation that lie at the heart of this case. The State impliedly threatens this Court with the "risk [of] unnecessary, intense and ongoing conflict with the other branches of state government." *Id.* at 39. The State should not be allowed to, in effect, guarantee "multifarious pronouncements" by effectively promising in advance to gainsay whatever this Court determines unless the court avoids this outcome by abdicating its judicial

responsibility to "say what the law is." It is the State, not the *Gannon* Panel or this Court, that has shown disrespect for a coordinate branch of government.

D. Cases from Other States Do Not Dictate the Justiciability of School Funding in Kansas

The State contends that the decisions in cases such as *King v. State*, 818 N.W. 2d 1(Ia. 2012) and *Bonner ex rel. Bonner v. Daniels*, 907 N.E. 2d 516 (Ind. 2009) compel this Court to find that the questions raised in this litigation are nonjusticiable. State's Brief, at 48-49. However, the holdings from these two cases are simply not applicable here.

The State premises its reliance on *King* on the fact that the Iowa Constitution "contains a somewhat similar provision to Kansas[']." State's Brief, at 51. But, in *King*, the Iowa Supreme Court specifically distinguishes itself from "most other states" on the basis of the language included in its constitution. *King*, 818 N.W. 2d at 19-21. For instance, unlike Kansas, the Iowa Consitution "does not mandate free public schools." *Id.* at 19. It also does not require that the public education system "be 'adequate,' 'efficient,' 'quality,' 'thorough,' or 'uniform.'" *Id.* at 19-21. The Kansas Constitution, on the other hand, does require that the system be "suitable," which our courts have compared to "adequate." ***Supra*** Arguments and Authorities §IV.B. In Iowa, it is the legislature alone that "is expressly authorized to provide for the educational interests of the state, in such manner as shall seem best and proper." *King*, 818 N.W.2d at 17 (citing *Kinzer v. Dirs. of Indep. Sch. Dist.*, 105 N.W. 686, 687 (1906)). However, in Kansas, the Legislature shares constitutional responsibility for the educational interests of the state with the local school boards. ***Supra*** Arguments and Authorities §II. Because of these

significant differences between the constitutional language of Iowa and Kansas, this Court should not rely on the *King* case to determine the issue of justiciability.

Similarly, the *Bonner* case in inapposite here. In that case, the Court found that the Indiana Constitution "does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality." *Bonner ex rel. Bonner v. Daniels*, 907 N.E. 2d 516, 522 (Ind. 2009). But it did so based on language in Indiana's constitution drawing a distinction between the duty to (1) "*encourage* moral, intellectual, scientific, and agricultural improvement" and (2) "the duty to *provide* for a general and uniform system of open common schools without tuition." *Id.* at 520 (emphasis added). Again, the Kansas Constitution *does* require that the educational system be "suitable", language that does not appear in Indiana's constitution and which Kansas courts have compared to "adequate". *Supra* Arguments and Authorities §IV.B. As with the Iowa Constitution, the Indiana Constitution is simply not sufficiently similar to the Kansas Constitution to be relied on to determine the issue of justiciability. In fact, it differs in precisely the way that the *Bonner* court recognized as the crux of the justiciability issue; i.e., the difference between a mere duty to "encourage" certain educational outcomes and a duty to "provide" for those outcomes. *Id.* at 522. The relevant portion of the Kansas Constitution "The legislature *shall make suitable provision* for finance of the educational interests of the state" simply cannot be read as a mere duty to "encourage" certain outcomes – it is a clear directive to provide for those outcomes. Kansas Constitution, Art. 6, §6. Thus, unlike the language in the Indiana Constitution, the Kansas Constitution's language clearly supports the justiciability of the suitability of the provisions made by the State.

IX. The Proper Remedy is One That Requires the State to Fund Education at a Level Based on the Actual Costs of Providing a Constitutional Education

The State takes issue with the remedy ordered within the *Gannon* Decision. So do Plaintiffs. 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). This statute has not been amended since 2008. K.S.A. 72-6410. 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." *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. *See* Brief of Cross-Appellant, Statement of the Facts §E, at pp.16-19; §F, at pp.19-23.

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." *Montoy I*, 275 Kan. at 153 (emphasis added).

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; R.Vol.23, pp.1060-61; R.Vol.25, pp.1631-32; R.Vol.14, p.1895; R.Vol.13, pp.1631-32; R.Vol.14, p.1775; R.Vol.27, p.2112. No additional studies are necessary. Instead, this Court should rely on the evidence presented by Plaintiffs regarding the actual costs of providing an education to Kansas students. The *Gannon* Panel entered a factual finding that these studies were not only valid, but also that they supported a finding that the base should be set higher than $4,492:

> [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)).

X. The Court Has The Authority to Enter an Order Enjoining the Legislature and Other Public Officials

This Court has the authority to enter the order requested by Plaintiffs even though the Kansas Legislature is not a party to this action. An injunction is an order to do or refrain from doing a particular act. K.S.A. 60-901. "Every order granting an injunction . . . shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert or participation with them who receive actual notice of the order by personal service or otherwise." K.S.A. 60-906. This language mirrors that of Fed. R. Civ. P. 65(d). Case law interpreting the federal language allows a court to order injunctive relief against an official or agency of the state even if the official or agency was not specifically and separately listed as a party to the action. *Cornelius v. Hogan*, 663 F.2d 330, 335 (1st Cir. 1981); *Hendrickson v. Griggs*, 672 F. Supp. 1126, 1142 n. 26 (N.D. Iowa 1987). This fact was recognized by Judge Bullock in a Letter Decision issued from the trial court in the *Montoy* case dismissing the Governor and State Treasurer as individual parties. As Judge Bullock stated, "Should orders of restraint be needed at the end of this litigation requiring or prohibiting any constitutionally required or prohibited actions, those can always be then served on all

appropriate officials." *See* Addendum F: Letter Decision, *Montoy v. State*, 99-C-1738 (Sep. 8, 2003)(Bullock).

XI. Legislative Immunity Does Not Prevent This Court from Remedying the Legislature's Constitutional Violation

In their never-ending battle to avoid the substantive constitutional issues in this case, the State erroneously argues that the Legislature is legally immune from any contempt or other enforcement action related to the injunction, and thus argues that the *Gannon* Panel's Entry of Judgment and Order is a "practical nullity." State's Brief, at 92-93. But legislative immunity does not prevent this Court from remedying the Legislature's constitutional violation.

As an initial matter, the Court need not rule on this newly raised issue that was not argued at trial. "It is a fundamental rule of appellate procedure that issues not raised before the trial court cannot be raised on appeal." *Miller v. Bartle*, 283 Kan. 108, 119 (2007)(*citing Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003)).

Second, the State attempts to rely on *State ex. rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45 (1984) for its position that the Legislature is immune from suit, while disregarding the specific exception noted by the Court in that case for instances in which the "petitioner argues the enactment of rules and regulations pursuant to the statute constitutes legislative usurpation of a function exclusively vested in the executive." *Id.* at 58. As the Court stated, "If this is so, this lawsuit would not be barred on the basis of legislative immunity under the Speech or Debate Clause." *Id.* As Plaintiffs have argued, *supra* Arguments and Authorities §II, the Legislature has effectively usurped the constitutionally instituted role of the Kansas State Board of

Education in determining what a "suitable" education for Kansas schoolchildren is by refusing to adequately fund that education. Thus, legislative immunity under the Speech or Debate Clause does not apply here.

Furthermore, unlike in *Stephan*, the action in this case is being brought by individuals whose rights have been affected by the legislature's unconstitutional action. The *Stephan* Court specifically recognized this as a reason for sanctioning suits against the Legislature. *Id.* ("Cases in the United States Supreme Court giving sanction to an attack upon a legislative enactment exceeding the bounds of legislative power, where obviously there was a usurpation of functions vested in the judicial or executive branches of government, were brought by individuals whose rights were affected by unconstitutional action on the part of the legislature"), *citing Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); *I.N.S. v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). The Plaintiffs in this case have been harmed by the Legislature's unconstitutional acts, which involve a usurpation of the KSBE's constitutional functions, and therefore the Legislature is not immune to suit.

XII. The State's Continuing Violation of Article 6 of the Kansas Constitution is Egregious and Sanctionable

The issues at stake in this appeal are of the utmost importance. In dismissing the *Montoy* case, then-Chief Justice Kay McFarland stated: "I have been a member of the Kansas Supreme Court for almost 30 years. Without doubt, this is the most significant case to come before the Court in my tenure." Statement of Chief Justice Kay McFarland, July 28, 2006.[6] Despite the importance of this issues raised in this case, the State – in its briefing – effectively tells this Court to "butt out." It is clear that, in order to finally

[6] Available at http://www.schoolfunding.info/states/ks/MontoyStatement72806.pdf.

achieve constitutionality, this Court must retain jurisdiction over the matter until the State fulfills its constitutional obligations and this Court should exercise its inherent power to sanction the State's bad-faith conduct.

It is only somewhat surprising that the State asks this Court to refrain from issuing a decision in this matter. History shows the State has been unwilling to meet its burden under the Constitution for almost as long as the burden has existed and, at the same time, has continually attempted to avoid a court determination of inadequate funding. Brief of Cross-Appellant, Statement of the Facts §B, at pp.6-8; §C, at pp.8-14. The result is a never-ending, unconstitutional status quo: the Legislature avoids complying with its cconstitutional duties and the situation continues for each successive generation of Kansas kids. R.Vol.96, p.7090. In the past, the State has avoided Court determination of the issues by adopting new legislation. 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.

Id.

Peripherally, it is important to realize that – despite efforts to do so – there is no need for an overhaul of the current school finance system. R.Vol.81, pp.5638-41 (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 (same). 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, at pp.242-43 (emphasis added)); R.Vol.14, p.1949 (*Gannon* Decision, at p.230 (stating "the systemic failure lies in the reduction of the BSAPP")).

In *Montoy*, the State not only adopted new legislation to avoid a court determination of the issues, it also made representations to the Court in order to seek dismissal of a school funding case and then defaulted on those commitments. To entice the Kansas Supreme Court to dismiss *Montoy*, the State promised to fund the three-year plan. It not only failed to do so, but knew as early as 2005 that it would not be able to fully fund what it promised in the *Montoy* three-year plan without substantial budgetary shortfalls. *Supra* Arguments and Authorities §VI; *see also* 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.")).

The Supreme Court's decision to dismiss the *Montoy* case was not only based on the Legislature's promise to fund. The Court was also impressed that the Legislature

"undert[ook] 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." *Montoy V*, 282 Kan. at 23. However, following *Montoy*, the State disregarded all recommendations made by the LPA and the 2010 Commission. ***Supra*** Arguments and Authorities §V; 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. . . .") (emphasis added). The State not only ignored all recommendations by the LPA and the 2010 Commission, it took it one step further: following *Montoy*, the State adopted K.S.A. 46-1226 in an apparent effort to undermine the value of any cost study done for the purpose of complying with the Kansas Constitution. The statute states that "[a]ny cost study analysis, audit or other study commissioned or funded by the legislature and any conclusions or recommendations therefor shall not be binding upon the legislature." K.S.A. 46-1226. The State obviously had no intent in complying with Article 6 of the Kansas Constitution when it established the 2010 Commission; instead, it only intended to make whatever representations necessary to convince the Court to release jurisdiction over the matter.

Because of this lengthy history of questionable behavior by the State, it is highly likely that the State will continue to underfund Kansas public education in the absence of a court order directing otherwise. But, even with a court order directing the Legislature

to fully fund education, there is no guarantee that the Legislature will comply with the Kansas Constitution. Members of the Kansas Legislature have publicly stated that the Kansas Legislature may decide to defy an order by this Court to increase school funding. *See* Addendum D: Dion Lefler, *Senate President Susan Wagle: 2013 Legislative Session Could Be Even Worse*, THE WICHITA EAGLE (June 5, 2013)[7]; Addendum E: Roy Wenzl, *Namesake Father in School Financing Case Driven by Helping Children*, THE WICHITA EAGLE (June 8, 2013)[8] One legislator, Rep. Steve Brunk, went so far as to indicate that "there's a mood [in the Senate and the House] to give the courts the finger." *See* Addendum E. In fact, the Legislature has already shown its willingness to ignore the court's pronouncements. Despite the finding of the trial court that the State's failure to fund the Capital Outlay Equalization fund was unconstitutional, taking advantage of the stay of the Order issued by this Court, the Legislature passed S.B. 171, §265, which amends K.S.A. 72-8814(c) to continue the State's unconstitutional failure to fund beyond the 2013 and 2014 fiscal years to the 2015 and 2016 fiscal years. If the State is willing to act in this manner under a mere stay of a trial court's order, its willingness to act in derogation of its constitutional duties where no court retains jurisdiction can only be greater. Furthermore, to the extent the Legislature continues its attempts to limit the judiciary's ability to determine and interpret the proper remedy for the State's violation, see e.g. K.S.A. 72-64b03(d), those attempts are unconstitutional. R.Vol.4, pp.498-99, (Amended Petition, Count 6).

For the Plaintiffs, this case represents the worst sense of déjà vu. As Judge Bullock noted in his Decision and Order (Remedy) of May 11, 2004 in the *Montoy* case:

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[7] Also available at http://www.kansas.com/2013/06/05/2834156/wagle-2014-session-could-be-even.html.

[8] Also available at http://m.kansas.com/wichita/db_108691/contentdetail.htm?contentguid=lZG1MxrE&full.

> [R]ather than attack the problem, the Legislature chose instead to attack the Court. From the outset, legislative leaders openly declared their defiance of the Court and refused to meaningfully address the many constitutional violations within the present funding scheme, all of which were created by the Legislature itself ... How the children of Kansas benefit from these official actions of our government escapes the Court.
>
> This case was originally filed in 1999. Five years later, there is still no relief in sight for our children. Hundreds of thousands of these children have gone through the Kansas educational system during this period of time. According to the evidence, many thousands of them have been permanently harmed by their inadequate educations and forever consigned to a lesser existence. Further delay will unquestionably harm more of these vulnerable ... students. Given these facts, coupled with the attitudes and inaction of the Legislature, the Court now has no choice but to act and to act decisively.

See Addendum G: Decision and Order (Remedy), *Montoy v. State*, 99-C-1738 (May 11, 2004)(Bullock). What was true in 2004 remains true today, even more so. Many more thousands of Kansas schoolchildren have now been harmed by the State's refusal to fulfill its constitutional obligations; many more will continue to be harmed unless the Court acts.

Thus, for all of these reasons, to finally achieve constitutionality, this Court must retain jurisdiction over the matter until the State fulfills its constitutional obligations. Moreover, this Court should exercise its inherent power to sanction the State's bad-faith conduct. *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.) Allowing the State to continue this behavior without consequence will reward it for continuously failing to meet its constitutional obligations.

CONCLUSION

It is this Court's responsibility to interpret the Kansas Constitution and to take action when the Constitution is violated. This Court should not succumb to the implied threats against the Judicial Branch by the Legislative Branch. The guiding principle is Article 6 of the Kansas Constitution, as previously interpreted and applied by this Court. At stake is the future of generations of Kansas schoolchildren. From Thomas Jefferson's plea for public education in the 18th Century through the 19th Century's common school reformers to the 20th Century's *Brown v. Board of Education* and George Wallace on the steps of the University of Alabama in Tuscaloosa, it is hard to imagine how much poorer the quality of education would be today for all children if avoiding conflict had been the most important guiding principle through the last 250 years.

The 2010 Commission made clear that Kansas "cannot sacrifice a generation of Kansas students because the economy is weak." R.Vol.66, p.3574. Similarly, this Court cannot sacrifice another generation of Kansas students because the State refuses to fulfill its constitutional obligations.

Dated this 15th day of July, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2013, I sent two copies of the foregoing to each the following addresses via U.S. First Class Mail, postage prepaid to:

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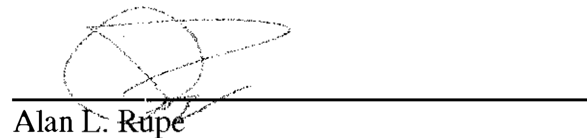

Alan L. Rupe

ADDENDA

I. **Addendum A: May 24, 2013 Memorandum regarding Legislative Matters**

II. **Addendum B: June 6, 2013 Letter to Kansas Attorney General from Commissioner of Education**

III. **Addendum C: Peter Hancock, *State Education Board Seeks $656 Million Funding Increase*, THE SHAWNEE DISPATCH (July 10, 2013)**

IV. **Addendum D: Dion Lefler, *Senate President Susan Wagle: 2013 Legislative Session Could Be Even Worse*, THE WICHITA EAGLE (June 5, 2013)**

V. **Addendum E: Roy Wenzl, *Namesake Father in School Financing Case Driven by Helping Children*, THE WICHITA EAGLE (June 8, 2013)**

VI. **Addendum F: Letter Decision, *Montoy v. State*, 99-C-1738 (Sep. 8, 2003)(Bullock)**

VII. **Addendum G: Decision and Order (Remedy), *Montoy v. State*, 99-C-1738 (May 14, 2004)(Bullock)**

ADDENDUM A:
MAY 24, 2013 MEMORANDUM REGARDING LEGISLATIVE MATTERS

Kansas State Department of Education
(785) 296-3201
(785) 296-7933 (fax)
120 SE 10th Avenue • Topeka, KS 66612-1182 • (785) 296-6338 (TTY) • www.ksde.org

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To: Commissioner Diane DeBacker
From: Dale Dennis
Subject: Legislative Matters
Date: 05/24/2013

A. REVIEW BUDGET FOR FY 2014
A summary of the FY 2014 KSDE budget following final action by the Kansas Legislature will be provided at the June meeting.

B. BEGIN DISCUSSION OF FY 2015 BUDGET RECOMMENDATIONS
The budget process recommended by the Governor and Legislature has been changed for Fiscal Years 2014 and 2015. In the past, the Legislature approved the budget for the coming fiscal year. During the 2013 legislative session, state agency budgets were approved for Fiscal Years 2014 and 2015.

In order to begin the budget recommendation discussion, we have provided the attached history and options for education aid programs. You will note that the Fiscal Year 2015 budget has already been adopted; however, the State Board of Education may submit additional requests above the amount approved by the Legislature and Governor.

We plan to discuss these programs and any additional recommendations at the June meeting and make final recommendations for the Fiscal Year 2015 budget at the July meeting.

C. REVIEW EDUCATION LEGISLATION
A report on the final status of education legislation following final adjournment of the Legislature will be reviewed with the State Board.

D. MINI BUDGET WORKSHOP
We will conduct a mini school finance budget workshop based on the formulas for distributing general state aid, supplemental general state aid (local option budget), and if time permits, special education state aid.

Fiscal & Administrative Services Division
Phone: 785-296-2303
Fax: 785-296-7933
TTY: 785-296-6338

DISCUSS FY 2015 KSDE BUDGET

Listed below are options to begin the discussion on recommendations for the FY 2015 KSDE budget.

BASE STATE AID PER PUPIL (BSAPP)

	Year	Amount	Additional Cost
History:	2005-06	$ 4,257	
	2006-07	$ 4,316	
	2007-08	$ 4,374	
	2008-09	$ 4,400 (Reduced from $4,433)	
	2009-10	$ 4,012	
	2010-11	$ 3,937	
	2011-12	$ 3,780	
	2012-13	$ 3,838	
	2013-14 Adopted by Leg.	$ 3,838	
	2014-15 Adopted by Leg.	$ 3,852	
Options:	2014-15	$ 4,433	$ 393,337,000
	2014-15	$ 4,492	$ 433,280,000
	2014-15	$ 4,012	$ 108,320,000

SUPPLEMENTAL GENERAL STATE AID (LOCAL OPTION BUDGET)

	Year	Amount	Additional Cost
History:	2008-09	$ 324,145,881	
	2009-10	$ 339,212,000 (90.0%)	
	2010-11	$ 339,212,000 (91.7%)	
	2011-12	$ 339,212,000 (86.1%)	
	2012-13	$ 339,224,000 (79.0%)	
	2013-14 Adopted by Leg.	$ 339,212,000 (77.0%)	
	2014-15 Adopted by Leg.	$ 339,212,000 (75.0%)	
Options:	2014-15	$ 452,282,000 (100.0%)	$ 113,070,000
	2014-15	$ 407,054,000 (90.0%)	$ 67,842,400

SPECIAL EDUCATION

	Year	Amount	Notes / Additional Cost
History:	2008-09	$ 427,753,137 (92.0%)	
	2009-10	$ 367,540,630 (88.7%)	(Rec. $56,517,000-ARRA)
	2010-11	$ 389,404,843 (92.0%)	(Rec. $54,454,000-ARRA)
	2011-12	$ 428,140,397 (88.4%)	
	2012-13	$ 427,724,000 (82.8%)	
	2013-14 Adopted by Leg.	$ 427,717,000 (80.1%)	
	2014-15 Adopted by Leg.	$ 427,717,000 (78.7%)	
			Additional Cost
Options:	2014-15	$ 499,898,000 (92.0%)	$ 72,181,000
	2014-15	$ 461,862,000 (85.0%)	$ 34,145,000

ALL-DAY KINDERGARTEN

			Additional Cost
Options:	2014-15	Implement all at once	$ 81,500,000
	2014-15	Implement over 5-year period	$ 16,300,000 per year

PARENTS AS TEACHERS

Helps parent become child's first teacher. Improves school readiness and provides screening for undetected health problems, disabilities, and developmental delays. Serve an estimated 18,000 children and parents.

History:	2008-09	$ 7,567,000
	2009-10	$ 7,567,000
	2010-11	$ 7,359,130
	2011-12	$ 7,237,635
	2012-13	$ 7,237,635
	2013-14 Adopted by Leg.	$ 7,237,635
	2014-15 Adopted by Leg.	$ 7,237,635

			Additional Cost
Options:	2014-15	Increase number of children by 1,000	$ 460,000
	2014-15	Increase number of children by 2,000	$ 920,000

MENTOR TEACHER PROGRAM

Voluntary program that provides probationary teachers with three years of professional support and assistance by an on-site mentor.

History:	2008-09	$ 1,650,000
	2009-10	$ 1,450,000
	2010-11	$ 1,450,000
	2011-12	$ 0
	2012-13	$ 0
	2013-14 Adopted by Leg.	$ 0
	2014-15 Adopted by Leg.	$ 0

			Additional Cost
Options:	2014-15	Fund 100% of law	$ 3,000,000
	2014-15	Fund 50% of law	$ 1,500,000

PROFESSIONAL DEVELOPMENT

State law allows a district to receive state aid up to one-half percent of its general fund budget or 50 percent of its actual expenditures, whichever is less.

History:	2008-09	$ 1,750,000	
	2009-10	$ 0	
	2010-11	$ 0	
	2011-12	$ 0	
	2012-13	$ 0	
	2013-14 Adopted by Leg.	$ 0	
	2014-15 Adopted by Leg.	$ 0	
			Additional Cost
Options:	2014-15	Fund 100% of law	$ 8,500,000
	2014-15	Fund 75% of law	$ 6,375,000
	2014-15	Fund 50% of law	$ 4,250,000

TRANSPORTATION

Legislative study recommended the threshold for computing state aid should be reduced from 2.5 to 1.25 miles.

			Additional Cost
Options:	2014-15	Decrease mileage limit from 2.5 to 2.0	$ 8,925,000
	2014-15	Decrease mileage limit from 2.5 to 1.5	$ 17,850,000
	2014-15	Decrease mileage limit from 2.5 to 1.25	$ 21,000,000

SCHOOL LUNCH

Reimburse local education agencies six cents per school lunch as provided by Kansas law.

History:	2008-09	$ 2,510,486 (4.4 cents per lunch)	
	2009-10	$ 2,435,171 (4.3 cents per lunch)	
	2010-11	$ 2,435,171 (4.3 cents per lunch)	
	2011-12	$ 2,487,458 (4.3 cents per lunch)	
	2012-13	$ 2,510,486 (4.4 cents per lunch)	
	2013-14 Adopted by Leg.	$ 2,510,486 (4.4 cents per lunch)	
	2014-15 Adopted by Leg.	$ 2,510,486 (4.4 cents per lunch)	
			Additional Cost
Options:	2014-15	$ 3,586,000 (6.0 cents per lunch)	$ 1,075,514

CAPITAL OUTLAY STATE AID

History:	2008-09	$ 22,600,000	
	2009-10	$ 0	
	2010-11	$ 0	
	2011-12	$ 0	
	2012-13	$ 0	
	2013-14 Adopted by Leg.	$ 0	
	2014-15 Adopted by Leg.	$ 0	
			Additional Cost
Options:	2014-15	Fund law	$ 25,200,000

AGRICULTURE IN THE CLASSROOM

History:	2008-09	$ 35,000	
	2009-10	$ 35,000	
	2010-11	$ 35,000	
	2011-12	$ 0	
	2012-13	$ 0	
	2013-14 Adopted by Leg.	$ 0	
	2014-15 Adopted by Leg.	$ 0	
			Additional Cost
Options:	2014-15	Fund at 2010-11 level	$ 35,000

COMMUNITIES IN SCHOOLS

History:	2008-09	$ 35,000
	2009-10	$ 35,000
	2010-11	$ 35,000
	2011-12	$ 0
	2012-13	$ 0
	2013-14 Adopted by Leg.	$ 250,000
	2014-15 Adopted by Leg.	$ 250,000

KANSAS ASSOCIATION OF CONSERVATION AND ENVIRONMENTAL EDUCATION

History:	2008-09	$ 35,000	
	2009-10	$ 0	
	2010-11	$ 0	
	2011-12	$ 0	
	2012-13	$ 0	
	2013-14 Adopted by Leg.	$ 0	
	2014-15 Adopted by Leg.	$ 0	
			Additional Cost
Options:	2014-15	Fund at 2008-09 level	$ 35,000

NATIONAL BOARD CERTIFICATION

History:	2008-09	$ 285,000	
	2009-10	$ 55,000 (scholarships only)	
	2010-11	$ 55,000 (scholarships only)	
	2011-12	$ 50,000 (scholarships only)	
	2012-13	$ 16,694	
	2013-14 Adopted by Leg.	$ 0	
	2014-15 Adopted by Leg.	$ 0	
			Additional Cost
Options:	2014-15	Fund law	$ 375,000

PRE-K PILOT

History:	2009-10	$ 5,000,000	
	2010-11	$ 4,880,370	
	2011-12	$ 4,799,812	
	2012-13	$ 4,799,812	
	2013-14 Adopted by Leg.	$ 4,799,812	
	2014-15 Adopted by Leg.	$ 4,799,812	
			Additional Cost
Options:	2014-15	Fund law	$ 200,188

TECHNICAL EDUCATION - TRANSPORTATION

History:	2012-13	$ 600,000
	2013-14 Adopted by Leg.	$ 650,000
	2014-15 Adopted by Leg.	$ 650,000

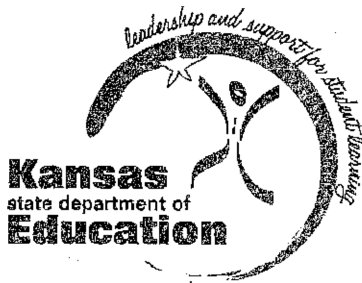
DISCRETIONARY GRANTS

Appropriation for Discretionary Grants is as follows.

	2010-11	2011-12	2012-13	Adopted 2013-14	Adopted 2014-15	Option 2014-15
After School Programs	$ 375,000	$ 187,500	$ 187,500	$ 187,500	$ 187,500	$ 375,000
Middle School After School Programs	$ 250,000	$125,000	$125,000	$ 125,000	$ 125,000	$ 250,000
TOTAL	$625,000	$312,500	$ 312,400	$ 312,500	$ 312,500	$ 625,000

h:sbe:2015 Budget Options—6-13

ADDENDUM B:
JUNE 6, 2013 LETTER TO KANSAS ATTORNEY GENERAL FROM COMMISSIONER OF EDUCATION



Office of the Commissioner

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June 6, 2013

Honorable Derek Schmidt
Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612-1597

Dear Attorney General Schmidt:

As the Kansas Commissioner of Education, I request your opinion on a question of law on behalf of the Kansas State Department of Education (the "KSDE") and the Kansas State Board of Education (the "KSBE") on a topic of interest which impacts unified school districts ("school districts") across the State of Kansas. The issues involve interpretation of House Bill No. 2319, the Coalition of Innovative Districts Act (the "Act"). A copy of the enrolled Bill and summary is attached.

Since HB 2319 was signed by Governor Brownback on April 22, 2013, the KSDE and KSBE have received numerous questions from school districts regarding interpretation and application of the Act. The KSBE is required, pursuant to Section 3 of the Act, to develop an application for school districts to apply for innovative district status. Pursuant to Section 9 of the Act, the KSBE is required to provide technical assistance to any school board during the application process and applications are to be submitted no later than December 1, 2013. The KSDE plans to provide an application and technical assistance as of July 1, 2013, which is the effective date of the Act. However, concerns exist regarding the constitutionality of the Act. Resolution of these issues is critical due to time constraints for the submission of applications for innovative district status for the 2014-15 academic school year. Given the constitutional implications, impact upon the KSBE and the KSDE and the statewide interest in this Act, your prompt interpretive guidance is requested.

The stated purpose of the Act is to allow up to ten percent of the state's school districts to opt out of most state laws and rules and regulations in order to improve student achievement. The legal effect of the Act will be to supplant the role of the KSBE and erode the concept of local control by locally elected school boards. The questions the KSDE has received indicates that disagreement and confusion exists regarding the KSBE's authority over innovative districts and whether innovative districts must comply with state laws. Specifically, an opinion is sought on the following issues.

1. Do the provisions of HB 2319 which establish a Coalition of Innovative Districts and a Coalition Board violate Article 6, Section 2(a) of the Kansas Constitution by usurping the authority specifically granted to the KSBE to provide general supervision of school districts?
2. Do the provisions of HB 2319 which establish a Coalition of Innovative Districts and a Coalition Board violate Article 6, Section 5 of the Kansas Constitution by permitting the Coalition Board to maintain, develop and operate a Public Innovative District without a locally elected board?
3. Does HB 2319 violate the Kansas Constitution, Article 6, Section 1 by granting innovative districts the legal authority to determine which federal and state laws with which the public innovative districts will comply?
4. Does HB 2319 violate the Kansas Constitution, Article 6, Section 1 by granting the coalition board the legal authority to determine which federal and state laws with which public innovative districts must comply?

KSDE is of the opinion that that the answer to each of these questions is "Yes" as HB 2319 unlawfully and fundamentally alters the key provisions of, Section 6 of the Kansas Constitution (the "Education Article"). HB 2319 infringes upon the KSBE's constitutional authority specifically granted to the KSBE and the judicially interpreted mandate to provide general supervision over school districts. The Kansas Legislature made clear that HB 2319 grants legal authority and discretion to either innovative districts or the coalition board to choose, with limited exceptions, which federal and state laws with which to comply.

The KSDE and the KSBE are of the belief that the constitutional role of the KSBE, the Legislature and local boards of education has already been established, and the Education Article establishes the distinct and separate role of the Legislature, the KSBE, the Kansas Board of Regents, and local public schools in the Kansas educational system. Pursuant to Article 6, section 1, the Kansas Legislature has overall oversight for Kansas educational systems.

> **Schools and related institutions and activities.** The legislature shall 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.

Section 2(a) provides 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." (emphasis added). Section 2(b) provides "for a state board of regents and for its control and supervision of public institutions of higher education." Finally, section 5 describes the role of local boards of education.

> 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).

The 1966 constitutional amendments to the Education Article, and specifically the meaning of the phrase "general supervision," have been interpreted by the Kansas Supreme Court. The phrase was first considered by the Kansas Supreme Court in *State ex Rel., v. Board of Education*, 212 Kan. 482, 511 P.2d 705 (1973), in an opinion referred to as the Peabody case.

The Peabody case established the parameters for determining whether the KSBE acted within the scope of its constitutional authority. The Court concluded that "[a]s used in article 6, section 2(a) of the Kansas Constitution, general supervision means the power to inspect, to superintend, to evaluate, to oversee for direction." *Id.*, Syl. 9. In addition, the Court held that "[a]s found and employed in both the constitution and in the statutes of this state the term 'general supervision' means something more than to advise and confer but something less than to control." *Id.*, Syl. 10.

The Kansas Supreme Court next considered the authority of the KSBE and the phrase "general supervision" in the case of *NEA-Fort Scott v. U.S.D. No. 234*, 225 Kan. 607, 592 P.2d 463 (1979). In the Fort Scott case, a local board of education challenged the constitutionality of the Secretary of Human Resources' role in negotiations and mediation between teachers and school boards pursuant to the Teachers Collective Negotiations Act. The local board argued that the statute, and the secretary's role,

violated the KSBE's constitutional authority to provide general supervision over schools. The Court held that the statute did not violate the KSBE's constitutionally established role. The Court stated that the KSBE's basic "mission is to equalize and promote the quality of education for the students of this state by such things as statewide accreditation and certification of teachers and schools." *NEA-Fort Scott*, 225 Kan. at 610-11. The Court noted that the Secretary's role is limited in nature to professional negotiations which is an area of expertise for the Secretary and not included within the KSBE's basic mission. *Id.*

The Kansas Supreme Court again interpreted the KSBE's role in *Board of Education 443 Ford County v. KSBE*, 266 Kan. 75, 966 P.2d 68 (1998). In this case, a local board of education challenged a statutory change which required KSBE approval before terminating an interlocal agreement. The Court further defined the KSBE's constitutional authority to generally supervise school districts.

> The legislative history of the 1966 amendments to Art. 6 of the Kansas Constitution shows that the creation of a powerful State Board was one of the intentions of the 1966 changes. In a detailed report, *Implementation of the Education Amendment--A Report of the Education Advisory Committee to the Committee on Education on Proposal No. 45* (Publication No. 260, November 1966), the committee characterized the functions conferred on the State Board as of "such magnitude and importance that people of outstanding ability and experience will be needed as members." The committee also noted that the State Board would "exercise some quasi-legislative and quasi-judicial powers in adopting rules and regulations and reviewing disagreements or conflicts between local educational agencies or interests." *Report of the Education Advisory Committee*, p. 8.

It is clear that the substantial responsibility for establishing and maintaining the educational interests in the State of Kansas has been broadly provided to the KSBE in the Kansas Constitution, which has been recognized in subsequent cases. The Act attempts to displace that authority and place that authority with the Coalition Board.

In addition, numerous Kansas Attorney General Opinions have interpreted the phrase "general supervision." (See AG Op. 03-33 ("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 provisions of the constitution.")(Citing *Bd. of Ed. of U.S.D. No. 443, Ford County v. Kansas State Board of Education*, 266 Kan. 75, 96 (1998), quoting *Peabody*, 212 Kan. at 482, Syl. ¶ 7.); AG Op. 07-43 (In performing this role, the State Board has "the power to inspect, to superintend, to evaluate, and to oversee for direction.")(Citing *Unified School District No. 380, Marshall County v. McMillen*, 252 Kan. 451, 460 (1993)); AG Op. 95-117 ("[T]he legislature may not delegate to another body the authority to adopt or determine laws contrary to express statutory provisions.")(Citing to *Republic Natural Gas Co. v. Axe*, 197 Kan. 91, 96 (1966)); AG Op. 90-30("The state board may, in regards to rules and regulations addressing matters within the state board's power of 'general supervision', alter, amend, waive, revoke, or adopt rules and regulations without regard to the procedure set forth in state statute."); AG Op. 83-154 ("Thus, it is only in the event of a conflict between legislation and State Board regulation relating to the quality of education that the legislation would be ineffective."); AG Op. 81-236 ("By requiring the establishment of a state board of education, this constitutional provision [Art. 6, Sec. 2(a)] imposes another positive duty upon the legislature in regard to the matter of education. However, the balance of this section has been viewed as a limitation on legislative authority."); AG Op. 75-35 ("[T]o the extent that the State Board of Education relies not upon any statutory rule-making authority, but exclusively upon Article 6, §2(a) to support any regulation adopted in the implementation of its constitutional general supervisory authority over public schools, educational institutions and all the educational interests of the state," except those delegated to the State

Board of Regents, any such rule or regulation is not subject to legislative review pursuant to K.S.A. 1974 Supp. 77-426(b).")

For example, in opinion 97-95, the Attorney General opined that:

> In review, the State Board of Education is authorized pursuant to Section 2 of Article 6 of the Kansas Constitution to provide 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. The term 'general supervision' means something more than to advise and confer with, but something less than to control.

These cited Kansas Supreme Court decisions, as well as numerous Kansas Attorney General Opinions, interpret the KSBE's self-executing authority as granted to it by the Kansas Constitution. It is clear that the KSBE's role in generally supervising local boards of education involves inspecting, evaluating, overseeing, advising and conferring but not controlling. The locally elected school boards maintain, operate, and develop the local public schools. This "local control" is left to the local boards of education. "This power is qualified, however, in that such authority exists only 'under the general supervision of the state board of education.'" *Board of Education 443 Ford County*, 266 Kan. at 95, 966 P.2d at 83; See Article 6, Section 5 of Kansas Constitution.

Because of this constitutionally mandated role, the KSDE believes that the Act violates the KSBE's constitutional authority to generally supervise public schools. In section 4, the Act provides for overall oversight and supervision of innovative districts by the coalition board. More specifically, the coalition board is responsible for student performance in innovative districts and the operation of innovative districts. In addition, the Act does not allow the KSBE to exercise its discretion in considering applications from districts which seek innovative district status. Section 3(c)(1) states that the "state board shall approve" any application which complies with the application requirements established by the Act. This provision eliminates any KSBE discretion to determine whether the application proposes any programs which are in fact determined to be innovative by the KSBE. The Act eliminates any general supervision by the KSBE despite the constitution's designation of the KSBE as the entity providing general oversight of Kansas schools. Therefore, it is respectfully suggested that the formation of the Coalition Board and the statutory mandates imposed upon the coalition of innovative schools by the legislature is an improper derogation of authority and violates the Kansas Constitution.

The second question highlights a concern that the legislature has taken a dramatic step to eviscerate the long supported notion of "local control." According to the Act, the leadership of the Coalition Board is selected by the Governor and legislative leadership. This ignores the constitutionally mandated requirement that local public schools be maintained, developed and operated by "locally elected boards." (Kansas Constitution, Article 6, Section 6).

The third and fourth questions will be discussed together. The KSDE has received many comments and concerns that innovative districts are not required to comply with state and federal laws. Either the district itself or the coalition board may waive state and federal requirements. The KSDE disagrees with this position and cites to the Act itself as support. The confusion arises from the ambiguous wording of the Act itself but a careful analysis establishes that innovative districts are subject to most, if not all, education specific state and federal laws.

The Act provides the discretion for the selective application of laws when the Act states that "a public innovative district shall be exempt from all laws and rules and regulations that are applicable to school districts." HB 2319, Sec. 3, (e)(1). However, the next subsection specifically establishes that

several acts apply to innovative districts. These acts are: special education for exceptional children act; virtual school act; school district finance and quality performance act; provisions of K.S.A. 72-8801 et seq. (capital outlay levy, fund and bonds); all laws regarding issuance of general obligation bonds; provisions of K.S.A. 74-4901 et seq. (public employees retirement systems); laws governing election of members of local boards of education; open meetings act; and open records act. HB 2319, Sec. 3, (e)(2). In addition, Section 3(d) states that innovative districts must comply with financial and auditing requirements applicable to school districts, and must "comply with all applicable health, safety and access laws . . . ."

Because of these specific laws which apply to innovative districts, the KSDE submits that all educational statutes and regulations apply to innovative districts, and neither an innovative district nor the coalition board may waive these requirements. For example, the school district finance and quality performance act (SDFQPA) includes K.S.A. 72-6439 which directs the KSBE to "design and adopt a school performance accreditation system based upon improvement in performance that reflects high academic standards and is measurable." K.S.A. 72-6439(a). The KSBE did so pursuant to its self-executing statutory authority and the regulations are located at K.A.R. 91-31-31, et. seq.

In order to obtain accredited status, each school must meet performance and quality criteria described in K.A.R. 91-31-32. Subsection (c)(11) requires each school to comply with "local policies ensuring compliance with other accreditation regulations and state education laws." Accreditation regulations establish requirements, for example, for graduation criteria and licensure of educators. Based on this one example, the KSDE submits that all education statutes adopted by the Kansas Legislature and regulations adopted by the KSBE apply to innovative districts.

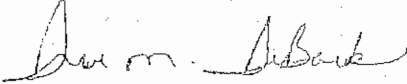
In addition, neither the coalition of innovative districts, the coalition board, nor an innovative district has the legal authority to ignore laws passed by the Kansas Legislature. The Kansas Constitution, Article 6, section 1, grants the legislature the authority to "establish[ing] and maintain[ing] public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law." Admittedly, this provision also places significant authority with the legislature. However, 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 provisions of the constitution." Ford County, 266 Kan. at 96 (citing Peabody, 212 Kan. 482, Syl. 7, 511 P.2d 705).

On the face of the Act, it is apparent that the effect of the Act is not to facilitate or assist in the operation of the KSBE. Instead, the application of the Act preempts the self-executing powers of the KSBE, removing certain powers from the KSBE and placing them with the Coalition Board. The statement that the goal of the Act is to "improve student achievement" disguises the fact that it relegates the authority of the KSBE for supervision of the innovative districts to the Governor and the chairpersons of the Senate and House education committees, in the first and second instance, and to the Coalition Board, thereafter. The Coalition Board reports to the legislature, not the KSBE, and the Board and the innovative district have discretionary authority to determine if the public innovative district shall be exempt from all laws and rules and regulations that are applicable to school districts. (H.B. 2319, Sec. 3(e)(1)). The KSDE knows of no legal authority which allows any entity to unilaterally decide to exempt itself from certain laws, rules and regulations, presumably ignoring laws passed by the Kansas Legislature.

The KSDE and the KSBE ask that the Attorney General closely examine this Act and find that it does not pass constitutional muster because it improperly infringes on the authority of the KSBE and its role in the general supervision of education in the State of Kansas.

Thank you for your prompt attention to this matter. These are educational concerns of statewide interest. If you have questions or require additional information, please feel free to contact me or Cheryl Whelan, KSDE General Counsel.

Sincerely,



Diane M. DeBacker, Ed.D.
Commissioner of Education

Enclosures (2)

HOUSE BILL No. 2319

AN ACT creating the coalition of innovative districts act.

Be it enacted by the Legislature of the State of Kansas:

Section 1. The provisions of sections 1 through 10, and amendments thereto, shall be known and may be cited as the coalition of innovative districts act.

Sec. 2. As used in sections 1 through 10, and amendments thereto:

(a) "Board of education" means the locally elected board of education of a school district.

(b) "Public innovative district" means a school district that has been approved to operate as a public innovative district pursuant to section 3, and amendments thereto.

(c) "Coalition" means the coalition of innovative districts established pursuant to section 4, and amendments thereto.

(d) "Completion percentage" means the percentage of high school graduates of a public innovative district that have enlisted in military service or completed a postsecondary educational certificate program or degree program as determined by the national student clearinghouse, or other postsecondary educational program completion database utilized by such public innovative district.

(e) "School district" means a unified school district organized and operated under the laws of this state.

(f) "School year" means the 12-month period ending June 30.

(g) "State board" means the state board of education.

Sec. 3. (a) Except as provided in section 5, and amendments thereto, the board of education of any school district may apply to the state board for a grant of authority to operate such school district as a public innovative district. The application shall be submitted in the form and manner prescribed by the state board, and shall be submitted not later than December 1 of the school year preceding the school year in which the school district intends to operate as a public innovative district.

(b) The application shall include the following:

(1) A description of the educational programs of the public innovative district;

(2) a description of the interest and support for partnerships between the public innovative district, parents and the community;

(3) the specific goals and the measurable pupil outcomes to be obtained by operating as a public innovative district; and

(4) an explanation of how pupil performance in achieving the specified outcomes will be measured, evaluated and reported.

(c) (1) Within 90 days from the date such application is submitted, the state board shall review the application to determine compliance with this section, and shall approve or deny such application on or before the conclusion of such 90-day period. If the application is determined to be in compliance with this section, the state board shall approve such application and grant the school district authority to operate as a public innovative district. Notification of such approval shall be sent to the board of education of such school district within 10 days after such decision.

(2) If the state board determines such application is not in compliance with either this section, or section 5, and amendments thereto, the state board shall deny such application. Notification of such denial shall be sent to the board of education of such school district within 10 days after such decision and shall specify the reasons therefor. Within 30 days from the date such notification is sent, the board of education of such school district may submit a request to the state board for reconsideration of the application and may submit an amended application with such request. The state board shall act on the request for reconsideration within 60 days of receipt of such request.

(d) A public innovative district shall:

(1) Not charge tuition for any of the pupils residing within the public innovative district;

(2) participate in all Kansas math and reading assessments applicable to such public innovative district, or an alternative assessment program for measuring student progress as determined by the board of education;

(3) abide by all financial and auditing requirements that are applicable to school districts, except that a public innovative district may use generally accepted accounting principles;

(4) comply with all applicable health, safety and access laws; and

(5) comply with all statements set forth in the application submitted pursuant to subsection (a).

(e) (1) Except as otherwise provided in sections 1 through 10, and amendments thereto, or as required by the board of education of the public innovative district, a public innovative district shall be exempt from all laws and rules and regulations that are applicable to school districts.

(2) A public innovative district shall be subject to the special education for exceptional children act, the virtual school act, the school district finance and quality performance act, the provisions of K.S.A. 72-8801 et seq., and amendments thereto, all laws governing the issuance of general obligation bonds by school districts, the provisions of K.S.A. 74-4901 et seq., and amendments thereto, and all laws governing the election of members of the board of education, the open meetings act as provided in K.S.A. 75-4317 et seq., and amendments thereto, and the open records act as provided in K.S.A. 45-215 et seq., and amendments thereto.

Sec. 4. (a) There is hereby established the coalition of innovative districts, which shall consist of each school district granted authority to operate as a public innovative district pursuant to section 3, and amendments thereto.

(b) The duties and functions of the coalition set forth in the provisions of sections 1 through 10, and amendments thereto, shall be carried out by the coalition board, which shall consist of one representative of each public innovative district who shall be designated by the board of education of such public innovative district.

(c) The chairperson of the coalition board shall be appointed by the governor, the chairperson of the senate committee on education and the chairperson of the house of representatives committee on education whose decision shall be unanimous. The chairperson shall serve for a term of five years. In the event of a vacancy in the position of chairperson, a successor shall be appointed pursuant to this subsection.

(d) The coalition board may meet at such times and places as determined by the coalition board. Any action by the coalition board shall be taken only upon approval by a majority of the members.

(e) The coalition board may organize itself into subcommittees.

(f) The coalition board shall report annually to the governor and the legislature regarding pupil performance in public innovative districts, recommendations for amendments to laws and rules and regulations pertaining to school districts and any other information regarding the operation of public innovative districts during the immediately preceding school year.

Sec. 5. (a) Until such time as two or more public innovative districts have been granted authority to operate as public innovative districts pursuant to section 3, and amendments thereto, any board of education of a school district desiring to operate as a public innovative district shall submit a request for approval to operate as a public innovative district to the governor, the chairperson of the senate committee on education and the chairperson of the house of representatives committee on education and have such request approved by a majority of the three persons prior to submitting an application to the state board under section 3, and amendments thereto. The request for approval shall include such information as is required to be included on an application for authority to operate as a public innovative district under section 3, and amendments thereto.

(b) Upon the approval of the first two public innovative districts, the board of education of a school district desiring to operate as a public innovative district shall submit a request for approval to operate as a public innovative district to the coalition board and have such request approved by the coalition board prior to submitting any application to the state board under section 3, and amendments thereto. The coalition board, in its sole discretion, shall approve or deny the request. As part of its review of such request, the coalition board may make recommendations to the requesting school district to modify the request, and may consider any such modifications prior to making a final decision.

(c) The request for approval required by subsection (b) shall include such information as is required to be included on an application for authority to operate as a public innovative district under section 3, and amendments thereto. Copies of the request for approval shall be submitted to each public innovative district that is a member of the coalition.

Within 30 days after receipt of the request for approval by the last member to receive such request, the coalition board shall meet to approve or deny the request. Notification of the approval or denial of a request shall be sent to the board of education of the requesting school district within 10 days after such decision. If the request is denied, the notification shall specify the reasons therefor. Within 30 days from the date a notification of denial is sent, the board of education of the requesting school district may submit a request to the coalition board for reconsideration of the request for approval and may submit an amended request for approval with the request for reconsideration. The coalition board shall act on the request for reconsideration within 30 days of receipt of such request.

(d) No more than 10% of the school districts in the state shall operate as public innovative districts at any one time. Any request for approval submitted at such time shall be denied by the coalition board.

Sec. 6. (a) The authority to operate as a public innovative district shall be effective for a period of five school years. At least 90 days prior to the expiration of such five-year period, the board of education of a public innovative district may submit an application for renewal of its authority to operate as a public innovative district. Such renewal application shall be submitted in such form and manner as prescribed by the state board.

(b) A renewal application submitted pursuant to this section shall include:

(1) Evidence that such public innovative district has met the standards on the math and reading state assessments, or the alternative assessment adopted by the board of education, during the period of operation as a public innovative district;

(2) evidence that such public innovative district has shown improvement in its completion percentage during the period of operation as a public innovative district;

(3) demonstrated progress that such public innovative district is achieving the goals and outcomes described in its application for authority to operate as a public innovative district; and

(4) a description of compliance with the provisions of sections 1 through 10, and amendments thereto.

(c) (1) Within 60 days after such renewal application is submitted, the state board shall review the renewal application to determine compliance with this section. If the renewal application is in compliance with the provisions of this section, the state board shall grant the renewal of the authority to operate as a public innovative district for a subsequent five-year period and notify the board of education of such public innovative district within 10 days after such decision.

(2) If the state board determines the renewal application is not in compliance with this section, the state board shall hold a hearing on the issues in controversy. Representatives of the public innovative district shall be provided the opportunity to present information refuting the basis upon which the noncompliance is premised. At least 30 days' notice shall be provided to the board of education of the public innovative district prior to the hearing. Within 60 days after the hearing, the state board shall determine whether to not renew the grant of authority, renew the grant of authority contingent upon compliance with specified conditions or renew the grant of authority without conditions. Notification of such decision shall be sent to the board of education of the public innovative district and shall specify the reasons therefor.

(3) If a grant of authority is not renewed, the board of education of such school district may apply for a grant of authority to operate as a public innovative district in accordance with the provisions of sections 1 through 10, and amendments thereto.

Sec. 7. (a) If at any time a public innovative district fails to meet any of the renewal criteria set forth in subsection (b) of section 6, and amendments thereto, for two or more consecutive school years, then:

(1) Such public innovative district may submit a petition to the state board for a release of the grant of authority to operate as a public innovative district; or

(2) the coalition board may submit a petition to the state board requesting that such public innovative district have its grant of authority to operate as a public innovative district revoked.

(b) If a petition is submitted to the state board pursuant to subsection

(a)(1), then the state board shall grant such petition and release such public innovative district from the grant of authority to operate as a public innovative district. Such release shall be effective for the school year immediately succeeding the grant of the petition.

(c) If a petition is submitted to the state board pursuant to subsection (a)(2), then the state board shall hold a hearing on the issues in controversy. Representatives of the public innovative district shall be provided the opportunity to present information refuting the basis upon which the petition is premised. At least 30 days' notice shall be provided to the board of education of the public innovative district prior to the hearing. Within 60 days after the hearing, the state board shall determine whether to grant or deny the petition. Notification of such decision shall be sent to the board of education of the public innovative district and shall specify the reasons therefor. If the petition is granted, the authority to operate as a public innovative district shall be revoked commencing with the school year immediately succeeding the grant of the petition.

Sec. 8. The members of the coalition, represented by the superintendent of each public innovative district, shall meet at least once a month to discuss the educational programs of the public innovative districts and the success or failure thereof. Such meetings shall be conducted in the spirit of cooperation and the sharing of educational program concepts that are either being implemented or being considered for implementation.

Sec. 9. The state board shall provide, upon request, any board of education with technical advice and assistance regarding the preparation of an application for a grant of authority to operate a public innovative district.

Sec. 10. The state board shall adopt such rules and regulations as necessary for the implementation and administration of the provisions of sections 1 through 10, and amendments thereto.

Sec. 11. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the HOUSE, and was adopted by that body

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HOUSE adopted
Conference Committee Report ____________________

____
Speaker of the House.

____
Chief Clerk of the House.

Passed the SENATE
as amended ____________________

SENATE adopted
Conference Committee Report ____________________

____
President of the Senate.

____
Secretary of the Senate.

APPROVED ____________________

____
Governor.

Coalition of Innovative Districts Act; HB 2319

HB 2319 creates the Coalition of Innovative Districts Act, the purpose of which is to allow up to ten percent of the state's school districts, at any one time, to opt out of most state laws and rules and regulations in order to improve student achievement.

Establishment of Public Innovative Districts

The bill authorizes a process whereby a school district board of education may apply for authority to operate as a "public innovative district." The bill limits the number of public Innovative districts to no more than ten percent of the state's school districts at any time. The application and approval requirements differ based on the application queue, as follows:

- For the first two school districts, a request for approval (containing the same information as the application) must go first to the Governor and the chairpersons of the Senate and House education committees. If a majority of these individuals approves the request, the district may submit an application to the State Board of Education (State Board), which is required to review and approve the application within 90 days, if it included the required contents (see below). Requirements regarding notification of both approval and denial are contained in the bill. If an application is denied, the district has an opportunity to submit an amended application.

- For the remaining districts, the request for approval goes first to the Coalition Board, which is created by the bill (see below). The Coalition Board has sole discretion to approve or deny the request and may recommend the requesting school district modify the request. Modifications may then be considered by the Coalition Board prior to making a final decision. If the request is approved, the district may submit the application to the State Board. The same review and notification requirements apply.

The application must contain a description of the educational programs of the public innovative district, a description of parental and community interest and support, the specific goals and measurable pupil outcomes to be obtained, and an explanation of how pupil performance in achieving the specified outcomes will be measured, evaluated, and reported.

Requirements and Exemptions for Public Innovative Districts

In addition to complying with its own stated goals, a public innovative district must:

- Participate in all applicable Kansas math and reading assessments or an alternative assessment determined by the local board of education;
- Abide by all financial and auditing requirements applicable to school districts, except a public innovative district would be permitted to use generally accepted accounting principles;

- Comply with all applicable health, safety and access laws; and

- Be subject to the Special Education for Exceptional Children Act, the Virtual School Act, the School District Finance and Quality Performance Act, capital outlay requirements (KSA 72-8801 *et seq.*), all laws governing the issuance of general obligation bonds by districts, laws governing public employee retirement (KSA 74-4901 *et seq.*), laws governing school board elections, the Kansas Open Records Act, and the Kansas Open Meetings Act.

A public innovative district may not charge tuition for any pupils residing in the district's boundaries.

Unless otherwise required by the Act or decided by the board of education of the public innovative district, public innovative districts are exempt from all laws and rules and regulations applicable to school districts.

Coalition of Innovative Districts; Coalition Board

The bill establishes the Coalition of Innovative Districts, the duties and functions of which are carried out by a Coalition Board. The Coalition Board consists of one representative of each public innovative district as designated by the board of education of the public innovative district.

The bill requires the chairperson of the Coalition Board be appointed in a unanimous decision by the Governor and the chairpersons of the House and Senate education committees. The Coalition Board chairperson serves a five-year term, and a vacancy must be filled in the same method as a regular appointment.

The Coalition Board is required to carry out the duties and functions of the coalition, including the following:

- The Coalition Board must conduct the initial review of all but the first two prospective public innovative districts, and will have the sole discretion to approve or deny a district's request to become a public innovative district. (If the Coalition Board approves the request, the district's petition to become a public innovative district may proceed to the State Board.) As part of the initial review, the Coalition Board is permitted to make recommendations to modify the request and may subsequently consider the modifications prior to making a final decision.

- If a public innovative district fails to meet any of the specified renewal criteria (see "Performance-Related Provisions," below), the Coalition Board may petition the State Board to request the public innovative district's authority be revoked.

- The Coalition Board must report annually to the Legislature regarding pupil performance in the public innovative districts, the laws and rules and regulations deemed problematic by the Coalition Board, and any other information regarding success or problems experienced by the public innovative districts during the previous year.

The Coalition Board has latitude to meet as often as, and wherever, deemed appropriate. The Coalition Board is allowed to form subcommittees.

Operational Time Limit; Performance-Related Provisions; Petition for Revocation of Authority

Under the bill, a public innovative district has authority to operate as such for a period of five school years. At least 90 days prior to expiration of this period, a public innovative district may submit an application to renew its authority to the State Board and, if the application is complete, the State Board must approve the application within 60 days of submission, with related notification deadlines. The renewal application must contain:

- Evidence that the public innovative district has met the standards on the designated math and reading state or alternative assessments during the five-year period;
- Evidence that the public innovative district has shown improvement in its completion percentage during the same period;
- Demonstrated progress that the public innovative district is achieving the goals and outcomes described in its application; and
- A description of compliance with the requirements of the Act.

However, if a public innovative district fails to meet any of the renewal criteria for two or more consecutive years, either the public innovative district itself may petition the State Board for a release from its public innovative district status, or the Coalition Board may submit a petition to the State Board requesting the public innovative district's authority to operate as such be revoked. The State Board must honor any such petition request originating from the public innovative district itself, and release from the authority to operate under the Act would then be effective for the school year immediately following the grant of the petition. In the case of a Coalition Board-initiated petition, the public innovative district must be provided the opportunity to have a hearing on the matter. A time frame for the hearing request and subsequent decision are provided in the bill. If the petition is granted, the authority to operate as a public innovative district will be revoked beginning with the school year immediately following the grant of the petition.

The bill requires the superintendents of the public innovative districts to meet at least monthly to discuss the success or failure of educational programs.

Additional Duties of the State Board

The bill requires the State Board to provide technical advice and assistance in preparing an application for authority to operate as a public innovative district, upon the request of a prospective school district. Additionally, the State Board must adopt rules and regulations as deemed necessary to implement the Act.

ADDENDUM C:
PETER HANCOCK, *STATE EDUCATION BOARD SEEKS $656 MILLION FUNDING INCREASE*, THE SHAWNEE DISPATCH (JULY 10, 2013)

The Dispatch

State education board seeks $656 million funding increase

Peter Hancock

July 10, 2013

The Kansas State Board of Education voted today to seek an estimated $656 million funding increase for fiscal year 2015, which begins next July.

Department of Education officials said that represents the difference between the budget that Kansas lawmakers have already approved for next year, and what is otherwise required to be spent under various formulas currently in state law.

"I believe that if there's a statute on the books, it should be funded," said board member Sally Cauble, a Republican from Liberal.

The 7-3 vote was seen as largely symbolic because it is unlikely to influence Gov. Sam Brownback or the conservative-controlled legislature, which has focused the last two years on cutting income taxes and reducing state spending.

"I would love to see us get to where we can spend this kind of money on schools, but I don't think we can do it in one fell swoop," Republican board member Ken Willard of Hutchinson said. "I'm reluctant to vote for this because it represents a humongous tax increase."

Kansas lawmakers this year passed a two-year budget that appropriates money for both the current fiscal year that ends June 30, 2014, as well as the following year that begins next July 1. But Brownback still has authority to request changes to next year's budget, and so state agencies like the Department of Education are going through their normal process of submitting budget requests to the administration.

Most of the money the state board is seeking — about $443 million — would come from raising the base funding formula to the statutory amount of $4,492 per pupil.

Currently, the state is spending only $3,838 per pupil. That is scheduled to go up next year by $14, to $3,852.

Another $113 million would come from fully funding the subsidy the state pays to help fund the local option budgets of less wealthy districts.

The board's request also includes about $72 million for full funding of state aid for special education, and $25 million to fully fund a program that subsidizes the capital outlay budgets of less wealthy districts.

The Lawrence school district does not qualify for either the local option budget or capital outlay subsidies.

Other programs included in the board's request that are spelled out in statute include the Parents as Teachers program, school lunch subsidies and professional development for teachers.

But the governor and legislature are no longer the only people deciding next year's budget, especially when it comes to education funding.

In January, a three-judge panel ruled in a school finance lawsuit that current funding levels violate the Kansas Constitution's requirement that the legislature make "suitable provision" for financing public schools. The judges ordered the legislature to increase funding by an estimated $515 million, based largely on many of the same statutory requirements.

That case is now on appeal before the Kansas Supreme Court, which will hear oral arguments in October. A ruling is expected around the first of the year, about the same time the legislature begins its 2014 session.

Originally published at: http://www.shawneedispatch.com/news/2013/jul/10/state-education-board-seeks-656-million-funding-in/

ADDENDUM D:

DION LEFLER, *SENATE PRESIDENT SUSAN WAGLE: 2013 LEGISLATIVE SESSION COULD BE EVEN WORSE*, THE WICHITA EAGLE (JUNE 5, 2013)

The Wichita Eagle
Kansas.com

Back to web version

Thursday, June 6, 2

Posted on Wed, Jun. 05, 2013

Senate President Susan Wagle: 2014 legislative session could be even worse

By Dion Lefler
The Wichita Eagle

If you thought this year's legislative session was long and difficult, just wait for the constitutional crisis over school finance to come next year.

That was the message state Senate President Susan Wagle brought to a Wednesday luncheon meeting of the Wichita Downtown Lions Club.

By the time they return to the Statehouse in January, lawmakers likely will be faced with a Supreme Court order to increase school funding – an order the Legislature may decide to defy, Wagle said.

"I'm quite worried about next year's session, in that we will most likely be in a constitutional crisis," Wagle said.

Wagle expressed pride in the tax plan that the Legislature passed, after a grueling slog, about 2 a.m. Sunday, clearing the way for adjournment on the 99th day of what was supposed to be an 80-day session.

But that could be just the warm-up act for next year.

The last time the Supreme Court ordered the Legislature to increase funding for schools, the Legislature grudgingly complied in a special session.

In the current case before the court, numerous school districts argue that subsequent budget cuts by the Legislature have denied schools the money that lawmakers agreed to provide in 2005 and that the Legislature is failing to meet its constitutional mandate to provide "suitable" funding for education.

Ken Ciboski, a Wichita State University professor of political science who attended Wagle's speech, said he doesn't know that a Kansas Legislature has ever outright defied a court order. He said he's not sure how it would work out if it comes to that.

"Obviously, if they refused to do it, they'd be in contempt of court," Ciboski said. "Where they go from there, that's the issue."

A special three-judge panel already has ruled that the state is underfunding schools. That decision is on appeal and Wagle said she expects the Supreme Court to uphold it.

Ron Keefover, spokesman for the Supreme Court, said he could not "speculate" on the outcome of the case or its potential aftermath.

Wagle accused the court of failing to consider other state spending priorities as it focuses on school funding.

"The Medicaid people were not there, the hospital people were not there, the roads were not there, the jails were not there," she said. "They did not have their say in the courtroom on what their needs are for public spending.

"What they (Supreme Court justices) are doing is having a hearing and they're only listening to lawyers who are saying that education is underfunded. They aren't listening to the taxpayers who are saying, 'Well, here's what I can afford to give you.' They aren't listening to the other needs, and therefore I don't believe they should have the right to appropriate your money or demand that we appropriate in a certain amount to any agency."

Wagle said one possible solution would be for the Legislature to put an amendment before voters to change the state constitution and place authority over school funding entirely in the hands of the Legislature.

The Senate passed such an amendment this session, but the House didn't.

"I'm really hopeful that when this ruling comes down that the House will consider our constitutional amendment," Wagle said. "If they don't look at the passage of that constitutional amendment, then clearly we're going to be

caught between the court telling us to do one thing and the people of Kansas maybe asking for something else. And then the question is, who has the authority to spend your money? Ultimately, I think it should be your elected legislators."

Wagle, a Wichita Republican and the first female president of the Senate, spoke to the club three days after the marathon Saturday-into-Sunday session that wrapped up legislative business for the year.

The tax plan, which took weeks of votes and revotes to resolve, walks back some of the tax relief provided by a 2012 tax bill that even its supporters acknowledge went too far. Overall, this year's bill is projected to raise $777 million more in tax revenue over the next five years than would be raised under current law.

The plan makes permanent part of a temporary emergency sales-tax increase that the Legislature passed in 2010 during a financial crisis brought on by the nationwide recession.

The sales tax was scheduled to revert from the current 6.3 percent to 5.7 percent. The new plan sets it at 6.15 percent going forward.

Wagle said she pushed to extend the sales tax after meeting with Gov. Sam Brownback, who told her that reducing income taxes would create jobs and commerce, which similar cuts in sales or property taxes wouldn't do.

"He wanted to keep that six-tenths of a cent to help lower income (tax) and move to what we call a consumption tax, which is a Fair Tax model," Wagle said.

Lawmakers reduced base rates on income taxes but simultaneously phased down the value of most tax deductions, which nearly offsets the tax relief gained from the lower rates.

The bill requires that from 2018 on, growth in government spending will be capped at 2 percent a year, with any additional revenue earmarked for income-tax reduction – the "glide path to zero" Brownback has called for.

"We're excited about moving to a consumption tax," Wagle said. "We're excited about lowering income tax. I believe you'll find that the plan works."

Although she hailed the tax plan that did pass, Wagle said she personally preferred an earlier plan approved by the Senate, but rejected by the House, that would have kept the basic sales tax at 6.3 percent but reduced the tax on groceries to 4.95 percent.

"This was the best bill we passed," she said. "I was praying this would pass in the House."

Reach Dion Lefler at 316-268-6557 or dlefler@wichitaeagle.com.

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ADDENDUM E:
ROY WENZL, *NAMESAKE FATHER IN SCHOOL FINANCING CASE DRIVEN BY HELPING CHILDREN*, THE WICHITA EAGLE (JUNE 8, 2013)

The Wichita Eagle
Kansas.com

Sunday, June 30, :

Posted on Sat, Jun. 08, 2013

Namesake father in school financing case driven by helping children

By ROY WENZL
The Wichita Eagle

The Rev. Jeff Gannon is not a public policy issue.

He is a father of three. He does what might be called Good Samaritan work.

But among the most divisive public policy issues in the state today is "Gannon v. State of Kansas," a case the Kansas Supreme Court will decide by the end of the year.

The case has disappointed conservative state legislators, who have tried not only to pay the state's bills after the recession but also tried, they say, to increase prosperity by cutting taxes.

If the Supreme Court decides in favor of Gannon, it will likely order the state to pay as much as an additional $450 million to finance public schools.

Conservative Republicans such as Rep. Steve Brunk from Wichita are not ruling out the possibility of defying such an order. Senate President Susan Wagle also raised that prospect in a speech this past week.

"I think there's enough votes now in the Senate and House that if the courts rule for Gannon, we might just say to the court that deciding expenditures is not your responsibility, thank you, and we'll take it from here," Brunk said. "I say this politely, but there's a mood to give the courts the finger, so to speak."

Gannon – the court case – has inspired language like that.

The real Gannons are two schoolchildren from Wichita. Their father is a church pastor who says many of his congregation members from Chapel Hill Fellowship, near K-96 and East 13th Street, are conservative Republicans.

And in the poor Wichita neighborhood of Planeview, and among people who help children at Jardine Middle School, Gannon and his congregation members are considered heroes.

• • •

If the Supreme Court rules in favor of Gannon, it will mean that the courts will dictate to an elected legislature how to spend public money, Brunk said.

That happened in 2005, when a similar lawsuit was decided. The Supreme Court, ruling that the Legislature had failed to meet its constitutional mandate to provide "suitable" funding for education, ordered the state to provide more money – $600 million more, between 2005 and 2010, before the state began cutting again after the recession.

School districts disappointed about those cuts filed a new case. With Gannon's assent, they named his children, Luke and Grace, as lead plaintiffs. Gannon had previously met school officials connected to the case while speaking at a public forum about the issue.

Brunk had never heard of Gannon's Good Samaritan work in Planeview until he was interviewed for this story. He said he was impressed, but would like to pose a question.

"Who is doing the best job down in Planeview of helping people in need?" Brunk asked. "Is it the government? Or is it the people from Rev. Gannon's church with good hearts?

"It sounds to me like it's the people with good hearts."

• • •

City and school officials and officials from Wichita charities say that what the Chapel Hill congregation has done in

Planeview is extraordinary.

It was mostly Gannon's idea. Starting in 2009, Gannon and other Chapel Hill members talked the Lord's Diner into opening a new branch in Planeview, feeding the hungry every day.

Gannon and other congregation members, primarily a laid-off accountant named Charlie Schwarz, raised hundreds of thousands of dollars to help the Hunter Health Clinic build a new building and widen medical services to poor children and adults.

The principal at Jardine said last year that Chapel Hill people donated school supplies to 40 to 50 needy children there. They helped pack Kansas Food Bank backpacks to give kids food on the weekends. They mentor children, volunteer in classrooms.

"If we have a need and mention it, we get what we need," Principal Lura Atherly said last year.

Chapel Hill members even bring pickups to do neighborhood cleanups, said Janet Johnson, a City Hall neighborhood assistant.

"I'm not real big on religious organizations and other do-gooders who swoop in and impose their middle-class values on the poor, and then leave," Johnson said. "But Jeff and his church are different."

Many of the Planeview poor are Hispanic, Asian or other minority races. Many kids live in single-parent homes. Some are illegal immigrants.

Yet many Chapel Hill members, Gannon said, are white, affluent, conservative. Average household income last year was about $85,000. Some members have houses worth $350,000 to $400,000. The church is doing a $6.9 million expansion.

While Gannon and his wife, Meredith, have always sent their children to Wichita public schools, "the vast majority of people in our congregation send their schoolchildren to Andover, or to private schools," he said.

Gannon began all this with a sermon on Nov. 29, 2009, in which he told church members he wanted them to be "apprentices" of Jesus, not just "admirers."

"But when I talk about the lawsuit, I am speaking only for myself and not my congregation," Gannon said. "I have many in my congregation who adamantly disagree with my stances on these problems."

But when they talk about cutting budgets and spending as a way to create prosperity, it has a familiar ring to it, he said.

"I've heard it all before. And it doesn't work."

• • •

"For the record, I was raised in a home in Montana, a very Republican state," Gannon said. "My mother was a member of the John Birch Society, an organization with members who make libertarians seem liberal in comparison.

"My mother went to all the meetings, and thought that if you even said the word 'government,' you were swearing.

"I have been exposed to right-wing ideas all my life."

Those ideas include cutting income taxes to spur growth, as the Legislature did last year. That decision followed years in which aid to schools was cut, he said.

People who promote this move, Gannon said, are usually "speaking from a position of advantage, from a position of plenty rather than want."

The flaw, Gannon said, is to assume the playing field in America is level – that everyone going to school will do well if they just work hard.

But when children show up at school lacking parents who read to them at home, when they lack food for a weekend, the theory falls apart, he said.

"The only institution we have that actually makes the playing field level is public schools," Gannon said. "And now these people want to cut them."

• • •

"Rev. Gannon probably … has a good heart," said Brunk, the legislator. "But when he talks about what we've done, and when he hears the words 'cut, cut, cut,' I'm not sure what he's getting at."

The recession lowered revenue. Legislators had to cut many things, he said.

"Since the recession, we've cut law enforcement, maybe far more than we should have. We've cut social services. We've got a serious problem with KPERS (increasing costs in the state employee retirement fund).

"And yet with education, what we've done is spend, spend, spend.

"And when we ask the other side, 'Well, how much more do you need?' They say, 'More.' So we ask, 'How much more?' and they say, 'More.'

" 'Well, give me a number!' "

" 'More!' "

"And they ask for 10 more, and we give eight.

"And they call that a 'cut.' "

• • •

The state's contribution to public schools, according to the Kansas Department of Education, was $3.131 billion for the school year 2007-08, the year the recession began.

It dropped to $2.867 billion for the 2009-10 year. It was $3.185 billion for the 2011-12 year.

That last number actually went up, but district officials maintain expenses went up, too. As a result, district officials have said, they had to cut programs and staff.

Since 2009, the year after the recession started, the Wichita district has seen many cuts, said district spokeswoman Susan Arensman. They include $199 million less in general fund operating dollars to the district; capital outlay funds reduced by $20 million in the last four years because of legislative cuts, and the elimination of 213 positions – 104 teachers, 11 para-educators, 74 operational support people, 24 administrators.

Wages were frozen from 2008 to 2012, she said. Driver's education was eliminated. So were middle school police officers, fifth-grade strings and high school librarians.

• • •

David Trabert is a father of two sons who went to public schools.

He is president of the Kansas Policy Institute, a nonprofit group, influential among some conservative Kansans. It advocates for free markets and personal liberties, and Trabert and his organization do a lot of research on education

"I don't doubt that he is sincere," Trabert said of Gannon. "But he's saying … that if you aren't for spending a lot more on schools, then you are trying to defund public schools."

The worst part about the debate about financing, Trabert said, is that no one on either side even debates the real issues, such as whether children are getting a good education, whether education could be improved, whether administrative costs are spent wisely and whether more charter schools might inspire more opportunities for impoverished children in places like Planeview.

"If we could just get ordinary people in a room and show them the challenges, have them look at the real problems, we'd probably reach consensus," Trabert said.

Take the issue of administrative costs, as just one example, he said.

The Kansas Policy Institute has pointed out that Kansas has 105 counties, but 286 school districts. Some, like the Wichita district with more than 50,000 students, are large; others have only a few hundred students. Each district has its own administrative staff, superintendent, purchasing system, computer system and bus system.

Could we combine these systems? Trabert asked. Probably. But raise that idea in the political realm, Trabert said, and watch what happens.

• • •

One of the legal quirks about Gannon v. Kansas is that neither Luke nor Grace Gannon will play any role in the case other than be named as plaintiffs in the documents. They are merely "place-holder" names in the lawsuit, even though they are students who will suffer the consequences or enjoy the benefits of whatever is decided in the public policy realm.

The real players in the lawsuit are the school districts – including Wichita, Hutchinson, Dodge City and Kansas City, Kan. – that initiated the suit. So Luke, who attends Heights High School, and Grace, who attends Stucky Middle School, were not interviewed by lawyers for the case, said John Robb, an attorney for the plaintiffs. The Gannon kids also did not testify in court, he said.

One thing that Brunk, Trabert and Jeff Gannon all agree on is that in the public policy debate, and in the government debate, and in the court debate, few people doing the talking ever talk about the actual children involved.

"My challenge," Gannon said, "is this: Is it about the taxes, or is it about the children?"

Reach Roy Wenzl at 316-268-6219 or rwenzl@wichitaeagle.com.

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ADDENDUM F:
LETTER DECISION, *MONTOY V. STATE*, 99-C-1738 (SEP. 8, 2003)(BULLOCK)

MR09/09/03

KANSAS DISTRICT COURT

Chambers of
TERRY L. BULLOCK
District Judge

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LYNN KEEZER
Administrative Assistant
(785) 233-8200 Ext. 4375

September 8, 2003

TO: Counsel of Record

RE: Eric Montoy, et al v. State of Kansas, et al
Case No. 99-C-1738

2003 SEP -8 A 11:08
DISTRICT COURT
THIRD JUDICIAL DIST.

LETTER DECISION

Greetings:

Now that you have had an opportunity to spend a little time with the Court's opinion on questions of law, the issues of procedure and parties emerge.

The Court's current thought is as follows:

A. Equity:

1. The plaintiffs must first establish a prima facia case by demonstrating disparate per-pupil funding, (or in the adverse, that in some cases it is not disparate enough, i.e. special needs unmet).

2. The defendants would then proceed to explain with their evidence whether there is a rational non-pretextual legal basis for that (those) disparities (or lack thereof) based upon actual cost to provide the <u>children</u> receiving additional or substandard funds an <u>equal educational opportunity</u>.

3. There would then be an opportunity for the plaintiffs to challenge or rebut the defendants explanatory evidence.

B. Suitability:

1. The plaintiffs must first establish a prima facia case by demonstrating

that Kansas children generally are failing to receive a suitable education (as that term is now defined) for reasons of inadequate total funding, unrelated to inequitable distribution of gross educational dollars (which we deal with in paragraph A, above).

2. Defendants would then have an opportunity to dispute plaintiffs evidence on this point.

3. There would then be an opportunity for plaintiffs to rebut defendants evidence of suitability of education offered to all Kansas children.

[Frankly, thus understood and given what the Court understands of the plaintiffs' factual claims, the Court wonders if we will ever reach this suitability question. But that remains to be seen.]

C. Motions to Dismiss:

The Court is also satisfied that the constitutional school funding mandate is directed at the Legislature alone. Consequently, there is no need to have the Governor or the State Treasurer as individual parties. Should orders of restraint be needed at the end of this litigation requiring or prohibiting any constitutionally required or prohibited actions, those can always be then served on all appropriate officials. Accordingly, the motions of those parties to dismiss are sustained, no further Journal Entry being required.

Finally, in case the Court has not been crystal clear, the Court takes the view that this case is about children and their suitable, and equal educational opportunities. Nothing else. If we all keep our focus on the children, I believe we shall reach the goal our constitution mandates.

Very truly yours,

Terry L. Bullock
District Judge

TLB/lrk

ADDENDUM G:
DECISION AND ORDER (REMEDY), *MONTOY V. STATE*, 99-C-1738 (MAY 14, 2004)(BULLOCK)

FILED BY CLERK
K.S. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS.
2004 MAY 11 A 11:00

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

RYAN MONTOY, by and through his father and next friend, Reuben Montoy; LAJUAN and MYTESHA ROBINSON, by and through their mother and next friend, Earnestine Robinson; SIERRA and SETH GWIN, by and through their mother and next friend, Kimberly Gwin; RENE BESS, by and through his grandfather and next friend, Earl Bess, Jr.; KEELY BOYCE, by and through her mother and next friend, Kenna Boyce; CRUZ CEDILLO, by and through his mother and next friend, Sandra Delgado; LYNETTE DO, by and through her mother and next friend, Lieu Do; CHRISTOPHER and MONIQUE HARDING, by and through their mother and next friend, Phyllis Harding; JOSEPH HAWKINSON, by and through his mother and next friend, Melody Hawkinson; JENNIE NGUYEN, by and through her father and next friend, Phillip Nguyen; SANDY, NICOLE, and BRUCE THU PHAM, by and through their father and next friend, Da Thu Pham; ANDREA BETHKE, by and through her mother and next friend, Linda Bethke; DAMIAN and DYLAN ARREDONDO, by and through their mother and next friend,	)	**Case No. 99-C-1738**

Nancy Arrendondo; EDUARDO)
DOMINGUEZ, by and through his)
mother and next friend, Guadalupe)
Dominguez; CHRIS FREEMAN, by)
and through his mother and next)
friend, Rita Freeman; MONICA)
GARCIA, by and through her)
mother and next friend, Evangelina)
Garcia; WILLIAM ZACHARY)
HARRISON, by and through his)
father and next friend, Jeff Harrison;)
ROBERT HINDMAN, by and)
through his father and next friend,)
Robert Hindman; ALEX JAKE, by)
and through his father and next)
friend, Richard Jake; YADIRA)
MORENO, by and through her)
mother and next friend, Nora)
Barrientos; MANUEL)
SOLORZANO, by and through his)
father and next friend, Manuel)
Solorzano; BENJAMIN VICENTE,)
by and through his mother and next)
friend, Susanne Vicente; BRITTANY)
ASH-CLARKE, by and through her)
mother and next friend, Tina Ash;)
JIN JEON, by and through his)
mother and next friend, Joomi)
Bobbett; JACOB STACK, by and)
through his father and next friend,)
John Stack; BRONSON WAITE,)
by and through his mother and next)
friend, Marcia Waite; JACOB)
LEMASTER, by and through his)
mother and next friend, Virginia)
Lemaster; NICHOLAS)
WOODFIELD, by and through his)
mother and next friend, Linda)
Woodfield; BROOKE AND BLAINE)
SMITH, by and through their mother)

and next friend, Kristina Brin;)
JERRY DIX, by and through his)
mother and next friend, Kim Dix;)
TANNER ROBIDOU, by and)
through his mother and next friend,)
Vicki Robidou; JUSTIN)
HOSTETTER, by and through his)
mother and next friend, Valerie)
Hostetter; UNIFIED SCHOOL)
DISTRICT NO. 443; and UNIFIED)
SCHOOL DISTRICT NO. 305,)
)
Plaintiffs,)
)
v.)
)
THE STATE OF KANSAS; CONNIE)
MORRIS, member of the Kansas)
State Board of Education, in her)
official capacity; JANET WAUGH,)
member of the Kansas State Board of)
Education, in her official capacity;)
SUE GAMBLE, member of the)
Kansas State Board of Education, in)
her official capacity; JOHN W.)
BACON, member of the Kansas State)
Board of Education, in his official)
capacity; BILL WAGNON, member)
of the Kansas State Board of)
Education, in his official capacity;)
BRUCE WYATT, member of the)
Kansas State Board Education, in his)
official capacity; KEN WILLARD,)
member of the Kansas State Board of)
Education, in his official capacity;)
CAROL RUPE, member of the)
Kansas State Board of Education, in)
her official capacity; IRIS VAN)
METER, member of the Kansas State)
Board of Education, in her official)

capacity; STEVE E. ABRAMS,)
member of the Kansas State Board)
of Education, in his official capacity;)
and ANDY TOMPKINS,)
Commissioner of the State)
Department of Education, in his)
official capacity,)
)
Defendants.)
)

DECISION AND ORDER
REMEDY

Section I: Background

On December 2, 2003, this Court entered a Preliminary Interim Order holding that the Kansas school funding scheme, as it then existed, was unconstitutional in violation of Article 6 of the Kansas Constitution and the Equal Protection Clauses of both the Kansas and United States Constitutions. At the request of Defendant State Board of Education, the Court withheld final judgment and gave the legislative and executive branches an opportunity to craft remedial legislation. Specifically, the Court provided the State a grace period encompassing the entire 2004 legislative session in which to repair the constitutional violations in the funding scheme. Unfortunately, during that just-concluded legislative session, the legislative and executive branches failed to utilize the time provided by the Court and none of the adjudicated constitutional defects in the school funding scheme were addressed and none corrected. The Legislature has now adjourned and left the capital. Only formal

sine die adjournment remains. Accordingly, with considerable regret and after much deliberation, the Court can find no reason to further delay and is now prepared to announce its remedy ruling in this matter.

The Kansas Supreme Court has stated that "[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." *Provance v. Shawnee Mission U.S.D. No. 512*, 231 Kan. 636 (1982). Our high court has also held that "[t]he 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." *State v. Smith*, 155 Kan. 588 (1942). In *Mock v. State*, Case No. 91-CV-1009, 31 Washburn L.J. 475 (Shawnee County District Court, October 14, 1991), this Court stated that the Legislature is constitutionally obligated "to furnish each child with an educational opportunity equal to that made to every other child." This Court issues its remedy with these guiding principles in mind.

Section II: Constitutional Deficiencies in School Finance

On December 2, 2003, this Court held, almost entirely as a matter of fact, that the current school funding scheme then stood in blatant violation of Article 6 of the Kansas Constitution and the Equal Protection Clauses of both the Kansas and United States Constitutions in the following three separate and distinct aspects:

A. It failed to equitably distribute resources among children equally entitled by the Constitution to a suitable education, or in the alternative, to provide a rational basis premised in differing costs for any differential;

B. It failed to supply adequate total resources to provide all Kansas children with a suitable education (as that term was previously defined by both this Court and the Legislature itself); and

C. It dramatically and adversely impacted the learning and educational performance of the most vulnerable and/or protected Kansas children. This disparate impact occurred by virtue of underfunding, generally, and selective underfunding of the schools where these vulnerable and/or protected children primarily attend, specifically. Those vulnerable and/or protected children, of course, were and are: the poor, the minorities, the physically and mentally disadvantaged, and those who cannot or nearly cannot yet speak the primary language of America and its schools.

The Court made its interim ruling based upon facts found following an eight day bench trial (generating 1,367 pages of transcribed testimony), including approximately 300 exhibits consisting of thousands of pages, and after considering 565 proposed findings of fact and conclusions of law submitted by the parties and the arguments made by the parties. In addition to the general factual and legal conclusions

stated above, the Court noted the following concerns in the then current funding scheme:

a. Defendants' own books and records showed some children received $5,655.95 of the state's educational largesse each year, while others received $16,968.49, a difference of more than 300 percent;

b. There was no rational factual basis whatsoever for this funding differential premised on additional costs incurred to educate those children receiving more. To be blunt and specific, as the school officials who testified were, the current funding scheme was found to be irrational: that is, those schools with the children most expensive to educate receive the least! Further, the State does not even gather or request cost information from our schools. It has no "bottom up" budgeting process which would provide this critical information in this, an endeavor which already expends nearly four billion tax dollars each year, well over half of the entire annual revenues of the State;

c. Although the Legislature is free to choose a public school structure and management model more efficient than the one presently in use, according to the uncontroverted evidence presented to the Court the cost of providing a suitable education for Kansas children under the current legislatively authorized configuration is nearly a billion dollars more than

is presently provided. This fact was established by the Defendants' own commissioned study of costs (Augenblick & Myers), which again was not only uncontroverted, but was actually accepted and recommended by the Defendant State Board of Education for adoption. To date, no more efficient, and thus less costly, system has been either proposed or adopted by the Legislature;

d. In commissioning the Augenblick & Myers' study, the Legislature statutorily found as a <u>fact</u> that the current funding scheme is <u>inadequate</u> and <u>inequitable</u> (findings this Court has only duplicated);

e. The Defendants' own records established that the current funding scheme provides <u>least</u> to those school districts which have the largest concentrations of our most vulnerable and/or protected students; our poor, our disabled, our minorities, and our children not fluent in the language spokcn in their schools (children, whom all agree cost <u>more</u> to educate);

f. The Defendants' own disagreggated educational testing records conclusively established that those most vulnerable and/or protected students, described in subparagraph e above, are experiencing an "achievement gap" of staggering proportion when compared to other Kansas students;

g. That "achievement gap" (reflecting failure rates in some categories of vulnerable and/or protected students as high as 80 percent), referred to in subparagraph f above, violates Defendants' own current legal educational standards and if not corrected, will soon violate the federal law of the land, the law known as No Child Left Behind; and

h. This disparate funding and this correlative "achievement gap," both referred to above, when coupled with the uncontroverted evidence shown to this Court that all children can learn and flourish when education is properly funded and students properly taught, conclusively demonstrates the adverse and unconstitutional disparate impact the current funding scheme has on our most vulnerable and/or protected students; factually a clear denial of equal protection of the laws in contravention of both the United States and Kansas Constitutions.

Section III: Activity Since December 2, 2003

The Court judicially notices the official records of the Kansas Legislature, which reveal the following:

- The Governor began the 2004 Legislative Session by submitting her "Education First" plan as a part of the State of the State address. In this plan, the Governor proposed increasing education funding a total of $300

million per year, phased in over a three year period. Her plan called for an increase of $250 in the base per year per pupil allotment, and also provided additional funds for at-risk, bilingual, and Special Education students. It proposed no structural or management changes in the schools, but it did propose additional funds for All-Day Kindergarten, Parents-as-Teachers, and teacher mentoring.

- The Governor's Education First Plan was rather quickly dismissed by both houses of the Legislature.
- The House then adopted a bill which proposed making a one-time addition of $155 million to education funding. This measure proposed no changes in school structure or management, an omission replicated in every proposal made thereafter by either house.
- The Senate did not act on the $155 million House measure during the "regular" session and did not adopt any school funding proposal of its own whatsoever.
- During the "wrap up" or "veto" session, the Senate adopted a bill which proposed to add $72 million to school funding for one year only. This bill was "funded" by a deduction of $32 million from the State's cash reserves, with the balance to be taken from the pensions of elderly and retired state workers.

- The Senate then rejected the $155 million House bill and the House rejected the $72 million Senate bill.
- These mutual rejections placed the entire matter of school finance in the hands of a joint conference committee, which, on a vote of 5-1, agreed on a $108 million compromise measure which would have increased the base per pupil per year allotment by $27. Other single-year adjustments were also proposed. Because a House member of the conference committee refused to sign the conference committee report, the House, under its rules, could not consider the compromise. The House was then asked to adopt a procedure which would allow a second conference committee to be appointed, whose report could then be considered with only two signatures from each house. That proposal was rejected by the House. Twice.
- Despite rules which would seem to prevent it, the joint conference committee then met again and reached yet another agreement on a different proposal. This suggested compromise measure proposed to add $66 million to school funding for one year and further proposed to authorize the State's sixteen wealthiest districts to raise even more revenue locally from district property taxes, thus proposing to substantially <u>enlarge</u> the current 300% state-wide per pupil funding

disparity. This proposal, like the earlier Senate plan, was proposed to be funded by reducing the State's cash reserves by $26 million, with the balance coming from State worker pension funds. This proposed compromise also included a provision designed to diminish the Court's constitutional definition of "suitable education," a definition provision which would expire in one year (a date apparently selected to coincide with the estimated termination of the litigation at bar.)

- The $66 million compromise proposal was abandoned without a vote.
- Next, a bi-partisan plan was proposed by some members of the House. This proposal would have generated $128 million in new revenue for schools and would have 1) raised the base per pupil allotment by $100 per year, 2) funded Special Education at 100 % for the first time in Kansas history and 3) increased funds for at-risk and bilingual students. It also proposed to increase the LOB limit for local districts from 25 % to 28.5%, thus again proposing to increase the state-wide per pupil funding discrepancy, previously held unconstitutional by the Court.
- The $128 million House proposal was debated in the Senate and, once again, sent to the conference committee for further negotiations.
- In the closing hours of the "veto" session, the Senate rejected a $108 million compromise proposal and the House rejected a $95.1 million

counterproposal. An $82 million conference committee recommendation funded entirely with funds to be taken from the State Highway Fund was likewise rejected.

- Finally, a $92 million suggested compromise failed to pass either house and the Legislature adjourned without addressing or correcting even one of the following unconstitutional aspects of State's school funding scheme:

  a. The enormous funding disparities (totaling more than 300%) between individual school children created by wealth-based, local funding options and other aspects of the funding scheme;

  b. The local and state funding statutes which disparately benefit only some children in certain geographic areas of the State, and which are not related in any way to the cost of educating those children;

  c. The categories of weightings or other funding concepts providing additional funds only to some children and some school districts, none of which are related to actual costs incurred;

  d. The state and/or federal school and student performance mandates which are not fully funded;

e. The funding mechanisms in place which deprive schools with "expensive to educate" students of the funds necessary to successfully teach them.

f. The hugely insufficient total dollars to adequately fund the education system as a whole under its present organizational and management structure; and,

g. The inadequate and inequitable funding formulas which disparately and adversely impact vulnerable and/or protected children, creating an "achievement gap" of shocking proportion (again creating failure rates for some classes of vulnerable and/or protected children as high as 80%).

To paraphrase Aesop: The mountain labored and brought forth nothing at all. In fact, rather than attack the problem, the Legislature chose instead to attack the Court. From the outset, legislative leaders openly declared their defiance of the Court[1]

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[1]According to Plaintiff's brief, unchallenged in the record, examples include:

- "Mr. Bullock has made his decision. Now let him enforce it." *Kansas City Star*, "School Aid Formula Thrown Out" (December 3, 2003) (quote from Representative John Edmonds, R-Great Bend).
- "Collectively, the Legislature [does not] give the case a chance. The leadership [is] confident it [will] be thrown out." *Salina Journal*, "Judge Orders School Funding Fixed" (December 3, 2003) (quote from Senator Pete Brungard, R-Saline).
- "[T]his is just another judicial attempt to usurp the authority of elected officials. To have an unelected judge essentially mandate a tax increase by July 1 is unacceptable. . . . What this does, in effect, is give him his day of glory in the press. He's showboating." *Dodge City Daily Globe*, "Judge's

and refused to meaningfully address the many constitutional violations within the present funding scheme, all of which were created by the Legislature itself. To this very day, those legislative leaders continue to disregard this Court's factual findings, premised largely on the State's own records and other uncontroverted evidence. They likewise continue to ignore the fact that this Court did not act alone, but was in fact operating under a mandate handed down by the Kansas Supreme Court in this very case. Accordingly, the mocking and disrespect shown this Court must be understood to be directed at the State's entire judicial branch of government.

Preliminarily, it is also worth noting that the "remedy" brief filed herein by Defendant State of Kansas was distinctly unhelpful. It was furthermore disrespectful to the Court and unprofessional in tone. How the children of Kansas benefit from these official actions of our government escapes the Court.

This case was originally filed in 1999. Five years later, there is still no relief in sight for our children. Hundreds of thousands of these children have gone through the Kansas educational system during this period of time. According to the evidence, many thousands of them have been permanently harmed by their inadequate educations

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Ruling in School Funding Case Sparks Mixed Reactions" (December 3, 2003) (quote from Senator Tim Huelskamp, R-Fowler).

- "I dare [Judge Bullock to] hold me in contempt of court for not passing a bill out of the appropriations committee to do what he ordered." Wichita Eagle, "Solving the Problem" (December 4, 2003) (quote from Representative Melvin Neufeld, Chairman of the House Appropriations Committee).

and forever consigned to a lesser existence. Further delay will unquestionably harm more of these vulnerable and/or protected of our students. Given these facts, coupled with the attitudes and inaction of the Legislature, the Court now has no choice but to act and to act decisively.

Section IV: Remedies Utilized Elsewhere: The National Perspective

After reviewing similar cases across our nation, the Court finds many parallels to the present situation in Kansas. Our Legislature has recently followed a path nearly identical to that followed by legislatures in a few other states. In those states, the inaction was almost always preceded by a debate more concerned with political considerations than with the educational needs of the children. As a result, the courts in these states have been compelled to take appropriate action to enforce their constitutions, have shown constitutional leadership, and have implemented a variety of means necessary to correct the legislatively-created constitutional deficiencies.

In *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31 (2002), the Arkansas Supreme Court, after allowing the Legislature an opportunity to correct funding defects and finding the legislative corrective effort inadequate, appointed a special master to take charge of and correct constitutional deficiencies in that state's educational organizational and funding systems. In addition, the Arkansas court affirmed the grant of attorneys' fees in the amount of $3,088,050, plus costs in the amount of $309,000.

In *Campaign for Fiscal Equity, Inc. v. New York*, 100 N.E.2d 326 (N.Y. Slip Op. No. 15615 June 26, 2003), the New York court gave the state one year to: (1) determine the cost of providing the opportunity for sound basic education (which has already been done in Kansas); (2) provide those resources; and (3) ensure an accountability system to measure whether reforms actually provide the opportunity for a sound basic education.

In *Abbott v. Burke*, 710 A.2d 450 (1998), the New Jersey Supreme Court remanded the case to the lower court to direct the commissioner of the department of education to initiate a study and to prepare a report with specific findings and recommendations. In addition, the lower court appointed a special master to study the issues and to make specific recommendations. After consideration of the recommendations of the commissioner and the special master, the lower court adopted them.

In *Hoke County v. North Carolina*, 95 CVS 1158 (April 4, 2002), Superior Court Judge Howard E. Manning, Jr. stated, in accordance with *Leandro v. North Carolina*, 346 N.C. 336 (1997), that "[i]t is up to the Executive and Legislative Branches to provide the solution to constitutional deficits...." The court went on to say that "[t]hese branches can no longer stand back and point their fingers . . . and escape responsibility for lack of leadership and effort, lack of effective implementation of educational strategies, the lack of competent, certified, well-trained teachers effectively

teaching children, or the lack of effective management of the resources that the state is providing to each [school district]." While giving deference to the executive and legislative branches of government, the North Carolina court maintained jurisdiction, just as this Court has, to see that a proper remedy is implemented.

On April 26, 2004, in the revived remedy phase of *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545 (1993), Justice Margot Botsford filed a 357 page report to the Massachusetts Supreme Judicial Court. In this report, Justice Botsford found that the funds provided Massachusetts schools were constitutionally inadequate. The justice further found that increases in funding alone would not produce a constitutionally adequate educational program. In her findings, Justice Botsford noted:

> The Commonwealth, and the department, have accomplished much over the past ten years in terms of investing enormous amounts of new money in local educational programs, ensuring a far greater degree of cquitable spending between rich and poor school districts, and redesigning in some fundamental ways the entire public school educational program. When one looks at the State as a whole, there have been some impressive results in terms of improvement in overall student performance. Nevertheless, the factual record establishes that the schools attended by the plaintiff children are not currently implementing the Massachusetts curriculum frameworks for all students, and arc not currently equipping all students with the *McDuffy* capabilitics [which had previously defined an adequate or suitable education]. This point may be best illustrated graphically in the areas of English language arts and mathematics, which are the primary subjects of the MCAS [Massachusetts Comprehensive

> Assessment System] tests, but it is perhaps even more strongly made in relation to the other critical areas of study that the *McDuffy* capabilities and the curriculum frameworks encompass: history, science, health, the arts, and foreign languages. The inadequacies of the educational program provided in the [relevant] districts are many and deep. Most worrisome is the fact, reflected in all the MCAS scores, that for children with learning disabilities, children with limited English proficiency, racial and ethnic minority children, and those from low-income homes, the inadequacies are even more profound.

In considering the appropriate remedy, Justice Botsford held:

> The defendants have argued in this remedy phase that even if some of the [relevant] districts are struggling, clearly "appropriate legislative action" has indeed been taken by the Commonwealth. This is evidenced by . . . reform measures enacted by the Legislature since 1993, all of which, the defendants state, the Commonwealth has implemented with diligence and effectiveness over the past ten years. Accordingly, in the defendants' view, the proper resolution of this case is to deny the plaintiffs' motion for further relief, and dismiss their complaint. The plaintiffs, on the other hand, contend that the evidence plainly establishes they are not receiving an adequate education because the schools and school districts they attend do not have sufficient resources to provide it. They propose that the court appoint a "21st Century Foundation Budget Commission" under the supervision of the court. They further propose that the court direct the commission to develop, subject to the court's approval, a new foundation budget that provides sufficient resources to allow the [relevant] districts to provide an adequate education that meets constitutional standards.
>
> I recommend against accepting the defendants' suggestion of no remedial relief. The defendants' argument is essentially two-fold. They first contend that the struggles being experienced by certain school districts, including

presumably the [subject] districts, are not related to inadequate resources but rather, reflect a lack of leadership and managerial capacity. Second, they contend that the Commonwealth is dealing with the capacity issues through the school and district accountability system it has put into place. This system includes not only the coordinated program reviews and school panel reviews conducted by the department but the parallel district reviews conducted by EQA [Educational Quality and Accountability] – each of which contemplates analysis, targeted assistance for improved planning, use of data and improved programs, monitoring, and, if there is no marked improvement, the possibility of more drastic action and greater intervention by the Commonwealth.

I have found that capacity problems are a cause of the inadequate education being provided to the plaintiffs, but inadequate financial resources are a very important and independent cause. Moreover, apart from the issue of funding, the difficulty with the defendants' solution is that the system they depend on to improve the capacities of schools and districts is not currently adequate to do the job.

* * *

The plaintiffs have a right under the Massachusetts Constitution to an education that will equip them in a number of ways to be in a position to fulfill their responsibilities and enjoy their rights as productive, participating citizens in a republican government. *McDuffy*, 415 Mass. at 618-620. The duty to educate evolves with society, as the court recognized in *McDuffy*. *Id.* at 620. As the evidence showed, it becomes more and more apparent that in the United States today, individuals need to receive an education that will enable them to pursue degrees beyond high school or at least excellent, technologically competent, vocational education. In the [relevant] districts, too many students currently are not receiving what they need to be able to pursue these paths. The commissioner has set the date of 2014 for students in

the Commonwealth to become "proficient" in [English language arts] and math; there is no timetable for proficiency in other areas of study. The associate commissioner of education for school finance and support suggested that it may not be fair to begin assessing whether the current system of education reform embodied in the ERA [Education Reform Act] is successful until all districts in the Commonwealth have operated at least 100 % of their foundation budget for a full cycle of kindergarten through twelfth grade– the year 2012. In the context of this litigation, and eleven years after the *McDuffy* decision, that timetable is just too long.

In light of the findings in this report, I conclude the plaintiffs are entitled to remedial relief from this court.

* * *

In the last twenty years, courts in several States have struggled with the question of remedy after reaching a conclusion that the particular State was not meeting its State constitutional obligation regarding public school education. I recommend that the court follow the path that the New York Court of Appeals has recently chosen in a case concerning the adequacy of education provided in the New York City public schools. See *Campaign for Fiscal Equity, Inc. v. New York,* 100 N.Y. 2d 893, 928-932 (2003). Translated into this case, the relief would be an order directing the State defendants to: (1) ascertain the actual cost of providing the level of education in each of the focus school districts that permits <u>all</u> children in the district's public schools the opportunity to acquire the capabilities outlined in *McDuffy* -- a directive that means, at present, the actual cost of implementing all seven of the Massachusetts curriculum frameworks in a manner appropriate for all the school district's children; (2) determine the costs associated with measures, to be carried out by the department working with the local school district administrations, that will provide meaningful improvement in the capacity of these local districts to carry out an

> effective implementation of the necessary educational program; and (3) implement whatever funding and administrative changes result from the determinations made in (1) and (2). This order would be directed to the State defendants to accomplish because *McDuffy* expressly holds that the Commonwealth, not the local districts, is ultimately responsible "to devise a plan and sources of funds sufficient to meet the constitutional mandate." 415 Mass. at 621.
>
> Further, I recommend that the court give a definite, but limited, period of time for the defendants to carry out this order and report back to the court with a plan and timetable for implementation, perhaps six months. I also recommend, as in New York, that the court continue to retain jurisdiction over the case to allow the court, or a single justice, or a judge of the Superior Court, to monitor the remedial process and provide whatever direction may be appropriate.

In *Columbia Falls v. Montana*, Case No. BDV-2002-528 (Montana First Judicial District Court, April 15, 2004), Judge Jeffrey M. Sherlock, sitting in Helena, held Montana's entire school finance system unconstitutional. In reaching this conclusion, Judge Sherlock quoted, with approval, the following section from *Brown v. Topeka Bd. of Ed.*, 347 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for

> later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, must be made available to all on equal terms.

He also quoted with approval the following statement made by Judge Loble in the January 13, 1988 Montana case finding an earlier version of Montana's school finance plan unconstitutional:

> Contemporary society demands incrcasing levels of sophistication, and increased knowledge and understanding of technology. Education plays the central role in developing a person's abilities to achieve that sophistication, knowledge and understanding. Consequently, the quality of an individual's life is increasingly dependent on the level and quality of that individual's education.

Judge Sherlock noted the following deficiencies in the current Montana school funding scheme:

1. It utilized an excessive reliance on permissive and voted levies;
2. It was unnecessarily complicated and hard to understand;
3. There was no mechanism to deal with inflation;
4. The funds allocated were not based on actual costs of providing education;
5. No allowance was made for increased costs incurred in achieving increased achievement standards;

6. The information used to create the plan was already two years old when it was used to formulate the plan;

7. There was no cost study to justify the various levels of per pupil funding;

8. Additional funding was allocated by the Legislature in response to earlier constitutional litigation, which was later withdrawn when that litigation was concluded and judicial attention focused elsewhere;

9. Many of the funding provisions were tied to the wealth of each district, not related to actual educational costs or needs;

10. Increased accreditation requirements and No Child Left Behind laws created substantial additional costs which were not provided for in the funding scheme and were, thus, essentially unfunded mandates;

11. Accreditation standards created minimum requirements but in no way guaranteed an adequate or quality education to any child;

12. The "every classroom staffed with a teacher qualified in the subject being taught" and AYP (Adequate Yearly Progress) required by the No Child Left Behind Act placed considerable costs on schools, costs not met by the Montana funding scheme;

13. Special education, although legally required, was not fully funded, creating a competition between regular student and special education student needs;

14. In designing the Montana funding system, no effort was made to determine the components of a basic system of quality education, nor to relate funds provided to the necessary costs incurred in providing that education;

15. The cost study done in Montana by Augenblick & Myers, commissioned by the Montana School Boards Association, was ignored by lawmakers; and,

16. The testimony of Dr. Lawrence Picus of the University of Southern California (who also testified for Defendants in the instant action) was found to lack credibility in that, while testifying for the defense in Kansas and Massachusetts he had opined those systems were equitable and thus constitutional, but in Montana (while testifying for the plaintiffs) he opined Montana's funding was inadequate and violative of constitutional requirements- - -both opinions being based astonishingly on undisputed numbers showing Montana's system more equitable in virtually every measurement than either Kansas or Massachusetts. In other words, Dr. Picus "danced with the girls that brought him."

In reviewing these Montana findings, Judge Sherlock observed that some of the adverse effects of Montana's underfunding were prospective. In that regard, he held:

> This Court takes into account the fact that some of the damage that the educators testified to at trial is prospective

> in nature. However, this evidence is persuasive and relevant. Just as the Montana Supreme Court did not feel it necessary to wait for "dead fish [to] float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked" (MEIC, ¶ 77), this Court finds that it should not have to wait until Montana's school system collapses in financial ruin prior to entering an order [in] this case.

In Montana, like Kansas, the Defendants raised three principal defenses: "(1) Montana's relative spending in light of its fiscal capacity compared to other states; (2) Montana's ability to recruit and retain quality teachers; and (3) achievement levels of Montana students as measured by available standardized tests." On these points, Judge Sherlock concluded as follows: (1) As to fiscal capacity, he held "state-wide fiscal difficulties cannot justify an unconstitutional funding system. 236 Mont. at 54, 769 P.2d 690. The constitution says what it says and does not allow for such a defense." (2) As to teacher salaries, he found that "Montana teachers' salaries have been lagging behind national averages." (3) Concerning standardized test results, he found that the testimony of Montana's "boots on the ground" educators "trumped" statistical arguments of proffered "experts" convincing Judge Sherlock that state-wide average test scores do not measure the adequacy of education for any particular student. He also stated that: "The State also relies on evidence that Montana's students do well on standardized national tests. Defendants' [exhibit] sets forth various encouraging statistics concerning Montana's students' achievement on the National Assessment of Education Progress (NAEP) test and on college entrance examinations. The State

attempted this same defense *Helena Elementary I*, and it was rejected there." Accordingly, he found all defenses lacking in merit.

If the findings of Judge Sherlock sound familiar, it is perhaps because they are nearly identical to many of those made by this Court on December 2, 2003 with respect to Kansas.

It is apparent, then, that although courts across the country have taken different approaches to resolving the unconstitutional nature of their school funding statutes, all have acted to enforce their constitutions. Nearly all have given the legislative and executive branches of government an opportunity to first remedy the violations themselves. After failed attempts (or no attempts at all) to remedy the constitutional violations, some courts have singlehandedly taken over public schools, while others have appointed special masters to craft and impose new school funding schemes, or have, in some instances, handed down their own school funding provisions. The time may come when this or other Kansas courts will be forced to take such action, and in so doing, place the balance of power between the branches of government directly at issue for the sake of compelling compliance with our constitutions. But not yet.

Section V: Remedy

In the Court's view, the next logical and correct step is not for the Court to take charge of the school system or to write a new school finance law but instead to simply declare the funding statutes, already found unconstitutional, to be also void as they apply to the funding of our public schools. As previously noted, the Court has already provided one opportunity for the Legislature to correct the noted defects while allowing the unconstitutional funding scheme to remain in place and the schools to remain open. Since that course of action was ineffective to compel compliance with our Constitutions, the Court's next chosen course of action is to enjoin the use of all statutes related to the distribution of funds for public education, this time with the schools closed. This action by the Court will terminate all spending functions under the unconstitutional funding provisions, effectively putting our school system on "pause" until the unconstitutional funding defects are remedied by the legislative and executive branches of our government. Although this action may delay our children's education slightly (should the other branches fail to respond quickly), it will end the inadequate and inequitable education being provided now and the disparate damage presently being done to the most vulnerable of our children.

This remedy should not be a surprise to Defendants. In fact, the Court telegraphed its likely remedy in its December 2, 2003 Preliminary Interim Order when it made the following statement:

> Accordingly, this Court will withhold its final order and judgment in this cause until July 1, 2004. This delay will give the executive and legislative branches of our government the luxury of a full legislative session (while our schools remain open) to correct the Constitutional flaws outlined in this opinion.

(Emphasis added).

It should also be quickly added that the option of the Legislature and the Governor now to do nothing is simply not an option. The Constitution requires the State of Kansas to establish, maintain, and finance public schools to provide a suitable and equitable education for all Kansas children. Under the Constitution, they simply have no choice and neither does this Court.

Section VI: Elements of a Constitutional Funding Scheme

Although there must be literally hundreds of ways the Legislature could constitutionally structure, organize, manage, and fund public education in Kansas[2], whatever plan is ultimately agreed upon must contain certain basic provisions in order to pass constitutional muster:

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[2]For example, the brief amicus filed herein by Educational Management Consultants of Wichita suggests one such possibility; that being a new school finance computer model which could be used to first assess and then fund and address the discrete educational needs of the precise children located in each school building of our diverse Kansas school system. By this means, the author claims all state and federal student performance goals could be met with a maximum of financial efficiency.

1. The Legislature should first determine the structure and organizational form it finds best for our schools. As the Court has previously held, it is the duty of the Legislature to not only fund but also to manage our schools. If there are expensive inefficiencies in the present structure and operation of our schools, the Legislature has the power to correct them. Such corrections might well reduce significantly the total dollars needed to provide a suitable education for our children. As examples, it is for the Legislature to determine the number of school districts, the size of those districts, what size of schools are most desirable for a suitable education, and whether some educational services can be efficiently outsourced or regionalized. This power rests solely with the legislative and executive branches of our government. It is not only their prerogative but their constitutional duty to use this power.

2. Once the structure and organizational form of the schools have been determined, the Legislature should next determine the actual costs of a "suitable education" for every Kansas child within that configuration. "Suitable education," as used in this opinion, has been defined to mean one which "provide[s] all Kansas students, commensurate with their natural abilities, the knowledge and skills necessary to understand and

successfully participate in the world around them both as children and later as adults."

3. The Legislature must then, as required by our Constitution, provide adequate total funds sufficient to fund those actual costs of that suitable education for every Kansas child.

4. In so doing, the Legislature must also ensure that each and every child is treated equally. Accordingly, any per pupil differences in funding must be justified by actual differing costs necessary to provide a suitable and equal education for that child. In this regard, it is fair to observe that, as established by the evidence in this case, some children are more expensive to educate than others (especially the poor or at-risk; the physically and mentally disabled; racial minorities; and those who cannot or are limited in their ability to speak English). Accordingly, differences in per pupil spending, if any, will be found constitutional if they are premised on differences in the actual costs incurred to provide an essentially equal educational opportunity for each child. In other words, the Legislature is not required to furnish each school or each school child with the same exact amount of funding, provided that any differential in funding is justified by a rational explanation premised on the varying

actual costs incurred in providing essentially equal educational opportunities for each of those children.

5. Because of Constitutional Equal Protection requirements, the Legislature must further ensure that the funding scheme does not disparately and adversely impact any category of Kansas children. A system based on actual costs to educate is thus the only fair and measurable way to guarantee this right, as any other system will inevitably lead us back down the well-worn path of political influence and compromise, all at the expense of our children's educations.

6. To ensure that the funding scheme remains constitutional, the new plan must also provide an effective and permanent mechanism to oversee its implementation, operation, and future adjustment. Without this built-in system of review and adjustment, there is no doubt that even a new funding scheme would quickly begin to resemble the present unconstitutional one. That is our unfortunate history. At a minimum, this mechanism should:

    (a) Provide actual cost information from the school house upwards in the form of school-based budgeting or some other mechanism designed to

reveal the actual costs of providing a suitable education for each child now and in the future.

(b) Provide officials with adequate power to monitor the implementation and operation of the funding scheme, with authority to adjust its provisions on account of changed circumstances and for inflation, and with authority to continually evaluate and adjust the plan to ensure there is always a direct relationship between the actual costs of its components and the funds it provides.

7. The new funding plan must provide resources necessary to close the "achievement gap" and comply with state accreditation standards, No Child Left Behind, and all other relevant statutory and rule requirements.

8. The new funding plan must be all-inclusive. It must be premised on the legal fact that every cent of public funds reaching our schools are "state" funds (except for federally provided funds) which must be considered in the equalization analysis. Every child is a Kansas child with an equal claim to a suitable education. The plan, therefore, must address every school financial need, from teacher salaries, to the building and maintaining of schools, to the purchase of crayons and computers, to the

costs of special education, to transportation and food costs and every other aspect of modern education.

9. This new funding plan must <u>not</u> contain:

   a. Wealth-based, local funding options which cause per pupil funding disparities;

   b. Special "weights" which favor some children and some locales over others;

   c. Geographic considerations which result in unfair per pupil funding differentials not related to actual costs incurred in providing equal educational opportunities for individual children;

   d. Unnecessary complexity of the type which has previously prevented both legislators and the public from comprehending both the inequity and the inadequacy of the present school finance system;

   e. Special local or other funding authority benefitting only some children;

   f. Any funding concept which is not based on actual costs for every child;

g. Unequalized "local" funding options, which by their nature are more available to wealthy districts both politically and in the revenues generated;

h. Any revenue source which requires local approval, thus creating inequities between places and children.

i. Special fund categories, such as special education, which are not tied to actual costs and which are not fully funded.

j. Quality or performance mandates for which funds are not provided; and

k. Any funding mechanism which deprives schools with "expensive to educate" students of the funds necessary to successfully teach them (as low enrollment weighting does in the current system, for example- - - although if cost studies reveal that it actually costs more per pupil to operate necessarily small schools, differentials premised upon those actual costs would be permissible, provided such funding does not, in turn, disadvantage students in other schools).

To draft a funding scheme which is constitutional, the Legislature could well begin by seeking truthful answers to the questions the Legislature itself posed to the

legislative coordinating council during the 2001 session in K.S.A. 46-1225 in the following words:

a. The legislative coordinating council shall provide for a professional evaluation of school district finance to determine the cost of a suitable education for Kansas children. The evaluation shall include a thorough study of the [current funding scheme] with the objective of addressing inadequacies and inequities inherent in the act. In addition to any other subjects the legislative coordinating council deems appropriate, the evaluation shall address the following objectives:

   (1) a determination of the funding needed to provide a suitable education in typical K-12 schools of various sizes and locations including, but not limited to, per pupil cost;

   (2) a determination of the additional support needed for special education, at-risk, limited English proficient pupils and pupils impacted by other special circumstances;

(3) a determination of funding adjustments necessary to ensure comparable purchasing power for all districts, regardless of size or location; and

(4) a determination of an appropriate annual adjustment for inflation.

b. In addressing the objectives of the evaluation as specified in subsection (a), consideration shall be given to:

(1) The cost of providing comparable opportunities in the state's small rural schools as well as the larger, more urban schools, including differences in transportation needs resulting from population sparsity as well as differences in annual operating costs;

(2) the cost of providing suitable opportunities in elementary, middle and high schools;

(3) the additional costs of providing special programming opportunities, including vocational education programs;

(4) the additional cost associated with educating at-risk children and those with limited English proficiency;

(5) the additional cost associated with meeting the needs of pupils with disabilities;

(6) the cost of opening new facilities; and

(7) the geographic variations in costs of personnel, materials, supplies and equipment and other fixed costs so that districts across the state are afforded comparable purchasing power.

Let the Court be crystal clear. If school funding is not based on actual costs incurred by our schools in providing a suitable education for our children, no one, not this Court, not the Supreme Court, not the schools, not the public, and not even the Legislature itself will ever be able to objectively determine whether that funding meets the dual requirements of our Constitution, those being 1) adequacy and 2) equity. This is why the Courts of our sister States have moved unanimously and in a rising tide to this position[3], and that is the absolute essensc of this Court's ruling in the case at bar.

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[3]See *Campaign for Fiscal Equity, Inc. v. New York*, 100 N.E.2d 326 (N.Y. Slip Op. No. 15615 June 26, 2003), *Lake View Sch. Dist. No. 25 v. Huckabee,* 351 Ark. 21 (2002), *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545 (1993), *Columbia Falls v. Montana*, Case No. BDV-2002-528 (Montana First Judicial District Court, April 15, 2004).

Section VII: Final Observations

Great discretion is granted by our Constitution to the Legislature to devise, create, and reform education in Kansas. Obviously, educational needs, and concomitant costs, will vary from place to place, from child to child, and from time to time. The mandate of our Constitutions is to furnish each child both a suitable education and an educational opportunity equal to that made available to every other child. While much focus in this case has been drawn to the alleged "billion dollar adequacy price tag" contained in the uncontroverted evidence presented to this Court (which was based on the current legislatively authorized school structure and management model), there are many factors, other than mere dollars, which the Legislature may consider to remedy the State's present unconstitutional funding scheme. Some of those factors would cost more, some less. As previously observed, the Constitution places not only the duty to fund, but also the duty to effectively organize and manage the Kansas educational system squarely on the Defendants. If more cost-effective organizational structures and management techniques are available, then Defendants certainly have the authority to implement those improvements. In addition, Defendants are empowered to prescribe and control how the funds provided to public schools are used. If funds are presently being squandered or misused in some schools, Defendants are likewise empowered to initiate policies and programs to correct any misuse.

Much of the reported public comment by legislators during this past regular legislative session centered on the impact any tax increase necessary to fund education might have on our state's economy and its legislators, particularly in an election year. In this connection, the Court takes judicial notice of the webpage of the Kansas Department of Revenue, http://www.ksrevenue.org, a thorough study of which is telling.[4] In this official government document, it is revealed that as a result of the significant tax cuts passed by the Kansas Legislature during the past ten years, the state has forfeited nearly $7 billion in funds which it would have otherwise had in the treasury. The depletion for 2005 alone is $918 million! The significance of these statistics is that it was during this precise period of time that the present school funding scheme became unconstitutional, in significant part through inadequate funding. According to the undisputed evidence presented at trial, without any changes in the structure and management form of Kansas schools, the state needs to add nearly a billion dollars to the funds furnished our schools to bring them into constitutional compliance. By coincidence, a billion dollars is very close to the revenue dissipation brought about by the legislative tax reductions during the current fiscal year alone. In other words, the people of Kansas provided the funds needed to educate our children, it was the Legislature which sent them away.

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[4]This website chart is appended to this decision as Appendix A.

Although ordinarily it is not the Court's role to direct the Legislature on how to levy taxes or on how to spend the funds it does collect, this case is the exception. The Constitution provides virtually no mandatory state programs or services, except for the education of our children. If the Legislature deems a tax increase (or a restoration of taxes) inappropriate to adequately fund education, it most certainly has the authority to make that decision. However, it has no choice when it comes to funding education. Under the Constitution, it simply must do it and do it adequately. Accordingly, other programs and services not required by the Constitution may ultimately face termination or reduction if the Legislature elects to provide no additional revenue and adequate funds are not otherwise available to provide for both constitutionally mandated education and those programs and services which are merely discretionary.

VIII: Order of Restraint

The Court directs Plaintiffs to prepare for the Court's consideration a proposed order of restraint, punishable by contempt, directed to the following individuals and classes of individuals: the Kansas State Treasurer, all county treasurers, relevant city fiscal officers, the boards of all school districts, and to any other individual or public body which furnishes or expends funds for public schools.

This order of restraint shall command the individuals and classes of individuals served to cease and desist the expenditure of funds under all education funding statutes

for the purposes of operating schools (including, but not limited to K.S.A. 72-6405, *et seq*., the School District Finance and Quality Performance Act; K.S.A. 72-8807, *et seq*., the capital outlay funding provisions; and K.S.A. 72-961, *et seq*., the special education excess cost provisions, and all other relevant statutes designed to authorize expenditures for Kansas K-12 education). Plaintiffs shall cause this order of restraint to be served on or before June 14, 2004 and make due return thereof. The order of restraint shall take effect by its terms on June 30, 2004.

IX: Jurisdiction and Costs

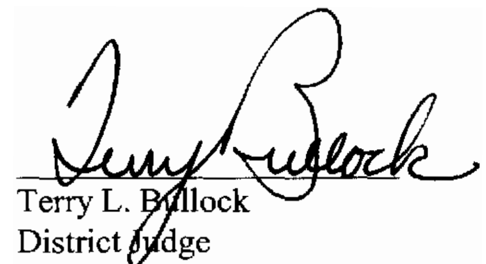
The Court specifically retains jurisdiction to:

a. Determine whether the violations outlined in its December 2, 2003 decision have been corrected and, if so, to dismiss this case.

b. Issue such further orders and take such further steps as may be required to enforce our state and federal constitutions if the other branches of government fail to do so.

c. Determine final costs, fees, and expenses and to assess them as law and equity may require.

IT IS SO ORDERED this 11th day of May 2004.



Appendix A

Estimated Effect of Tax Reductions and Increases
Enacted since 1995

Dollars are in Millions

	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005
Property Taxes:											
Car Tax Reductions	--	$ 26.7	$ 68.9	$ 95.5	$ 96.6	$ 104.9	$ 106.5	$ 108.1	$ 109.6	$ 111.8	$ 114.0
General Property Tax Reduction	--	--	$ -	$ 115.6	$ 267.5	$ 326.2	$ 338.9	$ 362.3	$ 378.4	$ 393.5	$ 409.3
Property Tax Subtotal	$ --	$ 26.7	$ 68.9	$ 211.1	$ 364.1	$ 431.1	$ 445.4	$ 470.4	$ 488.0	$ 505.3	$ 523.3
Income Taxes:											
Income Tax Subtotal	$ --	$ --	$ --	$ 19.1	$ 152.3	$ 158.1	$ 166.8	$ 169.6	$ 194.2	$ 201.0	$ 206.9
Replace Inheritance Tax with Estate Tax	--	--	--	--	$ 30.5	$ 63.3	$ 66.4	$ 69.7	$ 73.2	$ 76.9	$ 80.7
Sales Tax Exemptions for:											
Sales Tax Subtotal	$ 2.1	$ 31.9	$ 33.4	$ 35.0	$ 60.4	$ 66.8	$ 73.0	$ 73.8	$ 75.8	$ 77.9	$ 80.0
Severance Taxes:											
Production Exemptions	--	--	--	$ -	$ 2.7	$ 4.6	$ 4.6	$ 4.6	$ 4.6	$ 4.6	$ 4.6
Insurance Premiums Taxes	--	--	--	$ 1.5	$ 21.6	$ 26.6	$ 28.6	$ 24.1	$ 19.6	$ 15.0	$ 12.0
Privilege Taxes					$ 8.4	$ 8.8	$ 9.2	$ 9.7	$ 10.2	$ 10.6	$ 11.0
Total Tax Reductions	$ 99.5	$ 162.4	$ 213.0	$ 386.5	$ 764.2	$ 759.3	$ 794.0	$ 821.9	$ 865.6	$ 891.3	$ 918.6
Cumulative Reductions	$ 99.5	$ 261.9	$ 474.9	$ 861.4	$ 1,625.6	$ 2,384.9	$ 3,178.8	$ 4,000.7	$ 4,866.4	$ 5,757.6	$ 6,676.2
Tax Increases									$ 252.0	$ 295.0	$ 304.0
Cumulative Increases									$ 252.0	547.0	851.0
Net Tax Reductions	**$ 99.5**	**$ 162.4**	**$ 213.0**	**$ 386.5**	**$ 764.2**	**$ 759.3**	**$ 794.0**	**$ 821.9**	**$ 613.6**	**$ 596.3**	**$ 614.6**
Cumulative Net Tax Reductions	**$ 99.5**	**$ 261.9**	**474.9**	**861.4**	**1,625.6**	**2,384.9**	**3,178.8**	**4,000.7**	**4,614.4**	**5,210.6**	**5,825.2**

CERTIFICATE OF MAILING

I hereby certify that a true and correct file-stamped copy of the above and foregoing **DECISION AND ORDER REMEDY** was mailed on the 11th day of May, 2004, by United States mail, postage prepaid thereon, and transmitted by facsimile to the following:

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