**No. 13-109335**

# In the Supreme Court of the State of Kansas

**Luke Gannon, *et al.*,**

Plaintiffs-Appellees-Cross-Appellants,

v.

**State of Kansas,**

Defendant-Appellant-Cross-Appellee.

Appeal From Appointed Panel
Presiding in the District Court of Shawnee County, Kansas

Honorable Franklin R. Theis
Honorable Robert J. Fleming
Honorable Jack L. Burr

District Court Case No. 10C001569

## RESPONSE BRIEF OF CROSS-APPELLEE

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Oral Argument: One Hour

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*Ryan Montoy, et al. v. State of Kansas, et al.*, Supreme Court of the State of Kansas, Case No. 92,032, February 12, 2012 (slip opinion).

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*Dianne Petrella, et al., v. Sam Brownback, et al.,* United States District Court for the District of Kansas, Case No. 10-CV-2662-JWL-KGG , Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Declaratory Relief (excerpts).

## I. NATURE OF THE CASE/CROSS-APPEAL

Not satisfied with a Panel decision awarding them approximately $500 million in state funding, the Plaintiff Districts[1] press this Court in their cross-appeal to in fact award even more, perhaps as much as $1.5 billion in new state funding, even though Plaintiff Districts do not claim – and the Panel did not find – that the current school finance statutes are themselves unconstitutional. Instead, Plaintiff Districts just want more money.

Further, Plaintiff Districts claim a "fundamental" right to education – alternatively argued as either a claim under Article 6 of the Kansas Constitution, an equal protection claim purportedly under federal or Kansas law, or a substantive due process claim under the Kansas Constitution – all in an effort to persuade this Court to apply a heightened level of scrutiny. That said, the Plaintiff Districts are remarkably unclear about the level of scrutiny they believe applicable to their claim and, in any event, they are wrong in their legal assertions and arguments.

The bulk of Plaintiff Districts' cross-appeal brief is nothing more than a lengthy "novel" on the "facts" of school finance in Kansas as the Plaintiff Districts see those facts. Indeed, some of the "facts" were not adopted or found by the Panel, and others are either largely irrelevant or undisputed.

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[1] In this brief, the plaintiffs are referred to as "Plaintiff Districts." Although the named plaintiffs in this litigation include, along with four local school districts, individual In this brief, the plaintiffs are referred to as "Plaintiff Districts." Although the named plaintiffs in this litigation include, along with four local school districts, individual students and their parents, let there be no mistake that this appeal is brought by the four local school districts. As discussed in the text, the individual named plaintiffs in the case did not present evidence supporting any claim; in fact, the individual plaintiffs never even appeared at trial, much less testified or put on evidence to support a claim. This case is about educators who want more money for the schools that employ them, not students and parents who are making such demands.

At bottom, the Plaintiff Districts' opening cross-appeal brief demonstrates precisely what they are asking this Court to become: the Special Master of the Kansas public school system, at least in terms of financing that system, which is by far the single largest item in the annual budget of the State of Kansas. Plaintiff Districts no longer want to live with the traditional democratic process; instead they seek to have this Court supervise – on an annual basis – the "suitable provision for finance" of Kansas public schools.

## II. STATEMENT OF THE ISSUES ON THE CROSS-APPEAL

1. Should this Court retain jurisdiction of this case indefinitely and perhaps permanently for the purpose of preventing the Governor or the Legislature from enacting any changes to the financing of Kansas schools in any way with which the Plaintiff Districts might disagree, or for the purpose of ordering the Legislature and the Governor to enact and rubber stamp funding in the amount of $5944 in Base State Aid Per Pupil ("BSAPP") for FY2014 as the Plaintiff Districts demand?
2. Did the Panel arbitrarily disregard undisputed evidence or act with bias, passion or prejudice in rejecting the Plaintiff Districts' demand for nearly one billion dollars *more* in annual state aid for primary and secondary public schools than the almost $500 million increase the Panel in fact ordered?
3. Do the Plaintiff Districts have standing to assert a "fundamental" right to education claim under Kansas law; if so, is there such a claim; and, if so, what level of judicial scrutiny applies to such a claim?
4. Did the Panel err in finding the Plaintiff Districts failed to prove a federal or Kansas equal protection violation?

5. Did the Panel err in finding the Plaintiff Districts failed to prove a substantive due process violation under the Kansas Constitution?

6. Did the Panel properly conclude that the State cannot be required to make FY2010 capital outlay aid payments?

7. Did the Panel err in denying the Plaintiff Districts' request for attorney's fees given the "American Rule" that each party bears its own attorney's fees in the absence of a statutory authorization to the contrary, and the complete absence of authority in Kansas law for any attorney's fees award in this case?

## III. STATEMENT OF FACTS

### A. Introduction

The Cross-Appeal primarily challenges the Panel's judgment concerning the remedy entered on Count 1 (the Plaintiff Districts' claim that the level of funding provided violates Kan. Const., art. 6, § 6). The Plaintiff Districts argue that the Panel's order that the State provide almost $500 million in additional school funding next year is inadequate. The Plaintiff Districts also argue that the Panel erred in rejecting the claims in Count 2 (the lack of an appropriation for capital outlay state aid in FY2010), Count 4 (alleged deprivation of substantive due process rights), and Count 5 (alleged denial of equal protection rights).

The Panel's holding that current funding of public primary and secondary education violates Article 6, § 6 of the Kansas Constitution is the subject of the State's appeal. All of the relevant facts are stated in the State's Opening Brief. Brief of Appellant, at 2-25. Where possible, those facts are not repeated here.

The Plaintiff Districts' "Statement of Facts" intertwines argument, extensive citation to Plaintiff Districts' Trial Brief, R. Vol. 1, Pl. Ex. 1, pp. 1-165, and a

reformatted version of Plaintiffs' Proposed Findings of Fact. R. Vol. 13, pp. 1586-1719. The State, in contrast, attempts to limit its discussion of the facts to those findings and the absence of findings on topics relevant specifically to the Cross Appeal.

### B. The Plaintiff Districts' "Statement of Facts" Includes Findings Which The Panel Declined To Make

As explained in the State's Opening Brief, this Court cannot accept findings that are merely the Panel's substituted judgment for the Legislature's presumed findings. *See* Brief of Appellant, at 57-61. However, the Plaintiff Districts' "Statement of Facts" in their cross-appeal brief goes even further, arguing "facts" that the Panel did not find.

Specifically and importantly, the Panel did not adopt the following proposed findings of "fact" the Plaintiff Districts proposed at trial:

> 61. The individual Plaintiffs named in this lawsuit are representative of all of the students in the Plaintiff School Districts. . . . This is consistent with findings in previous school finance decisions. . . .
>
> 62. Teachers, principals, and administrators from each of the Plaintiff School Districts testified that they were unable to provide a "suitable education" to all of the students in their classrooms, buildings, and districts. . . .
>
> 64. Regardless of this Court's determination of what constitutes a "suitable education," this Court can — and does — determine that the State is not meeting its constitutional obligation to fund a "suitable education" because the State fails to provide an education that meets "the legislature's own definition of suitable education.". . .
>
> 93. While this Court does consider accreditation standards as a base measurement, this is not an accurate and complete measure of whether students are receiving a "suitable education." . . .
>
> 139. With significant numbers of students graduating from Kansas schools unprepared for college and/or a career, it is not enough for the State to focus solely on inputs (*i.e.* - assert school districts are accredited). . . .
>
> 187. When the Kansas Legislature made cuts to the base, they did not consider the costs. *See* Hensley Tr. Test. 2467:7-2468:14, 2469:15-

2470:11; Winn Tr. Test. 755:22-25; 777:5-778:8. They simply considered what they needed to do to reduce funding to education. *See id*.

193. The record further shows that, often times, despite having information regarding the actual costs available to them, the Legislature would ignore the information rather than take it into consideration; Senator Hensley testified "my opinion is that we [the Legislature] conduct studies and then routinely ignore them." *See* Hensley Tr. Test. 2458:15-2460:24; *see also* Hensley Tr. Test. 2458:15-2460:24, 2467:24-2468:14; Winn Tr. Test. 774:14-775:2, 778:5-18; Chronister Tr. Test. 3262:20-24, 3268:6-10 (stating the Legislature ignored various reports provided by the 2010 Commission). [The legislator "testimony," cited in Proposed Findings 187 and 193, was part of an offer of proof made after the Panel had ruled it inadmissible. *See, e.g.,* R. Vol. 30, pp. 2466-69. The Plaintiffs did not appeal these evidentiary rulings.]

234. Had the State complied with its obligation to determine the actual costs of providing a "suitable education," instead of relying on outdated data, the results would show that education in Kansas is significantly underfunded.

244. Based on the above [other proposed findings the Panel rejected], the only conclusion regarding the underfunding of Kansas education is that it is knowing and deliberate. Additionally, because of this history, it is highly likely that the State will continue to underfund Kansas public education in the absence of a court order directing otherwise.

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

373. Because of the increased demands associated with the Common Core standards, without significant changes in the system to address the new standards, proficiency rates [on standardized tests] will likely go down because the new standards are much higher. Compare Tr. Ex. 62 with Tr. Ex. 166 and Tr. Ex. 167.

375. There is no increased financial support given to the districts in order to allow them to comply with the increased demands associated with the more rigorous Common Core standards. . . .

> 387. Additionally, often times, as in Kansas, the weightings that are used "wash out" or counterbalance any benefits of weightings for students of poverty or ELL students. See Baker Tr. Test. 1288:25-1292:13; Tr. Ex. 384 ("Districts with higher concentrations of children qualified for free or reduced price lunch receive no statistically significant additional support in general fund budgets. That support is entirely washed away by other provisions in the general fund weighting scheme."). (parentheticals in original)
>
> 442. The current standards in Kansas, under the QPA, do not reflect "high academic standards.". . . Moreover, Kansas standards are low compared to other states. See Tr. Ex. 86, at 28-31.
>
> 443. Moreover, students are not achieving "improvement in performance," and instead, rates of improvement on state assessments have significantly decreased. . . .
>
> 459. Because of cuts in these areas, student achievement is declining. See e.g. Feist 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. And in the process they are not getting the same education that they have had in the past at Dodge City High School.")

*Compare* R. Vol. 14, pp. 1775-1805 (Opinion, pp. 56-86, 159-76) and R. Vol. 13, pp. 1586-1719.

### C. The Panel Did Not (And Could Not) Find That A Single Kansas Student Was Deprived Of The Opportunity For An Education Because Of The Present Financing Of K-12 Schools

The Panel found the *only* evidence provided concerning the named individual student plaintiffs and their parents was their respective names and schools of attendance. R. Vol. 14, p. 1939 (Opinion, p. 219). Thus, the Panel concededly had no basis from which to find the student and parent plaintiffs have suffered or will suffer any injury from the State's school finance decisions.

Moreover, the Panel made no findings about opportunities for an education provided to any particular student or student group. It did not find that a single school district lacked the ability to provide required educational opportunities because of lack of funding or otherwise. There is no Panel finding that a single student scored below "meets standard" (or non-proficient) on any test because of the lack of an opportunity to learn the material tested. No finding was made as to why any student scored below "meets standard," did not graduate within four years, or graduated without college or career ready skills. Likewise, the Panel made no finding that Kansas local districts are unable to provide the education required under Kansas accreditation statutes and regulations.

In contrast to the trial court's findings in *Montoy,* Brief of Appellant, Appendix E, at A75, the Panel did not find that the school districts most in need of funding are provided the least under present funding formulas. Rather, the Panel held that the Plaintiff Districts failed to establish *any* inequity in the weighting factors in the School District Finance and Quality Performance Act ("SDFQPA"), K.S.A. 72-6405, *et seq*. R. Vol. 14, pp. 1949-51. Thus, in stark contrast to *Montoy*, the Plaintiff Districts here cannot and do not complain about the funding formulas; they only argue that they want more money overall.

The Panel did not find any impact on individual districts or students or parents from the alleged wealth-based tax disparities from "cuts" to the BSAPP or from reductions of "equalization" state aid relating to Local Option Budget ("LOB") [ *i.e.*, supplemental state aid] or capital outlay funding [*i.e.*, capital outlay state aid]. The Panel (1) did not find a correlation between lower tax levies in districts with greater assessed property values or greater tax levies in districts with lower assessed property values; (2)

did not find that districts with lower assessed property values are unable to provide the education required under Kansas accreditation regulations and statutes; (3) made no finding that less than full funding of supplemental state aid created unequal educational opportunities; and (4) did not find that capital outlay expenditures will be critical or even important in FY2013 or FY2014, much less that lack of capital outlay state aid has or will create unequal educational opportunities.

### D. The Panel Did Not Even Attempt To Determine The Actual Cost For Suitable Provision For The Finance Of K-12 Schools

Perhaps most important to the cross-appeal, and conspicuously absent from the Panel's Opinion, is any attempt by the Panel to determine the actual costs to fund primary and secondary public education in this State. The State is not suggesting that the Panel should have invaded the Legislature's discretionary judgments in this complicated and ever-changing area of public policy, but points out the absence of any findings on actual costs in the Panel's otherwise detailed Opinion in part because the Plaintiff Districts rely so heavily on arguments that costs must have increased over time. The Panel explained:

> The *Montoy* decisions required a factual basis for any funding decision to be made under the Kansas school finance system. Here, such requirement is equally applicable to us. . ..
>
> While evidence has been presented about the likely increases in costs to be brought to our school system due to increased standards and the State's Waiver from the No Child Left Behind Act, exactly what those exact costs are likely to be has not been presented to us. ...
>
> Further, as a constraint on us, we must consider the *Montoy* decision itself...
>
> ... [W]e find the *Montoy* decision both conservative and highly deferential to legislative choice when made on facts presented to, and obviously considered by, the Legislature. Certainly, the recommendations reflected by the cost studies could support a finding for a higher value for the

> BSAPP with *Montoy IV* being seen as acceptance of the figure decided upon as within an acceptable range.
>
> ... [O]ur opinion here is that without additional facts regarding costs, having found the studies valid, and given *Montoy's* acceptance of threshold compliance at a FY2009 threshold BSAPP of $4433, our range of independent reaction to the evidence is substantially constrained and circumscribed by the noted lack of new facts and the affect [sic] of the *Montoy* precedent.

R. Vol. 14, p. 1955-59 (Opinion, pp. 236-39, emphasis supplied). Ultimately, the Panel rejected the Plaintiff Districts' following proposed finding:

> 234. Had the State complied with its obligation to determine the actual costs of providing a "suitable education," instead of relying on outdated data, the results would show that education in Kansas is significantly underfunded.

*Compare* R. Vol. 14, pp. 1793-94 (Opinion, pp. 73-74) *and* R. Vol. 13, p. 1654.

### E. The Panel Substituted Its Judgment For That Of The Legislature On Whether Cost Studies Were "Valid"

#### 1. The Panel Approved Estimates In The A&M And LPA Studies, Even Though It Recognized That They Were Outdated

Although the Panel improperly substituted its judgment for the Legislature's, it accepted, "as valid," the Augenblick & Myers "Calculation of the Cost of a Suitable Education in Kansas in 2000-2001 Using Two Different Approaches," dated May 2002 ("A&M Study"), R. Vol. 71, Pl. Ex. 203, and the LPA "Elementary and Secondary Education in Kansas: Estimating the Costs of K-12 Education Using Two Approaches," dated January 2006 ("LPA Study"), R. Vol. 70, Pl. Ex. 199. *See* R. Vol. 14, p. 1957 (Opinion, p. 238). Yet, the Panel limited this finding by stating the estimates of actual cost were reasonable "at the time they were conducted." R. Vol. 14, p. 1804 (Opinion, p. 85). The Panel also adopted Plaintiff Districts' Proposed Finding 279, which reads:

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

*Id.*

### 2. The Panel Made Policy Judgments In Selecting Or Approving Particular Studies, And Thus Improperly Overrode The Legislature's Presumed Findings

The Legislature had ample reason to question the validity of the BSAPPs recommended in the A&M and LPA Studies. The A&M and LPA Studies are both based on old data and challenged methodologies, and are aimed at achieving targets for student achievement that are no longer relevant. The Legislature expressed the clear intention not to be bound by any study's recommendations with the passage of K.S.A. 2012 Supp. 46-1226 (cost studies "shall not be binding upon the legislature" and the Legislature "may reject, at any time, any such analysis, audit or study and any conclusions and recommendations thereof").

Neither the A&M nor the LPA Study attempted to estimate FY2013 or FY2014 costs. The A&M Study estimated costs for three to five years, but recommended a new study thereafter. R. Vol. 25, pp. 1661-62. The LPA Study was only designed to estimate costs for 2006 and 2007. R. Vol. 27, pp. 2044-45.

Additionally, all experts testifying at trial criticized both of the two methods the A&M Study used to arrive at its cost estimates. None of the experts felt that the "successful school approach" to determine costs – the first of two approaches used in the A&M Study – had any value. *E.g.,* R. Vol. 24, pp. 1421-23. The A&M Study acknowledged that the "professional judgment" methodology, the Study's second approach, typically generates higher cost estimates. R. Vol. 25, pp. 1673-75. Dr. Eric Hanushek explained the professional judgment methodology generates a "wish list." R.

Vol. 28, p. 2272. He explained that, logically and understandably, teachers and administrators are not able to estimate actual costs to achieve desired outcomes, in part, because social scientific studies have not identified the strategies that can produce the desired outcomes. *Id*., pp. 2267-81. Even the Plaintiff Districts' expert, Dr. Bruce Baker, acknowledged that teachers and administrators are likely to be biased in favor of the strategies they themselves are using in classrooms, even though there often may be superior or equally effective strategies which cost less to implement. R. Vol. 24, pp. 1417-21.

The LPA Study's "inputs" cost calculation produced an estimate which required a range of higher BSAPPs, but which did not include weighting factors. R. Vol. 70, Pl. Ex. 199, p. 3948. That Study's "output" analysis was premised on the assumption that undirected increases in money to school districts will increase academic achievement. But a peer-reviewed and published statistical study, reviewing the same data used by the LPA Study, concluded there was little or no correlation between the amounts Kansas schools spent and their students' achievement. R. Vol. 108, Df. Ex 1009, pp. 8825-47.

Moreover, the LPA Study calculated the spending baseline by employing data about how much Kansas schools spent in the 1999-2000 to 2003-04 school years. R. Vol. 70, Pl. Ex. 199, p. 3952. The economic efficiency of that spending was not questioned. *See Id.*, p. 4055; R. Vol. 24, pp. 1431-38. Thus, the LPA Study necessarily failed to evaluate whether there are less costly methods to produce achievement on the Kansas assessment tests than those used in the 1999-2000 through 2003-04 school years. Indeed, this is an inherent flaw in virtually all, if not all, cost studies, as the Legislature recognized when it declined to be slavishly bound to such cost studies: an awfully lot

depends on the premises and assumptions made for a study, and *all* studies make numerous assumptions and start from numerous premises. *See* K.S.A. 2012 Supp. 46-1226.

Both the A&M and LPA Studies were specifically designed to estimate the amount of money needed for students to meet the then-existing state achievement standards as measured by Annual Yearly Progress ("AYP"). R. Vol. 72, Pl. Ex. 203, p. 4127; R. Vol. 70, Ex. 199, pp. 3950-52, 4856-57. Under both studies, the "outputs" assessments effectively incorporated Kansas' AYP goals set to obtain federal funds under the Elementary and Secondary Education Act, known as the No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. §§ 6301, *et seq*. The A&M Study's "professional judgment" approach used panels of "qualified persons" to identify what was needed to obtain a "suitable education" as defined in the study. R. Vol. 72, Pl. Ex. 203, pp. 4127, 4132. The LPA Study's cost function analysis tried to statistically determine the costs to achieve desired outputs. R. Vol. 70, pp. 3950-52. This study's suitable education definition required, as outputs, achieving the AYP percentages of students scoring "meets standard" or above on the annual Kansas assessment tests in math and reading and targeted graduation rates. *Id.*, pp. 3950-52, 4856-57.

The A&M and LPA Studies' focus on AYP, however, is far outdated and now irrelevant. The Kansas Waiver changed accountability measures, implementing a multi-dimensional look at student performance reviewed against Annual Measurable Objectives ("AMOs") that replaced AYP performance targets. R. Vol. 115, pp. 15607-09; R. Vol. 116, pp. 15901-17, 15921-31.

Moreover, even if the AYP paradigm had not been replaced, Kansas assessments are designed to test whether students have grade level proficiency in the subjects tested. R. Vol. 116, p. 15936-37; R. Vol. 112, Df. Ex. 1130. One problem with relying on any particular cost study is that, necessarily, student achievement tests are tied to the State's education standards which have proven to be a constantly moving target. R. Vol. 31, pp. 2711-12. For example, the standards, school curricula and assessment tests all have changed significantly since the 2006 LPA Study. R. Vol. 27, p. 2114; R. Vol. 49, pp. 1647-53, 1662; R. Vol. 58, pp. 2683-84, 2701-03; R. Vol. 116, p. 15959. Most recently, the Kansas NCLB Waiver incorporated use of the Common Core Standards ("CCS"), adopted in Kansas in 2010, R. Vol. 116, p. 15958.

### F. The Panel Made No Findings Quantifying Any Increase In Actual Costs

#### 1. The Panel Stopped Short Of Finding "Updates" Of The Cost Studies To Be Valid Or Accurate

The Panel adopted Plaintiff Districts' Proposed Findings which recited the BSAPPs calculated as "updates" of the A&M and LPA Studies. R. Vol. 14, p. 1777-78 (Opinion, pp. 58-59). One update calculated a BSAPP for FY2012 of $5,965 by merely applying a standard inflation rate to the BSAPP for 2001 which the A&M Study had recommended. R. Vol. 71, Pl. Ex. 209, pp. 4261-62 & Ex. 211, p. 4276. Separate from its Study, the LPA extrapolated BSAPPs of $6,142 for FY2013 and $6,365 for FY2014, assuming progressively more spending was required to satisfy the ever-increasing AYP targets required by No Child Left Behind before the Kansas Waiver. Vol. 69, Pl. Ex. 197, pp. 3898-99. However, the author of the LPA "update" testified that he was uncomfortable using the 2006 study's data to predict costs in 2013 or 2014, explaining

the further one gets from the original data the less predictive the estimate. R. Vol. 27, pp. 2044-45.

In any event, the Panel's findings do not accept "as valid" or otherwise conclude that the study updates accurately estimate present costs. The Panel did *not* make the following finding that the Plaintiff Districts proposed:

> 281. The studies acknowledged that "the estimate base-level cost of meeting standards will continued to increase significantly in future years, because the standards adopted by the Board increase each year until 2013-14." Additionally, comparing the standards during the years these studies were conducted to the current standards shows that the demands associated with the standards have continuously increased over time.

*Compare* R. Vol. 14, pp 1804-05 (Opinion, pp. 85-86) *and* R. Vol. 13, pp. 1665. Rather, the Panel did its own comparison of the A&M and LPA Studies, holding that "it is our analysis that controls our ultimate conclusions." R. Vol. 14, p. 1805 (Opinion, p. 86).

Central to both the State's appeal and this cross-appeal, however, is the Panel's determination that it would calculate the BSAPP allegedly required to comply with Article 6 based solely on state-appropriated funds, pointedly ignoring significant and regular sources of school funding known to and relied upon by the Legislature such as federal dollars and LOB funds. *See, e.g., id.*, p. 1823, n.6 (Opinion, p. 104, n.6). Moreover, the Panel did not – contrary to Plaintiff Districts' urging in this cross-appeal – use either of the BSAPPs calculated in the "updates" to the A&M and LPA Studies. R. Vol. 14, pp. 1820, 1822, 1824 (Opinion, pp. 101, 103 at n.3, 105 at n.10).

### 2. The Panel Made No Findings Quantifying Any Increase In Actual Costs That May Have Occurred Because Of Changes In Educational Standards Or Other Factors, Such As The NCLB Waiver, The Adoption Of The Common Core Standards, New Board Of Regents College Admission Requirements, Or Changes In Kansas Demographics

Costs associated with implementation of the Kansas Waiver, CCS and Regents' admission requirements are tied together. The Waiver adopted continued compliance with the CCS. The CCS is designed to provide students with the required knowledge and skills to be "college or career ready" upon graduation. R. Vol. 27, p. 2084. The Board of Regents committed to allowing high school graduates who score proficient or above in subjects on Kansas assessment tests aligned with the CCS to immediately take credit courses in those subjects. R. Vol. 116, pp. 15937-39; R. Vol. 115, Df. Ex. 1300, Attachment 5, pp. 15765-67.

The Panel found that "[w]hile evidence has been presented about the likely increases in costs to be brought to our school system due to increased standards and the State's Waiver from the No Child Left Behind Act, exactly what those exact costs are likely to be has *not* been presented to us." R. Vol. 14, p. 1955 (Opinion, p. 236, emphasis added).

After the trial, the LPA completed a study estimating potential costs related to implementation of the Kansas Waiver. Plaintiff Districts attached that report to their Cross-Appeal Brief, and that study concludes that local districts are likely to incur only between $2 million and $10 million in real (additional expense above currently budgeted funds) or opportunity (other professional training deferred or replaced) costs to implement the Waiver in FY2013, and a cumulative total of $32 million to $60 million in real or opportunity costs, including the FY2013 costs, *over the next five years*. *See* Brief

of Cross-Appellant, Addendum B, at A58. In other words, the Study opined that the added money or loss of time because of the "increased demands," which Plaintiff Districts have emphasized, is a fraction of the actual $35 million increase the Legislature actually appropriated in the State General Fund for FY2013. *Compare* Appellant's Brief, Appendix A, p. A11, col. 21(d) *and* R. Vol. 37, Pl. Ex. 12, p. 317, col. 21(d).

The Panel also did not find any increase in demands on local districts that was unaccounted for by the SDFQPA, as a result of changing student demographics. More funds are provided to local districts for every increase in student enrollment. Brief of Appellant, Appendix B, at 2. Further, as the Panel acknowledged, the BSAPP is the starting point for application of weightings to arrive at a school district's General Fund balance. R. Vol. 14, pp. 1807-08 (Opinion, pp. 88-89). Thus, for example, the weightings increase funds to districts by each increase in at-risk or ELL student enrollment. Brief of Appellant, Appendix B, at 7-8. Application of the weightings provided U.S.D. 259, Wichita, for example, results in approximately $147 million more in FY2013, nearly twice the pre-weighted sum. *Id.*, Appendix C, p. A39.

### G. The Panel's "Underfunding" Conclusion Applies Only To K-12 State General Fund Appropriations, Not To The Total Actual Funds Provided And Available To School Districts

The Plaintiff Districts' Statement of Facts emphasizes two of the Panel's findings without putting them in proper context. First, in the "Conclusion and Summary" of its Opinion, the Panel stated that the "State's K-12 educational system now stands as unconstitutionally underfunded." R. Vol. 14, p. 1948 (Opinion, p. 229). Second, the Panel adopted Plaintiff Districts' Proposed Finding 260, which reads:

> 260. Public education in Kansas is currently underfunded. *See e.g.* Tr. Ex. 245. The dollars available for general operating purposes are at the

> lowest level in Kansas history since 2006. *See* Tr. Ex. 328, at SIG—KASBOO0338; Tallman Tr. Test. 1044:16- 1045:14.

R. Vol. 14, p. 1799 (Opinion, p. 80).

It is critical that this Court understand that the Panel's findings did not address *all* sources of revenue regularly available to districts; in particular, the Panel ignored federal funding and LOB funding. When all sources are counted, Kansas schools have available total funding that closely approximates and most likely exceeds the $500 million in additional BSAPP the Panel ordered. *See* Brief of Appellant, at 3-9.

The Panel described the State "General Fund" [described in the SDFQPA at K.S.A. 2012 Supp. 72-6410 as "state financial aid"] as follows:

> The Kansas school finance formula denominates, principally, "BSAPP", which is the base student aid per pupil, as the beginning basis for weightings to arrive at a school district's "general fund" for budgeting purposes. The "BSAPP" in the Kansas school finance formula is an unweighted sum. The "general fund" is, of course, the weighted operating fund.

R. Vol. 14, p. 1807-08 (Opinion, pp. 88-89).

The Panel's two findings merely express a comparison of the State's adopted General Funds in FY2012 and FY2013 to funding levels at the higher $4,492 BSAPP stated in K.S.A. 2012 Supp. 72-6410(b)(1). Plaintiff Districts' Exhibit 245, R. Vol. 80, pp. 5511-20, is the support Plaintiff Districts cite for Fact Finding 260. R. Vol. 14, p. 1799 (Opinion, p. 80). The important part of that exhibit compares FY2012 State General Fund and LOB funding, which used a $3,780 BSAPP, with hypothetical funding if the $4,492 BSAPP had been employed. The approximate $500 million difference in the hypothetical State General Fund when the higher BSAPP is used consists mostly of an increased General Fund because the allowable LOB is calculated with a $4,433 BSAPP.

K.S.A. 2012 Supp. 72-6433d. But LOB revenue and federal funding are not counted as State General Fund aid. *E.g.,* R. Vol. 37, pp. 299-317. Again, the adopted LOB in FY2012 alone was approximately twice the difference between the FY2012 State General Fund appropriation and the hypothetical General Fund appropriation that the Plaintiff Districts are demanding. *Id.*, p. 317, col. 22(c) & (d).

### H. The Panel Did Not Find That The Current School Accreditation Requirements Are Constitutionally Inadequate In Any Respect

The Panel declined to make the Plaintiff Districts' following proposed findings:

> 93. While this Court does consider accreditation standards as a base measurement, this is not an accurate and complete measure of whether students are receiving a "suitable education." . . .
>
> 139. With significant numbers of students graduating from Kansas schools unprepared for college and/or a career, it is not enough for the State to focus solely on inputs (*i.e.* - assert school districts are accredited). . . .
>
> 442. The current standards in Kansas, under the QPA, do not reflect "high academic standards.". . . Moreover, Kansas standards are low compared to other states. See Tr. Ex. 86, at 28-31.
>
> 443. Moreover, students are not achieving "improvement in performance," and instead, rates of improvement on state assessments have significantly decreased. . ..

*Compare* R. Vol. 14, pp. 1775, 1888 (Opinion, pp. 56, 169) *and* R. Vol. 13, pp. 1608, 1620, 1710.

The Panel's rejection of these findings is telling. Plaintiff Districts presented no evidence that any district or school is unable, because of lack of funds, to satisfy the rigorous accreditation requirements Kansas implemented after *Montoy*. In fact, all primary and secondary public schools in Kansas are accredited. R. Vol. 23, p. 1075; R.

Vol. 27, p. 2124; R. Vol. 112, pp. 12765-833. No evidence was presented that any Kansas schools will be unable to successfully meet the AMOs under current funding levels.

The Panel expressly held that Plaintiff Districts failed to prove that the educational standards, which are the bedrock Kansas' accreditation requirements, are too low. R. Vol. 14, p. 1870 (Opinion, p. 151) ("No standards currently in effect, or in the process of implementation, stand here challenged [as] to their suitability by education professionals, except by Plaintiff Districts' expert Dr. Baker who raises, but which we find Plaintiff Districts have not proved, questions of whether, in fact, they are too low."). Instead, the Panel adopted findings the Plaintiff Districts proposed that the constitutionality of Kansas school finance under Article 6 should be measured by percentages of Kansas students who have not received a "suitable education." R. Vol. 14, pp. 1880 [finding 405], 1881 [finding 407], 1894 [finding 451] (Opinion, pp. 161, 162). *See also*, R. Vol. 14, 1895 [finding 453] (Opinion, p. 176) ("The State is failing to meet its [performance] obligation with regard to a significant number of Kansas students.").

The Panel did not define what it meant by "suitable education" in these findings, not surprisingly given that there is no obvious or precise constitutional definition for a term that is never mentioned in the Kansas Constitution. Instead, the Panel seemed to focus on purported failures to achieve AYP, a measure that is no longer relevant under either Kansas or federal law. More fundamentally, however, the real problem with defining a virtually undefinable (and not constitutionally required) concept like "suitable education" is the undisputed fact that no teacher, school, district, or State has found a way to satisfactorily educate *every* student. *See* Brief of Appellant, at 74-76.

For example, student achievement gaps have always existed and are a national concern. R. Vol. 11, p. 1396, ¶ 231 (citing R. Vol. 28, p. 2123; R. Vol. 25, pp. 1524-26). No school district anywhere has been able to fully close the gaps, *id.*, a fact that is hardly surprising given that social and family background factors generally far beyond a school's ability to control influence achievement gaps. *Id.* Nonetheless, Kansas has made progress in narrowing achievement gaps. R. Vol. 11, p. 1396, ¶ 232.

When analyzed against the new API, two important conclusions emerge: (1) Kansas test scores within every performance category have *increased* since 2000; and (2) the gap between the lowest performing students and highest performing students *has narrowed*. R. Vol. 115, p. 15608-09. In January of 2012, the Kansas Association of School Boards ranked Kansas public education among the top 10 of all states in the "all student" and "free and reduced lunch" categories for reading and math, based on NAEP scores for the past several years. R. Vol. 23, pp. 1127-28; R. Vol. 58, pp. 2734-49. A more complete description of the success of Kansas schools, particularly in comparison to other states, is found in Brief of Appellant at 16-21.

Thus, the Panel's "suitable education" findings do not undercut the propositions that current Kansas school accreditation is adequate (based upon improvement in performance), reflects high academic standards, and is measurable.

### I. The Panel Did Not And Could Not Find That The State Intentionally Or Deliberately Denied Educational Opportunities To Any Student

In spite of the Panel's refusal to find that any Kansas student has been denied the opportunity for an education, the Plaintiff Districts assert a violation of the "fundamental" right to education, a deprivation of equal protection of the laws, and a

substantive due process violation. They asked for, but the Panel declined to make, the following finding:

> 244. Based on the above [other proposed findings the Panel rejected], the only conclusion regarding the underfunding of Kansas education is that it is knowing and deliberate. Additionally, because of this history, it is highly likely that the State will continue to underfund Kansas public education in the absence of a court order directing otherwise.

*Compare* R. Vol. 14, p. 1796 (Opinion, p. 76) *and* R. Vol. 13, p. 1655. The Panel wrote instead that "for Plaintiffs' claim to stand independently as a constitutional equal protection violation, it needs to be hinged to a deliberate, or so obvious by impact, intent by the actor to do so, here, the State .... We find no such intent displayed by the evidence before us." R. Vol. 14, p. 1941 (Opinion, p. 221).

### J. The Legislature Appropriated No Money For The Capital Outlay State Aid Fund For FY2010 And State Board Of Education's Request For Such Funds Did Not Occur Until After The Legislature Made FY2011 Reappropriations

As part of the cross appeal, Plaintiff Districts demand a writ of mandamus to require payment of an alleged appropriation for FY2010 capital outlay state aid. The Panel certified a class composed of "[a]ll Kansas school districts that were or will be certified by the Kansas Board of Education to receive capital outlay state aid funding pursuant to K.S.A. 72-8814, as amended, for fiscal years 2009-2010, 2010-2011, and 2011-2012." Vol. 5, p. 741. The claims of the class were "limited to monetary damages for payment of aid for the fiscal years 2009-2010, 2010-2011, and 2011-2012." *Id.* However, Plaintiff Districts' cross appeal only concerns FY2010 capital outlay state aid.

Section 66(b) of the FY2010 Omnibus Appropriation Act provided:

§ 66(b).:

> There is appropriated for the above agency [Department of Education] from the following special revenue fund or funds for the fiscal year ending June 30, 2010, all moneys now or hereafter lawfully credited to and available in such fund or funds, except that expenditures other than refunds authorized by law and transfers to other state agencies shall not exceed the following:
>
> ***
>
> School district capital outlay state aid fund..... No limit

2009 Kan. Sess. Laws ch. 124, § 66(b). The act did not otherwise mention capital outlay state aid. *Id.*

The Legislature intentionally did not appropriate money for capital outlay state aid in FY2010 because legislators decided it was more important to put the limited resources available into general state aid. R. Vol. 104, pp. 8180-81, 8191–96, 8208. Moreover, even if any sums were technically appropriated for FY2010 capital outlay state aid, the funds were later removed by "allotment." *Id.*, pp. 8202, 8217–20; R. Vol. 95, p. 6966. Then 2010 House Substitute for Senate Bill No. 572 became law on June 10, 2010 and reappropriated all unencumbered FY2010 balances for use in FY2011. *Id.* § 79(a). Thus, no money ultimately was placed into the capital outlay state aid fund for FY2010, R. Vol. 104, p. 8199, and the Panel had no factual basis to consider the relief the Plaintiff Districts requested. *Id.*, p. 1925 (Opinion, p. 205).

## IV. ARGUMENT AND AUTHORITIES

### Introduction to the Argument

Plaintiff Districts attack and attempt to demonize the Legislature. Sadly, such demagoguery is frequently used in political debate by those who fail to accomplish their political objectives through the democratic process. After electing representatives, lobbying, campaigning, and editorializing, those who could not persuade the Legislature

to provide more state funding for education may well be disappointed. That disappointment, however, does not justify *ad hominem* attacks on legislators and attempts to demonize the Legislature, such as Plaintiff Districts' claims (in a legal brief, not a political forum!) that since the 1960s the Kansas Legislature and its members have been willfully "maneuvering" and "feign[ing] 'good faith compliance'" with constitutional requirements, but all the while purposely providing inadequate funding to Kansas schools at the expense of "each successive generation of Kansas kids." Brief of Cross-Appellant, at 67.

This case is not *Brown v. Board of Education*, or even *Montoy v. State* for that matter. Here, unlike in *Brown*, there is no racial discrimination, no sorry history of oppressing minority classes of any kind, and no evidence that Kansas parents, teachers and schools lack a full and fair opportunity to pursue their objectives through the democratic process. Indeed, Kansas legislators are Kansans, Kansans who themselves have children, grandchildren, other family members, friends and neighbors who attend or have children who attend Kansas public schools. Moreover, every Kansas legislator is elected in free and open elections by constituents who have all sorts of connections to Kansas public schools, as well as interests in the very children currently obtaining an education in those schools.

The Plaintiff Districts' "us versus them" mentality and apparent suggestion that the legislators and the Legislature somehow want to harm generations of Kansas kids simply has no basis in fact. It has no contact with reality. Instead, there is no question that all parties in this litigation want each Kansas school to be a good school, and want

each Kansas child to receive a quality education. We may debate or have competing visions about how best to accomplish those goals, but we do share those objectives.

Once a public policy debate has been turned into litigation by one side of the debate, the courts must act within the settled framework for review of the constitutionality of legislative conduct. Courts are not an alternative public forum in which those disappointed by legislative outcomes get another shot at the political arena. The constitutional requirements for judicial review require that a plaintiff have standing to bring a particular constitutional claim and that any such claim be justiciable. Furthermore, courts generally are deferential to the resolution of complex political issues, accord legislative actions a presumption of constitutionality, and avoid the substitution of the judges' personal or policy judgments for those made by the people's elected representatives.

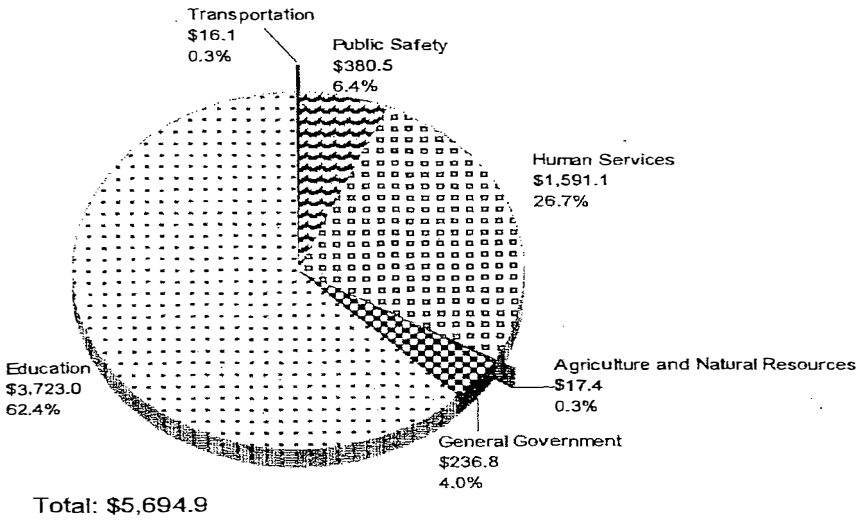
If a proper plaintiff brings a cognizable constitutional claim, and the court proceeds to the merits of a claim and finds a constitutional violation, any judicial remedy for the violation must itself respect the limits of the law (including appellate jurisdiction, the rules for the termination of litigation, and the scope of injunctive powers), the courts' co-equal branches of government, and the people of Kansas who have elected the other branches of government but not the courts. In fact, the people of Kansas have specifically granted the Legislature the exclusive authority to make appropriations in general and to make suitable provision for the finance of the State's schools in particular under the Kansas Constitution. Plaintiff Districts' hyperbole and vitriol does not further the legal resolution of this case.

That Plaintiff Districts begin their cross appeal by arguing that "this Court retain jurisdiction until the State wholly complies with its constitutional obligations" highlights the justiciability and remedy problems the State identified in its Opening Brief. In fact, if this Court accepts the Plaintiff Districts' interpretation of Article 6, § 6, school finance litigation and this Court's prominent role in it will never end; in the Plaintiff Districts' world, the courts wield super legislative powers, with the other branches of government necessarily playing a diminished, subservient role in school funding and educational policy.

The Plaintiff Districts want the Court to "retain jurisdiction" to order what the Panel declined to do in spite of the extraordinary relief it did purport to order – by judicial fiat dictate a massive increase of the BSAPP to $5,944. In this case, the Plaintiff Districts are not advocating for different educational standards or accreditation requirements, nor are they asking for particular classroom innovations or educational technology. Instead, the Plaintiff Districts are simply and solely asking this Court to order the Legislature and the Governor to spend hundreds of millions, if not billions, of dollars more on the public schools, essentially because Kansas statutes had targeted certain spending levels before economic conditions took a negative turn in recent years. In the Plaintiff Districts' world, the Legislature's only function when it comes to school finance is to write increasingly larger annual checks; in fact, no Legislature would really even be necessary under Plaintiff Districts' view – this Court could supervise annual funding for Kansas schools and a designated administrative official could issue checks to the school districts each year.

The Plaintiff Districts' view of the world is unrealistic and, more importantly, unconstitutional. The funding questions presented in the public education context are complex, multi-faceted, quickly evolving and policy-oriented. The choices that must be made are inherently political and legislative, which is why the people of the State of Kansas, through our Constitution, wisely vested the authority for deciding appropriations generally, and school financing specifically, in the Legislature and not in the courts. In fact, all educational expenditures account for 62.4% of the State's FY2014 General Fund budget. *See* following figure. Plaintiff Districts' cross-appeal demands reallocation or increase of an additional 17.5% for education. *See* figure below.

**FY 2014 Approved State General Fund Budget**
**by Function of Government**
**(Dollars In Millions)**




Kansas Legislative Research Department, "Supplement II to Preliminary Summary of Legislation, 2013 Kansas Legislature," p. 19 (June 12, 2013), <http://skyways.lib.ks.us/ksleg/KLRD/Publications/2013-preliminary-summary-supp-2.pdf>.

In the Plaintiff Districts' unrealistic and unconstitutional world, this Court is being asked to order that a breathtaking 80 cents of every State General Fund dollar collected by the State of Kansas be spent on education services, leaving only 20 cents of every dollar to pay for health care for the poor, public safety and the state prison system, social services for the aged, actuarially necessary contributions to the public employees retirement system, and all other vital public services financed with State General Fund appropriations. To accept Plaintiff Districts' request necessarily would require the following: (1) massively reallocate other portions of the budget to education, stripping bare the programs scheduled to be funded; (2) massively increase state revenue in some fashion (presumably by imposing dramatically higher taxes); or (3) employ some combination of the two.

Further, in Plaintiff Districts' unrealistic and unconstitutional world, where the Court accepts their invitation to supervise K-12 funding in an ongoing manner, the Court must also expect imposition of ongoing judicial oversight over higher education funding and into policy decisions concerning provision for educators' retirement benefits, pre-Kindergarten preparation, vocational training, parents-as-teachers, adult education and myriad of other current or possible programs that comprise the state's educational interests. Article 6, § 6 of the Kansas Constitution is simply not limited to K-12 funding; rather, its language speaks more broadly to the "educational interests of the state."

Litigation is neither the legally appropriate nor the practically desirable means for resolving these policy and resource allocation questions. At best, the courts can only take snapshots of student needs, educational policies, accreditation standards, educational objectives and tools, and the resources available for education, snapshots applicable to a

given point in time. Furthermore, courts have neither information about nor expertise regarding the other important programs in the State's budget, including the purposes, objectives, needs and importance of those other funding commitments. Lastly, it should go without saying that unelected judges are not the appropriate public officials to decide on tax increases, either in actuality (by ordering such increases as a matter of law) or effectively (by ordering relief that cannot be satisfied in any other realistic way). America was founded in part because of strong reaction against taxation without representation, and there is no reason to accept Plaintiff Districts' invitation to draw this Court into territory where no court actually belongs as a matter of constitutional law and common sense.

### A. The Court Should Reject The Plaintiffs' Invitation To Act As The Permanent Special Master Of Educational Finance In Kansas

That the Plaintiff Districts choose to begin their brief by arguing that "this Court should retain jurisdiction until the State wholly complies with its constitutional obligations" highlights the extraordinary nature of the relief they seek, and the unconventional role they are asking this Court to assume. To say that "[h]istory shows the State has been unwilling to meet its burden under the Constitution for almost as long as the burden has existed," Brief of Cross-Appellant, at 67, is fantasy, an attempt to ignore and rewrite history, a history which is far more complicated and nuanced, and in which there are no Black Hats and White Hats. *See Unified School Dist. No. 229 v. State*, 256 Kan. 232, 243, 885 P.2d 1170 (1994) (summarizing the history through 1992).

As this Court knows, in *U.S.D. 229*, the first Kansas school finance case to reach the merits, this Court affirmed then-District Judge Luckert's decision upholding the constitutionality of the system. Indeed, even in this case, the Plaintiff Districts concede

that had it not been for funding decisions made at the onset of and during the "Great Recession," the Legislature (in Plaintiff Districts' view at least) had been providing sufficient funding. Brief of Cross-Appellant, at 16 ("Had the State funded that plan, this matter would likely not been brought before the Kansas Supreme Court again."). The Plaintiff Districts also make the notable concession that "[t]here is no need for an overhaul of the current school finance system." *Id.*, at 68.

Unlike *Montoy*, therefore, the only question here is the *amount* of funding – nothing else is at issue. Many things have changed since the *Montoy* litigation concluded, including the undisputed facts showing a high level of progress and achievement by Kansas students, as well as the propriety of the School District and Quality Performance Act, K.S.A. 72-6405, *et seq*., which even the Plaintiff Districts and the Panel acknowledge is constitutional "at this point and on this record." Brief of Cross-Appellant, at 68 (citing Opinion, p.242-43). The Plaintiff Districts are asking this Court to "retain jurisdiction," or essentially to adopt a remedial posture, even though the underlying Act has not been found unconstitutional and the Plaintiff Districts themselves are not even asking the Court to declare it unconstitutional.

Denying a motion to reopen *Montoy,* this Court through Chief Justice Davis acknowledged that the *Montoy* litigation was over and done when the Legislature enacted legislation in substantial compliance with the Court's prior remedial orders. *Montoy v State of Kansas*, No. 92-032 (Feb. 12, 2010), at 1 (attached as Appendix, hereto) (citing *Montoy v. State*, 282 Kan. 9, 138 P.3d 755 (2006)). The Order notes that even in its final 2006 opinion in *Montoy*, the Court did not review "whether the new legislation provided constitutionally suitable provision for finance of the public schools," but rather only

whether the Legislature had complied with the Court's prior remedial orders. *Id.*, at 2. The Order indicates that this refusal to review the legislation beyond the narrow issue of compliance was "based on the limits of our appellate function." *Id.* Moreover, the Order cites the Court's previous decision which had emphasized that 2006 Senate Bill 549 "materially and fundamentally" altered the school funding formula. *Id.* (citing *Montoy*, 282 Kan. at 16, 25). Finally, the Order quoted with approval the Court's *Montoy IV* opinion:

> This court is an appellate court and not a fact-finding court. The constitutionality of S.B. 549 is not before this court. It is new legislation and, if challenged, its constitutionality must be litigated in a new action filed in district court. . .. The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III.* The sole issue now before this court is whether the legislation passed in 2005 and S.B. 549 comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed. A constitutional challenge of S.B. 549 must wait for another day.

282 Kan. at 18-19.

In ending *Montoy,* this Court recognized that litigation is not indefinite and that courts generally do not retain continuing jurisdiction over a matter for years and years. Plaintiffs such as Ryan Montoy lose standing, the "facts" relevant to the legal claims change and evolve, the defendants and others take actions that alter and affect the situation. Thus, ultimately, even in *Montoy* the Court recognized the limits of both judicial power and the judicial role in complex public policy debates.

Here, the Plaintiff Districts' request for this Court to "retain jurisdiction" begs the question: for what purpose? In *Montoy*, the Court retained jurisdiction when the case was in a remedial posture, *after* finding that the then-existing statutes did not comply with constitutional requirements and for the limited purpose of ensuring compliance with the

Court's prior orders. *Montoy v. State*, 279 Kan. 817, 826, 112 P.3d 923 (2005). The *Montoy* Court correctly recognized that the primary responsibility for making suitable provision for the finance of Kansas schools rests with the Legislature, not the judicial branch.

The Plaintiff Districts want this Court to "retain jurisdiction" for at least two purposes: (1) to impose a funding requirement of $5,944 in base state aid per pupil (where even the Panel refused to go based on the record), Brief of Cross-Appellant, at 99; and (2) to *prevent* the Legislature from legislating in any way to change the current educational system or to enact any law that does not comply with the first purpose of dramatically increasing the BSAPP. *Id.*, at 68. The Plaintiff Districts are not advocating for a change in educational standards or accreditation, for example, or even for a change in the funding formula; rather, they are asking this Court to make permanent the current school finance system, and to limit the Legislature to no role but to write increasingly larger checks each year. The Plaintiff Districts offer no authority for this Court to assume such an unprecedented role in Kansas history.

The Plaintiff Districts assert that the Court should retain jurisdiction of this appeal even after deciding it because the Legislature might change the funding statutes or other aspects of the school finance system in Kansas, with the apparently inconceivable (to the Plaintiff Districts anyway) result that a new lawsuit would have to be filed, instead of simply continuing this one indefinitely. Brief of Cross-Appellant, at 68-69. This argument demonstrates, however, that Plaintiff Districts' real complaint is with the separation of powers and traditional litigation (as well as judicial power and role) principles. As the Court has recognized in previous school finance cases, such cases

come to an end, and future changes in the relevant statutes and circumstances require new litigation before a court may even consider further action. *Montoy*, 282 Kan. at 18-19; *Knowles v. State Bd. of Ed.*, 219 Kan. 271, 274, 547 P.2d 699 (1976).

The Plaintiff Districts' argument also asks this Court to embrace a presumption that the Legislature always acts in bad faith or unconstitutionally with regard to its school finance decisions. Brief of Cross-Appellant, at 67-69. With good reason, this Court's decisions have never embraced such a presumption, nor should they. In fact, the opposite has been true. For example in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 912, 179 P.3d 366 (2008), the Court relied upon the Legislature's authority, and even duty, to make preliminary judgments on the constitutionality of its actions, emphasizing the traditional presumption that a statute is constitutional. *Id.*, at 883 ("the separation of powers doctrine requires a court to presume a statute to be constitutional"); *see also, Seattle Sch. Dist. No. 1 of King County. v. State,* 90 Wash. 2d 476, 538-39, 585 P.2d 71, 105 (1978) ("The trial court's decision to retain jurisdiction is inconsistent with the assumption that the Legislature will comply with the judgment and its constitutional duties.").

As this Court noted in *U.S.D. 229*, legislation is presumed constitutional in school finance cases (as in all cases) because the Legislature is presumed to act constitutionally when making policy judgments. 256 Kan. at 236-38; *see generally, State ex rel. Tomasic v. Unified Govt. of Wyandotte County/Kansas City, Kan.*, 264 Kan. 293, 300, 955 P.2d 1136 (1998) (reciting long-standing law that the Court's duty is to uphold a statute, resolving all doubts in favor of its validity) (citations omitted). As a general matter, the presumption of constitutionality is even more pronounced in the area of taxation and

finance. *Peden v. State*, 261 Kan. 239, 250-51, 258, 930 P.2d 1 (1996) (upholding the higher income tax rate for single taxpayers).

The Plaintiff Districts' view turns this Court's basic jurisprudence on its head. Legislators take the same oath to uphold the Constitution as members of this Court. *See* Kan. Const., art. 15, § 14; K.S.A. 75-4308; *see also, Farrelly v. Cole*, 60 Kan. 356, 44 L.R.A. 464, 498 (1899). Compliance with that oath is presumed. *Farrelly; see, e.g., Seattle School Dist. No. 1 of King County,* 90 Wash. 2d at 538-39. Thus, a presumption of constitutionality is fully warranted in school finance cases, just as in all other cases.

Even in retaining jurisdiction while the case was in a remedial posture in the unprecedented and extraordinary case of *Montoy*, this Court cautioned against judicial overreaching. For example, this Court in *Montoy* pointed to Kentucky as an example of a state where the courts had exercised appropriate restraint, citing with approval *Rose v. Council for Better Educ., Inc.,* 790 S.W.2d 186, 213-15 (Ky. 1989), which expressly recognized that courts lack the power to adopt specific legislation and held that a trial court erred in requiring the Kentucky Legislature to report back to that court.

Finally, as is the case with other state supreme courts in this area of litigation, the opinions written by the Justices of the Ohio Supreme Court in *DeRolph v. State*, 97 Ohio St. 3d 434, 780 N.E.2d 529 (2002), another court this Court cited with approval in *Montoy*, illustrate the institutional perils of judicial assumption of a non-traditional, policy-making role. In discussing the Ohio Court's earlier decision in *DeRolph*, Justice Pfeifer's majority opinion noted that "none of the majority was 'completely comfortable' with the opinion." *Id.* at 530. After reciting the history of the litigation, Justice Pfeifer noted the Court's previous decision "was in many ways the result of impatience . . . [but]

we have changed our collective mind." *Id.* at 435. Instead, the Ohio Justices had a sharp debate that sharply divided them and resulted in the Court essentially cannibalizing itself. *Compare DeRolph*, at 532 (Resnick, J., concurring); *with id.*, at 535 (Stratton, J., concurring and dissenting); *and id.* (Moyer, C.J. dissenting). As Chief Justice Moyer stated in his dissent, "[w]ithout consistency, the law risks the appearance of caprice." *DeRolph,* at 538.

As subsequent waves of school finance litigation often have been only about the *level of funding* rather than educational standards, accreditation requirements, educational innovation, or funding formulas, courts rightly have become more and more reluctant to be drawn into a central or primary role in resolving disputes about the school finance decisions within their respective states. *See, e.g., Nebraska Coalition for Educational Equity and Adequacy v. Heineman,* 273 Neb. 531, 731 N.W.2d 164 (2007) (dismissing as nonjusticiable a challenge to the adequacy of school funding); *Oklahoma Ed. Assoc. v. State of Oklahoma*, 2007 OK 30, 158 P.3d 1058 (2007) (same). In *Lobato v. State*, 12SA25, 2013 Co. 30, ___ P.3d ____, 2013 WL 2349302 (May 28, 2013) (noting decision unpublished and subject to change), the Colorado Supreme Court recently upheld Colorado's school finance system as constitutional, finding the system satisfied the state constitution's requirement to provide "thorough and uniform" schools despite state budget cuts. That court reasoned that even if the "system might not provide an optimal amount of money to the public schools, the statutory public school financing system is itself constitutional," and the court applied a rational basis test to uphold the Colorado system. *Id.*, at ¶ 33. In its conclusion, the Court cautioned as follows:

> "courts must avoid making decisions that are intrinsically legislative. It is not up to the court to make policy or to weigh policy." While the trial

> court's detailed findings of fact demonstrate that the current public school financing system might not be ideal policy, this Court's task is not to determine "whether a better financing system could be devised, but rather to determine whether the system passes constitutional muster."

*Id.*, at ¶ 45 (internal citations omitted).

Far more so than the policy issues surrounding wiretap statutes at issue in *State v. Bruce*, 295 Kan. 1036, 1048, 287 P.3d 919 (2012), the complex policy and resource allocation questions involved in determining the appropriate level of funding for schools is "an especially poor environment for judicial policy making." The Court should decline the Plaintiff Districts' dangerous invitation to become the permanent Special Master of educational finance in Kansas.

### B. The Panel Did Not Arbitrarily Disregard Undisputed Evidence Or Act With Bias, Passion or Prejudice In Failing To Require The Appropriation Of Nearly One Billion Dollars *More* In Annual State Aid For Kansas Schools

#### 1. The Remedy The Plaintiff Districts Seek Is Beyond Judicial Authority As A Matter of Law

After Plaintiff Districts decided not to present any evidence of injury to the Student and Parent Plaintiffs, the Panel should have dismissed Plaintiff Districts' Article 6, § 6 claim for lack of a plaintiff with standing, as explained in the State's Opening Brief. Brief of Appellant, at 28-33. Furthermore, an Article 6, § 6 claim based solely on a demand for more money is nonjusticiable, as also discussed in the State's Opening Brief. *Id.,* pp. 34-53. Finally, the Panel lacks the constitutional authority to order legislative appropriations (or to enjoin contrary appropriations) even were the Court to find a proper plaintiff and a meritorious Article 6 claim. Brief of Appellant, at 85-97. For each and all of these reasons, this Court lacks the constitutional and legal authority to order almost

$1.5 billion in additional legislative appropriations for Kansas schools, which is precisely the relief Plaintiff Districts seek.

### 2. The Court's Standard Of Review Is Whether The Panel Arbitrarily Disregarded Undisputed Evidence Or Acted With Bias, Passion Or Prejudice

The Plaintiff Districts complain that the Panel did not order the State to fund K-12 education at a level no lower than the average cost study base (BSAPP) of $5,944. Brief of Cross-Appellant, at 79. Among other errors, the Plaintiff Districts mistakenly assert that an average of the BSAPP estimates in the "updated" A&M and LPA Studies must be adopted by the Legislature because such estimates are "the only evidence before this Court regarding the actual costs." *Id.*, p. 78. However, the Panel refused to make several of the findings which are central to the Plaintiff Districts' claim, and the Panel refused to order the $1.5 billion increase the Plaintiff Districts sought for FY2013. *See* R. Vol. 80, Pl. Ex. 245, pp. 5511-20 ($5.69 billion vs. $3.95 billion).

The standard of review applicable to the Panel's refusal to find that the evidence supported the Plaintiff Districts' requested increase is whether the court arbitrarily disregarded undisputed evidence, or was influenced by some extrinsic consideration such as bias, passion, or prejudice. *In re Marriage of Kuzanek*, 279 Kan. 156, 160, 105 P.3d 1253 (2005) (*citing Mynatt v. Collis*, 274 Kan. 850, 872, 57 P.3d 513 (2002)). *See also*, *Brown v. Lang*, 234 Kan. 610, 616-17, 675 P.2d 842 (1984) (applying the standard to plaintiff's claim that the trial court erred in the amount of damages awarded).

### 3. The Panel Did Not Make Findings That Support Requiring An Increase Of $1.5 Billion In Legislative Appropriations For Public Schools

The State showed in its Opening Brief that, if reviewable or reviewed with proper deference to the Legislature's presumed findings, the Legislature has made suitable

provision for finance of the educational interests of the state using traditional techniques for determining the level of funding for governmental services. The Legislature evaluated budgets, historical spending, year-end fund balances, available sources of revenue (much of which was only collected after *Montoy*) and advice from a variety of sources. With all sources of revenue (state, local and federal) considered, and the Legislature did in fact consider them, Kansas public K-12 schools are receiving funds *at record levels*. Kansas K-12 schools meet state accreditation requirements, all teachers are licensed and, with rare exceptions, all teachers are considered qualified or highly qualified. Also, individual districts have held millions of dollars unspent, in reserve, in recent years. Brief of Appellant, at 63-75.

Nonetheless, the Panel reasoned as follows with respect to Count 1:

> 1. The directive of Article 6, § 6 to the Kansas Constitution to "make suitable provision for finance of the educational interests of the state" means the present finance formula with the BSAPP approved in *Montoy IV* is an absolute floor unless the State provides a contrary empirical, "actual costs" justification for reduction of the BSAPP below the *Montoy* floor, *e.g.*, a consultant's study. As the current BSAPP is below that floor, K-12 public education is "underfunded." *See e.g.,* R. Vol. 14, pp. 1775-93, 1835 (Opinion, pp. 56-74, 116) ("the soundness of the State's assertion of funding adequacy necessarily requires that this judicial panel find some actual and logical basis to exist, *in fact*, in order to disregard the *Montoy* court's determination that certain dollar expenditures were required to be provided by state government officials or, alternatively, that the cost basis used by the *Montoy* Court in reaching its conclusions of dollar shortfall have been impeached by some legally viable subsequent cost or "output" analysis").
>
> 2. Further, the State cannot shift some provision for finance from the General Fund to the LOB because local taxation injects wealth-based disparities which are unconstitutional *per se.* Additionally, any reduction in state equalizing aid is also a *per se* violation of Article 6, § 6. *See e.g.,* R. Vol. 14, p. 1868 (Opinion, p. 149) (Panel finds present funding unconstitutional "on a basis of either costs [when only revenue from the State is considered] or equity [when all revenue is considered]," emphasis supplied).

Although possibly due to a misunderstanding of the holding in *Montoy*, the leaps of faith necessary to turn these "legal" conclusions into a violation of the Kansas Constitution ignore conventional legal reasoning. These "legal" conclusions allowed the Panel to ignore and take no legal account of hundreds of millions of dollars provided to and available to Kansas school districts each year.

Plaintiff Districts would compound the Panel's error. Plaintiff Districts' position, in this cross appeal, depends completely on ignoring entirely both federal and LOB funds for Article 6 purposes. Ignoring substantial, real, and available sources of revenue is logically unsupportable. Considering only the addition of LOB funds in FY2013, for example, increases the total funding for schools by $995.8 million. *See* Brief of Appellant, Appendix A (showing FY2013 General Fund and LOB totals).

The BSAPP is a legislatively created concept that dates to 1992; to ignore other sources of funding that are now known to the Legislature and are now available to schools is to impute an irrational immutability to a legislative decision made more than three decades ago and based on facts and circumstances long since outdated. Likewise, the State General Fund and the LOB also are legislatively created concepts. Because the Legislature regularly reviews the school funding formula and makes changes to it based upon new information, or a new assessment of existing information, the meaning of these concepts evolves over time. During appropriations decisions in recent sessions, the Legislature was aware of federal funds available to school districts and also was aware of the amount, increased equalization, and broadened purpose of LOB funds available to schools. R. Vol. 11, pp. 1327-30, ¶ 20. It is perfectly rational for the Legislature to

conclude, as it did, that the total funding available to school districts should be considered when making annual state appropriation decisions related to school funding.

Moreover, the Panel did not make numerous factual findings that would be required to consider the Plaintiff Districts' request for a massive additional appropriation above and beyond what the Panel ordered. For instance, the Panel did not determine the actual cost to make suitable provision for finance of K-12 schools, made no findings quantifying any increase in costs from alleged increased demands on Kansas educators, did not adopt the "updates" of the A&M and LPA Studies on which Plaintiff Districts rely, and did not find that, under current funding levels, accreditation standards are not being met or that any student in Kansas is being deprived the opportunity for an education.

Ultimately, Plaintiff Districts have not shown and cannot show that the Panel arbitrarily ignored undisputed testimony or acted out of bias, passion or prejudice. Even if only money from the State General Fund counts toward payment of the "actual costs" of K-12 education, the Panel was not required to rely on the "updates" of the A&M and LPA Studies because, among other reasons, those "updates" were unsound in that they relied on contested methodologies and assumptions, and were tied to admittedly outdated studies that address educational AYP targets and other tests that either are no longer in use or which have been substantially revised. Thus, the Panel did not act arbitrarily in declining to award Plaintiff Districts an increase in BSAPP that would require an additional $1.5 billion appropriation.

### 4. The State Board Of Education Has No Constitutional Authority Over School Finance In Kansas

The Plaintiff Districts assert that the State Board of Education defines what constitutes a constitutionally-mandated "suitable education" in Kansas. Brief of Cross-Appellant, at 71-73. There are at least two fundamental problems with this claim. First, the Kansas Constitution does not require the provision of a "suitable education" (it speaks only to "suitable provision for the finance of the educational interests of the state") and further does not define "suitable" in any way. *See* Brief of Appellant, at 34-52 (explaining that whether the Legislature has made "suitable provision for finance of the educational interests of the state is a nonjusticiable question in the circumstances presented here, *i.e.*, where plaintiffs simply want more money). Second, contrary to Plaintiff Districts' claim, Article 6 does not give the State Board of Education control of education funding. Instead, Article 6, § 6(b) explicitly vests in the Legislature the responsibility to make suitable provision for the finance of the educational interests of the State.

Why do the Plaintiff Districts argue that the Legislature must provide funding to satisfy the State Board's independently adopted regulations and directives issued in its supervision of local school districts? The Panel did not address this claim. The answer is that Plaintiff Districts want this Court to go even further than it already did in *Montoy* in crafting a definition of "suitable" that suits the Plaintiff Districts.

In *Montoy*, albeit addressing a much different challenge to the finance system than the challenge presented here, the Court found that the Legislature in K.S.A. 72-6439(a) and (c) (since amended) imposed criteria for determining whether it has made suitable provision for the finance of education: "Do the schools meet the accreditation

requirements and are students achieving an 'improvement in performance that reflects high academic standards and is measurable'?" *Montoy v. State*, 278 Kan. 769, 773, 120 P.3d 306 (2005). The Court concluded that "we need look no further than the legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula." *Id.* at 774.

In this case, Plaintiff Districts were unable to show that Kansas schools fail to meet accreditation requirements, including the requirement for improvement in academics as measured against high standards. Accordingly, Plaintiff Districts did not show and cannot show that a lack of funding resulted in any alleged deficiencies. The undisputed facts demonstrate just the opposite. *See* Brief of Appellant, at 10-21. Moreover, Plaintiff Districts completely fail to explain how or why $1.5 billion in new funding is required even if the State Board of Education (rather than the Legislature) defines the benchmarks for compliance with Article 6 – benchmarks with which Kansas schools are complying at current levels of funding.

The second fundamental flaw in the Plaintiff Districts' argument regarding the State Board of Education (the first being the fact that Article 6 nowhere requires a "suitable education") is that the Board simply does not have the constitutional authority that the Plaintiff Districts wish it had. The Kansas Constitution presumably could be amended to provide that the Legislature shall make "provision for finance of the educational interests of the state *as determined by the state board of education*," but that is not what Article 6 currently says, or has ever said. In *Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 265, 885 P.2d 1170 (1994) (emphasis supplied), this Court opined that "[t]he legislature would be derelict in *its* constitutional duty if it just gave each

school district a blank check each year." Plaintiff Districts' suggestion that the Legislature simply give the State Board a blank check is equally irresponsible, and completely unsupported by any constitutional requirements.

Plaintiff Districts would have this Court rewrite Article 6, § 2 to authorize the State Board of Education to do a lot more than provide "general supervision" over the Kansas school system. *Cf. State ex rel. Miller v. Bd. of Educ.*, 212 Kan. 482, 491-92, 511 P.2d 705 (1973) ("general supervision" involves the power to inspect, to superintend, and to evaluate, but something less than legal and financial control over Kansas schools). Article 6 does not make the State Board of Education a fourth branch of government that effectively controls the "complex, constantly evolving process [which] determines funding of public education," *Unified Sch. Dist. No. 229,* 256 Kan. at 265, a system that in fact accounts for almost two-thirds of the Kansas annual general fund budget.

### C. Plaintiff Districts Incorrectly Claim That Whether Education Is A Fundamental Right Makes A Constitutional Difference In This Case

Plaintiff Districts' primary "legal" claims in their cross-appeal are that education is a fundamental right under the Kansas Constitution and that such a legal conclusion, assuming it is correct, makes a significant difference in this case. Plaintiff Districts are wrong on both counts: (1) this Court has never held that education is a fundamental right under the Kansas Constitution; and (2) even if it were to do so in this case, that conclusion would not alter the outcome here.

Furthermore, no school district plaintiff in this case has standing even to raise such a claim, and the individual plaintiffs in the case did not present evidence supporting such a claim; in fact, the individual plaintiffs never even appeared at trial, much less testified or put on evidence to support such a claim. Thus, it would be particularly

inappropriate and unnecessarily aggressive on this Court's part to address the "education is a fundamental right" claim in this case, given these particular circumstances. In any event, even if the Court chooses to go there, the level of judicial scrutiny of legislative policy decisions regarding the financing of public schools necessarily remains deferential rational basis review, a level of scrutiny that all of the Legislature's funding decisions readily satisfy, as explained in the State's Opening Brief.

### 1. The Plaintiff Districts, As Political Subdivisions Of The State, Have No Standing To Assert The Rights Of Individuals

As a matter of law, the school districts lack standing to bring an "education is a fundamental right" claim. School districts are political subdivisions of the State. *National Education Association-Wichita v. Unified Sch. Dist. No. 259*, 234 Kan. 512, 517, 674 P.2d 478 (1983) ("a school district is an arm of the state existing only as a creature of the legislature to operate as a political subdivision of the state"). The clearly-established federal rule is that a political subdivision of a state may not bring a constitutional challenge "against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights," *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998), such as claims under the Fourteenth Amendment Due Process and Equal Protection Clauses. *City of Hugo v. Nichols*, 656 F.3d 1251, 1257 (10th Cir. 2011) ("The parties have not identified, and this court has not found, a single case in which the Supreme Court or a court of appeals has allowed a political subdivision to sue its parent state under a substantive provision of the Constitution"); *City of Moore, Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 699 F.2d 507, 511-12 (10th Cir. 1983) (rejecting an equal protection challenge to a state statute on the ground that "political subdivisions of a state lack standing to challenge the

validity of a state statute on Fourteenth Amendment grounds"); *see also, Trenton v. New Jersey*, 262 U.S. 182 (1923), *Williams v. Baltimore*, 289 U.S. 36, 40 (1933) (adopting the federal rule against standing in such circumstances).

Here, the Plaintiff Districts cannot claim any individual constitutional "right to an education" because they are providers of education, not consumers of the right, *i.e.*, not those entitled to receive an education. Instead, the Plaintiff Districts throughout this case have been asserting the rights of their students, which is an assertion of third-party standing, pure and simple. Third-party standing, however, is generally not allowed, and certainly not when the third-parties (here individual students and parents) are both parties to the case and fully capable of asserting their own rights in litigation yet chose not to do so. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"); *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) ("third parties themselves usually will be the best proponents of their own rights"); *State v. Coman*, 294 Kan. 84, 90-91, 273 P.3d 701 (2012) (citations omitted); *Johnson v. State*, 289 Kan. 642, 651, 215 P.3d 575 (2009) ("'A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.'") (quoting *Cross v. Kansas Dept. of Revenue,* 279 Kan. 501, 508, 110 P.3d 438 (2005)); *Hall v. Dillon Co., Inc.*, 286 Kan. 777, 784-85, 189 P.3d 508 (2008). Thus, well-settled constitutional doctrine requires the conclusion that the Plaintiff Districts here lack standing to assert an "education is a fundamental right" claim.

Nor does the Plaintiffs Districts' argument that they are "persons" under 42 U.S.C. §1983 and therefore must be treated as individuals permitted to raise individual rights claims under the Kansas Constitution make *any* sense. *See* Brief of Cross-Appellant, at 92 (arguing that §18 of the Kansas Constitution refers to "persons," that the federal courts have held that school districts are "persons" under §1983, and thus the plaintiffs must be "persons" for purposes of §18). The issue under §1983 is what state and local governmental entities are "persons" for purposes of being *defendants subject to potential federal liability for violating the federal rights of citizens*! The key case in that regard is *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 690 (1978), which holds that local governments are "persons" for purposes of being defendants who can be sued for violations of federal rights. *See also, Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) (the State and its officials acting in their official capacities are not "persons" under §1983).

That school districts are "persons" under §1983 for purposes of being sued when they violate a student's federal rights makes perfect sense, but that fact also proves just the opposite of what the Plaintiff Districts are asserting here. Local government entities can be sued for violating individual constitutional rights precisely because individual rights are guaranteed *to individuals* and *against intrusion or infringement by government actors*. The Plaintiff Districts do not cite a single case (and cannot do so) holding that as a matter of federal law local government entities have individual constitutional rights.

Indeed, the very notion of a governmental entity having an individual constitutional right makes no sense, and has no precedent or basis in federal or Kansas law. At bottom, the Plaintiff Districts here have no individual constitutional rights of their

own under the Kansas Constitution, nor can they properly assert any claimed rights of their students on the ground of third-party standing.

### 2. The Individual Plaintiffs Failed To Provide Any Facts To Establish Standing

The Panel expressly held that the individual plaintiffs had failed to provide evidence of more than their names and schools of attendance in support of their claims. R. Vol. 14, pp. 1938-39 (Opinion, pp. 219-220). Thus, there is no factual basis on which any court reasonably could conclude that the individual plaintiffs were deprived of any rights under the Kansas Constitution, whether a fundamental right to education, a right to equal protection of the laws, or due process rights, all of which the Plaintiff Districts allege.

In their Cross-Appeal Brief, the individual plaintiffs still fail to point to any specific or particularized evidence about their circumstances. Instead, they simply assert that they are "representative of all students in their district and all students in the State of Kansas." Brief of Cross-Appellant, at 88 (emphasis original). Plaintiff Districts cannot be serious. *Any* individual students randomly selected in the Dodge City, Wichita, KCK or Hutchinson school districts are automatically "representative of all students in their district and all students in the State of Kansas"? Such a bald, unsupported assertion is deserving of the credibility it reflects: none. In short, Plaintiff Districts made a litigation strategy decision to rely on the school districts as the true plaintiffs in this case, and they should not now be permitted to evade the consequences of that deliberate and conscious choice.

To hold that there is standing in this case to assert that education is a fundamental right is to hold that the Kansas courts do not take standing doctrine seriously (or indeed,

do not have or apply a legitimate standing doctrine). There is no reason to bend over backwards to allow the Plaintiff Districts in this case to assert hypothetical constitutional claims when they have had months, in fact years, to prepare their case, identify their plaintiff-clients, and assert constitutional claims for which they have had every opportunity to provide supporting evidence. Finding standing in this case will make a mockery of standing doctrine under Kansas law. The precisely analogous federal doctrine would throw all of these Plaintiff Districts out of Court.

### 3. Education Is Not A Fundamental Right Under The Kansas Constitution

#### a. There Is No Constitutional Right To Education Under Federal Law

There is no constitutional right to education under the United States Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). In rejecting such a claim forty years ago, the Supreme Court emphasized that "fundamental" rights generally are explicit in the Constitution (*e.g.*, the Bill of Rights) and sometimes implicit. The Supreme Court also rejected any notion that because a claimed interest might be viewed by some as just as "important" as a right recognized under the Constitution the claimed interest also must be recognized as a fundamental right. 411 U.S. at 33 ("the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel."). Instead, the "answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." *Id.*

The Supreme Court then proceeded, just as this Court has done with respect to claims under the Kansas Constitution in prior cases, to hold that education "of course, is not among the rights afforded explicit protection," nor did the Court "find any basis for saying it is implicitly so protected." 411 U.S. at 35. The Supreme Court's holding in *Rodriguez* has remained untouched and unaltered for decades now. Though *Rodriguez* is not controlling on the question whether the Kansas Constitution recognizes education as a fundamental right, *Rodriguez* does suggest the proper analysis and the correct conclusion under the Kansas Constitution as well as the U.S. Constitution, as further explained below.

**b. This Court Has Never Held That There Is A Fundamental Right To Education Under The Kansas Constitution**

In *Unified School Dist. No. 229 v. State*, 256 Kan. 232, 885 P.2d 1170 (1994), this Court held that education is not a fundamental right under the Kansas Constitution. *See id.* at 260 ("The district court applied the rational basis test. The … Plaintiff Districts contend that the strict scrutiny test should have been applied or, alternatively, the heightened scrutiny test. We do not agree."); *id.* at 263 ("We conclude the district court was correct in applying the rational basis test"). More recently, in *Montoy v. State*, 278 Kan. 769, 120 P.3d 306 (2005), this Court implicitly relied on that holding "on its way to" the conclusion that the school funding statute at issue there "did not violate the Equal Protection Clauses of the federal and state Constitutions." *Montoy II*, 278 Kan. at 776 (Beier, J., concurring). *See also, id.* at 776 (Luckert, J., concurring) (in *U.S.D. No. 229*, "the Supreme Court, at least implicitly, reached" the conclusion that education is not a fundamental right under the Kansas Constitution); *Montoy v. State*, 282 Kan. 9, 27, 138

P.3d 755 (2006) (*Montoy IV*) (Rosen, J., concurring) (concurring separately to state his minority opinion that there is "a fundamental right to an education guaranteed by the Kansas Constitution").

At most, three current members of this Court have opined (in concurring opinions) that education should be recognized as a fundamental right under the Kansas Constitution, for reasons the State addresses in the next section of this Brief. But never has *this Court* held that education is a fundamental right, nor should it do so in this case, particularly given the standing problems identified earlier. That said, even were the Court to recognize that education is a "fundamental right," such a legal conclusion by no means automatically ratchets up the level of judicial scrutiny beyond rational basis review as explained below.

### c. Even Were The Court To Find A Kansas Constitutional Right To Education, The Proper Level Of Judicial Scrutiny Would Be Rational Basis Review Here

Although some current members of the Court have opined in concurring opinions that there is a fundamental right to education under the Kansas Constitution, even their arguments in favor of reaching such a conclusion do not suggest a basis for a rigorous or high level of judicial scrutiny to be applied to *school finance decisions* when there is not and cannot be a plausible claim that any Kansas child is being deprived of an education. Even the most extensive discussion of the claim that education is a fundamental right in Kansas candidly acknowledges that "the precedential landscape on the appropriateness of a rational basis standard of review for school finance legislation, as opposed to outright denial of the right to an education, has changed little since *U.S.D. No. 229* was decided, and I agree that the cases on which Justice Luckert and the Supreme Court relied remain

persuasive on the wisdom of applying that standard to statutes providing for education finance in Kansas." *Montoy II*, 278 Kan. at 776G (Beier, J., concurring).

Justice Beier's concurring opinion in *Montoy II* identifies four factors in support of the claim that education is a fundamental right in Kansas, while the concurring opinions of Justices Luckert (in *Montoy II*) and Rosen (in *Montoy IV*) essentially agree with Justice Beier's opinion without adding to her rationales. Therefore, the State will focus on the reasons Justice Beier gave for recognizing such a right.

**First**, she asserts that the language of Article 6 is mandatory, using the word "shall" in describing what is expected of the Legislature. 278 Kan. at 776I. But many constitutional provisions are mandatory, without meaning that every action the State takes arguably at odds with an aggressive view of individual rights is unconstitutional. *E.g.*, Kan. Const. Art.7, §1 ("Institutions for the benefit of mentally or physically incapacitated or handicapped persons, and such other benevolent institutions as the public good may require, **shall** be fostered and supported by the state"); *Id.*, Art. 7, §4 ("The respective counties of the state **shall** provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity or other misfortune, may have claims upon the aid of society."); *Id.*, Art. 8, §2 (The legislature **shall** provide for organizing, equipping and disciplining the militia. . ..); *Id.*, Art. 15, §15 (Victims of crime, as defined by law, **shall** be entitled to certain basic rights); *Id.*, Art. 15, §16 ("Marriage **shall** be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.") (emphasis supplied). In fact, "shall" may well be the most commonly used word in the Kansas Constitution, showing

up in literally a host of provisions, often multiple times in any given article, and in virtually every article somewhere.

Furthermore the use of the word "shall" in a constitution hardly mandates a heightened level of judicial scrutiny. For example, the Fourteenth Amendment to the U.S. Constitution says that no state "shall" deprive anyone of due process of law or equal protection of the laws, yet many—indeed most—laws are subjected only to rational basis review under those two important and "fundamental" federal constitutional protections.

**Second**, Justice Beier posited that education is fundamental because Article 6 appears relatively early in the Kansas Constitution, right after articles addressing the three branches of government, elections, and suffrage. 278 Kan. at 776I. But this argument also proves too much: is education more important than public institutions for the welfare of the most vulnerable Kansas citizens, legislative apportionment that is required by the supremacy of the federal Constitution, the militia that would defend Kansas against possible invasion, the power to tax precisely in order to support state institutions such as the public schools, or the creation of local governments (which ultimately play a large role in administering public schools), all of which appear later in the Kansas Constitution than Article 6? Indeed, taken to its logical conclusion, the argument suggests that the executive branch is the most important part of Kansas government because executive powers appear in Article 1, while the Legislature and the Judiciary follow in Articles 2 and 3, respectively. The reality, of course, is that a constitution has to start somewhere, and has to cover *a lot* of topics, powers, and rights.

Thus, the precise order in which a comprehensive constitution addresses powers and rights makes no sense as a controlling factor in determining what "rights" such a

constitution recognizes and what rights it does not. In fact, if one wants to make an argument about the most "fundamental" individual rights under the Kansas Constitution, those rights are to be found in the Bill of Rights, which follows the Preamble and precedes everything else in the Kansas Constitution, including Article 6 and education. If Kansans intended education to be a fundamental right, why not include it expressly in the Bill of Rights?

**Third**, Justice Beier argues that the history of Kansas demonstrates the importance of education, 278 Kan. at 776I, which, of course, it does, but that hardly tells us whether a claimed individual constitutional "right" never expressly declared in the Kansas Constitution is in fact "fundamental." Again, if Kansans viewed the right to education as fundamental in the pioneer days, or at any time since, why did they not include education in the Kansas Bill of Rights? One suspects that Kansas pioneers also perceived housing, food, transportation, employment and health care to be "significant components of life on the prairie," *see Montoy II, Id.,* but none of those basic human needs are listed as "rights" anywhere in the Kansas Constitution.

**Finally**, Justice Beier opines that "indications are that the framers of our constitution intended education to be a fundamental right," *Montoy II*, 278 Kan. at 776K, but that argument really seems to be nothing more than the historical importance argument (the third factor), mixed with some rhetoric drawn from a dissenting opinion in the Supreme Court of the United States. In truth, Article 6 was revised in the 1960s – a hundred years after Kansas became a State – and yet one will search in vain in Article 6 or the Kansas Bill of Rights for an express statement that education is a fundamental

individual right, just as one will search in vain the majority opinions of this Court for such an assertion.

Ultimately, arguing about whether education is a fundamental right under the Kansas Constitution is largely an academic exercise. Justice Beier candidly acknowledged that "[o]f course, once we recognize the existence of a fundamental right to education under our Kansas Constitution, the question is how legislation implicating education financing should be reviewed. As I have said, I understand and agree that the rational basis standard of review should apply." 278 Kan. at 776L. So what are we arguing about then? Rational basis review is the default or baseline level of judicial scrutiny for constitutional challenges in general and, properly applied, it is deferential to the policy decisions of the other branches of government.

In fact, again by way of comparison, under U.S. Supreme Court precedent, government actions implicating "fundamental" rights are not automatically or necessarily subject to any higher judicial scrutiny than rational basis review. True, when there is a complete deprivation of a right, for example when competent consenting adults of different races are forbidden to marry, a higher level of scrutiny applies. *Loving v. Virginia*, 388 U.S. 1 (1967). But a host of other restrictions on the "fundamental" right of marriage, for example regulations including license requirements, officiant requirements, waiting periods, age limitations, incest and polygamy prohibitions, and many other such constraints are evaluated only by a very deferential rational basis standard.

Ultimately, the parties and this Court could debate at great length whether education might be considered a fundamental right under the Kansas Constitution, but the conclusion (however the debate turned out) would not change the applicable standard of

judicial scrutiny of the Legislature's appropriations decisions, including those related to school funding – rational basis review.

### D. The Plaintiff Districts Failed to Prove Their Equal Protection Rights, If Any, Were Denied

One of Plaintiff Districts' most egregious legal errors is to suggest that they could raise a Fourteenth Amendment equal protection claim against the State. That argument is dead on arrival, actually well before arrival, and demonstrates the Plaintiff Districts' fundamental misunderstandings of both federal and state constitutional law, as well as the utterly ill-advised nature of their invitation to this Court to embark on a constitutional adventure that is not supported by or warranted under either federal or Kansas constitutional law. The Plaintiff Districts' Kansas equal protection claim fares no better than their federal claim, and for many of the same reasons. This Court should decline the Plaintiff Districts' invitation to act as a Super-Legislature, formulating the educational policies and funding decisions of the State of Kansas.

#### 1. Plaintiff Districts' Fourteenth Amendment Equal Protection Claim Is A Non-Starter

Plaintiff Districts boldly declare that the State has denied them "Equal Protection of the Law Guaranteed by . . . the Fourteenth Amendment of the United States Constitution." Brief of Cross-Appellant, at 83. This assertion is nothing short of breath-taking, both for its audacity and its utter lack of legal foundation. Let the State count the ways in which such an argument fails: (1) the only defendant in this case is "the State of Kansas," which has federal Eleventh Amendment immunity from such a federal claim in state court; (2) the school districts have no standing to assert the equal protection rights of their students; (3) the individual plaintiffs here – as the Panel expressly found and held – provided NO evidence by which a court even could evaluate their standing to assert an

equal protection claim; and (4) on the merits, the *Montoy* litigation emphatically rejected federal equal protection challenges to Kansas school finance laws.

**a. Eleventh Amendment Immunity Plainly Applies – The Only Defendant In The Case Is "The State Of Kansas"**

The States, as States, generally have immunity from any suit based on federal law, irrespective of whether the suit is brought in federal court, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or in state court, *Alden v. Maine*, 527 U.S. 706 (1999), or even when the State is named in a proceeding before a federal agency. *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743 (2002). This constitutional immunity applies with full force in this case to *any federal claim* the Plaintiff Districts might assert against "the State of Kansas." Although the immunity can be waived, *Clark v. Barnard*, 108 U.S. 436 (1883); *Sossamon v. Texas*, 563 U.S. ___, 131 S. Ct. 1651 (2011), and in very limited circumstances (none of which apply here) Congress can override the immunity against the States' will, *Hutto v. Finney*, 437 U.S. 678 (1978); *City of Boerne v. Flores*, 521 U.S. 507 (1997), neither of those situations is present, not even arguably so.

This Court is well aware of the State's federal constitutional immunity, and has faithfully applied it in cases brought in Kansas courts. *See, e.g.*, *Purvis v. Williams*, 276 Kan. 182, 193-94, 73 P.3d 740 (2003); *Schall v. Wichita State Univ.*, 269 Kan. 456, 463-66, 7 P.3d 1144 (2000). This ground alone fully and completely disposes of any Fourteenth Amendment claims by the school districts or individual plaintiffs against "the State of Kansas," the sole defendant in this case.

### b. The School Districts Have No Standing To Bring Such A Claim

As explained above in Section IV.C.1., federal law plainly holds that *political subdivisions of a State have no legal standing to bring claims about individual constitutional rights against the State itself.* For this reason, the Plaintiff Districts have no standing to raise a Fourteenth Amendment equal protection claim, even if the State lacked constitutional immunity from any such claim, which it does not.

### c. The Panel Correctly Held That The Individual Plaintiffs Presented No Evidence By Which A Court Could Evaluate An Equal Protection Claim, And Thus The Individual Plaintiffs Lack Standing To Bring Such A Claim

As explained above in Section IV.C.2., the individual plaintiffs lack standing to bring any federal (or state) equal protection claims against the State because, as the Panel expressly found and held, they offered NO evidence that they were members of any particular suspect class, nor any evidence as to how the Legislature's financing decisions in any way detrimentally affected any particular cognizable class of individual students. Instead, this "equal protection" claim really is nothing more than an attempt to re-package the Plaintiff Districts' "education is a fundamental right" claim, but under federal law such a claim has NO possible merit. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education is NOT a fundamental right under federal law and thus federal law applies only very deferential rational basis review to the school funding decisions made by States).

### d. On The Merits, *Montoy* Emphatically Rejected 14th Amendment Equal Protection Claims Because Such Claims Require Proof Of Discriminatory Intent

Finally, even were the Court inexplicably to reach the merits of Plaintiff Districts' purported Fourteenth Amendment equal protection claim, there would be no option but to reject the claim on the merits, as this Court so emphatically did in the *Montoy* litigation. For any possible federal equal protection claim to succeed, the plaintiff must demonstrate discriminatory *intent*. *Washington v. Davis*, 426 U.S. 229 (1976).

Not surprisingly, the Plaintiff Districts make no such claim (aside from the wild and unsubstantiated assertions, discussed above in Section IV, Intro. and A, that the Legislature has consistently set out to harm the education of Kansas schoolchildren since the 1960s). Instead, they cite a pair of Second Circuit cases and an Eastern District of New York case (rather than addressing the controlling U.S. Supreme Court precedent), that they claim recognize "deliberate indifference" as a federal equal protection standard. The very Plaintiff Districts in this case espoused a different view, on June 27, 2013, in *Petrella v. Brownback, et al.*, In the United States District Court for the District of Kansas, Case No. 10-CV-2661-JWL-KGG. Plaintiff Districts intervened in *Petrella* where students and their parents assert they are denied equal protection because of the limit on LOB revenue. Opposing a motion for summary judgment, Plaintiff Districts wrote:

> "A claim of denial of equal protection requires a showing of intentional or purposeful discriminatory conduct by a governmental entity." *Johnson v. City of Wichita*, 687 F.Supp. 1501, 1510-11 (D. Kan. 1988) (citing *Washington v. Davis*, 426 U.S. 229 (1976)) (emphasis added). . . .
>
> Further, even if Plaintiffs could establish that the LOB Cap resulted in the Plaintiffs being treated differently, Plaintiffs would also be required to show that such discrimination was the result of purposeful or intentional

> conduct by Defendants. *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1179 (10th Cir. 2003) (holding that the acts forming the basis for Plaintiffs' claim must have been "motivated by a discriminatory purpose" to sustain a claim under the Equal Protection Clause.). A showing of discrimination under the Fourteenth Amendment requires Plaintiffs to prove that the "state legislature selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

*Petrella v. Brownback, et al.*, In the United States District Court for the District of Kansas, Case No. 10-CV-2661-JWL-KGG, Memorandum in Opposition to Plaintiffs' Motion For Summary Judgment and Declaratory Relief, Doc. No. 111, p. 13 (relevant portions attached as Appendix 2, hereto).

There are at least three problems with the position Plaintiff Districts advance in this litigation: (1) U.S. Supreme Court precedent clearly holds that an equal protection plaintiff must prove discriminatory *intent*, not deliberate indifference or something less; (2) this Court's decisions in the *Montoy* litigation correctly applied the discriminatory intent standard and found the Plaintiff Districts' proof there utterly lacking; and (3) "deliberate indifference" is primarily a standard utilized in the prison context in evaluating claims of Eighth Amendment violations, not a Fourteenth Amendment equal protection standard. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994) (defining and applying "deliberate indifference" standard to Eighth Amendment claims in a prison setting).

Indeed, there is much about the *Montoy* litigation and decisions that is arguably unclear, or about which parties may plausibly debate, but this Court's federal equal protection holding in *Montoy* is not in the debatable category:

> 1. We reverse the district court's holding that SDFQPA's financing formula is a violation of equal protection. Although the district court

> correctly determined that the rational basis test was the proper level of scrutiny, it misapplied that test. We conclude that all of the funding differentials as provided by the SDFQPA are rationally related to a legitimate legislative purpose. Thus, the SDFQPA does not violate the Equal Protection Clause of the Kansas or United States Constitutions.
>
> 2. We also reverse the district court's holding that the SDFQPA financing formula has an unconstitutional disparate impact on minorities and/or other classes. In order to establish an equal protection violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose.

*Montoy v. State*, 278 Kan. 769, 771, 120 P.3d 306, 308 (2005) (*per curiam*) (emphasis added).

### 2. Plaintiff Districts Have No Valid Equal Protection Claim Under Kansas Bill Of Rights §1

#### a. The School Districts Lack Standing

As explained above in Section IV.C.1., political subdivisions of a State have no legal standing to bring claims about individual constitutional rights against the State itself. For this reason, the Plaintiff School Districts have no standing to raise a Kansas constitutional equal protection claim.

#### b. The Individual Plaintiffs Failed To Establish Standing

As explained above in Section IV, C, 2, the individual plaintiffs lack standing to bring any state equal protection claims against the State because, as the Panel expressly found and held, they offered NO evidence that they were members of any particular suspect class, nor any evidence as to how the Legislature's financing decisions in any way detrimentally affected any particular cognizable class of individual students. Instead, this "equal protection" claim really is nothing more than an attempt to re-package the Plaintiff Districts' "education is a fundamental right" claim which, for reasons explained in Section IV, C, 3, has no possible merit.

### c. The Equal Protection Analysis Under Kansas Bill of Rights § 1 Is The Same As Fourteenth Amendment Equal Protection Analysis

This Court gives Section 1 of the Kansas Bill of Rights "the same construction as the due process and equal protection clauses of the Fourteenth Amendment." *Unified School Dist. 229*, 256 Kan. at 259. Thus, "Kansas applies the same standard to equal protection claims under both the United States and Kansas constitutions." *Brooks v. Sauceda*, 85 F. Supp. 2d 1115, 1128-29 (D. Kan. 2000) (citing *Matter of Hay*, 263 Kan. 822, 832 (1998), and *Guardian Title Co. v. Bell*, 248 Kan. 146, 154 (1991)). The initial prerequisites to establishing any equal protection claim under §1 are that a plaintiff must show that the State (1) has acted with discriminatory intent and (2) treated similarly situated persons differently. *In re Appeal of Weisgerber*, 285 Kan. 98, 106, 169 P.3d 321 (2007); *Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 308 (2005).

### d. Plaintiff Districts Failed To Establish Any § 1 Violation

The Panel correctly held that the Plaintiff Districts failed to prove the threshold discriminatory *intent* element of their §1 claim and did not have to decide the second element. The Panel stated,

> even if the Plaintiff school district's [sic] have standing under an equal protection claim (*U.S.D. No. 380 v. McMillen*, 252 Kan. 451 (1993) and *U.S.D. No. 443 v. Kansas St. Bd. of Educ.,* 266 Kan. 75 (1998), they, equally, have failed to identify a deliberate, intended disparate consequence from the school finance act or by those acting in furtherance of it.

And,

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

R. Vol. 14, pp. 1941-42 (Opinion, pp. 221-22).

Plaintiff Districts present no argument and point to no evidence to support that these negative findings arbitrarily disregarded undisputed evidence or were the result of bias, passion or prejudice. *See In re Marriage of Kuzanek*, 279 Kan. 156, 160, 105 P.3d 1253 (2005) (Court reviews the refusal to find discretionary intent against an arbitrary disregarded or influence by extrinsic considerations standard).

### E. The Plaintiff Districts Have Not Established Any Substantive Due Process Claims Under The Kansas Constitution

By the time the Plaintiff Districts get to a "substantive due process" claim, they are simply throwing the kitchen sink at this Court, hoping desperately that some claim will "stick." Like their equal protection claims, their "substantive due process" claim under the Kansas Constitution is nothing more than a thinly disguised effort to repackage their "education is a fundamental right" claim. Thus, ultimately, the Plaintiff Districts' substantive due process claim does not and cannot possibly add anything to their other claims; it is merely duplicative and unmeritorious.

Furthermore, this claim suffers from the same standing problems inherent in all of the Plaintiff Districts' constitutional claims. But the Plaintiff Districts' substantive due process claim also suffers from the fundamental flaw that federal and state courts are loathe to engage in "substantive due process" analysis when, in fact, other constitutional provisions such as Article 6 of the Kansas Constitution more directly address the claim being asserted. Ultimately, the Plaintiff Districts' substantive due process claims fail for several reasons, as explained below.

### 1. None Of The Plaintiff Districts Have Standing

#### a. School Districts

As explained above in Section IV, C, 1, political subdivisions of a State have no legal standing to bring claims about individual constitutional rights against the State itself. For this reason, the Plaintiff Districts have no standing to raise a Kansas constitutional substantive due process claim purportedly asserted on behalf of their students.

#### b. Individual Plaintiffs

As explained above in Section IV, C, 2, the individual plaintiffs lack standing to bring any state substantive due process claims against the State because, as the Panel expressly found and held, they offered NO evidence that they were members of any particular suspect class, nor any evidence as to how the Legislature's financing decisions in any way detrimentally affected any particular cognizable class or rights of individual students. Instead, this "substantive due process" claim really is nothing more than yet another attempt to re-package the Plaintiff Districts' "education is a fundamental right" claim which, for reasons explained in Section IV, C, 3, has no merit. At a minimum, any "substantive due process" claim adds *nothing* to the analysis of whether education is a fundamental right under the Kansas Constitution.

### 2. Plaintiff Districts Have No Substantive Due Process Claim On The Merits

#### a. Courts Do Not Resort To "Substantive Due Process" Analysis When A More Specific Constitutional Provision Addresses The Claimed Right, Nor Do Courts Use Due Process Principles To Impose Rights To Affirmative Government Aid

When a potential constitutional claim is addressed by a specific constitutional provision, courts have long emphasized that they will look to the specific provision to determine whether a right exists and, if so, the parameters of that right, rather than inventing or creating a right under the guise of "substantive due process." *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims"); *id.* at 281 (Kennedy, J., concurring) ("I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process"); *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims").

Here, Article 6 addresses education, and thus there is no justification for courts to use the vague and unfettered notion of substantive due process to seek a right to education in the Kansas Constitution. If there were such a right (there is not, as demonstrated above), it would be found in Article 6, not the due process provision of § 18 of the Kansas Constitution. Indeed, the fact that education is never mentioned in the Kansas Bill of Rights actually undermines any claim that it is a fundamental, individual right under the Kansas Constitution. But here, it would be even more inappropriate and unwarranted to find an unenumerated right under § 18 when the Kansas Constitution has

an article expressly addressing the very topic on which Plaintiff Districts are asserting a fundamental right. If Kansans wanted to establish education as a fundamental right, they either could have included it in Article 6 (again, there is not such a right in that article) or they can in the future amend the Kansas Constitution to provide for such a right expressly. In no event is this Court warranted in creating such a right on the basis of § 18.

Furthermore, substantive due process – to the extent it is recognized at all – operates as a limit on governmental authority to impose *restrictions* on individuals, not as a font of *affirmative rights*, *i.e.*, requiring government to provide financial or other aid to citizens. Thus, federal substantive due process may recognize a right to obtain an abortion without undue regulation of that right by the government, but "due process" does not further impose on the government any obligation to provide or pay for such a procedure. *Harris v. McRae*, 448 U.S. 297, 317-18 (1980). Nor is the government obligated under due process principles to provide food, housing, employment, health care, or a host of other "affirmative" rights to citizens. *E.g.*, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no government obligation to provide housing). Yet that is precisely what the Plaintiff Districts here seek as a substantive due process matter: a decision of this Court creating a *due process* obligation of the State of Kansas to provide the citizens a service that is funded at judicially-specified levels. Such a "right" simply does not exist under § 18.

**b. Plaintiff Districts' Substantive Due Process Claim Is Nothing More Or Different Than Their Claim That "Education Is A Fundamental Right," And Thus Adds Nothing To The Analysis, Nor Does It Affect The Level Of Judicial Scrutiny**

Indeed, no matter how many times one might read Plaintiff Districts' Cross-Appeal Brief, it is impossible to see how Plaintiff Districts' "substantive due process"

claim is any different than their Article 6 "education is a fundamental right" claim, the latter of which at least has the virtue of being made under the potentially relevant constitutional provisions of the Kansas Constitution. Even if this Court wanted to recognize a freestanding constitutional right to "education," a course the State cautions the Court against pursuing, it would make no sense to do so as a matter of purportedly interpreting the vague, general language of § 18.

That is especially so when it is impossible to see how a "substantive due process" claim would in any way alter the legal analysis, or change or affect the applicable standard of judicial review. Are the Plaintiff Districts suggesting, for example, that even if there is no "fundamental right to education under Article 6," there is nonetheless a separate "substantive due process right to education"? Such an assertion would be utter nonsense. Nor does it make any sense to suggest that the level of judicial scrutiny for an Article 6 right-to-education claim would somehow differ from (presumably being either more or less exacting than) the level of judicial scrutiny applicable to a substantive due process right-to-education analysis. There is just no "there" there, *i.e.*, no "substance" to the Plaintiff Districts' substantive due process arguments, as the Panel properly concluded.

### F. The Panel Properly Concluded That the State Cannot Be Required To Make FY2010 Capital Outlay Aid Payments

#### 1. The Court's Standard Of Review Over The Panel's Determination That It Could Not Order Payment Of FY2010 Capital Outlay State Aid Is *De Novo*

*See Lemuz v. Fieser,* 261 Kan. 936, 943, 933 P. 2d 1234 (1997) ("determining a question of law, this court may exercise an unlimited de novo standard of review").

### 2. The Panel Held That Monies Appropriated In FY2010 For Capital Outlay State Aid Were No Longer Available And That It Could Not Order Appropriations Of State Funds

In Count 2, a certified class of local school districts challenged the Legislature's decision not to fund the state capital outlay aid authorized by K.S.A. 72-8814 for FY2010, 2011 and 2012. They sought damages against the State in the amount of the unfunded aid. R. Vol. 7, p. 950. In this Cross Appeal, the School District Class seeks "an order requiring the State to make payments required under K.S.A. 72-8814 for fiscal year 2009-10." Brief of Cross-Appellant, at 96. The "damage" sought for nonpayment of state capital outlay aid in other fiscal years is not before the Court.

The Panel characterized the class claims:

> Essentially Plaintiffs' claim [was] that if the legislative or executive methodology used to deny payment is now struck as unconstitutional, then it would leave the statute intact and past entitlements yet due and payable. In other words, Plaintiffs seek an order of mandamus from this Court directing such payments be made.

R. Vol. 14, pp. 1921-22 (Opinion, pp. 201-02). It then rejected the requested mandamus, stating "[under Article 2, § 24 of the Kansas Constitution] there is simply no way this Court can order monies be paid out of the State treasury in the absence of an appropriation therefore." R. Vol 14, p. 1924 (Opinion, p. 204). The Panel reasoned that monies appropriated in FY2010 for state capital outlay aid either had been reappropriated or were removed in the allotment process which, in either event, deprived the Panel of any ability to order the delivery of those funds. *Id.*, p. 1925 (Opinion, p. 205).

### 3. FY2010 State Capital Outlay Aid Funds Were Never Available

#### a. Appropriation, Allotment, Reappropriation/Lapse Of Capital Outlay State Aid In FY2010

Kansas school districts are authorized to levy a tax on tangible taxable property within their districts to raise funds for capital outlay expenditures. *See* K.S.A. 72-8801 to -8804 *et. seq.* and amendments. K.S.A. 72-8814 allows for state aid to some school districts for capital outlay expenditures.

The FY2010 Omnibus Appropriation Act appropriated $2,001,654,934 for general state aid and other appropriations for K-12 public schools. *See* 2009 Kan. Sess. Laws ch. 124, § 66(a). Section 66(b) of that law provided:

> There is appropriated for the above agency [Department of Education] from the following special revenue fund or funds for the fiscal year ending June 30, 2010, all moneys now or hereafter lawfully credited to and available in such fund or funds, except that expenditures other than refunds authorized by law and transfers to other state agencies shall not exceed the following:
>
> ***
>
> School district capital outlay state aid fund..... No limit

*Id.* §66(b). The act did not otherwise mention capital outlay state aid. *Id.*

Before May 21, 2009, K.S.A. 72-8814, provided:

> (a) There is hereby established in the state treasury the school district capital outlay state aid fund. Such fund shall consist of all amounts transferred thereto under the provisions of subsection (c).
>
> (b) In each school year, each school district which levies a tax pursuant to K.S.A. 72-8801 et seq., and amendments thereto, shall be entitled to receive payment from the school district capital outlay state aid fund in an amount determined by the state board of education as provided in this subsection....
>
> (c) The state board shall certify to the director of accounts and reports the entitlements of school districts determined under the provisions of subsection (b), and an amount equal thereto shall be transferred by the

> director from the state general fund to the school district capital outlay state aid fund for distribution to school districts. All transfers made in accordance with the provisions of this subsection shall be considered to be demand transfers from the state general fund.
>
> (d) Payments from the school district capital outlay state aid fund shall be distributed to school districts at times determined by the state board of education. The state board of education shall certify to the director of accounts and reports the amount due each school district entitled to payment from the fund, and the director of accounts and reports shall draw a warrant on the state treasurer payable to the treasurer of the school district. Upon receipt of the warrant, the treasurer of the school district shall credit the amount thereof to the capital outlay fund of the school district to be used for the purposes of such fund.

2007 Kan. Sess. Laws ch. 195, §36. In 2009, the statute was amended. 2009 Senate Substitute for House Bill No. 2354 became law on May 21, 2009. *See* 2009 Kan. Sess. Laws ch. 124 and comments after ch. 124, §161. Subpart (b) of §130 of the law reads:

> Notwithstanding the provisions of K.S.A. 2008 Supp. 72-8814, and amendments thereto, or any other statute, all transfers made from the state general fund to the school district capital outlay state aid fund in accordance with the provisions of K.S.A. 2008 Supp. 72-8814, and amendments thereto, *during the fiscal years ending June 30, 2010, and June 30, 2011, shall be considered to be revenue transfers from the state general fund.*

*Id.* (emphasis supplied).

Insufficient state revenue resulted in the commencement of an allotment in November of 2009. The allotment explicitly removed any capital outlay state aid funding appropriated for FY2010 because there had been confusion whether monies for the aid had been appropriated under the "no limit" description or other language in the FY2010 Omnibus Appropriation Act. Plaintiff Districts dispute that the capital outlay aid was removed by the November 2009 allotment, but the Panel found otherwise. R. Vol. 14, p. 1926 (Opinion, p. 206).

Subsequently, 2010 House Substitute for Senate Bill No. 572 became law on June 10, 2010. *See* 2010 Kan. Sess. Laws ch. 165 and comments after §179. Section 79(a) appropriated funds for the Department of Education and reappropriated all unencumbered FY2010 balances for use in FY2011. *Id.* §79(a).

### b. No Money Was Placed In The Capital Outlay State Aid Fund For FY2010

The Panel found FY2010 capital outlay aid was authorized in an appropriation bill, but the Panel further correctly concluded that no funds ever arrived at or were placed in the capital outlay state aid fund because, at a minimum, the State Board did not timely issue certification for transfer under K.S.A. 72-8814(c). R. Vol. 14, p. 1924 (Opinion, p. 204). The Board issued a certification dated September 22, 2010, R. Vol. 79, Pl. Ex. 240, pp. 5455-61, but, as the Panel recognized, that action was taken too late to have any legal effect because "no encumbrance of [the funds appropriated for the aid] was ever [made], [and] nothing prevented the lapsing of the appropriation made for FY2010 on June 30, 2010." *Id.*, pp. 1924-25 (Opinion, pp. 204-05). In other words, any chance of accessing those funds disappeared as a matter of law on June 30, 2010, and the Board's certification did not occur until almost three months later.

Plaintiff Districts assert that the Panel's finding that no certification of entitlements was issued is plainly incorrect and clearly erroneous. Brief of Cross-Appellant, at 94. Yet, this argument misunderstands the Panel's point – which Plaintiff Districts do not dispute – that no certification issued *before* the FY 2011 reappropriation caused the FY2010 capital outlay state aid appropriation to lapse on June 30, 2010.

### c. Before Reappropriation, The November 2009 Allotment Removed Any Appropriated State Aid

Even if monies can be said to have been earmarked in the capital outlay state aid fund for FY2010, the Panel correctly found, as a matter of fact, that any such appropriated funds were withdrawn by the November 2009 allotment. R. Vol. 14, pp. 1926-27 (Opinion, pp. 206-07).

The Kansas Secretary of Administration may "inaugurate the allotment system so as to assure that expenditures for any particular fiscal year will not exceed available resources" when general or special fund resources are "likely to be insufficient to cover the appropriations made against such general fund or special revenue fund." K.S.A. 75-3722, second paragraph; K.A.R. 1-61-1, *et seq*. The Secretary did so for FY2010. R. Vol., p. 1925 (Opinion, p. 205).

When the Secretary of Administration establishes an allotment system pursuant to K.S.A. 75-3722, the Secretary is exercising a delegated legislative function. *State ex rel. Schneider v. Bennett,* 219 Kan. 285, 300, 547 P.2d 786 (1976). The Legislature has vested the Secretary of Administration with the authority and responsibility for determining the manner in which an allotment system can best be applied. Allotment may be imposed on any appropriation from any fund for which the allotment system is established. K.S.A. 75-3722. *See also,* K.S.A. 75-3724 ("No appropriations . . . shall become available for expenditure until an allotment has been applied for . . . and has been approved . . . and funds allotted . . .."). The allotment system statutes make no distinction as to the types of appropriations which are subject to allotment, and there is nothing in the statute's legislative history to indicate that the 1953 Legislature intended any such distinction. *See* Report and Recommendations of the Kansas Legislative Council, Part 1 –

Regular, submitted to the 1953 Legislature (Proposal No. 21), pp. 108-89 & Publication No. 183 of the Kansas Legislative Council's Research Department.

The Plaintiff Districts allege capital outlay state aid could not be removed under the allotment process because transfers made in accordance K.S.A. 72-8814(c) are "demand transfers" from the State General Fund, not subject to allotment. Brief of Cross-Appellant, at 97. There are two simple answers to this argument. First, 2009 Kan. Sess. Laws ch. 124, §130 (b) amended K.S.A. 72-8814(c), making transfers under that section "revenue transfers from the state general fund" for FY2010 and FY2011, and Plaintiff Districts do not contest that the allotment statutes and procedures apply to revenue transfers. Second, the demand for transfer did not happen until September 22, 2010, after any monies appropriated for the FY2010 aid were removed by the allotment. R. Vol. 79, Pl. Ex. 240, pp. 5455-61.

#### 4. Mandamus Cannot Be Used To Order Appropriations Of State Funds

Article 2, § 24 of the Kansas Constitution provides: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Thus, state funds over which the Legislature has the rightful control cannot be withdrawn from the treasury "except in pursuance of an act of the Legislature setting apart or assigning such money to a particular public use." *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 661, 308 P.2d 537 (1957). "This use must be specific in amount and specific in purpose to indicate to the public officials who are authorized to withdraw and use such funds the purpose to be accomplished by the appropriation." *Id. Accord, Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 709-10, 957 P.2d 379 (1998); *State ex rel. Stephan v. Carlin*, 230 Kan. 252, Syl. ¶ 3, 631 P.2d 668 (1981). As a result, no state expenditure

from an appropriation can be legally made after its expiration date. *Hyre v. Sullivan*, 171 Kan. 307, 311-12, 232 P. 2d 474 (1951).

Under Article 2, § 24, the State cannot be compelled by *mandamus* to pay appropriated sums after such monies are no longer in the State's treasury. *See Panhandle Eastern Pipe Line Co. v. Fadely*, 189 Kan. 283, 287, 369 P.2d 356 (1962) (holding plaintiff, by mandamus, could not recover back the taxes notwithstanding the law under which such taxes were paid was declared unconstitutional); *Hyre v. Sullivan*, 171 Kan. 307, 311-12, 232 P. 2d 474 (1951) (refusing to issue an order of mandamus directing payment of increase in salary to state employee after appropriation had expired).

Plaintiff Districts do not dispute the existence of the stated limitation on mandamus, but continue to assert that FY2010 capital outlay state aid was never properly unfunded by allotment or reappropriation. With this predicate, they argue their June 17, 2010, Notice of Claims, R. Vol 96, Pl. Ex. 363, p. 7093, allows the books to be reopened. Brief of Cross-Appellant, at 95.

Plaintiff Districts rely on *Hicks v. Davis*, 97 Kan. 312, 154 P. 1030 (1916) for their argument, but to no avail. Again, as already explained, the predicate for the Plaintiff Districts' position is wrong because there was never any money in the capital outlay fund or any such funds were legally removed. Furthermore, *Hicks* provides no support for Plaintiff Districts' position. In *Hicks*, the plaintiff sought a writ of mandamus to compel the auditor of the state to pay expenses he incurred while in the employ of the State Grain Inspection Department. The auditor contended that the State had no legal or moral obligation to pay the expenses, even though the Legislature had specifically appropriated funds for payment of the claim. This Court held that a member of the executive branch

could not substitute his judgment for the Legislature's, noting "[t]he courts cannot impeach the legislative discretion, neither can an executive officer." *Id.* at 316.

*Hicks* then addressed whether it was too late to compel the auditor to pay the expenses. The Court wrote:

> The auditor suggests that there is no money in the grain inspection fee fund to pay this claim. We assume that this is because the books for the fiscal year ending June 30, 1915, have been closed, and that any balances then existing in that fund have reverted to the general revenue funds of the state. *But the books were open when the petitioner filed this action.* That crystallized the status of the fund as of that date, and if there were moneys in the grain inspection fee fund at that time, the closing of the books will not bar the petitioner. There is no magic in bookkeeping. Books which have been closed in derogation of a lawful outstanding claim which had been provided for by the legislature must be reopened and the claim paid and the proper entries made to recite the pertinent facts.

*Id.* at 317 (emphasis supplied). The *Hicks* rule simply does not apply here. This action was filed on November 2, 2010, R. Vol. 1, p. 28, *after* the November 2009 allotment removed any monies in the FY2010 capital outlay state aid fund if any monies had been so earmarked, and *after* reappropriation of remaining FY2010 monies on June 30, 2010.

Also, there is another and more fundamental difference between *Hicks* and this case. The State, not a member of the executive branch, is the only defendant in this case. *Hicks* was concerned with encroachment on legislative powers. The Legislature found that the plaintiff in *Hicks* was owed reimbursement for his expenses. By contrast, rather than support the Legislature's powers, in this case Plaintiff Districts seeks to undo the Legislature's intent not to fund FY2010 capital outlay state aid. Unlike the plaintiff in *Hicks,* the local school boards are not owed anything. As subordinate entities of state government, the districts do not have a property interest in capital outlay aid from the State. Thus, the additional restrictions on suits against the State discussed in its Opening

Brief apply and also explain why *Hicks* is not support for reversal of the Panel's decision on Plaintiff Districts' Count 2. *See* Brief of Appellant, at 88-97.

### G. The Panel Did Not Err In Denying The Plaintiff Districts' Attorneys' Fee Request

It is almost absurd to talk about a supposed failure to award attorneys' fees in this case. The Plaintiff Districts Class did not prevail. There is no statutory basis for an award of fees. There is no "fund" from which fees can be distributed, if after application, notice and a hearing, the trial court would find an award of attorneys' fees to "class counsel" is appropriate. The Panel made no findings necessary to support imposition of monetary sanctions against the State. The Panel actually refused to make Plaintiff Districts' proposed finding which suggested bad faith on the State's part. Most importantly, Plaintiff Districts do not even pretend to assert that the Panel abused its discretion in denying their request for attorneys' fees.

#### 1. Standard Of Review

The question whether the Panel had authority to award fees is a question of law subject to *de novo* review. *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 572, 215 P.3d 561 (2009). Presuming *arguendo* such authority, the Panel's decision to decline to award fees in this case would be subject to an abuse of discretion standard of review. *Id.*

#### 2. The Plaintiff Districts Acknowledge There Is No Authority For An Award Of Fees

The Plaintiff Districts cite no statutory authority for the requested award of attorneys' fees in this case, acknowledging that no statutory basis for an award of fees exists. "In Kansas, a party's request for attorney fees cannot be granted absent statutory authority or agreement applicable to the parties." *Id.* (citing *Hawkinson v. Bennett*, 265 Kan. 564, 575, 962 P.2d 445 (1998)). As this Court is well aware, the "American Rule" is

that attorneys' fees are not recoverable by a prevailing litigant, even in federal litigation, absent statutory authorization. In reversing a fee award made to an environmental group based on a lower federal court's "equitable" powers, the Supreme Court discussed, emphasized and applied the American Rule in *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 271 (1975) (after reviewing the long history of denial of such awards and finding that to make such an award in the absence of statute violated the legislative province).

### 3. There Is No Basis For Awarding Fees As Part Of A Class Action "Common Fund"

The Plaintiff Districts claim that the Panel should have exercised discretion and equitable powers to award attorneys' fees because of the alleged class action status of the claim, citing a 1994 Attorney General Opinion, No. 94-47 (April 8, 1994), generally discussing the possibility of fee awards from a common monetary fund created by a successful class action, citing *Am Jur* and *Newberg on Class Actions*. Since no common monetary fund resulted from the Panel's judgment on the capital outlay issue, there is no fund from which attorneys' fees could be awarded or apportioned; the prerequisite for the common fund doctrine is lacking. A. Conte and H. Newberg, *Newberg on Class Actions* §14:6, at 547 (2002). *See, e.g., Seattle School Dist. No. 1 of King County v. State*, 90 Wash. 2d 476, 585 P.2d 71, 107 (1978) (en banc) (affirming trial court's denial of attorneys' fee request in school finance case for reasons including the lack of statutory authority and rejecting Plaintiff Districts' class action argument on the grounds that no identifiable fund was created by the judgment against which attorneys' fees could be impressed).

### 4. There Is No Basis For An Award Based On "Bad Faith"

Finally, the Plaintiff Districts ask this Court to award attorneys' fees where the Panel refused based upon an allegation that the Legislature acted in "bad faith." In support of this claim, the Districts assert that the Legislature did not commission a new study of actual costs and did not conform to recommendations made to it by certain educators and a Commission. Brief of Cross-Appellant at 99. These are policy choices within the Legislature's discretion. To term such decisions "bad faith" misconstrues the concept. *See, e.g., Black's Law Dictionary* (9th ed. 2010) ("bad faith" contemplates dishonesty of belief or purpose).

In addition to the lack of sufficient factual basis, the Plaintiff Districts' Brief fails to cite any truly relevant authority, pointing primarily to *Shoenholz v. Hinzman*, 295 Kan. 786, 787, 289 P.3d 1155 (2012), and representing that *Shoenholz* cited *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 926, 128 P.3d 364 (2006)). Brief of Cross-Appellant at 98. Actually, *Shoenholz* did not cite or rely upon *Alpha Medical Clinic*. Rather in *Shoenholz*, this Court affirmed the Court of Appeals' decision that the district court abused its discretion in failing to award attorneys' fees given that K.S.A. 60-237(b)(2) required such an award for failure to comply with a discovery order. *Id.*, at 802. In other words, there was statutory authorization for such an award, unlike the situation here.

The Court's opinion in *Alpha Medical Clinic* referred generally to a Court's inherent power to impose sanctions. However, *Alpha* and the decisions it cited simply do not stand for a rule that an appellate court should impose, as a sanction, an award of the opposing parties' attorney fees in the absence, at the very minimum, of facts clearly demonstrating sanctionable bad faith, such as bringing harassing, frivolous or vexatious

litigation. No attorneys' fees were awarded in *Alpha*. 280 Kan. at 926. Further, the cases cited in *Alpha* for that proposition did not even involve an award of attorneys' fees against a party. *Wilson v. American Fidelity Ins. Co.*, 229 Kan. 416, 421, 625 P.2d 1117 (1981) (refusal to permit a deposition of a medical examiner as a sanction); *Knutson Mortgage Corp. v. Coleman*, 24 Kan. App. 2d 650, 654, 951 P.2d 548 (1997) (reversing an award of a monetary sanction against an attorney where the district court had not provided notice, opportunity for hearing, and a specific finding that counsel's conduct constituted bad faith).

In sum, the "American Rule" bars the Plaintiff Districts' claim for attorney's fees, and they cannot identify any statute or equitable doctrine that would justify their request.

## V. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the State requests that the Panel's decision concerning the issues raised in Plaintiff Districts' cross appeal should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 15th day of July 2013, true and correct copies of the above and foregoing RESPONSE BRIEF OF CROSS-APPELLEE was mailed, postage prepaid, to:

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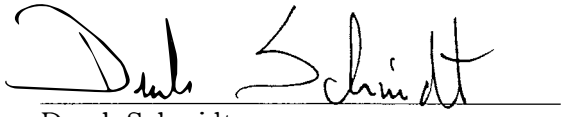

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# APPENDIX

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 92,032

RYAN MONTOY, *et al.*,
*Appellees*,

v.

STATE OF KANSAS, *et al.*,
*Appellants.*



**ORDER**

The plaintiffs, Ryan Montoy, *et al.*, have filed a motion to reopen *Montoy v. State of Kansas*, Case No. 92,032. The defendants, the State of Kansas and the Kansas State Board of Education, have each filed a response. The plaintiffs have filed a reply to the defendants' responses.

Having fully considered the motion, the responses, and the reply, the court denies the motion.

On July 28, 2006, in the fifth and final decision in this case, this court concluded that the legislature's efforts in enacting 2005 H.B. 2247, modified by 2005 S.B. 3, and 2006 S.B. 549 constituted substantial compliance with our prior remedial orders. *Montoy*

*v. State*, 282 Kan. 9, 138 P.3d 755 (2006). Our decision was limited to determining compliance; we refused to address the question of whether the new legislation provided constitutionally suitable provision for finance of the public schools as required by Article 6, § 6 of the Kansas Constitution.

Our refusal was based on the limits of our appellate function. After reviewing S.B. 549, we determined that it had so "materially and fundamentally" altered the school funding formula that it had essentially replaced the funding scheme at issue in the case. 282 Kan. at 16, 25. While the extensive record before us contained volumes of evidence concerning the financial operation and effect of the prior funding formula, we had "no facts and figures in the record from which we could determine how [the new funding formula of S.B. 549 would] operate over the next 3 years." 282 Kan. at 25. Accordingly, we held:

> "[T]his court is an appellate court and not a fact-finding court. The constitutionality of S.B. 549 is not before this court. It is new legislation and, if challenged, its constitutionality must be litigated in a new action filed in the district court. We have already made the determination that the school finance formula which was before this court in *Montoy II* [*State v. Montoy*, 278 Kan. 769, 120 P.3d 306 (2005)] was unconstitutional. The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III* [*State v. Montoy*, 279 Kan. 817, 112 P.3d 923 (2005)]. The sole issue now before this court is whether the legislation passed in 2005 and S.B. 549 comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed. A constitutional challenge of S.B. 549 must wait for another day." 282 Kan. at 18-19.

Although we recognized that we could have remanded the case to the district court to allow the plaintiffs to amend their pleadings to challenge the new legislation, we chose

not to do so, "electing instead to end this litigation" by dismissing the case. 282 Kan. at 25. The decision to dismiss the case was not unanimous; nonetheless, it was the decision of a majority of the members of this court that dismissal was necessary to achieve finality in this case.

Now, over 3 years later, the plaintiffs ask us to reopen this case. Although the plaintiffs' motion was captioned as a motion to reopen the appeal, procedurally, it is more properly characterized as a motion to recall the mandate. The mandate on our July 28, 2006, decision dismissing this case was issued on August 21, 2006. Upon issuance of the mandate, our decision became final and our appellate jurisdiction ended. See K.S.A. 60-2106(c); Supreme Court Rule 7.06 (2009 Kan. Ct. R. Annot. 60).

Although issuance of an appellate mandate generally terminates appellate jurisdiction, an appellate court retains the inherent power to recall its mandate. However, because recalling a mandate disturbs the finality of a judgment, the power to recall a mandate is to be exercised only in extraordinary circumstances. "In light of 'the profound interests in repose' attaching" to a mandate, the power to recall a mandate "can be exercised only in extraordinary circumstances" and is thus a power "of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) (quoting 16 Wright, Miller & Cooper, Federal Practice and Procedure § 3938, p. 712 [2d ed. 1996]); see also *Greater Boston Television Corporation v. F.C.C.*, 463 F.2d 268, 278 (D.C. Cir. 1971) (To recall a mandate, "[t]here must be special reason, 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation.").

The context of this case at this time underlines the good reasons for the strong policy against recalling mandates. There are obvious standing issues. For example, it is

likely that the named plaintiff, Ryan Montoy, may no longer have standing as a plaintiff in this case. An issue has been raised as to whether all of the same school districts that participated in this case as named plaintiffs would continue in future litigation. There are other issues regarding necessary party defendants that have been raised in the responses to the motion to reopen this case.

Last, and most important, the plaintiffs' request would have this court recall its mandate and reassert its appellate jurisdiction in this case solely for the purpose of remanding it to the district court. On remand, the case would go through essentially the same process as a new case: the filing of an amended petition with substituted parties and new claims, discovery, and trial. Thus, there is nothing the plaintiffs are seeking that they cannot accomplish by filing a new lawsuit.

The power to recall a mandate is an extraordinary power to be used as a last resort. It should only be used to accomplish something that, without it, cannot otherwise be remedied. That is not the situation here. We conclude that the circumstances do not warrant recalling the mandate dismissing this case.

This decision denying the plaintiffs' motion to reopen this case is a procedural ruling, not a decision on the merits of any issues raised in the motion, responses, or reply.

BY ORDER OF THE COURT, this 12th day of February, 2010.

ROBERT E. DAVIS
Chief Justice

NUSS, J., and BILES, J., not participating

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

**DIANE PETRELLA, *et al.*,**

**Plaintiffs.**

**vs.**

**SAM BROWNBACK, Governor of Kansas, in his official capacity, *et al.*,**

**Defendants.**

**Case No. 10-CV-2661-JWL-KGG**

**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DECLARATORY RELIEF**

## INTRODUCTION

Plaintiffs ask this Court to declare that the Local Option Budget ("LOB") Cap, K.S.A. 72-6433(b) violates the United States Constitution. It is no secret that Intervernor-Defendants believe there are issues with the funding of education in Kansas. But, Plaintiffs' solution is one that throws the proverbial baby out with the bathwater. Plaintiffs suggest this Court take a school funding scheme that currently offers unequal educational opportunities and take out one of the only remaining mechanisms aimed at ensuring equity. In a time of decreased funding and diminishing equality in Kansas' state-wide school system, Plaintiffs advocate "every district for itself." By asking this Court to eliminate the LOB Cap from the current school funding formula, with no other considerations for equalizing the distribution of aid to school districts, Plaintiffs will impose further damage on an already broken system. Plaintiffs' requested relief would have very real consequences for those school districts that cannot rely on the property wealth of Shawnee Mission School District ("SMSD"). The Kansas Supreme Court described just this situation in *Montoy v. State of Kansas*, 279 Kan. 817, 840 (2005) (Montoy IV):

classifications of persons, Plaintiffs cannot establish that the resulting discrimination was caused by Defendants' purposeful or intentional conduct.

"A claim of denial of equal protection requires a showing of intentional or purposeful *discriminatory* conduct by a governmental entity." *Johnson v. City of Wichita,* 687 F.Supp. 1501, 1510-11 (D. Kan. 1988) (citing *Washington v. Davis*, 426 U.S. 229 (1976)) (emphasis added). Here, Plaintiffs cannot and do not establish that Defendants have engaged in any discriminatory conduct. The LOB Cap, which Plaintiffs allege violates the Equal Protection Clause, applies uniformly to *all* school districts. Plaintiffs do not allege otherwise.

Further, even if Plaintiffs could establish that the LOB Cap resulted in the Plaintiffs being treated differently, Plaintiffs would also be required to show that such discrimination was the result of purposeful or intentional conduct by Defendants. *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1179 (10th Cir. 2003) (holding that the acts forming the basis for Plaintiffs' claim must have been "motivated by a discriminatory purpose" to sustain a claim under the Equal Protection Clause.). A showing of discrimination under the Fourteenth Amendment requires Plaintiffs to prove that the "state legislature selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Plaintiffs cannot make this showing. The purpose of the LOB Cap is to "equalize the ability of districts with lower property wealth to raise money through the use of the LOB." *See e.g., Montoy V*, 282 Kan. at 16. The LOB Cap was enacted to "level the playing field" by bringing lower property wealth districts "up to par" with other districts. *Id.* Thus, Plaintiffs cannot show that the LOB Cap was enacted *because of* its adverse effects on the Shawnee Mission School District. Because Plaintiffs cannot show *any*

## CONCLUSION

For these reasons and reasons set forth in previous briefing, Defendants and Intervenor-Defendants respectfully request this Court enter an Order: (1) denying Plaintiffs' Motion for Summary Judgment and Declaratory Relief; (2) dismissing Plaintiffs' claims or, in the alternative, staying a decision on Plaintiffs' claims pending an outcome in *Gannon v. State*; and (3) awarding such other further legal and equitable relief as may be proper under the circumstances.

Dated this 27th day of June, 2013.

**s/ Alan L. Rupe**
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