

NO. 13-109335-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

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

Plaintiffs/Appellees/Cross-Appellants,

vs.

STATE OF KANSAS,

Defendant/Appellant/Cross-Appellee

BRIEF OF *AMICUS CURIAE*

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

Donna L. Whiteman #10862
Lori M. Church #21688
Kansas Association of School Boards
1420 SW Arrowhead Road
Topeka, KS 66604-4024
785-273-3600 (Telephone)
785-273-7580 (Facsimile)
Attorneys for *Amicus Curiae*

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I. INTRODUCTION

“If we want to invest in the prosperity of our nation, we must invest in the education of our children....” – William Jefferson Clinton, *The President's Radio Address* (December 9, 2000).

The issues surrounding the Kansas “school finance” cases have been debated within the hallowed halls of the capitol, around local school board tables and in coffee shops throughout Kansas. They have been exhaustively briefed, extensively argued, and occupied large amounts of time and energy. Despite all of this, one of the main issues first addressed in the school finance case in 1999 is still very much present. After all this time and effort, the state is still quibbling over its constitutional duty to provide suitable funding for the education of Kansas school children. In a time when expectations are greater and needs are higher, the debate should be focused on how to get better and how to prepare students for life beyond high school. Instead, Kansas schools are struggling to do more with less while they attempt to anticipate the next program they will be forced to cut. The Kansas Legislature must accept its constitutional responsibility to fund and improve the educational system in Kansas.

II. ISSUES PRESENTED

- A. **Whether the Kansas Legislature has met its constitutional duty to provide suitable finance for the education of all the 447,961 students in public schools across Kansas, pursuant to Article 6, Section 6(b) of the Kansas Constitution.**
- B. **Whether the Kansas Legislature has met its constitutional responsibility to provide for the “intellectual, educational, vocational and scientific improvement” of Kansas public schools, as required by Article 6, Section 1 of the Kansas Constitution.**

III. SUMMARY OF ARGUMENT

The Kansas Legislature has failed to meet its constitutional funding obligation as established in *Montoy v. State*, 278 Kan. 769 (2005)(*Montoy II*). In the *Montoy*

decisions, the Court set forth the necessary framework for the legislature to achieve compliance with the Kansas Constitution's "suitable provision for finance" requirement. First, this Court determined that the financing formula or decisions must be "based upon actual costs" rather than "on political or other factors not related to education." *Montoy II*, 278 Kan. at 774-75. Second, school legislative funding must be one which advances the Kansas K-12 educational system to a better quality or state, which is also required by Article 6, §1 of the Kansas Constitution. *Id.* at 773.

Not once since the *Montoy* case was dismissed has the Kansas Legislature provided adequate funding as required by the line of *Montoy* decisions and has actually gone to great lengths to further defund public education. Between 2009 and 2012, the Kansas Legislature reduced revenues available to Kansas schools including over \$511 million in cuts to the base budget per pupil. Memorandum Opinion and Entry of Judgment at 77, *Gannon v. State* (January 11, 2013) (No. 10C1569). These reductions were made even though Kansas educators have identified strategies that improve student achievement, including extended learning opportunities, smaller class sizes, professional development and hiring qualified teachers. *See id.* at 177. Whether the legislature wants to acknowledge it or not, these educational strategies cost money. *See id.* at 169.

Therefore, to be in compliance with Article 6, §1 and §6 of the Kansas Constitution, the Kansas Legislature cannot simply provide enough educational funding for Kansas schools to get by or do well enough. Rather, the Kansas Legislature has a constitutional duty to improve the educational system in Kansas. Thus, as standards get higher and Kansas schools see an increase in minority and at-risk students, the legislature must continue to provide funding and resources that enable schools to meet the

educational needs of all students. It is not sufficient to simply allocate enough funds to keep achievement levels stagnant or above national averages. Per the Kansas Constitution, average is not good enough for Kansas kids.

ARGUMENT

A. Whether the Kansas Legislature has met its constitutional duty to provide suitable finance for the education of all the 447,961 students in public schools across Kansas, pursuant to Article 6, Section 6(b) of the Kansas Constitution.

1. The Kansas Legislature has continued to drastically underfund the current Kansas School Finance System.

In the *Montoy* decisions, this Court was very specific in determining that the legislature was not providing suitable funding for Kansas schools. Unfortunately, very little has changed since those decisions. The legislature is still failing to adequately fund schools despite the State's claim that spending per pupil is at an all-time high. While on the surface the numbers may seem to indicate that the legislature is spending more money on education than ever before, these figures are simply smoke screens used to hide the truth – education funding in Kansas is lower today than it was before *Montoy*.

The current school funding formula can be broken down into the following seven basic categories: 1) Base State Aid per Pupil (hereinafter “base”); 2) Unrestricted weightings (i.e., low and high enrollment weightings); 3) Restricted weightings (i.e., at-risk and bi-lingual weightings) and special education funding; 4) Local option budgets; 5) Federal aid; 6) KPERS contributions; and 7) Capital outlay and bonds. The legislative response to school funding decisions in the past decade has resulted in more money being filtered into a scheme that requires local schools to function with lower general operating funds while having to continue to maintain standards and comply with more legislative mandates.

a. Total State Aid per Pupil

In looking at only the raw numbers, the total per pupil amount in 2005-2006, which would include all of the categories outlined above, was \$10,596. *See* Appendix A. In 2008-2009, when the legislature was increasing funding in light of the *Montoy* decision, total funding per pupil was \$12,660. *Id.* In 2012-2013, the total per pupil funding was \$12,628. *Id.* Despite there being a decrease in recent years, the State maintains that education funding is holding steady and the legislature is meeting its constitutional responsibilities. The State's argument fails because total funding per pupil is deceiving, especially when one starts to inspect the specific legislative funding categories more closely.

Examining school finance dollars when adjusted for rising inflation costs gives a more accurate picture of what school districts receive under current legislative funding. *See Gannon* Decision at 237. The 2005-2006 total per pupil amount when adjusted for inflation is \$12,278. *See* Appendix A. In 2008-2009 that number increased to \$13,787. *Id.* The amount for 2012-2013 is \$12,628, which is a scant \$350 more than the amount schools were receiving in 2005-2006. *Id.* This alone shows that the legislature is not adequately funding schools, but still provides less than a clear picture of the legislature's school finance funding landscape.

Of greater significance is the fact that the legislature is drastically underfunding the base while increasing its KPERs contributions and using local option budget and capital outlay funds to amplify its total funding numbers, which does little to meet its constitutional duties. *See Gannon* Decision at 142.

b. Base and Unrestricted Weightings Funding

Essentially, the first two categories outlined above are the only state-contributed portion of a local district budget that can be attributed to the school's general operating fund. *See id.* at 88-9. The base is particularly important because it is the "foundation upon which school district funding is built." *Id.* at 77-8.

In 2005-2006, the base and unrestricted weighting funds were \$4,878 per pupil. *See* Appendix A. In 2008-2009, those funds totaled \$5,153. *Id.* Finally, in 2012-2013, the base and unrestricted weighting totals were \$4,497 – down \$381 from 2005-2006 and \$656 in 2008-2009. *Id.* Even without adjusting for inflation, it is impossible to argue that the base is being adequately funded. However, when the numbers are adjusted for inflation, the situation becomes even more critical.

When adjusted for inflation, the 2005-2006 base and unrestricted weighting funding equals \$5,652. *Id.* In 2008-2009, the adjusted totals were \$5,612. *Id.* By 2012-2013, the totals had plummeted to \$4,497, which is more than a \$1,100 drop in the base when compared to previous years. *Id.*

The Kansas Legislature has cut more than \$511 million dollars in base state aid between 2009 and 2012. *Gannon Decision* at 77. This underfunding is a problem for two reasons. First, funding cuts to the base impact all students. *Id.* at 189-90. "[L]est one think that funding cuts impact only those children disadvantaged..., it should be recalled that a diversion of resources to those most in need leaves those with...greater potential on their own rather than with...a teacher who could challenge them to rise above whatever satisfactory level the government has said they have achieved...." *Id.* at 189. Second, the base is the number used to multiply weightings for enrollment, at-risk

and bilingual funding, just to name a few. *Id.* at 77. Therefore, since the legislature is failing to increase the base, the weighting percentages for at-risk and bilingual funding are losing value. *Id.* This impact is further felt since there has been an increase of at-risk students in Kansas. *Id.* at 67. Schools actually have to educate more at-risk students with fewer resources because the value of the weighting has dropped. *Id.* at 77 (Finding that “cuts to the base [have] a multiplier effect, cutting more from districts with more weightings or more high need students.”); *see also id.* at 87-8.

Studying the numbers more closely proves this point. According to the Kansas Legislative Research Department, the base state aid per pupil in 2008-2009 was \$4,400 and at-risk weighting was .456. Therefore, in 2008-2009, schools were getting an additional \$2,006 per at-risk student. In 2012-2013, the base state aid per pupil had declined to \$3,838 and at-risk weighting remained at .456, which means districts were only receiving an additional \$1,750 per at-risk student – a \$256 decrease since the 2008-2009 school year. This number would be further diminished if the 2008-2009 figures were adjusted for inflation. It is illogical to argue that if it cost \$2,006 extra dollars in 2008-2009 to educate an at-risk student, it only costs \$1,750 in 2012-2013. Such an assertion has no factual foundation and illustrates that the legislature has significantly underfunded the base state aid per pupil.

c. KPERS Funding

While most restricted weightings and special education funds do assist schools in needed areas, the KPERS contributions are merely a pass through and districts cannot use the allocated funds for anything other than funding KPERS. *See* K.S.A. 74-4939a. While this is a worthy endeavor, it has no bearing on the daily operations of schools or on

the educational interests of students. It certainly has little impact on the constitutional threshold the legislature is required to meet in providing adequate funding for Kansas schools. Despite this, KPERS funding has more than doubled since 2005-2006. *See* Appendix A. These numbers are particularly powerful when total per pupil funding and base state aid per pupil funding have significantly decreased over the same period. *Id.*

Facts and numbers are important to examine in constitutional challenge cases because they create tangible examples of our current system. The figures highlight in concrete terms that schools' general operating funds are the same or lower than before the first *Montoy* case. *Id.* They confirm that since 2009, current spending on education is not keeping up with inflation. *Id.* The data shows that Kansans are contributing less of their personal income to public education than ever before. *See* Appendix B. Ultimately, they illustrate the startling reality that the Kansas Legislature has continued to underfund public education in spite of the clear precedent established in *Montoy*.

2. The Court's decision in *Montoy* clearly prescribes the standards for determining whether education funding is suitable.

"The legislature shall make suitable provision for the finance of the educational interests of the state." Kan. Const. Art. 6, §6(b). The text of the Kansas Constitution is clear. However, defining the construct of the words in practice is more difficult. Yet, we are not without guidance in this labyrinth of suitable school finance. The *Montoy* cases lay the framework needed to determine whether the legislature is meeting its constitutional obligation of providing suitable finance for the state's schools. *Montoy II*, 278 Kan. at 774-75. It was established by this Court in *Montoy* that to meet its constitutional responsibilities, the legislature must base its funding decisions on the actual costs of education and must take the actual costs into account when determining

education funding formulas. *Montoy v. State*, 282 Kan. 9, 12 (2006)(*Montoy V*). The *Gannon* Panel emphasized the point, affirming, "...the *Montoy* cases establish...a requirement on responsible government officials, when acting under Article 6, particularly §6(b), to act on facts and for sound reasons that support educational advancement, and to do so demonstrably in regard to both." *Gannon* Decision at 54. The Court has continued to emphasize that the actual cost of education is where the legislature must begin in determining whether it is passing constitutional muster in funding education. *See id.* at 43-44. The legislature cannot "ignore facts or factually sound recommendations...or act on the basis of stale facts or no facts without a basis *in fact* for doing so." *Id.* at 52. Such actions fly in the face of logic. As the *Gannon* panel observes, "...[n]owhere in our free market society, absent duress, would any rational individual act on an economic matter without reference to a need versus its cost." *Id.*

3. Based on the tests established in *Montoy*, the Kansas Legislature is not meeting its constitutional duty to provide suitable finance for Kansas public schools.

Despite the clear guidance provided by the Court in *Montoy*, the Kansas Legislature has failed to meet its constitutional duty to provide suitable finance for Kansas public schools.

The legislature has failed to make decisions based on the actual costs associated with operating public schools and educating Kansas students. *Id.* at 117-18 (concluding that "the Legislature could not have possibly considered the actual costs of providing an Article 6, §6(b) suitable education in making its appropriations in its...2008 session through its 2012 session"). Fewer dollars are being channeled into the legislative funding categories where the actual cost of providing a suitable education occurs. *See* Appendix

A. In examining the dollars applied to the base and unrestricted weighting alone, even without it being adjusted for inflation, it is apparent that the legislature is actually providing less funding in those areas today than it did at the time this Court made its original decision in *Montoy*. *Id.* Since it was unequivocally determined in *Montoy* that the legislature was not meeting its constitutional obligation to provide adequate funding for public education, it is not reasonable to conclude that they are meeting their funding responsibilities over a decade later by providing less money in these areas. *See Gannon* Decision at 243. This is particularly evident when the base establishes the foundation for a significant portion of other school funding. *Id.* at 77. When the funding is adjusted for inflation the discrepancies are even more apparent. *See Appendix A.* The legislature is not following the requirements established by the Court in *Montoy*, which requires actual costs be examined to determine what funding would be suitable. *Montoy V* at 12. The State wants to be able to point to the fact that more actual dollars have been allocated, but this is irrelevant to the issue of whether suitable funding is being provided. *Gannon* Decision at 52-3. It is equivalent to a rich uncle providing you with a million dollars one year, two million the next year and so on, to provide for all your basic needs, but then increasing the amount that is placed in an irrevocable trust that cannot be used to pay your mortgage, food, utilities or other expenses, but saying you should be able to pay for everything you did before because he is providing you with more money every year. If the money is not attainable or available to apply to your actual needs, i.e. your actual costs, it is not adequate to provide for your basic needs. The same is true under the current funding formula provided by the legislature. It may be more money, but the actual restricted allocations provided by the legislature do not provide for the actual costs

to school districts associated with educating students and maintaining schools.

Therefore, it fails the suitable funding test required by the Kansas Constitution.

B. Whether the Kansas Legislature has met its constitutional responsibility to provide for the “intellectual, educational, vocational and scientific improvement” of Kansas public schools, as required by Article 6, Section 1 of the Kansas Constitution.

1. Legislative underfunding of Kansas public schools has negatively impacted achievement in a time when educational standards are rising and student needs are greater.

The Kansas Legislature’s underfunding of Kansas schools is undisputed. *See Gannon* Decision at 229 (stating “Plaintiffs have established beyond any question that the State’s K-12 educational system now stands as unconstitutionally underfunded”). Across Kansas, student demographics are changing, performance standards and benchmarks are rising and the needs of students are increasing. *See id.* at 67-8. The gap is growing between available resources and the current educational needs of Kansas students. *Id.* at 68. Without a drastic change in funding, the gap will become insurmountable. “Simply, school opportunities do not repeat themselves and when the opportunity for a formal education passes., it is most likely gone.” *Id.* at 188.

A number of significant changes have occurred in the Kansas education arena since the Court’s last *Montoy* decision. In October 2010, the Kansas State Board of Education adopted the Kansas College and Career Ready Standards. These standards were specifically designed to identify the skills and knowledge students need to be successful in vocational, technical or academic programs after high school. *Id.* at 171. In July 2012, Kansas was granted a conditional waiver from certain requirements of the federal No Child Left Behind program, which required the implementation of college and career ready standards. *Id.* These changes have highlighted that the performance of

Kansas students is declining and decreased funding is the reason behind the deficiencies. *See generally id.* at 159-90.

Established benchmarks and standards are showing that Kansas schools are struggling and lack of funding is the cause. Prior to 2011-2012, data generally showed achievement scores for Kansas students were slightly increasing. *Id.* at 161. However, “[t]he preliminary state data for 2011-12 shows that school districts are beginning to feel the effects of the decrease in funding.” *Id.* at 159. If Kansas had not been granted the NCLB waiver for the 2011-2012 school year, the state would not have met AYP requirements in math or reading. *Id.* Barely one-fourth of high school graduates in Kansas meet the ACT benchmarks in Math, Science, Reading and English, demonstrating only that fraction of graduates is college-ready in those areas. *Id.* at 166-67. These statistics are even more staggering when broken down by subgroup. *See id.* at 159-61, 166-67.

These deficiencies will be exacerbated by the higher college and career ready standards, included as part of the NCLB waiver. While the standards are still in their infancy, early results indicate the common core standards, including those adopted in Kansas, require the need for major curriculum changes and will create “a dramatic increase in the intellectual rigor relative to current state assessments.” Ctr. for K-12 Assessment and Performance Mgmt. at Educational Testing Service, *Seeing the Future: How the Common Core Will Affect Mathematics and English Language Arts in Grades 3-12 Across America*, 5 (May 2013). As with any change, especially when trying to improve, additional support and funding will be needed to meet the established goals. *See Gannon Decision* at 169, 175.

2. The Kansas Constitution and the *Montoy* decisions specifically require the Kansas Legislature to provide for educational improvement of Kansas schools.

The Kansas Constitution also requires that the legislature “provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools....” Kan. Const. Art. 6, §1. In *Fatzer v. Bd. of Regents*, 67 Kan. 587, 595 (1949), this Court established that “[t]he constitution makes it mandatory upon the Legislature to encourage the promotion of intellectual...improvement.” It furthered that directive in *Montoy* by holding that the legislature cannot meet its constitutional duty of providing suitable finance if the level of funding does not meet the constitutional mandate of *improving education*. *Montoy II* at 773 (emphasis added). Pursuant to Article 6, §1, the Kansas Constitution requires that the educational system in Kansas not remain “static or regressive,” but instead must “advance to a better quality or state.” *Id.* (quoting the definition of “improve” from the *Webster’s II New College Dictionary*, 557 (1999)). This Court has held that any funding scheme that merely examines the costs for educational “inputs” comprised of “the cost of delivering kindergarten through grade 12 curriculum, related services, and other programs ‘mandated by state statute in accredited schools,’” is incapable of meeting the legislature’s constitutional duties to provide suitable funding and educational improvement. *Montoy v. State*, 279 Kan. 817, 842 (2005)(*Montoy IV*). The Court went on to clearly establish that any constitutionally adequate education must be funded to include educational outputs, including “achievement of measurable standards of student proficiency.” *Id.* at 843. Those standards must seek to achieve an “improvement in performance that reflects high academic standards and is measurable.” *See Montoy II* at 773 (quoting K.S.A. 72-6439).

Furthermore, the legislature cannot reduce funding simply because there are signs of improvement. *See Gannon Decision* at 161. Thus, to determine if funding is suitable, one must examine the amount contributed to the daily operations of the school, i.e. the inputs, and how students are performing on national tests, in post-secondary situations and the workforce, i.e. the outputs.

3. The Kansas Legislature is not meeting its constitutional duty to provide for the “intellectual, educational, vocational and scientific improvement” of Kansas public schools.

In reviewing the current state of Kansas schools, it is obvious the legislature is not meeting its constitutional burden to provide for the “intellectual, educational, vocational and scientific improvement” of public schools. *See id.* at 229. The funding provided to schools must be enough for schools to improve. *Montoy II* at 773. The schools in Kansas are not improving under the current lesser standards, let alone the tougher standards that are public schools’ new reality. *Gannon Decision* at 169.

Currently, Kansas students are not meeting the performance outputs required by current standards. *See id.* at 159. Therefore, under the requirements established in *Montoy*, the Kansas Legislature is not meeting its constitutional duties. *Montoy IV* at 842. “The State is not failing to meet its [performance] constitutional obligation by one or two students, or even five percent of students. The State is failing to meet...its [performance] obligation with regard to a significant number of Kansas students.” *Gannon Decision* at 176 (citing testimony that thousands of Kansas students are not meeting state assessment standards). This failure will be aggravated since the students who benefited from the increased funding from 2006-2008 are graduating. *Id.* at 184-85. In their wake are the students with greater needs who were not given the same targeted

services and interventions and the impact of decreased funding is starting to show in their achievement levels. *See id.* at 188-89. “[T]he legislative experiment with cutting funding has impacted Kansas children’s...*opportunity to learn* for almost one-third of their K-12 educational experience...” *Id.*

The Kansas College and Career Ready Standards will require funds to prepare teachers to implement these changes. *See id.* at 169. Not to mention the curriculum, training and other resources that will be required to teach students to meet the new standards. *See id.* at 175.

As determined by the Court in *Montoy*, it is not enough for the legislature to fund schools to do well enough and still meet its constitutional duty. *Montoy II* at 773. Schools must improve. *Id.* For schools to succeed under the new Kansas College and Career Ready Standards and to comply with the NCLB waiver, more resources and additional funding are needed. *Gannon* Decision at 175. If the legislature fails in its constitutional obligation to provide for the suitable funding of Kansas schools, the future of every Kansas student will be diminished. “[T]he failure to provide full opportunity for learning experiences in our Kansas K-12 school system...due to a shortfall in funding is truly sad, however, a continuation of the status quo would only deepen the reflection of opportunities lost.” *Id.* at 189.

III. CONCLUSION

The history of Kansas is forever interwoven with the history of public education. One of the most important and poignant court cases involving the rights of American citizens to receive an education began in Kansas. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the U.S. Supreme Court identified education as the cornerstone for

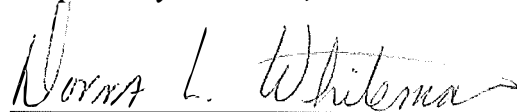
achieving the American dream or participation in our democracy. In her remarks at the Grand Opening Dedication Ceremony of the Brown v. Board of Education National Historic Site, Kansas Governor Kathleen Sebelius stated:

A sound education is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to the cultural values, in preparing him for later professional training and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

While we have made great advances in education since the decision in *Brown* was handed down, we must continue to strive to improve. A child cannot succeed in life without the benefit of a quality education. And Kansas schools cannot aid in that success without suitable provisions to fund such education.

Let us not forget that the role of legislators is not to posture in the political arena, but to honor their oaths and conduct their duties to further the posterity of Kansans by investing in the education and training of our children to develop a highly educated and intelligent populace, and by doing so, all Kansans will benefit.

Respectfully submitted,



Donna L. Whiteman #10862
Lori M. Church #21688
Kansas Association of School Boards
1420 SW Arrowhead Road
Topeka, KS 66604-4024
785-273-3600 - phone
785-273-7580 - fax
Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September 2013, the original and 15 true and correct copies of the foregoing *Amicus Curiae* Brief were hand delivered to the Clerk of the Appellate Court and the appropriate number of copies was served upon counsel of record herein in the United States mail postage prepaid to:

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Deputy Attorney General, Civil Litigation
Division
Stephen R. McAllister
Solicitor General of the State of Kansas
M.J. Willoughby
Assistant Attorney General
Memorial Building, 2nd Floor
120 SW Tenth Avenue
Topeka, Kansas 66612-1597

Arthur S. Chalmers
Hite, Fanning & Honeyman, L.L.P.
100 N. Broadway, Suite 950
Wichita, Kansas 67202-2209

Alan L. Rupe
Richard Olmstead
Kutak Rock LLP
8301 E. 21st Street North, Suite 370
Wichita, Kansas 67206-2935

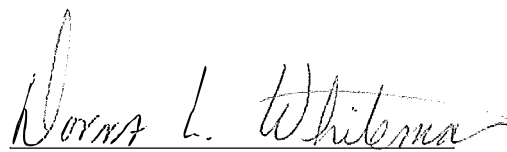
John S. Robb
Somers, Robb and Robb
110 E. Broadway
Newton, Kansas 67114

David Schauner
General Counsel
Kansas National Education Association
715 SW 10th Avenue
Topeka, Kansas 66612-1686

Robert E. Keeshan
Scott, Quinlan, Willard, Barnes & Keeshan,
3301 SW Van Buren
Topeka, Kansas 66611

Dr. Walt Chappell
Educational Management Consultants
3165 N. Porter
Wichita, Kansas 67204

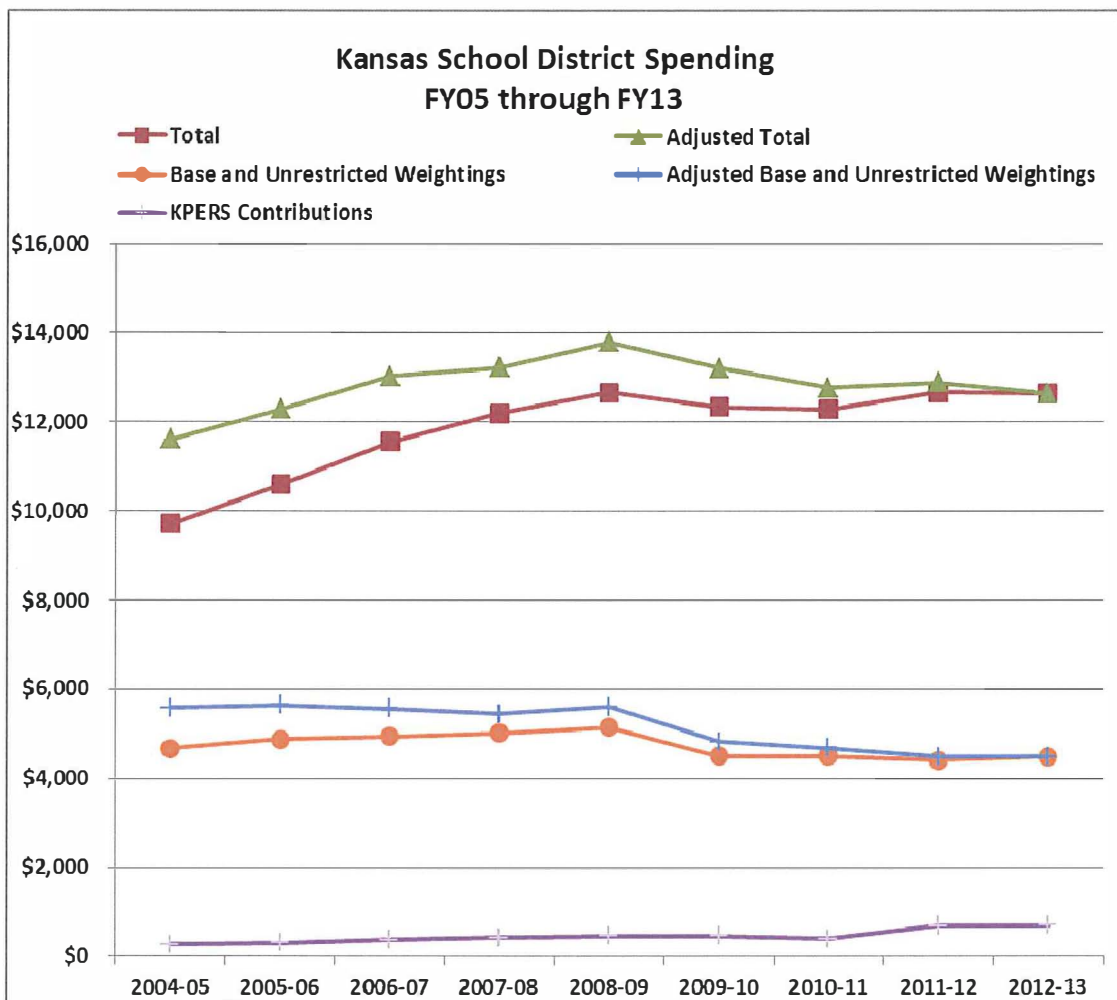
Autumn L. Fox
Lawrence S. Lustberg
Education Law Center
60 Park Place, Suite 300
Newark, New Jersey 07102


Donna L. Whiteman

APPENDIX A

Kansas School District Spending
FY 05 through FY 13

School Year	CPI	Total	Adjusted Total	Base and Unrestricted Weightings	Adjusted Base and Unrestricted Weightings	KPERS Contributions
2004-05	195.3	\$9,707	\$11,611	\$4,673	\$5,590	\$274
2005-06	201.6	\$10,596	\$12,278	\$4,878	\$5,652	\$320
2006-07	207.3	\$11,558	\$13,025	\$4,948	\$5,576	\$379
2007-08	215.3	\$12,188	\$13,224	\$5,032	\$5,460	\$434
2008-09	214.5	\$12,660	\$13,787	\$5,153	\$5,612	\$477
2009-10	218.1	\$12,330	\$13,206	\$4,507	\$4,827	\$477
2010-11	224.9	\$12,283	\$12,758	\$4,511	\$4,686	\$409
2011-12	229.6	\$12,656	\$12,876	\$4,418	\$4,495	\$690
2012-13	233.6	\$12,628	\$12,628	\$4,497	\$4,497	\$714

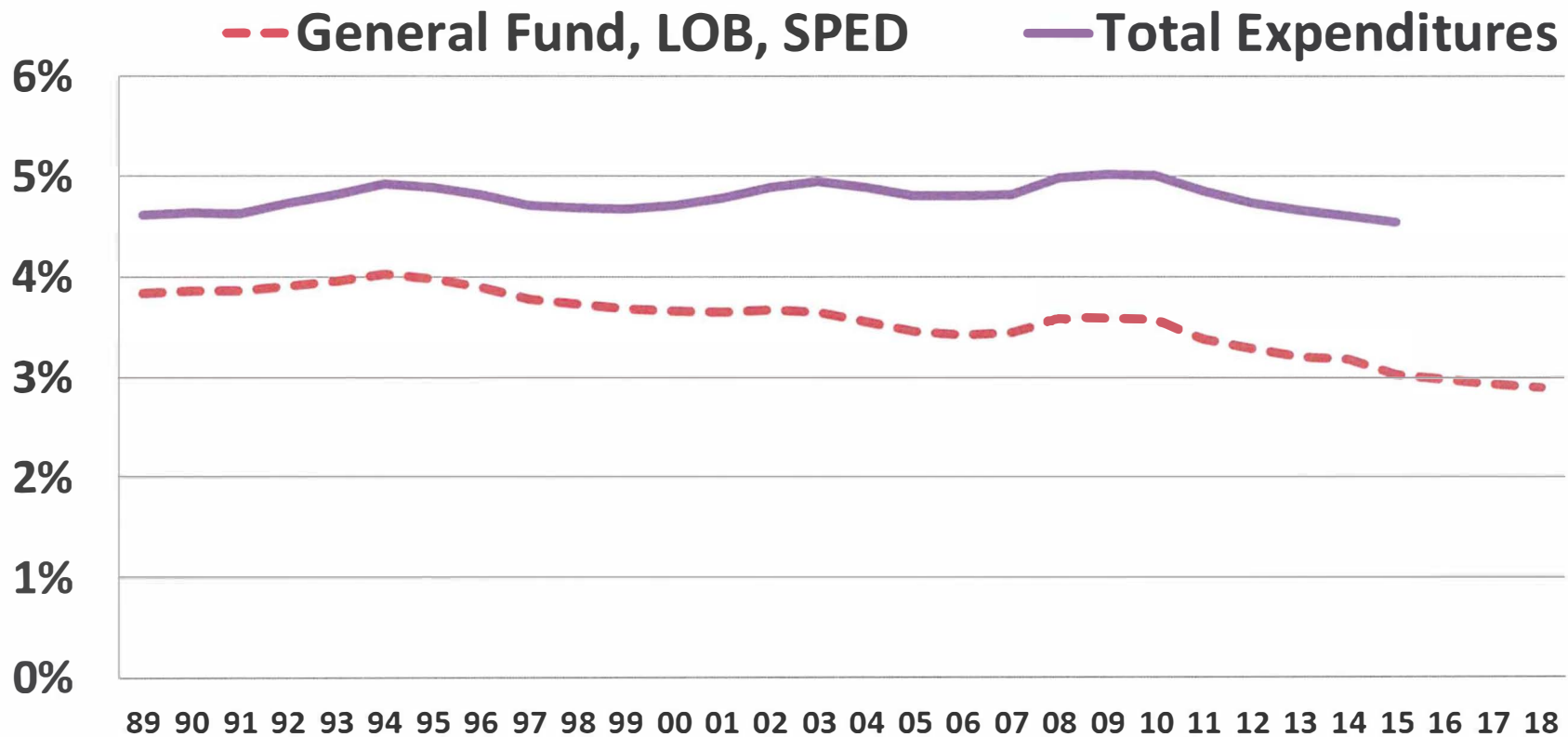


Source: Mark Tallman, KASB Associate Executive Director/Advocacy Compiled from KS Dept. of Ed. Data

APPENDIX B

School Spending and State Income

USD Budgets as Percent of Kansas Personal Income



Source: Mark Tallman, KASB Associate Executive Director/Advocacy - Compiled from KS Dept. of Education Data