IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

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

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

and next friend, Kristina Brin; JERRY DIX, by and through his mother and next friend, Kim Dix; TANNER ROBIDOU, by and through his mother and next friend, Vicki Robidou; JUSTIN HOSTETTER, by and through his mother and next friend, Valerie Hostetter; UNIFIED SCHOOL DISTRICT NO. 443; and UNIFIED SCHOOL DISTRICT NO. 305,

Plaintiffs,

v.

THE STATE OF KANSAS; CONNIE MORRIS, member of the Kansas State Board of Education, in her official capacity; JANET WAUGH, member of the Kansas State Board of Education, in her official capacity; SUE GAMBLE, member of the Kansas State Board of Education, in her official capacity; JOHN W. BACON, member of the Kansas State Board of Education, in his official capacity; BILL WAGNON, member of the Kansas State Board of Education, in his official capacity; BRUCE WYATT, member of the Kansas State Board Education, in his official capacity; KEN WILLARD, member of the Kansas State Board of Education, in his official capacity; CAROL RUPE, member of the Kansas State Board of Education, in her official capacity; IRIS VAN METER, member of the Kansas State Board of Education, in her official

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

Defendants.

MEMORANDUM DECISION AND PRELIMINARY INTERIM ORDER

This case appears before the Court upon remand from the Kansas Supreme Court for further proceedings. The Court has held an eight day bench trial in this matter (generating 1,367 pages of transcribed testimony), has carefully examined approximately 300 exhibits consisting of thousands of pages, has reviewed 565 proposed findings of fact and conclusions of law submitted by the parties, and has fully and thoughtfully considered all arguments made by the parties. This cause has been well and ably tried by counsel for both sides and all submittals to the Court have been well crafted and professionally presented. After considerable deliberation, the Court is now prepared to determine the issues submitted and finds and concludes as follows:

Ruling in Advance of Trial

Prior to trial, the parties submitted briefs to the Court seeking rulings of law in advance of trial on four legal issues. The Court determined these controlling issues in the following pre-trial ruling:

RULING OF THE COURT ON ISSUES OF LAW BRIEFED AND SUBMITTED IN ADVANCE OF TRIAL

This case appears before the Court upon remand from the Kansas Supreme Court for further proceedings. The four issues to be considered at this time are: (1) the appropriate level of judicial scrutiny for disparate impact and other claims; (2) the constitutionality (equity and suitability) of statutory funding schemes, including (a) general purpose funding, (b) capital outlay statutes, (c) sales tax supplements, and (d) special education funding; (3) the alleged legislative invasion of the State School Board's powers; and (4) whether the statutory funding schemes violate the Due Process Clause. After careful consideration, the Court finds and concludes as follows:

CONCLUSIONS OF LAW

This Court set out the historical background for education in Kansas in *Mock v. Kansas*, Case No. 91-CV-1009 (Shawnee County District Court, October 14, 1991). This background, which demonstrates the significance of education in Kansas, is as follows:

Early School History

The history of education in Kansas predates statehood. Pioneer schools existed even prior to the time the territory was organized. In fact, schools were often organized and built well before taxes were collected for their operations. *Heritage of Kansas*, (Emporia, Kansas, State Teachers College, 1963). Provisions in the organic Act and the Act for the Admission of Kansas Into the Union included provisions related to public schools. The Organic Act, Section 34, provided that certain sections of land should be reserved for educational purposes.

The Act for Admission of Kansas into the Union, in paragraph three, repeated this reservation of land for educational purposes. During territorial days, the territorial legislature created the office of Territorial Superintendent of common Schools. This officer subsequently was authorized to certify teachers and to organize local school districts. Education has always been a very high priority for Kansans. In fact, shortly after statehood there existed over nine thousand schools and over twenty-seven thousand school board members. Every child had a school within walking distance of his or her home.

Constitutional History

There were four constitutional conventions, the first three of which were unsuccessful. It is important to note, however, that all three constitutions issuing from these ill-fated conventions contained mandatory provisions for education.

In 1859, the Wyandotte Constitutional convention met to draft a constitution to submit to a vote of the residents of the Kansas territory. The constitution used as a model the Ohio constitution, which itself was modeled after the New York constitution. Kansas Constitutional Convention: A Reprint of the Proceedings and Debates of the Convention Which Framed Constitution of Kansas at Wyandotte in July,

1859. (Kansas State Printing Plant, Topeka, Ks. 1920) at page 697.

The Ohio constitution, however, contained only two short sections on education. *Id.* at 687. Our founders desired more and thus premised their proposed, education article on a combination of provisions from Iowa, Oregon, Michigan, Wisconsin and California. *Id.* In explaining the scope and effect intended for the proposed constitution, one framer stated, "It has been the aim of the majority of this body to make this Constitution the draft, the outline of great civil truths and rights." (Emphasis added).

Constitutional Provisions Adopted in 1859

In the Ordinance to the Constitution (the official legislative act which adopted the constitution), three of eight sections, including the first section, dealt directly with elementary public education. The new constitution contained an entire article, Article 6, solely concerned with education. Section 2 stated "The legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools." The bulk of the remainder of the article dealt with the financing of schools.

Some of the original constitutional provisions on education have since been amended. The relevance of the earlier text to this case is that it clearly demonstrates the treatment of public school education as a paramount duty of the legislature which has been continuous from the beginning of statehood and before.

Amendments to the Educational Article in 1966: The Current Text

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

uniform system of public schools. *The Education Amendment to the Kansas Constitution*, Publication No. 256, Dec. 1965 Kansas Legislative Council, page v.

The committee assigned to review and recommend changes to the education article stated that by including an article on education in the original Kansas Constitution "the people secure[d] themselves what is of first importance by placing binding responsibilities on the legislative, executive, and judiciary departments." *Education Amendment* at page 2. The committee further noted, "[t]he constitution of 1861 placed a responsibility on the legislature to establish a uniform system of schools," and that "*equality of educational opportunity* is a goal *which has been generally accepted.*" (Emphasis added). *Id.* at 3.

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

> Section 1. Schools and related institutions and activities. The *legislature* shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.
>
> Section 2. State board of education and state board of regents. (a) The *legislature* shall provide for a state board of education which shall have general supervision of schools . . . and all the educational interests *of the state*, except educational functions delegated by law to the state board of regents. (Emphasis added).
>
> Section 5. Local public schools. Local public schools under the *general supervision* of the

> state board of education shall be maintained, developed and operated by locally elected boards. When authorized by law, such boards may make and carry out agreements for cooperative operation and administration of educational programs under the *general supervision* of the state board of education, but such agreements shall be subject to limitation, change or termination by the legislature. (Emphasis added).
>
> Section 6. Finance. (b) The legislature shall make suitable provision for finance of the educational interests of the state. *No* tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law. The legislature may authorize the state board of regents to establish tuition, fees and charges at institutions under its supervision. (Emphasis added).

Mock v. State.

The Court in *Mock* also considered the then relevant authority:

Kansas Case Law

No controlling authority [at the time of *Mock*] exists in Kansas interpreting the meaning of these constitutional provisions. Diligent research, however, discloses the following general statements of principles from our high court which help light the path to understanding.

In the context of a challenge to unequal educational opportunities based on race, Justice Valentine, in 1881 (more than seventy years before *Brown v. Board of Education*, 347 U.S. 483 (1954)), rhetorically asked,

> And what good reason can exist for separating two children, living in the same house, equally intelligent, and equally advanced in their studies, and sending one, because he or she is black, to a school house in a remote part of the city, past several school houses nearer his or her home, while the other child is permitted, because he or she is white, to go to a school within the distance of a block? *Board of Education v. Tinnon*, 26 Kan. 1, 21 (1881).

More recently, the Kansas Supreme Court stated, "[t]he ultimate State purpose in offering a system of public schools is to provide an environment where quality education can be afforded to all." *Provance v. Shawnee Mission U.S.D. No. 512*, 231 Kan. 636, 643 (1982). In a similar vein, the Kansas Supreme Court has also held "[t]he general theory of our educational system is that every child in the state, without regard to *race, creed, or wealth,* shall have the facilities for a free education." (Emphasis added). *State v. Smith*, 155 Kan. 588, 595 (1942).

Although the constitutions of the other states of the union vary in content and wording, and in fact [there are] none of the same precise text as that set out in the present Kansas Education Article, it is, nonetheless, instructive for us to examine, preliminarily, relevant authorities from other states, applicable at least by analogy. (For a complete catalog of the various comparative constitutional provisions, see generally *Pauley v. Kelley*, 255 S.E. 2d 859, 884 (W. Va. 1979).

The Cases from Our Sister States

Forty-nine of our fifty states include education provisions in their constitutions. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 112 (1973) (Justice Marshall, in dissent). The lone state currently without such a provision, South Carolina repealed its education article in response to the decision of the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Of

these forty-nine states, at least ten with school financing systems somewhat similar to that existing in Kansas have ruled those systems unconstitutional for varying reasons. *See DuEree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983); *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Rose v. Council for Better Educ*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Robinson v. Ca-hill*, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976, 94 S. Ct. 292, 38 L.Ed.2d 219 (1973); *Seattle School District No. 1 v. State*, 90 Wash.2d 476, 585 P.2d 71 (1978); *Pauley v Kelley*, 162 W. Va. 672, 255 S.E.2d 859 (1979); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo.), cert. denied, 449 U.S. 824, 101 S. Ct. 86, 66 L.Ed.2d 28 (1980); and *Edgewood Independent School District v Kirby*, 777 S.W.2d 391 (Tex. 1989).

Other state courts have reached different results. *See Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Luian v. Colo. State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1082); *McDaniel v. Thom*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 2d 597, 458 A.2d 758 (1983); *Board of Educ, Levittown v. Nyquist*, 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359 (1982); appeal dism'd, 459 U.S. 1138, 103 S. Ct. 775, 74 L.Ed.2d 986 (1983); *Board of Educ. v Walter*, 58 Ohio St.2d 368, 390 N.E. 2d 813 (1979), cert. denied, 444 U.S. 1015, 100 S. Ct. 665, 62 L.Ed.2d 644 (1980); *Fair School Finance Council of Oklahoma, Inc. v. Oklahoma*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360 (1979); *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470 (1988).

A review of all the cases reveals a checkered history for equal protection challenges, while attacks grounded squarely on specific state constitution education articles have generally fared better for the challengers. In these latter cases, the precise wording of each constitutional provision has been highly important. Several cases, which this Court finds most persuasive, deserve more detailed attention.

In *Rose v. Council for Better Education*, 790 S.W.2d 186 (1990), the Kentucky Supreme Court, in interpreting the education article of their constitution held the entire public school system was unconstitutional as it was then organized and financed by the legislature. Their constitution simply stated "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." *Rose* at 200.

The rationale of the Kentucky decision was that the school system in Kentucky as operated was not "efficient" and therefore not constitutional. *Rose* at 203. An efficient system, in the eyes of the Kentucky court includes: sole responsibility in the General Assembly; free common schools to all children; schools available to all children; all schools substantially uniform; equal educational opportunities for all children, regardless of place of residence or economic circumstances; ongoing monitoring by the general assembly to prevent waste, duplication, mis-management, or political influence; all children having a constitutional right to an adequate education; and the provision by the general assembly of sufficient funding to assure adequate education.

In *Edgewood School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989), the Texas court examined their education article which provided:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools. *Edgewood* at 393.

In interpreting that provision the court observed:

> If our state's population had grown at the same rate in each district and if the taxable wealth in each district had also grown at the same rate, efficiency could have probably been maintained within the structure of the present

system. That did not happen. Wealth, in its many forms, has not appeared with geographic symmetry. The economic development of the state has not been uniform. Some cities have grown dramatically, while their sister cities have remained static or have shrunk. Formulas that once fit have been knocked askew. Although local conditions vary, the constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live. *Edgewood* at 396.

We conclude that, in mandating "efficiency," the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist. Instead, they stated clearly that the purpose of an efficient system was to provide for a "general diffusion of knowledge." (Emphasis added). The present system, by contrast, provides not for a diffusion that is general, but for one that is unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency. *Id.*

Following which, the Court held:

Efficiency does not require a per capita distribution, but it also does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards. *Id.* at 397.

Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds. Certainly, this much is required if the state is to educate its populace efficiently and provide for a general diffusion of knowledge statewide. *Id.*

> Under article VII, section 1, the obligation is the legislature's to provide for an efficient system. In setting appropriations, the legislature must establish priorities according to constitutional mandate; *equalizing educational opportunity cannot be relegated to an "if funds are left over" basis*. We recognize that there are and always will be strong public interests competing for available state funds. However, the legislature's responsibility to support public education is different because it is constitutionally imposed. *Id.* at 397.
>
> This does not mean that the state may not recognize differences in area costs or in costs associated with providing an equalized educational opportunity to atypical students or disadvantaged students. (Emphasis added). *Id.* at 398.

Finally, with respect to the contentions raised concerning the importance of "local control" of Texas schools, the Court noted:

> Some have argued that reform in school finance will eliminate local control, but this argument has no merit. An efficient system does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices. *Id.* at 398.

In *Seattle Sch., Dist. No. 1 of King City, v. State*, 585 P.2d 71 (Wash. 1978), the Washington Supreme Court reviewed constitutional provisions which provided:

> It is the paramount duty of the state to make ample provision for the education of all children residing within its borders .... *Seattle* at 83.

In commenting upon the "duty" imposed by their constitution, the Washington court held:

> By imposing upon the State a paramount duty to make ample provision for the education of all children residing within the State's borders, the constitution has created a "duty" that is supreme, preeminent or dominant. Flowing from this constitutionally imposed "duty" is its jural correlative, a corresponding "right" permitting control of another's conduct. Therefore, all children residing within the borders of the State possess a "right," arising from the constitutionally imposed "duty" of the State, to have the State make ample provision for their education. Further, since the "duty" is characterized as paramount the correlative "right" has equal stature. (footnotes omitted). *Seattle* at 91.
>
> "Providing free education for all is a state function. It must be accorded to all on equal terms." *See also Robinson v. Cahill*, 287 A.2d 187, 213 (N.J. 1972) citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

Relying, in part, on the state's equal protection clause the Court then concluded:

> Thus we hold, compliance with Const. art. 9, Sections 1 and 2 can be achieved only if sufficient funds are derived, through dependable

> and regular tax sources, to permit school districts to provide "basic education" through a basic program of education in a "general and uniform system of public schools." (Emphasis added in the original). *Seattle* at 97.

Finally, we note in passing the Washington court made its decision prospective only in effect. (*See Seattle* at pages 105-6).

In *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989), the Montana Supreme Court examined constitutional provisions that read:

> (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.
>
> (3) The legislature shall provide a basic system of free quality public elementary and secondary schools.... It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system. *Helena* at 689.

The Court then held:

> Art. X, Sec. 1(3), Mont. Const., requires that the Legislature shall provide a basic system of free quality education, that it may provide various types of educational institutions and programs, and that the state's share of the cost of the basic system shall be distributed in an equitable manner. There is nothing in the plain wording of subsection (3) to suggest that the clear statement of the obligations on the part of the Legislature in some manner was intended to be a limitation on the guarantee of equal educational opportunity contained in subsection (1). The guarantee provision of subsection (1) is

> not limited to any one branch of government. Clearly the guarantee of equal educational opportunity is binding upon all three branches of government, the legislative as well as the executive and judicial branches. We specifically conclude that the guarantee of equality of educational opportunity applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level. *Helena* at 689-90.

With respect to "local control," the Montana Supreme Court noted and held:

> The State also argued that the Constitutional directive of local control of school districts, Art. X, Sec. 8, Mont. Const., requires that spending disparities among the districts be allowed to exist. That section provides:
>
> *School district trustees*. The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.
>
> While Section 8 does establish that the supervision and control of schools shall be vested in the board of trustees, there is no specific reference to the concept of spending disparities. Further, as made especially apparent after the passage of Initiative 105, the spending disparities among Montana's school districts cannot be described as the result of local control. In fact, as the District Court correctly found, the present system of funding may be said to deny to poorer school districts a significant level of local control, because they have fewer options due to fewer

> resources. We conclude that Art. X, Sec. 8, Mont. Const. does not allow the type of spending disparities outlined in the above quoted findings of fact. *Helena* at 690.

Finally, in *Robinson v. Cahill*, 287 A.2d 187 (N.J. 1972), the New Jersey Supreme Court was presented with a constitutional provision which recited:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years. *Robinson* at 209.

The Court held:

> The Education Clause was intended to do what it says, that is, to make it a state legislative obligation to provide a thorough education for all pupils wherever located. (*Robinson* at 210).
>
> The word "thorough" in the Education Clause connotes in common meaning the concept of completeness and attention to detail. It means more than simply adequate or minimal. (*Robinson* at 211).

In reviewing the "local" versus "state" tax question, the court observed:

> Although districts can be created and classified for appropriate legislative purposes ... the state school tax remain[s] a state tax even though assessed and levied locally upon local property, with revenues returned by the State to local districts. (citations omitted). *Robinson* at 210.

New Jersey, like Kansas, had a "hold harmless" component in their school financing system. In commenting thereon, Justice Botter, for the Court, wrote:

> The Bateman Committee (a New Jersey committee which had reviewed school finance and had recommended a whole new "needs-based" finance scheme) sought to justify minimum aid on the ground that it would provide even wealthy districts with the incentive to improve educational programs, and to maintain them at high levels. The justification offered at trial was that the State "should do something for every district." However, as long as some districts are receiving inadequate education, below that constitutionally required, the reasons offered cannot constitute a valid legislative purpose. As long as some school districts are underfinanced I can see no legitimate legislative purpose in giving rich districts "state aid." I am satisfied by the evidence that a strong reason for minimum aid and save-harmless aid is political, that is, a "give-up" to pass the legislation. *Robinson* at 211.

The New Jersey Court also recognized fundamental constitutional problems with the use of the property tax to support schools:

> Even if districts were better equalized by guaranteed valuations, the guarantees do not take into consideration "municipal and county overload..... Poor districts have other competing needs for local revenue. The evidence shows that poorer districts spend a smaller proportion of their total revenues for school purposes. The demand for municipal services tends to diminish further the school revenue-raising power of poor districts. Another

> general disadvantage of poor districts is the fact that property taxes are regressive; they impose burdens in inverse proportion to ability to pay. This is because poor people spend a larger proportion of their income for housing. (citations omitted). *Robinson* at 213.

Finally, with the respect to the need to spend "equal dollars" on each pupil in order to achieve "equal educational opportunity," the Court observed:

> This is not to suggest that the same amount of money must be spent on each pupil in the State. The differing needs of pupils would suggest the contrary. In fact, the evidence indicates that pupils of low socioeconomic status need compensatory education to offset the natural disadvantages of their environment. *Robinson* at 213.

Mock v. State.

Following this analysis of then relevant authorities, the Court in *Mock* resolved the following legal issues in advance of trial:

Analytical Queries

A series of questions will be posed and answered to aid in understanding and interpreting the language of the text:

1) Upon what entity of government is the sole and absolute duty to establish, maintain, and finance public schools imposed by the plain language of our constitution?

On this point nothing more need be said but that the clear answer appears from the text alone: that answer is the Legislature.

2) To whom is this absolute duty to establish, maintain, and finance public schools owed?

In the court's view, the answer is self-evident when the question is stated another way. For whose primary benefit are public schools created and maintained? The answer can only be the school children of Kansas.

Without doubt, much collateral benefit from education inures to the benefit of others in our society, from business, industry, the professions, and the government, to the public at large, but the essential and primary beneficiaries of an education are the students who are educated. Thus, it is clear to the Court that the duty created by the constitutional mandate is owed to the school children of Kansas.

3) If the duty to establish, maintain, and finance public schools is constitutionally owed by the Legislature to the school children of Kansas, in what proportion is that duty owed to each individual child?

Once again, the answer is logically inescapable. If the duty is owed to every child, each child has a claim to receive that educational opportunity which is neither greater nor less than that of any other child.

Thus, the fundamental answer is plain: the duty owed by the Legislature to each child to furnish him or her with an educational opportunity is equal to that owed every other child.

4) What can the Legislature charge each child required to attend our public schools?

The text of the constitution alone answers this question: except for "such fees or supplemental charges as may be authorized by law," the answer is nothing.

Accordingly, the overall constitutional scheme becomes more plain: the Legislature must establish and maintain *free* public schools, which the Legislature must finance from public funds and not from tuition paid by students required to attend those schools.

5) If, then, the Legislature must establish, maintain, and finance free public schools for the benefit of all Kansas school children, how must it divide its resources among districts, schools, and students?

The answer lies in the educational opportunity which the Legislature owes under the constitution equally to each child. This legislative duty is not to districts, not to schools, not to towns or cities, not to voters, not to counties, not to personal constituents - but *to each school child of Kansas, equally.*

6) Must, then, exactly equal (per pupil) dollar amounts be furnished to each school?

Again we must review the text of the Education Article. Great discretion is granted the Legislature to devise, change, and reform education in Kansas. Obviously, educational needs, and concomitant costs, will vary from child to child and from place to place. The mandate is to furnish each child an educational opportunity equal to that made available to every other child. To do so will unquestionably require different expenditures at different times and places.

For example, if a child lives a great way from school, the transportation cost for that child will be greater than for another child nearer to school - just to provide him or her the *same educational opportunity*. Similarly, if a child cannot speak English, it may cost more to teach that child English as a second language before the child can learn math and other subjects. Again, a disproportionate expenditure may be required to afford this child an equal educational opportunity. Other examples could be given but these suffice to demonstrate that the constitutional mandate is to provide to each child an *equal educational opportunity*, not necessarily exactly equal dollars.

Because the legislative duty to each child is the same, however, in the Court's view, a disproportionate distribution of financial resources alone gives rise to a duty on the part of the legislature, if challenged, to articulate a *rational educational explanation* for the differential. Any rational basis for the unequal expenditures necessitated by

circumstances encountered in furnishing equal educational opportunities to each child, however, would conclude the constitutional judicial inquiry.

Not only is this what the Constitution says and seems to mean, but isn't this precisely how one would logically expect the people of Kansas to want their Constitution interpreted? The Court invites the following experiment: ask any citizen this question: "If our Constitution requires the Legislature to establish, maintain, and finance free public schools from public funds for all the school children of Kansas what kind of educational opportunity would you expect the Legislature to be constitutionally required by our courts to provide each individual child? This Court believes the answer you would get is: EQUAL!

7) Does this mean 100% "state financing" is required for public schools?

The clear and simple answer is "yes." The reasons are two: (a) that is what the Constitution says; and (b) that is what we have always had–for so-called local school districts are legally only political subdivisions of the state, exercising such of the state's taxing authority as the Legislature delegates to them in partial fulfillment of the legislature's obligation to finance the educational interests of the state. Thus money raised by school districts through "local" taxation is still state money. It just hasn't been thought of that way.

8) What financial costs of educating students are included in the constitutional mandate placed by the Educational Article upon the Legislature?

Let us return to the text of Article 6 again. The key words from Section 1 are "establishing and maintaining" and from Section 6(b) "suitable provision for finance." Once again, the answer is clear: *all costs, including capital expenditures* are included. If only operating and maintenance costs were intended, the Constitution would not say "establishing and maintaining." Furthermore, as previously demonstrated, in all events there is only the state, inasmuch as school districts are merely political subdivisions of the state. If the "state" (as thus understood to include its subdivisions)

were not responsible for building needed schools - who or what would be? And how can a school be "established" unless some edifice to house the school be built, bought, rented, or otherwise acquired?

9) Is the Legislature's *only* duty to divide its educational resources in such a way as to provide equal opportunities for every child?

Section 6(b) of Article 6 requires the Legislature to provide "suitable financing." Clearly, then, the answer is no. In addition to *equality of educational opportunity*, there is another constitutional requirement and that relates to the duty of the legislature to furnish enough total dollars so that the educational opportunities afforded every child are also suitable.

In other words, should total legislative funding fall to a level which the Court, in enforcing the Constitution, finds to be inadequate for a "suitable" (or "basic" as some state's decisions prefer) or minimally adequate education, a violation of the "suitable" provision would occur. In the case at bar, the question of what that "minimum" or "basic" level is will not be reached as all parties to these cases have agreed that if present funding levels are equitably divided, so as to provide every child equal educational opportunities as herein defined, no question of minimal adequacy (suitability) exists to be presented at this time. The Court notes, however, for general edification, that such a day has come in other states, most recently Kentucky. See e.g. *Rose v. council for Better Educ.*, 790 S.W.2d 186 (Ky. 1990). In that state, after reviewing expert testimony, the court there held a minimally adequate education is one that has the following goals:

> 1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
> 2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
> 3) sufficient understanding of governmental processes to enable the

> student to understand the issues that affect his or her community, state and nation;
> 4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
> 5) sufficient grounding in the arts to enable each student to appreciate his or her cultural historical heritage;
> 6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
> 7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in and surrounding states, in academics or in the job market. (*Rose* at 212-213).

10) Can the Legislature be sued for "restitution" arising from past disproportionate funding?

The answer is no. The Education Article of the Kansas constitution creates no express right of action for damages. The remedy for a violation, therefore, is to strike existing laws which do not comply with constitutional provisions.

Furthermore, as an added precaution, in light of the length of time the present system has existed and the reliance placed upon it until now, should violations be found when the facts are heard, the Court has determined to make its decision in this case operate prospectively only.

Conclusion

From the foregoing, it is apparent that the interpretation given by this Court to the plain text of Article 6 of the Kansas Constitution is entirely in accord with the constitutional history and traditions of the state, the general principles of law laid down over time by our Supreme Court,

the clear weight of reason, logic, and the modern trend of authorities in our sister states. Indeed our own Legislature, in its most recent session correctly anticipated the basic decision reached here.

In reviewing the school financing system here in Kansas, an interim committee in its report to the 1991 Legislature specifically noted,

> It [the hold harmless component of the SDEA] is, therefore, unsuited for the task of equalizing wealth base differences among school districts. *If applied over multiple years, this approach could not be expected to withstand legal challenge.* (Emphasis added).
>
> Report on Kansas Legislative Interim Studies to the 1991 Legislature, School Finance Proposal No. 35, at page 314.

Further, the title of the School District Equalization Act and the legislative statement of purpose in the School Consolidation Act of 1963 reflect an understanding of the duty imposed by our Constitution. The latter provides:

> The Legislature hereby declares that this act is passed for the general improvement of the public schools in the state of Kansas; the equalization of the benefits and burdens of education throughout the various communities in the state; to expedite the organization of public school districts of the state so as to establish a thorough and uniform system of free public schools throughout the state . . . . K.S.A. 72-6734.

Indeed, the State Board of Education's own Strategic Plan for Kansas Public Education for the Year 2005 recites:

> The Kansas State Board of Education affirms it support for high quality education and

learning opportunities for all Kansas citizens and for the elimination of differential access on the basis of race, sex, national origin, geographic location, age, socioeconomic status, or handicapping conditions.

The final question may arise, how could we have come from 1861 to 1991 without having had these issues decided. There are several possible answers:

The first is simple - no one ever asked. Courts only decide cases actually presented. Although several cases were filed over the years, none were ever prosecuted to final conclusion and thus no controlling precedent ever emerged.

Second, for many years the original system of completely supporting public schools, or nearly completely, with property tax dollars was probably constitutionally sufficient. When the assets of the state consisted virtually entirely of unimproved prairie land, and when school districts had about equal amounts of that, the property tax likely resulted in reasonably equal educational opportunities for every child.

Third, as the assets of the state developed unevenly, various funding programs were apparently invented, by the Legislature, which gave schools enough funds that they elected not to complain. Today, however, with tight budgets and many demands on the resources of the state, these plaintiffs here before the Court today have elected to chance litigation.

Finally, commencing constitutional litigation is always a high risk enterprise. As perhaps some plaintiffs today will tell you, the scope of the decision reached this day may be quite different from what they had expected or perhaps even desired.

> In any event, here we are. The Court has been presented with the questions now and it has an absolute constitutional duty to decide. However difficult, however popular or unpopular, that is the role of the court from which no judicial officer is permitted to retreat. There is no more solemn duty for any Court than to uphold, protect, and defend the Constitution. This duty, however, is not the sole responsibility of the judiciary. All those in government service, the Governor, Legislators, state and local school board members, even educators and teachers who are on the front lines of education, have all taken the same oath and assumed the same duty.
>
> This Court is confident, therefore that as it today discharges its duty under the Constitution, so tomorrow will its counterparts throughout our democratic and constitutional government.
>
> ORDER
>
> IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the rules set forth in questions one through ten, *supra*, are held to be the governing rules of law applicable to the controversy at bar, which rules will be applied to the facts found controlling at trial.

Since *Mock v. State* was not appealed, it became the law of the case.

Following the *Mock* decision, in 1992, the Kansas Legislature enacted a new school financing scheme, the School District Financing and Quality Performance Act (the Act), which responds to and, in general, follows the guidelines set out in *Mock.* Philip C. Kissam, *Constitutional Thought and Public Schools: An Essay on Mock v. State of Kansas*, 31 Washburn L.J. 475, 485 (1992). The Act was subsequently challenged in

Unified School District Number 229 v. State, 256 Kan. 232, 885 P.2d 1170 (1994).

In *U.S.D. No. 229*, the Supreme Court first held that the constitutional responsibility imposed upon the Legislature for school funding "did not unduly impede the power of locally elected boards to establish, operate and maintain schools." *Id.* at 253. Thus ended the so-called "local control" argument. The Court next turned to the question of whether the school finance act provided suitable (or adequate) school funds under Article 6, Section 6(b). In resolving this issue, the high court quoted with approval the following analysis of the trial judge, the Honorable Marla Luckert:

> 6. The issue for judicial determination is whether the Act satisfies this provision, not whether the level of finance is optimal or the best policy.
>
> A. *Decisions From Other States*
>
> . . . In other jurisdictions much of the recent litigation has focused upon the education clauses of the various state constitutions and charters. However, analysis of these decisions reveals that each of these decisions is necessarily controlled by the particular wording of the state's education clause and, to a lesser extent, organization and funding. Some state constitutions specifically mandate 'equality'. Others mandate 'uniformity'. Many require 'efficiency'. Some constitutions specify an explicit and significant standard such as 'high quality' or 'quality' public education. In Louisiana the standard is to provide 'excellence'. Many other states imply a lower standard such as 'thorough', 'efficient', or 'adequate'. See McUsic, 'The Use of Education Clauses in School Finance Reform Litigation,' 28 Harv. J. Leg. 308 (1991).

Based upon the language of their respective state constitutions, some courts have rejected education clause challenges to public school funding legislation when the challenge is based upon the adequacy of funding or upon uniformity of funding. *See, e.g., Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1025 (Colo. 1982) (Colorado's constitution requirement of a 'thorough and uniform system of free public schools,' while mandating equal educational opportunities, does not necessitate equal expenditures per pupil); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156, 164 (1981) (constitution requires only an 'adequate education,' not equal educational opportunities); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635, 647 (1975) (equal educational opportunities not required by constitutional requirement of 'general, uniform and thorough system' of public schools); *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 458 A.2d 758, 776 (1983) ('thorough and efficient' clause commands only that legislature provide the students of the state 'with a basic public school education'); *East Jackson Public Schools v. State*, 133 Mich. App. 132, 348 N.W.2d 303, 305 (1984) (provision mandating legislature to 'maintain and support a system of free public elementary and secondary schools' grants only a right to an adequate education); *Board of Education, Levittown Union Free School District v. Nyquist*, 57 N.Y.2d 27, 47-48, 453 N.Y.S.2d 643, 653, 439 N.E.2d 359, 368-69 (1982) (constitutional provision for 'the maintenance and support of a system of free schools' contemplates only 'minimal acceptable facilities and services'), appeal dismissed, 459 U.S. 1138, 74 L. Ed. 2d 986, 103 S. Ct. 775 (1983); *Britt v. North Carolina State Board of Education*, 86 N.C. App. 282, 357 S.E.2d 432, 436 (1987) (state constitutional provision requiring 'general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students' mandates only equal access to schools, not a right to identical opportunities); *Board of Education of the City School District of Cincinnati v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813, 825,12 Ohio Op. 3d 327 (1979), cert. denied, 444 U.S. 1015, 62 L. Ed. 2d 644, 100 S. Ct. 665 (1980) (constitutional requirement that a 'thorough

and efficient' education be provided mandates only that students not be deprived of 'educational opportunity'); *Fair School Finance Council of Oklahoma, Inc. v. State*, 746 P.2d 1135, 1149 (Okla. 1987) (mandate to 'establish and maintain' a public school system guarantees only a 'basic, adequate education according to standards . . .'); *Olsen v. State ex rel. Johnson*, 276 Or. 9, 554 P.2d 139, 148 (1976) (constitution prescribing a 'uniform and general system' of schools guarantees only a minimum of educational opportunity); *Danson v. Casey*, 484 Pa. 415, 399 A.2d 360, 365 (1979) (a 'thorough and efficient' education is equated with an 'adequate,' 'minimum,' or 'basic' education); *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470, 472 (1988) (constitutional requirement that legislature maintain and support public schools guarantees equal standards and equal opportunity under the method of funding chosen by the legislature).

Even in states which the courts have upheld constitutional challenges based upon their respective education clauses, often only 'adequacy' has been required. See, e.g., *Alabama Coalition for Equity, Inc. v. Hunt*, No. CV-90-883-R (Ala. Cir. 1 993) (1993 Westlaw 204083) (constitution's education guarantee accords right to 'quality education that is generous in its provision and that meet minimum standards of adequacy'); *Rose v. Council for Better Education*, 790 S.W.2d 186, 211 (Ky. 1989) (the constitutionally required 'efficient' system of public schools' must be substantially uniform throughout the state,' providing every child in the state 'with an equal opportunity to have an adequate education'); *Helena Elementary School District No. 1 v. State*, 236 Mont. 44, 769 P.2d 684, 690 (1989) (constitution expressly provides for equality of educational opportunity'), modified in 236 Mont. 44, 784 P.2d 412 (1990) (delaying effective date of decision); *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359, 368-69 (1990) ('thorough and efficient' system will provide an 'equal educational opportunity for children' enabling each student to become 'a citizen and . . . a competitor in the labor market'); *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) ('efficient' system guarantees 'substantially equal

access to similar revenues per pupil at similar levels of tax effort' so that students are 'afforded a substantially equal opportunity to have access to educational funds'); *Seattle School District No. 1 of King County v. State*, 90 Wash. 2d 476, 585 P.2d 71, 97 (1978) (constitutional language calling for 'ample provision' for a 'general and uniform' system of schools imposes a duty to 'make ample provision for the "basic education" of our resident children through a general and uniform system supported by dependable and regular tax sources'); *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859, 877 (1979) ('thorough and efficient' education is one which 'develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically').

B. *The Standard in Kansas*

What may be concluded from these decisions is that the analysis necessarily differs state to state. While many courts state laudatory goals for educational systems, such statements reach beyond the requirement of the Kansas constitution.

The standard most comparable to the Kansas constitutional requirement of 'suitable' funding is a requirement of adequacy found in several state constitutions. In common terms, 'suitable' means fitting, proper, appropriate, or satisfactory. Webster's New Collegiate Dictionary (1977). Suitability does not mandate excellence or high quality. In fact, suitability does not imply any objective, quantifiable education standard against which schools can be measured by a court. Rather, value judgments must be made regardless of whether the constitutional mandate requires that education be suitable, sufficient, appropriate, or adequate. Because these concepts are amorphous, courts have molded tests by which to assess the level of funding.

One of the most frequently cited definitions of an adequate education was one proffered by the Kentucky Supreme Court when it iterated six goals of education: (1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (2) sufficient knowledge of economic, social, and

political systems to enable the student to understand the issues that affect the community, state, and nation; (3) sufficient selfknowledge and knowledge of his or her mental and physical wellness; (4) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (5) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (6) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states whether competing in academics or the job market. *Rose v. Council for Better Education*, 790 S.W.2d at 212.

Another court indicated that a sufficient education was one which 'will equip all the students of this state to perform their roles as citizens and competitors in the same society'. *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359, 410 (N.J. 1990).

Most recently, these definitions were embraced by the Alabama Circuit Court, in *Alabama Coalition for Equity, Inc. v. Hunt*, No. CV-90-883-R (Ala. Cir. 1993) (1993 Westlaw 204083), after the court found that the state's constitution's education 'guarantee is one that accords school children of the state the right to a quality education that is generous in its provision and meets minimum standards of adequacy'. *Id.* at 1993 WL *52.

The definitions in *Hunt*, *Rose* and *Abbott* bear striking resemblance to the ten statements or goals enunciated by the Kansas legislature in defining the outcomes for Kansas schools, which includes the goal of preparing the learners to live, learn, and work in a global society. K.S.A. 72-6439. Through the quality performance accreditation standards, the Act provides a legislative and regulatory mechanism for judging whether the education is 'suitable'. These standards were developed after considerable study by educators from this state and others. It is well settled that courts should not substitute judicial judgment for educational decisions and standards. *Finstad v. Washburn University of Topeka*, 252 Kan. 465, 475, 845 P.2d 685 (1992). Hence, the court will not substitute its judgment of what is 'suitable', but will utilize as

a base the standards enunciated by the legislature and the state department of education.

The evidence presented is that all schools in Kansas are able to meet such a standard. Some Plaintiffs, particularly Moscow [of the Southwestern group of plaintiffs], argue that eventually the Act will result in closure of schools and even the district and, therefore, the financing will not be suitable. However, the court cannot base its judgment upon the speculation of what may happen in the future. At this time, the standards are being met. Nor is the judgment of the court controlled by the many policy concerns raised by Plaintiffs who indicted the Act for failing to ensure that per pupil spending would continue to increase in proportion with increasing needs, for not allowing local boards to make long range plans, for not providing an inflationary factor, and for fostering a spend-or-lose philosophy.

However, the issue of suitability is not stagnant; past history teaches that this issue must be closely monitored. Previous school finance legislation, when initially attacked upon enactment or modification, was determined constitutional. Then, underfunding and inequitable distribution of finances lead to judicial determination that the legislation no longer complied with constitutional provisions. Compare *Knowles v. Board of Education*, Case No. 77 CV 251 (Shawnee County District Court, January 26, 1981) (upon remand from the Supreme Court [219 Kan. 271, 547 P.2d 699 (1976)] for evaluation of legislative modifications, finding the School District Equalization Act [SDEA] constitutional) with *Mock v. State of Kansas*, Consolidated Case No. 91-CV-1009 (Shawnee County District Court, October 14, 1991) (impliedly holding SDEA was unconstitutional). However, while the issues raised by Plaintiffs raise serious policy questions, the arguments do not compel a determination that the financing is not 'suitable' at the present time. The Act does not violate section 6 of article 6.

U.S.D. No. 229, 256 Kan. at 256-58.

The Supreme Court, in *U.S.D. No. 229,* then noted:

> The 10 goals referred to in the district court's opinion are found at K.S.A. 72-6439(a), a part of the Act, and are set forth as follows:
>
> (1) Teachers establish high expectations for learning and monitoring pupil achievement through multiple assessment techniques;
>
> (2) schools have a basic mission which prepares the learners to live, learn, and work in a global society;
>
> (3) schools provide planned learning activities within an orderly and safe environment which is conducive to learning;
>
> (4) schools provide instructional leadership which results in improved pupil performance in an effective school environment;
>
> (5) pupils have the communication skills necessary to live, learn, and work in a global society;
>
> (6) pupils think creatively and problem-solve in order to live, learn, and work in a global society;
>
> (7) pupils work effectively both independently and in groups in order to live, learn, and work in a global society;
>
> (8) pupil has the physical and emotional well-being necessary to live, learn, and work in a global society;
>
> (9) all staff engage in ongoing professional development;
>
> (10) pupils participate in lifelong learning.
>
> We agree with the district court's analysis and conclusion that the Act does not contravene the provisions of § 6(b) of Article 6 that the legislature shall make suitable provision for the financing of public education.

U.S.D. No. 229, 256 Kan. 258-59.

The Supreme Court next addressed the question of what level of scrutiny was appropriate in resolving a claim that the legislative funding

scheme violated "equal protection rights" of some students. In this connection, neither the trial court nor the Supreme Court distinguished between a Section 1 claim under the Kansas Constitution Bill of Rights (equal protection for life, liberty and the pursuit of happiness) and an Article 6, Section 6(b) claim for equal treatment under the Education Article. Although one might argue that the latter creates an absolute or fundamental right requiring heightened scrutiny of any funding discrepancies between students, the Court adopted the "rational basis" test for examining challenges to "equity" of whatever type. In doing so, however, the Court refined the rational basis level of scrutiny as follows:

> [T]his standard of review, although deferential, is not a toothless one.' *Mathews v. De Castro*, 429 U.S. 181, 185 (1976), quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The rational-basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, *the Court has explained that these limitations amount to a prescription that 'all persons similarly situated should be treated alike.'*

U.S.D. No. 229, 256 Kan. at 260. (Emphasis added).

This refinement of the rational basis level of scrutiny to be applied to per pupil spending discrepancies is fundamentally synonymous with that used by this Court in *Mock*. If challenged, the legislature must be prepared to justify spending differentials based on actual costs incurred in furnishing

all Kansas school children an equal educational opportunity. In other words, all children similarly situated must be treated alike.

After considerable discussion, the Supreme Court in *U.S.D. No. 229*, concluded that there was a "rational basis" for each funding differential and that the Act, as it then existed and under circumstances then existing, passed constitutional muster. In so holding, the high Court concluded:

> The funding of public education is a complex, constantly evolving process. The legislature would be derelict in its constitutional duty if it just gave each school district a blank check each year. . . . Rules have to be made and lines drawn in providing "suitable financing." The drawing of these lines lies at the very heart of the legislative process and the compromises inherent in the process.

U.S.D. No. 229 v. State, 256 Kan. at 265.

The Supreme Court further quoted with approval the following observation of the trial court:

> Hence, the court will not substitute its judgment of what is 'suitable', but will utilize as a base the standards enunciated by the legislature and the state department of education.

U.S.D. No. 229, 259 Kan. at 257.

This Court incorrectly understood this ruling to mean that it was the Legislature's duty to draw the lines in providing suitable financing and thus to make the determination as to whether or not funding for public education is suitable (and hence constitutional). Consequently, when *Montoy v. State*

first came before this Court, the Court dismissed the case under the understanding that it was the Legislature's responsibility, and not the Court's, to determine whether school funding is suitable (blending equity and adequacy arguments as the Supreme Court had done in *U.S.D. No. 229*). However, the Supreme Court reversed that ruling, holding:

> In Count I involving the suitability of school finance, the plaintiffs assert that state law no longer contains educational goals or standards and that the State Board has not issued any regulations containing academic standards or objective criteria against which to measure the education Kansas children receive. The 10 goals quoted by *U.S.D. 229* are no longer part of the statute. L. 1995, ch. 263, § 1. What remains is a statutory requirement that the State Board adopt an accreditation system that is "based upon improvement in performance that reflects higher academic standards and is measurable." K.S.A. 2001 Supp. 72-6439(a). While the amendment to K.S.A. 72-6439(a) may not represent a serious shift in the goals of public education in the state of Kansas, we believe that the suitability analysis required by *U.S.D. 229* is more rigorous than presumed by the district court.
>
> *U.S.D. 229* relied on the legislature to promulgate standards but asserted that the ultimate question on suitability must be one for the court. Accreditation is a "base," but *U.S.D. 229* also quoted the following caveat from the district court in that case:
>
> > The issue of suitability is not stagnant; past history teaches that this issue must be closely monitored. Previous school finance legislation, when initially attacked upon enactment or modification, was determined constitutional. Then, underfunding and inequitable distribution of finances lead to judicial determination that the legislation no longer complied with constitutional provisions. 256 Kan. at 258.

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

The Supreme Court then noted the following issues raised by Plaintiffs which it wished this Court to address:

> The state law no longer contains educational goals or standards;
>
> the BOE has not issued any regulations containing academic standards or objective criteria against which to measure the education Kansas children receive;
>
> the amount of Base State Aid Per Pupil (BSAPP) has not kept up with inflation. For FY 2003, the BOE requested approximately $635 million in additional educational funding;
>
> school districts are still required to raise capital outlay expenses locally, and the four mill levy limit has been removed, allowing wealthier districts even greater access to capital outlay expenditures than poorer districts and thus increasing funding disparities; see K.S.A. 72-8801. In *Mock*, this Court specifically held that Article 6(b) of the Constitution, in its direction to the legislature to provide suitable financing, makes the state responsible for capital expenses. *Mock*, *supra* at 501. *See also Wyoming v. Campbell County School District*, et al., 2001 WY 19, 19 P.3d 518, 557 (Wyo. 2001 (capital construction financing system based upon a school district's assessed valuation necessarily depends on local wealth creating unconstitutional disparities in educational opportunities.);

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

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

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

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

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

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

the plaintiff school districts raise less money per pupil with each mill levy than wealthier districts;

increased reliance on local taxes has resulted in a less advantageous education in the plaintiff school districts than in wealthier districts;

although it purports to be based on the cost of educating children in the various school districts, the school finance formula is based on political decisions, because neither the legislature nor the BOE has

gathered information about the actual costs of education in the various districts;

the Kansas Legislature has recognized that there are inherent inadequacies and inequities in the SDFQPA. L. 2001, Ch. 215, § 10(a);

young people nowadays need additional technological skills to compete favorably in the global society.

the state law no longer contains educational goals or standards;

Montoy v. State, 275 Kan. 145, 153-54, 68 P.3d 228 (2003).

The high court then concluded:

> We do not believe that the plaintiffs' factual allegations are a sham, frivolous, or so unsubstantial that it would be futile to try the case we now consider. The issues raised in this case require the district court to determine either on the basis of uncontroverted facts or on facts determined by trial whether the school financing provisions complained of are now constitutional.
>
> There is a point where the legislature's funding of education may be so low that regardless of what the State says about accreditation, it would be impossible to find that the legislature has made "suitable provision for finance of the educational interests of the state." Kan. Const. art. 6, § 6. *U.S.D. 229* suggested base criteria for determining suitability. The district court must make a finding, after giving the plaintiffs the opportunity to substantiate their claims, that the legislature has provided suitable provisions for financing the educational interests of the State before judgment may be entered for the defendants regarding the plaintiffs' unsuitability claim. Presently, the statute requires an accreditation system which is "based upon improvements in performance that reflects higher academic standards and is measurable." K.S.A. 2001 Supp. 72-6439(a).

> In Count II involving a claim of denial of equal protection, the plaintiffs advance a number of allegations. For example, they alleged that the minority students in the plaintiff school districts have increased dramatically, that a substantial gap exists between the performance of minorities and whites, and that a substantial gap exists between the performance standards of students in the free and reduced lunch programs and those not in these programs. Upon remand, these factual allegations will have to be addressed by the parties as well as by the district court in order for a final judgment to be entered. The same may be said for the factual allegations by the plaintiffs in Count III regarding their claim that they have been denied substantive due process of law.

Montoy, 275 Kan. at 155.

This Court concludes, therefore, that its duty, once again, is to determine whether the current school funding meets constitutional requirements. Accordingly, the Court will consider anew all issues presented to determine questions of law in advance of trial.

I. The appropriate level of judicial scrutiny for disparate impact claims.

In *Mock*, this Court held that differences in per pupil spending, to pass constitutional muster, must be premised on actual differences in *costs incurred* to provide an essentially equal educational opportunity for all Kansas children. This standard is consistent with the rational basis test approved in *U.S.D. No. 229*, as previously observed.

As also previously noted, our Supreme Court has not distinguished between equal protection claims and Educational Article claims concerning

disparate funding, or other disparate treatment, of Kansas children. Both are equity claims and both are tested in Kansas by the same rational basis analysis, as previously explained. In the statement of this holding, however, much emphasis has been placed on the financial aspect of the rule. Here, however, it is important to note that the reason for essentially equal funding is to guarantee an *equal educational opportunity* for every child. At bottom, this constitutional requirement is about *education*. In other words, small-minded people with calculators could worry about small differences in per pupil expenditures and still miss the point: it's about equal *educational* opportunities.

Accordingly, whether any Kansas child is of a minority race, or is a slow learner, or suffers a learning disability, or is rich or poor, or lives east or west, or any other consideration that child is "our child" and our Constitution guarantees that child an equal educational opportunity consistent with his or her natural abilities. Differential funding, always suspect, must always be justified by a rational explanation (basis), which will usually be related to varying costs incurred in providing essentially equal educational opportunities. This test seems to be adequate for all purposes relevant to the current controversy.

II. The constitutionality (equity and suitability) of statutory funding schemes including general purpose funding, capital outlay statutes, and special education funding.

In considering whether any public school funding, be it general purpose funding, capital outlay statutes, sales tax supplements, or special education funding is constitutional, the same rules apply.

Equity

Again, as previously observed, the Legislature is constitutionally obligated "to furnish each child with an educational opportunity equal to that made available to every other child." *Mock v. State*, Case No. 91-CV-1009, 31 Washburn L.J. 475 (Shawnee County District Court, October 14, 1991). As this Court noted in *Mock*, the Legislature does not have to furnish each school with the same amount of funding per pupil. However, in order to fulfill its duty to provide each child with equal educational opportunities, the Legislature must begin by providing each district with the same amount of funding per pupil. The Legislature may then increase funding for a particular school district only if there are rational reasons that are based on actual increased costs necessary to provide children, or particular children, in that district with an equal educational opportunity. Again, the increased costs must be essential in providing the students in that

district with educational opportunities equal to that provided to students in that and other districts.

In *Mock v. State*, this Court illustrated two circumstances in which a school district would require additional funding to assure that the students were receiving equal educational opportunities. The first involved an increase in the cost of transportation for students who live farther from school compared to the cost of transportation of those who live closer. *See Mock v. State.* The second situation involved the cost of teaching English as a second language to a student who does not speak English in order to assure that student, in turn, can learn math and other subjects taught to all students. *See id.*

In each circumstance, the school district required additional funding to assure that both the student living far from school and the student who could not speak English received the same educational opportunities as other students. The first student received the same educational opportunities as other students because he could attend school, despite the fact that he lived farther than other students. The second student also received equal education opportunities because, after learning English as a second language, she could learn other subjects such as math and science

along with the other students. Again, established rules seem adequate to resolve all claims presented in the case at bar.

Suitability

In addition to providing public school children with equal educational opportunities, the Legislature is constitutionally obligated to "furnish enough total dollars so that the educational opportunities afforded every child are also *suitable*." *Mock v. State.* The Kansas Constitution does not provide a yardstick by which to measure whether the educational opportunities are suitable.

In *U.S.D. No. 229*, the Supreme Court cited with approval the trial court's observation that expressions of suitability criteria in foreign jurisdictions were roughly equivalent to those standards set out in K.S.A. 72-6439(a). The Court was also favorably impressed with the [oversight committee], legislatively created by K.S.A. 72-6439(a), to oversee the quality and equal application of the funding scheme. Based upon those statutory criteria, the oversight of that [committee], and all of the circumstances then existing, the Court found the then-current funding levels and mechanisms "suitable" and thus constitutional.

Today, as our current Supreme Court has now observed in *Montoy*, both those standards and that [committee] have been abolished. Many changes have been made in the funding statutes and many circumstances are alleged to be vastly and relevantly different. Some might suggest the Court adopt the State Board accreditation standards and the State Board of Education as substitutes for the statutory criteria and [committee]. *Montoy* teaches otherwise. (*See Montoy*, 275 Kan. at 155). In all events, the task of construing and enforcing the Constitution is the ultimate and primary province of the judiciary.

Accordingly, in the absence of any appellate court or even legislative suitability standard, this Court must craft one under the Constitution. As noted in *U.S.D. No. 229*, many states have utilized rigid objective criteria in assessing suitability (or adequacy, as many constitutions provide). *See Rose v. Council for Better Educ.*, 790, S.W.2d 186, 212 (1989). Although some courts have obviously preferred an objective criteria for determining suitability or adequacy, this Court is unwilling to prescribe such a list. An example supporting this conclusion follows: An objective set of criteria formulated twenty years ago would not have mentioned computer literacy. Today, it would be essential. Who knows what the list might contain twenty years hence? Accordingly, in order to avoid "freezing" outdated

technological or other matters in the Constitution, this Court finds that the standard should be of a general nature in order to meet the changing needs and conditions of our society.

Therefore, the Court holds that a constitutionally suitable education (much like an efficient education or an adequate education as provided for in the constitutions of our sister states) must provide all Kansas students, commensurate with their natural abilities, the [knowledge and][1] skills necessary to understand and successfully participate in the world around them both as children and later as adults. Because this is the constitutional right of every Kansas child, whether the Legislature has met this requirement is ultimately a decision for the judicial branch. *Montoy*, 275 Kan. at 145.

III. Whether the School District Finance and Quality Performance Act unconstitutionally usurps or otherwise violates the self-executing powers of the Kansas State Board of Education.

At issue is whether the Legislature acted in derogation of the constitutionally mandated powers of the State Board of Education (the Board) when the Legislature developed the School District Financing and Quality Performance Act (the Act), K.S.A. 72-6405 *et seq.*, which contains provisions for determining the amount of state aid school districts will

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[1]Implied in the Court's original ruling and now made explicit.

receive each school year. Article 6 of the Kansas Constitution mandates that the Legislature create and maintain a public school system. To further this constitutional mandate, Article 6 also endows the Legislature and the Board with specific powers.

Article 6, Section 2 is self-executing, meaning the Board can exercise its constitutionally mandated power of general supervision without supplemental legislation. *State ex rel. v. Board of Education* (the *Peabody* case), 212 Kan. 482, 486, 511 P.2d 705 (1973). When a constitutional provision is self-executing, the general rule is that the Legislature may enact legislation that facilitates its constitutionally mandated duties and powers, provided that the legislation is in harmony with the provisions of the Kansas Constitution. *State ex rel. v. Board of Education*, 212 Kan. at 488. The court in *Kansas Enterprises, Inc. v. Frantz*, 269 Kan. 436, 6 P.3d 857 (2000), elaborated on the general rule regarding self-executing provisions:

> [E]ven in the case of a constitutional provision which is self-executing, the legislature may enact legislation to facilitate the powers directly granted by the constitution; legislation may be enacted to facilitate the operation of such a provision, prescribe a practice to be used for its enforcement, provide a convenient remedy for the protection of the rights secured or the determination thereof, or place reasonable safeguards around the exercise of a right. And, even though a provision states that it is self-executing, some legislative action may be necessary to effectuate its purposes. But legislative authority to provide the

> method of exercising a constitutional power exists only where the constitutional provisions themselves do not provide the manner and means and methods for executing the powers therein conferred. . . . . It is clear that legislation which would defeat or even restrict a self-executing mandate of the constitution is beyond the power of the legislature.

Kansas Enters., Inc. v. Frantz, 269 Kan. at 452. The Legislature, therefore, may enact legislation to facilitate its obligation to make provisions for funding public schools, only if the legislation is in harmony with Article 6, Section 2. The Constitution limits, rather than confers, power. *NEA-Fort Scott v. Board of Education*, 225 Kan. 607, 612, 592 P.2d 463 (1979). Article 6, Section 2 thereby limits the Board's power to that of general supervision. *Id.* "The people of this state, by constitutional fiat, have placed the maintenance, development and operation of local public schools with locally elected school boards, subject to the general supervision of the state board of education." *State ex rel. v. Board of Education*, 212 Kan. at 492-93. Although the *Peabody* court found it difficult to precisely define 'general supervision,' it did conclude that "'supervision' means something more than to advise but something less than to control." *Id.* According to the *Peabody* court, the Kansas Constitution and state statutes endow the Board "with authority to supervise the public schools and to adopt regulations for that purpose." *Id.* at 489.

Considering Article 6 in conjunction with the aforementioned case law that illuminates the boundaries of the Board's power, it is clear that the Legislature and the Board play two distinct roles. The Kansas Constitution provides the Legislature with the duty to develop a method with which to provide funding to the public schools and provides the Board with the duty to supervise local school boards to ensure the educational interests of the state are being met. The Board simply does not have the power to develop or alter provisions for funding, nor does it have the power to control the funding of the school districts.

The legislation at issue, the Act, does not usurp the Board's powers of general supervision. Rather, the Act is a provision created by the Legislature to facilitate its duty, and its duty alone, to provide funding to the public schools of Kansas. The Act does not defeat or restrict the Board's constitutionally mandated powers of general supervision. Nothing in the Act prevents the Board from supervising the schools and adopting regulations to aid in doing so. Consequently, the Act does not usurp or otherwise violate the constitutionally mandated powers of the Board.

IV. Whether the statutory funding schemes violate the Due Process Clause and Equal Protection Clause of the Kansas Constitution.

What the Court has previously held is sufficient. However characterized, the Legislature's constitutional obligation to provide every child an essentially equal educational opportunity is the same and will be measured by the same level of scrutiny previously described.

PRETRIAL JUDGMENT ON LEGAL ISSUES

For all of these reasons, the Court finds that: (1) the appropriate level of judicial scrutiny for disparate impact claims is rational basis premised on an educational cost to provide equal educational opportunity rationale; (2) total school funding must be such that it provides every Kansas student, commensurate with their natural abilities, the [knowledge and] skills necessary to understand and successfully participate in the world around them both as children and later as adults; (3) the School District Finance and Quality Performance Act does not usurp or otherwise violate the self-executing powers of the Kansas State Board of Education; and (4) for due process claims, the constitutional obligation is the same and is measured by the same test previously set out for determining whether school funding is equitable and suitable.

The legal principles pertaining to the issues herein having been thus determined, and now re-affirmed by the Court, the Court next proceeded to a trial of the relevant facts.

Following an eight day bench trial, held before the Court, a detailed examination of numerous exhibits and a thorough review of the arguments and ably and well prepared proposed findings of fact and conclusions of law submitted by the parties, the Court now finds and concludes as follows:

FINDINGS AND CONCLUSIONS OF FACT AND LAW

Parties and Standing

1. The Kansas school children who have brought this action as parties plaintiff, are protected, as are all Kansas school children, by Article 6, Section 6, of the Kansas Constitution, the Education Article, and Section 1 and 2 of the Bill of Rights of the Kansas Constitution, and, as such, have standing as aggrieved parties to raise the issues of equity and suitability alleged in this action.

2. Some of these Plaintiff children are members of one or more of (and in the aggregate, are members of all) the various protected and/or vulnerable

categories of students with respect to whom the disparate impact claims are alleged and thus, have standing bring all such claims in this action.

3. Plaintiff Unified School District No. 443 is a school district formed pursuant to state law and is located in Dodge City, Kansas. U.S.D. No. 443 possesses the power to sue and be sued pursuant to state statute.

4. Plaintiff Unified School District No. 305 is a school district formed pursuant to state law and is located in Salina, Kansas. U.S.D. No. 305 possesses the power to sue and be sued pursuant to state statute.

5. Defendant State of Kansas is the government of this state and includes the Legislature (in its official capacity); upon which the Kansas Constitution places the sole duty to fund Kansas schools.

6. Individual Defendants are respectively members of and Commissioner of Education for the Kansas State Board of Education. All are named in their official capacities only. The State Board of Education is an elected, 10-member body mandated by Article 6, Section 2 of the Kansas Constitution. The Education Article provides the State Board shall have general

supervision of Kansas public schools and all other educational interests of the state, except those specifically delegated by law to the State Board of Regents. The constitutional powers of the State Board of Education are self-executing. *State ex. rel. v. Board of Education*, 212 Kan. 482 (1973). The State Board's "basic mission" is to equalize and promote the quality of education through such things as statewide accreditation and certification of teachers and schools. *NEA-Ft. Scott v. U.S.D. 234*, 225 Kan. 607 (1979); *U.S.D. 279 v. Secretary of Kansas Dep't of Human Resources*, 247 Kan. 519 (1990). Since the Supreme Court's ruling in 1973 that the State Board's constitutional powers were self-executing, there have been three proposed amendments to modify the provisions of Article 6 applicable to the State Board. Those efforts were rejected by voters in 1974, 1986, and 1990. In addition to its self-executing powers, the Legislature has provided the State Board with general powers to adopt and maintain standards, criteria, guidelines, or rules and regulations for: school libraries and other educational materials (except text books), courses of study and curriculum, accreditation of elementary and secondary public and non-public schools, certification of administrators, teachers, counselors, school nurses, and supervisors of school districts, and the administration of such other matters as may be specified by the Legislature. K.S.A. 72-7513. Pursuant to the

Education Article, the State Board appoints a commissioner of education, who supervises the Kansas Department of Education, and is also responsible for the development of state plans, goals, and objectives regarding school districts, as well as the oversight of the administration of the State School for the Blind and the State School for the Deaf. K.S.A. 72-7601 *et seq*. The Kansas Department of Education is established pursuant to K.S.A. 72-7701 *et seq*., and is under the administrative supervision of the Commissioner as directed by law and by the State Board.

Equity

7. Following this Court's decision in *Mock*, the Kansas Legislature repealed former school funding schemes (primarily the SDEA–the School District Equalization Act) and enacted the present funding scheme (primarily the SDFQPA–the School District Finance and Quality Performance Act). K.S.A. 72-6405 *et seq*.

8. This new financing scheme, as originally enacted, included, *inter alia*:

   a. An equal financial base allotment per FTE (full time equivalent) pupil (kindergartners and four-year at-risk old preschoolers counting as one half student);

b. Additional funding for:

i. At-risk (free and reduced lunch) students, sometimes referred to as economically disadvantaged;

ii. Special education students (physically and mentally disadvantaged students);

iii. Students who do not speak or are limited in speaking English;

iv. Students in small school districts;

v. Transportation funding for students who live a greater than specified distance from their school;

vi. Optional funding for "extras" through a Local Option Budget ("LOB"), limited to an amount equal to 25 percent of the school district budget and "power equalized" to the 75th percentile (i.e. districts with high valuations are required to raise the entire LOB within the district through property taxes, but poor districts are allowed to raise one fourth of their total LOB through property taxes in their districts, with the State supplying the balance);

vii. Funds for capital improvements and maintenance raised through bond issues and/or local taxes (local capital outlay taxes being limited to 4 mills originally); and

viii. Vocational education and other perceived special needs.

9. At the time of the adoption of this new financing scheme, this Court believed that funds under the new plan would be equally distributed for the benefit of all Kansas children and, if there were disparities, such would be justified by a rational basis explanation premised upon actual differing costs incurred in providing each child with an equal educational opportunity as required by *Mock*. In fact, in remarks from the bench expressed upon passage of the new funding scheme and the consequent dismissal of *Mock*, this Court said:

> I have never been prouder to be a Kansan. I have never been prouder of our Constitutional democracy with its three separate and equal branches. I believe the wisdom of our founders has been proved again–the system works! Of course, the road to resolution was neither easy nor smooth. Such is the nature of democratic self-government. As we all know, democracy is messy, noisy, and just a little inefficient. But it works and it works better than anything else the world has ever tried.
>
> I would like to conclude, finally, with a word to those who are not entirely satisfied with the new legislation. The work of humans is never perfect and never finished. Is the new school finance plan perfect? Probably not. Will it require refinement and adjustment as experience sheds light upon its results? Probably so. Such is the

nature of the work of mere mortals. But of this much I am also certain, in the fullness of time those additional concerns will be also carefully addressed. And, if they can be addressed in the same spirit of cooperation and good will forged in the preparation of the plan now becoming law, your interests and the interests of all Kansans (and especially its children) will be very well served indeed.

10. When the new funding scheme was challenged in *U.S.D. 229*, both Judge (now Justice) Luckert and the Kansas Supreme Court held similar views. Judge Luckert, however, was concerned about whether the low enrollment weighting (extra funds for "small districts") would eventually skew the equity of funding distribution. But the Supreme Court, impressed that the scheme contained objective criteria for fairness and quality and a high-powered committee, consisting primarily of legislative leaders, to oversee future fairness in implementation, approved it conceptually.

11. The goals contained in the new funding scheme, K.S.A. 72-6439(a), referred to in paragraph 10, were stated as follows:

    a. Teachers establish high expectations for learning and monitoring pupil achievement through multiple assessment techniques;

    b. Schools have a basic mission which prepares the learners to live, learn, and work in a global society;

    c. Schools provide planned learning activities within an orderly and

safe environment which is conducive to learning;

d. Schools provide instructional leadership which results in improved pupil performance in an effective school environment;

e. Pupils have the communication skills necessary to live, learn, and work in a global society;

f. Pupils think creatively and problem-solve in order to live, learn, and work in a global society;

g. Pupils work effectively both independently and in groups in order to live, learn, and work in a global society;

h. Pupils have the physical and emotional well-being necessary to live, learn, and work in a global society;

i. All staff engage in ongoing professional development;

j. Pupils participate in lifelong learning.

12. The oversight committee of legislative and other leaders, referred to in paragraph 10, charged with the fair and equal implementation of the new funding scheme, was composed of the chairperson and ranking minority member of the House Committees on Education, Taxation, and Appropriations and the Senate Committees on Education, Assessment and Taxation, and Ways and Means. In addition, the Governor and the State

Board of Education each appointed two representatives of the general public to the committee.

13. The charge of the committee, referred to in paragraphs 10 and 12, was to:

a. Monitor implementation and operation of the SDFQPA (the new funding scheme) and the QPA (the new quality of education plan);

b. Evaluate the SDFQPA and determine if there was a fair and equitable relationship between the costs of weighted components and the assigned weights;

c. Determine if additional school district operations should be weighted;

d. Evaluate the effect of the Act and system on local control;

e. Determine if the Act impeded successful accomplishment of the mission for Kansas education;

f. Evaluate the reform and restructuring components of the law and assess their impact;

g. Evaluate the system of financial support, reform, and restructuring of public education in Kansas and in other states to ensure that the Kansas system was the most efficient and effective;

h. Review the amount of the base state aid per pupil and determine if the amount for school districts is sufficient to provide quality educational opportunities for Kansas children;

i. Explore ways of decreasing LOB spending authority in conjunction with increases in the amount of the base state aid per pupil, by adjusting any weighted component of the Act, or by weighting any additional school district operation;

j. Explore alternative funding sources; and,

k. Evaluate the state policy regarding qualifications of educational programs for categorical state aid and whether entitlement formulas are equitable.

14. Sadly, for the children of Kansas, Judge (now Justice) Luckert's concerns were prophetic.

15. In addition to changes in the laws, since the Supreme Court's decision in *U.S.D. 229* in 1994, the following changed or altered societal circumstances, *inter alia*, have significantly impacted education in the State of Kansas and in the Plaintiffs' school districts:

a. Thirty-six percent of Kansas public school children now qualify for free and/or reduced lunches;

b. The number of limited English proficient ("LEP") children or children for whom English is a second language ("ESL") has increased considerably;

c. The number of children qualifying for special education in Kansas public schools has increased dramatically;

d. The number of immigrants, children of foreign origin, Hispanics, and African Americans enrolled in Kansas public schools has increased dramatically; and

e. Qualified admissions are now required for graduating seniors to attend a state institution of higher learning.

16. Turning to matters statutory, once judicial attention shifted from school finance, the following developments occurred:

a. The goals of K.S.A. 72-6439(a), so important in the Supreme Court's approval of the scheme, as a concept, were removed by the Legislature in 1995. (House Bill 2173).

b. The provision of the SDFQPA creating the oversight committee charged with the fair and equitable administration of the funding

scheme was allowed to expire on June 30, 1994, thus abolishing the committee entirely.

c. The following amendments, *inter alia*, thereafter gradually crept into the funding scheme:

i. The low enrollment weight, initially for school districts under 1,900 enrollment, was amended and fixed at 1,725.

ii. A new weighting category, "correlation weight," was added in 1995 for all school districts not receiving the low enrollment weight.

iii. The at-risk pupil weight was increased from 0.05 to 0.10.

iv. The school district general fund property tax rate was decreased from 35 mills, when the Act was passed, to 20 mills, greatly reducing revenue for school finance.

v. In 1997, a $20,000 exemption was added to the mill levy calculation on residential property appraised valuation, further significantly lowering the property tax yield for school funding.

vi. The new facilities weight was added by a 1993 amendment. This weight gives school districts which have built new

facilities, and have adopted the maximum 25 percent LOB, yet more additional revenues, premised upon the apparent presumption, never verified, that new buildings cost more to operate than old ones!

vii. Special education funds, by amended statute, were added into a school district's general fund for the sole purpose of increasing the base upon which the LOB lid is calculated. This amendment, designed to create additional LOB funding, was necessitated by insufficient general fund allotments, requiring more and more districts to resort to the LOB for basic operational funding and not for "extras" as originally intended.

viii. Ancillary weighting was added, an artifice purporting to grant additional funds to school districts who (1) have commenced operation of a new school facility, (2) have adopted the maximum 25 percent LOB, and (3) have experienced extraordinary enrollment growth, but which actually only benefits three Johnson County school districts (Blue Valley, Desoto, and Olathe).

ix. The cap on capital outlay authority was removed (resulting in wealthy districts being able to raise virtually unlimited funds for the construction and maintenance of buildings and the purchase of new equipment, with no provision for power equalization for poor districts unable to do likewise).

x. Most special education funds were limited to a reimbursement for 85 percent of the actual costs incurred in hiring special education teachers and para-professionals, at a reduced rate (and if no such credentialed teachers or para-professionals can be actually found and employed by the district, no additional dollars are added by the State for the care and education of these expensive and challenging learners, although such services are required of the district by federal law).

17. As it develops, and contrary to this Court's earlier belief, the current financing scheme was never based upon costs or even estimated costs to educate children, but was in fact the result of a "political auction" (where various funding levels were proposed until, finally, a political majority could be achieved in the Legislature). In fact, it is now revealed that the present scheme was actually premised not upon costs but upon former

spending levels of districts under the old unconstitutional SDEA, thus freezing the inequities of the old law into the new.

18. In uncontroverted testimony from the State's top education official, frankly astonishing to the Court, it was revealed that Kansas has no "bottom-up" budgeting system for public schools whatsoever! No one, in the history of Kansas, has ever asked our schools what resources they need to provide a suitable education for our children. And this in a vital, constitutionally protected endeavor already consuming nearly four billion dollars (well over half the entire revenues of the State). Instead, these billions of tax dollars are distributed annually by legislative fiat (the financing scheme) without any requests, estimates, or other input on costs or needs from the "boots on the ground" superintendents, principals, or teachers in the field. Only after these legislatively "allotted" funds are received, does each school district then budget how to spend every cent that it has been given, as any left-over funds are snatched away and the district's "allotment" the following year is reduced by an equal sum. The notion of saving for a rainy day (or to fix a leaky roof) is apparently anathema under the present funding scheme.

19. *Mock* involved only the constitutional question of equity, i.e. does the funding scheme treat all our children equally (save only for any differential which can be justified by a rational basis premised on actual additional costs incurred to provide "expensive" or "costly" children with the same equal education provided others). The case at bar raises that claim, once again, and others.

The Funding Statutes

20. The State of Kansas presently funds its public schools, grades K-12, through a statewide funding scheme, containing within the following statutes pertinent to this litigation: the School District Finance and Quality Performance Act (the "SDFQPA," usually referred to as "the present funding scheme"), K.S.A. 72-6405 *et seq.*, the capital outlay provisions of K.S.A. 72-8801 *et seq.*, and the special education excess cost provisions of K.S.A. 72-961 *et seq.*

How the Statutes Are Implemented

The Base Allotment

21. Since 1992 when the present funding scheme was first enacted, Kansas has used what is known as a foundation program to fund its schools. A

foundation program establishes a minimum (or foundation) level of revenue a school district will receive, as well as a tax rate the district must assess to raise that level of funding. The funding scheme at the present time requires every school district to levy a minimum of 20 mills. If the district is unable to raise the full foundation amount through its own tax efforts, the State funds the difference. If the district raises more than the foundation formula allows, those tax revenues are "recaptured" and paid to the State. The base (or foundation) rate for the 2002-2003 school year is funded presently by the Legislature at the annual rate of $3,863 per full time equivalent ("FTE") student.

22. Declining Enrollment: When a district's FTE enrollment in the current school year decreases from the preceding school year, a district may use the greater enrollment of the preceding school year or a three-year average enrollment (the current year and the two preceding school years) for budgeting purposes. This provision allows schools whose enrollment declines to receive more funds than their actual headcount would justify.

Additions to the Base Allotment

23. Adjustments to Base State Aid Per Pupil: The base rate is adjusted by several factors or weights. These weighting factors follow:

a. Low Enrollment: Districts with fewer than 1,725 students receive a weight for each pupil based on a linear function in three groups of students–under 100 FTE, between 100-299 FTE, and between 300-1,725 FTE. K.S.A. 72-6412. The weight is determined by constructing linear transitions between the actual 1991-92 median budget per pupil of districts having enrollments of 75-125 and 200-399 and between the 1991-92 median budget per pupil of districts having enrollments of 200-399 and 1,900. Initially, the cutoff for the low enrollment weight was 1,899, but beginning in 1995 the cutoff decreased incrementally until it reached its present level of 1,725 beginning with the 1999-2000 school year. An illustration is helpful: The sliding scale is set at 2.14 for districts enrolling 100 pupils. In districts with 100 pupils, for example, each pupil is counted as 2.14 children and allotted 2.14 times the base allotment other children receive in larger schools. This weighting is designed to defray the presumed, but never verified, extra costs of operating "small" districts of 1,725 or less students. Again, the origin of this weighting

is that the Legislature used the median per pupil allotment from the 1991-92 school year to determine low enrollment weights. Thus, this weighting factor was also based solely on the spending history from the prior, unconstitutional SDEA and not from any actual or even estimated costs to operate such schools. Once again, the inequities of the old law were frozen into the new.

b. Correlation Weighting: Each district with enrollments over 1,725 receives a correlation weight of 0.063211 for each FTE pupil. This has the effect of increasing the base state allotment by just over six percent for districts with more than 1,725 FTE students. This weighting is the enrollment adjustment that is assigned to the larger enrollment districts as a "correlative" to the low enrollment weight. Frankly, this "weight" appears to the Court to be an implicit legislative admission of and an attempt to ameliorate, to some small extent, the inequity created by the low enrollment weighting factor without actually decreasing funds to the favored schools.

c. New School Facility: Districts are provided a weight of 0.25 for each student in a new school for the first two years of its operation, provided the district utilizes the full amount of its Local Option Budget authority. This weighting is based on the presumption, never

verified, that a brand new facility costs more to operate than an existing building.

d. Transportation: A weight for transportation costs is generated based on a district's population density and the number of students who live more than 2.5 miles from school.[2] This weighting is derived by first having the State Board determine the expenditures in the preceding year for transporting public and non-public pupils on regular school routes. Calculations are then made to net out a portion of these costs to represent 50 percent of the transportation costs for pupils residing less than 2.5 miles from school. The remaining amount is divided by the number of pupils residing more than 2.5 miles from school. The quotient is then plotted on a density-cost graph used to construct a "curve of best fit" statistically. The formula is codified at K.S.A. 72-6411.

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[2] This mileage reimbursement cutoff, set at 2.5 miles, deprives most urban schools of significant transportation funds made available to their rural counterparts, as most urban children live within the 2.5 mile radius of their school and thus receive no transportation funding whatsoever. In this connection, it should be noted that Defendants' own expert consultants, Augenblick & Myers, recommended a 1.5 mile cutoff....a recommendation ignored by the Legislature.

24. Student Weights:

a. Vocational Education: A weight of 0.5 is provided for each FTE student (measured by contact hours) enrolled in vocational education programs approved by the State Board of Education. Pupils who participate in vocational education programs receive this additional weight based upon the number of total hours in which students are enrolled in vocational education programs. This weighting is not based upon the actual cost incurred by the school district in providing for these vocational programs, but for some unexplained reason upon the number of hours in which a student is enrolled.

b. Bilingual Education: A weight of 0.2 is provided for each FTE student (measured by contact hours) enrolled in a bilingual class in which bilingual services are offered through a program approved by the State Board. The approved programs provide substantive instruction in core classes (math, science, social studies, and others) in the student's native language while also teaching English. Bilingual weighting for educational programs, such as English as a second language, is premised on the theory that such programs have higher costs than regular programs. Like vocational funds, bilingual

funds are based not on costs, but for reasons heretofore unexplained upon the number of hours in which a student is enrolled.

c. At-risk Education: A weight of 0.1 is applied to the number of students qualifying for free meals under the National School Lunch Program. To receive these funds, a school district must maintain an at-risk assistance plan approved by the State Board. It should be noted that although the funding is based on the number of students approved for the free lunch program, the approved educational programs financed by this weighting may include at-risk students who are not qualified for free lunch. Again, this factor does not rest on any empirical evidence of actual costs.

25. "Weighted FTE" Pupil Count: Once determined, the weights are added to the FTE pupil count to generate a "weighted FTE" pupil count, which is then multiplied by the base state allotment to generate a district's foundation allotment. The State allotment is then the difference between this amount and the amount raised from local taxes.

26. Local Option Budgets: The present funding scheme permits local school districts to pass local option budgets to supplement State funding. An LOB

requires the levying of additional taxes and is sometimes dependent on the approval of residents of the district. "State aid" (a misnomer as all school funds are "state" funds), as these funds are known, is provided to each school district with an LOB if its assessed valuation per pupil is below the 75th percentile of assessed valuation per pupil statewide for the prior school year. Districts above the 75th percentile receive no supplemental "state aid." Local option budgets are capped at 25 percent of the school district's adjusted general fund budget. LOBs were originally intended to fund "extra" expenses, not general educational expenses. More school districts use LOBs today than when the Supreme Court last reviewed the finance formula in 1994. Now, however, school districts use LOBs to fund basic educational services, not "extras." Since 1994, the Legislature has enacted changes to the LOB provision that has produced growing disparities in the amount of LOB funds utilized by local school districts. For example, the Legislature has authorized certain districts to assess LOBs without voter protest; eliminated the requirement that LOB percentages drop when the base state aid per pupil increases; and, in 2001, included additional special education funds into the base figure for LOB cap calculation. It is significantly easier for districts with high assessed property values to raise substantial funds through an LOB. Obviously, the higher the value of the

property in the district, the more dollars each mill of tax will raise. Thus, in districts with low property valuations, it is virtually impossible to raise adequate funds to supply basic education needs (for which LOBs are now used) without severely impacting district taxpayers. Accordingly, it is a fact that LOBs, as their use has evolved, create wealth-based disparities in per pupil revenues for Kansas schools.

27. Bond Principal and Interest Obligations: State law provides additional state funds to school districts for use in the payment of bond principal and interest on general obligation bonds for the construction of school facilities and equipment. These funds are provided inversely to a school district's assessed valuation per pupil. The percentage of state contribution is higher for bonds issued after July 1, 1992. For a school district having the median assessed valuation per pupil, the state funds ratio is 25 percent for bond and interest obligations incurred after July 1, 1992. The state funds computation factor is 5 percent for bond and interest obligations prior to July 1, 1992. The factor increases or decreases by one percentage point for each $1,000 of assessed valuation per pupil of a district below or above the median.

28. Federal Impact Aid Equity: Federal impact aid is provided by the federal government to school districts to offset the omission of federal property from the local *ad valorem* tax rolls. The present funding scheme deducts 75 percent of federal impact aid from the amount a school district is to receive in state aid under the formula.

29. Capital Outlay: Kansas law authorizes school districts to assess additional property taxes for certain capital expenditures outside the general fund budget. No state equalization funds are provided. Prior to 1999, the mill levy available for these capital expenditures was capped at four mills. In 1999, the cap was eliminated. These statutes enable wealthy local school districts to raise unlimited, unequalized funds to be used for capital expenditures such as buildings, site improvements, maintenance, and equipment. Because school districts have vastly different assessed property values, Kansas school districts, under the present funding scheme, have enormously differing and unequal available funds for capital expenditures on buildings, equipment, site improvements, and maintenance.

30. In 2002, for example, Burlington had an assessed valuation per pupil of $461,051 while Galena had an assessed valuation per pupil of $14,604.

Thus, in 2002, a one mill capital outlay levy in Burlington would raise $461.05 per pupil while the same levy in Galena would only raise $14.60 per pupil.

31. Again, it must be noted that when the capital outlay provisions were originally enacted and reviewed by the Supreme Court in *U.S.D. 229*, the mill levy for capital outlay funds was capped at four mills. The Kansas Legislature has since removed the four mill limit. *See* K.S.A. 72-8801(b)(2); K.S.A. 79-5040.

32. The wealth-related disparities of the capital outlay system are manifested in an additional manner. Capital outlay levies are subject to protest petition. Before a school district can access capital outlay funds, it must publish a resolution that is subject to protest and election. According to the United States Census Bureau, the median household income in Johnson County is $61,485. In Ford County and in Saline County, by contrast, the respective median annual household incomes are $37,860 and $37,308. This difference in incomes translates into a different political reception for capital outlay referendums at the ballot box. Lower income voters simply perceive the necessity for additional property taxes differently than higher

income voters. The reality of Kansas education is that wealthier districts not only can raise more total money through capital outlay levies, they also have an unequal political opportunity to implement a capital outlay levy from the outset.

33. It is also important to note that from 1998 to 2002, the wealthiest school district in the State had its assessed valuation, or "capital outlay purchasing power," increase 108 percent while the poorest district in the State actually *lost* 30 percent in valuation over the same time period. The statewide median during those five years showed an increase of 18 percent. The inescapable factual conclusion is that those who had the capital outlay advantage of high purchasing power in the first place have had that inequitable advantage *increase* over the past five years.

34. Special Education Funding: State funds for special education and related services comes from both the special education law and the present funding scheme. The state special education categorical aid program provides reimbursement to school districts and/or cooperatives and interlocals formed by school districts for children with disabilities. "Aid" is based upon prioritized criteria. Funding under the present scheme for special

education children is provided by counting each school-aged exceptional child as one pupil, and each preschool-aged exceptional child as one-half pupil. The priorities are as follows:

a. The first priority for special education funding is to provide "state aid" for the following: (a) an amount equal to 75 percent of the costs of special education or related services for a child exceeding $25,000 for the school year; (b) 80 percent of the costs in providing transportation for children to receive special education or related services; (c) 80 percent of the cost of the travel expenses actually incurred by special teachers to provide services; and (d) 80 percent of the costs to provide maintenance for a child away from the child's residence in an amount not to exceed $600 per child per school year.

b. The second priority, which constitutes most of the special education "state aid" provided, is based on the number of "special teachers" as defined by law. This is distributed by taking the appropriation amount remaining after fulfilling the obligations in the first priority criteria divided by the number of special teachers to determine a per teacher amount. In making this calculation, the formula includes both special education teachers and special education para-

professionals. The latter are counted as 2/5 full-time equivalent special teacher.

As can be observed from the foregoing, although some special education weighting is based on actual costs, the State only reimburses a portion of it. In the primary special education funding category, the State only provides reimbursement for 85 percent of the costs of the salary of a special education teacher or para-professional incurred by local school districts. Local school districts, at a minimum, must use general fund dollars to pay for at least 15 percent of all special education services. Obviously, this reduces the available funds for regular education services, a built-in deficiency by legislative design. Accordingly, Defendants have intentionally failed to fully fund the costs to meet the needs of Kansas children with disabilities. Further, the current funding scheme only reimburses the district for 85 percent of the actually incurred salaries of special education teachers and para-professionals (to a lessor extent). Thus, as previously mentioned, if the distirct cannot find such a credentialed teacher or para-professional, no funds are forthcoming from the State. Because federal law requires these services, the district must eventually contract for these services with the costs therefor coming from the "regular"

education funds of the district (which further diminishes the availability of those funds for the education of other children).

35. Sales Tax Revenue: Several school districts have negotiated agreements with the cities and/or counties in which they are situated to obtain sales tax revenue for their school districts. The cities and/or counties have apparently justified this tax by indicating that having "better" schools (better than the schools furnished other Kansas children) attracts business and thus is an aid in economic development.

36. Ancillary Weighting: Ancillary weighting is an artifice purporting to grant additional funds to school districts who (1) have commenced operation of a new school facility, (2) have adopted the maximum 25 percent LOB, and (3) have experienced extraordinary enrollment growth, but which actually only benefits three Johnson County school districts (Blue Valley, Desoto, and Olathe).

37. In many cases, a few miles makes a difference of thousands of dollars in the amount of state funds received. For example, U.S.D. No. 489 in Hays, receives $2,150.58 less per FTE than U.S.D. No. 432 in Victoria, which is a

mere nine miles away, and U.S.D. No. 331 in Kingman, receives $2,311.14 less per FTE than U.S.D. No. 332 in Cunningham, which is a mere 20-minute drive down U.S. Highway 54.

38. As this Court and the Supreme Court have already held, the Kansas Constitution requires the Legislature to provide 100 percent of the funding for a suitable education for all Kansas children. The fact that Kansas is divided into over three hundred school districts and the nature and extent of the territory contained within each is a policy decision of the Legislature. The State of Hawaii, for example, has only one school district. (Hawaii Department of Education website, http://www.doe.k12.hi.us/about). Similarly, some Kansas school districts are small by necessity and others merely by legislative choice. These are political decisions the Legislature has every right to make, provided they are willing to raise the taxes necessary to pay for those choices. But such policy decisions cannot constitutionally, through resultant underfunding, have the effect of depriving other Kansas children in other districts of their constitutionally guaranteed suitable education. The fact that the present funding scheme utilizes funds from state-wide property taxes, from the general fund, from local school district property taxes from the LOB and capital outlay funds,

bond proceeds, and sales tax revenue from cities and counties, *inter alia*, does not obscure the fact that these funds are all authorized and generated by a legislative scheme and that each of these entities utilize only such public governmental taxing power as the state, through its Legislature, chooses to share. Thus, as a matter of fact and law, all school funds generated by the State and its various subdivisions are state funds. As the Supreme Court has affirmed in the prior appeal of this action and as this Court has held at least back as far as *Mock*, there is only one entity with the constitutional funding duty: the Legislature; and there is only one type of funds utilized by the Legislature for that purpose: state funds.

The Totals

39. In summary, when added together, the Kansas Legislature allotted and the schools of Kansas spent $3,617,441,890 from the funds of the State and its various subdivisions, in the 2002-2003 school year. To this total, the federal government added $250,428,582, for a grand total of $3,867,870,418. Today, just eleven years after *Mock*, the disparity in per pupil funding has once again climbed to in excess of 300 percent. To be precise, the lowest per pupil FTE allotment, received by students in U.S.D. 480 (Liberal), is $5,655.95, while students in U.S.D. 301 (Nes Tres La Go) receive the

highest per pupil FTE allotment of $16,968.49, a differential of slightly more than 300 percent! The Legislature has not justified this enormous disparity with evidence of any rational basis premised upon differing costs to educate the children who receive more. In fact, such costs are not only not collected and kept by the state, they have never even been requested! Several education professionals, all working in the Kansas education system daily, actually described our present scheme as irrational!

40. Accordingly, as a matter of uncontroverted fact and law, the current funding scheme containing, as it does, a 300 percent unexplained FTE pupil disparity for which no rational basis has been shown or proved, violates Article 6 of the Kansas Constitution in its failure to provide equity in funding for all Kansas children.

Adequacy or Suitability

41. In addition to the issue previously discussed, the lack of equity in the funding scheme, Plaintiffs herein also allege that the total funds provided by the Legislature, even if all its base allotments, weights, LOBs, capital outlays, sales taxes, and other allowances and supplements are combined, is grossly inadequate in the aggregate to provide a suitable education to all

Kansas children (as that term has been defined by both this Court[3] and the Legislature) and as required by Article 6 of the Kansas Constitution.

42. The task of "costing out" a suitable education for 467,326 Kansas children in grades K-12 is a daunting one. In fact, before the Court heard the evidence in this cause, the Court was doubtful if it would be possible to make such an assessment and thus reach this issue. And then the Court heard the following uncontroverted evidence:

a. As previously mentioned, Kansas has no cost-based budgeting system from which even estimated costs of a suitable education could be ascertained.

b. In 2001, the Kansas Board of Education and the Legislature, perhaps in anticipation of this very litigation, became concerned with what a suitable education was, as required by Article 6 of the Kansas Constitution and what such an education might cost. The Legislature authorized the employment of a team of professional school finance experts to make a study and report their findings and conclusions. In so doing, the Legislature pronounced the reasons for its actions in K.S.A. 46-1225 with these words:

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[3] Virtually all witnesses concurred with the Court's definition of suitability as being professionally adequate and sound in terms of modern educational thought.

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

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

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

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

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

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

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

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

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

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

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

(6) the cost of opening new facilities; and

(7) the geographic variations in costs of personnel,

materials, supplies and equipment and other fixed costs so that districts across the state are afforded comparable purchasing power.

(Emphasis added).

43. In conformity with this legislative directive, the firm of Augenblick & Myers was employed. These experts, in the Court's opinion, are highly qualified and respected in their fields and are trustworthy, competent, and reliable, views are shared by the State Board of Education and the Legislature which engaged them. The Court notes parenthetically that John Meyers, who testified before the Court in the instant action, was previously employed by the Legislature to assist this Court twelve years ago in *Mock*.

44. Promptly after being engaged, Augenblick & Myers notified the State Board of Education and the Legislature that the determination of a "suitable education" was a policy matter on which it looked to them for guidance. In consultation with the State Board of Education and the Legislative Coordinating Council, a definition of a "suitable education" was agreed upon. In general, the definition included a curricular program consisting of required elementary subjects (K.S.A. 72-1101), high school graduation

requirements (K.S.A. 72-1103), history and government course requirements (K.S.A. 72-1117), State Scholarship Program requirements, and the Qualified Admissions Pre-College Curriculum. (See Plaintiffs' Exhibit 142A for a more detailed breakdown of the course work described).

45. Having received their legislative instructions on the content of a suitable education, Augenblick & Myers then spent about one year in Kansas "costing out" that suitable education throughout the many and varied circumstances presented by Kansas schools. Two different professionally accepted analytical methods were employed by Augenblick & Myers to reach their conclusions. Their final report drew from both methods and included numerous consultations with many Kansas educators working "in the trenches."

46. The Augenblick & Myers report concluded, in 2002, that the funds provided to Kansas schools was $853 million short of adequate for a suitable education, as legislatively defined. Furthermore, the Augenblick & Myers report excluded many "big ticket" items, such as:

i. all transportation costs;

ii. all Capital Outlay costs (for construction, purchase, and/or maintenance of all buildings and equipment);

iii. all food service costs; and

iv. all adult education costs.

In addition, John Meyers, one of the draftsmen of the report, indicated that the figures in the report are now several years old, and as such, would now have to be adjusted upward to account for inflation. The true amount of the suitability shortage then, taking all Augenblick & Myers exclusions and inflation into account, appears to the Court to be well in excess of a billion dollars (as Kansas schools are presently configured and managed–both legislative choices). To be specific, the Augenblick & Myers' cost projections are premised upon the current configuration of Kansas schools: 303 districts with 1,500 schools of the size, type, and location presently extant. No organizational efficiencies were asked for or suggested.

47. When asked whether there was anything the Court could consider other than the Augenblick & Myers report in deciding what a suitable education would cost and how that figure compared to current funding, the State Commissioner of Education, Defendant Dr. Andy Tompkins, testified unequivocally there was nothing.

48. Many small, low enrollment Kansas school districts actually advertise in newspapers and publications in neighboring mid and large-sized districts seeking the transfer of students from the large districts into their smaller district by touting the educational benefits available to students in those smaller districts which, because of the gross disparities in funding, are not afforded students in the larger and mid-sized districts where the targeted students live.

49. Many Kansas school children are currently being "socially promoted;" that is passed on to the next grade level without meeting the requirements for promotion or graduation.

50. Many Kansas teachers, in large classes, only have time to "teach to the middle;" that is they must tailor their presentations to the perhaps fictitious "average" student with no time or resources to really help those at either end of the achievement spectrum.

51. Defendants do not seriously dispute most of the facts contained in this opinion. In point of truth, virtually all financial information relied upon by the Court was furnished by the Defendants themselves. Not one witness

took the stand for Defendants to testify the current funding level was suitable. With respect to the Augenblick & Myers report, one of the Defendants, the State Board of Education, has actually publicly recommended that the Legislature adopt and implement it over a three-year period and has stated that current Kansas school funding is inadequate to meet the State's own goals.

52. In defense, Defendants simply argue "money doesn't matter." Without regard to the constitutional mandate that there be adequate funds for a suitable education and that those funds be equitably divided, the defense seems to say: there is no correlation between spending and student learning, so what's all the fuss.

For reasons which shall be elucidated more fully in the final portion of these findings related to disparate impact on student performance, the Court finds this argument wholly lacking in merit. Perhaps one example from the evidence will suffice as an illustration of this factual conclusion for present purposes: Last year, Jacque Feist, principal of Dodge City High School and Kathy Taylor, principal of Dodge City Middle School, applied for and received a short-term federal grant. With this grant, they doubled their

teachers, cut their middle school classes in half, and added special training for their teachers in how to teach children with reading problems. In one year, they raised their middle school reading proficiency from 44 percent to 70 percent in a school with a makeup of 74 percent minority (Hispanic), 67 percent impoverished, 13 percent disabled, 47 percent ESL, and 25 percent LEP and all in a district where the bilingual teacher-pupil ratio is one to a hundred, where two hundred summer school applicants were denied admission for lack of funds, and where 120 wait on the waiting list for the after school tutoring program. "Money doesn't matter?" That dog won't hunt in Dodge City!

53. Defendants also argued, early on and again in their proposed findings, that the accreditation of a school is a guarantee of the adequacy or suitability of the education provided by that school. Because all Kansas schools are accredited, the argument goes, the suitability test is satisfied. On this point, the Supreme Court in the appeal of this case has already held to the contrary as a matter of law. Furthermore, as Defendants' Exhibit 61 shows, Kansas minorities, disabled, non-English speakers, poor children, and in some cases even majorities are failing at alarming rates in Kansas schools, all of which are accredited. Accreditation standards are all about schools, not students.

Even student scores are averaged when compared to averages of students in others schools. This case is about individual students who seek an equal and suitable education, individuals who are "left behind" in the averaging of the present accreditation system. Thus, accreditation is no guarantee of either suitability or student proficiency (the ultimate aim of a suitable education). Specifically, to the extent even average student performance is considered in accreditation, the Court notes that failure rates for all students as high as 70.9 percent are adequate for both AYP (adequate yearly progress, under NCLB) and accreditation. (See paragraph 54, *infra*). Accordingly, this argument fails on both legal and factual grounds.

54. Similarly, Defendants also argued in this cause that any school meeting the AYP requirements of the federal No Child Left Behind ("NCLB") law thereby conclusively demonstrated that it was providing a suitable education to its students.[4] AYP criteria for 2001-2002 and 2002-2003, as adopted by Kansas, require simply that the school do no worse than the year before. For example, for any Kansas school to meet AYP for either 2002 or 2003 in K-8 reading, only 44 percent of all students need to pass (a failure rate of 56 percent); in 9-12 reading, only 51.2 percent of all students need to

[4]See paragraphs 65-72, *infra*, for a full discussion of AYP and NCLB.

pass (a failure rate of 48.8 percent); in K-8 math, only 46.8 percent of all students need to pass (a failure rate of 53.2 percent); and in 9-12 math, only 29.1 percent of all students need to pass (a failure rate of 70.9 percent)! For actual performance results, see paragraph 77, *infra*. Obviously, the attainment of such AYP status in no way indicates that all Kansas students in those schools receive an adequate or suitable education. Accordingly, this argument likewise fails on the facts.

55. Defendants also argue that a lack of suitability in education would reflect a crumbling system in constitutional crisis, unable to provide the basics of an education. In this connection, they point to graduation requirements, teacher and administrator salaries and certifications, and spending increases in Plaintiffs' districts and suggest these facts do not indicate an educational collapse. The difficulties with this argument are two-fold: First, the proffered implied definitions of a suitable education (i.e a system or district slightly above collapse) is not the constitutional definition elucidated by this Court, or by the State Board of Education or the Legislature for that matter. Second, this action is primarily brought by students who challenge the Kansas funding scheme state-wide, not just in Plaintiffs' districts. Accordingly, this argument likewise lacks merit on the facts.

56. Defendants further contend that some schools seem to achieve greater student performances than other schools with the same or even less funding. This contention really addresses an implied lack of consistent good management and accountability throughout the Kansas school system. Apparently, Defendants wish the Court to conclude, from these arguments, that more funding should not be forthcoming until all schools reach maximum efficiency at present funding levels. This arguments fails for the following reason: Addressing problems of management and accountability is also Defendants' responsibility. The Constitution of Kansas places not only the duty to fund, but also the duty to effectively manage the Kansas educational system squarely on the Defendants. Accordingly, if there is a failure in this regard, it is the Defendants' failure to design and implement a better plan to manage and bring our schools to account. Such a failure on Defendants' part, if any there be, to perform one constitutional duty can hardly excuse the failure of Defendants to perform another equally important constitutional duty. It must be remembered that these rights belong to our children. What a cruel hoax it would be if their guaranteed promise of a suitable education for all could be so easily and diabolically frustrated.

57. Defendants' also argue that student performance results are more closely tied to how local districts spend the money they are provided than the actual amount of those funds. This contention fails to take into account to whom the constitutional guarantee of a suitable education runs. As this Court held in *Mock*, that guarantee runs to every Kansas child. Thus, if funds sent to any given district for the education of the children in that district are being squandered and those children's guaranteed suitable education frustrated thereby, it is up to the State Board and the Legislature to either correct the problem or design a different system where suitable quality can be assured. The parties are reminded once again that it is the Legislature which is constitutionally mandated to provide every child with a free and suitable education. See paragraph 56, *supra*.

58. Perhaps Defendants' most elegantly expressed and dangerously alluring argument is the one to which they devote the most space in their proposed findings: that Kansas gets a great bargain from its schools, the students of which perform amazingly well when compared with other schools across the nation. Considerable attention is given by Defendants to ACT, SAT, PSAT, NAEP, and other types of student achievement scores. Defendants highlight certain subjects and grade levels where the State ranks very high

indeed in the national comparisons. These laudable achievements and high rankings prove, it is argued, that education in Kansas is suitable. This argument is alluring, of course, because all of us wish all of our schools well and we are justly proud when Kansas ranks highly in any academic standing. But what these broad, general statements obscure is the ugly truth hidden behind them. What these generalities actually reflect is how Kansas students, when all are averaged together, compare to similar averages elsewhere. What is hidden are the disaggregated results of the various subclasses of students. When these broad averages are disaggregated, it becomes clear that many categories of Kansas students (minorities, the poor, the disabled, and the limited English) are failing at alarming rates. Because Kansas state-wide has relatively few minorities, poor, disabled, and non-English speakers, the scores of Kansas majority students, when averaged with all others, bring the Kansas average higher than other states, many of which have greatly dissimilar demographics. Yet the stubborn fact remains: 83.7 percent of Kansas African American students, 81.1 percent of Kansas Hispanic students, 64.1 percent of Kansas Native American students, 79.8 percent of Kansas disabled students, 87.1 percent of Kansas limited English proficiency students, and 77.5 percent of Kansas impoverished students are failing 10th grade math, for example. In fact,

only 51 percent of Kansas white students are passing the same subject! Although reading and math scores at other grade levels are slightly better, the results are similar and equally disturbing. These averages also conceal dropout rates for certain categories of students which are frankly frightening. The Dodge City high school dropout rate for Hispanics males, for example, is 65 percent. These are the students who have completely given up on receiving a suitable education. They do not appear in any of the averages. Accordingly, the Court finds that these broad averages conceal the fact that most of Kansas' most vulnerable and/or protected students are failing or giving up; hardly proof of a suitable education made available to all.

59. Even more troublesome is Defendants' well-phrased and superficially attractive argument that even if one chooses to examine alarming student failure rates of Kansas minorities, poor, disabled, and limited English, one finds these failure rates compare "favorably" with similar failure rates for such persons elsewhere. Reduced to its simplest and clearest terms, this argument suggests that there is "no problem" in Kansas since our vulnerable and/or protected students aren't performing any worse than such students are performing elsewhere. This argument seems to the Court to be

on a par with the following statement: "Persons of color should be comforted by the fact that lynchings in Kansas are no more frequent than lynchings in many other states." Although this analogy may seem extreme, at first blush, remember both subjects are covered by the exact same constitutional provision: the provision guaranteeing all citizens the equal protection of the law. Clearly, this argument does not prove, as Defendants allege, the suitability of education for all Kansas students and must fail in any civilized constitutional democracy. Finally, as previously observed, the Augenblick & Myers' cost study, commissioned by the State Board and the Legislature, found current funding levels dramatically short of that necessary to provide a suitable education by the Legislature's own standards. That is the issue at bar and on this overarching point the evidence is uncontroverted.

60. Based upon the uncontroverted facts in the record before the Court, the Court finds as a matter of fact and law that the funds provided to Kansas school districts by the Legislature under the present financing scheme as applied is clearly and grossly inadequate to provide Kansas children a suitable education (as that term is defined by both this Court and the

Legislature itself) and, as such, in violation of Article 6 of the Kansas Constitution.

Disparate Impact

61. The final contention of the Plaintiffs is that not only are Kansas K-12 school funds inadequate for a suitable education and those inadequate funds inequitably distributed, but these constitutional deficiencies disparately and adversely impact certain vulnerable and/or constitutionally protected students, such as: the poor or at-risk (defined as free and reduced lunch); the physically and mentally disabled (special education); racial minorities (particularly African-American and Hispanic students); and those who cannot or are limited in their ability to speak English.

62. In order to understand Plaintiffs' disparate impact claim, four underlying facts must be understood. First, how funds are geographically distributed under the present funding scheme; second, where the vulnerable and/or protected categories of students generally attend school within that geographic funds distribution system; third, how these students perform or fail to perform academically; and fourth, the causal relationship of that funding scheme to any poor academic performance.

63. But first a look back at educational thought historically. The Court was advised by one of Defendants' experts, Dr. Hanushek, that historically it was believed by education experts that only what went into a school was of essential importance. In other words, what was important was how many rooms were in the building, how many books were in the library, was the playground fenced, were the teachers credentialed; the so-called "inputs." Within the last nine years, he advised the Court, two monumental breakthroughs in educational thought were achieved:

i. Equal in importance with school "inputs," is whether the children attending the schools are actually learning anything, and

ii. Good teachers make a difference.

While these "monumental breakthroughs" seem somewhat self-evident to the Court, the Commissioner of Education, Dr. Andy Tompkins, concurred in the observation, and added that it has been only a recent development that educators and governmental school officials have come to the understanding that "all children can learn." In fact, Commissioner Tompkins testified that it would be two more generations before those who believed the contrary (that some children cannot and will not learn) have left the halls of Kansas education. These attitudes (that some children

cannot learn), still extant among some Kansas education personnel, have led to many generations of "throw away" children. If a generation is still calculated as 33 years, as it was when this Court was in college, it is absolutely amazing that any education professional would still think, in this day and age, that 66 years is not too long for disadvantaged Kansas children to wait for their constitutional due: an equal and suitable education.

64. Perhaps in recognition of the mentioned "breakthroughs" and changing thought about the ability of all students to learn and become proficient, Kansas upgraded and changed its curriculum standards in 1995. L. 1995, ch. 263, §1(b). The Legislature required the State Board of Education to provide for individual student assessments in the "core academic areas;" those being math, science, reading, writing, and social studies. In 1996, the State Board of Education revised its accreditation regulations in compliance with the Legislature's directive. The regulations were revised, once again, in 1999, as part of a continuing review of the accreditation process.

65. More recently, the current federal administration has placed education on the national agenda with the passage of the law known as No Child Left

Behind ("NCLB"). This law mandates, nation-wide, that all children shall be proficient in reading/language arts, math, and science by 2014. All states are required to adopt interim annual goals to ensure that the overall goal of total proficiency will be reached in the next 10 years. NCLB also mandates that school tests be given at prescribed times and on specified subjects to ensure progress. These test results are also required to be "disaggregated" as to student type and classification and "adequate yearly progress" is mandated not only overall, but in each disaggregated sector, as well. Disaggregated categories include: racial minorities, at-risk (free and reduced lunch), physically and mentally disadvantaged (special education), and those with no or limited English proficiency.

66. Under No Child Left Behind, schools and school districts must ensure that every child learns. To measure levels of learning, NCLB has set measurable goals and standards for every school and school district. The measurable data, obtained by annual state assessments, are reported by economic background, race and ethnicity, English proficiency, and disability.

67. NCLB's goal of measuring progress by subgroups is to demonstrate not just that overall student performance is improving, but also that achievement gaps are closing between disadvantaged students and other students.

68. The major premises behind NCLB are fourfold:

- All children can achieve to high standards.
- All schools are accountable for all students.
- A unitary accountability system must apply to all schools.
- All teachers must be highly qualified.

69. NCLB requires Kansas to define adequate yearly progress (AYP) for school districts and schools. In defining adequate yearly progress, Kansas has set minimum levels of improvement–measurable in terms of student performance–that school districts and schools must achieve within time frames specified in the law. Kansas began by setting a "starting point" that is based on the performance of its lowest-achieving demographic group or of the lowest-achieving schools in the state, whichever was higher. The state then sets the bar–or level of student achievement–that a school must attain each year in order to continue to show adequate yearly progress. The AYP goal for 2002-2003 was the same as the starting point base year. Thus to achieve AYP for year two (2002-2003), all the school districts had to do was not decline. And yet, 184 schools failed to meet this goal and 33 were

placed on "need improvement" for failing for two years in a row. As previously observed, for any Kansas school to meet AYP for either 2002 or 2003 in K-8 reading, only 44 percent of all students need to pass (a failure rate of 56 percent); in 9-12 reading, only 51.2 percent of all students need to pass (a failure rate of 48.8 percent); in K-8 math, only 46.8 percent of all students need to pass (a failure rate of 53.2 percent); and in 9-12 math, only 29.1 percent of all students need to pass (a failure rate of 70.9 percent)! For actual performance results, see paragraph 77, *infra*.

70. If a school is placed "on improvement" for not reaching its AYP goals, then:

- First year on improvement: Districts must provide technical assistance to identified schools, must develop a school improvement plan, must offer public school choice to all students to attend another school in the district and must pay for associated transportation costs.
- Second year on improvement: In addition to providing technical assistance and public school choice options, the district must make supplemental educational services available to low-income students in the school.
- Third year on improvement: Corrective action must be applied including reassigning staff, revamping the curriculum or extending the school year or school day. In addition, public school choice, supplemental services and technical assistance must continue.
- Fourth and fifth year on improvement: During the fourth year, a corrective action plan must be developed and implemented. During the fifth year, school management or governance restructuring must

occur such as converting to a public charter school, replacing school leadership or reconstituting staff, or contracting with an outside entity to operate the school. Public school choice, supplemental educational services, and technical assistance must continue.

71. At the end of 10 years, all Kansas students must be achieving at the proficient level on state assessments in reading/language arts, math, and science. In theory, NCLB will close the achievement gap by increasing accountability for student performance, focusing on what works, reducing bureaucracy, increasing flexibility, and empowering parents.

72. NCLB expands the federal government's role in elementary and secondary education. It reinforces the Elementary and Secondary Education Act of 1965 (ESEA), the main federal law regarding K-12 education. Through the ESEA, the federal government's role in K-12 education was primarily one of providing aid to disadvantaged students and investing in educational research and development. NCLB emphasizes accountability by making federal aid for schools conditional on those schools meeting academic standards and abiding by policies set by the federal government.

This new law sets strict requirements and deadlines for states to expand the scope and frequency of student testing, revamp their accountability system,

and guarantee that every classroom is staffed by a teacher qualified to teach in his or her subject area. NCLB requires states to improve the quality of their schools from year to year. The percentage of students proficient in reading and math must continue to grow and the test-score gap between advantaged and disadvantaged students must narrow. NCLB pushes state governments and educational systems to help low-achieving students in high-poverty schools meet the same academic performance standards that apply to all students.

73. With the understanding that Kansas first and the nation second have now mandated that all children can and will learn, we turn to the four essential underlying factors necessary to understand Plaintiffs' disparate impact claim.

74. Virtually every professional witness, including those furnished by the Defendants, agreed that disadvantaged students (whether poor, minority, language deficient, or disabled) are more costly to educate for a variety of reasons.

75. Because of the definition of "small schools" as school districts with 1,725 students and fewer, a significant number of the school districts in the state of Kansas are small, excepting only a double handful of major population centers.

76. And yet, because the vast majority of the poor, the language deficient, racial minorities, and even those with physical and mental disabilities (due to the availability of care and treatment) are located in major population centers, these especially vulnerable and/or protected categories of students find themselves in the Kansas schools which receive the <u>least</u> in per pupil funding.

77. Kansas test results are informative and disturbingly telling. When averaged together, "all Kansas students" do pretty well when compared to students in other states (although there may be significant differences in testing and grading standards and there is evidence that Kansas students may be beginning to rank lower than they have previously as programs to bring about improvement are eliminated by budget cuts). But when those broad averages are disaggregated, the following is revealed:

a. The proficiency[5] numbers for 5th grade reading in 2002 and 2003 were:

	2002	2003
African American	35.0%	44.5%
Native American	43.8%	58.2%
Hispanic	41.3%	52.6%
Disabled	36.5%	48.7%
LEP (limited English)	40.6%	50.9%
Poverty	43.7%	52.8%
White	68.7%	73.6%

b. In 8th grade reading, the proficiency numbers in 2002 and 2003 were:

	2002	2003
African American	39.3%	46.8%
Native American	45.1%	54.9%
Hispanic	37.8%	43.6%
Disabled	31.6%	39.2%
LEP (limited English)	42.2%	53.3%
Poverty	45.8%	51.4%
White	71.9%	75.2%

c. The proficiency figures for 11th grade reading in 2002 and 2003 were:

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[5] Under both state and federal definitions, "proficient" means "passing." Anything less is "failing." Thus, if 30% are proficient for example, 70% are failing.

	2002	2003
African American	27.3%	33.3%
Native American	38.5%	52.5%
Hispanic	35.4%	42.1%
Disabled	19.8%	28.0%
LEP (limited English)	29.0%	51.0%
Poverty	32.8%	39.6%
White	59.7%	64.4%

d. The proficiency numbers for 4th grade math in 2002 and 2003 were:

	2002	2003
African American	39.4%	47.8%
Native American	52.3%	60.8%
Hispanic	47.7%	56.4%
Disabled	48.5%	58.8%
LEP (limited English)	44.0%	50.3%
Poverty	49.1%	57.9%
White	73.3%	79.0%

e. The proficiency figures for 7th grade math in 2002 and 2003 were:

	2002	2003
African American	23.8%	28.1%
Native American	32.1%	42.2%
Hispanic	26.6%	33.4%

Disabled	29.5%	34.3%
LEP (limited English)	20.0%	21.4%
Poverty	31.9%	36.4%
White	63.7%	66.9%

f. The proficiency numbers for 10th grade math in 2002 and 2003 were:

	2002	**2003**
African American	15.1%	16.3%
Native American	27.6%	35.9%
Hispanic	19.5%	18.9%
Disabled	16.1%	20.2%
LEP (limited English)	13.7%	12.9%
Poverty	21.5%	22.5%
White	49.3%	51.0%

78. Dr. Winston Brooks, superintendent of Wichita public schools (the State's largest local school district), described the "achievement gap" in Wichita as "stunning." Dr. Andy Tompkins, State Commissioner of Education, said the state-wide achievement gap "would take your breath away."

79. What remains factually is to determine if there is a nexus or causal connection between the lack of funding and the poor performance of the referenced disadvantaged, vulnerable, and/or protected students. As was previously mentioned, Defendants attempted to discount any connection

with expert witnesses some of whom hinted that "money didn't matter" in student performance. Controverting these Ivory Tower views (which were vehemently disputed by Plaintiffs' experts) were the impressive and credible experiences of many Kansas educators who labor in the vineyards of Kansas schoolhouses every day. One by one, these unsung heros in the daily battle against ignorance looked the Court straight in the eye and said we know how to do it, we simply lack the resources to do what we know how to do. They also said it breaks their hearts to see what the lack of funding does, especially to the vulnerable children. In a word, this Court believed them. They are the "boots-on-the-ground" soldiers in the education field. They, almost with one voice, laid out the strategies necessary to teach the most challenging students:

a. Smaller class size;

b. New learning strategies and training for teachers;

c. More and better trained teachers;

d. The ability to use various approaches to "find something the child knows" and build on that (perhaps an interest in music, in a vocation, in sports, or in mechanics);

e. School principals who encourage innovation and reward achievement;

f. One-on-one learning opportunities, especially for language deficient and disabled students;

g. Expanded learning times;

h. Head Start;

i. Tutors; and

j. Summer school.

All of these strategies take money—money most Kansas schools do not presently have.

80. As previously noted, instead of providing the Court with any other evidence of the cost of providing Kansas students a suitable education, Defendants have instead attempted to show somehow that "money doesn't matter," i.e., that spending is not connected with student education and achievement at all.

In their effort to prove that "money doesn't matter," the Defendants produced a series of experts. Those experts, and the Court's assessment of their testimony follows:

Dr. Lawrence Picus, University of Southern California:

Dr. Picus testified he believes Kansas has a "substantial amount" of school equity, but in so opining he also testified that he assumed the Kansas system of weighting was based on actual costs to educate, which it is not. Dr. Picus was not asked to evaluate the question of adequacy of school funding in Kansas, although he has testified in Wyoming that a study made there, utilizing the same methods as those employed by Augenblick & Myers in Kansas, was sufficient and reliable. Further, he has himself recently done an adequacy study in Kentucky where he recommended spending at the $6,893 per pupil level, a total increase in the Kentucky budget of $740,000,000.

Dr. Herbert Walberg, University of Illinois, Chicago, retired:

Dr. Walberg testified that education specialists were largely concerned only with school input (not student performance) until 1983 when a paper entitled *Nation at Risk* was published, exposing the monumental failure of American schools in comparison with those in Europe and elsewhere. Dr. Walberg opined that our Kansas education standards were clear, careful, and balanced, perhaps

superior to others. He also indicated we have medium spending with high achievement when compared to other states. Dr. Walberg did not offer opinions about equity, adequacy, or disparate impact, except to say he thought things in Kansas "got better" following the enactment of our present funding scheme.

Dr. Poggio, University of Kansas:

Dr. Poggio was not helpful, in the Court's opinion. First, he seemed obsessively bent on discrediting his Kansas University colleague, Dr. Baker, a witness for the Plaintiffs. Second, Dr. Poggio is a principal in the group known as Center for Educational Testing and Evaluation, which has contracted with the Kansas Department of Education to draft student evaluations tests, and thus seemed to feel the need to defend both his work and his employer. Third, he was unaware of the Dodge City reading grant achievements, as were several other of Defendants' experts. And fourth, Dr. Poggio eliminated from his statistical analysis any schools with fewer than six minority students. In litigation concerned in large part with small schools, the Court found this less than helpful.

Dr. Yvonna Lincoln, University of Texas:

Dr. Lincoln was called to criticize the research and statistical methods of Plaintiffs' expert, Dr. Van Mueller. She offered no opinions, on the equity, suitability, or disparate impact of the Kansas funding scheme. She did reluctantly concede, however, that "money matters" in school performance and student achievement.

Dr. Eric Hanushek, Stanford:

Dr. Hanushek was billed as the expert who would demonstrate that "money doesn't matter." What he actually said was that money, foolishly spent, would not close the significant "achievement gap" which exists between the vulnerable and/or protected students who have brought this action and their majority counterparts. In fact, Dr. Hanushek testified that money spent wisely, logically, and with accountability would be very useful indeed. He concluded by agreeing with this statement: "Only a fool would say money doesn't matter."

81. By way of summary, the Court was persuaded, as a matter of fact, by the evidence that there is a causal connection between the poor performance of the vulnerable and/or protected categories of Kansas students and the low funding provided their schools. Except for a few expert opinions vaguely to the point that "money doesn't ever matter" the causal connection was uncontroverted by those who actually work with students on a daily basis.

Accordingly, the Court finds as a matter of fact and law that the funding scheme presently in place and as applied in Kansas by its underfunding in general and by its mid and large-school underfunding specifically, clearly and disparately injures vulnerable and/or protected students and thus violates both Article 6 of the Kansas Constitution and the equal protection clauses of both the United States and Kansas Constitutions.

PRELIMINARY INTERIM ORDER

The Court hereby concludes, for all the reasons stated, but almost entirely as a matter of fact, that the current school funding scheme stands in blatant violation of Article 6 of the Kansas Constitution and the equal protection clauses of both the Kansas and United States Constitutions in the following three separate and distinct aspects in that:

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

b. It fails to provide adequate total resources to provide all Kansas children with a suitable education (as that term has been defined by both this Court and the Legislature itself); and

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

The Remedy

The final question then becomes one of the selection of a remedy. First and foremost, the Court is satisfied that it should not and cannot write

a new or different school funding scheme. That is a function of the legislative and executive branches of our government. The function of the judicial branch in our government characterized by its separation of powers, is to enforce our State and Federal Constitutions, the primary laws of our land, which are the supreme expressions of the will of the people, the source of all power in any democracy.

Second, the problems outlined in this opinion have been created by the Legislature and it is to them that we must now look for the solution. An entire session of that body awaits in a few weeks time. Each legislator and our Governor took the same oath this Court (and all other members of the judiciary) took when assuming office: To **Preserve, Protect**, and **Defend** the Constitution of the United States and the State of Kansas.

That time has come.

This Court trusts and believes that now that the facts have been laid bare and the law plainly elucidated, the members of our Legislature and our state's chief executive will step up to the challenge to bring the Kansas school funding scheme into compliance with our fundamental law.

The Court here pauses to note parenthetically that there is very little in our Constitution, or in anyone's Constitution for that matter: just the structure and fundamentals of government and an expression of the rights and values which we as a people hold dear and which we wish to deny our government even the hint of

power ever to withhold or deny. The Kansas Constitution, for example, contains articles on the Legislature, the Executive, the Judiciary, the Bill of Rights, and a whole article on education. That is the emphasis and place in our values as Kansans that schools and education have always held.

To take drastic steps today, in this Court's opinion, would unduly disrupt that very fundamental expression of our values: to keep our schools open and functioning for the education of our children. Although this Court will not hesitate to take any and all required action necessary to enforce our Constitutions, it does not believe it should begin with a remedy which would further disadvantage those very students this suit was brought to protect.

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

a. Then determine whether the problems outlined herein have been corrected and, if so, to dismiss this case; or

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

OTHER ISSUES

All issues pled and briefed have been considered. Those not mentioned in this opinion are resolved adversely to the party raising them.

A WORD OF CAUTION

The Court would be less than candid, and perhaps remiss, if it did not conclude this Preliminary Interim Order with a caveat. All are reminded, once again, that our Constitutions are at issue here. This is not a matter where the judiciary seeks to discover and then give due deference to legislative intent (as would be true with ordinary legislation). This case involves the fundamental law of our land and this Court has no discretion whatsoever in whether it will be enforced and preserved. There is no higher duty of any judicial officer than to see to the adherence of government to our Constitutions. There is no such thing as "a little bit pregnant" and there is no such thing as "slightly unconstitutional."

Accordingly, when determining what action will be taken in response to this Interim Order, recall once again that the following are facts:

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

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

c. The cost of providing a suitable education, as the Legislature itself has defined it, is apparently over a billion dollars more than is currently provided (as Kansas schools are presently configured and managed–both legislative choices). This fact was established by the Defendants' own commissioned study of costs, which was not only uncontroverted, but was actually accepted and recommended by the Defendant State Board of Education for adoption;

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

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

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

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

h. This disparate funding and this correlative "achievement gap," both referred to above, when coupled with the uncontroverted evidence shown to this Court that all children can learn and flourish when education is properly funded and students properly taught,

conclusively demonstrates the adverse and unconstitutional disparate impact the current funding scheme has on our most vulnerable and/or protected students; factually a clear denial of equal protection of the laws in contravention of both the United States and Kansas Constitutions; and,

i. This case has already been appealed. In that appeal, the high court has clearly told us: a) what law is applicable and b) what questions it wanted answered factually. That has now been done.

These facts are true today and they will continue to be true on July 1, 2004 when this Court re-convenes, unless of course, the time intervening is wisely and courageously spent correcting the problems made manifest here. If each branch of our government does its part and portion, all can still end well and our children, both today and in the future, will be the long-term beneficiaries of our sound judgment and wise actions.

IT IS SO ORDERED this 2nd day of December 2003.

Terry L. Bullock
District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

RYAN MONTOY, et al.,)
)
Plaintiffs,)
v.) Case No. 99-C-1738
)
THE STATE OF KANSAS, et al.,)
)
Defendants.)

ERRATA

The Court herewith corrects the following typographical errors contained in its opinion issued earlier today:

1. Paragraph 20, page 68, line 2, the word "containing" is corrected to read contained.

2. Paragraph 34, page 81, line 16, the word "distrirct" is corrected to read district.

3. Paragraph 43, page 89, line 4, the word "are" is stricken.

4. Paragraph 53, page 95, line 1, the word "Even" is stricken and the word "student" is capitalized to read Student.

5. Paragraph 58, page 100, line 5, the word "Hispanics" is corrected to read Hispanic.

These typographical errors in the original opinion have been corrected. Please mark your copies accordingly.

Please inform the Court if you notice any other typographical errors that should be corrected.

IT IS SO ORDERED BY THE COURT.

Terry L. Bullock
Judge of the District Court