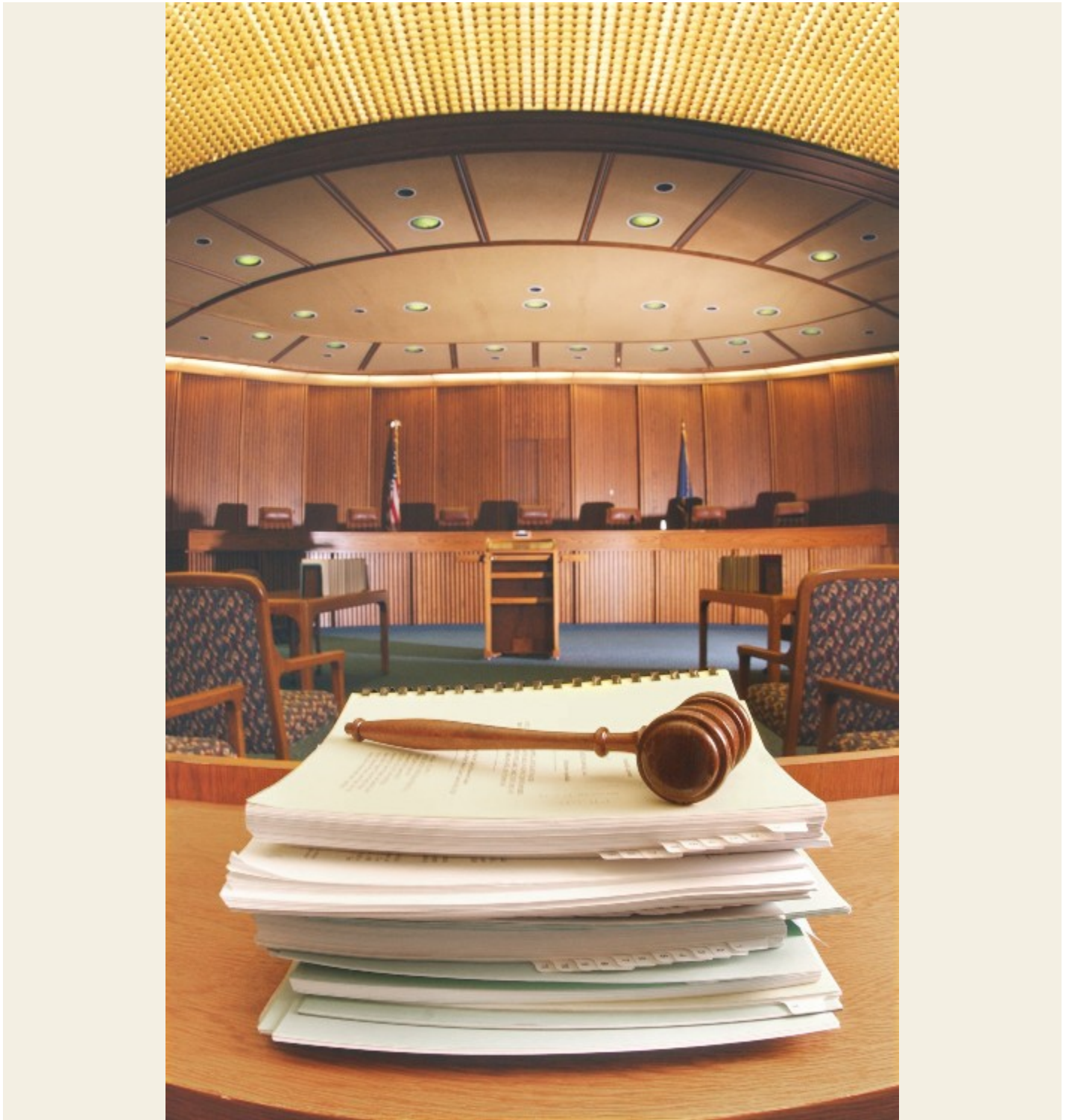


THE MONTOY COMBINED DECISIONS

Kansas Supreme Court

Montoy, et al., v. State of Kansas, et al.
Nos. 88,440 & 92,032 & 91,915

	Page
Montoy 1- January 24, 2003	1
Montoy 2- January 3, 2005.....	7
Montoy 3- January 3, 2005.....	17
Montoy 4- June 3, 2005.....	19
Montoy 5- July 28, 2006.....	35



Kansas Judicial Branch Photo Album

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The Supreme Court had a thick set of briefs to consider in deciding the constitutionality of the state's school finance act.

THE MONTROY COMBINED DECISIONS.

[MONTROY 1- January 24, 2003]

ERIC and RYAN MONTROY, et al., Appellants, v. STATE OF KANSAS, et al., Appellees.

No. 88,440

SUPREME COURT OF KANSAS

275 Kan. 145; 62 P.3d 228; 2003 Kan. LEXIS 16

January 24, 2003, Opinion Filed

SUBSEQUENT HISTORY: Subsequent appeal at Montoy v. State, 278 Kan. 765, 102 P.3d 1158, 2005 Kan. LEXIS 1 (2005)

Subsequent appeal at Montoy v. State, 278 Kan. 769, 102 P.3d 1160, 2005 Kan. LEXIS 2 (2005)

Later proceeding at Montoy v. State, 2005 Kan. LEXIS 460 (Kan., Jan. 3, 2005)

PRIOR HISTORY: [***1] Appeal from Shawnee district court, TERRY L. BULLOCK, judge.

DISPOSITION: District court judgment reversed, and case remanded.

SYLLABUS

1. Since the adoption of the Kansas Rules of Civil Procedure, Kansas courts have followed the rules of notice pleading. K.S.A. 60-208(a)(1) requires a short and plain statement of the claim showing that the pleader is entitled to relief. A rule of liberal construction applies when judging whether a claim has been stated. The purpose of the petition is to give notice of the substance of the plaintiffs' claims. Discovery will more easily and effectively fill the gaps.

2. The spirit of our present rules of civil procedure permits a pleader to shift the theory of his or her case as the facts develop, as long as the pleader has fairly informed his opponent of the transaction or the aggregate of the operative facts involved in the litigation. The determination of whether a party's claim is a late shift in the thrust of the case which prejudices the opponent is left to the sound discretion of the trial court. Where such an exercise of discretion is questioned on appeal, we must determine whether the opposing party was taken by surprise and, if so, whether it resulted in [***2] substantial prejudice to that party.

3. The record is reviewed and it is determined that under the facts of this case, the district court erred in failing to permit the plaintiffs to raise constitutional

challenges to the special education provisions, capital outlay provisions, and the encroachment on the general supervision responsibility of the Kansas State Board of Education before it summarily disposed of the plaintiffs' claims.

4. Ordinarily, summary judgment should not be granted when discovery is incomplete.

5. A judge of a court of general jurisdiction possesses the inherent power to summarily dispose of litigation where there remains no genuine issue as to any material fact.

6. The inherent power to summarily dispose of litigation exists on the same conditions as would justify a summary judgment on motion of a party. Summary disposition of an action may logically follow a pretrial conference when proper pretrial proceedings disclose the lack of a disputed issue of material fact and the facts so established indicate an unequivocal right to a judgment in favor of a party.

7. Generally, it must appear conclusively that there remains no genuine issue as [***3] to a material fact and that one of the parties is entitled to judgment as a matter of law. A mere surmise or belief on the part of the trial court, no matter how reasonably entertained that a party cannot prevail upon a trial will not justify a summary judgment where there remains a dispute as to a material fact which is not clearly shown to be sham, frivolous, or so unsubstantial that it obviously would be futile to try it.

8. The record in this case is reviewed and it is determined that based there remain genuine issues as to material facts which are not clearly shown to be a sham, frivolous, or so unsubstantial that it obviously would be futile to try the case.

COUNSEL: Alan L. Rupe, of Husch & Eppenberger, LLC, of Wichita, argued the cause, and Dwight D. Fischer, and Alisa A. Nickel, of the same firm, and

John S. Robb, of Somers, Robb and Robb, of Newton, were with him on the briefs for appellants.

Dan Biles, of Gates, Biles, Shields & Ryan, P.A., of Overland Park, argued the cause, and William Scott Hesse, assistant attorney general, was with him on the brief for appellees.

JUDGES: The opinion of the court was delivered by DAVIS, J. NUSS, J., not participating. BRAZIL, S. J. [***4] , assigned.¹

1 REPORTER'S NOTE: Judge Brazil was appointed to hear case No. 88,440 vice Justice Nuss pursuant to the authority vested in the Supreme court by K.S.A. 20-2616.

OPINION BY: DAVIS

OPINION

[**230] [*146] The opinion of the court was delivered by

DAVIS, J.: In this constitutional challenge to the Kansas scheme of financing public education, numerous students representing African-American, Hispanic, and disabled groups, along with two large school districts, sued the State of Kansas, the Governor, the chairperson of the Kansas State Board of Education (State Board), and the Commissioner of the Kansas State Department of Education. In three separate counts, the plaintiffs alleged (1) a violation of the requirement that the legislature provide for the suitable finance of the educational interests of the State under Kan. Const. art. 6, § 6(b); (2) a violation of equal rights protection under the Kansas Constitution; and (3) a violation of substantive due process rights under the Kansas Constitution. The district court *sua sponte* [*147] granted judgment to the defendants, concluding that the plaintiffs failed to present legally sufficient claims.

In their appeal, the plaintiffs claim [***5] (1) that the district court erred by excluding certain [**231] claims on the grounds that they were outside the pleadings; (2) that the district court erred by failing to treat the dismissal of their case as a dismissal based upon a motion for summary judgment; and (3) that contrary to the findings of the district court, their claims are legally sufficient. We conclude the district court prematurely granted judgment and remand the case for further proceedings.

Excluded claims

We first consider whether the district court erred in excluding consideration of certain claims of the plaintiffs. The district court explained its exclusion as follows:

"Plaintiffs have raised several new issues that were not contained in their pleadings. Kansas law requires that a challenge to the constitutionality of a statute be specifically raised in the pleadings. *Missionary Baptist Convention v. Wimberly Chapel Baptist Church*, 170 Kan. 684, 228 P.2d 540 (1951). Plaintiffs had the opportunity to amend their pleading to include these new issues prior to the Court ordered deadline of November 11, 2000. Plaintiffs failed to do so. The issues raised by Plaintiffs that the Court will not consider because they [***6] were not properly pled are: (1) Plaintiffs' constitutional challenge to K.S.A. § 72-8801 *et seq.* (Capital Outlay); (2) Plaintiffs' constitutional challenge to K.S.A. § 72-961 *et seq.* (Special Education Excess Costs); and (3) Plaintiffs' claim that the SDFQPA [School District Finance and Quality Performance Act] violates Article 6, § 2(a) of the Kansas Constitution (as being an encroachment on the 'general supervision' responsibility of the State Board of Education). Plaintiffs failed to properly raise these issues or amend their petition to include these issues. Therefore, this Court will not permit these claims to be raised at this point in the case."

While *Missionary Baptist, Convention v. Wimberly Chapel Baptist Church*, 170 Kan. 684, 228 P.2d 540 (1951), excluded consideration of constitutional claims raised for the first time on appeal, the district court's reliance upon the holding in *Missionary Baptist* is inappropriate in this case. *Missionary Baptist* is a case where the excluded constitutional issues surfaced the first time before the appellate court, not the district court. The constitutionality [***7] of the statutes involved in *Missionary Baptist* was neither raised in the [*148] pleadings nor presented by the parties to the action at any stage of the proceedings before the district court. 170 Kan. at 687-88. Unlike *Missionary Baptist*, the plaintiffs' constitutional issues in this case were raised by the plaintiffs before the district court. Thus, this court's decision in *Missionary Baptist* fails to provide authority for excluding consideration of the plaintiffs' challenges to the capital outlay provisions, the special education provisions, and the encroachment on the general supervision responsibility of the State Board. Other reasons for exclusion of the plaintiffs' additional claims before the district court and advanced by the district court and the defendants in this appeal are considered herein.

In Count I of their petition, the plaintiffs alleged a violation of Kan. Const. Art. 6, § 6(b), which requires the legislature to "make suitable provision for finance

of the educational interests of the state." Under this count, the petition made the constitutionality of the School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 [***8] *et seq.*, the issue before the trial court. The district court rejected the plaintiffs' three additional constitutional claims, capital outlay provisions, the special education excess cost provisions, and the encroachment on the general supervision responsibility of the State Board on the basis that these matters were not specifically pled by the plaintiffs. The question presented is whether consistent with notice pleading, the claims of the plaintiffs are broad enough to include the additional constitutional claims.

Since the adoption of the Kansas Rules of Civil Procedure, Kansas courts have followed the rules of notice pleading. K.S.A. 60-208(a)(1) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." A rule of liberal construction applies when judging whether a claim has been stated. The purpose of the petition is to give notice of the substance of the plaintiffs' claims. Discovery [**232] will more easily and effectively fill the gaps. See *Fowler v. Criticare Home Health Services, Inc.*, 27 Kan. App. 2d 869, 873-75, 10 P.3d 8 (2000) *aff'd* 271 Kan. 715, 26 P.3d 69 (2001). We note [***9] in this case that while discovery was nearing completion, it was not complete. On appeal, the plaintiffs argue that outstanding discovery related to the three additional [*149] issues they asked the district court to consider. Ordinarily, a summary disposition of a pending case before the district court should not be granted until discovery is complete. See *Bell v. Kansas City, Kansas, Housing Authority*, 268 Kan. 208, 220, 992 P.2d 1233 (1999).

Based upon the record before us, including matters considered by the district court in a memorandum filed by the plaintiffs and the defendants' response, and the defendants' pretrial questionnaire, the three issues of capital outlay, special education excess costs, and encroachment on the general supervision responsibility of the State Board were sufficiently raised and should have been considered by the trial court in its resolution of this case. The plaintiff's petition focused on the SDFQPA in particular. However, while the petition focused on SDFQPA, it alleged a violation of the suitability requirement. Under the liberal interpretation of the pleadings required by our rules of notice pleading, relying on discovery to fill [***10] in any gaps, we conclude that the trial court erred in refusing to consider the three excluded issues.

We acknowledge that the district court's deadline for amending the pleadings had passed. However, it is clear that the plaintiffs sought to include their three

additional constitutional claims before the district court. A final pretrial conference order was not entered in this case. K.S.A. 2001 Supp. 60-216(c)(3) provides that the district court should consider at any pretrial conference "the necessity or desirability of amendments to the pleadings." See *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 141-42, 815 P.2d 72 (1991). Once a pretrial order is made pursuant to K.S.A. 2001 Supp. 60-216, it supercedes the pleadings and controls the subsequent course of the action. *Herrell v. Maddux*, 217 Kan. 192, 193, 535 P.2d 935 (1975).

The spirit of our present rules of civil procedure permits a pleader to shift the theory of his case as the facts develop, as long as he has fairly informed his opponent of the transaction or the aggregate of the operative facts involved in the litigation. [***11] *Griffith v. Stout Remodeling, Inc.*, 219 Kan. 408 Syl P3, 548 P.3d 1238 (1976). The determination of whether a party's claim is a late shift in the thrust of the case which prejudices the [*150] opponent is left to the sound discretion of the trial court. Where such exercise of discretion is questioned on appeal, we must determine whether the opposing party was taken by surprise and, if so, whether it resulted in substantial prejudice to that party. *Boydston v. Kansas Board of Regents*, 242 Kan. 94 Syl. P 1, 744 P.2d 806 (1987).

We do not believe that consideration of the additional constitutional claims would cause the defendants surprise or unfair prejudice. Even if accomplished through amendment by a final pretrial conference order allowing the plaintiffs to advance their three claims, we find such an amendment would cause no surprise or unfair prejudice to the defendants. See *Johnson v. Board of Pratt County Comm'rs*, 21 Kan. App. 2d 76, 90-91, 897 P.2d 169 (1995). We conclude that it was error for the district court to exclude consideration of the plaintiffs' three additional constitutional claims.

Summary Judgment Procedure

[***12] The plaintiffs claim that the order entered was a summary judgment without any of the procedural safeguards set forth in K.S.A. 60-256. The plaintiffs complained to the district court that its memorandum decision was entered without the benefit of Supreme Court Rule 141 (2002 Kan. Ct. R. Annot. 189), and the procedure set forth in K.S.A. 60-256. In addressing this contention, the district court noted:

"The Court's memorandum decision and order was not based on a motion for summary judgment. The parties submitted briefs to the Court to determine whether Plaintiffs' claims were legally sufficient as [**233] a matter of law. Therefore, the rules set forth for summary judgment did not have to be followed.

"There is no question Plaintiffs understood that they were submitting briefs for the Court to determine the legal sufficiency of their claims. Not only did the Court order them to file a brief, but they argued that a briefing schedule should be established to determine these issues. Plaintiffs had ample opportunity to present and argue the legal sufficiency of their claims."

The trial court ordered the parties to file briefs to [***13] determine various legal issues in advance of trial. While the trial court later declared such legal issues in advance of trial included the legal [*151] sufficiency of the plaintiff's claims, there is no indication that the case was to be disposed of based upon the briefs submitted. Based upon the responses of the parties, the parties were asked to identify in advance of trial the legal issues involved in the trial of the case. Both parties attempted to identify those issues for the court. Had the plaintiffs been informed by the court that it would consider their submission to determine the legal sufficiency of the plaintiffs' claims, rather than to determine what legal issues it would be faced with upon trial of the case, the plaintiffs may have approached their task differently.

Nevertheless, the district court disposed of the case based upon the legal insufficiency of the plaintiffs' claims and we, therefore, consider its ultimate ruling. While the trial court may not have based its memorandum decision and order on a motion for summary judgment, the order disposing of the case was a judgment within the definition of K.S.A. 60-254 as a final determination of the [***14] rights of the parties in this action. A judge of a court of general jurisdiction, as the trial judge in this case, possesses the inherent power to summarily dispose of litigation where there remains no genuine issue as to any material fact. See *Missouri Medical Ins. Co. v. Wong*, 234 Kan. 811, 816, 676 P.2d 113 (1984); *Green v. Kaesler-Allen Lumber Co.*, 197 Kan. 788, 790, 420 P.2d 1019 (1966). The judgment entered in this case was based upon the trial court's inherent power to dispose of litigation on its own motion as a matter of law.

Before such a judgment is entered, this court has stated that "it may be said that . . . the same conditions must exist as would justify a summary judgment on motion of a party." *Green*, 197 Kan. at 790. We further noted:

"Summary disposition of an action may logically follow a pretrial conference when proper pretrial proceedings disclose the lack of a disputed issue of material fact and *the facts so established indicate an unequivocal right to a judgment in favor of a party.*

....

"This court has now laid down a definite yardstick for the granting of such judgments. Generally, it must appear [***15] *conclusively* that there remains no genuine issue as to a material fact and that one of the parties is entitled to judgment as a [*152] matter of law. A mere surmise or belief on the part of the trial court, no matter how reasonably entertained, that a party cannot prevail upon a trial will not justify a summary judgment where there remains a dispute as to a material fact which is not clearly shown to be sham, frivolous or so unsubstantial that it would obviously be futile to try it. A party against whom a summary judgement is being considered must be given the benefit of all reasonable inferences that may be drawn from the facts under consideration. [Citations omitted.]" (Emphasis added.) 197 Kan. at 790-791.

Missouri Medical reiterated and reinforced the principles set forth in *Green* and sustained a judgment where discovery had been completed, a thorough pre-trial conference had been held, and all of the basic facts had been developed. We concluded that there remained no genuine issue of material fact and that the plaintiff was entitled to judgment as a matter of law. 234 Kan. at 816. The same, however, may not be concluded in this case.

The judgment [***16] entered by the district court in this case fails to address the factual allegations of the plaintiffs except to [**234] say that all allegations of the plaintiffs are without merit and resolved by our recent decision in *U.S.D. 229 v. State*, 256 Kan. 232, 885 P.2d 1170 (1994). As more fully discussed below, giving the plaintiffs the benefit of all reasonable inferences that may be drawn from the record, we conclude that there remain genuine issues of material fact not shown to be a sham, frivolous, or so unsubstantial that it would be futile to try the case. See *Green*, 197 Kan. at 790.

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 [***17] 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 [*153] *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 [***18] 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.

In this case, the plaintiffs assert the following facts are disputed in the memorandum to determine legal issues in advance of trial:

"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 [***19] 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;

[*154] "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;

[**235] "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 [***20] 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 judgment entered by the district court contains [***21] no findings of fact to support its *sua sponte* judgment for the defendants. We reject the district court's legal conclusion that *U.S.D. 229* alone supports its judgment. Based upon its decision, the district court did not see the need to address the factual allegations of the plaintiffs. Generally, however, when we review such a judgment we, as well as the trial court, are required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000).

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 [*155] 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 [***22] 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 [***23] 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.

When this court is called upon to review a trial court decision, we must acknowledge the [**236] wisdom of the Kansas Code of Civil Procedure in requiring that the controlling facts be set forth in a final judgment rendered by a district court. See K.S.A. 2001 Supp. 60-252; K.S.A. 2001 Supp. 60-256. Moreover, Supreme Court Rule 141, while only dealing with summary judgment, further emphasizes the necessity that such judgments be entered only where there remains no genuine issue of material fact and a party is entitled to judgment as a matter of law. In light of our decision, we [*156] may not ignore the plaintiffs' factual allegations. When we consider the record as a whole and apply the standard we are required to apply, we conclude that there remain in dispute genuine issues

of material fact which do not support the summary disposition of the district court. We, therefore, reverse [***24] the judgment of the district court and remand for further proceedings.

Reversed and remanded.

NUSS, J., not participating.

BRAZIL, S. J., assigned. ¹

1 **REPORTER'S NOTE:** Judge Brazil was appointed to hear case No. 88,440 vice Justice Nuss pursuant to the authority vested in the Supreme court by K.S.A. 20-2616.

[MONTOY 2- January 3, 2005]

**RYAN MONTOY, et al., Appellees/Cross-appellants, v. STATE OF KANSAS, et al.,
Appellants/Cross-appellees.**

No. 92,032

SUPREME COURT OF KANSAS

278 Kan. 769; 120 P.3d 306; 2005 Kan. LEXIS 460

January 3, 2005, Opinion Filed

PRIOR HISTORY: [***1] Appeal from Shawnee district court; TERRY L. BULLOCK, judge. Montoy v. State, 275 Kan. 145, 62 P.3d 228, 2003 Kan. LEXIS 16 (2003)

DISPOSITION: Affirmed in part and reversed in part.

COUNSEL: Curtis L. Tideman, of Lathrop & Gage L.C., of Overland Park, argued the cause, and Kenneth L. Weltz and Alok Ahuja, of the same firm, and David W. Davies, assistant attorney general, and Phill Kline, attorney general, were with him on the briefs for appellant/cross-appellee State of Kansas.

Dan Biles, of Gates, Biles, Shields & Ryan, P.A., of Overland Park, argued the cause, and Rodney J. Bieker, of Kansas Department of Education, and Cheryl Lynne Whelan, of Lawrence, were with him on the briefs for appellants/cross-appellees Janet Waugh, Sue Gamble, John Bacon, Bill Wagon, Connie Morris, Bruce Wyatt, Kenneth Willard, Carol Rupe, Iris Van Meter, Steve Abrams, and Andy Tompkins.

Alan L. Rupe, of Kutak Rock LLP, of Wichita, argued the cause, and Richard A. Olmstead, of the same firm, and John S. Robb, of Somers Robb & Robb, of Newton, were with him on the briefs for appellees/cross-appellants.

Wm. Scott Hesse, assistant attorney general, was on the brief for defendants/cross-appellees Governor Kathleen Sebelius and State Treasurer Lynn Jenkins.

Jane L. Williams, [***2] of Seigfreid, Bingham, Levy, Selzer & Gee, of Kansas City, Missouri, was on

the brief for amicus curiae Kansas Families United for Public Education.

Patricia E. Baker, of Kansas Association of School Boards, of Topeka, was on the brief for amicus curiae Kansas Association of School Boards.

avid M. Schauner and Robert Blaufuss, of Kansas National Education Association, of Topeka, were on the brief for amicus curiae Kansas National Education Association.

Joseph W. Zima, of Topeka Public Schools, was on the brief for amicus curiae Unified School District No. 501, Shawnee County, Kansas.

Michael G. Norris and Melissa D. Hillman, of Norris, Keplinger & Hillman, L.L.C., of Overland Park, were on the brief for amici curiae Unified School Districts Nos. 233, 229, and 232, Johnson County, Kansas.

Anne M. Kindling, of Goodell, Stratton, Edmonds & Palmer, L.L.P., of Topeka, was on the brief for amicus curiae Unified School District No. 512, Shawnee Mission, Kansas.

Bernard T. Giefer, of Giefer Law LLC, of WaKeeney, was on the brief for amici curiae Unified School District No. 208, Trego County, Kansas (WaKeeney), et al. (60 other Kansas school districts).

Thomas [***3] R. Powell and Roger M. Theis, of Hinkle Elkouri Law Firm L.L.C., of Wichita, were on the brief for amicus curiae Unified School District No. 259, Sedgwick County, Kansas.

Janice L. Mathis, of Rainbow/PUSH Coalition, of Atlanta, Georgia, was on the brief for amicus curiae Rainbow/PUSH Coalition.

Cynthia J. Sheppard, of Weathers & Riley, of Topeka, was on the brief for amicus curiae Kansas Action for Children.

Bob L. Corkins, of Lawrence, was on the brief for amicus curiae Kansas Taxpayers Network.

Kirk W. Lowry, of Kansas Advocacy & Protective Services, of Topeka, was on the brief for amicus curiae Kansas Advocacy & Protective Services.

JUDGES: BEIER, J., DAVIS, J., LUCKERT, J., concurring.

OPINION

[**307] [*770] *Per Curiam*: The defendants in this case, the State of Kansas (appellant/cross-appellee) along with Janet Waugh, Sue Gamble, John Bacon, Bill Wagnon, Connie Morris, Bruce Wyatt, Kenneth Willard, Carol Rupe, Iris Van Meter, Steve Abrams and Andy Tompkins (the State Board of Education related defendants) (appellants/cross-appellees) appeal from a decision of the district court holding that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 [***4] *et seq.*, is unconstitutional.

[**308] The plaintiffs in this case, U.S.D. No. 305 (Salina) and U.S.D. No. 443 (Dodge City), along with 36 individually named students in those districts, cross-appeal from the district court's determination that the legislature did not abrogate the constitutional obligations of the State Board of Education.

The constitutionality of the statutory scheme for funding the public schools in Kansas is at issue in this appeal. Because this court's resolution of this issue will have statewide effect and require [*771] legislative action in the 2005 legislative session, we announce our decision in this brief opinion. A formal opinion will be filed at a later date.

After examining the record and giving full and complete consideration to the arguments raised in this appeal, we resolve the issue as follows:

1. We reverse the district court's holding that SDFQPA's financing formula is a violation of equal protection. Although the district court correctly determined that the rational basis test was the proper level of scrutiny, it misapplied that test. We conclude that all of the funding differentials as provided by the SDFQPA are rationally related to a [***5] legitimate legislative purpose. Thus, the SDFQPA does not vio-

late the Equal Protection Clause of the Kansas or United States Constitutions.

2. We also reverse the district court's holding that the SDFQPA financing formula has an unconstitutional disparate impact on minorities and/or other classes. In order to establish an equal protection violation on this basis, one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979). No discriminatory purpose was shown by the plaintiffs. Thus, the SDFQPA is not unconstitutional based solely on its "disparate impact."

3. We affirm the district court's holding that the legislature has failed to meet its burden as imposed by Art. 6, § 6 of the Kansas Constitution to "make suitable provision for finance" of the public schools.

The district court reached this conclusion after an 8-day bench trial which resulted in a record of approximately 1,400 pages of transcript and 9,600 pages of exhibits. Most of the witnesses were experts in the fields of primary [***6] and secondary education. The trial followed this court's decision in *Montoy v. State*, 275 Kan. 145, 152-53, 62 P.3d 228 (2003) (*Montoy I*), in which we held, in part, that the issue of suitability was not resolved by Unified Sch. Dist. No. 229 v. State, 256 Kan. 232, 885 P.2d 1170 (1994), *cert. denied* 515 U.S. 1144, 132 L. Ed. 2d 832, 115 S. Ct. 2582 (1995). We had held in *U.S.D. No. 229* that the SDFQPA as [*772] originally adopted in 1992 made suitable provision for the finance of public education. See 256 Kan. at 254-59. Later, in *Montoy I*, we noted that the issue of suitability is not stagnant but requires constant monitoring. See 275 Kan. at 153.

Following the trial, the district court made findings regarding the various statutory and societal changes which occurred after the decision in *U.S.D. No. 229* and affected school funding. Regarding societal changes, the district court found: (1) 36% of Kansas public school students now qualify for free or reduced-price lunches; (2) the number of students with limited proficiency in English has increased dramatically; (3) the number of immigrants has increased dramatically; and (4) state institutions [***7] of higher learning now use more rigorous admission standards.

Additionally, the district court found a number of statutory changes made after the decision in *U.S.D. No. 229* which affected the way the financing formula delivers funds: (1) the goals set out in K.S.A. 72-6439(a) were removed; (2) the SDFQPA's provision requiring an oversight committee to ensure fair and equitable funding was allowed to expire; (3) the low enrollment weighting was changed; (4) correlation weighting was added; (5) at-risk pupil weighting was changed; (6) the

mill levy was decreased from 35 mills to 20 mills; (7) a \$ 20,000 exemption for residential property was added to the mill levy, also decreasing revenue; (8) a new facilities weighting was added; (9) special education funds were added to the calculation to increase the base on which the local option [*309] budget funding was calculated; (10) ancillary weighting was added; (11) the cap on capital outlay authority was removed; and (12) most special education funds were limited to reimbursement for 85 percent of the costs incurred in hiring special education teachers and paraprofessionals.

Our standard of review requires [***8] us to determine whether the district court made findings of fact which are supported by substantial competent evidence and are sufficient to support the conclusions of law. *McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 12, 61 P.3d 68 (2002). We conclude that the district court's findings regarding the societal and legislative changes are supported by substantial competent evidence.

[*773] The plaintiffs argued and the district court found that the cumulative result of these changes is a financing formula which does not make suitable provision for finance of public schools, leaving them inadequately funded. Before determining whether there is substantial competent evidence to support these findings, we must examine the standard for determining whether the current version of the SDFQPA makes suitable provision for the finance of public school education. The concept of "suitable provision for finance" encompasses many aspects. First and perhaps foremost it must reflect a level of funding which meets the constitutional requirement that "the legislature shall provide for intellectual, educational, vocational and scientific *improvement* by establishing [***9] and maintaining public schools" (Emphasis added.) Kan. Const. art. 6, § 1. The Kansas Constitution thus imposes a mandate that our educational system cannot be static or regressive but must be one which "advances to a better quality or state." See Webster's II New College Dictionary 557 (1999) (defining "improve"). In apparent recognition of this concept, the legislature incorporated performance levels and standards into the SDFQPA and, although repealing the 10 goals which served as the foundation for measuring suitability in the *U.S.D. No. 229* decision, has retained a provision which requires the State Board of Education to design and adopt a school performance accreditation system "based upon improvement in performance that reflects high academic standards and is measurable." K.S.A. 72-6439(a). Moreover, the legislature mandated standards for individual and school performance levels "the achievement of which represents excellence in the academic area at the grade level to which the assessment applies." K.S.A. 72-6439(c).

Through these provisions, the legislature has imposed criteria for determining whether it [***10] has made suitable provision for the finance of education: Do the schools meet the accreditation requirements and are students achieving an "improvement in performance that reflects high academic standards and is measurable"? K.S.A. 72-6439(a).

These student performance accreditation measures were utilized in 2001 when the legislature directed that a professional evaluation [*774] be performed to determine the costs of a suitable education for Kansas school children. In authorizing the study, the legislature defined "suitable education." K.S.A. 2003 Supp. 46-1225(e). The Legislative Education Planning Committee (LEPC), to whom the task of overseeing the study was delegated, determined which performance measures would be utilized in determining if Kansas' school children were receiving a suitable education. The evaluation, performed by Augenblick & Myers, utilized the criteria established by the LEPC, and, in part, examined whether the current financing formula and funding levels were adequate for schools to meet accreditation standards and performance criteria. The study concluded that both the formula and funding levels were inadequate [***11] to provide what the legislature had defined as a suitable education.

Although in *Montoy I*, 275 Kan. at 153-55, we concluded that accreditation standards may not always adequately define a suitable education, our examination of the extensive record in this case leads us to conclude that we need look no further than the legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula. Within that record there is substantial competent evidence, including the Augenblick & Myers study, establishing that [*310] a suitable education, as that term is defined by the legislature, is not being provided. In particular, the plaintiff school districts (Salina and Dodge City) established that the SDFQPA fails to provide adequate funding for a suitable education for students of their and other similarly situated districts, *i.e.*, middle- and large-sized districts with a high proportion of minority and/or at-risk and special education students. Additional evidence of the inadequacy of the funding is found in the fact that, while the original intent of the provision for local option budgets within the financing formula [***12] was to fund "extra" expenses, some school districts have been forced to use local option budgets to finance general education.

Furthermore, in determining if the legislature has made suitable provision for the finance of public education, there are other factors to be considered in addition to whether students are provided a suitable education. Specifically, the district court found that the [*775] financing formula was not based upon actual

costs to educate children but was instead based on former spending levels and political compromise. This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors.

Thus, there is substantial competent evidence to support the district court's findings discussed above. These findings are sufficient to support the conclusion that the legislature has failed to "make suitable provisions for finance" of the public school system as required by Art. 6, § 6 of the Kansas Constitution.⁴ As to the cross-appeal, we affirm the district court's holding that the legislature has not usurped the powers of the State Board of Education.

In addressing [***13] the appropriate remedy, as the district court noted, there are "literally hundreds of ways" the financing formula can be altered to comply with Art. 6, § 6. Similarly, there are many ways to recreate or reestablish a suitable financing formula. We do not dictate the precise way in which the legislature must fulfill its constitutional duty. That is for the legislators to decide, consistent with the Kansas Constitution.

It is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula constitutionally suitable. The equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs, are critical factors for the legislature to consider in achieving a suitable formula for financing education. By contrast, the present financing formula increases disparities in funding, not based on a cost analysis, but rather on political and other factors not relevant to education.

We are aware that our decision (1) raises questions about continuing the present financing formula pending corrective action by the legislature; (2) could have the potential to disrupt the [***14] public schools; and (3) requires the legislature to act expeditiously to provide constitutionally suitable financing for the public school system. Accordingly, at this time we do not remand this case to the district court or consider a final remedy, but instead we will retain jurisdiction and stay all further proceedings to allow the legislature a [*776] reasonable time to correct the constitutional infirmity in the present financing formula. In the meantime, the present financing formula and funding will remain in effect until further order of this court.

We have in this brief opinion endeavored to identify problem areas in the present formula as well as legislative changes in the immediate past that have contributed to the present funding deficiencies. We have done so in order that the legislature take steps it deems necessary to fulfill its constitutional responsibility.

Its failure to act in the face of this opinion would require this court to direct action to be taken to carry out that responsibility. We believe further court action at this time would not be in the best interests of the school children of this state.

The legislature, by its action or lack thereof in the 2005 [***15] session, will dictate what form our final remedy, if necessary, will take. To ensure the legislature complies with our holding, we will withhold our formal opinion until corrective legislation has been enacted [***311] or April 12, 2005, whichever occurs first, and stay the issuance of our mandate in this case.

Affirmed in part and reversed in part.

CONCUR BY: BEIER

CONCUR

¹ BEIER, J., concurring: I concur fully in the court's result and in the bulk of its rationale. I write separately only because I disagree with the holding of *U.S.D. No. 229 v. State*, 256 Kan. 232, 260-63, 885 P.2d 1170 (1994), that education is not a fundamental right under the Kansas Constitution. I believe it is. Thus I would not, as the court implicitly did on its way to the opinion in this case, rely on *U.S.D. No. 229* to conclude that the Kansas school financing formula under SDFQAA did not violate the Equal Protection Clauses of the federal and state Constitutions. Rather, I would take the opportunity presented by this case to overrule the *U.S.D. No. 229* holding on the status of the right to education under the Kansas Constitution.

1 REPORTER'S NOTE: Two concurring opinions to the majority opinion in *Montoy v. State*, No. 92,032 filed January 3, 2005, were filed with the Clerk of the Appellate Courts on September 9, 2005.

[***16] In *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278, *reh. denied* 411 U.S. 959, 36 L. Ed. 2d 418, 93 S. Ct. 1919 (1973), the United States Supreme Court held that education is not a fundamental [*776A] right under the United States Constitution. In reaching this conclusion, the Court stated:

"The key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 33-34.

Article 6, § 1 of our state constitution reads: "The legislature *shall* provide for intellectual, educational,

vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities." (Emphasis added.) Article 6, § 6 provides: "The legislature *shall* make suitable provision for finance of the educational interests of the state." (Emphasis added.)

If [***17] we were to apply the United States Supreme Court's straightforward pattern of analysis from *Rodriguez*, we would need to look no further than the mandatory language of these two constitutional provisions. Because they explicitly provide for education, education is a fundamental right.

It is certainly true, however, that our sister states, when faced with the question of whether their own constitutions make education a fundamental right, have not always been satisfied with the *Rodriguez* approach. For example, in *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982), the Colorado Supreme Court stated:

"While the [*Rodriguez*] test may be applicable in determining fundamental rights under the United States Constitution, it has no applicability in determining fundamental rights under the Colorado Constitution. This is so because of the basic and inherently different natures of the two constitutions [Footnote omitted.]

"The United States Constitution is one of restricted authority and delegated powers. As provided in the Tenth Amendment, all powers not granted to the United States by the Constitution, nor denied to the [***18] States by it, are reserved to the States or to the People. [Citations omitted.]

"Conversely, the Colorado Constitution is not one of limited powers where the state's authority is restricted to the four corners of the document. [Citation omitted.] The Colorado Constitution does not restrict itself to addressing only those areas deemed fundamental. Rather, it contains provisions which are . . . suited [*776B] for statutory enactment . . . as well as those deemed fundamental to our concept of ordered liberty Thus, under the Colorado Constitution, fundamental rights are not necessarily determined by whether they are guaranteed explicitly or implicitly within the document."

[**312] Several other states also have rejected *Rodriguez* as the test for whether their state constitutional provisions on education demand recognition of a fundamental right. See *Serrano v. Priest (Serrano II)*, 18 Cal.3d 728, 766-67, 135 Cal.Rptr. 345, 557 P.2d 929 (1976) (refusing to be constrained by whether rights and interests are explicitly or implicitly guaranteed by state constitution), *cert. denied* 432 U.S. 907, 53 L. Ed. 2d 1079, 97 S. Ct. 2951 (1977); *McDaniel v. Thomas*, 248 Ga. 632, 646, 285 S.E.2d 156 (1981) [***19] ("explicit or implicit" guarantee model lacks

meaningful limitation under state constitution); *Thompson v. Engelking*, 96 Idaho 793, 803-05, 537 P.2d 635 (1975) (rejecting categorization of "fundamental" versus "non-fundamental" rights); *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 650, 458 A.2d 758 (1983) (state constitution explicitly guarantees rights and interests not considered "fundamental"); *Bd. of Edn. v. Walter*, 58 Ohio St. 2d 368, 375, 390 N.E.2d 813 (1979) (state constitution not limited in power and contains provisions suitable for statutory enactment), *cert. denied* 444 U.S. 1015, 62 L. Ed. 2d 644, 100 S. Ct. 665 (1980); *Fair Sch. Finance Coun. v. State of Okla.*, 1987 OK 114, 746 P.2d 1135, 1149 (Okla. 1987) (fundamental rights not necessarily determined by inclusion in state constitution); *Olsen ex rel. Johnson v. State*, 276 Or. 9, 19-20, 554 P.2d 139 (1976) (laws considered to be legislation included in state constitution; thus *Rodriguez*' method weak); see also Dayton, *Serrano and its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 Ed. Law. Rep. 447, 453 (2001) (most states reject [***20] *Rodriguez* test to determine existence of state constitutional right to education). In such states, *Rodriguez*' simple search for explicit or implicit recognition of a fundamental right to education in a constitution's language gives way to a variety of other patterns of analysis. For example, certain interests are deemed fundamental in California "because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government." *Serrano II*, 18 Cal.3d at 767-68.

[*776C] At this point in time, courts in 15 states - Alabama, California, Connecticut, Kentucky, Minnesota, New Hampshire, New Jersey, North Carolina, North Dakota, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming -- appear to have recognized a fundamental right to education under their constitutions, employing various patterns of analysis. See *Opinion of the Justices*, 624 So. 2d 107, 157 (Ala. 1993) (advisory opinion) ("The right to education in Alabama is fundamental" and implicitly guaranteed by the state constitution); *Serrano v. Priest (Serrano I)*, 5 Cal.3d 584, 608-09, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971) [***21] ("The distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"); *Horton v. Meskill (Horton I)*, 172 Conn. 615, 646, 376 A.2d 359 (1977) (state constitution specifically recognizes right to education; this right is "basic and fundamental"); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989) (framers of state constitution emphasized education as essential to welfare of citizens of Kentucky); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) ("We hold that education is a fundamental right under the state constitution, not only because of its overall importance to the state but also because of

the explicit language used to describe this constitutional mandate."); *Claremont School Dist. v. Governor*, 142 N.H. 462, 473, 703 A.2d 1353 (1997) ("Even a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights. The latter being recognized as fundamental, it is illogical to place the means to exercise those rights on less [***22] substantial constitutional footing than the rights themselves."); *Robinson v. Cahill*, 69 N.J. 133, 147, 351 A.2d 713 (1975) ("The right of children to a thorough and efficient system of education is a fundamental right."), *cert. denied sub nom. Klein v. Robinson*, 423 U.S. 913, 46 L. Ed. 2d 141, 96 S. Ct. 217 (1975); *Leandro v. State of North Carolina*, 346 N.C. 336, 348, 488 S.E.2d 249 (1997) ("The intent of the framers [of the state constitution] was that every child have a fundamental right to a sound basic education which would prepare the child to participate fully in society as it existed in his or her lifetime."); *Bismarck Public School Dist. I v. State*, 511 N.W.2d 247, 256 (N.D. 1994) ("The [*776D] parties agree that [**313] the right to education is a fundamental right under the North Dakota Constitution."); *Brigham v. State*, 166 Vt. 246, 262, 692 A.2d 384 (1997) (emphasizing importance of education to self-government and state's duty to ensure proper dispersion); *Scott v. Commonwealth*, 247 Va. 379, 386, 443 S.E.2d 138, 10 Va. Law Rep. 1192 (1994) (finding state constitution's language clear and unambiguous; state should assure opportunity for [***23] fullest development through education); *Seattle School Dist. v. State*, 90 Wn. 2d 476, 511, 585 P.2d 71 (1978) ("The [state constitution's] singular use of the term 'paramount duty,' when taken together with its plain English meaning, is [a] clear indication of the constitutional importance attached to the public education of the State's children."); *Pauley v. Kelly*, 162 W. Va. 672, 707, 255 S.E.2d 859 (1979) (finding education is fundamental right under state constitution's mandatory requirement of "thorough and efficient system of free schools"); *Kukor v. Grover*, 148 Wis. 2d 469, 496, 436 N.W.2d 568 (1989) ("Equal opportunity for education' is a fundamental right," as emphasized by Wisconsin's case law and legislature's involvement); *Washakie Co. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) ("In light of the emphasis which the Wyoming Constitution places on education, there is no room for any conclusion but that education for the children of Wyoming is a matter of fundamental interest."), *cert. denied* 449 U.S. 824, 66 L. Ed. 2d 28, 101 S. Ct. 86 (1980).

Meanwhile, six states -- Colorado, Georgia, Idaho, [***24] Maryland, New York, and Ohio -- have rejected arguments that their state constitutions establish education as a fundamental right. See *Lujan*, 649 P.2d at 1017 (noting Colorado Constitution not restricted to

areas deemed fundamental; on its face, does not establish education as fundamental right); *Bd. of Educ. v. Nyquist*, 57 N.Y.2d 27, 43, 453 N.Y.S.2d 643, 439 N.E.2d 359 (1982) (The state constitution "does not automatically entitle [education] to classification as a 'fundamental constitutional right' triggering a higher standard of judicial review for purposes of equal protection analysis."); *Bd. of Edn.*, 58 Ohio St. 2d at 374 (rejecting the *Rodriguez* analysis which would have established education as a fundamental right under Ohio's constitution); *Hornbeck*, 295 Md. at 649 ("Education 'can be a major factor in an individual's chances for [*776E] economic and social success as well as a unique influence on a child's development as a good citizen and on his future participation in political and community life.' [Citation omitted.] Nevertheless, we conclude that education is not a fundamental right for purposes of [***25] equal protection analysis."); *McDaniel*, 248 Ga. at 647 (noting complexity of school financing and management, remaining consistent with *Rodriguez*, and holding education "per se" not fundamental right); *Thompson*, 96 Idaho at 805 (refusing to classify right to education as fundamental; holding schemes for school funding unconstitutional could negatively affect funding for other local services).

The exact nature of any right to education under the Oklahoma Constitution is currently unclear. See *Fair Sch. Finance Coun.*, 746 P.2d at 1149-50 (Okla. 1987) (Even "assuming that education is a fundamental interest, the question remains as to what is the exact nature of the interest guaranteed. . . . We find no authority to support the plaintiffs' contention that the school finance system should be subjected to strict judicial scrutiny."). The status of any right in Arizona also is unclear at this time. See *Shofstall v. Hollins*, 110 Ariz. 88, 90, 515 P.2d 590 (1973) ("We hold that the [state] constitution does establish education as a fundamental right of pupils between the ages six and twenty-one years."); but see [***26] *Roosevelt Elem. School Dist. No. 66 v. Bishop*, 179 Ariz. 233, 238, 877 P.2d 806 (1994) ("We do not understand how the rational basis test can be used when a fundamental right has been implicated. . . . If education is a fundamental right, the compelling state interest test [strict scrutiny] ought to apply. . . . If the rational basis test properly applies, education is not a fundamental right.").

Those courts that recognize a fundamental right to education under their state constitutions also vary on the extent to which they permit the right's status to strengthen judicial review of specific legislative enactments. Some apply strict scrutiny when they review [**314] statutes on school funding. See, e.g., *Serrano I*, 5 Cal.3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (state funding scheme invidiously discriminates against poor; no compelling state purpose necessitates state's inequitable method of financing education); *Scott v. Com-*

monwealth, 247 Va. 379, 386, 443 S.E.2d 138, 10 Va. Law Rep. 1192 (1994) (state's system of funding withstands strict scrutiny). [*776F] But others reserve strict scrutiny for equity challenges to statutory schemes that constitute a *denial* of the fundamental right to [***27] education; they employ a more forgiving standard of review when their focus is on legislative mechanisms to *fund* exercise of the right. See *Skeen*, 505 N.W.2d at 315-16 (strict scrutiny applies when offered education falls below "adequacy" level; otherwise, Minnesota applies rational basis standard); *Bismarck Public School Dist. 1*, 511 N.W.2d at 257 (North Dakota applies intermediate scrutiny); *Kukor*, 148 Wis. 2d at 498 (Wisconsin applies rational basis standard); see also *Horton v. Meskill*, (*Horton II*), 195 Conn. 24, 35-38, 486 A.2d 1099 (1985) (Connecticut adopts three-part analysis for school funding; educational funding "in significant aspects sui generis"); *Seattle School Dist.*, 90 Wn. 2d at 518 (although education "paramount duty," means of discharging duty left to legislature).

In *Bismarck Public School Dist. 1*, 511 N.W.2d 247, the North Dakota Supreme Court held that a fundamental right to education existed under the state constitution. The court declined, however, to adopt strict scrutiny for decisions involving the financing of the educational system. Instead, [***28] the court adopted intermediate scrutiny in order to strike a balance between flexibility needed in finance decisions and the importance of the right. 511 N.W.2d at 257-59.

In *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993), the Minnesota Supreme Court found that a fundamental right to education existed because of education's overall importance to the state and an explicit provision in the state constitution mandating a duty to "establish a 'general and uniform system' of education." The court concluded that strict scrutiny should apply only to challenges to adequacy and uniformity in funding the school system, but that particular funding mechanisms should be reviewed under the rational basis standard. 505 N.W.2d at 315-16. The court noted that the state constitution used only the word "shall" in the section describing financing, while the "duty of the legislature" language was used in the section addressing establishment of schools. 505 N.W.2d at 315 n.9. Further, the court stated: "Because the state constitution does not require strict economic equality under the [*776G] equal protection clause, it cannot be said that there is [***29] a 'fundamental right' to any particular funding scheme" 505 N.W.2d at 315.

In *Kukor v. Grover*, 148 Wis. 2d 469, 496, 436 N.W.2d 568 (1989), the Wisconsin Supreme Court concluded that "'equal opportunity for education' is a fundamental right" but concluded that absolute equality in financing was not required. The court noted that the equalization system at issue actually exceeded the de-

gree of uniformity required under the state constitution. 148 Wis. 2d at 496. Holding that the rational basis test rather than strict scrutiny applied to issues based on spending disparities, the court reasoned that spending disparities did not involve the denial of an educational opportunity within the scope of the state constitution. 148 Wis. 2d at 496-98.

When District Judge (now Justice) Luckert wrote her opinion in *U.S.D. No. 373, et al. v. State*, No. 90 CV 2406 (Shawnee County District Court, filed Dec. 16, 1993) (For ease of reference, this slip opinion will be referred to hereinafter as "*U.S.D. No. 229*, slip op."), she looked at all of the school finance opinions from other jurisdictions to that point and concluded [***30] that those applying a rational basis standard of review to school finance equity challenges were the most persuasive. *U.S.D. No. 229*, slip op. at 89-92. Those justices who sat on this court at the time the appeal arose in that case adopted Justice Luckert's position, as well as nearly all of her exhaustive and eloquent discussion. *U.S.D. No. 229*, 256 Kan. at 239-51, 261-63.

In my view, the precedential landscape on the appropriateness of a rational basis standard of review for school finance legislation, [***315] as opposed to outright denial of the right to an education, has changed little since *U.S.D. No. 229* was decided, and I agree that the cases on which Justice Luckert and the Supreme Court relied remain persuasive on the wisdom of applying that standard to statutes providing for education finance in Kansas. However, I am not comfortable reasoning backward from that conclusion to say there is no fundamental right to education under our Kansas Constitution. In fact, on close reading, it is evident that Justice Luckert was also reluctant to make this backward leap of logic. See *U.S.D. No. [*776H] 229*, slip op. at 94 ("Further, while there may be a fundamental right [***31] to the constitutional guarantee of an education, the legislature met this right and the lesser rational basis standard should be applied to the examination of the equality of the financing."). It was not until the Kansas Supreme Court's opinion in *U.S.D. No. 229* that Justice Luckert's use of a rational basis standard for review of school finance legislation was equated to a conclusion that the Kansas Constitution recognizes no fundamental right to education. See *U.S.D. No. 229*, 256 Kan. at 261 ("Here, the district court exhaustively analyzed decisions from other jurisdictions in concluding that education was not a fundamental right requiring application of the strict scrutiny test in analyzing legislation involving the funding of public education.").

As stated above, if we were to regard *Rodriguez* as controlling on the method for determining the existence of a fundamental right to an education, our Kansas Constitution's explicit education provisions would settle the matter in favor of holding that such a right ex-

ists. *Lujan* and like cases are probably correct, however, to question the utility of this approach for the interpretation of state constitutions. [***32] See *Lujan*, 649 P.2d at 1017. Like the Colorado Constitution under consideration in *Lujan*, the Kansas Constitution contains several explicit provisions "suited for statutory enactment" that plainly do not give rise to fundamental rights for individuals. See, e.g., Kan. Const. Art. 12, §§ 1, 2 (provisions regarding corporations, stockholder liability).

As Justice Luckert recognized, factors that may be considered in addition to the language of a state's education clause include the relationship of that clause to the state constitution as a whole, the state's particular constitutional history, and any perception that the framers intended education to be a fundamental right. See *U.S.D. No. 229*, slip op. at 85-92 (citing *Alabama Coalition for Equity v. Hunt*, No. CV-90-883-R [Ala. Cir. unpublished opinion filed April 1, 1993] [1993 Westlaw 204083]; *Horton I*, 172 Conn. at 653-54 [Bogdanski, J. concurring]; *Washakie Co. Sch. Dist. No. One*, 606 P.2d at 333). In Kansas, all of these factors support the existence of a fundamental right to education.

[*776I] First, the language of the education article is mandatory. [***33] The legislature "shall provide for intellectual, educational, vocational and scientific improvement" and it "shall make suitable provision for finance of the educational interests of the state." Kan. Const. Art. 6, §§ 1, 6. Neither the provision of progressive educational improvement nor the financing of it is optional.

Second, the education article's relationship to the constitution as a whole emphasizes its centrality to the document's overall design. Only five articles precede it. Each of the first three outlines one of the three branches of government. See Kan. Const. Arts. 1, 2, 3. The fourth and the fifth deal with elections and suffrage, without which the three branches could not be populated. See Kan. Const. Arts. 4, 5. Next comes education; once the branches are established and their seats filled, it appears education is the first thing on the agenda of the new state. See Kan. Const. Art. 6. The education article comes before those dealing with public institutions and welfare, the militia, county and township organization, apportionment of the legislature, and finance and taxation, among others. See Kan. Const. Arts. 7, 8, 9, 10, 11. Our constitution not only [***34] explicitly provides for education; it implicitly places education first among the many critical tasks of state government.

Third, our state's constitutional history reinforces the importance of education even before statehood. As noted both by Justice [***316] Luckert in her *U.S.D. No. 229* opinion and by District Judge Terry Bullock in

his earlier decision in *Mock v. State*, No. 90 CV 918 (Shawnee County District Court, filed Oct. 14, 1991), public schools were significant components of life on the prairie that would become Kansas. In Justice Luckert's words:

"The Organic Act and the Act for the Admission of Kansas Into the Union included provisions providing that certain sections of land be reserved for educational purposes. (The Organic Act, and Act to Organize the Territory of Kansas § 34 (10 Stat. 289, chapter 59, § 34, May 30, 1854)). A Territorial Superintendent for Common Schools certified teachers and organized local school districts within walking distance of students' homes.

"When passed in 1859, the Ordinance to the Constitution contained eight sections, three of which dealt with elementary public education. The framers of the constitution devoted an entire [***35] article to the establishment and finance of a system of 'common schools.' Section 6 of the Ordinance provided for statewide financing [*776J] of schools by earmarking five percent of all proceeds from the sale of public lands for the exclusive use of the public schools.

"The original Article 6 of the Kansas Constitution was adopted by the statehood convention in July 1859, ratified by the electors of the State of Kansas on October 4, 1859, and became law upon the admission of the State into the United States in 186[1]. Section 3 of the Article 6 provided for funding of public education. Sale of public lands, unclaimed estates, rents on public lands, 'and such other means as the legislature may provide, by tax or otherwise, shall be enviously appropriated to the support of common schools.'

"Hence, from its inception, Kansas has financed public schools through taxes and other mechanisms provided for by the legislature" *U.S.D. No. 229*, slip op. at 5-6.

See King, C., *The Kansas School System-Its History and Tendencies*, Collections of the Kansas State Historical Society 1909-1910, pp. 424-25.

The relevant original language of our constitution's Article 6 stated:

[***36] "§ 2. "The legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate and university departments." (Emphasis added.) Kan. Const. Art. 6, § 2 (1859).

This language remained in place until 1966, when Article 6 was amended to its current form. The amendment re-affirmed "the inherent power of the legislature -- and through its members, the people -- to

shape the general course of public education and provide for its financing." *U.S.D. No. 229*, slip op. at 8 (quoting Kansas Legislative Council, *Implementation of the Education Amendment*-Report of the Education Advisory Committee, p. vii [Nov. 1966]). The amendment also revamped administration of the consolidated state system of education, but it did nothing to undercut any individual right to education. In fact, it strengthened the language outlining the legislature's responsibilities. Section 2 of Article 6 of the original constitution became § 1 of Article 6 and now commands: "The legislature shall provide for intellectual, educational, [***37] vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities." (Emphasis added.) Kan. Const. Art. 6, § 1. In addition, new language was inserted in Section 6 of the Article: "The legislature [*776K] shall make suitable provision for finance of the educational interests of the state." Kan. Const. Art. 6, § 6(b).

Finally, indications are that the framers of our constitution intended education to be a fundamental right. Education was central to Kansas settlers, both pro and antislavery. Early proposed constitutions and the ultimate document, adopted at Wyandotte on July 29, 1859, and ratified October 4 of that year, "reveal the educational spirit of the Kansas pioneer." See King, *The Kansas School System-Its History and Tendencies*, pp. 424-25. Statutes since 1858 enumerated subjects that must be taught in the common schools; after that time, curriculum has been marked by continuous expansion and enrichment. [***317] See King, p. 425. As Justice Luckert discussed in *U.S.D. No. 229*, slip op. at 5-6, the Ordinance to the Kansas Constitution passed in 1859 devoted three of its eight sections to elementary public education. [***38] And the original and amended constitution not only devoted an entire article to the establishment and finance of a public education system, see *U.S.D. No. 229*, slip op. at 5, the placement of that article and its resulting emphasis suggest that education was considered a high, if not first, priority of state government.

Beyond the factors enumerated in the cases, it is also well worth noting that Justice William J. Brennan discussed the societal and political significance of education in his *Rodriguez* dissent: "There can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment." 411 U.S. at 63 (Brennan, J., dissenting); see Blumenson and Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 Wash. U. Q. 65, 99, 102 (Spring 2003).

What was true when Justice Brennan wrote those words in 1973 certainly continues to be true in the

early years of the 21st century. Our sister courts have not disagreed, instead recognizing education's overwhelming political and economic importance. [***39] See *U.S.D. No. 229*, slip op. at 88 (citing *Lujan*, 649 P.2d at 1017; *Hornbeck*, 295 Md. at 649-50; *Levittown UFSD*, 57 N.Y.2d at 43; *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139, 151-52 [*776L] [Tenn. 1993]). That a certain level and quality of formal education is necessary for any citizen to function intelligently and productively in our increasingly complex democracy and our shrinking world is not honestly debatable. An individual citizen's right to education at this level and quality is "fundamental" in every imaginable sense of the word. Given the mandatory language of our constitution, the clarity of the historical record, and modern exigencies, how can it be otherwise? Education is vital for each citizen and no less imperative for the survival and progress of our republic.

Of course, once we recognize the existence of a fundamental right to education under our Kansas Constitution, the question is how legislation implicating education *financing* should be reviewed. As I have said, I understand and agree that the rational basis standard of review should apply. Like the Minnesota Supreme Court in [***40] *Skeen*, 505 N.W.2d at 313-16, however, I believe there is a theoretical point of no return. At that point, the standard must shift to strict scrutiny. If inequities in a school financing system become so egregious that they actually or functionally *deny* the fundamental right to education to a segment of otherwise similarly situated students, we must be prepared to require more of our legislature than a mere rational basis for its line drawing.

In addition to the reasons outlined in Justice Luckert's *U.S.D. No. 229*, slip op., and adopted by our court for using rational basis review as the usual governing standard in *U.S.D. No. 229*, 256 Kan. 232, 885 P.2d 1170, Syl. P7, I believe there are at least two other justifications in school finance cases for deviation from our typical strict scrutiny of alleged violations of a fundamental right.

First, the exercise -- indeed, the existence -- of an individual's fundamental right to education under the Kansas Constitution is unavoidably dependent at least in part on societal and governmental philosophy and action. Unlike, for example, the right to free speech or the right to privacy, which are inherent in the [***41] humanity of any individual and thus cannot be infringed by the government, see *Gilbert v. Minnesota*, 254 U.S. 325, 332, 65 L. Ed. 287, 41 S. Ct. 125 (1920) (right to free speech natural, inherent); *Lawrence v. Texas*, 539 U.S. 558, 573-74, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003) (right to privacy discussed; choices "central to personal dignity [*776M] and autonomy"

protected from government interference) (citing *Planned Parenthood of Southwestern PA. v. Casey*, 505 U.S. 833, 846-47, 120 L. Ed. 2d 674, 112 S. Ct. 2791 [1992]), the right to education is at least in part a function of the way in which our society and other societies of the world have chosen to order and govern themselves and [**318] to prepare citizens for full political and economic participation. No child but the most exceptional is capable of educating himself or herself completely independently to the level and quality assured by the fundamental right. Some governmental assistance or intervention is required. State government, through the legislature, is a guarantor and facilitator of the exercise of the right as well as a potential source of interference with it. When the government [***42] must be involved, as it must be here, and that involvement demands investment of resources purchased at some cost to taxpayers, it is logical and reasonable that the legislature should be more free than the specter of strict scrutiny would allow it to be when it makes policy choices. Even under rational basis review, however, the judiciary retains its power to decide whether legislative choices make educational sense, *i.e.*, whether they comport with the overall constitutional mandates that the legislature "provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities" and "make suitable provision for finance of the educational interest of the state." Kan. Const. Art. 6, §§ 1, 6.

Second, I agree that rational basis review has much to recommend it when a case reaches a remedial phase, *i.e.*, when we are called upon to judge the adequacy and efficacy of the legislature's efforts to correct constitutional problems identified by the courts. See *U.S.D. No. 229*, slip op. at 92-95 (discussing Connecticut's approach in *Horton v. Meskill* [Horton III], 195 Conn. 24, 486 A.2d 1099 [***43] [1985]).

For all of the foregoing reasons, I concur in the judgment and most of the rationale of my colleagues. I respectfully disagree with their view that education is

not a fundamental right under the Kansas Constitution. It is. Justice Luckert never held otherwise in *U.S.D. No. 229*, slip op. This court should not have jumped to that [*776N] regressive conclusion then, and it should not reinforce that error now.

DAVIS, J., joins in the foregoing concurring opinion.

LUCKERT, J., concurring: I concur fully in the result of the majority of the court and most of its rationale. However, I would find that education is a fundamental right under the Kansas Constitution. In this regard, I agree with Justice Beier's analysis of this issue.

As Justice Beier indicates, I addressed this issue when acting as the trier of fact in *U.S.D. No. 373, et al. v. State*, No. 90 CV 2406 (Shawnee County District Court, filed Dec. 16, 1993) (Slip op.), but did not state a conclusion of law regarding whether there was a fundamental right to education under the Kansas Constitution. Rather, as does Justice Beier, I cited the analysis of opinions such as *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993), [***44] and *Kukor v. Grover*, 148 Wis. 2d 469, 496, 436 N.W.2d 568 (1989), and left open the issue stating that "there may be a fundamental right." (Slip op. at 94). Despite this language in the trial court decision, the Supreme Court interpreted my conclusions of law to include a determination that education was not a fundamental right. Further, the Supreme Court, at least impliedly, reached that conclusion. *U.S.D. No. 229 v. State*, 256 Kan. 232, 261-63, 885 P.2d 1170 (1994). Respectfully, I disagree with that conclusion and would adopt the rationale set forth in Justice Beier's concurring opinion, emphasizing the unique nature of Article 6, in which Kansas citizens mandate legislative action and then define the scope of the required action. See Article 6, § 1 ("The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools."); Article 6, § 6(b) ("The legislature shall make suitable provision for finance of the educational interests of the state.").

[MONTROY 3- HAWVER APPEAL- January 3, 2005]

ERIC AND RYAN MONTROY, et al., Plaintiffs/Appellees, v. STATE OF KANSAS,
et al., Defendants. KANSANS FOR THE SEPARATION OF SCHOOL AND
STATE, Proposed Intervenor/Appellant.

No. 91,915

SUPREME COURT OF KANSAS

278 Kan. 765; 102 P.3d 1158; 2005 Kan. LEXIS 1

January 3, 2005, Opinion Filed

PRIOR HISTORY: [***1] Appeal from Shawnee district court; TERRY L. BULLOCK, judge. *Montoy v. State*, 275 Kan. 145, 62 P.3d 228, 2003 Kan. LEXIS 16 (2003)

DISPOSITION: Affirmed.

SYLLABUS

BY THE COURT

1. Intervention is a matter of judicial discretion. Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court.

2. The right to intervene under K.S.A. 60-224(a) depends on the concurrence of (1) a timely application, (2) a substantial interest in the subject matter, and (3) a lack of adequate representation of the intervenor's interests.

3. The requirement for "timely application" to intervene has no application under K.S.A. 60-224(a)(2) until such time as adequate representation ceases.

4. If a trial court reaches the right result, its decision will be upheld even though the trial court relied upon the wrong ground or assigned erroneous reasons for its decision.

COUNSEL: Alan L. Rupe, of Kutak Rock LLP, of Wichita, argued the cause, and Richard A. Olmstead, of the same firm, and John S. Robb, of Somers Robb & Robb, of Newton, were with him on the brief for appellees Eric and Ryan Montoy, et al.

Ira Dennis Hawver, of Ozawkie, [***2] argued the cause, and Bret D. Landrith, of Topeka, was with him on the brief for proposed intervenor/appellant Kansans for the Separation of School and State.

JUDGES: The opinion of the court was delivered by ALLEGRUCCI, J. LUCKERT, J., not participating. CHRISTEL E. MARQUARDT, J., assigned. ¹

1 REPORTER'S NOTE: Judge Marquardt, of the Kansas Court of Appeals, was appointed to hear case No. 91,915 vice Justice Luckert pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c).

OPINION BY: ALLEGRUCCI

OPINION

[**1159] [*765] The opinion of the court was delivered by

ALLEGRUCCI, J.: Kansans for the Separation of School and State appeals from the district court's memorandum decision and order denying its motion to intervene. An order denying an application to intervene is a final appealable order. *State ex rel. Stephan v. Kansas Dept. of Revenue*, 253 Kan. 412, Syl. P1, 856 P.2d 151 (1993).

[*766] The sole issue we must decide is whether the district court abused its discretion in denying appellant's motion to intervene.

On December 18, 2003, appellant filed a motion to intervene in *Montoy v. State*, Shawnee County District Court Case No. 99-C-1738. In a memorandum [***3] decision and order that was filed February 13, 2004, the trial court denied intervention. Appellant filed its notice of appeal on March 1, 2004.

Intervention is a matter of judicial discretion. *Mohr v. State Bank of Stanley*, 244 Kan. 555, 561, 770 P.2d 466 (1989). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *Varney Business Services, Inc. v. Pottruff*, 275 Kan. 20, 44, 59 P.3d 1003 (2002).

K.S.A. 60-224 (a) provides:

"Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter substantially impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Appellant sought to intervene under subsection (2), claiming an interest relating to the property or transaction that is the subject of the action. The [***4] district court denied appellant's motion to intervene for the following reasons:

"The Kansas Supreme Court set forth three factors that must be present to allow intervention: '(1) timely application; (2) a substantial interest in the subject matter; and (3) lack of adequate representation of the intervenor's interests.' *Memorial Hospital Ass'n, Inc. v. Knutson*, 239 Kan. 663, 722 P.2d 1093[, 239 Kan. 663, 722 P.2d 1093] (1986). '[A] prospective party's untimely application to intervene in an action is the same as voluntarily declining to intervene. . . .' *Davis v. Prudential Property and Casualty Ins. Co.*, 961 F. Supp. 1496 (D. Kan. 1997).

"Kansans for the Separation of School and State had ample opportunity to file a motion to intervene prior to trial in this matter. This action has been pending for nearly five years. The facts have already been heard and determined in this action. A preliminary interim order was entered by this Court on December 2, 2003. This party did not file their motion to intervene until December 18, 2003. All that remains is to determine a proper remedy. As the motion to intervene is untimely, the Court hereby denies the request.

[*767] "Additionally, [***5] the motion is denied because Kansans for the Separation of School and State improperly state that their members have property interests in the State of Kansas 'relating to the property or transaction which is the subject of the action.' To the contrary, there is no property or transaction that is the subject of this matter. This Court's preliminary order contains no directive that the Legislature raise property taxes statewide. In addition, the Court's preliminary

order does not set forth an amount . . . which the Legislature must provide to adequately fund schools. The Court merely set forth the facts. Until July 1, 2004, it is up to the executive and legislative branches to devise [**1160] a remedy to these constitutional deficiencies."

Appellant relies on *Moyer v. Board of County Commissioners*, 197 Kan. 23, 415 P.2d 261 (1966), for the proposition that posttrial intervention is timely. Appellant's reliance on *Moyer* is misplaced. *Moyer* stands for the principle that intervention may be timely even after judgment *if* the party who represented the intervenor-applicant's interest at trial refuses to appeal, see 197 Kan. 23, Syl. P3, 415 P.2d 261, in which case the [***6] intervenor's interest would no longer be adequately represented by an existing party. In *Hukle v. City of Kansas City*, 212 Kan. 627, Syl. P3, 512 P.2d 457 (1973), the court held that "the requirement for 'timely application' to intervene in an action as that term is used in K.S.A. . . . 60-224(a) has no application until such time as adequate representation ceases."

In the present case, the district court made no determination about the adequacy of the representation of appellant's interest. Appellant contends that it is "without adequate representation by the state, which like the governor, politically benefits from losing this action and suddenly, in a single blow accumulating wealth, power and patronage that doubles what it has taken generations to confiscate from Kansans democratically." Appellant's argument seems to be that it opposes a tax increase to finance schools but the State of Kansas favors an increase. The legislature's rejection of all proposals for tax increases to finance schools in its last session, however, demonstrates that appellant's position is adequately represented by the State.

In *Hukle*, the court stated that the right to intervene under [***7] K.S.A. 60-224(a) depends on the concurrence of (1) a timely application, (2) a substantial interest in the subject matter, and (3) a lack of adequate representation of the intervenor's interests. 212 [*768] Kan. at 630-32. Without a showing of inadequate representation, there can be no concurrence of the three factors.

Here, although the trial court was silent on the issue, appellant failed to show a lack of adequate representation of its interest in the appeal. Thus, the motion to intervene was not timely.

If a trial court reaches the right result, its decision will be upheld even though the trial court relied upon the wrong ground or assigned erroneous reasons for its decision. *Bergstrom v. Noah*, 266 Kan. 847, 875-76, 974 P.2d 531 (1999).

Affirmed.

LUCKERT, J., not participating.

[MONTROY 4- June 3, 2005]

**RYAN MONTROY, et al., Appellees/Cross-appellants, v. STATE OF KANSAS, et al.,
Appellants/Cross-appellees.**

No. 92,032

SUPREME COURT OF KANSAS

279 Kan. 817; 112 P.3d 923; 2005 Kan. LEXIS 347

June 3, 2005, Supplemental Opinion Filed

PRIOR HISTORY: [***1] Appeal from Shawnee district court; TERRY L. BULLOCK, judge. *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160, 2005 Kan. LEXIS 2 (2005)

SYLLABUS

2005 House Bill 2247 is not in compliance with the January 3, 2005, opinion of this court and fails to remedy the constitutional infirmities in the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.*, identified in that opinion.

COUNSEL: Kenneth L. Weltz, of Lathrop & Gage L.C., of Overland Park, argued the cause, and Curtis L. Tideman, Alok Ahuja, and Jeffrey R. King, of the same firm, and David W. Davies, assistant attorney general, and Phill Kline, attorney general, were with him on the briefs for appellant/cross-appellee State of Kansas.

Dan Biles, of Gates, Biles, Shields & Ryan, P.A., of Overland Park, argued the cause, and Rodney J. Bieker, of Kansas Department of Education, and Cheryl Lynn Whelan, of Lawrence, were with him on the briefs for appellants/cross-appellees Janet Waugh, Sue Gamble, John Bacon, Bill Wagon, Connie Morris, Kathy Martin, Kenneth Willard, Carol Rupe, Iris Van Meter, Steve Abrams, and Andy Tompkins.

Alan L. Rupe, of Kutak Rock LLP, of Wichita, argued the cause, and Richard A. Olmstead, of [***2] the same firm, and John S. Robb, of Somers Robb & Robb, of Newton, were with him on the briefs for appellees/cross-appellants.

Wm. Scott Hesse, assistant attorney general, was on the brief for defendants/cross-appellees Governor Kathleen Sebelius and State Treasurer Lynn Jenkins.

Jane L. Williams, of Seigfreid, Bingham, Levy, Selzer & Gee, of Kansas City, Missouri, was on the briefs for amicus curiae Kansas Families United for Public Education.

Patricia E. Baker and Zachary J.C. Anshutz, of Kansas Association of School Boards, of Topeka, were on the briefs for amicus curiae Kansas Association of School Boards.

David M. Schauner and Robert M. Blaufuss, of Kansas National Education Association, of Topeka, were on the briefs for amicus curiae Kansas National Education Association.

Joseph W. Zima, of Topeka Public Schools, was on the brief for amicus curiae Unified School District No. 501, Shawnee County, Kansas.

Michael G. Norris and Melissa D. Hillman, of Norris, Keplinger & Hillman, L.L.C., of Overland Park, were on the brief for amici curiae Unified School Districts Nos. 233, 229, and 232, Johnson County, Kansas.

Anne M. Kindling, of Goodell, Stratton, [***3] Edmonds & Palmer, L.L.P., of Topeka, was on the briefs for amicus curiae Unified School District No. 512, Shawnee Mission, Kansas.

Bernard T. Giefer, of Giefer Law LLC, of WaKeeney, was on the briefs for amici curiae Unified School District No. 208, Trego County, Kansas (WaKeeney), et al. (60 other Kansas school districts).

Thomas R. Powell and Roger M. Theis, of Hinkle Elkouri Law Firm L.L.C., of Wichita, were on the briefs for amicus curiae Unified School District No. 259, Sedgwick County, Kansas.

Janice L. Mathis, of Rainbow/PUSH Coalition, of Atlanta, Georgia, was on the brief for amicus curiae Rainbow/PUSH Coalition.

Cynthia J. Sheppard, of Weathers & Riley, of Topeka, was on the briefs for amicus curiae Kansas Action for Children.

Bob L. Corkins, of Lawrence, was on the brief for amicus curiae Kansas Taxpayers Network.

Kirk W. Lowry, of Kansas Advocacy & Protective Services, of Topeka, was on the brief for amicus curiae Kansas Advocacy & Protective Services.

Martha B. Crow, of Crow, Clothier & Associates, of Leavenworth, was on the brief for amicus curiae Martha B. Crow.

Dr. Walt Chappell, of Wichita, was on the brief for amicus curiae [***4] Educational Management Consultants.

Tristan L. Duncan and Daniel D. Crabtree, of Stinson Morrison Hecker L.L.P., of Overland Park, were on the brief for amici curiae Individual Students in the Shawnee Mission Unified School District No. 512.

OPINION

[*818] [**925] SUPPLEMENTAL OPINION

Per Curiam: This case requires us to review recent school finance legislation to determine whether it complies with our January 3, 2005, opinion and brings the state's school financing formula into compliance with Article 6, § 6 of the Kansas Constitution. We hold that it does not.

FACTS

In our January opinion, this court reversed the district court in part and affirmed in part, agreeing that the legislature had failed to make suitable provision for finance of the public school system [*819] and, thus, had failed to meet the burden imposed by Article 6, § 6 of the Kansas Constitution. *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160 (2005) (*Montoy II*). Among other things, we held that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.*, as funded, failed to provide suitable finance for students in middle-sized and large [***5] districts with a high proportion of minority and/or at-risk and special education students; some school districts were being forced to use local option budgets (LOB) to finance a constitutionally adequate education, *i.e.* suitable education; the SDFQPA was not based upon actual costs, but rather on former

spending levels and political compromise; and the failure to perform any cost analysis distorted the low-enrollment, special education, [**926] vocational education, bilingual, and at-risk student weighting factors.

We further held that among the critical factors for the legislature to consider in achieving a suitable formula for financing education were "equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs." We provided this guidance because "the present financing formula increases disparities in funding, not based on a cost analysis, but rather on political and other factors not relevant to education." We also held that "increased funding will be required." *Montoy II*, 278 Kan. at 775.

We stayed the issuance of the mandate to allow the legislature a reasonable time to correct the constitutional [***6] infirmity in the then existing financing formula. Rather than suspend the funding of education, we ordered that the present financing formula and funding would remain in effect until the court took further action, noting: "The legislature, by its action or lack thereof in the 2005 session, will dictate what form our final remedy, if necessary, will take." We set a deadline of April 12, 2005. *Montoy II*, 278 Kan. at 776.

The legislature timely responded by enacting 2005 House Bill 2247 on March 30, 2005, which was modified by 2005 Senate Bill 43, passed during the veto session (collectively H.B. 2247). The Governor allowed the bill to become law without her signature, and the new legislation was delivered to this court.

[*820] On April 15, 2005, we issued an order which, among other things, directed the parties to file briefs addressing "whether the financing formula, as amended by H.B. 2247, meets the legislature's constitutional burden to 'make suitable provision for finance' of the public schools."

The parties were first directed to address 10 specific components of the financing formula. With respect to each of the components, as well as to the formula as a whole, the [***7] parties were asked to address our special concern as to whether the actual costs of providing a suitable education was considered and whether H.B. 2247 exacerbates and/or creates funding disparities among the districts.

Second, the parties were asked to address whether additional fact-finding would be necessary, and, if so, how that fact-finding should be pursued.

Third, the parties were asked to address what remedial action should be ordered and on what timetable in the event the court concludes, without additional fact-finding, that the financing formula, as amended by H.B. 2247, is still unconstitutional.

The parties were ordered to appear before this court on May 11, 2005, to show cause why the court should or should not find that H.B. 2247 complied with our January opinion. We recognized that the burden of proof had been on the plaintiffs to show that the SDFQPA, as it existed at the time of the filing of the action herein, was constitutionally infirm. We held that because the plaintiffs had prevailed, the burden of proof had "shifted to the defendants to show that the legislature's action has resulted in suitable provision for the financing of education as required by Article [***8] 6, § 6."

Pursuant to our April order, the defendants, State of Kansas (State) and the Board of Education members and Commissioner of Education (Board), filed separate briefs. The plaintiffs filed a response brief. Ten *amici curiae* briefs were filed. Oral arguments were heard by this court on May 11, 2005.

We must now decide if H.B. 2247 remedies the SDFQPA infirmities identified in our January opinion and thus makes suitable provision for financing of education as mandated by Article 6, § 6 [*821] of the Kansas Constitution. To do that, we first need to identify the changes H.B. 2247 makes in the SDFQPA.

H.B. 2247 modifies the school finance system in several ways. First, it alters the Base State Aid Per Pupil (BSAPP) and several of the weightings and other factors that affect the formula. It increases bilingual and at-risk weightings; it eliminates correlation weighting; it provides for phased-in increases in funding of special education excess costs at a statutorily prescribed level; and it provides for increases in general state aid [**927] based on the Consumer Price Index-Urban (CIP-U). It does not substantively change the low-enrollment weighting provision as it existed at the time [***9] of the January opinion.

Second, it provides certain districts the authority to raise additional revenue through local ad valorem taxes upon taxable tangible property within the district. Specifically, it provides a phased-in increase in the LOB cap. Before H.B. 2247 was enacted, a school district could enact a LOB that was as much as 25 percent of its state financial aid. K.S.A. 72-6433(a)(1)(A)-(D); K.S.A. 72-6444. H.B. 2247 makes incremental increases in this cap of 27 percent in the 2005-06 school year, 29 percent in 2006-07, and 30 percent in 2007-08. H.B. 2247 also authorizes districts with high housing costs to levy additional ad valorem taxes upon the taxable tangible property within the district. The rationale for this provision is to allow districts to pay enhanced teacher salaries. In addition, districts with extraordinary declining enrollment may apply to the Board of Tax Appeals (BOTA) for permission to levy an ad valorem tax on the taxable

tangible property of the district in an amount authorized by BOTA.

Third, H.B. 2247 makes several nonformula changes. It provides for statutorily mandated areas of instruction; establishes [***10] an 11-member "2010 Commission" to provide legislative oversight of the school finance system; and provides for a study by the Legislative Division of Post Audit to "determine the costs of delivering the kindergarten and grades one through 12 curriculum, related services and other programs mandated by state statute in accredited schools."

[*822] Fourth, H.B. 2247 limits all new local capital outlay mill levies to eight mills. SDFQPA originally capped the capital outlay level at four mills, but the cap was completely removed in 1999.

Fifth, certain changes to H.B. 2247 made by S.B. 43 are slated to become effective July 1, 2005, while other provisions became law upon publication in the Kansas Register. See S.B. 43, secs. 27, 28.

The estimated grand total for H.B. 2247's fiscal impact is approximately \$ 142 ¹ million in additional state funding for the 2005-06 school year.

1 This total increase of \$ 142 million includes a \$ 7.35 million increase provided by 2005 H.B. 2059, which created a second enrollment count date for students who are dependents of active military personnel. The parties do not take issue with the provisions of H.B. 2059. Our discussion of the funding and provisions in H.B. 2247 collectively refers to H.B. 2247, S.B. 43, and H.B. 2059.

[***11] DISCUSSION AND ANALYSIS

Overall, the State claims that the constitutionality of the school financing formula as amended by H.B. 2247 is not properly before this court. In its view, this case can address only the *former* financing formula, which no longer exists. Regarding the important issue of consideration of actual costs, the State contends that the legislature did consider such costs to the extent possible. At oral arguments, the State repeatedly claimed that our focus should be limited to whether the legislature had authority to pass school finance legislation, suggesting any further intervention by this court would offend the separation of powers doctrine and the carefully calibrated system of checks and balances among our three branches of government.

In the alternative, the State generally argues that if the financing formula's constitutionality remains at issue, H.B. 2247 should enjoy a presumption of constitutionality and the burden of proof should be upon the plaintiffs

to demonstrate otherwise. Moreover, if the court should determine that further fact-finding is necessary on the constitutional issue, the case should be remanded for further proceedings, with the [***12] present legislation remaining in effect until [*823] the remand produces another district court ruling. Finally, as another alternative, the State argues that if this court holds the legislation unconstitutional, without remand, then our only authority is to strike it in toto. In that event, the State contends, the legislature would have to enact new legislation, because this court has no authority to impose an interim funding plan.

[**928] In contrast, the Board argues that the issue before us is whether the State complied with our January opinion. It generally disagrees that the legislation fully meets the legislature's constitutional obligation. It also argues that H.B. 2247's modifications to the financing formula were not based upon the actual costs of providing a suitable education. However, because the legislation commissions a cost study, the Board asserts this court should uphold the legislation as an adequate interim first step in a multi-year remedial response. It urges us to hold that the changes made by H.B. 2247 are sufficient pending the results of the cost study, *i.e.*, an installment on the first remedy year toward what may very well be a much larger obligation based on the evidence [***13] in this case.

The Board strongly disagrees, however, with the legislation's provisions allowing increased funding authority based solely on local ad valorem property taxes, because it believes these provisions exacerbate funding inequities based on district wealth. It asks that these provisions be stricken, with the remainder of H.B. 2247 taking effect to enable school districts to plan for the rapidly approaching school year with the benefit of increased state aid. The Board also specifically disagrees with the parameters of the legislature's proposed cost study and expresses concerns that merely studying how much money has been spent over the years on a broken school financing system will be of little assistance. As a result, it argues that additional fact-finding will be necessary to determine the future costs of providing a suitable education.

The plaintiffs argue the increases in funding "fall grossly short of what is actually necessary to provide a constitutionally suitable education." They agree with the Board that actual costs were not considered and allege that the legislation was the result of political compromise and what the majority of the legislature believed it could [***14] provide without raising taxes. They also agree with the Board [*824] that the three provisions dependent on local ad valorem property taxes compound the formula's unjustified funding disparities.

The plaintiffs further argue that additional fact-finding is unnecessary. They ask us to (1) declare the legislation unconstitutional; (2) direct the Board to design a temporary school funding plan that incorporates recommendations from the 2001 Augenblick & Myers Study (A&M study), and direct the State to implement the plan, on a temporary basis, by July 1, 2005; (3) direct the State to enact constitutional legislation for funding public education; and (4) retain jurisdiction to ensure our orders are followed.

With this overview of the parties' arguments in mind, we turn to consideration of more specific contentions.

In support of its argument that the financing formula, as amended by H.B. 2247, is no longer properly before us, the State relies on *Knowles v. State Board of Education*, 219 Kan. 271, 547 P.2d 699 (1976). It characterizes *Knowles* as "indistinguishable" from the situation before us. In fact, the State's reliance on *Knowles* is misplaced because *Knowles* [***15] was before this court in an entirely different procedural posture.

In *Knowles*, the district court struck down the 1973 School District Equalization Act as unconstitutional. Because the legislature was in session when the judgment was entered, the district court withheld issuing a remedy in order to give the legislature time to correct "the inequities." The legislature amended the 1973 School District Equalization Act effective July 1, 1975. The district court took judicial notice of the new bill, declined to hear new evidence, dissolved the injunction, and dismissed the case. The district court held that because the legislature enacted new legislation, the law as it existed on the date of the decision no longer was in effect. Thus any determination concerning the constitutionality of the old law was moot, and any issue of the constitutionality of the new legislation was an entirely new matter that must be litigated in a new action. *Knowles*, 219 Kan. at 274.

The *Knowles* plaintiffs appealed the order dissolving the injunction and dismissing the case. This court found the new legislation had not rendered the case moot and reversed and remanded the matter to [***16] the district court for additional fact-finding on the [**929] [*825] changes made to the formula. This court rejected the plaintiffs' request that it rule on the constitutionality of the new legislation, stating that the facts and figures necessary to demonstrate plaintiffs' claims as to the new legislation were not part of the record before the court. *Knowles*, 219 Kan. at 278.

In *Knowles*, this court did not review the 1973 Act in the first instance; nor did it reach an independent conclusion as to the constitutionality of that Act. In contrast, in the instant case, not only was the issue of the constitu-

tionality of the SDFQPA before this court pursuant to our appellate jurisdiction, but also we evaluated the district court's findings of fact to determine if they were supported by substantial competent evidence and determined the school financing formula was unconstitutional. In addition, the statutory amendments at issue in *Knowles* were made in response to the district court's declaratory judgment issued while it still had jurisdiction over the case. Here, H.B. 2247 arose as a remedy in response to a specific order of this court while we retained jurisdiction. Due to these [***17] differences, the following statement in *Knowles* actually supports our continuing review at this juncture:

"The right of persons to challenge the constitutional effect of a law upon their persons or property should not be aborted every time the law is amended by the legislature. In some instances amendments occur almost annually with minimal impact upon the overall effect of the law. It is entirely possible that the 1976 legislature will again amend this Act.

....

"The nature of this controversy is such that the rights of the parties continue to be affected by the law. It is an ongoing controversy which can be adjudicated in the present action as well, if not better, than in a new action filed." *Knowles*, 219 Kan. at 279-80.

In short, this court's retained jurisdiction allows a review to determine if there has been compliance with our opinion.

The State's next argument -- that if the provisions of H.B. 2247 are properly before us, we must presume that the new statute is constitutional -- has already been rejected. (Order, 4/15/05.) While this presumption normally applies to initial review of statutes, in this case we have already determined the financing [***18] formula does not comply with Article 6, § 6. H.B. 2247 was passed because [*826] this court ordered remedial action. The State now presents its remedy for our determination of whether it complies with our order.

The Ohio Supreme Court faced the same argument after the Ohio Legislature passed school finance legislation in response to the court's ruling that the system was unconstitutional. It also rejected the argument, stating:

"The legislature has the power to draft legislation, and the court has the power to

determine whether that legislation complies with the Constitution. *However, while it is for the General Assembly to legislate a remedy, courts do possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional.* If it did not, then the power to find a particular Act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy." (Emphasis added.) *DeRolph v. State*, 89 Ohio St. 3d 1, 12, 2000 Ohio 437, 728 N.E.2d 993 (2000).

Typically [***19] a party asserting compliance with a court decision ordering remedial action bears the burden of establishing that compliance, and our April 15 order made the allocation of that burden clear in this case. See also *DeRolph v. State*, 83 Ohio St. 3d 1212, 1212, 1998 Ohio 301, 699 N.E.2d 518 (1998) (state must meet burden by preponderance of evidence standard).

We also reject the State's related argument that the doctrine of separation of powers limits our review to the issue of whether the legislature had the authority to pass such legislation. Any language in *U.S.D. No. 229 v. State*, 256 Kan. 232, 236-38, 885 P.2d 1170 (1994), to this effect is inapplicable here because of this case's remedial posture. Even now, however, we do not [***930] quarrel with the legislature's authority. We simply recognize that the final decision as to the constitutionality of legislation rests exclusively with the courts. Although the balance of power may be delicate, ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), it has been settled that the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity. We are not at liberty [***20] to abdicate our own constitutional duty.

Again, like arguments have been raised in other state courts. Other state courts consistently reaffirm their authority, indeed their duty, to engage in judicial review and, when necessary, compel [*827] the legislative and executive branches to conform their actions to that which the constitution requires.

For example, in *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 54-55, 91 S.W.3d 472 (2002), the court reviewed legislation passed after its 1994 determination that the Arkansas school financing system

violated the education provisions of that state's constitution. The Arkansas Supreme Court stated:

"This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education. As Justice Hugo Black once sagely advised: *The judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the [***21] executive and legislative branches.*' Hugo L. Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865, 870 (1960).

....

"The Supreme Court of Kentucky has emphasized the need for judicial review in school-funding matters. The language of that court summarizes our position on the matter, both eloquently and forcefully, and, we adopt it:

'Before proceeding . . . to a definition of "efficient" we must address a point made by the appellants with respect to our authority to enter this fray and to "stick our judicial noses" into what is argued to be strictly the General Assembly's business.

' . . . [In this case] we are asked--based solely on the evidence in the record before us--if the present system of common schools in Kentucky is "efficient" in the constitutional sense. *It is our sworn duty to decide such questions when they are before us by applying the constitution. The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called the constitution and in it provided for the existence of a third equal branch of government, the judiciary.*

' . . . *To avoid deciding the case because of "legislative discretion, [***22] " "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or,*

in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.

"The judiciary has the ultimate power, and the duty, to apply, interpret, define, and construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do. This duty must be exercised even when such action services as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public." (Emphasis added.)

[*828] Almost 60 years ago the Kansas Supreme Court addressed the separation of powers issue in the non-school finance case of *Berentz v. Comm'rs of Coffeyville*, 159 Kan. 58, 152 P.2d 53 (1944). There the appellants challenged a pension act on the grounds it violated Article 2, § 17 of the Kansas Constitution. Finding the challenge meritorious, this court noted:

"This court has always approached consideration of questions [***23] challenging the constitutionality of statutes with a disposition [***931] to determine them in such manner as to sustain the validity of the enactment in question. It has repeatedly recognized, as we do now, the rule that *it is the duty of the court to uphold a law whenever such action is possible. In so doing it has not, however, lost sight of the fact that constitutions are the work not of legislatures or of courts, but of the people, and when in its calm and deliberate judgment, free from the influences frequently responsible for legislative enactments, it determines rights guaranteed by its provisions have been encroached upon it has, with equal consistency, recognized its duty and obligation to declare those enactments in contravention of constitutional provisions.*" (Emphasis added.) 159 Kan. at 62-63.

Our holding in *Berentz* is consistent with decisions in other states when a challenge has been made to the constitutionality of school finance systems and a separation of powers issue has arisen during the remedial

phase. We agree with the conclusions drawn by one commentator reviewing those cases:

"Judicial monitoring in the remedial phase can help check political [***24] process defects and ensure that meaningful relief effectuates the court's decision.

"Thus, when these defects lead to a continued constitutional violation, judicial action is entirely consistent with separation of powers principles and the judicial role. Although state constitutions may commit educational matters to the legislative and executive branches, if these branches fail to fulfill such duties in a constitutional manner, 'the Court too must accept its continuing constitutional responsibility . . . for overview . . . of compliance with the constitutional imperative.' Moreover, unlike federal courts, state courts need not be constrained by federalism issues of comity or state sovereignty when exercising remedial power over a state legislature, for state courts operate within the system of a single sovereign.

"Nor should doubts about the court's equitable power to spur legislative action or to reject deficient legislation impede judicious oversight. An active judicial role in monitoring remedy formulation is well-rooted in the courts' equitable powers. As long as such power is exercised only after legislative noncompliance, it is entirely appropriate." (Emphasis added.) [***25] Note, *"Unfulfilled [829] Promise: School Finance Remedies and State Courts,"* 104 Harv. L. Rev. 1072, 1087-88 (1991).

We now turn to this court's specific concerns about whether the actual costs of providing a constitutionally adequate education were considered as to each of the formula components and the statutory formula as a whole, and whether any unjustified funding disparities have been exacerbated rather than ameliorated by H.B. 2247. In this determination we will be guided, in large part, by the A&M study, despite the State's criticism of it and our knowledge that, at best, its conclusions are dated. We do so for several reasons.

First, the A&M study is competent evidence admitted at trial and is part of the record in this appeal. See

Montoy II, 278 Kan. at 774 (within the extensive record on appeal "there is substantial competent evidence, including the Augenblick & Myers study, establishing that a suitable education, as that term is defined by the legislature, is not being provided").

Second, the legislature itself commissioned the study to determine the actual costs to suitably and equitably fund public school systems; it also maintained the [***26] overall authority to shape the contours of the study and to correct any A&M actions that deviated from its directions during the process. (See K.S.A. 60-460[h]). As we stated in *Montoy II*:

"The legislature directed that a professional evaluation be performed to determine the costs of a suitable education for Kansas school children. In authorizing the study, the legislature defined 'suitable education.' K.S.A. 2003 Supp. 46-1225(e). The Legislative Education Planning Committee (LEPC), to whom the task of overseeing the study was delegated, determined which performance measures would be utilized in determining if Kansas' school children were receiving a suitable [*932] education. The evaluation, performed by Augenblick & Myers, utilized the criteria established by the LEPC, and, in part, examined whether the current financing formula and funding levels were adequate for schools to meet accreditation standards and performance criteria. The study concluded that both the formula and funding levels were inadequate to provide what the legislature had defined as a suitable education." *Montoy II*, 278 Kan. at 773-74.

[***27] Third, the A&M study is the only analysis resembling a cost study before this court or the legislature.

[*830] Fourth, both the Board and the State Department of Education recommended that the A&M study recommendations be adopted at the time the study was completed and sent to the legislature.

With the A&M study as background, we next examine the provisions of H.B. 2247 in light of the two guiding considerations set forth in our January opinion: (1) actual costs of providing a constitutionally adequate education and (2) funding equity.

BASE STATE AID PER PUPIL

BSAPP is the foundation upon which school district funding is built, as state financial aid to schools is determined by multiplying BSAPP by each district's "weighted enrollment." See K.S.A. 72-6410(b). When the SDFQPA was first implemented in 1992, BSAPP was set at \$ 3,600. It remained at that level until 1995, when it was increased by \$ 26 to \$ 3,626. Small increases were funded each year thereafter until the 2002-03 school year. During the years of increases, the amounts ranged from an additional \$ 22 to \$ 50 per student. From 2002 until 2005, the statute allowed for a BSAPP of \$ 3,890; however, [***28] only \$ 3,863 was funded. Over the span of time from when the SDFQPA was implemented in 1992 until 2005, the legislature increased the BSAPP only a total of \$ 263. As the plaintiffs point out, if the BSAPP had been increased to keep up with inflation, in 2001 alone the increase would have been \$ 557. The A&M study recommended increasing the base to \$ 4,650 in 2001, resulting in \$ 623.3 million in additional funding (in 2001 dollars).

H.B. 2247 increases the BSAPP from \$ 3,890 to \$ 4,222. Only \$ 115 of the \$ 359 increase is "new" money; the balance was achieved by eliminating the correlation weighting and shifting those dollars to BSAPP. The \$ 115 increase translates to \$ 63.3 million in additional funding flowing into the financing formula for the 2005-06 school year.

The State argues the legislature considered actual costs in deciding upon the increase.

The plaintiffs point out that the legislature had the A&M study recommendations, as well as the results of a 2005 survey conducted by Deputy Commissioner of Education Dale Dennis for the Senate Education Committee. The survey, which requested cost information [*831] from selected school districts, showed the BSAPP should be \$ 6,057. The [***29] plaintiffs argue that the legislature ignored the A&M and Dennis figures, instead looking at historical expenditures and arbitrarily choosing a BSAPP level based on political compromises and what it believed it could afford without raising taxes.

The Board contends that the increase in the BSAPP, coupled with increases in the at-risk and bilingual weightings, provide a substantial increase in funding for those middle-sized and large districts with a high proportion of such students. By implication, this is an argument that the BSAPP increase helps equalize the funding disparity suffered by those districts.

The plaintiffs, on the other hand, claim that increasing the BSAPP only exacerbates the inequities in the system because the formula was not adjusted to make distorted weights, such as the low-enrollment weight, correspond to actual costs. For example, for every \$ 1 of base funding that middle-sized or large districts receive,

some low-enrollment districts receive \$ 2.14. The plaintiffs assert Dr. Bruce Baker's testimony at trial and his earlier report described this effect.

At a minimum, the increased BSAPP provided for in H.B. 2247 substantially varies from any cost information [***30] in the record and [***933] from any recommendation of the Board or the State Department of Education.

AT-RISK

H.B. 2247 increases funding for at-risk students from .10 of the BSAPP to .145. This increased weighting, when applied to the higher BSAPP, results in an increase of \$ 26 million targeted to at-risk students. The A&M study recommended a weight of .20 for districts with 200 or fewer students, .52 for districts with 1,000 students, .59 for districts with 10,000 students, and .60 for districts with 30,000 students, resulting in a range of \$ 1,491 to \$ 2,790 per student (in 2001 dollars).

Both the State and the Board contend the increased funding for at-risk students is significant. The Board argues that, pending performance of a new cost study, H.B. 2247 should be viewed as a good faith effort toward legislative compliance with our January 3, [*832] 2005, opinion. The plaintiffs, on the other hand, contend that the increased funding level remains significantly lower than that recommended by the State's own expert witness in 1991, *before* the SDFQPA was enacted. That expert, Dr. Allan Odden, recommended a .25 minimum weight to provide an extra \$ 1,000 for each eligible at-risk [***31] student.

Neither the State nor the Board contend that actual costs of educating at-risk students were considered.

BILINGUAL

H.B. 2247 increases the weighting for bilingual programs from .2 to .395 for the 2005-06 school year and thereafter. When applied to the higher BSAPP, the result is an \$ 11 million increase in state aid. The Board computes the effects of these changes to be an additional \$ 1,668 per bilingual student, a 115.7 percent increase. A&M recommended that the bilingual weighting increase be based on student enrollment and that it range from .15 to .97, providing \$ 1,118 to \$ 4,510 per bilingual student.

The plaintiffs point out that this weighting is limited to "contact hours," usually a maximum of two hours per day for each student. This means the \$ 1,668 amount must be reduced by 2/3, to \$ 556 per actual bilingual student.

The State contends that it considered the actual costs of providing a suitable education for bilingual students.

That contention is based solely on the House Select Committee on School Financing's reliance on historical data showing what school districts had already been spending under the financing formula we have held to be unconstitutional. [***32] The Board makes no argument as to the weighting's relationship to actual costs; it simply repeats that it regards the change in the weighting as a good faith effort toward compliance.

Although the increase in this weighting is significant, it still differs substantially from the cost information in the record.

SPECIAL EDUCATION

H.B. 2247 provides for a multi-year phased-in increase in state reimbursement for special education excess costs from 85 percent [*833] in the 2005-06 school year to 88 percent in 2006-07 and 91 percent in 2007-08 and thereafter. According to the evidence at trial, the State had been funding only 85 percent of the excess costs of special education. For fiscal year 2005, however, only 81.7 percent of the average excess costs of special education were funded. Reimbursement at 85 percent thus results in a total funding increase of \$ 17.7 million for the upcoming school year.

The plaintiffs contend that anything less than 100 percent reimbursement for a district's special education costs is a failure to fund the actual costs of a suitable education. The State and the Board both disagree, contending less than 100 percent reimbursement furthers the State's policy [***33] of discouraging school districts from over-identifying students as eligible for special education money.

The defendants have failed to point to any evidence that any district has ever over-identified students; and, when asked at oral arguments, the State's counsel responded that he was not aware of any district that had intentionally inflated its number of such students to maximize reimbursement. Furthermore, the A&M study recommended a [**934] range, based on student enrollment, of weights from .90 to 1.50, resulting in a nearly \$ 102.9 million (in 2001 dollars) increase in funding -- a stark contrast to the \$ 17.7 million provided by H.B. 2247.

LOCAL OPTION BUDGET

H.B. 2247 provides a phased-in increase in the LOB cap from the current 25 percent to 27 percent in the 2005-06 school year, 29 percent in the 2006-07 school year, and 30 percent in the 2007-08 school year and thereafter.

The plaintiffs argue local districts have been forced to use the LOB to cover the inadequacies of state fund-

ing. They also argue the use of the LOB increases disparities and exacerbates inequities.

The Board takes issue with the legislature's failure to provide for equalization for the new level of LOB [***34] authority above 25 percent for the 2005-06 school year only. The absence of equalization means the dollars for the optional increases must come entirely [*834] from each district's property tax base, which can worsen wealth-based disparities.

The State argues that the LOB acts as a counterweight to low-enrollment weighting, at-risk weighting, and perhaps even bilingual weighting, because the middle-sized and large districts expected to benefit from the increased LOB "receive little, if any, of these weightings."

This argument fails because increasing the LOB does not address inadequate funding of middle-sized and large districts that have high concentrations of bilingual, at-risk, minority, and special education students, high pupil-to-teacher ratios, and high dropout rates, but also have low median family incomes and low assessed property valuation. For example, the Emporia school district demonstrates that size of enrollment does not necessarily correlate with high property valuations or low numbers of students who are more costly to educate.

The original intent and purpose of the LOB was to allow individual districts to levy additional property taxes to fund enhancements to the constitutionally [***35] adequate education provided and financed under the legislative financing formula. The evidence before the trial court demonstrated that the inadequacy of the formula and its funding had forced some districts to use the LOB to fund the State's obligation to provide a constitutionally adequate education rather than enhancements. See *Montoy II*, 278 Kan. at 774. H.B. 2247 does nothing to discourage this practice.

We also agree with the plaintiffs and the Board that, in fact, the legislation's increase in the LOB cap exacerbates the wealth-based disparities between districts. Districts with high assessed property values can reach the maximum LOB revenues of the "district prescribed percentage of the amount of state financial aid determined for the district in the school year" (K.S.A. 72-6433[a][1], amended by S.B. 43, sec. 17) with far less tax effort than those districts with lower assessed property values and lower median family incomes. Thus, the wealthier districts will be able to generate more funds for elements of a constitutionally adequate education that the State has failed to fund.

[*835] COST-OF-LIVING WEIGHTING

H.B. 2247 authorizes [***36] a new local property tax levy for cost-of-living weighting. As originally en-

acted, the purpose of this weighting was to "finance teacher salary enhancements." H.B. 2247, sec. 19. In S.B. 43, sec. 12, the legislature removed this limiting provision and no purpose for the additional funding is now stated in the law. This weighting is available in those districts where the average appraised value of a single-family residence exceeds 125 percent of the state average, as long as the district has already adopted the maximum LOB. This is estimated to amount to a total funding increase of \$ 24.6 million for the 17 districts that would currently qualify.

This provision, the State asserts, is necessary to allow districts with high housing costs to recruit and retain high-quality teachers and is based on the actual costs of providing an education in those 17 districts that would qualify.

[**935] Counsel for the State could not substantiate, when asked at oral arguments, its rationale that those 17 districts pay higher salaries or would pay higher salaries to teachers or that higher education costs are linked to housing prices. Further, as the plaintiffs noted, the evidence at trial demonstrated that [***37] it is the districts with high-poverty, high at-risk student populations that need additional help in attracting and retaining good teachers.

Furthermore, we note that this weighting, like the increase in the LOB cap, demonstrates the State is not meeting its obligation to provide suitable financing. Also, as with the other property-tax based provisions of H.B. 2247 there is a potentially disequalizing effect. Moreover, since the original reason given for the enhancement, teacher salary increases, has been removed from the legislation, the funds generated can be used for any purpose.

LOW-ENROLLMENT WEIGHTING

Low-enrollment weighting provides a sliding scale of adjustments for districts with fewer than 1,750 students; as district enrollment decreases past that number, the size of the adjustment increases. In other words, smaller school districts receive more favorable treatment based on the premise that they require additional [*836] funding to balance economies of scale at work for larger districts.

H.B. 2247 did not substantively change the low-enrollment weighting; it remains a significant component of the financing formula. Extrapolating from State Department of Education data, [***38] the plaintiffs argue that total state spending on the low-enrollment weighting in 2003-04 was \$ 226,189,852. In comparison, total state spending in 2003-04 on at-risk students was \$ 47,123,964 and on bilingual students was \$ 8,352,964. The plaintiffs also note that application of the various

weighting factors results in a large disparity in per pupil aid, ranging in 2002-03 from \$ 16,968 to \$ 5,655, and this disparity is largely caused by the low-enrollment factor.

Because of the significant impact of low-enrollment weighting on the financing formula, in our January opinion and April order we sought cost justifications for it. In response to questions from the court at oral arguments, counsel for the State could not provide any cost-based reason for using the 1,750 enrollment figure or for the weight's percentage. This absence of support is particularly troubling when we consider the disparity this low-enrollment weighting may produce. H.B. 2247 has the potential to worsen this inequity because it eliminates correlation weighting for districts with 1,750 enrollment or more. The funds allocated for correlation weighting were transferred to the BSAPP; this gives low-enrollment districts [***39] even more of the funds that previously were devoted to balancing the disparities in per pupil funding caused by the low-enrollment weighting.

EXTRAORDINARY DECLINING ENROLLMENT

In addition to the declining enrollment provision of K.S.A. 2004 Supp. 72-6407(e)(2), H.B. 2247, as amended by S.B. 43, created two provisions concerning extraordinary declining enrollment. First, H.B. 2247 authorizes a district with "extraordinary declining enrollment," defined as declining enrollment over 3 years at a rate of 15 percent or 150 pupils per year, to apply to the Board of Tax Appeals (BOTA) for permission to levy an additional property tax if it has already adopted the maximum LOB. See H.B. 2247, sec. 29, repealed and replaced by S.B. 43, sec. 13. Currently only four [*837] districts potentially would qualify for this provision. We will refer to this provision as the EDE-BOTA provision.

Second, H.B. 2247 requires districts entitled to equalizing supplemental capital improvements state aid on their bonds to seek approval from the Joint Committee on State Building Construction (JCSBC) prior to issuing new bonds if the district has had an "extraordinary declining enrollment, [***40] " defined for purposes of this section as declining enrollment over 3 years at a rate of 5 percent or 50 pupils per year. If approval is denied, the district can still issue the bonds, but it does not receive any state aid on the bonds. See H.B. 2247, sec. 28, repealed and replaced [**936] by S.B. 43, sec. 14. We will refer to this provision as the EDE-JCSBC provision.

The State asserts that these provisions, which are intended to help districts absorb lost revenue from declining enrollments, ensure consideration of actual costs because districts seeking to access authority for this addi-

tional local tax levy must document need before BOTA or JCSBC.

The Board contends it is difficult to assess the financial impact of these provisions because the money available under them is potentially unlimited, subject to each district's willingness to tap into its property tax base, and, when the EDE-BOTA provision applies, BOTA's approval. The Board urges us to sever these provisions pending appropriate cost analysis.

The plaintiffs contend these provisions are not based upon cost and exacerbate funding inequities in two ways. First, the plaintiffs point to the EDE-JCSBC provision which allows issuance [***41] of bonds to construct new facilities but if permission is denied the district would not receive any state aid on the bonds. Plaintiffs contend that because wealthy districts with extraordinary declining enrollment such as Shawnee Mission receive no equalizing supplemental capital improvements state aid on their bonds, the new provision penalizes only districts with low property valuation and declining enrollment.

Second, the plaintiffs contend that these provisions exacerbate funding inequities because the extraordinary declining enrollment weight is added into the definition of a district's "adjusted enrollment" and thus adds to the base upon which the LOB is computed. [*838] The effect of this is to provide 127 percent of any revenues lost from extraordinary declining enrollment. This effect is further compounded for those districts, like Shawnee Mission, that also benefit from the cost-of-living weight, which is also included in the "adjusted enrollment."

These provisions have the potential to be extremely disequalizing because they are unlimited and have been designed to benefit a very small number of school districts.

CAPITAL OUTLAY

In support of this provision of H.B. 2247, [***42] the State relies upon an affidavit of Representative Mike O'Neal. The affidavit states the legislature was mindful that this court had noted the repeal of the capital outlay cap in its January opinion. The affidavit also states the decision to reimpose the cap at 8 mills was made after the legislature reviewed data from the Department of Education and heard from various districts. The Board does not offer any information as to whether actual costs were considered with respect to this provision.

The plaintiffs do not specifically address the extent to which actual costs were considered in imposing the new cap on capital outlay. The plaintiffs argue that, although H.B. 2247 reimposes a cap on the capital outlay authority, it still is disequalizing because it grandfathers

those districts with a higher capital outlay resolution in place for up to 4 more years.

The State argues, without elaboration, that the 8 mill cap reflects the legislature's attempt to improve wealth equalization. The Board encourages the court to view this change favorably, despite the local property tax basis of this factor.

Because the provision is based on local property tax authority, the amount of revenue a [***43] district can raise is tied to property value and median family income; thus the failure to provide any equalization to those districts unable to access this funding perpetuates the inequities produced by this component.

FINANCING FORMULA AS A WHOLE

With regard to the financing formula as a whole, the parties [*839] basically restate the same arguments they made regarding the formula's components. The State claims that the increased funding provided by H.B. 2247 alleviates this court's constitutional concerns. The Board disagrees, but it considers the increased funding a good faith initial effort toward compliance and an installment on the first remedy year toward what may very well be a much larger obligation based on the evidence in this case. The plaintiffs argue [*937] the increases in funding "fall grossly short of what is actually necessary to provide a constitutionally suitable education." The State contends that overall it considered, to the extent possible, actual costs, including the A&M study. The plaintiffs respond that actual costs were not considered; rather the financing formula as amended by H.B. 2247 is merely a product of political compromise and the legislative majority's [***44] unwillingness to consider raising taxes to increase funding of schools. The Board argues H.B. 2247 does not fund actual costs and has many inequities.

We agree with the Board that although H.B. 2247 does provide a significant funding increase, it falls short of providing constitutionally adequate funding for public education. It is clear that the legislature did not consider what it costs to provide a constitutionally adequate education, nor the inequities created and worsened by H.B. 2247. At oral arguments, counsel for the State could not identify any cost basis or study to support the amount of funding provided by H.B. 2247, its constellation of weightings and other provisions, or their relationships to one another.

Particularly, we share the plaintiffs' and Board's concern that H.B. 2247's increased dependence on local property taxes, as decided by each school district, exacerbates disparities based on district wealth. We fully acknowledge that once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from al-

lowing school districts to raise additional funds for enhancements to the constitutionally [***45] adequate education already provided. At least to the extent that funding remains constitutionally equalized, local assessments for this purpose may be permissible. Clearly, however, such assessments are not acceptable as a substitute for [*840] the state funding the legislature is obligated to provide under Article 6, § 6. That should pre-exist the local tax initiatives.

As of this time, the legislature has failed to provide suitable funding for a constitutionally adequate education. School districts have been forced to use the LOB to supplement the State's funding as they struggle to suitably finance a constitutionally adequate education, a burden which the constitution places on the State, not on local districts. The result is wealth-based disparity because the districts with lower property valuations and median incomes are unable to generate sufficient revenue. Because property values vary widely, a district's ability to raise money by the required mill levy also varies widely. The cost-of-living weighting and extraordinary declining enrollment provision also have the potential to exacerbate inequity. A higher LOB cap, cost-of-living weighting, and the extraordinary declining enrollment [***46] provisions cannot be allowed to exacerbate inequities while we wait for the legislature to perform its constitutional duty.

We conclude that, on the record before us, a continuing lack of constitutionally adequate funding together with the inequity-producing local property tax measures mean the school financing formula, as altered by H.B. 2247, still falls short of the standard set by Article 6, § 6 of the Kansas Constitution.

COST STUDY

As we prepare to consider an appropriate remedy and the mechanisms necessary to assure that future school financing will meet the requirements of the constitution, we agree with all parties that a determination of the reasonable and actual costs of providing a constitutionally adequate education is critical. H.B. 2247 provides for a Legislative Post Audit "cost analysis study."

Section 3 of the legislation reads in relevant part:

"(a) In order to assist the legislature in the gathering of information which is necessary for the legislature's consideration when meeting its constitutional duties to:

- (1) Provide for intellectual, educational, vocational and scientific improvement in public schools established and maintained by the state; and [***47]
- (2) make suitable provision for the finance of educa-

tional interests of the state, the division of post audit shall conduct a professional cost study analysis to determine the costs of [*841] delivering the kindergarten and grades one through 12 [**938] curriculum, related services and other programs mandated by state statute in accredited schools. . . .

"(b) Any study conducted pursuant to subsection (a) shall include:

- (1) A determination of the services or programs required by state statute to be provided by school districts. Such review shall include high school graduation requirements, admissions requirements established by the state board of regents pursuant to K.S.A. 76-716, and amendments thereto, state scholarship requirements established by the state board of regents and courses of instruction at various grade levels required by state statute.

- (2) A study of the actual costs incurred in a sample of school districts to provide reasonable estimates of the costs of providing services and programs required by state statute to be provided by school districts for regular elementary and secondary education, including instruction, administration, support staff, supplies, [***48] equipment and building costs.

- (3) A study of the actual costs incurred in a sample of school districts to provide reasonable estimates of the costs of providing services and programs required by state statute to be provided by school districts for specialized education services including, but not limited to, special education and related services, bilingual education and at-risk programs.

- (4) A study of the factors which may contribute to the variations in costs incurred by school districts of various sizes and in various regions of the state when providing services or programs required by state statute to be provided by school districts. Such study shall include the administrative costs of providing such services and programs.

- (5) An analysis in a sample of districts as determined by the legislative post auditor showing such things as:

- (A) The percent of the estimated cost of providing services and programs required by state statute that could have been funded by the various types of state aid the districts received in the most recently completed school year, as well as the percent funded by the district's local option budget;

(B) the percent of district funding that is spent [***49] on instruction;

(C) the percent of district funding that is spent on central administration; and

(D) the percent of district funding that is spent on support services.

(6) A review of relevant studies that assess whether there is a correlation between amounts spent on education and student performance.

(7) A review to determine whether students who are counted as a basis for computing funding for specialized educational services are actually receiving those services.

(8) Any additional reviews or analyses the legislative post auditor considers relevant to the legislature's decisions regarding the cost of funding services or programs required by state statute to be provided by school districts.

....

"(d) Following the completion of such cost analysis study, the legislative post auditor shall submit a detailed report thereon to the legislature on or before the [*842] first day of the 2006 legislative session. If additional time is needed to provide the most accurate information relating to any area of requested study, the legislative post auditor shall so report to the legislature, explaining the reasons for the need for additional time and providing a reasonable time frame for [***50] completion of that aspect of the study. In that event, the legislative post auditor shall submit a report on that portion of the study which has been completed before the start of the 2006 legislative session and the balance of such report shall be submitted within the time frame established by the legislative post auditor when requesting additional time." H.B. 2247, sec. 3.

The plaintiffs and the Board contend that the H.B. 2247 study is designed merely to determine the amounts of historical expenditures under the system and that the legislature will then equate those expenditures to reasonable and actual costs of a future system [*939] we should find constitutional. This characterization is not entirely correct.

Although the language of the statute is not completely clear, it can be read to require post audit, among other things, to study historical costs in a sample of districts and then extrapolate from the collected data a reasonable estimate of the future cost of providing services and programs "required by state statute." Estimating future reasonable and actual costs based on historical expenditures can be acceptable if post audit ensures that its examination of historical expenditures [***51] corrects for the recognized inadequacy of those expenditures and ensures that a reliable method of extrapolation is adopted. Post audit must incorporate those components into its study, and its report to the legislature must demonstrate how the incorporation was accomplished.

It also appears that the study contemplated by H.B. 2247 is deficient because it will examine only what it costs for education "inputs" -- the cost of delivering kindergarten through grade 12 curriculum, related services, and other programs "mandated by state statute in accredited schools." It does not appear to demand consideration of the costs of "outputs" -- achievement of measurable standards of student proficiency. As the Board pointed out in its brief, nowhere in H.B. 2247 is there specific reference to K.S.A. 72-6439(a) or (c), which provided the criteria used by this court in our January 2005 opinion to evaluate whether the school financing formula provided a constitutionally adequate education. [*843] H.B. 2247 also does not mention educational standards adopted by the Board pursuant to its constitutional responsibilities under Article 6, § 2(a) or in fulfilling its statutory directives. [***52] Without consideration of outputs, any study conducted by post audit is doomed to be incomplete. Such outputs are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the legislature. See *Montoy II*, 278 Kan. at 773 (quoting K.S.A. 72-6439) (constitutionally suitable education is one in which "schools meet the accreditation requirements and [students are] achieving an 'improvement in performance that reflects high academic standards and is measurable.'"); see also Kan. Const., Art. 6, § 1 (legislature shall provide for intellectual, educational, vocational, and scientific *improvement*). The post audit study must incorporate the consideration of outputs and Board statutory and regulatory standards, in addition to statutorily mandated elements of kindergarten through grade 12 education. Further, post audit's report to the legislature must demonstrate how this consideration was accomplished.

The study parameters in H.B. 2247 do provide for analysis of the percentages of sample school district spending on instruction, central administration, and support services. They [***53] also specifically provide for exploration of several components of the current financing formula. We endorse these provisions with the ex-

ception that all administrative costs, not just costs of central administration, must be analyzed. All of this information should assist post audit and, eventually, the legislature and this court in evaluating the reasonableness or appropriateness of cost estimates. Suitable finance of a constitutionally adequate education does not necessarily include every item each school district or student *wants*; its focus must be on *needs* and the appropriate costs thereof.

REMEDY

In light of the legislature's unsatisfactory response to our January opinion we are again faced with the need to order remedial action. See *Montoy II*, 278 Kan. at 775 ("The legislature, by its action or lack thereof in the 2005 session, will dictate what form our remedy, if necessary, will take."). We are guided not only by our interpretation [*844] of Article 6, § 6, but also by the present realities and common sense. Time is running out for the school districts to prepare their budgets, staff their classrooms and offices, and begin the 2005-06 school year. [***54] School districts need to know what funding will be available as soon as possible.

[**940] The legislature has known for some time that increased funding of the financing formula would be necessary. In July 2002, the Kansas Department of Education prepared a computation of the cost of implementing the recommendations in the A&M study. Calculated in 2001 dollars the total cost of the increase would have been \$ 725,669,901 for each school year. Additionally, the Department adjusted that number because of changes in LOB funding and applied a 2 percent inflation factor for each of the school years of 2001-02, 2002-03, and 2003-04. The resulting number was an increase in costs of approximately \$ 853 million. As noted, the A&M study was commissioned by the legislature, monitored by the legislature's committees, paid for by the legislature with tax dollars, and received by the legislature. Although the State claims it considered the A&M study, it in fact chose to impugn its design and ignore its recommendations. It can no longer do so.

This case is extraordinary, but the imperative remains that we decide it on the record before us. The A&M study, and the testimony supporting it, appear in the record [***55] in this case. The State cites no cost study or evidence to rebut the A&M study, instead offering conclusory affidavits from legislative leaders. Thus the A&M study is the only analysis resembling a legitimate cost study before us. Accordingly, at this point in time, we accept it as a valid basis to determine the cost of a constitutionally adequate public education in kindergarten through the 12th grade. The alternative is to await yet another study, which itself may be found legislatively or judicially unacceptable, and the school children of

Kansas would be forced to further await a suitable education. We note that the present litigation was filed in 1999.

The initial attractiveness of the Board's suggestion that we accept H.B. 2247 as an interim step toward a full remedy pales in light of the compelling arguments of immediate need made by the plaintiffs and *amici curiae*. They remind us that we cannot continue to [*845] ask current Kansas students to "be patient." The time for their education is now. As the North Carolina Supreme Court eloquently stated:

"The children . . . are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied [***56] their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive. We note that the instant case commenced ten years ago. If in the end it yields a clearly demonstrated constitutional violation, ten classes of students as of the time of this opinion will have already passed through our state's school system without benefit of relief. We cannot similarly imperil even one more class unnecessarily." *Hoke Cty Bd. of Educ. v. State*, 358 N.C. 605, 616, 599 S.E.2d 365 (2004).

As set forth earlier in this opinion, the Legislative Division of Post Audit has been commissioned to conduct a comprehensive and extensive cost study to be presented to the 2005-06 legislature. With such additional information available, the legislature should be provided with the cost information necessary to make policy choices establishing a suitable system of financing of Kansas public schools.

We conclude, however, that additional funding must be made available for the 2005-06 school year to assist in meeting the school districts' immediate needs. We are mindful of the Board's [***57] argument that there are limits on the amount the system can absorb efficiently and effectively at this point in the budget process. We further conclude, after careful consideration, that at least one-third of the \$ 853 million amount reported to the Board in July of 2002 (A&M study's cost adjusted for inflation) shall be funded for the 2005-06 school year.

Specifically, no later than July 1, 2005, for the 2005-06 school year, the legislature shall implement a minimum increase of \$ 285 million above the funding level

for the 2004-05 school year, which includes the \$ 142 million presently contemplated in H.B. 2247. In deference to the cost study analysis mandated by the legislature in H.B. 2247, the implementation beyond the 2005-06 school year will be contingent upon the results of the study directed by H.B. 2247 and this opinion.

[**941] [*846] Further, if (1) the post audit study is not completed or timely submitted for the legislature to consider and act upon it during the 2006 session, (2) the post audit study is judicially or legislatively determined not to be a valid cost study, or (3) legislation is not enacted which is based upon actual and necessary costs of providing a suitable system [***58] of finance and which equitably distributes the funding, we will consider, among other remedies, ordering that, at a minimum, the remaining two-thirds (\$ 568 million) in increased funding based upon the A&M study be implemented for the 2006-07 school year.

Clearly, the legislature's obligation will not end there; the costs of education continue to change and constant monitoring and funding adjustments are necessary. H.B. 2247's provisions regarding establishment of the 2010 Commission and mandating annual increases based upon the Consumer Price Index may satisfy these demands, but the legislature may seek other means to assure that Kansas school children, now and in the future, receive a constitutionally adequate education.

In addition, on the rationale previously expressed, the new funding authorized by H.B. 2247's provisions regarding the increased LOB authority over 25 percent, the cost-of-living weighting, and both extraordinary declining enrollment provisions are stayed. The remainder of H.B. 2247, as amended by the legislature in compliance with this opinion, shall remain in effect for the 2005-06 school year.

We readily acknowledge that our present remedy is far from perfect; [***59] indeed, we acknowledge that it is merely a balancing of several factors. Among those factors are:

(1) The ever-present need for Kansas school children to receive a constitutionally adequate education. *Montoy II*, 278 Kan. at 773.

(2) The role of this court as defined in the Kansas Constitution. See *Berentz v. Comm'rs of Coffeyville*, 159 Kan. 58, 152 P.2d 53 (1944).

(3) The need for the legislature to bring its school finance legislation into constitutional compliance, with acknowledgment of the unique difficulties inherent in the legislative process.

[*847] (4) The press of time caused by the rapidly approaching school year.

Accordingly, we retain jurisdiction of this appeal. If necessary, further action will be taken by this court as is deemed advisable to ensure compliance with this opinion.

[MONTROY 5- July 28, 2006]

**RYAN MONTROY, et al., Appellees/Cross-appellants, v. STATE OF KANSAS, et al.,
Appellants/Cross-appellees.**

No. 92,032

SUPREME COURT OF KANSAS

282 Kan. 9; 138 P.3d 755; 2006 Kan. LEXIS 479

July 28, 2006, Opinion Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Bergman v. Kansas*, 127 S. Ct. 730, 166 L. Ed. 2d 562, 2006 U.S. LEXIS 9262 (U.S., 2006)

PRIOR HISTORY: [***1] Appeal from Shawnee district court; **TERRY L. BULLOCK**, judge. *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160, 2005 Kan. LEXIS 2 (2005)

DISPOSITION: Appeal dismissed and remanded with directions.

COUNSEL: Alok Ahuja, of Lathrop & Gage L.C., of Overland Park, and Stephen R. McAllister, special assistant attorney general, argued the cause, and Jeffrey R. King, of Lathrop & Gage L.C., of Overland Park, David W. Davies, assistant attorney general, and Phill Kline, attorney general, were with Alok Ahuja on the briefs for appellant/cross-appellee State of Kansas.

Dan Biles, of Gates, Biles, Shields & Ryan, P.A., of Overland Park, argued the cause, and Rodney J. Bieker, of Kansas Department of Education, was with him on the briefs for appellants/cross-appellees Janet Waugh, Sue Gamble, John Bacon, Bill Wagnon, Connie Morris, Kathy Martin, Kenneth Willard, Carol Rupe, Iris Van Meter, Steve Abrams, and Bob Corkins.

Alan L. Rupe, of Kutak Rock LLP, of Wichita, argued the cause, and Richard A. Olmstead, of the same firm, and John S. Robb, of Somers Robb & Robb, of Newton, were with him on the brief for appellees/cross-appellants.

Patricia E. Baker and David C. Cunningham, of Kansas Association of School Boards, of Topeka, were on the

brief for amicus curiae Kansas Association [***2] of School Boards.

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David M. Schauner and Robert M. Blaufuss, of Kansas National Education Association, of Topeka, were on the brief for amicus curiae Kansas National Education Association.

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Bernard T. Giefer, of Giefer Law LLC, of WaKeeney, was on the brief for amici curiae Unified School District No. 208, Trego County, Kansas (WaKeeney), et al. (126 other Kansas school districts).

Bradley R. Finkeldei and Peter C. Curran, of Stevens & Brand, L.L.P., of Lawrence, were on the brief for amicus curiae Unified School District No. 229 (Blue Valley School District).

Thomas R. Powell and Roger M. Theis, of Hinkle Elkouri Law Firm L.L.C., of Wichita, were on the brief for amicus curiae Unified School District No. 259, Sedgwick County, Kansas.

Anne M. Kindling, of Goodell, Stratton, Edmonds & Palmer, L.L. [***3] P., of Topeka, was on the brief for amicus curiae Unified School District No. 512, Shawnee Mission, Kansas.

JUDGES: NUSS, J., not participating. ROSEN J., concurring. BEIER, J., concurring in part and dissenting in part. LUCKERT, J., joins in the foregoing concurring and dissenting opinion.

OPINION

[*10] [**757] *Per Curiam*: This is the fifth time this case has been before this court since the district court *sua sponte* dismissed the case on November 21, 2001. In that initial appeal by the plaintiffs, we reversed the district court and remanded the case for further proceedings in *Montoy v. State*, 275 Kan. 145, 62 P.3d 228 (2003) (*Montoy I*). On remand, the district court held that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.*, was unconstitutional. The defendants appealed, and on January 3, 2005, this court affirmed the district court in part, concluding that the legislature had failed to make suitable provision for the finance of the public schools as required by Article 6, § 6 of the Kansas Constitution. *Montoy v. State*, 278 Kan. 769, 120 P.3d 1160 (2005) (*Montoy II*). We [***4] stayed the issuance of the mandate to allow the legislature a reasonable time to correct the constitutional infirmity in the school finance formula and set a deadline of April 12, 2005, for that to be accomplished.

Although we held that increased funding would be required, we did not dictate the manner in which the legislature should amend the financing formula to bring it into constitutional compliance, noting, as did the district court, that "there are 'literally hundreds of ways' the financing formula can be altered to comply with Art. 6, § 6." 278 Kan. at 775. However, we did make it clear that the actual costs of providing a constitutionally suitable education and the equity with which the funds are distributed are critical factors for the legislature to consider in crafting a suitable formula for financing public education. 278 Kan. at 775.

The legislature responded by enacting changes to the school finance formula on March 30, 2005. (2005 H.B. 2247 [L. 2005, ch. 152], modified by 2005 S.B. 43 [L. 2005, ch. 194] [collectively referred to as H.B. 2247].) See *Montoy v. State*, 279 Kan. 817, 819, [*11] 112 P.3d 923 (2005) ([***5] *Montoy III*). H.B. 2247 provided a funding increase of approximately \$ 142 million for the 2005-06 school year.

The changes made by H.B. 2247 included modifications to the weighting components of the finance formula and changes to the authority of certain districts to raise revenue through local ad valorem property taxes. H.B. 2247 modified the funding formula by increasing the Base State Aid Per Pupil (BSAPP), bilingual, and at-risk weightings; phasing in increases in

special education funding; eliminating the correlation weighting (while retaining the low enrollment weighting); and providing for annual adjustments to general state aid funding levels in accordance with the Consumer Price Index-Urban (CPI-U).

With respect to local revenue generating provisions, H.B. 2247 provided for incremental increases in the 25 percent cap on local option budgets (LOB) over the following 3 years to 30 percent in the 2007-08 school year; authorized districts with high housing costs to levy a "cost-of-living" ad valorem tax to pay enhanced teacher salaries; and authorized [**758] districts with extraordinary declining enrollment to apply to the Board of Tax Appeals (BOTA) for permission to levy [***6] an additional ad valorem tax.

H.B. 2247 also provided for a cost study to be performed by the Legislative Division of Post Audit to "determine the costs of delivering the kindergarten and grades one through 12 curriculum, related services and other programs mandated by state statute in accredited schools." 279 Kan. at 821.

After the new legislation became law, this court issued an order to show cause directing the parties to address whether the amendments to the financing formula met the legislature's constitutional obligation to "make suitable provision for financing" of the public schools. 279 Kan. at 820. The parties were directed to address whether the actual costs of providing a suitable education were considered with respect to each component of the formula, as well as the formula as a whole, "and whether H.B. 2247 exacerbates and/or creates funding disparities among the districts." 279 Kan. at 820.

After an expedited briefing and argument schedule, on June 3, 2005, this court held that the changes made by H.B. 2247 failed [*12] to bring the state's school financing formula into compliance with Article 6, § 6 of the Kansas Constitution. 279 Kan. at 840. [***7] This court considered each component of the formula, the new local ad valorem tax authorizations, and the overall funding provided by the changes as a whole and held that although H.B. 2247 provided a significant funding increase, it still failed to provide constitutionally suitable funding for public education because the changes were not based on considerations of the actual costs of providing a constitutionally adequate education and exacerbated existing funding inequities. 279 Kan. at 839-40.

Specifically, this court found that the increases in the BSAPP, at-risk weighting, bilingual weighting, and special education funding all varied substantially from the cost information in the record, and that the State

had failed to provide any cost basis to support the amount of funding provided. 279 Kan. at 831-33, 839. Further, this court noted that the low enrollment weighting was not altered, and although we had specifically sought cost justifications for this significant funding component, none was provided. 279 Kan. at 836.

Moreover, this court found certain components of the amended formula exacerbated unjustified inequities in the distribution [***8] of funding. For example, we found that the funding disparity caused by the low enrollment weighting was exacerbated by the elimination of the correlation weighting for middle-sized and large districts. By rolling those funds into the BSAPP, low enrollment districts were given "even more of the funds that previously were devoted to balancing the disparities in per pupil funding caused by the low-enrollment weighting." 279 Kan. at 836.

We also found that "H.B. 2247's increased dependence on local property taxes, as decided by each school district, exacerbate[d] disparities based on district wealth." 279 Kan. at 839.

We held that the new cost-of-living property tax provision was not based on any evidence that there was any link between high housing costs and higher education costs or that the 17 districts that would benefit from the provision pay higher teacher salaries. We noted that the evidence at trial demonstrated the opposite—that the districts with high-poverty, high at-risk student populations [*13] are the ones that need help attracting and retaining teachers. 279 Kan. at 835.

This court also held that H.B. 2247's two extraordinary [***9] declining enrollment provisions were potentially "extremely disqualifying because they are unlimited and have been designed to benefit a very small number of school districts." 279 Kan. at 838.

With respect to the increase in the LOB cap, this court found that the failure to provide for equalizing state aid for the new level of LOB authority worsened wealth-based disparities between districts, because districts with high assessed property values can generate maximum LOB revenues with far less [**759] tax effort than districts with lower assessed property values and median family incomes. 279 Kan. at 834.

Moreover, this court found it significant that H.B. 2247 did not attempt to correct the problem identified in *Montoy II*, namely, that unconstitutional underfunding has forced some districts to "use the LOB to fund the State's obligation to provide a constitutionally adequate

education rather than enhancements," as the LOB was originally intended. 279 Kan. at 834.

This court also concluded that the Legislative Division of Post Audit (LPA) cost study provided for by H.B. 2247 was insufficient to determine the actual and necessary costs [***10] of providing a constitutionally suitable education because it would examine only the cost of "inputs"—the curriculum, programs, and related services required by law, and would not consider the costs of "outputs"—the cost of achieving measurable standards of proficiency. 279 Kan. at 842-43. Accordingly, the court required the cost study to incorporate the costs of outputs in addition to the statutorily mandated elements of a K-12 education. 279 Kan. at 843.

Because time was running out for school districts to prepare for the 2005-06 school year, there was no evidence of the actual costs of a suitable education other than the Augenblick & Myers (A&M) study, and the litigation had been pending since 1999, this court accepted the A&M study "as a valid basis to determine the cost of a constitutionally adequate public education" and ordered the legislature to implement for the 2005-06 school year a minimum funding increase of \$ 285 million above the 2004-05 funding level, which [*14] included the \$ 142 million provided by H.B. 2247. 279 Kan. at 844-45. The \$ 285 million increase represented one-third of the \$ 853 million estimated cost of implementing [***11] A&M's recommendations.

Deferring to the cost study analysis to be performed by LPA, this court held that implementation of the remaining two-thirds of the A&M recommendation would be contingent upon the results of the LPA study. However, absent compliance, this court stated we would consider ordering an increase in funding of the remaining \$ 568 million for the 2006-07 school year, in addition to other remedies. 279 Kan. at 846.

This court also ordered a stay on the increased LOB cap, the cost-of-living weighting, and both extraordinary declining enrollment provisions, due to their potential to exacerbate inequities in funding. 279 Kan. at 846. We retained jurisdiction, stating that further action, if necessary "will be taken by this court as is deemed advisable to ensure compliance with this opinion." 279 Kan. at 847.

The governor then called the legislature into special session. See Governor's Proclamation of June 9, 2005. By July 2, 2005, the legislature had failed to comply with this court's June 3, 2005, opinion, so we issued an order directing the parties to appear on July 8, 2005, and show cause "why this Court should not

[***12] enter an ORDER enjoining the expenditure and distribution of any funds for the operation of Kansas schools pending the Legislature's compliance with this Court's June ruling regarding minimum funding increases for the 2005-06 school year." *Montoy*, Order of July 2, 2005.

Thereafter, on July 6, 2005, the legislature enacted S.B. 3 (L. 2005 Special Session, ch. 2), which provided a funding increase of \$ 147 million over the \$ 142 million provided by H.B. 2247.

With respect to the various components of the formula, S.B. 3 increased the BSAPP by another \$ 35 to \$ 4,257; increased the at-risk weighting from .145 to .193; increased funding for special education by raising the excess cost reimbursement from 88 percent in 2006-07 to 92 percent; lowered the enrollment cut-off for the low enrollment weighting from 1,725 students to 1,662; restored the correlation weighting with a threshold of 1,622 students; eliminated the cap on LOB equalizing supplemental state aid and increased access to LOB equalization for districts with lower property [*15] valuations by raising the AVPP entitlement from the 75th percentile to the 81.2 percentile; replaced the extraordinary declining enrollment [***13] (EDE)-BOTA provision with a similar declining enrollment provision that applies more [**760] broadly to any district with a decline in enrollment from the previous year; and provided for matching state aid for districts with lower property valuations.

S.B. 3 also amended the cost study provision to require the LPA to conduct two cost studies: One would study the cost of inputs, and the other would estimate the cost of meeting student performance outcome standards adopted by the State Board of Education (Board). See K.S.A. 2005 Supp. 46-1131.

The parties appeared before the court on July 8, 2005. The issue before the court at the July 8 proceeding was whether the new legislation complied with this court's June 3, 2005, order for a minimum funding increase. At that hearing, all parties agreed that S.B. 3 complied with the court's June 3, 2005, order.

On July 8, 2005, this court held: "The legislature, by enacting S.B. 3, has complied with our June 3 opinion regarding the minimum funding increase" for the 2005-06 school year, and we approved the school finance formula, as amended by H.B. 2247 and S.B. 3, "for interim purposes." *Montoy*, Order of July 8, 2005. Further, [***14] because S.B. 3 increased LOB equalization and provided increased access to such equalization, this court lifted the stay on the provision increasing the LOB authority. Order of July 8, 2005. The stay on the EDE-BOTA provision was lifted as well, because S.B. 3 replaced it with a new provision

designed to benefit a larger number of districts. The stays on the cost-of-living weighting and the EDE-Joint Committee on State Building Construction (JCSBC) provisions, however, were continued.

This court retained jurisdiction "to review further legislative action which may modify, repeal, or make permanent the temporary solution contained in S.B. 3." Order of July 8, 2005.

On January 9, 2006, LPA completed and submitted to the legislature the cost study report commissioned by H.B. 2247/S.B. 3. As pointed out by the State in its argument before this court, the legislature referred to this report throughout its 2006 session and sought further input and explanation from LPA during the session.

[*16] Thereafter, the legislature enacted changes to the school finance formula in S. B. 549 (L. 2006, ch. 197), which was signed by the governor on May 19, 2006.

The plaintiffs then filed [***15] a motion for a show cause order and briefing schedule, and on May 22, 2006, this court ordered the parties to brief and argue the issue whether S.B. 549 satisfies our court's prior orders.

Rather than modifying the provisions of S.B. 3/H.B. 2247, the legislature materially and fundamentally changed the way K-12 is funded in this state.

S.B. 549 adopted a 3-year funding scheme for K-12. It also alters the formula components by creating two additional at-risk weightings: the high-density at-risk weighting which provides additional at-risk funding for districts with high percentages of at-risk students; and the nonproficient at-risk weighting, which provides \$ 10 million in additional funding in 2006-07 for students who are not proficient in reading or math, but are not classified as at-risk (eligible for the federal free lunch program).

An additional fundamental change occurred in providing flexibility to local districts to spend money received for at-risk, preschool at-risk, and bilingual education programs interchangeably. More significant are the changes that S.B. 549 made in the LOB.

The school finance formula provided a feature designed to equalize the ability [***16] of districts with lower property wealth to raise money through the use of the LOB. The formula was designed so that districts with an assessed valuation per pupil (AVPP) below the 75th percentile would receive supplemental aid in an amount designed to bring them up to par with the district at the 75th percentile of AVPP. Under this formula, districts with an AVPP above the 75th percentile

would not receive supplemental state aid. K.S.A. 72-6434.

The legislature has increased equalization in two ways. First, it increased the LOB equalization threshold from the 75th percentile to the 81.2 percentile of AVPP. K.S.A. 2005 Supp. 72-6434(a). [**761] Accordingly, districts with an assessed valuation per pupil below the 81.2 percentile would receive supplemental aid on the LOBs [*17] in an amount designed to bring those districts up to par with the districts at the 81.2 percentile of AVPP.

Second, the 25 percent LOB cap on supplemental general state aid was eliminated. See S.B. 3, sec. 12(b). In S.B. 549, the LOB authority was increased to 30 percent for the 2006-07 school year and 31 percent for 2007-08 and thereafter. An election would be required [***17] to adopt an LOB in excess of 31 percent. S.B. 549 did not change the AVPP threshold and did not impose a limit on equalization supplemental aid.

S.B. 549 further requires that such supplemental state aid be used to meet accreditation requirements, provide programs required by law, and improve student performance. S.B. 549, sec. 20(e)(1). The 3-year cumulative total of such aid under S.B. 549 is \$ 74 million. Added to H.B. 2247/S.B. 3's increase of \$ 47.7 million, the estimated increase since *Montoy II* is \$ 121.7 million.

Under the prior structure, LOB state aid funding has never been considered part of the foundation level of funding provided by the State for a district's basic operating expenses. However, S.B. 549 now requires that supplemental state aid be applied to meet basic educational requirements, essentially making LOB state aid part of the foundation level of funding.

Further, the original intent and purpose of the LOB (which would necessarily include LOB state aid) was to allow individual districts to fund enhancements to a constitutionally adequate education provided and financed by the funding formula. *Montoy III*, 279 Kan. at 834 (citing [***18] *Montoy II*, 278 Kan. at 774). S.B. 549, however, now provides that school districts are required to use LOB state aid moneys to fund basic educational expenses.

The plaintiffs point out that these changes to the LOB state aid do not provide new money and are nothing more than a "money renaming scheme." Regardless of whether LOB state aid is new money, the point is that these changes to the equalizing state aid provisions of the LOB component of the formula fundamentally alter the structure of the funding system.

In addition, S.B. 549 increases the BSAPP from \$ 4,257 to \$ 4,316 in 2006-07; to \$ 4,374 in 2007-08; and

to \$ 4,433 in 2008-09. That amounts to an increase of \$ 101.25 million over the 3 years, and [*18] \$ 183.75 million since January 3, 2005. The low enrollment weighting adjustment was lowered to 1,637 pupils in 2006-07 and 1,622 pupils in 2007-08 and 2008-09. The high enrollment weighting (formerly the correlation weighting) threshold was lowered to correspond to the changes in the low enrollment weighting, resulting in \$ 18.5 million over the 3-year period.

At-risk weighting was increased to 0.278 for 2006-07, 0.378 for 2007-08, and 0.456 for 2008-09, resulting [***19] in an estimated 3-year cumulative increase of \$ 152.55 million. The 3-year total for high-density at-risk is \$ 29.6 million. Bilingual weighting remained unchanged at .395 (based upon the number of student contact hours in a bilingual program). Special education excess costs reimbursement is set at 92 percent, totaling an estimated \$ 80.3 million over 3 years, and \$ 111.5 million since January 3, 2005. S.B. 549 provides an estimated total funding increase of \$ 466.2 million. The total increase in funding since January 3, 2005, is an estimated \$ 755.6 million.

S.B. 549 leaves intact the cost-of-living weighting, which is a new local property tax levy intended to allow districts with higher regional costs to raise additional revenue, purportedly to fund higher teacher salaries, although the requirement that funds be used for that purpose was removed from the statute. See 279 Kan. at 835. While we stayed the effect of this provision last year due to concerns about wealth-based disparities, nevertheless, this new component alters the funding formula.

We begin our analysis by addressing the State's first argument that (1) the school finance formula challenged by the [***20] plaintiffs no longer exists, and thus, the case is moot, and (2) this court cannot engage in the fact [**762] finding necessary to determine the constitutionality of S.B. 549. The first argument was raised in *Montoy III*, and we rejected it because this case was and continues to be in the remedial stages, or to be more precise, the compliance stage. It continues to have no merit, and we again reject it.

As to the State's second part of the argument, we agree that this court is an appellate court and not a fact-finding court. The constitutionality of S.B. 549 is not before this court. It is new legislation and, if challenged, its constitutionality must be litigated in a new [*19] action filed in the district court. We have already made the determination that the school finance formula which was before this court in *Montoy II* was unconstitutional. The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III*. The sole issue now before this court is whether the

legislation passed in 2005 and S.B. 549 comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed. A constitutional challenge of S. [***21] B. 549 must wait for another day.

The State argues alternatively that the legislature has been highly responsive to the court's orders in enacting the 2005 legislation and S.B. 549 and, therefore, the appeal should be dismissed. It points out that the 2005 legislation and S.B. 549 together provide annual increased funding by the 2008-09 school year of \$ 755.6 million over that provided in 2004-05. The State further asserts the manner in which the funds are to be distributed is directly responsive to the concerns expressed by the court in its prior orders regarding at-risk students, special education students, and middle- and large-sized districts. The State also urges the court to lift the stay on the cost-of-living weighting.

Although noting it has some concerns with S.B. 549, the State Board of Education contends that S.B. 549, in conjunction with the changes made by the 2005 legislation, makes "suitable provision for finance" of the public schools as required by Article 6, § 6 of the Kansas Constitution, as construed by this court, and requests the court to release jurisdiction of the case.

The plaintiffs contend that S.B. 549 fails to comply with this court's prior [***22] orders and fails to make suitable provision for finance of the public schools as required by Article 6, § 6 of the Kansas Constitution. The plaintiffs contend the funding increases and formula components of S.B. 549 are not based on the actual and necessary costs of providing a suitable system of finance of public education and do not distribute funding equitably, exacerbating existing constitutional deficiencies.

Specifically, the plaintiffs contend that S.B. 549's funding for the 2006-07 school year is not based on actual and necessary costs because the funding it provides under the components of the formula [*20] is significantly less than the funding increase LPA concluded to be the actual and necessary costs of meeting the mandated performance standards for 2006-07. As a remedy, the plaintiffs request that we order the legislature to implement the LPA Cost Study Analysis outcomes based recommendations for the 2006-07 school year.

The State contends that in determining whether S.B. 549 complies with this court's orders, it would be inappropriate for the court to rely on the LPA Cost Study Analysis as evidence of actual costs because it is not part of the record on appeal, [***23] and the validity of its conclusions have not been subjected to ex-

pert analysis and judicially determined through operation of the fact-finding process.

The plaintiffs contend the LPA Cost Study Analysis is part of the legislative history of S.B. 549 and, therefore, may properly be considered by the court. They argue that this court may accept the LPA Cost Study Analysis as substantial competent evidence of the actual and necessary costs of achieving the State Board's mandated proficiency standards because it was designed and funded by the legislature, performed by its employees, subject to its direction, and presented to the legislature.

First, we reject the State's contention that we may not consider the LPA Cost Study Analysis in determining whether the legislature complied with our orders. Although the LPA Cost Study Analysis is not [**763] evidence in the record on appeal, it is part of the legislative history of S.B. 549. *Cf., Urban Renewal Agency v. Decker*, 197 Kan. 157, 160, 415 P.2d 373 (1966) (historical background, legislative proceedings, and changes in a statute during course of enactment may be considered by the court in determining legislative intent).

[***24] The LPA Cost Study Analysis was commissioned by the legislature in order to assist in determining the actual costs of providing a suitable funding system. The legislature dictated the parameters of the study, the study was conducted by its employees, subject to the legislature's direction and oversight, the study was presented to the legislature early in the 2006 session, and there was an ongoing dialogue between the legislature and LPA concerning the study during the course of the legislative session. See Memorandum [*21] of April 21, 2006 from LPA to all legislators. See also K.S.A. 2005 Supp. 46-1131 (commissioning LPA to conduct the Cost Study Analysis, setting the parameters of the study, and directing LPA to submit its report to the legislature by a date certain or request additional time); K.S.A. 46-1101 (legislative post audit committee comprised of five senators and five members of the house of representatives); K.S.A. 46-1102 (LPA headed by the post auditor, who is appointed by the legislative post audit committee); and K.S.A. 46-1103 (establishing LPA, and providing that [***25] its employees are under the direct supervision of the post auditor in accordance with the policies adopted by the legislative post audit committee).

Accordingly, we may consider the LPA cost study as part of the legislative history of S.B. 549 in determining legislative intent as it is relevant to the question whether the legislature has complied with our orders in this case. That does not mean, however, that we may consider the findings and conclusions in the report as

substantial competent evidence of the actual and necessary costs of providing a suitable education.

The cost study has not been subjected to the fact-finding processes of litigation through which the parties were permitted to examine the validity and accuracy of the study, including the methodology and policy decisions supporting the study, the qualifications of the persons participating in the study, the assumptions underlying the study's conclusions, and the veracity of the underlying data. Although such inquiry is vital to determining the validity of the study's conclusions and the degree of weight to accord the study if offered at trial in the district court, this is an extraordinary appeal and the legislature [***26] had the opportunity to analyze the methodology and policy decisions of the LPA Cost Study Analysis, and thus to accept or reject its findings as a factor in determining what is suitable finance for the Kansas school system.

There is no question that the legislature has substantially responded to our concerns that the funding formula failed to provide adequate funding for students in middle-sized and large districts with a high proportion of minority and/or at-risk and special education [*22] students and that the special education, bilingual, and at-risk student weighting factors were distorted by the lack of any actual cost basis.

S.B. 549 and the 2005 amendments together provide an estimated annual increased funding by the 2008-09 school year of \$ 755.6 million over that provided in 2004-05. Of that total, \$ 246 million—almost one-third—is directed to at-risk students: \$ 206.5 million in new funding by 2008-09 has been provided through increases in the at-risk weighting from .10 to .456 by 2008-09; \$ 29.6 million in additional at-risk funding is directed to districts with high percentages of at-risk students; and \$ 10 million is provided to students who, though not classified [***27] as "at-risk" under the free lunch eligibility criteria, nevertheless are not proficient in math or reading, based on statewide proficiency assessments.

Bilingual funding has been increased from .2 to .395, adding \$ 11 million in new funding as of 2005-06. Further, and significantly, the new legislation provides districts with the ability to use at-risk and bilingual funding interchangeably, giving districts with these students greater flexibility to use those funds to meet their needs.

[**764] Special education excess cost reimbursement has been increased from 85 percent at the time of *Montoy II* to 92 percent, and provides by 2008-09 an additional \$ 111.5 million in new funding.

The legislature also responded to our concerns about the equitable distribution of funding. Equity does not require the legislature to provide equal funding for each student or school district. In *Montoy II*, we rejected the plaintiffs' claim that the school finance act violated the Equal Protection Clause of the United States and Kansas Constitutions. What is required is an equitable and fair distribution of the funding to provide an opportunity for every student to obtain a suitable education.

[***28] Our concerns about the low enrollment weighting were addressed by reducing its relative significance in the funding formula by increasing funding to middle- and large-sized districts with high percentages of special needs students. The legislature has substantially increased the at-risk weighting, including the new high-density weighting designed to provide additional funding to middle- and large-sized districts with high percentages of at-risk students. [*23] S.B. 549 and the 2005 amendments together have provided non-low enrollment districts with an additional \$ 47 million in new funding through the high enrollment weighting (formerly the correlation weighting), while reducing entitlement to the low enrollment weighting by lowering the cut-off from to 1,725 pupils to 1,622 by 2007-08. In addition, we note that by restoring and increasing the high enrollment weighting, the legislature was directly responsive to our concern in *Montoy III* that the elimination of the correlation weighting exacerbated the disparities caused by the low enrollment weighting.

Further, the legislature responded to our concerns about wealth-based disparities inherent in the LOB by increasing the equalizing [***29] LOB state aid AVPP percentile.

Our prior orders have made it clear that we were concerned that the then existing financing formula was distorted and provided disparate funding because it was based on former spending levels with little or no consideration of the actual costs and present funding needs of Kansas public education.

The legislature has responded to this concern. The legislature has undertaken the responsibility to consider actual costs in providing a suitable system of school finance by commissioning the LPA to conduct an extensive cost study, creating the 2010 Commission to conduct extensive monitoring and oversight of the school finance system, and creating the School District Audit Team within LPA to conduct annual performance audits and monitor school district funding as directed by the 2010 Commission. In addition, the new legislation contains numerous provisions designed to improve reporting of costs, expenditures, and needs.

These new components provide the fundamental framework for a cost-based funding scheme in which the legislature will be regularly provided with the relevant, accurate information necessary to meet its constitutional obligation to [***30] provide and maintain a suitable system of financing of Kansas public schools.

We also find that the LPA Cost Study Analysis was considered by the legislature in making the decisions that underlie the formula changes in S.B. 549 and, thus, the legislature was responsive to our prior orders to consider actual costs. We note the plaintiffs' contention [*24] that because S.B. 549 does not provide funding at the levels recommended by LPA's cost study, it was not based on actual costs and, therefore, fails to provide constitutionally suitable funding. However, implicit in that argument is the conclusion that the LPA Cost Study Analysis is credible evidence of the actual costs of education. As discussed above, we cannot reach that conclusion.

Nonetheless, as we stated in *Montoy II*: "It is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula constitutionally suitable." 728 Kan. 775. Further, in *Montoy III* we said:

"As set forth earlier in this opinion, the Legislative Division of Post Audit has been commissioned to conduct a comprehensive [**765] and extensive cost study to be presented to the 2005-06 legislature. [***31] With such additional information available, the legislature should be provided with the cost information necessary to make policy choices establishing a suitable system of financing of Kansas public schools.

"We conclude, however, that additional funding must be made available for the 2005-06 school year to assist in meeting the school districts' immediate needs. We are mindful of the Board's argument that there are limits on the amount the system can absorb efficiently and effectively at this point in the budget process." 279 Kan. at 845.

The legislature is not bound to adopt, as suitable funding, the "actual costs" as determined by the A&M and LPA studies. On the other hand, the legislature cannot ignore the LPA study as it did the A&M study. In commissioning the cost study, the legislature clearly stated in H.B. 2247, Section 3:

""(a) In order to assist the legislature in the gathering of information which is necessary for the legislature's consideration when meeting its constitutional duties to: (1) Provide for intellectual, educational, vocational and scientific improvement in public schools established and maintained by the state; and (2) make suitable

[***32] provision for the finance of educational interests of the state, the division of post audit shall conduct a professional cost study analysis to determine the costs of delivering the kindergarten and grades one through 12 curriculum, related services and other programs mandated by state statute in accredited schools." 279 Kan. at 840-41.

We are mindful of the fact that the funding of public education is extraordinarily complex, just as we are mindful of the realities of the legislative process. We conclude that the legislature's efforts in 2005 and in 2006 S.B. 549 constitute substantial compliance with [*25] our prior orders, through which it will have provided by 2008-09 at least 755.6 million additional dollars to the education of the State's most precious asset—our children.

The determination that the funding system failed to provide for suitable funding of the public schools as required by Article 6, § 6 of the Kansas Constitution was the culmination of an extensive 8-day bench trial of this case before the district court, with testimony generating over 1300 pages of transcripts, and over 300 exhibits consisting of thousands of pages, a large number of which [***33] were spreadsheets and other documents showing the financial operation and impact of the funding formula for school districts statewide. All of this evidence pertained to the issue at hand—whether the school funding formula as it existed at that particular time was constitutional. Our opinion affirming the district court's determination on that issue was made on the basis of that extensive record.

As previously noted, in response to our orders, the legislature has amended the school finance formula three times. The most recent changes made in S.B. 549 have now so fundamentally altered the school funding formula that the school finance formula that was at issue in this case no longer exists. It has been replaced with a fundamentally different funding scheme for which there are no facts and figures in the record from which we could determine how it will operate over the next 3 years.

We recognize that we could remand this case to the district court to allow the plaintiffs to amend their pleading to challenge the new funding formula. However, we decline to do so, electing instead to end this litigation. We do so for two reasons.

First, we note the point made by the Chief [***34] Justice of the Ohio Supreme Court in *DeRolph v. State*:

"A review of sixteen other state Supreme Court decisions that have declared their systems for funding public education unconstitutional reveals that a majority of those decisions remanded the case to a trial court.

However, it is those states that have had the most difficulty producing a final plan that met the Supreme Court's opinion of constitutionality. For example, in New Jersey the issue has been through the courts for a period of twenty years and is now again pending in the New Jersey Supreme Court. Similar experiences, though not as dramatic, have occurred in [**766] Arizona, Arkansas, California, New Hampshire and Texas. In each of these states, either the final public school funding plan is not yet approved by the [*26] Supreme Court of the state after several years of litigation after remand or the plan has been approved only after several years of litigation." *DeRolph v. State*, 78 Ohio St. 3d 419, 421-422, 1997 Ohio 87, 678 N.E.2d 886, 888 (Ohio 1997) (Moyer, C.J., concurring in part and dissenting in part) (disagreeing with the majority's decision to remand the case to the district court pending legislative compliance [***35] so the trial court could hear evidence concerning the remedy after it is enacted and determine any new legislation's constitutionality).

See also *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990) (*Abbott II*) (Public School Education Act held unconstitutional); *Abbott v. Burke*, 136 N.J. 444, 643 A.2d 575 (1994) (*Abbott III*) (court ordered legislature to enact constitutional system and retained jurisdiction); *Abbott v. Burke*, 149 N.J. 145, 199-200, 693 A.2d 417 (1997) (*Abbott IV*) (thereafter, court ordered interim increased funding and remanded the case to district court for hearings on the special needs of urban students and to determine the costs of funding those needs); *Abbott by Abbott v. Burke*, 153 N.J. 480, 710 A.2d 450 (1998) (*Abbott V*) (on appeal from district court decision after extensive hearings, court ordered specific, detailed, comprehensive reform plan); *DeRolph v. State*, 78 Ohio St. 3d 193, 213, 1997 Ohio 84, 677 N.E.2d 733 (1997) (*DeRolph I*) (remanded to district court pending legislative compliance); *DeRolph v. State*, 89 Ohio St. 3d 1, 36-38, 2000 Ohio 437, 728 N.E.2d 993 (2000) [***36] (*DeRolph II*) (on appeal after extensive proceedings in trial court, court allowed the State more time to continue to refine system, set out areas of concern to address, and retained jurisdiction).

Second, S.B. 549 is a 3-year plan; thus, it may take some time before the full financial impact of this new legislation is known, a factor which would be important in any consideration of whether it provides constitutionally suitable funding. Indeed, as the Board's attorney pointed out at oral argument, we do not even know at this time how districts used the funding increase provided by the 2005 amendments.

The previous orders of this court affirming the judgment of the district court in part and reversing in part are re affirmed in this opinion. We lift the stays

imposed on the cost-of-living weighting and the extraordinary declining enrollment-Joint Committee on State Building Construction Provision. We dismiss this appeal and [*27] remand to the district court with directions to dismiss the pending case.

NUSS, J., not participating.

CONCUR BY: ROSEN ; ; BEIER (In Part); (In Part); LUCKERT

CONCUR

ROSEN J., concurring: Every child in Kansas has a fundamental right to an education guaranteed by [***37] the Kansas Constitution. I, therefore, agree with the concurrences to *Montoy v. State*, 278 Kan. 769, 120 P.3d 1160 (2005) (*Montoy II*), previously filed by Justices Beier, Davis, and Luckert. In addition to their thorough constitutional analysis, I note that every child is mandated to attend school. K.S.A. 2005 Supp. 72-1111. Our legislature has required all Kansans with control over or charge of a child to send that child to school. K.S.A. 2005 Supp. 72-1111. This requirement upon parents and guardians for the compulsory education of their children is paralleled by the requirement upon the legislature to provide that same constitutionally mandated education. Likewise, the citizens of Kansas through our state constitution have imposed a duty on the legislature to "make suitable provision for finance of the educational interests of the state." Kan. Const., Art. 6, § 6(b). It is our duty, as the arbiters and champions of the Kansas Constitution, to enforce each child's fundamental right to an education. Any analysis of the issues in this case must necessarily begin with an understanding of this right and the duties [***38] associated with that right.

Further, I concur with the majority's conclusion that S.B. 549 (L. 2006, ch. 187) complies with this court's prior orders and order to dismiss this case. I write separately to express my disagreement with the majority's analysis for concluding that S.B. 549 complies with this court's prior orders; to express my [**767] concern with including equalizing local option budget (LOB) state aid as part of the State's funding obligation; and to note my disagreement with the dissent remanding this case to the district court.

I disagree with the majority's analysis for concluding that S.B. 549 (L. 2006, ch. 197) complies with this court's prior orders. Although the majority opinion highlights the increase in funding for various categories of students, the analysis provides no linkage between those increases and the actual costs as determined by the Division of Legislative Post Audit (LPA) study or the Augenblick & Myers (A&M) study. I recognize

that the legislature has appropriated [*28] substantially more money to the State's school system. However, this court did not simply order the legislature to appropriate substantially more money.

In *Montoy II*, this court [***39] required the legislature to consider the "(1) actual costs of providing a constitutionally adequate education and (2) funding equity" to fulfill its constitutional duty for making a "suitable provision for finance of the educational interests of the state." 278 Kan. at 775. The *Montoy III* court further ordered that the cost study commissioned by the legislature to be performed by the LPA incorporate consideration of the costs of outputs in addition to inputs. 279 Kan. at 843.

LPA completed a study in January 2006, estimating the costs for providing an education based on four different models, including three inputs-based models, distinguished by class size, and one outputs (or outcomes)-based model. Although the results of the LPA study may be considered as part of the legislative history for determining legislative intent, I agree with the majority's analysis that we cannot consider the study as evidence because it has not been subjected to the fact-finding process of litigation. Nevertheless, the completion of the LPA cost study substantially complies with our order in *Montoy III*.

According to the LPA study, the costs of educating Kansas [***40] children using an outcomes-based model requires an additional \$ 399 million in state funding for the 2006-07 school year. The legislature thereafter enacted S.B. 549, which provides a 3-year plan for increasing school funding by approximately \$ 466.2 million. In the first year of the plan, 2006-07, the legislature increased school funding by \$ 194.5 million. In the second year of the plan, 2007-08, the increase is \$ 149 million, and in the third year of the plan, 2008-09, the increase is another \$ 122.7 million.

The plaintiffs argue that the legislature has fallen well short of the \$ 399 million in additional funding necessary to meet the outcomes-based model costs for the 2006-07 school year. The State and the Kansas Board of Education (Board), on the other hand, argue that S.B. 549 substantially complies with this court's order to consider the actual costs of education because it was based on the results of LPA's cost study. To support their argument, the [*29] State and the Board assert that the overall state funding provided for 2006-07 will exceed the \$ 399 million increase recommended in the LPA study. However, their argument depends on the inclusion of equalizing LOB state aid [***41] as part of the State's funding obligation in accordance with section 20 of S.B. 549. Because LPA did not include equalizing LOB state aid as part of the State's

funding for basic operating costs when it calculated the amount of increased funding needed for the outcomes-based education model, the State and the Board argue that the \$ 399 million figure must be reduced by the amount of equalizing LOB state aid.

According to the State and the Board, in 2005-06, the State provided \$ 222 million in equalizing LOB state aid. The State argues that after deducting the \$ 222 million from LPA's recommended increase of \$ 399 million, the total funding increase would be reduced to approximately \$ 180 million. Because S.B. 549 provides \$ 194.5 million in new funding for the 2006-07 school year, the State and the Board assert that the legislature has exceeded LPA's recommended funding increase.

Upon closer scrutiny of the State's figures, it appears the State's calculation fails to account for approximately \$ 38 million. This is [**768] because LPA's \$ 399 million figure does not include the approximately \$ 38 million in additional equalizing LOB state aid that would be required if LPA's funding [***42] recommendation were adopted. The new funding provided by S.B. 549, however, does include that \$ 38 million increase. Nevertheless, this discrepancy is not significant enough to alter my analysis. If LPA's \$ 399 million figure is adjusted to include an additional \$ 38 million in increased LOB state aid funding, and \$ 222 million is deducted from that, LPA's recommendation, as adjusted, would be \$ 215 million.

When that figure is compared with the \$ 194.5 million funding increase provided by S.B. 549 for 2006-07, there is substantial compliance with LPA's recommended funding increase for the outcomes-based model. Accordingly, I conclude that the State has substantially complied with this court's order to consider the "actual costs of providing a constitutionally adequate education." *Montoy III*, 279 Kan. at 830.

[*30] In addition to requiring the State to consider the actual costs for providing a constitutional education, this court required the funding to be equitably distributed. *Montoy II*, 278 Kan. at 775. I find that the legislature has been responsive to our order to provide for equitable distribution of funding in two significant ways. Our equity [***43] concerns included disparate funding between the low enrollment districts and the middle- and large-sized districts with high percentages of special needs students. I agree with the majority that the significant increases in funding directed to the middle-and large-sized districts has reduced the relative significance of the low enrollment weighting in the formula. The legislature has also responded to our concerns about LOB inequities due to

property value disparities by raising the assessed valuation per pupil (AVPP) from the 75th percentile to the 81.2 percentile for equalizing LOB state aid. K.S.A. 2005 Supp. 72-6434(a).

However, I have some concern with the new provisions of S.B. 549 that include equalizing LOB state aid as part of the State's funding toward meeting its constitutional requirement to suitably fund public education. My concern centers on the fact that in order to receive LOB state aid, districts have to impose a local property tax levy by enacting an LOB. Essentially, the State is arguing that allowing local districts to levy property taxes as a condition for receiving equalizing LOB state aid is synonymous with providing state funding. [***44] However, because the LOB is optional and some school boards or taxpayers may reject a local tax to support their school district, children in districts in which base level funding is inadequate and in which an LOB is not adopted, or is not adopted at the full cap, may not have the funds necessary for a constitutionally adequate education. In other words, if equalizing LOB state aid would be necessary to fund a district's basic educational costs, and a district or its voters choose not to adopt LOB funding in full or in part, the legislature has not met its constitutional duty to those children in that district. Counting equalizing LOB state aid as part of the State's foundation funding in essence shifts the legislature's constitutional responsibility to the local school districts. While the legislature may constitutionally allow local districts to choose to provide extras beyond the minimum constitutionally [**31] adequate education, *Montoy III*, 279 Kan. at 839, it cannot allow districts to choose to fund less. By including equalizing LOB state aid to establish that S.B. 549 provides adequate funding, the legislature is essentially making the LOB funding mandatory in those [***45] districts where a constitutionally adequate education is not provided by base level state funding.

As of 2003, all but four of the Kansas school districts have opted into the LOB funding, and many were at the maximum cap as it then existed. Because there is such a high level of participation in the LOB funding, my concern about the equalizing LOB state aid does not alter my conclusion that S.B. 549 substantially complies with our order to consider actual costs and equitably distribute the State's education funding. However, so long as the legislature allows the LOB to remain an optional funding source rather than a mandatory one, my concern may be relevant in any subsequent challenge to the funding formula as amended by S.B. 549. In the school districts that [**769] receive less than the base level of state funding and which would have been eligible for equalizing LOB state aid but do not adopt an LOB at all, or adopt an LOB in an

amount lower than the amount necessary to generate the funding shortfall, the State is arguably still responsible for providing constitutionally adequate funding. If other school districts begin opting out in part or in full of the LOB funding, the equitable [***46] distribution of state funding may be at risk. Such heavy dependence on a local contribution has historically caused disparity and equity concerns which have led to Kansas school finance litigation, including this case. We must never again allow a funding scheme that makes the quality of a child's education a function of his or her parent's or neighbors' wealth.

The inclusion of equalizing LOB state aid in S.B. 549 provides an essential financial log in keeping afloat the raft of adequate funding for the education of Kansas children. However, if local communities at some future time decide to remove that log, the delicate raft will have a difficult time remaining afloat, and, again, the constitutional right of all Kansas children to a suitably funded education could soon find itself imperiled.

[*32] I further note my disagreement with the dissenting position that this case should be remanded for factfinding. Although I agree that the LPA study cannot be considered as evidence, I reject the conclusion that we cannot evaluate the legislature's compliance with this court's prior orders without remanding the matter. Following the dissent's analysis, we could only evaluate the legislature's [***47] compliance with this court's prior orders if the legislature had followed the A&M study because it was the only cost study in evidence. If this court had intended to require adherence to the A&M study, it should not have deferred further consideration pending the completion of the new cost study, as it did in *Montoy III*.

In rejecting the dissenting position, it is important to note that I am not accepting the LPA study as a model for a constitutionally adequate education. The A&M study estimated the costs for an educational model based on certain inputs and outcomes. The LPA study, on the other hand, estimated the costs for completely different educational models, either based on inputs or outcomes, but not a combination of the two. Without evidence and expert opinions regarding the adequacy of each LPA educational model, this court cannot conclude that the LPA model would provide a constitutionally adequate education. If we were to require such evidence before making a decision, we would find ourselves trying to hit a moving target unless each new cost study estimated the costs for exactly the same educational model. However, the decisions in this case demonstrate that the [***48] model for a constitutionally adequate education has not been a stationary, definable concept.

In *Montoy I*, this court ruled that accreditation standards may not be an adequate model. 275 Kan. at 155. In *Montoy II*, the court reiterated that accreditation standards may not always be adequate and then relied on the legislature's own definition of "suitable education" in K.S.A. 46-1225(e) (statute authorizing A&M study) to conclude that the standard was not being met. 278 Kan. at 774-75. In *Montoy III*, this court adopted the educational model from the A&M study as a constitutionally adequate education. *Montoy III*, 279 Kan. at 844. However, the *Montoy III* court also interjected another educational model by requiring the legislature to estimate the costs for achieving the outputs as necessary [*33] elements of a constitutionally adequate education. The *Montoy III* court also defined a constitutionally adequate education in accordance with K.S.A. 72-6439, the statute that requires the Kansas Board of Education to adopt an accreditation system based upon an improvement in performance.

[**49] As long as the target model for a constitutionally adequate education continues to move, the litigation in this case could continue in perpetuity. Each new cost study based on a new model would require factual testing at the district court before this court could determine whether the amended legislation is constitutional. Such a process would extend into an indefinite future, and the children of Kansas need a resolution of this matter now. Therefore, based on my analysis that the [*770] legislature has substantially complied with this court's prior orders, I concur with the result of the majority opinion dismissing this case.

DISSENT BY: BEIER

DISSENT

BEIER, J., concurring in part and dissenting in part: I concur with much in the majority's opinion, including its implicit decision not to interfere with immediate implementation of 2006 S. B. 549 (L. 2006, ch. 197). Implementation must proceed, pending further order of this court. As we have previously observed, time is of the essence. Kansas school administrators, employees, and students need to plan for the coming school year and those that follow, with the assurance that the state funds promised by the legislature and [*50] governor by way of S.B. 549 will actually be forthcoming.

I respectfully dissent from the majority's decision to dismiss this action, leaving for another day in a future lawsuit the determination of whether S.B. 549 meets the standard of Article 6, § 6 of the Kansas Constitution. That issue is alive in this action. Constitutionality has always been and remains squarely presented.

Further, our earlier opinions and orders in this case consistently and correctly equated compliance with this court's directives to adherence to the legislature's constitutional mandate. I am not willing to divorce these concepts now. If the State has demonstrated compliance with our directives, the legislature has corrected the constitutional deficiencies in the Kansas design for school finance. The converse would also be true: If the State has not demonstrated compliance with our directives, the legislature has not corrected the constitutional [*34] deficiencies in the school finance design. Logically and legally, if we meant what we have said, one cannot be satisfied without the other.

Reduced to its essence, our June 3, 2005, Supplemental Opinion had two components. The first dealt with the need for [*51] increased funding in the 2005-06 school year. That component is moot. The second component dealt with constitutionality of Kansas' school finance design beyond the 2005-06 school year. With regard to that component, we said:

"[I]f (1) the post audit study is not completed or timely submitted for the legislature to consider and act upon it during the 2006 session, (2) the post audit study is judicially or legislatively determined not to be a valid cost study, or (3) legislation is not enacted which is based upon actual and necessary costs of providing a suitable system of finance and which equitably distributes the funding, we will consider, among other remedies, ordering that, at a minimum, the remaining two-thirds (\$ 568 million) in increased funding based upon the [Augenblick and Myers] (A&M) study be implemented for the 2006-07 school year." *Montoy v. State*, 279 Kan. 817, 846, 112 P.3d 923 (2005).

The problem facing the parties and this court now is that, on the appellate record before us, we cannot know the status of (2) or (3) above. The soundness of the methodology and conclusions of the Legislative Division of Post Audit (LPA) cost study have not [*52] been tested by a typical adversary process. No evidence has been admitted on the ways in which the members of the legislature considered actual and necessary costs or equity. Without testimony and documentary evidence in the record to evaluate on these matters, this court simply cannot conclude the State has carried the burden placed upon it last year to demonstrate that the legislature's actions brought Kansas' school finance system into compliance with the state constitution. The appropriate way to respond is not to throw the plaintiffs out of court. It is to retain jurisdiction, acknowledge the factual deficiencies of the record, and remand to the district court for further proceedings focused on the constitutionality of the finance system, as altered by S.B. 549.

The district court proceedings could include any necessary substitution or realignment of parties, amendment of pleadings, appropriate discovery, and, finally, trial. Such a trial would, among [*35] other things, test the methodology and conclusions of the LPA study and the soundness of legislators' consideration of it in their crafting of S.B. 549. It would also give us a record on the actual [**771] adequacy and equity effects [***53] of S.B. 549, including the redesignation of local option budget equalization aid, a redesignation never mentioned by any party in 2005 but upon which the State now wishes us to rely heavily to dismiss this case. Such a trial, and the careful study of the district court, also could illuminate whether a need for further remedial action persists, and, if so, what form it should take.

There is no question that the legislature has made substantial efforts to improve the adequacy and equity of our school finance system. The political realities of the legislative process make perfection unattainable, and no amount of money committed to public education will ever solve all of the problems of Kansas' urban poor or of its rural communities losing population. Still, because I am unwilling to graft a "good enough for government work" phrase onto Article 6, § 6 of our state constitution, I would permit this case to continue in the district court, where it may be finally resolved or prepared for further, much better informed review by myself and my colleagues.

LUCKERT, J., joins in the foregoing concurring
and dissenting opinion.