IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

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

DECISION AND ORDER
REMEDY

Section I: Background

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

school funding scheme were addressed and none corrected. The Legislature has now adjourned and left the capital. Only formal sine die adjournment remains. Accordingly, with considerable regret and after much deliberation, the Court can find no reason to further delay and is now prepared to announce its remedy ruling in this matter.

The Kansas Supreme Court has stated that "[t]he ultimate State purpose in offering a system of public schools is to provide an environment where quality education can be afforded to all." *Provance v. Shawnee Mission U.S.D. No. 512*, 231 Kan. 636 (1982). Our high court has also held that "[t]he general theory of our educational system is that every child in the state, without regard to race, creed, or wealth, shall have the facilities for a free education." *State v. Smith*, 155 Kan. 588 (1942). In *Mock v. State*, Case No. 91-CV-1009, 31 Washburn L.J. 475 (Shawnee County District Court, October 14, 1991), this Court stated that the Legislature is constitutionally obligated "to furnish each child with an educational opportunity equal to that made to every other child." This Court issues its remedy with these guiding principles in mind.

Section II: Constitutional Deficiencies in School Finance

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

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

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

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

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

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

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

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

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

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

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

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

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

g. That "achievement gap" (reflecting failure rates in some categories of vulnerable and/or protected students as high as 80 percent), referred to in subparagraph f above, violates Defendants' own current legal educational

standards and if not corrected, will soon violate the federal law of the land, the law known as No Child Left Behind; and

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

Section III: Activity Since December 2, 2003

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

- The Governor began the 2004 Legislative Session by submitting her "Education First" plan as a part of the State of the State address. In this plan, the Governor proposed increasing education funding a total of $300 million per year, phased in over a three year period. Her plan called for an increase of $250 in the base per year per pupil allotment, and also provided additional funds for at-risk, bilingual, and Special Education students. It proposed no structural or management changes in the schools, but it did

propose additional funds for All-Day Kindergarten, Parents-as-Teachers, and teacher mentoring.

- The Governor's Education First Plan was rather quickly dismissed by both houses of the Legislature.
- The House then adopted a bill which proposed making a one-time addition of $155 million to education funding. This measure proposed no changes in school structure or management, an omission replicated in every proposal made thereafter by either house.
- The Senate did not act on the $155 million House measure during the "regular" session and did not adopt any school funding proposal of its own whatsoever.
- During the "wrap up" or "veto" session, the Senate adopted a bill which proposed to add $72 million to school funding for one year only. This bill was "funded" by a deduction of $32 million from the State's cash reserves, with the balance to be taken from the pensions of elderly and retired state workers.
- The Senate then rejected the $155 million House bill and the House rejected the $72 million Senate bill.
- These mutual rejections placed the entire matter of school finance in the hands of a joint conference committee, which, on a vote of 5-1, agreed on a $108 million compromise measure which would have increased the base

per pupil per year allotment by $27. Other single-year adjustments were also proposed. Because a House member of the conference committee refused to sign the conference committee report, the House, under its rules, could not consider the compromise. The House was then asked to adopt a procedure which would allow a second conference committee to be appointed, whose report could then be considered with only two signatures from each house. That proposal was rejected by the House. Twice.

- Despite rules which would seem to prevent it, the joint conference committee then met again and reached yet another agreement on a different proposal. This suggested compromise measure proposed to add $66 million to school funding for one year and further proposed to authorize the State's sixteen wealthiest districts to raise even more revenue locally from district property taxes, thus proposing to substantially enlarge the current 300% state-wide per pupil funding disparity. This proposal, like the earlier Senate plan, was proposed to be funded by reducing the State's cash reserves by $26 million, with the balance coming from State worker pension funds. This proposed compromise also included a provision designed to diminish the Court's constitutional definition of "suitable education," a definition provision which would expire in one year (a date apparently selected to coincide with the estimated termination of the litigation at bar.)
- The $66 million compromise proposal was abandoned without a vote.

- Next, a bi-partisan plan was proposed by some members of the House. This proposal would have generated $128 million in new revenue for schools and would have 1) raised the base per pupil allotment by $100 per year, 2) funded Special Education at 100 % for the first time in Kansas history and 3) increased funds for at-risk and bilingual students. It also proposed to increase the LOB limit for local districts from 25 % to 28.5%, thus again proposing to increase the state-wide per pupil funding discrepancy, previously held unconstitutional by the Court.
- The $128 million House proposal was debated in the Senate and, once again, sent to the conference committee for further negotiations.
- In the closing hours of the "veto" session, the Senate rejected a $108 million compromise proposal and the House rejected a $95.1 million counterproposal. An $82 million conference committee recommendation funded entirely with funds to be taken from the State Highway Fund was likewise rejected.
- Finally, a $92 million suggested compromise failed to pass either house and the Legislature adjourned without addressing or correcting even one of the following unconstitutional aspects of State's school funding scheme:
    a. The enormous funding disparities (totaling more than 300%) between individual school children created by wealth-based, local funding options and other aspects of the funding scheme;

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

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

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

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

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

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

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

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

- "Mr. Bullock has made his decision. Now let him enforce it." *KansasCity Star*, "School Aid Formula Thrown Out" (December 3, 2003) (quotefrom Representative John Edmonds, R-Great Bend).
- "Collectively, the Legislature [does not] give the case a chance. Theleadership [is] confident it [will] be thrown out." *Salina Journal*, "JudgeOrders School Funding Fixed" (December 3, 2003) (quote from SenatorPete Brungard, R-Saline).
- "[T]his is just another judicial attempt to usurp the authority of electedofficials. To have an unelected judge essentially mandate a tax increase byJuly 1 is unacceptable. . . . What this does, in effect, is give him his day ofglory in the press. He's showboating." *Dodge City Daily Globe*, "Judge's Ruling in School Funding Case Sparks Mixed Reactions" (December 3,2003) (quote from Senator Tim Huelskamp, R-Fowler).
- "I dare [Judge Bullock to] hold me in contempt of court for not passing abill out of the appropriations committee to do what he ordered." WichitaEagle, "Solving the Problem" (December 4, 2003) (quote fromRepresentative Melvin Neufeld, Chairman of the House AppropriationsCommittee).

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

Accordingly, the mocking and disrespect shown this Court must be understood to be directed at the State's entire judicial branch of government.

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

This case was originally filed in 1999. Five years later, there is still no relief in sight for our children. Hundreds of thousands of these children have gone through the Kansas educational system during this period of time. According to the evidence, many thousands of them have been permanently harmed by their inadequate educations and forever consigned to a lesser existence. Further delay will unquestionably harm more of these vulnerable and/or protected of our students. Given these facts, coupled with the attitudes and inaction of the Legislature, the Court now has no choice but to act and to act decisively.

Section IV: Remedies Utilized Elsewhere: The National Perspective

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

constitutional leadership, and have implemented a variety of means necessary to correct the legislatively-created constitutional deficiencies.

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

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

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

In *Hoke County v. North Carolina*, 95 CVS 1158 (April 4, 2002), Superior Court Judge Howard E. Manning, Jr. stated, in accordance with *Leandro v. North Carolina*, 346 N.C. 336 (1997), that "[i]t is up to the Executive and Legislative Branches to provide the solution to constitutional deficits...." The court went on to say that "[t]hese branches can no longer stand back and point their fingers . . . and escape responsibility for lack of leadership and effort, lack of effective implementation of educational strategies, the lack of competent, certified, well-trained teachers effectively teaching children, or the lack of effective management of the resources that the state is providing to each [school district]." While giving deference to the executive and legislative branches of government, the North Carolina court maintained jurisdiction, just as this Court has, to see that a proper remedy is implemented.

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

> The Commonwealth, and the department, have accomplished much over the past ten years in terms of investing enormous amounts of new money in local educational programs, ensuring a far greater degree of equitable spending between rich and poor school districts, and redesigning in some fundamental ways the entire public school educational program. When one looks at the State as a whole, there have been some impressive results in terms of improvement in overall student performance. Nevertheless,

> the factual record establishes that the schools attended by the plaintiff children are not currently implementing the Massachusetts curriculum frameworks for all students, and are not currently equipping all students with the *McDuffy* capabilities [which had previously defined an adequate or suitable education]. This point may be best illustrated graphically in the areas of English language arts and mathematics, which are the primary subjects of the MCAS [Massachusetts Comprehensive Assessment System] tests, but it is perhaps even more strongly made in relation to the other critical areas of study that the *McDuffy* capabilities and the curriculum frameworks encompass: history, science, health, the arts, and foreign languages. The inadequacies of the educational program provided in the [relevant] districts are many and deep. Most worrisome is the fact, reflected in all the MCAS scores, that for children with learning disabilities, children with limited English proficiency, racial and ethnic minority children, and those from low-income homes, the inadequacies are even more profound.

In considering the appropriate remedy, Justice Botsford held:

> The defendants have argued in this remedy phase that even if some of the [relevant] districts are struggling, clearly "appropriate legislative action" has indeed been taken by the Commonwealth. This is evidenced by . . . reform measures enacted by the Legislature since 1993, all of which, the defendants state, the Commonwealth has implemented with diligence and effectiveness over the past ten years. Accordingly, in the defendants' view, the proper resolution of this case is to deny the plaintiffs' motion for further relief, and dismiss their complaint. The plaintiffs, on the other hand, contend that the evidence plainly establishes they are not receiving an adequate education because the schools and school districts they attend do not have sufficient resources to provide it. They propose that the court appoint a "21st Century Foundation Budget Commission" under the supervision of the court. They further propose that the court direct the commission to develop, subject to the court's approval, a new foundation budget that provides sufficient resources to allow the [relevant] districts to provide an adequate education that meets constitutional standards.

I recommend against accepting the defendants' suggestion of no remedial relief. The defendants' argument is essentially two-fold. They first contend that the struggles being experienced by certain school districts, including presumably the [subject] districts, are not related to inadequate resources but rather, reflect a lack of leadership and managerial capacity. Second, they contend that the Commonwealth is dealing with the capacity issues through the school and district accountability system it has put into place. This system includes not only the coordinated program reviews and school panel reviews conducted by the department but the parallel district reviews conducted by EQA [Educational Quality and Accountability] – each of which contemplates analysis, targeted assistance for improved planning, use of data and improved programs, monitoring, and, if there is no marked improvement, the possibility of more drastic action and greater intervention by the Commonwealth.

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

* * *

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

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

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

* * *

In the last twenty years, courts in several States have struggled with the question of remedy after reaching a conclusion that the particular State was not meeting its State constitutional obligation regarding public school education. I recommend that the court follow the path that the New York Court of Appeals has recently chosen in a case concerning the adequacy of education provided in the New York City public schools. See *Campaign for Fiscal Equity, Inc. v. New York*, 100 N.Y. 2d 893, 928-932 (2003). Translated into this case, the relief would be an order directing the State defendants to: (1) ascertain the actual cost of providing the level of education in each of the focus school districts that permits all children in the district's public schools the opportunity to acquire the capabilities outlined in *McDuffy* -- a directive that means, at present, the actual cost of implementing all seven of the Massachusetts curriculum frameworks in a manner appropriate for all the school district's children; (2) determine the costs associated with measures, to be carried out by the department working with the local school district administrations, that will provide meaningful improvement in the capacity of these local districts to carry out an effective implementation of the necessary educational program; and (3) implement whatever funding and administrative changes result from the determinations made in (1) and (2). This order would be directed to the State defendants to accomplish because *McDuffy* expressly holds that the Commonwealth, not the

> local districts, is ultimately responsible "to devise a plan and sources of funds sufficient to meet the constitutional mandate." 415 Mass. at 621.
>
> Further, I recommend that the court give a definite, but limited, period of time for the defendants to carry out this order and report back to the court with a plan and timetable for implementation, perhaps six months. I also recommend, as in New York, that the court continue to retain jurisdiction over the case to allow the court, or a single justice, or a judge of the Superior Court, to monitor the remedial process and provide whatever direction may be appropriate.

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

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, must be made available to all on equal terms.

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

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

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

1. It utilized an excessive reliance on permissive and voted levies;
2. It was unnecessarily complicated and hard to understand;
3. There was no mechanism to deal with inflation;
4. The funds allocated were not based on actual costs of providing education;
5. No allowance was made for increased costs incurred in achieving increased achievement standards;
6. The information used to create the plan was already two years old when it was used to formulate the plan;
7. There was no cost study to justify the various levels of per pupil funding;
8. Additional funding was allocated by the Legislature in response to earlier constitutional litigation, which was later withdrawn when that litigation was concluded and judicial attention focused elsewhere;

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

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

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

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

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

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

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

16. The testimony of Dr. Lawrence Picus of the University of Southern California (who also testified for Defendants in the instant action) was found to lack credibility in that, while testifying for the defense in Kansas

> and Massachusetts he had opined those systems were equitable and thus constitutional, but in Montana (while testifying for the plaintiffs) he opined Montana's funding was inadequate and violative of constitutional requirements- - -both opinions being based astonishingly on undisputed numbers showing Montana's system more equitable in virtually every measurement than either Kansas or Massachusetts. In other words, Dr. Picus "danced with the girls that brought him."

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

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

In Montana, like Kansas, the Defendants raised three principal defenses: "(1) Montana's relative spending in light of its fiscal capacity compared to other states; (2) Montana's ability to recruit and retain quality teachers; and (3) achievement levels of Montana students as measured by available standardized tests." On these points, Judge Sherlock concluded as follows: (1) As to fiscal capacity, he held "state-wide fiscal difficulties cannot justify an unconstitutional funding system. 236 Mont. at 54, 769 P.2d 690. The constitution says what it says and does not allow for such a defense." (2) As to

teacher salaries, he found that "Montana teachers' salaries have been lagging behind national averages." (3) Concerning standardized test results, he found that the testimony of Montana's "boots on the ground" educators "trumped" statistical arguments of proffered "experts" convincing Judge Sherlock that state-wide average test scores do not measure the adequacy of education for any particular student. He also stated that: "The State also relies on evidence that Montana's students do well on standardized national tests. Defendants' [exhibit] sets forth various encouraging statistics concerning Montana's students' achievement on the National Assessment of Education Progress (NAEP) test and on college entrance examinations. The State attempted this same defense *Helena Elementary I*, and it was rejected there." Accordingly, he found all defenses lacking in merit.

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

It is apparent, then, that although courts across the country have taken different approaches to resolving the unconstitutional nature of their school funding statutes, all have acted to enforce their constitutions. Nearly all have given the legislative and executive branches of government an opportunity to first remedy the violations themselves. After failed attempts (or no attempts at all) to remedy the constitutional violations, some courts have singlehandedly taken over public schools, while others have appointed special masters to craft and impose new school funding schemes, or have, in

some instances, handed down their own school funding provisions. The time may come when this or other Kansas courts will be forced to take such action, and in so doing, place the balance of power between the branches of government directly at issue for the sake of compelling compliance with our constitutions. But not yet.

Section V: Remedy

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

government. Although this action may delay our children's education slightly (should the other branches fail to respond quickly), it will end the inadequate and inequitable education being provided now and the disparate damage presently being done to the most vulnerable of our children.

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

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

(Emphasis added).

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

Section VI: Elements of a Constitutional Funding Scheme

Although there must be literally hundreds of ways the Legislature could constitutionally structure, organize, manage, and fund public education in Kansas

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

Close , whatever plan is ultimately agreed upon must contain certain basic provisions in order to pass constitutional muster:

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

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

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

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

not required to furnish each school or each school child with the same exact amount of funding, provided that any differential in funding is justified by a rational explanation premised on the varying actual costs incurred in providing essentially equal educational opportunities for each of those children.

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

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

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

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

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

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

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

9. This new funding plan must not contain:

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

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

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

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

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

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

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

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

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

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

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

To draft a funding scheme which is constitutional, the Legislature could well begin by seeking truthful answers to the questions the Legislature itself posed to the legislative coordinating council during the 2001 session in K.S.A. 46-1225 in the following words:

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

deems appropriate, the evaluation shall address the following objectives:

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

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

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

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

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

(1) The cost of providing comparable opportunities in the state's small rural schools as well as the larger, more urban schools, including differences in transportation

needs resulting from population sparsity as well as differences in annual operating costs;

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

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

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

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

(6) the cost of opening new facilities; and

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

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

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

Close , and that is the absolute essence of this Court's ruling in the case at bar.

Section VII: Final Observations

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

techniques are available, then Defendants certainly have the authority to implement those improvements. In addition, Defendants are empowered to prescribe and control how the funds provided to public schools are used. If funds are presently being squandered or misused in some schools, Defendants are likewise empowered to initiate policies and programs to correct any misuse.

Much of the reported public comment by legislators during this past regular legislative session centered on the impact any tax increase necessary to fund education might have on our state's economy and its legislators, particularly in an election year. In this connection, the Court takes judicial notice of the webpage of the Kansas Department of Revenue, http://www.ksrevenue.org, a thorough study of which is telling.

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

Close In this official government document, it is revealed that as a result of the significant tax cuts passed by the Kansas Legislature during the past ten years, the state has forfeited nearly $7 billion in funds which it would have otherwise had in the treasury. The depletion for 2005 alone is $918 million! The significance of these statistics is that it was during this precise period of time that the present school funding scheme became unconstitutional, in significant part through inadequate funding. According to the undisputed evidence presented at trial, without any changes in the structure and management form of Kansas schools, the state needs to add nearly a billion dollars to the funds furnished our schools to bring them into constitutional compliance. By coincidence, a billion dollars is very close to the revenue dissipation brought about by the legislative tax reductions during the current fiscal year alone. In other words, the people of Kansas provided the funds needed to educate our children, it was the Legislature which sent them away.

Although ordinarily it is not the Court's role to direct the Legislature on how to levy taxes or on how to spend the funds it does collect, this case is the exception. The Constitution provides virtually no mandatory state programs or services, except for the education of our children. If the Legislature deems a tax increase (or a restoration of

taxes) inappropriate to adequately fund education, it most certainly has the authority to make that decision. However, it has no choice when it comes to funding education. Under the Constitution, it simply must do it and do it adequately. Accordingly, other programs and services not required by the Constitution may ultimately face termination or reduction if the Legislature elects to provide no additional revenue and adequate funds are not otherwise available to provide for both constitutionally mandated education and those programs and services which are merely discretionary.

VIII: Order of Restraint

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

This order of restraint shall command the individuals and classes of individuals served to cease and desist the expenditure of funds under all education funding statutes for the purposes of operating schools (including, but not limited to K.S.A. 72-6405, *et seq*., the School District Finance and Quality Performance Act; K.S.A. 72-8807, *et seq*., the capital outlay funding provisions; and K.S.A. 72-961, *et seq*., the special education excess cost provisions, and all other relevant statutes designed to authorize expenditures for Kansas K-12 education). Plaintiffs shall cause this order of restraint to be served on or

before June 14, 2004 and make due return thereof. The order of restraint shall take effect by its terms on June 30, 2004.

IX: Jurisdiction and Costs

The Court specifically retains jurisdiction to:

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

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

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

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

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Terry L. Bullock
District Judge