

## MINUTES OF THE SENATE EDUCATION COMMITTEE

The meeting was called to order by Chairman Dwayne Umbarger at 1:34 p.m. on January 22, 2004 in Room 123-S of the Capitol.

All members were present:

Committee staff present:

Carolyn Rampey, Legislative Research  
Kathie Sparks, Legislative Research  
Theresa Hollon, Legislative Research  
Theresa Kiernan, Office of the Revisor of Statutes  
Judy Steinlicht, Committee Secretary

Conferees appearing before the committee:

Dale Dennis, Deputy Commissioner, State Board of Education  
Dan Biles, Attorney, State Board of Education

Others attending:

See Attached List

### Introduction of Bills

Senator Umbarger, on behalf of Senator Kerr, requested introduction of a bill concerning sales tax; exempting certain sales by schools and school-sponsored groups and organizations. Motion to introduce by Senator Vratil. Second by Senator Bunten. Motion carried.

Dale Dennis, Deputy Commissioner, State Board of Education, requested introduction of two bills, one concerning alternative schools changing the official count date for students from September 20 to the week of September 20; and one concerning schools; virtual courses or schools; out-of-state pupils not counted for enrollment purposes. Motion to introduce by Senator Teichman. Second by Senator Lee. Motion carried. (Attachment 1)

### Summary of Judge Bullock's decision on funding education

Dan Biles, Attorney, State Board of Education introduced Ken Wertz who represented the State of Kansas; Deputy Attorney General David Davies who represented the State of Kansas; and Scott Hesse, Assistant Attorney General representing the Governor. Mr. Biles gave the Committee a summary of Judge Bullock's decision on funding education.

Mr. Biles advised the Committee that Judge Bullock found in his opinion that the state funding structure violates three areas of the constitution; 1) Section 1 of the Kansas Bill of Rights (state equal protection); 2) the Fourteenth Amendment of United States Constitution; and 3) Section 6(b) of the Kansas Constitution (suitable provision for finance).

Mr. Biles told the Committee that the order was not intended by the court to be appealable at this time and entitled its ruling as a "preliminary interim order." The judge did not impose a remedy, but gave the Governor and the Legislature until July 1, 2004 to decide if they want to address the issues in the court's decision. The court denied a request by the State Board of Education to permit an immediate, "interlocutory" appeal of its "Preliminary Interim Order." If changes are made this legislative session to the school funding structure, the district court indicated it would review the changes to decide if the new laws are in compliance. If they are in compliance, the case would be dismissed. If not, the district court could impose a remedy. Potential remedies could be to halt the distribution of moneys to public schools or the court could design its own school finance system.

Mr. Biles explained the following points of Judge Bullock's opinion; the judicial definition of a "suitable" education; differences in funding based on evidence of actual costs; overall funding level is inadequate; the achievement gap demonstrates the legislature is violating its duty to provide a suitable education to

CONTINUATION SHEET

MINUTES OF THE SENATE EDUCATION COMMITTEE at 1:34 p.m. on January 22, 2004 in Room 123-S of the Capitol.

every child in Kansas; state dominance over local education; special education funding is unconstitutional; capital outlay is unconstitutional; sales tax revenue is suspect; and small school district consolidation not within the court's jurisdiction.

Mr. Biles advised that in summary, the district court opinion says the current funding system in Kansas stands in "blatant violation" of Article 6 of the Kansas Constitution and the equal protection clauses of both the Kansas and United States constitutions because 1) it fails to equitably distribute resources among children who are equally entitled by the Constitution to a suitable education; 2) it fails to provide adequate total resources to provide all Kansas children with a suitable education; 3) Dramatically and adversely impacts the learning and educational performance of the most vulnerable and/or protected Kansas children. (Attachment 2)

Mr. Biles answered questions from Committee members pointing out that it is the decision of the Governor and the Legislature whether to act now or wait for the Supreme Court decision. Mr. Biles stated that the federal court has put off discussing the second law suit until this summer and at the federal level, there is a strong desire that this be a state issue. Mr. Biles explained the history of how low weighting was established and that it could again be brought up at the federal level.

Ken Weltz, attorney from OP, KS who represented the state of Kansas, interjected that he felt the state provided very strong evidence. He invited everyone to read the deposition, reports and trial testimony. He feels they have a very strong record of defending the state of Kansas.

The meeting was adjourned at 2:30. The next meeting is scheduled January 26, 2004.

**SENATE EDUCATION COMMITTEE GUEST LIST**

DATE - 1-27-04

<u>NAME</u>	<u>REPRESENTING</u>
JOHN DOUGHERTY	ESU
Patrick Mearley	KEC
Diane Gierstad	Wichita Public Schools
Jim Edwards	KASB
TERRY FOXS/TH	KWEA
Doug Bowman	Coordinating Council on Early Childhood
Michelle Poor	Cit.
Bill Henry	KCUA
KENT HUBB	USA
A Bourke	Conlee Consulting Group
Joyce Jackson	TEURC
Val DeFaux	SQE
Dana Dawn	Attorney General's office
DAN BIKES	STATE BOARD OF ED.
Karl & [Signature]	Special Asst. A/G
[Signature]	AAG
Ken Seber	Kren Law Firm
Bill Brady	SFFF
Brad Stuffer	TPS, USD 501
Mark Tallman	KASB
Stuart Little	Shawnee Mission 512

Dale Dennis  
KBOE

## APPROVED AMENDMENTS TO EDUCATION LEGISLATION

### CHARTER SCHOOLS

#### Current Law

Application due to State Board – February 1  
Decision by State Board – April 1

#### Amendment

K.S.A. 72-1906(g)—Same  
Decision by State Board – April 15\*

\*This will allow the State Board the opportunity to receive the application in one month and make a final decision the following month.

### TRANSFERS OF TERRITORY BY PETITION

#### Current Law

When two boards of education cannot agree on a transfer of territory, one district can petition the State Board of Education to order the territory transferred. A hearing officer conducts a hearing on behalf of the State Board and then submits a recommendation to the Board.

#### Amendment

K.S.A. 72-7108--Prior to petitioning the State Board, the local boards should be required to mediate the issue using a mediator assigned by the State Board. The cost should be paid by the district seeking the transfer.

### ALTERNATIVE SCHOOLS

#### Current Law

The official count date for students in alternative programs/schools is September 20.

#### Amendment

K.S.A. 72-6407--Count full-time equivalent students in alternative programs/schools during the week of September 20.

### VIRTUAL SCHOOL ENROLLMENT COUNT

#### Current Law

The official count date for students in virtual schools is September 20.

#### Amendment

K.S.A. 72-6407 and 72-1046 et seq.--The official enrollment count would remain September 20 but would exclude out-of-state virtual school students.

Senate Education  
1-22-04  
Attachment 1

MEMORANDUM

**To:** SENATE EDUCATION COMMITTEE

**From:** Dan Biles  
Attorney for the Kansas State Board of Education

**Date:** January 22, 2004

**Re:** *Montoy v. State of Kansas et al.*  
Shawnee County, Kansas Case No. 99 C 1738  
Prior appellate court treatment: 275 Kan. 145, 62 P.3d 228 (2003)

On December 2, 2003, Shawnee County District Judge Terry Bullock issued a 126-page "Memorandum Decision and Preliminary Interim Order" in the above-referenced litigation, which challenges the constitutionality of the way the State of Kansas provides funding to its public schools. The decision followed an eight-day trial to the court that concluded on October 1. The district court determined, based on the evidence and its interpretation of the applicable constitutional requirements, that the school funding structure in Kansas violates:

- 1) Section 1 of the Kansas Bill of Rights (state equal protection);
- 2) the Fourteenth Amendment of the United States Constitution;<sup>1</sup> and
- 3). Section 6(b) of the Kansas Constitution (suitable provision for finance).

This order was not intended by the court to be appealable at this time. That is why the court entitled its ruling as a "preliminary interim order." Instead, the district court gives the legislature and the governor until July 1, 2004, as an opportunity to enact new laws to address the court's order. The district court did this in recognition of the constitutional responsibilities of each branch of government regarding K-12 public education, and its belief that these

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<sup>1</sup> The Fourteenth Amendment was not an issue raised by the plaintiffs in this case.

Senate Education  
1-22-04  
Attachment 2

responsibilities mean the legislature should have the first opportunity to comply. The district court recently denied a request by the State Board of Education to permit an immediate, “interlocutory” appeal of its “Preliminary Interim Order.”

If changes are made this legislative session to the school funding structure, the district court has indicated it will review them to decide if the new laws are in compliance. If not, the district court said it will take whatever action it deems appropriate at the time to enforce the constitution. Those potential remedies could include:

- Halt the distribution of moneys to public schools. This is the most obvious remedy available to the court because it involves simply ordering that no money be distributed to the public schools through the statutes that are declared to be unconstitutional.
- Fashion a court-made funding scheme. This potential remedy is one that raises “murkier” constitutional questions because it would be the court itself designing its own funding scheme, and possibly ordering new money from the state treasury. This is “murkier” because it has the court making educational policy decisions that are traditionally reserved under our constitution to the legislature and State Board of Education. If new money were ordered to be paid out of the state treasury, there would be an additional issue that the judiciary was “appropriating” money, which is traditionally, and exclusively, a legislative prerogative.

It should be emphasized that procedurally, once the district court determines a remedy, the order will become “final” and subject to immediate appeal. Any remedy would be subject to an appellate court stay. The appeal of that order would then go directly to the Kansas Supreme

Court because the order declares various state laws to be unconstitutional.

Points from the decision that I would highlight:

- Judicial definition of what is a “suitable” education. The district court said a constitutionally “suitable” education is one that provides every Kansas student, commensurate with their natural abilities, the [knowledge and] skills necessary to understand and successfully participate in the world around them both as children and later as adults.
- Differences in funding based on evidence of actual costs. Any differences in funding to public schools (for example, weighting factors) must have a rational basis, and be justified by evidence as to the actual costs necessary to provide the educational opportunity the extra funding is supposed to accommodate. The court is clearly moving toward requiring empirical study of cost differences, something that was not required by the Kansas Supreme Court in 1994.
- Overall funding level is inadequate. Based on a rationale that the legislature and State Board defined the components of a constitutionally “suitable” education through the Augenblick & Myers cost study, the court found the overall funding level in Kansas for public education was constitutionally inadequate because the current funding level does not match the A&M study results.
- The Achievement Gap demonstrates the legislature is violating its duty to provide a suitable education to every child in Kansas. The court rejected the notion that even though Kansas does better than most other states on issues surrounding the achievement gap between majority students and poor and minority students, this is

not enough. The court said we must address the issues of performance variations, drop out rates, bilingual education, and special education achievement at the individual student level, because the constitutional duty is owed to each child. The court found the funding structure in Kansas has a disparate impact on poor, minority, disabled, and children not fluent in English. The court also determined the State Board's new accreditation regulations that target specific goals of adequate yearly progress in conformance with No Child Left Behind won't get the job done soon enough from a constitutional perspective.

- State dominance over local education. The decision has strong language about the obligation of the legislature and the State Board to make certain that local school district's use funds appropriately to achieve the goal of improving student performance. The point here is that since the state is being held accountable for student performance (suitable educational opportunity is owed to each child), it can dictate what local districts do with funds to make certain that students actually perform. This ties the state's performance of its constitutional duty more to actual student outcomes and less to the notion of simply providing educational opportunities.
- Special education funding is unconstitutional. The long-standing practice of the state providing most (but not all) state aid for excess costs in special education is unconstitutional because it takes money away from regular education. The court said this was not rational.



- Capital outlay is unconstitutional. The court found that since capital outlay is not equalized, and is now uncapped, it is unconstitutional.
- Sales tax revenue is suspect. In noting the various reasons why one school district has a larger budget per pupil than another, the court noted one component in a few districts was the access to sales tax revenue.
- Small school district consolidation not within the court's jurisdiction. The district court stated it did not have authority to consolidate school districts. The court said this is clearly a policy decision of the legislature. The court was not going to be brought into the debate over what might constitute a "necessarily small" school district, as the plaintiffs requested.

In summary, the district court opinion says the current funding system in Kansas stands in "blatant violation" of Article 6 of the Kansas Constitution and the equal protection clauses of both the Kansas and United States constitutions because:

- It fails to equitably distribute resources among children who are equally entitled by the Constitution to a suitable education.
- It fails to provide adequate total resources to provide all Kansas children with a suitable education.
- Dramatically and adversely impacts the learning and educational performance of the most vulnerable and/or protected Kansas children.

Constitutional provisions relevant to school finance litigation:

Kan. Const. Article 6:

**“Section 1. Schools and related institutions and activities.**

The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools... which may be organized and changed in such manner as may be provided by law.”

**“Section 2. State board of education and state board of regents.**

(a) The legislature shall provide for a state board of education which shall have general supervision of public schools... and all the educational interests of the state, except educational functions delegated by law to the state board of regents.”

**“Section 5. Local public schools.** Local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards...”

**“Section 6. Finance.** ... (b) The legislature shall make suitable provision for finance of the educational interests of the state. No tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law...”

Section 1 of the Kansas Bill of Rights:

“All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness.”