

MINUTES OF THE SENATE EDUCATION COMMITTEE

A joint caucus of Senate Republicans and Democrats was called to order by Chairman Jean Schodorf at 1:35 p.m. on January 13, 2005, in Room 313-S of the Capitol.

Committee members absent:

Committee staff present: Carolyn Rampey, Kansas Legislative Research Department
Kathie Sparks, Kansas Legislative Research Department
Theresa Kiernan, Revisor of Statutes
Shirley Higgins, Committee Secretary

Conferees appearing before the committee: Dan Biles, Attorney for the State Board of Education
Alan Rupe, Attorney at Law
Curtis L. Tideman, Lathrop & Gage L.C.

Senator Schodorf noted that the format for the meeting of the Senate Education Committee was changed to a caucus of Senate Republicans and Democrats to give all senators an opportunity to hear the conferees' overview of the recent Kansas Supreme Court ruling on *Montoy v. State of Kansas*, which relates to the Legislature's constitutional burden to make a suitable financial provision for public schools.

Dan Biles, attorney for the State Board of Education, said the Court's decision could be summarized as an expanded judicial standard for Kansas Constitution Article 6, Section 6(b), which requires that the Legislature make a suitable provision for school finance. He explained that the Supreme Court retains jurisdiction to review what, if anything, the Legislature does by an April 12, 2005, deadline. He went on to discuss the two primary holdings under the constitutional provision for equal protection (fairness) and the two primary holdings under Article 6 (adequacy). In his opinion, with the Court's decision, equal protection now plays much less of a role in school funding cases with the emphasis now being placed on Article 6 to determine whether school funding formulas comply with the constitution. After discussing the legal aspects of the ruling, Mr. Biles noted that the Court said, "The concept of a 'suitable provision for finance' encompasses many aspects." He discussed the "many aspects" under the following headings: Improvement, Established Educational Criteria, and Other Factors (Cost Analysis and Equity and Constant Monitoring). In conclusion, he discussed the components required to remedy the Article 6 violation. (Attachment 1)

Alan Rupe identified himself as one of the attorneys who represented the plaintiff school districts in the school finance lawsuit. He concurred with Mr. Biles' interpretation of the Supreme Court's decision. He commented, "There is no way to read this opinion without coming to the conclusion that this group needs to spend substantially more money on education to live up to your Article 6 constitutional obligation. That's the fact of this case. And it's not the State Board of Education or your constituents that are looking over your shoulder; it's the Supreme Court." He went on to say that it was clear that the Supreme Court has expanded its role and has taken an equal protection analysis of fairness and inserted it under Article 6 of the Constitution. He noted that adequacy and equitable distribution are the key words in the Court's opinion. He further noted that the decision tells the Legislature to focus on the actual cost of delivering education. He explained that the Supreme Court said that the mid and large size districts are not receiving their share and that the local option budget is not being used for the extras for which it was intended but, instead, is being used for essentials. He noted that, in addition, the Court said that the low enrollment weight, special education weight, bilingual weight, and at-risk weights must be adjusted to reflect the actual costs and that distribution must not be based upon political and other factors not relevant to education. (Attachment 2)

Mr. Rupe commented, "One of the things that I think it is imperative that you look at in this section is the magnitude of the fix that's going to be required. The question is, how much do you spend? And I think this opinion is very clear when it indicates the road map for how to fix the problem. It is going to take somewhere in the neighborhood of a billion dollars to fulfill your Article 6 responsibilities. And that's not my words, that's not Schools For Fair Funding words; that's where the Court directs this group to Augenblick and Myers because you have done a cost study, and you did it in 2001. If you take the Augenblick and Myers' base number of \$4,650 and adjust it for inflation, it's \$5,261. If you look at the consumer price index starting in 1992 and just bring it forward adjusting for inflation, the current base is \$1,000 short per kid in Kansas." He

CONTINUATION SHEET

MINUTES OF THE Senate Education Committee joint caucus at 1:35 p.m. on January 13, 2005, in Room 313-S of the Capitol.

went on to note that the Supreme Court recognized Judge Bullock's finding as to what was inadequate in Kansas' current system. Mr. Rupe urged legislators to consider testimony regarding the cost given at trial by Bruce Baker from the University of Kansas and Winston Brooks from USD 259. He suggested that they could also get direction from other states such as Arkansas and New York which were recently given the same instruction on how to provide adequate education. In conclusion, he emphasized that the Court's decision clearly concluded that there must be more funding and more equity and that the focus should be on actual costs to deliver adequate education. He said, "The consequence of inaction by this group by April 12 is one of three things – (1) the Supreme Court retains jurisdiction, (2) the Court may appoint a special master, or (3) the Court may return it to Judge Bullock." He pointed out that, in terms of the decision, one of the avenues that cannot be taken by the Legislature is an attempt to redefine suitability. He reiterated that the only avenue under the Court's decision is a substantial increase in funding.

Curtis L. Tideman, Lathrop and Gage L.C., expressed his opinion that the Legislature acted wisely in resisting the temptation and political pressure to remake the entire funding formula in the image of the District Court's preliminary order in 2004 because it was later found that pieces of the District Court order were wrong. He noted, "To remake the funding formula in the image of that order would have been grossly unfair to many districts who were not represented in that proceeding." He noted that the Supreme Court's brief opinion addressed four points and sided with the State of Kansas in three of the four issues addressed. He explained that, because the Supreme Court withheld its final and formal opinion, the Legislature does not have the benefit of the specific reasoning behind each of the rulings; however, the opinion does provide a degree of guidance in the areas of funding adequacy, funding equity, and actual costs. In summary, he said the Kansas Supreme Court provided valuable, although not definitive, guidance on the elements of a constitutional school finance system. (Attachment 3)

In reference to Mr. Rupe's comments, Mr. Tideman said, "I do not agree that this order contains any type of suggestion of the proper magnitude of additional funding. However, it's clear that additional funding will be required. And I'm not sure that I agree that the Court has specifically said that the LOB is only for extras. If you look at the opinion, it says that evidence of inadequate funding includes the fact that, although initially intended for extras, it's been commonplace for LOBs to be used for general education. If you read the entire opinion of the Court, they are pretty clear that they are not telling this body exactly how to do their job."

Senator Schodorf asked Mr. Tideman if he believed that "suitability" needed to be redefined. Mr. Tideman responded, "There's nothing in this opinion that specifically calls for a redefinition of suitability. It does rely on a definition, and it's a definition that was primarily drafted by the Legislature. But I'm not certain, if the Legislature were to change that definition, that the Court might not come to the same conclusion anyway."

Senator Ostmeyer expressed concern that the Legislature was simply told that more money is needed for education, but no budget solutions have been offered. In response, Mr. Rupe commented that focusing on the cost of providing an adequate education is the center point of what the Legislature needs to do. In his opinion, if the focus is on actual cost, all of the other factors will fall into place.

Senator Hensley asked how the actual cost of an adequate education would be ascertained by the Supreme Court, a special master, or Judge Bullock. Mr. Rupe responded, "The same way Augenblick and Myers did; by looking at evidence gathered from the testimony of superintendents, economists, and experts familiar with costs." He commented that the Augenblick and Myers study could be used as a basis to determine the cost and that, by focusing on costs, Augenblick and Myers solves all the equity problems. Senator Hensley asked the opinion of other conferees. Mr. Biles commented that the Augenblick and Myers study was not being forced upon the Legislature. He pointed out that the study was based on data that was now four years old. He felt that the old data was relevant but not compelling. He agreed that the study would be helpful if it became necessary for someone other than the Legislature to determine the cost. In addition, he noted that he felt that schools should be held accountable through the monitoring process.

Senator Lee commented that determining the actual cost was the most difficult part of the Supreme Court's ruling. Noting that Court's opinion prohibits the use of historical data in determining cost, she asked conferees for suggestions for determining the actual cost without using historical data. Mr. Rupe noted that Augenblick and Myers took two or three different approaches and combined them to come to the actual cost.

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Included in those approaches was simply asking educators in all sizes of schools and school districts what the actual cost was, not what funding they had received from the state in previous years.

Senator Vratil asked conferees, "To what extent did the Court in *Montoy* overrule any of the findings in USD 229, the 1994 school finance case, and if they didn't overrule anything in USD 229, are there any inconsistencies between those two opinions?" Mr. Biles responded, "I think you can expect, when the formal opinion comes down, that there are going to be parts of 229, and I think parts of *Montoy* one—that there will be some language in there that says to the extent either of those two opinions disagree with this one, that they are overruled. I don't see how they could be read consistently together."

Senator Steineger began a discussion regarding the use of local sales tax revenue for schools. Mr. Rupe and Mr. Tideman agreed that no new money would be needed for schools if they are adequately funded. Mr. Biles said, "I'm not quite willing yet to sign on the proposition that says once the Legislature meets and provides a basic education that it's not relevant what else is happening in terms of other money getting added for extras and whether that ultimately will be decided to be irrelevant to the issue of fairness. In 229, the Supreme Court said it was appropriate for the Legislature to put a cap on the total funding flexibility the school districts had. I don't think this case deals with it, but I think it's remained an issue."

There being no further time, the meeting was adjourned at 1:40 p.m.

The next meeting is scheduled for January 18, 2005.

**SENATE EDUCATION COMMITTEE
GUEST LIST**

DATE: January 13, 2005

NAME	REPRESENTING
JOHN ROBB	SCHOOLS FOR FAIR FUNDING
ALAN RUPE	" " " "
John C Peterson	Ks Govemtl Consulting
Bill Brady	SFFF
Scott Hesse	AAG
Jamil Lane	Senate Leadership
Ashley McMillan	Senate Leadership
Sue Krusiche	Senate Leadership
DON ADKISSON	USD 260 DERBY
Winston Brooks	USD 259 Wichita
Curtis L. Tideman	State of Kansas
David W Daves	Office of Attorney General
Cameron Leslie	
Jim Sullinger	KC STAR
Lewis Pressgrave	# 450
Jennifer Lepor	Sen Embler
Steve Johnson	Kansas Gas Service
Andrew Brouska	Sen Minority Leaders Office
Don Wilson	USA
Pat Van Slyke	Senate R. Leadership

MEMORANDUM

TO: SENATE EDUCATION COMMITTEE

FROM: DAN BILES
Attorney for the State Board of Education

DATE: JANUARY 13, 2005

RE: *MONTOY v. STATE OF KANSAS, et al.*
"MONTOY II"
Case No. 92,032; filed January 3, 2005

DECISION SUMMARY: The Court's *Per Curiam* Opinion sets an expanded judicial standard for Kan. Const. Art. 6, §6(b) – the requirement that the legislature “make suitable provision for finance” of public schools. This provision is no longer just about education adequacy. It is about funding a public school system using cost analysis based on educational criteria that is sufficient to achieve the “intellectual, educational, vocational and scientific improvement” required by Art. 6, §1, which is the constitutional purpose given to the legislature for establishing and maintaining public schools. There also must be a mechanism for constant monitoring to ascertain whether constitutional mandates are being achieved. Within these constitutional parameters, the legislature may act as it sees fit to comply. The Supreme Court retains jurisdiction to review what, if anything, the legislature does. But the Court’s review will begin no later than April 12, 2005.

DISCUSSION POINTS

I. THERE ARE FOUR PRIMARY HOLDINGS UNDER TWO CONSTITUTIONAL PROVISIONS – EQUAL PROTECTION AND THE EDUCATION ARTICLE

A. EQUAL PROTECTION

Holding #1: Reversed the district court’s ruling that SDFQPA violates the equal protection clause, saying the district court misapplied the rational basis test. This means the Supreme Court found the funding differentials (low enrollment weighting, at-risk, bilingual, correlation weighting, etc.) have a legitimate purpose and are rationally related to that purpose.

Holding #2: Reversed the district court’s ruling that SDFQPA has an unconstitutional disparate impact on minorities or other classes. The Supreme Court said plaintiffs failed to show a discriminatory purpose to the law.

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B. KANSAS CONSTITUTION, ARTICLE 6 – THE EDUCATION ARTICLE

Holding #3: Affirmed the district court’s ruling that the legislature has NOT usurped the State Board of Education’s Art. 6, §2(a) authority for general supervision of the state’s educational interests.

Holding #4: Affirmed the district court’s holding that the legislature FAILED to meet its constitutional responsibility under Art. 6, §6(b) to “make suitable provision for finance” of public schools.

II. WHAT ARE THE IMPORTANT LEGAL ASPECTS TO THIS RULING?

- A. The Supreme Court has EXPANDED the standard to be used by the courts when they are asked to decide whether the legislature is making “suitable provision” for the finance of public school education.¹
- B. This necessarily means the judiciary’s role in this area is expanded as well.
- C. What the Court says about the “many aspects” of Art. 6, §6(b) and the role of the judiciary in its review of those “many aspects” is the heart of what we have in this opinion.

III. WHAT ARE THE “MANY ASPECTS” TO SUITABLE FINANCE?

- A. Improvement. The Court said, “First and perhaps foremost” the legislature must provide a level of funding that meets the constitutional requirement contained in Art. 6, §1, which states that: “The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools.”²
- B. Established Educational Criteria. The Court noted K.S.A. 72-6439(a) requires the State Board to design and adopt a school performance accreditation system “based upon improvement in performance that reflects high academic standards and is measurable.” It further noted K.S.A. 72-6439(c) mandates standards for individual and school performance levels “the achievement of which represents excellence in the

¹ The Court said, “The concept of ‘suitable provision for finance’ encompasses many aspects.” (Slip Opinion, p. 6).

² The Court said Art. 6, §1 “imposes a mandate that our educational system cannot be static or regressive but must be one which ‘advance[s] to a better quality or state.’” (Slip Opinion, p. 6), quoting dictionary definition for the word “improve.”

academic area at the grade level to which the assessment applies.”³

NOTE: The Court left open the possibility for some future case that a court may find the educational criteria established by statute or regulation may be so inferior as to not adequately provide for a constitutionally “suitable” education. This leaves room for the judiciary’s ability to substitute other criteria.

C. Other factors.⁴

- Cost Analysis and Equity. These are determined to be Article 6, §6(b) requirements.⁵
- Constant Monitoring.⁶

IV. WHAT ARE THE COMPONENTS REQUIRED TO REMEDY THIS ARTICLE 6, §6(b) VIOLATION?

A. Increased Funding.⁷

B. Provide the systemic “improvement” required by Art. 6, §1.

C. Meet the Established Educational Criteria.

³ The Court then said, “Through these provisions, the legislature has imposed a criteria for determining whether it 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.’” (Slip Opinion, p. 7) quoting K.S.A. 72-6439(a).

⁴ The Court said, “[I]n 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.” (Slip Opinion, p. 8) (Emphasis Added).

⁵ The Court said, “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.” (Slip Opinion, p. 9).

⁶ The Court said, “[I]n *Montoy I*, we noted that the issue of suitability is not stagnant but requires constant monitoring.” (Slip Opinion, p. 5).

⁷ The Court said, “It is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula constitutionally suitable.” (Slip Opinion, p. 9).

D. Satisfy the “other factors” required by Art. 6, §6(b).

- Conduct a cost analysis to justify what is given as BSAPP (note comment about LOB being for extras) and to justify weighting factors.
- Equitable, which will probably be based on legitimacy of the cost analysis used.
- Contain a mechanism for constant monitoring. This monitoring should include analysis of changes in public education costs associated with societal changes, statutory amendments, State Board regulatory requirements, federal mandates, as well as an analysis as to how money is being spent and what outcomes are achieved with the money spent. ✓

KANSAS SUPREME COURT FINDS SCHOOL FUNDING LAW UNCONSTITUTIONAL.

[*Montoy v. State of Kansas*, 2005 Kan. Lexis 2, January 3, 2005]

“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.”

“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.”

In other words, it boils down to these four points:

1. More funding is required.
2. The formula must provide more equitable distribution of funding.
3. The distribution must be based upon actual education “costs,” and
4. Not based upon “political and other factors not relevant to education.”

Other points:

- **Augenblick & Myers Cost Study is a good guide to the proper legislative remedy.**
 - “Within that record 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.”
- **The funding levels for mid-sized and large districts must increase.**
 - “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.”
- **The LOBs need to go back to funding only extras. General funding must increase to allow this to occur.**
 - “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 was to fund "extra" expenses, some school districts have been forced to use local option budgets to finance general education.”
- **The low enrollment weight, special education weight, bilingual weight and at-risk weights must be adjusted to reflect those actual costs.**
 - “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 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.**”

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SCHOOLS FOR FAIR FUNDING

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Senate Education Committee

1-13-05

Attachment 2

Kansas School Finance Scheme

	Current Law	Augenblick and Myers Recommendations
1.	Enrollment on September 20 or adjusted for 3 year average	
2.	Low enrollment weighting- each student counts for additional students according to a formula of between .0632 and 1.14 additional students	A&M recommends an adjustment to the formula that adjusts for district size and economies of scale.
3.	Correlation weighting- each student counts for an additional .0632 students	A&M recommends an adjustment to the formula that adjusts for district size and economies of scale.
4.	Vocational weighting- each 6 hours of vocational class counts as a student and gets counted as .5 additional students	A&M recommends that this weighting be eliminated and covered by increased base.
5.	Bilingual weighting- each 6 hours of bilingual class counts as a student and gets counted as .2 additional students	A&M recommends new weights for bi-lingual students. It would be set by formula. A district of 200 students would use a weight of .15 additional students, a district of 1000 students would use a weight of .85 additional students, a district with 10,000 students would use a weight of .89 students and a district of 30,000 would use a weight of .97 students.
6.	At-risk weighting- each at-risk student gets counted as .1 additional students	A&M recommends new weights for at-risk students. It would be set by formula. A district of 200 students would use a weight of .2 additional students, a district of 1000 students would use a weight of .52 additional students, a district with 10,000 students would use a weight of .59 students and a district of 30,000 would use a weight of .6 students.
7.	New facilities weighting- each student in a new facility gets counted as an additional .25 students for two years.	A&M recommends that the weighting continue for three years but that it reduce each year.
8.	Transportation weighting- each student that gets transported more than 2.5 miles gets additional weighting figured by a formula	A&M recommends that the funding for transportation increase to allow for transportation of those that live 1.25 miles from school.
9.	Ancillary weighting- (applies only to U.S.D. 229, Blue Valley, U.S.D. 232 DeSoto and U.S.D. 233 Olathe)	
10.	Special Education Weighting- budgeted special education funding converted to an equivalent number of students by dividing the aid by the \$3870	A&M recommends new weights for special ed students. It would be set by formula. A district of 200 students would use a weight of .9 additional students, a district of 1000 students would use a weight of .92 additional students, a district with 10,000 students would use a weight of 1.1 students and a district of 30,000 would use a weight of 1.5 students.
11.	Base State Aid Per Pupil = \$3863	<p>1. A&M found two different base figures. Their "Professional Judgment Approach" yielded a new base of \$5,811 and their "Successful Schools Approach" yielded a new base of \$4,547. A&M considered both of these findings and recommended a new base of \$4,650 in 2000-01 dollars. This converts to a new base of \$5,261 in 2005-06 dollars. <small>(assumes 2.5% inflation/year)</small></p> <p>2. A&M recommends that this base be increased annually to track increases in the Consumer Price Index.</p> <p>3. A&M recommends that the base be adjusted by a "regional cost factor" to account for geographically different costs.</p>
12.	Authorized Local Option Budget Percentage- district can adopt an additional local budget of up to 25% of their General Fund	A&M recommends that a 25% LOB continue but that it be used, <i>as it was originally intended</i> , as a supplement above an adequate base.

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ANALYSIS OF MONTOY II.

KANSAS SUPREME COURT FINDS SCHOOL FUNDING LAW UNCONSTITUTIONAL.

[*Montoy v. State of Kansas*, 2005 Kan. Lexis 2, January 3, 2005]

“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.”

“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.”

- (a) In other words, it boils down to these four points:
 - (i) More funding is required.
 - (ii) The formula must provide more equitable distribution of funding.
 - (iii) The distribution must be based upon actual education “costs,” and
 - (iv) Not on “political and other factors not relevant to education.”
- (b) Suitability.
 - (i) The Constitution section of the opinion:

“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 and maintaining public schools”

“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.”

- (ii) The Statutory sections of the opinion:

“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)*.”

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(iii) Summed up:

“Through these provisions, the legislature has imposed a criteria for determining whether it has made suitable provision for the finance of education: **[1] Do the schools meet the accreditation requirements AND [2] are students achieving an "improvement in performance that reflects high academic standards and is measurable"?** *K.S.A. 72-6439(a)*.”

(iv) Augenblick & Myers Study definition of suitability:

“These student performance accreditation measures were utilized in 2001 when 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 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.**”

(v) The suitability definition conclusion:

1) The “safety valve” language:

“Although in *Montoy I*, 275 Kan. at 153-55, we concluded that accreditation standards may not always adequately define a suitable education, ...”

2) They don’t need to use the “safety valve” here:

“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 a suitable education, as that term is defined by the legislature, is not being provided. ”

(c) **The particulars of what is wrong:**

(i) **The funding levels for mid-sized and large districts must increase.**

“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.”

(ii) **LOBs need to go back to funding only extras. General funding must increase to allow this to occur.**

“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 was to fund "extra" expenses, some school districts have been forced to use local option budgets to finance general education.”

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- (iii) **The low enrollment weight, special education weight, bilingual weight and at-risk weights must be adjusted to reflect those actual costs.**

“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 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.**”

- (d) The remedy section.

- (i) Supremes retain jurisdiction:

“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 reasonable time to correct the constitutional infirmity in the present financing formula.”

- (ii) Problem areas are identified in this opinion:

“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.”

- (iii) If no action taken by legislature, court will direct action:

“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.”

- (iv) Action by April 12:

“To ensure the legislature complies with our holding, we will withhold our formal opinion until corrective legislation has been enacted or April 12, 2005, whichever occurs first....”

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MEMO

To: Kansas Senate Education Committee
From: Curtis L. Tideman, Lathrop & Gage L.C.
Date: January 13, 2005
Subject: **Kansas School Funding**

On January 3, 2005, the Kansas Supreme Court handed down its much anticipated ruling in *Montoy v. State of Kansas*. As it turned out, however, the Court withheld its "formal opinion" in lieu of a *per curiam* "brief opinion" in which it declared that the District Court opinion had been "Affirmed in part and reversed in part." The brief opinion addressed four points and sided with the State of Kansas ("State") in three of the four issues addressed. Specifically, in its brief opinion, the Kansas Supreme Court made the following rulings:

1. That the District Court had erred in finding that SDFQPA violates the equal protection clause of the Kansas and United States Constitutions. In reversing the District Court, the Supreme Court agreed with the State's appellate position, stating, "We conclude that all of the funding differentials as provided by the SDFQPA are rationally related to a legitimate legislative purpose."
2. That the trial court had erred in finding that SDFQPA was unconstitutional as a result of its "disparate impact." The Supreme Court reversed the District Court on this point, finding that the SDFQPA financing formula was not unconstitutional because of a "disparate impact on minorities and/or other classes." The Supreme Court held that this claim failed because "no discriminatory purpose was shown by the plaintiffs." This holding was identical to the appellate position taken by the State of Kansas.
3. Affirming the District Court's holding that the legislature had failed to meet its burden to "make suitable provision for finance" of the public schools pursuant to Article VI, Section 6 of the Kansas Constitution. The Supreme Court targeted certain aspects of education funding for "corrective legislation." On this point, the Kansas Supreme Court disagreed, at least to some degree, with the appellate position taken by the State.
4. As to the cross-appeal, the Supreme Court affirmed the District Court's holding that the legislature had not usurped the powers of the State Board of Education through its enactment of the SDFQPA

finance formula. On this point, the Supreme Court agreed, not only with the State, but with the District Court as well.

The Supreme Court's brief opinion concluded by retaining jurisdiction and staying further proceedings "to allow the legislature reasonable time to correct the constitutional infirmity in the present financing formula." The Court withheld its formal opinion until corrective legislative action has been enacted or until April 12, 2005, whichever occurs first. In the meantime, the present financing formula remains in effect until further order of the Supreme Court.

Because the Supreme Court withheld its final and formal opinion, the legislature does not have the benefit of the specific reasoning behind each of the rulings. The brief opinion does not set the criteria for a constitutional funding system, but merely identifies "problem areas" in the current formula. Nevertheless, in spite of the continuing uncertainties regarding the issues left open, the brief opinion does provide a degree of guidance in certain areas:

1. Funding Adequacy. The brief opinion is unambiguous that increased funding will be required. The Supreme Court was silent, however, on the proper amount of any funding increase. Whereas the plaintiffs had asked the District Court to "write a check" in the amount recommended by the Augenblick and Meyers study, the Supreme Court has not adopted that approach even though it easily could have done so. Although the Augenblick and Meyers study was cited in the brief opinion as part of the evidence supporting the Court's finding that funding levels were inadequate, the brief opinion does not mandate funding levels recommended by Augenblick and Meyers.

The Supreme Court does not commit to any particular definition of a "suitable education" under the Kansas Constitution in the brief opinion. In fact, the Supreme Court ultimately based its decision, not on its own definition of suitability, but on what it calls "the legislature's own definition" which it gleaned from K.S.A. 72-6439(a) and 46-1225(e).

While much of the legislature's debate will undoubtedly address the issue of tax policy, the Supreme Court's brief opinion does not address tax revenue. In fact, the Supreme Court's brief opinion does not concern itself with the source of funds at all.

2. Funding Equity. Although the Supreme Court dismissed the District Court's rulings on equal protection, the "equity" issue has not been completely eliminated from the case. The brief opinion stated that increased funding may or may not, in and of itself, make the financing formula "constitutionally suitable." The brief

opinion identified the “equity with which the funds are distributed” as one of the “critical factors” in determining whether any corrective legislation would cure the perceived constitutional defects. Although the brief opinion does not define the term “equity,” it does identify “problem areas” pertaining to equity.

The opinion states that the SDFQPA formula fails to provide adequate funding for a suitable education in “middle and large sized districts” and further finds that the current formula distorts the following weighting factors: (a) low enrollment, (b) special education, (c) vocational, (d) bilingual education, and (e) at risk student weighting. To the extent that the issue of “equity” remains in the case, these appear to be the “problem areas” relating to equity in the Kansas Supreme Court’s brief opinion.

Although the District Court, at the urging of the plaintiffs, disapproved of any local revenue, the Kansas Supreme Court apparently does not agree with that position. For example, noticeably absent from the Supreme Court’s list of “problem areas” are local option budgets, capital outlay funds, bond and interest funds, local sales tax revenues, grants and other sources of local revenue. Furthermore, in reversing the District Court’s equal protection conclusion, the Kansas Supreme Court held that all funding differentials under the current formula are “rationally related to a legitimate legislative purpose.” It is reasonable to conclude, therefore, that the Kansas Supreme Court disagreed with the District Court’s blanket indictment of local control and local revenue sources.

3. Actual Costs. The Supreme Court’s brief opinion also identifies the “actual cost of education” as another “critical factor” to consider in achieving a suitable formula. The brief opinion, however, stops short of mandating an actual cost study. In fact, it leaves open the possibility that increased funding could, in and of itself, make the financing formula constitutionally suitable. Nevertheless, the Supreme Court’s brief opinion is clear that “corrective legislation” is far more likely to pass constitutional muster if the legislature has considered actual cost of a “suitable education.” The brief opinion states that the problem areas were “distorted” by the failure to conduct a cost analysis. Accordingly, it appears that some sort of cost analysis would be helpful in persuading the Kansas Supreme Court that corrective legislation does not continue to “distort” individual weighting factors.

In summary, the Kansas Supreme Court has provided valuable, although not definitive, guidance on the elements of a constitutional school finance system.

Unfortunately, the legislature apparently will not get any more specific guidance until the sooner of April 12, 2005, or whenever corrective legislation has been enacted.

Nevertheless, the guidance provided by the Kansas Supreme Court's brief opinion in *Montoy v. State of Kansas* provides the legislature with direction far beyond that which was available during the last session. Obviously, the State's policy makers are in a far better position to make informed choices on education policy than if they had acted upon the orders of the District Court. While some of the District Court's opinion obviously remains, much of it has been reversed. Furthermore, the business of setting public policy for the State of Kansas remains in the hands of the legislature and the Governor, at least for the time being. Within the guidelines set forth in the brief opinion of the Kansas Supreme Court, there remains a great deal of latitude and discretion for the exercise of that public policy function.