

SPECIAL ISSUE:

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From the Editor

Public K-12 education is by far the single largest program funded by the State General Fund in Kansas. Over the past decade few issues have been as contentious in state policy. During 2005 the adequacy of the state’s funding as well as the way that funds are distributed across districts resulted in a stand-off between the State Supreme Court and the Legislature. With these issues in mind I asked Professor Bruce Baker if he would edit a special issue of the Kansas Policy Review devoted to an analysis of the legal, economic, political, and educational dimensions of this controversy. Professor Baker has done an excellent job, assembling a set of articles that clearly explain the history of the controversy and illuminate the complicated issues surrounding school finance and its place in state policy.

Joshua L. Rosenbloom

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History of School Finance Reform and Litigation in Kansas

Bruce D. Baker
Preston C. Green, III

Introduction

In this special issue of the *Kansas Policy Review*, we explore multiple aspects of the recent turmoil in the State of Kansas over the financing of elementary and secondary public schools. Events appeared to climax this past summer with a State Supreme Court declaration that the Kansas legislature had failed to comply with its January ruling, an order by the court to add another \$143 million to public school financing and a first-time-in-decades special legislative session. Quite likely, even more interesting and potentially volatile times are forthcoming in the spring legislative session of 2006.

In recent years, several states have faced challenges to their systems of funding K-12 public schooling, both on the basis of inequities and inadequacies of funding. States including New York and Arkansas have had their state school finance formulas overturned by their highest courts. Others, including Texas have had lower court decisions ruling in favor of plaintiffs. In the immediate region, Missouri currently faces challenges to the equity and adequacy of school funding brought initially by over 200 local public school districts in that state, and Nebraska faces challenges from two groups of districts, rural smaller districts in one case and a collection of demographically diverse larger districts in the other. Overall, 45 states have faced challenges to their school funding, and 23 are *in process* including cases recently filed and cases remaining under court oversight.¹

This first article takes a look at the history of state school finance reform and the role of school finance litigation in those reforms since the restructuring of Kansas public schools and redrafting of Article 6 (The Education Article) of the Kansas Constitution in the 1960s. In the second article, Preston Green, JD/Ed.D, addresses the details of recent legal challenges to school finance inequities and inadequacies in Kansas, including *Montoy v. Kansas* which led to the State Supreme Court ruling that the current system of funding is in violation of the Education Article (Article 6) of the Kansas Constitution. Next, Bruce Baker evaluates what the Kansas Supreme Court meant when it declared that the current school finance system is "politically distorted" and "not cost-based," and measures how far the legislature has come since the court order in rectifying these problems.

Near the time of release of this special issue on Kansas School Finance, the Kansas Legislative Division of Post Audit will be releasing two new studies of education costs, commissioned by the legislature as part of the reform bills of the special legislative session (summer 2005). Lori L. Taylor of the Bush School of Government and Public Service at Texas A&M provides an overview of alternative methods for measuring education costs and insights as to where past estimates of Kansas education costs fit into the national picture.

History of Kansas School Finance Reform

The Kansas system of K-12 public schooling emerged into its current form through a series of radical organizational changes in the 1960s. First, under the School Unification Law of 1963 the total number of school districts in the state was reduced from approximately 1,600 to 306. Parameters established for the consolidation movement were generally intended to organize rural, non-K-12 schools into fewer units covering wider geographic areas and complete K-12 grade ranges. Baker and Green (2005) explain how this reorganization, while substantially consolidating Kansas schoolchildren into far fewer organizational units, served to reinforce the racial isolation of schools in large towns (15,000 or more residents) that only nine years earlier were permitted under Kansas law to operate racially segregated schools.²

The next few years following the School Unification Act saw the redrafting and ratification of the current Education Article of the Kansas Constitution (Article 6). Scholars have argued that the changes to the constitution, which clarified a much stronger role for the state in organizing, controlling, and financing schools, were proposed and adopted in part to justify the state's contentious mandated reorganization of schools three years prior.³

Concurrently, in 1965, under Governor William Avery, the legislature enacted the first organized state level system for allocating aid to local public schools: The School Foundation Act. Major provisions of the act included a basic allotment of \$760 per pupil and included two major adjustments to that allotment: (1) an adjustment based on teacher education and experience levels; and (2) a multiplier based on each district's pupil-to-teacher ratio relative to the state average. The latter ratio served to place significantly greater funding into smaller, rural districts with far fewer pupils per grade level. In addition, districts were limited to annual budget increases of 4 percent. As such, districts with larger budgets as a function of the state funding program (smaller districts) were able, on a dollar rather than percentage comparison, to outpace the growth of districts with smaller budgets over time.

Round 1 in the Courts: *Caldwell v. State*

The first phase of Kansas school finance litigation, which started in the 1970s, began with a challenge of the constitutionality of the School Foundation Act of 1965.⁴ There were at least three major deficiencies with the school finance formula. First, districts with well-trained and experienced teachers received more state funding than districts with less experienced teachers because their CQ (*CQ's State Fact Finder*) ranking was higher. Second, the multiplier placed large, urban districts at a disadvantage by placing significantly more state funding into the coffers of small, rural districts with fewer pupils per teacher.⁵ Third, the index used for determining local tax effort harmed poor school districts in rich counties. This was the case because the expected contribution of a poor district was computed as equal to that of more affluent districts in the same county.⁶

Another provision of the act restricted the budgetary authority of school districts. School districts were prohibited from increasing their budgets annually by more than 4 percent. This provision had the effect of codifying existing inequalities between rich and poor school districts.

In 1972, the Johnson County District Court ruled in *Caldwell v. State* that the school finance system violated the Equal Protection Clause to the extent that it “[made] the educational system of the child essentially the function of, and dependent on, the wealth of the district in which the child resides.”⁷

Post-Caldwell Reforms

Following legal challenges to the School Foundation Act, the legislature adopted the first iteration of the School District Equalization Act (SDEA). SDEA replaced the pupil to teacher ratio adjustment with different sized base budgets for districts of different size. SDEA provided districts with fewer than 400 students a base budget of \$936 per pupil and districts with more than 1,300 students a base budget of \$728 per pupil. In addition, the state established new limits on annual budget growth and tied those limits to district size groups. Districts above median spending of districts in their size group could increase their budget by 5 percent per year. Districts below the median spending of districts in their size group could increase their budget to the lower of (a) 5 percent above the median or (b) a 15 percent increase over the previous year. This policy would lead to a ratcheting effect over the next 18 years, whereby higher funded enrollment categories (small districts) could significantly outpace revenue growth of lower-funded enrollment categories (large districts).

Round 2 in the Courts: *Knowles v. State*

In *Knowles v. State Board of Education*,⁸ plaintiffs challenged the constitutionality of the SDEA on the ground that it violated the Bill of Rights of the state constitution and the Equal Protection Clause of the U.S. Constitution. The Chautauqua County District Court struck down the SDEA because “the distribution of state funds under the formula provided in the Act resulted in unequal benefits to certain school districts and an unequal burden of ad valorem school taxes on taxpayers in various districts with no rational classification or basis.”⁹ The district court also held that the SDEA’s provision for school funding “was not sufficient to enable the plaintiffs to provide a fundamental education for the students within the respective districts on a rationally equal basis with students of other school districts within the state as required in the state constitution.”¹⁰

However, the district court took judicial notice that the state legislature was in session when it entered judgment and gave the legislature time to correct the inequalities.¹¹ The legislature then promptly amended the SDEA to correct the constitutional deficiencies identified by the district court.¹² For instance, the limitation on school budget increases was raised from 5 percent to 10 percent, and in some instances 15 percent.¹³ “District wealth” was also redefined to be an average of the previous three years to “soften any sharp increase or decrease in either the adjusted valuation or the taxable income within a district.”¹⁴ The district court then dismissed the case as moot because the amendments to the SDEA were substantial enough to constitute an entirely new law.¹⁵

The Kansas Supreme Court vacated the lower court’s dismissal because “[t]he ultimate effect of the formula depends upon the use of similar factors contained in the prior law such as district wealth, local effort, budget per pupil, and sales ratio to local assessed valuations.”¹⁶ Thus, the constitutional questions raised by the plaintiffs’ claims still remained unsolved.¹⁷ The case was remanded to the Shawnee County District Court because the record was insufficient to decide on these constitutional issues.¹⁸ The district court upheld the SDEA in 1981 – seven years after *Knowles* had been originally filed.¹⁹

It is important to observe that *Knowles* did not force the legislature to address the inequities created by its focus on enrollment disparities created by the SDEA. In fact, the legislature took steps during the 1970s that exacerbated enrollment-based disparities. As Charles Berger observes in his analysis of Kansas school finance litigation:

In 1978, the legislature repealed the alternative 115 percent cap on budget increases, allowing districts to raise their budget up to the median for their enrollment category. One year later, the cap was repealed altogether, permitting districts to raise their budget to any level with voter approval. The effect of this repeal was dramatic: Kansas went from being one of the more equitable systems in the nation to being average, at best, in equity terms. The weighted coefficient of variation for per pupil expenditures increased from 10.5 in 1980 to 20.9 in 1987—the highest rate in the nation. The weighted coefficient of variation also increased from 14.0 to 15.3. What this indicates is that disparity increased overall, but especially in a number of low-enrollment districts. It seems a fair assumption to say that, with the removal of budget increase caps, small, wealthy districts were free to raise their budgets to levels very much above the median.²⁰

Mock v. Kansas and the School District Finance Act (SDF)

SDEA came under fire in the late 1980s through 1991, with 42 districts across the state taking four separate legal challenges to Shawnee County District Court. District Court Judge Terrence Bullock consolidated these cases into a single case and issued a pre-ruling indicating that if the case went to trial, he would likely declare SDEA in violation of both equal protection and Article 6, Section 6 of the State Constitution which mandates that the legislature *make suitable provision for finance of the educational interests of the state*.

In a pre-trial opinion, Bullock held that the state constitution's "suitable provision for finance" clause required the legislature "to furnish each child an educational opportunity equal to that made available to every other child."²¹ Bullock also observed that this educational duty would "unquestionably require different expenditures at different times and places."²² For instance, he explained that "if a child cannot speak English, it may cost more to teach that child English as a second language before the child can learn math and other subjects."²³ Judge Bullock further cautioned that the state had to provide a "rational educational justification" for differences in educational funding.²⁴

Judge Bullock's pre-ruling was issued October 14, 1991, after which Governor Joan Finney immediately convened a task force which produced its recommendations for reforming the school finance formula in November. The task force recommended a financing method that would set an equal tax rate across Kansas school districts and that would provide each district with a flat amount of basic operating aid. The task force also recommended that it would be appropriate to

include some adjustment to that general fund budget to help sustain small, rural districts, and other adjustments to help districts cope with increased numbers of at risk and limited English speaking children.²⁵

During the legislative session of the spring of 1992, it appeared as if no solution would be reached on a new school finance plan. In April, 1992 after the regular session of the legislature adjourned failing to pass two separate plans, Judge Bullock warned the legislature that if they failed to comply with his preliminary ruling by June 1, he would order the schools closed in the fall. During the "veto session" which convened on April 29, the School District Finance (SDF) act, coupled with accountability legislation, the Quality Performance Accreditation Act (QPA) was passed into law (together, SDFQPA). SDF created a statewide uniform local property tax set originally at 32 mills (3.2%)²⁶ to be increased over the next few years to 35 mills.²⁷ In what many legislators and onlookers refer to as an auction, the base state aid per pupil for all districts was set at \$3,600.²⁸ The basis of the auction was to identify that level of underlying funding that could be supported with a politically palatable tax rate across constituents, rather than to identify that level of funding which would achieve the constitutional mandate laid out in Article 6.²⁹

It was not only the base state aid figure that had been arrived at via purely political means, but so too had a variety of special weightings or cost adjustments to accommodate differences in district characteristics and differences in the student populations served by districts. First, dating back to the School Foundation Act in 1965 small districts had received supplemental funding and had been provided higher limits on annual budget increases. The SDF also included special accommodations for small districts. The adjustment small districts received was based on 1991 general fund spending per pupil averages for districts with 75 to 125 students, 200 to 400 students and greater than 1,900 students. From the calculations, it was determined that a district with 100 students (midpoint of 75 to 125) would need 2.14 times the basic allotment of \$3,600 (or \$7,704) and a district of 300 students would need 1.58 times the basic allotment, or \$5,688. Straight line segments were then drawn between the points for the district with 100 students, 300 students and 1,900 students with the largest districts receiving the base aid level of \$3,600 (or weight of 1.0).

The legislature also included a factor to compensate districts for differences in transportation costs, based on numbers of children living more than 2.5 miles from school and the density of that population (number relative to district land area square miles). Moreover, the legislature added a 6 percent adjustment ($.06 \times 3600 = 216$ per qualifying pupil) to aid districts in meeting the

needs of low income students (counted as those qualifying for free lunch in the National School Lunch program). Other factors were added for children participating in bilingual education programs and vocational education programs (where 6 contact hours, full day, would constitute 1 full time equivalent student). A 20 percent weight was used for bilingual education ($.2 \times 3600 = 720$ per full day bilingual education) and a 50 percent weight for vocational education.

Finally, the legislature adopted a provision called the *Local Option Budget*, which would allow districts the opportunity to use additional local mill levies to increase annual operating budgets by up to 25 percent above general funds, as dictated by the weighted pupil funding formula. The state would provide matching aid to districts with local taxable assessed valuation per pupil lower than the 75 percentile district.³⁰

USD 229 v. State

Following passage of the SDF, Judge Bullock dismissed some of the consolidated cases and transferred jurisdiction of the remaining cases to Judge Marla Luckert.³¹ After a trial, Judge Luckert ruled in 1993 that the SDF did not violate Article 6, § 6 of the state constitution, which required the legislature to “make suitable provision for finance of the educational interests of the state.”³² Luckert did find that the act’s low enrollment weighting provision violated the state equal protection provision³³ because the cut-off was not “grounded upon education theory for distinguishing between districts larger than 1,900 and smaller schools, especially those districts with an enrollment between 400 and 1,899 students.”³⁴

In *Unified School District No. 229 v. State*, the Kansas Supreme Court agreed with the lower court’s assessment that the act did not violate the state’s “suitable provision for finance” clause because the school districts were presently meeting the accountability standards developed by the legislature.³⁵ The state high court also agreed with the lower court’s assertion that inequitable funding could one day result in a judicial finding that the school finance formula had failed to meet the accountability standards set by the legislature, and was thus unconstitutional.³⁶⁸

However, the Kansas Supreme Court reversed the lower court’s finding that the SDF’s low enrollment weighting policy violated state equal protection provision. According to the state high court, the lower court had concluded that: (a) “education was not a fundamental right requiring application of the strict scrutiny test”;³⁷ and (b) the rational basis test was appropriate.³⁸ The high court then held that although the rational basis test was indeed applicable, the lower court had incorrectly applied this test by invalidating

the low enrollment weighting cut-off on the basis that it was not grounded in educational theory.³⁹ The low enrollment weighting survived the rational basis test because “[p]lain common sense advises there is a rational basis for the allowance of extra funding for low enrollment situations.”⁴⁰

Drawing on History to Inform the Present

This brief review of the history of Kansas School Finance reform sheds significant light on present events, as will become clearer throughout the remaining articles in this issue. On the legal front, Kansas Courts have been evaluating the constitutionality of Kansas school funding for over three decades, and applying the Education Article to that evaluation for over a decade. Invariably, Kansas Courts have found that the Kansas Legislature, not cities, towns, counties, legislative districts or unified school districts, holds primary responsibility for making suitable provision for finance of the educational interests of the state. Invariably, within this allocation of authority, the Kansas Courts have upheld the legislature’s authority to control unified school district property taxation either in terms of required minimum effort, or revenue level or growth limitations. Further, Kansas Courts have historically recognized that some districts and some children will need more resources than others.

Legislative behavior has perhaps oscillated more than that of the courts over the decades. It was the legislature that first exercised without court intervention, its authority to reorganize Kansas public schools from 1,600 units of varied organization to just over 300 K-12 Unified Public School Districts as subdivisions of state government, and it was the legislature that then backed the redrafting of Article 6, reframing the state’s role. It was also the legislature in 1965 that first exercised its power to (a) allocate funding differently from one district to another; and (b) place state level controls on school district property taxation. Kansas courts simply upheld the legislature’s ability to take these actions, in the 1970s and again in 1994.

The following articles in this issue address legislative and judicial tensions over these very same issues. To what extent is the legislature primarily responsible for making suitable provision for finance of the educational interests of the state? To what extent does the legislature have authority to allocate funding differently from one location to another, and where empirical evidence is available regarding actual cost differences, can legislative decisions on allocation remain entirely political? Finally, while the legislature has historically exercised its authority to control school district tax rates, to what extent may the legislature relax that authority?

Notes

¹ As of October 14, 2005. <http://www.schoolfunding.info/litigation/In-Process%20Litigations-09-2004.pdf>

² Baker, B.D., Green, P.C. (2005) Tricks of the Trade: State Legislative Actions in School Finance Policy that Perpetuate Racial Disparities in the Post-Brown Era. *American Journal of Education* 111 (3) 372-413.

³ For more detailed explanation, see Berger, C. (1998) Equity without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act. *Journal of Law and Education* 27 (1) 1-46. Note that the new framing of the constitution came about as a result of recommendations to the legislature from an 11 member citizen task force. A similar approach would lead to 1992 reforms and eventually to the legislature's study of education costs that became the centerpiece of recent litigation.

⁴ *Kansas Statutes Annotated*. § 72-7001 (repealed 1973).

⁵ Green, P.C., Baker, B.D. (2005) *Montoy v. State* and State Racial Finance Disparities: Did the Kansas Courts Get It Right This Time? *West's Education Law Reporter*. 195 (3) 681-696.

⁶ Berger, 1998.

⁷ Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1177 (Kan. 1994) (quoting *Caldwell*, No. 50616).

⁸ 547 P.2d 699 (Kan. 1976).

⁹ *Id.* at 700.

¹⁰ *Id.*

¹¹ *Id.* at 701.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 702.

¹⁶ *Id.* at 705.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Berger, 1998

²⁰ *Id.* at 15.

²¹ *Mock*, No. 91-CV-1009.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Note that these task force recommendations drew heavily on the suggestions of John Myers, a consultant from the National Conference of State Legislatures and former Kansas state representative, who had presented recommendations for reforming the state school finance system at a conference called by Judge Bullock in October of 1991.

²⁶ In the case of residential properties, this mill levy would be applied times 11.5% of the fair market value. In the later 1990s, a provision was added to subtract the first \$20,000 in value from fair market value before applying the assessment rate of 11.5%.

²⁷ In the late 1990s, that base rate was reduced, incrementally until it reached only 20 mills, removing the equivalent of approximately \$350 million in revenue per year from the system and shifting the balance of revenue from approximately one-third of funding for school district general funds being supported by property tax to between one-fifth and one-quarter supported by property tax, the difference to be covered by state income and sales tax receipts. This made the funding structure more susceptible to economic fluctuations that would hit from 2001 to 2003. Governor Finney's task force had recommended a levy as high as 45 mills. See Berger, 1998.

²⁸ This historical background section draws heavily on Berger (1998), which provides the most comprehensive, published historical account of events leading to the 1992 reforms. The article by Preston Green in this volume, however, refutes substantially the legal analysis of the 1992 reforms presented by Berger.

²⁹ A more subtle but politically critical component of this debate included the extent that property tax revenues would be redistributed at different levels of base required tax rate.

³⁰ In the late 1990s, the local option budget provision would be modified such that any district below the average spending for their enrollment group could raise their local option budget to the average without local voter referenda.

³¹ Shavers, A.W. (2005) *Closing the School Doors in the Pursuit of Equal Education Opportunity: A Comment on Montoy v. State*, 2003 WL 22902963 (Kan. Dist. Ct. 2003), *Nebraska Law Review* 83 901, 904

³² *Kansas Constitution*. art. VI, § 6(b).

³³ *Kansas Constitution*. Bill of Rights, § 1 provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."

³⁴ Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1192 (Kan. 1994).

³⁵ *Id.* at 1187. These standards are as follows:

- (1) Teachers establish high expectations for learning and monitoring pupil achievement through multiple assessment techniques;
- (2) schools have a basic mission which prepares the learners to live, learn, and work in a global society;
- (3) schools provide planned learning activities within an orderly and safe environment which is conducive to learning;
- (4) schools provide instructional leadership which results in improved pupil performance in an effective school environment;
- (5) pupils have the communication skills necessary to live, learn, and work in a global society;
- (6) pupils think creatively and problem-solve in order to live, learn, and work in a global society;
- (7) pupils work effectively both independently and in groups in order to live, learn, and work in a global society;
- (8) pupils have the physical and emotional well-being necessary to live, learn, and work in a global society;
- (9) all staff engage in ongoing professional development;
- (10) pupils participate in lifelong learning.

³⁶ *Id.* at 1186.

³⁷ *Id.* at 1189.

³⁸ *Id.* at 1190.

³⁹ *Id.* at 1192.

⁴⁰ *Id.* at 1192.

School Finance Litigation in Kansas: Judicial Mandates, Legislative Defiance, and Legal Innovation

Preston C. Green, III

Introduction

Since the early 1970s, plaintiffs have tried to address the disparities created by the Kansas school finance system through the state and federal judiciary. An examination of this litigation record reveals two key themes. The first theme is captured by Michael Rebell's following description of school finance litigation:

[School finance] litigation...involves a troublesome paradox: although the inequities that plaintiffs demonstrate are more stark and more difficult to dispute than in many other areas of civil rights reform, plaintiffs have had greater difficulty obtaining relief. Equally significant, few of the plaintiff victories have resulted in reforms that have demonstrably ameliorated the inequities. Although inter-district disparities have been reduced in some states, adverse results have followed many court interventions, and overall, the record is disappointing. In some states, court orders have been virtually ignored; in others, the courts have felt compelled repeatedly to strike down legislative responses which were inadequate or unconstitutional or both.¹

This analysis is particularly applicable to Kansas. Since 1972, state courts have five times declared the state school finance system unconstitutional.² However, the plaintiffs have had little success convincing the state legislature to remedy these flaws. In fact, the state legislature has employed a variety of means to avoid complying with court orders.

The second important theme involves the proper interpretation of Article 6, § 6 of the state constitution, which requires the legislature to "make suitable provision for finance of the educational interests of the state."³ The Kansas Supreme Court appears to be one of the first state high courts to hold that its education clause requires vertical equity: *that is*, certain disadvantaged children must receive additional resources to meet the constitutional mandate. The third theme is the prominent role that the legislature's accountability system has served in determining the components of an adequate education. The fifth important theme revolves

around the interplay between the state's education clause and equal protection provisions. Finally, the Kansas school finance litigation story is significant because of the plaintiffs' attempts to resuscitate federal causes of action in school finance litigation.

This article provides an overview of recent Kansas school finance litigation. In this overview, I take particular care in discussing the various subterfuges employed by the legislature to circumvent judicial decisions in the plaintiffs' favor. I also take pains to discuss the judicial debate regarding the meaning of the state's "suitable provision for finance" clause. Moreover, I take care to point out some of the innovative legal arguments developed by plaintiffs and the legal strategies employed by the courts to correct the state school finance system's constitutional deficiencies.

Recent Challenges to Kansas School Finance Laws

The current phase of Kansas school finance litigation began as a bifurcated challenge to the School District Finance Act (SDF). The plaintiffs have filed two lawsuits, one in federal court and one in state court. A brief discussion of the federal and state litigation follows below.

Robinson v. Kansas

In the federal case, *Robinson v. Kansas*, the plaintiffs argued that the state's local option budgets and low enrollment and other weighting provisions violated the Equal Protection Clause. In *Robinson I*, the federal district court of Kansas dismissed the plaintiffs' equal protection claim with respect to the local option budgets on the ground that *San Antonio Independent School District v. Rodriguez* was controlling.⁴ In *Rodriguez*, the U.S. Supreme Court held that reliance on property taxation controlled as the level of the local education agency to fund education was permissible under the Equal Protection Clause in part because the federal courts were not authorized "to nullify state-wide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivision in which citizens live."⁵ School funding disparities resulting from local option budgets in Kansas were analogous to those found constitutional in *Rodriguez*.⁶

By contrast, the district court refused to dismiss the plaintiffs' low enrollment challenge on the ground that *Papasan v. Allain* rather than *Rodriguez* provided the basis for evaluating school funding differences created

directly by, rather than permitted by, state legislatures.⁷ In *Papasan*, the Supreme Court refused to dismiss an Equal Protection Clause challenge to Mississippi's inequitable distribution of educational funds from the Sixteen Section or Lieu Lands. It found that *Rodriguez* did not address the issue raised in *Papasan*: that is, whether a state can unequally distribute funds without violating the Equal Protection Clause.⁸ The district court found that the Kansas plaintiffs' low enrollment challenge was governed by *Papasan* because the state was disbursing funds to school districts in unequal amounts.⁹

The *Robinson* plaintiffs also argued that the low enrollment weighting provision violated Title VI of the Civil Rights Act of 1964 by having a disparate impact on minority students. Although Section 601 of the act prohibits only intentional discrimination,¹⁰ Section 602 permits agencies that provide financial assistance to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing financial assistance."¹¹ The U.S. Department of Education responded to Section 602 by implementing regulations that prohibit organizations receiving federal funding from adopting policies that have a disparate impact on minorities.¹² Although the Supreme Court had not at the time decided whether a private right existed under the regulations, the district court observed that the Tenth Circuit had recognized a private right under the disparate impact regulations.¹³

The defendants appealed to the Tenth Circuit Court of Appeals. After the plaintiffs' filed their briefs with this court, the U.S. Supreme Court held in *Alexander v. Sandoval*¹⁴ that there was no private right of action to enforce the Department of Education regulations pursuant to Section 602 of Title VI. An assumption that followed from *Sandoval* was that plaintiffs in *Robinson* could no longer use Title VI as the basis for their challenge that the state's school finance policies unintentionally discriminated (disparate impact) against students by race, ethnicity or national origin. As such, defendants argued that the plaintiffs' Title VI disparate impact claims should be dismissed.

In *Robinson II*, the Tenth Circuit rejected this argument, finding that the plaintiffs disparate impact claim could still be brought against state officials under 42 U.S.C. § 1983¹⁵ which provides a cause of action "for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by anyone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." The Federal challenge has now been on hold while state challenges have proceeded.

Montoy v. State

Montoy I (1999-2003)

In the state school finance case, *Montoy v. State*, the plaintiffs asserted that the SDFQPA violated state and federal equal protection provisions, the "suitable provision for finance" clause, and the federal due process clause. In *Montoy I*, Shawnee County District Court Judge Terry Bullock granted summary judgment to the defendants, dismissing the case primarily on the ground that *Unified School District No. 229* had resolved the plaintiffs' allegations.¹⁶ That is, that the pupil weighting scheme in place in 1994 and local option budgets had been upheld as not violating equal protection and school districts were achieving legislated accreditation standards, meeting the requirements of the education article.

In *Montoy I*, the Kansas Supreme Court reversed the dismissal. It observed that there were general issues of fact with respect to the plaintiffs' claims. With respect to the "suitable provision for finance" clause, the court observed that the standards quoted in *Unified School District No. 229* were no longer part of the statute.¹⁷ What remained was a statutory provision requiring the state board of education "to adopt an accreditation system that is 'based upon improvement in performance that reflects higher academic standards and is measurable.'"¹⁸ Although this amendment might not have represented "a serious shift" in the state's goals for public education, the case was sufficiently removed from *Unified School District No. 229* to preclude summary judgment.¹⁹

With respect to the equal protection and due process claims, the Kansas Supreme Court noted that the plaintiffs advanced a number of assertions (*e.g.*, a substantial achievement gap existed between minority and white students in the plaintiff districts) that had to be addressed by the litigants before the district court could enter a final judgment.²⁰

Montoy II (December, 2003)

On remand, Judge Bullock issued a preliminary order (*Montoy II*) holding that the SDFQPA was unconstitutional.²¹ The court found that the SDFQPA failed to provide students with an equal educational opportunity in violation of Article 6, § 6(b) of the state constitution. Bullock observed that he was applying the "rational basis" test required by *Unified School District No. 229* to examine equity challenges:

The Supreme Court next addressed the question of what level of scrutiny was appropriate in resolving a claim that the legislative funding scheme violated "equal protection rights" of some students. In this

connection, neither the trial court nor the Supreme Court distinguished between a Section 1 claim under the Kansas Constitution Bill of Rights (equal protection for life, liberty, and the pursuit of happiness) and an Article 6, Section 6(b) claim for equal treatment under the Education Article. Although one might argue that the latter creates an absolute or fundamental right requiring heightened scrutiny of any funding discrepancies between students, the Court adopted the “rational basis” test for examining challenges to “equity” of whatever type. In doing so, however, the Court refined the rational basis level of scrutiny as follows: “[T]his standard of review, although deferential, is not a toothless one.” ...The rational-basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, *the Court has explained that these limitations amount to a prescription that “all persons similarly situated should be treated alike.”*²²

Judge Bullock then expressed his understanding of *Unified School District No. 229’s* rational basis requirement:

This refinement of the rational basis level of scrutiny to be applied to per pupil spending discrepancies is fundamentally synonymous with that used by this Court in *Mock*. If challenged, the legislature must be prepared to justify spending differentials based on actual costs incurred in furnishing all Kansas school children an equal educational opportunity. In other words, all children similarly situated must be treated alike.²³

Judge Bullock then found that the SDFQPA “was never based upon costs or even estimated costs to educate children,” but was “actually premised not upon costs but upon former spending levels of districts under the old unconstitutional SDEA, thus freezing the inequities of the old law into the new.”²⁴ Because the SDFQPA contained a “300 percent unexplained FTE pupil disparity for which no rational basis has been shown or proved,” Judge Bullock concluded that the finance scheme was unconstitutional because it failed to provide equitable funding to all Kansas children.²⁵

Judge Bullock also found that the SDFQPA failed to “make suitable provision for finance of the educational interests of the state.” Bullock observed that a 2002 report by Augenblick & Myers commissioned by the legislature had concluded that Kansas schools were \$853 million short of an adequate education, as

defined by the state legislature.²⁶ He further noted that the defendants had failed to refute the report and that the state department of education had actually advised the legislature to adopt the Augenblick & Myers report and implement it over a three-year period.²⁷

Judge Bullock rejected the defendants’ assertion that “money doesn’t matter” with respect to the constitutional requirement to provide an adequate education. As Bullock colorfully explained:

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

“Money doesn’t matter?” That dog won’t hunt in Dodge City!²⁸

Moreover, Bullock rejected the contention that the failure of some schools to achieve acceptable student performance was due to the lack of good management and accountability throughout the state system and that funding should be withheld until “all schools reach maximum efficiency at present funding levels.”²⁹ The state constitution required the defendants to effectively manage the educational system: “[a]ccordingly, if there is a failure in this regard, it is the Defendants’ failure to design and implement a better plan to manage and bring our schools to account.”³⁰ Bullock further observed that “the failure to perform one constitutional duty can hardly excuse the failure of Defendants to perform another equally important constitutional duty.”³¹

Bullock noted that the defendants’ “most elegantly expressed and dangerously alluring argument” is that Kansas’ schools were adequately funded because they performed “amazingly well” in comparison “with other schools across the nation.”³² Bullock rejected this assertion by observing:

Yet the stubborn fact remains: 83.7 percent of Kansas African American students, 81.1 percent of Kansas Hispanic students, 64.1 percent of Kansas Native American students, 79.8 percent of Kansas disabled students, 87.1 percent of Kansas limited English proficiency students, and 77.5 percent of Kansas impoverished students are failing 10th grade math, for example. In fact, only 51 percent of Kansas white students are passing the same subject! Although reading and math scores at other grade levels are slightly better, the results are similar and

equally disturbing. These averages also conceal dropout rates for certain categories of students which are frankly frightening.³³

Bullock deemed “even more troublesome” the “superficially attractive argument” that notwithstanding the poor performance of the state’s minority, poor, disabled, and limited English proficiency students, their failure rates compared “‘favorably’ with similar rates for such persons elsewhere.”³⁴ Bullock likened that arguments to the following statement: “‘Persons of color should be comforted by the fact that lynchings in Kansas are no more frequent than lynchings in many other states.’”³⁵

Finally, Judge Bullock held that the school finance formula had a disparate impact on minority, disabled, and non-English speaking students in violation of state and federal equal protection provisions. He observed that:

As also previously noted, our Supreme Court has not distinguished between equal protection claims and Educational Article claims concerning disparate funding, or other disparate treatment, of Kansas children. Both are equity claims and both are tested in Kansas by the same rational basis analysis, as previously explained.³⁶

Thus, the state had to provide sufficient justifications for the funding disparities created by the school finance system. Judge Bullock concluded that the state failed to satisfy this test in light of the fact that: (a) minority students were performing so poorly on the state’s assessment system; and (b) increases in funding would enable schools to enact strategies, such as reducing class sizes and hiring better-trained teachers, that may improve educational outcomes.³⁷ The court then withheld its final judgment until the end of the 2004 legislative session to give the legislature a chance to address the constitutional deficiencies identified by the preliminary order.³⁸

Montoy III (2004)

The legislature adjourned the 2004 session without correcting the constitutional deficiencies identified in Judge Bullock’s preliminary order. In fact, Bullock sadly noted that the legislative leaders had “openly declared their defiance of the Court and refused to meaningfully address the many constitutional violations” that the legislature had created.³⁹ On May 11, Bullock responded to this defiance by ordering that the public schools be closed until the legislative and executive branches corrected these deficiencies (*Montoy III*).

“Although there must be literally hundreds of ways the Legislature could constitutionally structure, organize, manage, and fund public education in Kansas,” Judge Bullock identified several “basic provisions” that the plan had to include in order to withstand constitutional scrutiny.⁴⁰ For instance, the legislature had to determine the structure and organizational form that would enable the public school system to operate in the most efficient manner.⁴¹ Once the legislature had made this determination, it was then required to determine the actual costs for providing every child in the state with a suitable education and to fund the educational system accordingly.⁴² The legislature was also required to provide a rational explanation for any per pupil differences in expenditures.⁴³ In this regard, Judge Bullock maintained that “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.”⁴⁴ Moreover, the school funding scheme could not have a disparate impact on any class of Kansas children.⁴⁵

Judge Bullock also identified several features that a constitutional funding scheme could not contain. Prohibited policies included: (a) wealth-based funding options; (b) geographic weights that were unrelated to actual costs; and (c) funding mechanisms that deprive “schools with ‘expensive to educate’ students of the funds necessary to teach them.”⁴⁶

Montoy IV (2004–2005)

On May 18, 2004 the Kansas Supreme Court issued an order that stayed all further proceedings until the high court ruled on the case.⁴⁷ On January 3, 2005, the state supreme court issued a *per curiam* decision (*Montoy IV*) that reversed the trial court’s holding that the SDFQPA violated state and federal equal protection provisions.⁴⁸ Although the court agreed with Judge Bullock that the rational basis test was the appropriate level of scrutiny, it concluded that all of the funding differentials were rationally related to a legitimate governmental purpose.⁴⁹ The state high court also reversed the trial court’s ruling that the SDFQPA violated state and federal equal protection provisions by having a disparate impact on minorities and other classes.⁵⁰ “In order to establish an equal protection violation on this basis,” the court explained, “one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose.”⁵¹ The plaintiffs failed in this regard because they could not prove that the state had acted with discriminatory intent.⁵²

However, the Kansas Supreme Court affirmed the lower court's ruling that the state had failed to provide a suitable education.⁵³ The court found that the state had failed to satisfy its own definition of "a suitable provision for finance" of the public schools, which was based on state accreditation standards and student academic performance measures.⁵⁴ The court also cited the legislature-sponsored Augenblick & Meyers study, which concluded that the state was providing an adequate education, as defined by the legislature.⁵⁵ Further evidence of inadequacy was found in the fact that certain school districts had to use local options budgets, which were originally intended to provide supplemental funding, to support general education.⁵⁶

Also, the state high court cited Judge Bullock's finding that the SDFQPA was based on former spending levels and political compromise, instead of actual spending costs as evidence of an inadequate education.⁵⁷ The court further observed: "This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors."⁵⁸

The court declared that it would not "dictate the precise way in which the legislature must fulfill its constitutional duty."⁵⁹ The court did acknowledge that "[i]t is clear that increased funding will be required" although "increased funding may not in and of itself make the financing formula constitutionally suitable."⁶⁰ The court retained jurisdiction and stayed further proceedings to allow the legislature sufficient time to correct the constitutional deficiencies of the school finance formula.⁶¹

Montoy V (Spring - Summer 2005)

In response to *Montoy IV*, the legislature enacted House Bill 2247, which would provide \$142 million in additional educational aid for the 2005-06 school years.⁶² H.B. 2247 amended Kansas' school finance system in several ways. The bill altered the Base State Aid Per Pupil (BSAPP); increased bilingual and at-risks weights; provided a phased-in increase for special education.⁶³ However, H.B. 2247 did not substantially alter the SDFQPA's low enrollment weighting provision as it existed at time of the *Montoy IV* ruling.⁶⁴

H.B. 2247 would also increase the Local Option Budget cap from the present level of 25 percent, to 27 percent in 2005-06, 29 percent in 2006-07, and 30 percent in 2007-08.⁶⁵ Further, the statute authorized a cost-of-living weighting available for districts with single-family residence appraised values exceeding 125 percent of the state average, as long as those districts had already adopted the maximum LOB.⁶⁶ Districts with "extraordinary declining enrollment"

could receive authorization to levy an ad valorem tax on their taxable, tangible property.⁶⁷ In addition, H.B. 227 called for a study to compute the cost of delivering a constitutionally adequate education.⁶⁸ Moreover, the bill limited all new local capital outlay mill levies to eight mills.⁶⁹

After the bill became law, the Kansas Supreme Court ordered the parties to show cause as to why the court should or should not hold that H.B. 2247 complied with *Montoy IV*.⁷⁰ During the hearing, the primary argument presented on behalf of the state was that the Supreme Court, as an appellate court, lacked the authority to rule on H.B. 2247 because H.B. 2247 was a new law, on which no fact finding had occurred in lower courts. In late hours of the legislative session, Legislators had severed the local control provisions (increase to LOB, declining enrollment and cost of living adjustments) into S.B. 3, to further their claim that these components specifically held status outside the control of the Supreme Court.

The court, however, rejected the state's argument that the constitutionality of H.B. 2247 (and S.B. 3) was not properly before the court.⁷¹ The court found that the state's reliance on *Knowles*, the case in which the Kansas Supreme Court refused to rule on the constitutionality of the SDEA, was "misplaced" because *Knowles* came before the Kansas Supreme Court "in an entirely different procedural posture."⁷² In *Knowles*, the state high court had neither ruled on the constitutionality of the SDEA in the first instance, nor reached an independent conclusion regarding the constitutionality of the statute.⁷³ By contrast, in the instant case, the Kansas Supreme Court had addressed the constitutionality of the SDFQPA in its appellate capacity.⁷⁴ The state high court also had evaluated the trial court's findings of fact to determine whether the evidence supported a finding that the statute was unconstitutional.⁷⁵ Another material difference was that the statutory changes at issue in *Knowles* occurred while the trial court still had jurisdiction over the case.⁷⁶ By contrast, H.B. 2247 was issued in response to a Kansas Supreme Court order while it retained jurisdiction.⁷⁷

Moreover, the court rejected the state's argument that the doctrine of separation of powers limited the court's review to whether the legislature was authorized to enact H.B. 2247.⁷⁸ The court explained that "[a]lthough the balance of power may be delicate, ever since *Marbury v. Madison*,...it has been settled that the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity."⁷⁹ Quoting an Ohio school finance case, the court further explained:

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

that legislation complies with the Constitution. However, *while it is for the General Assembly to legislate a remedy, courts do possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment to ensure that it is then constitutional.* If it did not, the power to find a particular Act unconstitutional would be a nullity. A remedy that is never enforced is truly not a remedy.⁸⁰

Turning to the merits, the court examined whether: (a) the legislature had considered the actual costs of providing an adequate education with respect to each of the legislation's components and the funding formula as a whole; and (b) H.B. 2247 had exacerbated, rather than ameliorated, unjustified funding disparities.⁸¹ Over the state's objections, the court declared that it would be guided "in large part" by the Augenblick & Myers study, which concluded that the state had failed to provide a suitable education as defined by the legislature.⁸² The court reached this conclusion, in part, because (a) the legislature itself had commissioned the study and "had maintained the overall authority to shape the contours of the study and to correct any A & M actions that deviated from its directions during the process"; (b) "the A & M study is the only analysis resembling a cost study before this court or the legislature"; and (c) both the board and state department of education recommended that the legislature adopt the study's recommendations at the time of its completion.⁸³

The court then analyzed the provisions of H.B. 2247 in light of the two guiding principles laid down in *Montoy IV*: (a) actual costs of providing a suitable education; and (b) funding equity.⁸⁴ The legislation's BSAPP of \$4,222 was unconstitutional because it substantially varied "from any recommendation in the record and from any record of the Board of the State Department of Education."⁸⁵ The weighting for at-risk students fell substantially below the recommendation of the Augenblick & Myers study and was not based on "the actual costs of educating at-risk students."⁸⁶ The increase for bilingual education funding was "significant," but still differed "substantially from the cost information in the record."⁸⁷ The increase of \$17.7 million in special education was in "stark contrast" to the \$102.9 million increase recommended by the Augenblick & Myers study.⁸⁸ The court was also troubled by the legislation's failure to substantially change the low enrollment weighting provision.⁸⁹ The low enrollment weighting provision had been a significant cause of the funding disparities created by the SDFQPA.⁹⁰

The court further observed that the statute's increase of the LOB cap exacerbated wealth-based disparities among districts.⁹¹ This was the case because wealthy districts could reach the LOB maximum levels "with far less tax effort than those districts with lower assessed property values and lower median family incomes."⁹² The cost-of-living weighting, which was originally enacted to provide increased funding for teachers, was unconstitutional because the state could not support its claim that the provision was "necessary to allow districts with high housing costs to recruit and retain high-quality teachers and is based on the actual costs of providing an education in those 17 districts that would qualify."⁹³ Further, evidence at trial established that districts with high-poverty, high at-risk students were the ones that needed additional help to attract and retain good teachers.⁹⁴

The court invalidated H.B. 2247's extraordinary declining enrollment provision on the grounds that it too would increase wealth-related funding disparities among school districts.⁹⁵ The provision permitted school districts suffering "extraordinary declining enrollment" of 15 percent or 150 pupils per year over three years to seek approval from a state tax board to levy additional property taxes if they had already adopted the maximum LOB.⁹⁶ Only four districts benefited from this provision.⁹⁷

The court rejected the state's claim that the 8 mill cap on capital outlays demonstrated its attempt to improve wealth equalization.⁹⁸ Because this provision was based solely on local property tax authority, the ability to raise revenue was highly related to taxable property wealth and family income.⁹⁹ "Thus," the court concluded, "the failure to provide any equalization to those districts unable to access this funding perpetuates the inequities produced by this component."¹⁰⁰

With respect to the funding formula as a whole, the court concluded that "although H.B. 2247 does provide a significant funding increase, it falls short of providing constitutionally adequate funding for public education."¹⁰¹ It was also clear "that the legislature did not consider what it costs to provide a constitutionally adequate education, nor the inequities created and worsened" by the new legislation.¹⁰² Additionally, the court was concerned that H.B. 2247's increased reliance on local property taxes compounded inequities based on district wealth.¹⁰³ The court "fully acknowledge[d] that once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements to the constitutional system already provided."¹⁰⁴ However, local effort could not be a substitute for the state funding required by the state constitution.¹⁰⁵

The court noted that the legislation's provision for a "cost analysis" study was critical for determining the actual costs of providing a suitable education.¹⁰⁶ The court held that the study could estimate future costs on the basis of historical expenditures, as long as the study "corrected for the recognized inadequacy of those expenditures and ensures that a reliable method of extrapolation was adopted."¹⁰⁷ However, the cost study was deficient because it would examine only educational inputs. The cost study also had to compute the cost of educational outputs, or "achievement of measurable standards of student proficiency."¹⁰⁸

The Kansas Supreme Court then ordered that the legislature provide \$285 million (including the first \$142 million passed in the spring) in additional funding—or one-third of the \$853 million requested by the Augenblick & Myers study—for 2005-06.¹⁰⁹ Further, the court warned that if (a) the cost study called for by H.B. 2247 was not completed in time for the legislature to act during the 2006 session; (b) if the study was invalid; or (c) "legislation is not enacted which is based upon actual and necessary costs of providing a suitable system of finance and which equitably distributes the funding," it would consider "ordering that, at a minimum, the remaining two-thirds (\$568 million) in increased funding based upon the A & M study be implemented for the 2006-07 school year."¹¹⁰

Additionally, the court stayed the provisions in H.B. 2247 that authorized new funding for increases in the LOB cap over 25 percent, cost-of-living weighting, and extraordinary declining enrollment.¹¹¹ The remainder of the legislation, as amended by the legislature in compliance with this opinion, would remain in effect for 2005-06.¹¹²

The legislature responded to the June 3 order by convening a special legislative session which, after extending beyond the court's original deadline, resulted in the addition of \$148 million and modification of the declining enrollment provision and increased LOB authority to include equalization aid for lower property wealth districts. The court accepted the legislature's plan as a good faith effort, including modifications to the LOB cap increase and the declining enrollment provision. The court retained the stay on the cost of living adjustment.

Montoy VI

On September 9, 2005, concurring opinions on behalf of three Kansas Supreme Court Justices were filed as part of the court's January 2005 opinion (*Montoy VI*).¹¹³ The three justices agreed with the bulk of the court's rationale, but disagreed with the holding of *Unified School District No. 229* that education was not a fundamental right under the state constitution.

Justice Carol Beier wrote a concurring opinion that was joined by Justice Robert Davis. She noted that when District Judge (now Justice) Marla Luckert issued her opinion in *Unified School District No. 229*, "she looked at all of the school finance opinions from other jurisdictions to that point and concluded that those applying rational basis standard of review to school finance equity decisions were the most persuasive."¹¹⁴ All of the justices who sat on the Kansas Supreme Court at the time of the appeal adopted Justice Luckert's position.¹¹⁵ While Beier still agreed that the cases cited by Justice Luckert and the Kansas Supreme Court remained persuasive, she was "not comfortable reasoning backward from that conclusion to say there is no fundamental right to education" under the state constitution.¹¹⁶ In fact, a close reading of Luckert's opinion revealed that she "was also reluctant to make this backward leap in logic."¹¹⁷ It was not until *Unified School District No. 229* that Luckert's application of the rational basis test was equated to the conclusion that the state constitution did not recognize a fundamental right to education.¹¹⁸

Beier then considered the question of whether the state constitution recognized a fundamental right to education, using the factors identified by Luckert's trial court opinion: (a) the language of the education provisions of the state constitution; (b) "the relationship of that clause to the state constitution as a whole"; (c) "the state's particular constitutional history"; and (d) "any perception that the framers intended education to be a fundamental right." Beier found that "all of these factors support the existence of a fundamental right to education."¹¹⁹

First, the language of the education provisions in the state constitution, which stated that the legislature "shall provide for intellectual, educational vocational, and scientific improvement" and "shall make suitable provision for finance of the educational interests of the state," were mandatory, not optional.¹²⁰ Second, the relationship of these educational provisions to the constitution as whole "emphasizes its centrality to the document's overall design."¹²¹ The fact that only five articles preceded the educational provisions proved that the state constitution "not only explicitly provides for education; it implicitly places education first among the many critical tasks of state government."¹²²

Third, the state's constitutional history highlighted the importance of education even before statehood.¹²³ Public schools were a significant part of public life in the territory that became Kansas.¹²⁴ Beier also observed that the state had financed public schools through taxation from its inception, and that the state constitution always included provisions that obligated the legislature to provide for the public schools.¹²⁵ Finally, it

appeared as though the framers of the constitution intended education to be a fundamental right.¹²⁶ In support of this conclusion, Beier observed that early proposed constitutions as well as the original and amended constitutions emphasized the importance of education.¹²⁷

After concluding that education was a fundamental right, Beier then addressed the question of how educational financing legislation should be reviewed. She explained her approach in the following manner:

As I have said, I understand and agree that the rational basis standard of review should apply. Like the Minnesota Supreme Court in [*Skeen v. State*], however, I believe there is a theoretical point of no return. At that point, the standard must shift to strict scrutiny. If inequities in a school financing system become so egregious that they actually or functionally *deny* the fundamental right to education to a segment of otherwise similarly situated students, we must be prepared to require more of our legislature than a mere rational basis for its line drawing.¹²⁸

In addition to the reasons discussed in Luckert's *Unified School District No. 229* opinion, Beier believed there were two other reasons in school finance litigation for deviating from typical strict scrutiny for violations of fundamental rights.¹²⁹ First, "[u]nlike...the right to free speech or privacy, which [were] inherent in the humanity of any individual and thus cannot be infringed by the government," the right to education was dependent on governmental action.¹³⁰ Because governmental involvement was necessary for the provision of education, it was logical for the court to grant the legislature with more latitude with respect to policy choices than strict scrutiny.¹³¹ However, even under the rational basis test, the court retained the authority to decide whether legislative choices make educational sense pursuant to the educational provisions in the state constitution.¹³² Second, Beier asserted that rational basis review "has much to recommend it when a case reaches a remedial phase, *i.e.*, when we are called upon to judge the adequacy and efficacy of the legislature's efforts to correct constitutional problems identified by the courts."¹³³

Justice Marla Luckert also issued a concurring opinion. Luckert agreed with Beier's assertion that as trial court judge in the *Unified School District No. 229* case, she had not stated a conclusion of law as to whether the state constitution contained a fundamental right to education.¹³⁴ Rather, Luckert had left the issue open.¹³⁵ Luckert also asserted that the Kansas Supreme Court had incorrectly construed her

conclusions of law to include a finding that education was not a fundamental right.¹³⁶ Further, Luckert disagreed with the Kansas Supreme Court's holding in *Unified School District No. 229* that education was a fundamental right and adopted the reasoning set forth in Beier's concurrence.¹³⁷

Key Themes

It is apparent from the summary of Kansas school finance litigation provided above that the state's legislature and courts have been engaged in a battle over the components of the state's school finance system. A discussion of other important themes is provided below.

The Kansas Constitution's Suitability Provision and the Concept of Vertical Equity

The Kansas school finance litigation is significant because the Kansas Supreme Court is one of the first courts to adopt the concept of vertical equity: *i.e.*, that the state must provide certain disadvantaged groups with more resources than students from affluent neighborhoods to achieve the same level of educational outcomes.¹³⁸ Most cases have adopted the concept of horizontal equity, which treats all students in the same fashion.¹³⁹ However, the supreme courts of New Jersey and North Carolina have held that their state constitutions require their legislatures to consider the needs of at-risk districts and students, respectively.¹⁴⁰

Judge Bullock's *Mock* opinion was the first Kansas case to employ the concept of vertical equity. The "suitable provision for finance" clause required the legislature to provide limited-English-proficiency students with additional resources to learn English before they could learn math and other subjects.¹⁴¹ Neither Judge Luckert's trial court opinion nor the Kansas Supreme Court opinion in the *Unified School District No. 229* addressed whether the suitability provision required vertical equity. Both opinions merely concluded that the act was constitutional because the school districts were meeting the accountability standards established by the legislature.¹⁴²

This debate over the meaning of the education clause was revisited in the *Montoy* decisions. In *Montoy III*, Bullock concluded that Article 6, § 6 of the state constitution required the legislature to provide a rational justification for per-pupil spending differences.¹⁴³ He also reiterated his conclusion in *Mock* that some groups of students, such as the disabled and racial minorities, may need more resources to receive an adequate education.¹⁴⁴ In *Montoy V*, the Kansas Supreme Court appeared to adopt the concept of

vertical equity in striking down H.B. 2247.¹⁴⁵ The court struck down the weightings for at-risk and bilingual students because they fell substantially below the levels of funding recommended by the Augenblick & Myers study.¹⁴⁶

If other courts apply the concept of vertical equity to their state education clauses, then they may force state legislatures to finally provide poor and minority students with equal educational opportunity. Kansas is not the only state with racial funding differences. In fact, in 2001, the school finance systems of 27 other states provided high-minority school districts with less state and local funding than low-minority districts.¹⁴⁷ However, Kansas is among the few states that have, in recent years, had consistently among the largest racial disparities in education funding.¹⁴⁸ Bruce Baker and I have posited that in certain situations, these racial funding disparities may have been the result of ostensibly neutral funding policies that were actually designed to maintain disparities in existence during the “separate but equal” era.¹⁴⁹

Neither school desegregation litigation nor school finance litigation—the two main strategies employed by civil rights attorneys to obtain equal educational opportunities for minority students—has specifically targeted the sources of racial funding disparities.¹⁵⁰ The goal of school desegregation litigation has been to eliminate the “official barriers that prevented black students from attending public schools with white students.”¹⁵¹ Consequently, mechanisms that were designed to maintain funding disparities between black and white school districts might have remained unchallenged.¹⁵²

The goal of subsequent school finance litigation, on the other hand, was to equalize resources between rich and poor school districts.¹⁵³ However, school finance litigation was not designed to eliminate racial disparities; in fact, “school finance litigation is often depicted as an effective way of moving beyond race as the salient issue in education reform and as an effective way to achieve educational equity and adequacy for disadvantaged students from all racial and ethnic backgrounds.”¹⁵⁴ Thus, school finance litigation may have not addressed racial funding differences resulting from funding policies that were surreptitiously designed to maintain racial funding disparities.¹⁵⁵

Federal and state equal protection clauses are generally of little use in challenging racial funding disparities.¹⁵⁶ Plaintiffs have not convinced courts to use strict scrutiny because they cannot demonstrate that the disparities were the result of intentional discrimination.¹⁵⁷ Thus, in most cases, courts have employed the rational basis test, which is traditionally undemanding. Classifications that have a disparate

racial impact can withstand strict scrutiny if courts can identify any conceivable basis for funding disparities.¹⁵⁸ By contrast, if courts conclude that their education clauses require vertical equity, then the plaintiffs would not have to establish that disparities between high- and low-minority districts were the result of intentional discrimination. In fact, as *Montoy* demonstrates, they may be entitled to even *more* resources in order to receive a constitutionally adequate education.¹⁵⁹

The Role of the State Accountability System in Determining the Components of an Adequate Education

The history of Kansas school finance litigation is also remarkable for the role that adequacy cost studies have played in helping the courts determine whether the legislature has satisfied its constitutional mandate to provide a suitable education. In this regard, Kansas has departed from most successful adequacy litigation. In these cases, courts have identified the components of an adequate education and then ordered the legislature to develop a remedy that achieves this mandate.¹⁶⁰ Perhaps, the most famous case adopting this approach is *Rose v. Council for Better Education, Inc.*¹⁶¹ In *Rose*, the Kentucky Supreme Court adopted the following definition of adequacy:

[A]n efficient system of education must have its goal to provide each child with at least seven of the following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self knowledge of his or her physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic skills to enable public school students to compete favorably with counterparts in surrounding states, in academics, or in the job market.¹⁶²

Another influential adequacy case is *Campaign for Fiscal Equity v. State*.¹⁶³ In this case, the Court of Appeals of New York reversed a 2002 state appellate

ruling that the state must provide students with only an eighth- or ninth-grade education.¹⁶⁴ Instead, the state high court ruled that a “sound basic education” should provide students with a “meaningful high school education.”¹⁶⁵ As the court explained:

A high school education is today as indispensable as primary education was in 1894. Children in the 21st century need the opportunity for more than a ninth grade education to be productive citizens. Back in the 19th century, a high school education was not needed to obtain a good job. Now, a high school education is a prerequisite to most good jobs. Those who lack a high school education and have obtained good jobs have done so in spite of, not because, the lack of a high school education. While it may not be true that there will always be menial low-skill jobs, and thus a need for people to fill them, it should not be the purpose of the public schools to prepare students for those jobs, which are limited in number and dwindling.¹⁶⁶

The *Rose* and *Campaign for Fiscal Equity* cases notwithstanding, several courts have refused to develop their own definitions of an adequate education because: (a) the issue was not “justiciable,” in other words, that judicially manageable standards were unavailable; and (b) defining the components of an adequate education would violate the separation of powers doctrine by placing courts in the role of the legislature.¹⁶⁷ For example, in *Committee for Educational Rights v. Edgar*, the Illinois Supreme Court dismissed a claim that the state had failed to provide children with the state education clause’s requirement of “an efficient system of high quality public educational institutions and services.”¹⁶⁸ The state high court could not ascertain the components of a high quality education because the constitution provided no guidance, and this inquiry was beyond the court’s field of expertise.¹⁶⁹ Instead, the court observed that “the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.”¹⁷⁰ Further, the court warned that if it assumed the role of defining the components of an adequate education, it “would largely deprive members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois.”¹⁷¹ Such a result would be regrettable because “[s]olutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.”¹⁷²

By contrast, the Kansas school finance litigation illustrates that legislatively derived accountability standards and legislatively commissioned costing-out

studies eliminate the concerns about justiciability and separation of powers. By developing accountability standards and commissioning a costing-out study, the Kansas legislature “made the hard policy decisions, leaving the courts with an enforcement role that conforms to traditional visions of the judicial function.”¹⁷³ The state courts did not have to develop its own standard of adequacy, but instead they could rely on the legislature’s own definition of a suitable education. Also, the Augenblick & Myers study played an important role in the Kansas school finance litigation because the courts merely had to compare the legislature’s funding effort with its own commissioned study.

The State Constitution’s Equal Protection Provision and the Rational Basis Test

The concurring opinions in *Montoy VI* may be a point of contention as the Kansas legislature designs a school funding remedy. State Senator John Vratil, who was a plaintiff’s attorney in *Unified School District No. 229*, asserted: “If the Supreme Court should adopt the reasoning of these justices, what it would amount to is, the court would take over writing the school finance formula and determining how much money should be spent, because *the state could never win a lawsuit again.*”¹⁷⁴

An analysis of *Skeen v. State*,¹⁷⁵ the case from which the concurrences about their equal protection standard, raises serious doubt regarding the accuracy of Senator Vratil’s statement. In *Skeen*, the Minnesota Supreme Court held that the state’s school finance system, which provided high-wealth districts with a number of opportunities to supplement state educational aid, did not violate the state equal protection clause. The court found that a fundamental right to education existed under the state constitution “not only because of its overall importance to the state” but also because of a constitutional provision requiring the legislature to provide a “general and uniform system” of public schools.¹⁷⁶ Strict scrutiny was appropriate for determining whether the legislature had provided students with a general and uniform system of public education.¹⁷⁷ Challenges to the state’s funding formula “beyond what is necessary to provide an adequate level of education which meets all state standards” would be subject to the rational basis test.¹⁷⁸

Applying this standard, the court found that the state’s school funding system did not violate the state equal protection. The plaintiffs conceded that the state had satisfied its duty to create a general and uniform system of education: the system provided “uniform funding to each student in the state in an amount sufficient to generate an adequate level of education which meets all state standards.”¹⁷⁹ The court then held that

he challenged provisions satisfied the rational basis test because the “state has a legitimate interest in encouraging local districts to supplement the basic revenue component, and allowing localities to augment the state contribution is rationally related to furthering this goal.”¹⁸⁰

Thus, contrary to Senator Vratil’s claims, a Kansas school finance system could survive an equal protection challenge if the state supreme court adopted the concurrences’ standard. Because the “suitable provision for finance” of public education would be a fundamental right, the state’s distribution policies would be subject to strict scrutiny. The state would have to demonstrate that the state’s distribution system provided all students were receiving a constitutionally adequate education. In the case of Kansas, the funding system would have to be sufficient to enable school districts to satisfy the state accreditation standards and student academic performance measures.¹⁸¹ Because the state high court has adopted the concept of vertical equity, the state legislature would probably have to provide disadvantaged students with additional educational resources to meet the constitutional mandate.¹⁸² However, once the state had provided a constitutionally acceptable level of funding to all students, it would be free under the concurrence’s formulation to provide more affluent districts with mechanisms to raise funds above the constitutional standard, such as local options budgets, without interference from the courts.

Federal School Finance Challenges

Further, the Kansas litigation is notable because of the plaintiffs’ attempt in the *Robinson* cases to resuscitate federal causes of action for school finance litigation. Since the Supreme Court’s decision in *San Antonio Independent School District* that local property taxation did not violate the Equal Protection Clause, plaintiffs have raised most of their challenges in state courts.¹⁸³ In the *Robinson* cases, the plaintiffs raised a number of federal challenges, including the Equal Protection Clause, the Due Process Clause, and Title VI of the Civil Rights Act of 1964.

It is doubtful that Equal Protection Clause challenges, such as the one developed in the *Robinson* litigation, will be succeed in the federal courts. Recall that in *Robinson I*, the federal district court ruled that *San Antonio Independent School District* because the plaintiffs were challenging disparities caused by state distribution policies.¹⁸⁴ The problem with Equal Protection Clause challenges to state distribution policies is that, like *San Antonio Independent School District*, the rational basis test would be applicable.¹⁸⁵ Thus, the

classifications created by state distribution policies would be upheld so long as there was a conceivable rational basis for them.¹⁸⁶

It is also doubtful that disparate impact challenges based on Title VI will be successful. Recall that in *Alexander*, the Supreme Court held that there was no private right of action to enforce the Title VI disparate impact regulations because there was no evidence of congressional intent. Also, recall that after the *Alexander* decision, the Tenth Circuit ruled in *Robinson II* that the disparate impact regulations could be enforced under 42 U.S.C. § 1983. However, three weeks before the *Robinson II* decision, the Supreme Court held in *Gonzaga University v. Doe* that “a court’s role in discerning whether personal rights exist in the § 1983 context should...not differ from its role in discerning whether personal rights exist in the implied right of action context.”¹⁸⁷ Thus, the correct question for a court to ask was whether Congress intended a private right to enforce the statute. It would follow that “[g]iven that the Court held in [*Alexander*] that the [Title VI implementing] regulations do not create [enforceable] rights, *Gonzaga* seems to preclude their being enforced by § 1983.”¹⁸⁸

The plaintiffs in Kansas and other states may have more success mounting a Due Process Clause challenge to their school funding formulas. Specifically, plaintiffs may argue that the school finance formulas violate notions of substantive due process. Certain states (e.g., Minnesota and Wisconsin) have held that their constitutions recognize a fundamental right to an education. Such a fundamental right could be a property interest under the Due Process Clause. Furthermore, a number of states require students to pass a high-stakes test to receive a high school diploma. In *Debra P. v. Turlington*,¹⁸⁹ the Fifth Circuit held that students have a property interest to a high school diploma upon completion of their curricular requirements.

Plaintiffs would then have to demonstrate that the funding system is not rationally related to achieving a property interest. They could argue that an inadequately funded system would not be related to achieving the property interest of receiving an adequate system. Plaintiffs in states that have high-stakes testing could build upon the legal reasoning used in *Debra P.* In *Debra P.*, the Fifth Circuit ruled that a high school graduation test violates the substantive due process right if the test is arbitrary or capricious, frustrates a legitimate property interest, or is fundamentally unfair. The court then concluded that the test was unfair because it covered materials that were not taught in schools. Similarly, districts with high rates of failure may argue that the states’ failure to provide adequate education may also be fundamentally unfair.

Notes

- ¹ Rebell M.A., *Fiscal Equality in Education: Deconstructing the Reigning Myths and Facing Reality*. *New York Review of Law & Social Change* 691 693-94 (1995).
- ² *Caldwell v. State*, No. 50616 (Kan. Dist. Ct. Aug. 30, 1972); *Knowles v. State Bd. of Educ.*, 547 P.2d 699 (Kan. 1976) (discussing state court opinion declaring school finance system unconstitutional); *Montoy v. State*, (*Montoy II*) 2003 WL 22902963 (Kan. Dist. Ct. Dec. 2, 2003); *Montoy v. State*, 102 P.3d 1160 (Kan. 2005) (*Montoy IV*); *Montoy v. State*, 112 P.3d 923 (Kan. 2005) (*Montoy V*). Additionally, in *Mock v. State*, No. 91-CV-1009 (Kan. Dist. Ct. Oct. 14, 1991) (reprinted in Philip C. Kissam, *Constitutional Thought and Public Schools: An Essay on Mock v. State of Kansas*, 31 *Washburn Law Journal* 474, 489-505 (1992), the Shawnee County District Court in a pre-trial decision suggested that the state's school finance system was unconstitutional.
- ³ *Kansas Constitution* art. VI, § 6(b).
- ⁴ 117 F. Supp. 2d 1124, 1150 (D. Kan. 2000).
- ⁵ *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973)).
- ⁶ As a point of clarification, *Rodriguez* does not, by any means, guarantee a constitutional right to locally controlled taxation for public schools as implied in some Amicus briefs submitted in *Montoy v. Kansas* (Brief of Amici Curiae Individual Students in the Shawnee Mission School District, p. 7). Rather, *Rodriguez* merely finds that the Federal courts accept as a rational basis (under Federal equal protection challenges) for school funding disparities, the allowance by states of local control over property taxation, so long as that allowance is not crafted in such ways as to potentially violate equal protection in ways different than those controlled by *Rodriguez*. See Green, P.C., Baker, B.D. (2002) Can Plaintiffs use the Equal Protection Clause to Challenge School Finance Disparities Caused by Inequitable State Distribution Policies? *Texas Forum on Civil Liberties and Civil Rights*, 141-64.
- ⁷ *Id.*
- ⁸ *Papasan v. Allain*, 478 U.S. 265, 288 (1986).
- ⁹ *Robinson I*, 117 F. Supp. 2d at 1150.
- ¹⁰ Section 601 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2005).
- ¹¹ 42 U.S.C. § 2000d-1 (2005).
- ¹² The Department of Education regulations provide in pertinent part: "A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided...may not...utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (2005).
- ¹³ *Robinson I*, 117 F. Supp. 2d at 1139-40.
- ¹⁴ 532 U.S. 275 (2001).
- ¹⁵ 295 F.3d 1183, 1187 (10th Cir. 2002).
- ¹⁶ 62 P.3d 228, 230 (Kan. 2003).
- ¹⁷ *Id.* at 234.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.* at 235.
- ²¹ 2003 WL 22902963 (Kan. Dist. Ct. Dec. 2, 2003).
- ²² *Id.* at *17 (emphasis supplied by the court).
- ²³ *Id.* at *18.
- ²⁴ *Id.* at *30.
- ²⁵ *Id.* at *37.
- ²⁶ *Montoy II*, 2003 WL 22902963, at *39.
- ²⁷ *Id.* at *40.
- ²⁸ *Id.*
- ²⁹ *Id.* at *41.
- ³⁰ *Id.*
- ³¹ *Id.*
- ³² *Id.* at *42.
- ³³ *Id.*
- ³⁴ *Id.* at *43.
- ³⁵ *Id.*
- ³⁶ *Id.* at *21.
- ³⁷ *Id.* at *47-48.
- ³⁸ *Id.* at *52.
- ³⁹ *Montoy v. State*, 2004 WL 10945555, at *5 (Kan. Dist. Ct. May 11, 2004).
- ⁴⁰ *Id.* at *11.
- ⁴¹ *Id.*
- ⁴² *Id.* at *12.
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ *Id.*
- ⁴⁶ *Id.* at *13.
- ⁴⁷ Hanna, J. (2004, May 19). Supreme Court Blocks Lower Court Order Closing Schools. *Associated Press*.
- ⁴⁸ 102 P.3d 1160 (Kan. 2005).
- ⁴⁹ *Id.* at 1162.
- ⁵⁰ *Id.* at 1161-62.
- ⁵¹ *Id.* at 1163.
- ⁵² *Id.*
- ⁵³ *Id.*
- ⁵⁴ *Id.* at 1164.
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ *Id.*
- ⁵⁸ *Id.*
- ⁵⁹ *Id.* at 1165.
- ⁶⁰ *Id.*
- ⁶¹ *Id.*
- ⁶² *Montoy v. State*, 112 P.3d 923, 927 (Kan. 2005).
- ⁶³ *Id.* at 926.

⁶⁴ *Id.* at 927.

⁶⁵ *Id.*

⁶⁶ *Id.* at 935.

⁶⁷ *Id.* at 927.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 926.

⁷¹ *Id.* at 928.

⁷² *Id.*

⁷³ *Id.* at 929.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 930.

⁸⁰ *Id.* (quoting *DeRolph v. State*, 728 N.E.2d 993, 1003 (Ohio, 2000) (emphasis added by the court)).

⁸¹ The state claimed that it had considered “the important issue of consideration of actual costs” to the extent possible. *Id.* at 931. Surprisingly, the state board of education disagreed with the state’s claim that the legislation’s modifications were based upon the actual costs of providing an adequate education. *Id.* at 928. However, because H.B. 2247 commissioned a cost study, the board asserted that the H.B. 2247 should be upheld “as an adequate interim first step in a multi-year remedial response.” *Id.* The board opposed the legislation’s provisions authorizing increases of funding based solely on local ad valorem property taxes, because such provisions exacerbated wealth-based funding inequities. *Id.* The board also worried that the proposed cost study’s focus on prior education spending would be unhelpful. Therefore, additional fact-finding would be needed to compute the future costs of providing an adequate education. *Id.*

The plaintiffs asserted that H.B. 2247 fell “ ‘grossly short of what is actually needed to provide a constitutionally suitable education.’ ” *Id.* The plaintiffs agreed with the board’s contention that the legislation was not based on actual educational costs. *Id.* The plaintiffs also agreed with the board that the legislation’s use of local ad valorem property taxes amplified the formula’s inequities. *Id.* However, the plaintiffs believed that additional fact-finding was not needed. *Id.* They asked the court to declare H.B. 2247 unconstitutional, direct the board to implement a temporary school finance plan, that incorporated the Augenblick & Myers study, on a temporary basis, direct the state to enact a constitutionally acceptable school finance formula, and retain jurisdiction to ensure that the court’s orders were followed. *Id.*

⁸² *Id.* at 931.

⁸³ *Id.*

⁸⁴ *Id.* at 932.

⁸⁵ *Id.* at 932-33. For instance, a 2005 survey of school districts conducted by the deputy commissioner of education recommended a BSAPP of \$6,057. *Id.* at 932.

⁸⁶ *Id.* at 933.

⁸⁷ *Id.*

⁸⁸ *Id.* at 934.

⁸⁹ *Id.*

⁹⁰ *Id.* The plaintiffs argued that state spending on low-enrollment weighting in 2004-05 was \$226,189,852. By contrast, total state spending on at-risk students was \$47,123,964 and spending on bilingual students was \$8,352,964. *Id.* The plaintiffs also observed that the low-enrollment weighting resulted in large per pupil disparities, “ranging in 2002-03 from \$16,968 to \$5,655.” *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 934-35. The original justification provided for the enhancement, teacher salary, had been removed from the statute. Thus, the cost-of-living weighting could be used for any purpose. *Id.* at 935.

⁹⁴ *Id.*

⁹⁵ *Id.* at 936.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 937.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 939.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 940.

¹¹⁰ *Id.* at 941.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Montoy v. State*, 120 P.3d 306 (Kan. 2005).

¹¹⁴ *Montoy VI*, 120 P.3d at 314 (Beier, J., concurring).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 315.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (emphasis supplied by court).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 316.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 316-17.

¹²⁸ *Id.* at 317.

¹²⁹ *Id.*

¹³⁰ *Id.* at 318.

- ¹³¹ *Id.*
- ¹³² *Id.*
- ¹³³ *Id.*
- ¹³⁴ *Id.* (Luckert, J., concurring).
- ¹³⁵ *Id.*
- ¹³⁶ *Id.*
- ¹³⁷ *Id.*
- ¹³⁸ Ryan, J.E., Saunders, T. (2004) Foreword to Symposium on School Finance Litigation: Emerging Trends of New Dead Ends? *Yale Law and Policy Review* 22 463, 469.
- ¹³⁹ *Id.* at 468-69.
- ¹⁴⁰ *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004).
- ¹⁴¹ *Mock*, No. 91-CV-1009 (reprinted in Kissam, *supra* note 2, at 500).
- ¹⁴² *Unified Sch. Dist. No. 229*, 885 P.2d at 1187.
- ¹⁴³ *Montoy III*, 2004 WL 10945555, at *12.
- ¹⁴⁴ *Id.*
- ¹⁴⁵ *Montoy IV*, 112 P.3d at 933-34.
- ¹⁴⁶ *Id.*
- ¹⁴⁷ *Green and Baker*, *supra* note 6, at 694.
- ¹⁴⁸ Bruce D. Baker and Preston C. Green, III. Tricks of the Trade: State Legislative Actions in School Finance Policy that Perpetuate Racial Disparities in the Post-Brown Era, 111 *American Journal of Education* 372 (2005).
- ¹⁴⁹ *Id.*
- ¹⁵⁰ *Id.* at 377.
- ¹⁵¹ *Id.*
- ¹⁵² *Id.*
- ¹⁵³ *Id.*
- ¹⁵⁴ Ryan, J.E. (1999) Schools, Race, and Money. *Yale Law Journal* 109, 249-316.
- ¹⁵⁵ *Baker & Green*, *supra* note 147, at 377.
- ¹⁵⁶ *Id.* at 398-99.
- ¹⁵⁷ *Id.* at 399.
- ¹⁵⁸ *Id.*
- ¹⁵⁹ *Montoy IV*, 112 P.3d at 933-34 (finding that H.B. 2247 violates "suitable provision for finance" clause because at-risk, bilingual, and special education weights were not based on actual cost of education).
- ¹⁶⁰ Christopher Roellke et al., School Finance Litigation: The Promises and Limitations of the Third Wave, 79 *Peabody Journal of Education* 104 (2004).
- ¹⁶¹ 790 S.W.2d 186 (Ky. 1989).
- ¹⁶² *Id.* at 212.
- ¹⁶³ 801 N.E.2d 326 (N.Y. 2003).
- ¹⁶⁴ 744 N.Y.S.2d 130, 138 (N.Y. App. Div. 2002).
- ¹⁶⁵ 801 N.E.2d at 337.
- ¹⁶⁶ *Id.* at 331.
- ¹⁶⁷ *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Coalition for Adequacy v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Committee for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).
- ¹⁶⁸ *Illinois Constitution*. art. X, § 1.
- ¹⁶⁹ 672 N.E.2d at 1191.
- ¹⁷⁰ *Id.*
- ¹⁷¹ *Id.*
- ¹⁷² *Id.*
- ¹⁷³ Liebman, J.S. (1900) Implementing *Brown* in the Nineties: Political Restructuring, Liberal Recollection, and Litigatively Enforced Legislative Reform. *Virginia Law Review* 76, 416.
- ¹⁷⁴ John Hanna, Three Justices: Education a "Fundamental" Right: New Opinions Join January School Decision, *Associated Press*, Sep. 10, 2005.
- ¹⁷⁵ 505 N.W.2d 299 (Minn. 1993).
- ¹⁷⁶ *Id.* at 313.
- ¹⁷⁷ *Id.* at 315.
- ¹⁷⁸ *Id.* at 316.
- ¹⁷⁹ *Id.* at 315.
- ¹⁸⁰ *Id.* at 316.
- ¹⁸¹ *Montoy III*, 102 P.3d at 1164.
- ¹⁸² See *Montoy IV*, 112 P.3d at 933-34 (finding that H.B. 2247 violates "suitable provision for finance" clause because at-risk, bilingual, and special education weights were not based on actual cost of education).
- ¹⁸³ *Green & Baker*, *supra* note 6.
- ¹⁸⁴ *Robinson I*, 117 F. Supp. 2d 1124.
- ¹⁸⁵ *Papasan*, 478 U.S. 265.
- ¹⁸⁶ *Green & Baker*, *supra* note 6.
- ¹⁸⁷ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002).
- ¹⁸⁸ Ryan, J.E. (2002). What Role Should Courts Play in Influencing Educational Policy: The Limited Influence of Social Science Evidence in Modern Desegregation Cases? *North Carolina Law Review* 1659.
- ¹⁸⁹ 644 F.2d 397 (5th Cir. 1981).

What will it Take to Make Kansas School Funding “Cost Based”?

Bruce D. Baker

Introduction

As discussed in the article by Preston Green in this issue, on January 3, 2005, the Kansas Supreme court found the legislature’s current school finance law in violation of Article 6 (the education article) of the Kansas Constitution in two ways. First, the current system fails to guarantee that districts have adequate resources as measured against the legislature’s own study of cost. Second, the ways in which vastly differing amounts of resources are distributed across Kansas school districts are “politically distorted” and “not cost-based.” The implication of this latter concern is that for any legislative remedy to be considered constitutionally “suitable,” that remedy will have to be shown to be cost-based or at least no longer politically distorted.

In the aftermath of the January 3, 2005 Supreme Court decision, most media, legislative and judicial attention has been paid to the aggregate shortfalls in current funding when compared with the legislature’s own cost study released in 2001. That shortfall was estimated at approximately \$853 million. Much less attention has been paid to the question of political distortion and cost basis. This article will explain what is meant by the court’s declaration that the current state school finance system is *politically distorted* and not *cost-based*. Further, it will explain how those political distortions came into being.

How did the School District Finance Act Become “Politically Distorted”?

In this modern era of increasingly complex and state legislatively controlled school finance formulas there exist new opportunities for legislators to either improve dramatically or erode the rationality and cost basis of state aid allocations to schools. Throughout the 1970s and 1980s in Kansas and elsewhere, the politics of state aid to local schools centered primarily on the level and mix of taxes to be used for funding schools, and the basic level of funding to be put into the system. The political dynamic has changed with the proliferation of need-based or cost-based aid formulas that include a multitude of weightings or cost adjustments that may benefit some districts and not others and that have differing affects on total costs to the state.

For example, Baker and Duncombe (2004) show how the difference in urban/rural balance between Kansas and Texas has led to a very different balance in these two states’ funding formulas, with Texas having a far greater share of its population and political power in major urban areas (63% compared to Kansas’ 32%). Both state’s aid formulas include similar basic structures district size weights, student poverty, and bilingual education weights. But, in Kansas, the small district size weighting dwarfs the student need weightings, driving over 10% of general funding, with poverty-based weighting driving only 2% and bilingual program weighting driving less than one-half of 1%. In Texas, small district size and sparsity weights drive under 3% of funding while compensatory weightings drive nearly 10% and bilingual programming over 1%. In addition, the state aid formula includes a teacher wage index that tends to drive a greater share of aid to urban areas, and in total, drives over 10% of aid.¹ Baker and Green (2005) show how legislators in Kansas and Alabama have created cost/need adjustments that specifically disadvantage minority students and do so to a greater extent than in any other states.²

Some distortions were introduced into the School District Finance act (SDF) from its inception in 1992, while others emerged over the next decade as legislators became more familiar with the new system. The original distortion of SDF occurred in the calculation of the small district adjustment. That calculation was tied to the historical spending of those districts which had (a) been provided since 1965 with more state support per pupil, and (b) allowed to grow their budgets annually at a much faster rate.

Table 1 summarizes the data underlying the low enrollment weight calculation. In addition to the effects of state aid and budget growth limits, it also turns out that the very smallest districts that were spending 2.14 times what larger districts spent possessed 3.25 times the taxable assessed value per pupil of larger districts. Similarly, districts with 200 to 400 students, which spent 1.58 times the amount spent in larger districts, possessed 1.76 times the taxable property wealth per pupil.

In testimony presented at trial in *Montoy v. Kansas* in the fall of 2003, Baker showed that removing transportation costs and controlling for differences in taxable wealth (and income) and administrative expenditures leads to a reduction in maximum weight from 2.14 to 1.75 for the district with 100 pupils.³ It turns out however, that the most significant distortion in the “low enrollment” weight results from the fact that legislators drew straight lines rather than a more sharply dropping curve through their points. By alternative

Table 1
Origins of the Current Low Enrollment Weight

Enrollment	Median General Fund Expenditures per Pupil 1991 (ratio to >1,900)	Median Assessed Valuation per Pupil 1991 (ratio to >1,900)
75 – 125	\$7,337 (214%)	\$75,718 (325%)
200 – 400	\$5,406 (158%)	\$41,007 (176%)
> 1,900	\$3,426	\$23,292

Baker (2003), p. 61.

estimates district with 600 to 1,000 students that presently receives a weight of 1.41 would have received only 1.19 had a more appropriate curve been fit to the points (Baker, 2003). The effect of this “error” is that many medium sized Kansas districts, often adjacent to much larger districts received a substantial boost in funding (for example, Piper USD, carved out of the city limits of Kansas City has historically received about \$800 in revenue per pupil from this adjustment). Arguably, it was partly the exaggerated size of the low enrollment weighting that led to sufficient support among key rural legislators to pass SDF.⁴

In addition to errors made in establishing the low enrollment weighting, transportation weighting was added as an independent component of the new formula, despite the fact that general fund expenditures per pupil used in calculating the low enrollment weight included expenditures on transportation.

While not necessarily *plain common sense*, it is relatively well accepted in the field of school finance that economies of scale do exist across districts and schools of varied size, typically leveling off for districts with greater than 2,000 students. In addition, low density, large land area districts face higher per pupil transportation costs.⁵ Yet, it became obvious to some Kansas legislators that these adjustments were overstated, so obvious that one of the first modifications to the new formula was a “large district” weight called *correlation weight*. Correlation weight was specifically intended to offset the first few percentage points of low enrollment adjustment, and eventually to level large districts up to no less than 6.32% above basic aid. This meant that by 2003, when base aid per pupil had climbed from \$3,600 in 1992 to \$3,863, the actual minimum funding available to a large district would be 6.32% above \$3,863, or \$4,107.

Among the state’s larger districts, different political divisions emerged around weighting factors. Fast-growing suburban districts were able to successfully argue that they faced substantially greater costs to their

annual operations from opening new school facilities. Representatives of these districts negotiated a 25% adjustment per pupil for each pupil attending a new facility in its first two years of operation, if and only if that district had (a) already been able to garner the local support to construct new facilities, and (b) maximized all other local options for raising tax revenues.⁶

The policy specifically favored Johnson County districts in the Kansas City metropolitan area. Legislators did little to hide their targeting preference

when in 1996-97 they increased the weight from 25% to 33% for two districts only, Blue Valley (USD 229) and Olathe. Targeted by name or not, the weight was designed to serve specific suburban districts, and succeeded in doing so almost exclusively. Baker (2003) notes: In 1995, Blue Valley and Olathe alone received 64% of all new facilities aid, and with their neighbor Shawnee Mission (discussed in the previous example), the three received 82% of all new facilities aid.⁷ In more recent years, a related provision was added, called *ancillary new facilities* adjustment, which would allow districts already maximizing all other local taxing options and receiving new facilities aid to request additional general fund tax authority.

Table 2 shows the collective effects of formula distortions on Kansas City area districts in 2004–05. Table 2 specifically addresses the General Fund Budget authority (legal maximum) of districts. Table 2 uses weighted pupil count data from school year 2004–05. The general fund weighting ratio represents the number of weighted pupils allocated to each district as a cumulative function of district size adjustment, transportation adjustment, new facilities and ancillary new facilities, at risk pupils, bilingual and vocational program contact hours. A 1.29 ratio implies that the district would receive $1.29 \times \$3,863 = \$4,983.27$ per pupil in cost adjusted general funds, while a ratio of 1.23 would generate \$4,751.49. If we assume state defined general fund authority to reflect differences in district need, then the implication of FY 2005 funding for Kansas public schools was that Piper school district had, by far, the greatest needs among districts in the Kansas City metro area. Further, Blue Valley ranked second and DeSoto third, each with greater *implied* need than Kansas City. In 2003, Olathe, Blue Valley and DeSoto had received as much as 10% more need adjusted general fund budget authority as Kansas City.⁸

In short, Table 2 shows that the Kansas Legislature by adopting cost and need adjustments based solely on majority vote in the political process without serious

Table 2
Implied Costs/Needs of Districts in Wyandotte & Johnson County under SDF in 2004-05

Name	Fall Enrollment ^a	% LEP/ELL LEP/ELL (NCES 2003) ^b	% Poverty (Census 2000) ^c	Adjusted Total ^a	Low & Corr. ^a	Voc & Trans. ^a	Bilingual & at Risk ^a	New & Ancillary New ^a	Total Weighted ^a	Implied Cost/Need Ratio
Piper	1,346	0.0	2.4	1,346	269	120	5	0	1,741	1.29
Olathe	22,404.5	3.1	4.3	22,418	1,417	667	275	3,950	28,727	1.28
Blue Valley	18,409.6	1.3	1.9	18,410	1,164	710	51	2,433	22,767	1.24
DeSoto	4,543.1	2.3	3.6	4,553	288	209	59	488	5,596	1.23
Kansas City	18,944.5	12.0	21.9	19,436	1,229	846	1,620	125	23,255	1.23
Turner	3,583.3	3.7	11.2	3,651	231	152	163	0	4,196	1.17
Bonner Springs	2,163.3	0.0	8.6	2,179	138	104	68	0	2,489	1.15
Gardner-Edgerton	3,397.3	0.2	4.8	3,406	215	200	49	22	3,892	1.15
Basehor-Linwood	2,047.1	0.0	6.5	2,047	129	150	11	0	2,337	1.14
Shawnee Mission	27,874.9	3.3	3.8	28,276	1,787	1,084	392	22	31,562	1.13

Sources:

[a] Kansas State Department of Education, General Fund & Legal Max 2004-05. http://www.ksde.org/leaf/legal_max/legalmax.htm

[b] National Center for Education Statistics, Common Core of Data, Local Education Agency Universe Survey 2003. <http://nces.ed.gov/ccd>

[c] National Center for Education Statistics/U.S. Census Bureau School District Demographics System. <http://nces.ed.gov/surveys/sdds/>

consideration of actual costs and needs has created a system of school finance that directly (rather than indirectly via local control) favors districts with lower poverty rates and far fewer minority students. Indeed it may be too high a standard to imply that all legislative decisions of this type be based on the best possible empirical evidence. However, a particularly relevant question in the current political and legal context is just how far out or line, or just how “politically distorted” must a school finance system become before judicial intervention is warranted, or required? Further, if judicial intervention is warranted, how and to what extent must the distortions be alleviated?

How Much More and Where Should it Go?

In this section, I evaluate the funding deficits under current (at the time of the January 3 ruling) relative to two alternative empirically-based benchmarks of costs. First, I construct a simulation of core components of the cost study prepared for the legislature by the consulting

firm of Augenblick & Myers of Denver, Colorado (referred to as AMSB).⁹ Second, I construct an alternative simulation of core components of the AMSB study, using marginal cost adjustments for economies of scale and student needs drawn from more rigorous recent research.

Note that in the following analyses, I focus specifically on school districts’ General Fund Budgets, pulling out certain components of General Fund Budgets for the purpose of making apples to apples comparisons between actual funding and estimated costs. In Kansas school finance terminology, a school district’s general fund budget is the core component of a district’s annual operating budget, and the general fund budget authority for each district is defined by the School District Finance act. In short, the General Fund Budget is what the state aid formula guarantees that each district shall have available for paying teacher, administrator and support staff salaries and benefits, keeping the lights, air conditioning and/or heat on, keeping the halls clean, and paying for instructional and non-instructional

materials and supplies. The Supplemental Fund Budget, which may be used to generate additional annual operating revenues, is derived from local option taxes (Local Option Budget, or LOB). Programs for children with disabilities are partially financed by the state through a separate mechanism, but one which interacts with the general fund in that each child with a disability also generates regular education funding. Separate funds are used for generating revenues for capital outlay and bonded indebtedness.

In this same volume, Lori Taylor of Texas A&M has discussed education cost analysis and the specific application of cost analysis to Kansas and estimating the cost of a constitutionally adequate education. Studies of the cost of education attempt to measure both the bottom line of spending required in a state to meet constitutional mandates, as well as the ways in which costs vary across school districts based on a number of district characteristics and student population characteristics outside the control of local school officials. That is, education cost analysis identifies a basic underlying cost, usually either the cost of achieving a given set of outcomes in a scale efficient district with relatively few additional costs and needs (low to average teacher labor market costs and few special needs students), or the cost of achieving a given set of outcomes in a district of average characteristics. Education cost analysis also provides guidance on the additional amounts of funding needed for marginal costs of achieving the same set of educational outcomes in smaller school districts, districts in areas with higher competitive wages, districts with higher concentrations of at risk and limited English proficient students.¹⁰

Some background on the AMSB study is warranted. The study's origins date back to 1999 and a report issued by the *Vision 21st Century Task Force* convened by Governor Bill Graves. One of several working groups of citizens and legislators, the task force on public school finance recommended to the legislature:

To date, no one has defined what constitutes a suitable education in Kansas. Therefore, it has been impossible to put a price tag on it. When the current school finance formula was drafted, cost figures including the base state aid of \$3,600 per pupil and the various pupil weightings were derived primarily from political deliberation. The Task Force concluded that it is of critical importance that the first step toward public education finance reform in Kansas is to conduct a professional evaluation to determine the cost of a suitable education. (p.1.)

Kansas legislators responded by appropriating funding for the study and collaborating with the

Kansas State Board of Education on developing operational definitions of *suitable provision*, tied to current statutes prescribing curricular programs consisting of the subjects and courses required under the provisions of K.S.A. 72-1101, 72-1103 and 72-1117. Members of the Legislative Coordinating Council then oversaw the study through its implementation and completion.

One component of the study involved convening *professional judgment* panels to identify the inputs necessary to deliver a suitable education, while another component involved calculating the average expenditures of districts presently meeting required outcome standards. In their final recommendations, AMSB suggested using a base cost figure close to their findings of average expenditures of successful districts—\$4,650—but using marginal cost estimates from professional judgment analysis, because successful district analysis provided no guidance on marginal costs.

In *Montoy v. Kansas*, as discussed by Preston Green in this volume, the court has relied almost exclusively on the AMSB study as the basis for declaring that the total amount of funding available is insufficient. The AMSB study also addresses how that funding should be distributed across districts by costs and needs, and the court has declared that current funding is not distributed by costs and needs. One can only assume that the court believes that the legislature should not just meet the total spending target of AMSB, but should distribute that funding using AMSB district level cost variations as a guide. The court, however, has failed to articulate distributional benchmarks thus far. In their January 3, 2005 decision, the court indicated that more money would be necessary but that there were literally thousands of ways to meet the constitutional mandate. In June, 2005, the court indicated that not enough new funding was added in the spring of 2005, and ordered an additional \$142 million but did not specify where that money should be allocated.

The justices reasoned that the \$142 million was an appropriate amount because, combined with the first \$143 million added in the spring, the total would achieve the first one-third of meeting the costs proposed in the AMSB study ($(142 + 143)/853 = .33$). This assumes that 100% of each of the first two allotments was allocated toward closing existing gaps between existing district budgets and district needs estimated by AMSB. Surely the legislature would not have accomplished one-third of the goal had all of the new money been allocated only to small, rural, districts or wealthy suburban ones. Yet, the court did not specify as much.

For the comparisons in this section, I remove from current school district General Fund Budgets, transportation and vocational education because these costs were not estimated directly in the AMSB study.

Drawing on AMSB recommendations, I assume a basic annual operating cost of \$5,420 per pupil in 2004,¹¹ similar to the figure used by the court in reference to the cost study. Using this base cost figure results in an aggregate shortfall of general fund budgets totaling \$851 million when compared against similar budget components in 2004-05. The total cost in 2004-05, across all districts, of General Fund Budgets excluding transportation and vocational education was approximately \$2.14 billion and the total cost of funding AMSB recommendations for the same formula components (base aid, size adjustment, at risk and bilingual education adjustments), was approximately \$2.99 billion.

To simulate AMSB district level costs, I fit a curve (rather than using straight line segments as recommended by AMSB) to their cost estimates for districts of varied size. AMSB estimate the marginal costs for the smallest districts at between 40% and 50% above base costs, a much smaller margin than in the current law (101.4%). AMSB estimate weights to be applied to school district subsidized lunch counts (free only) ranging from 33% in a small district to 56% in a large district, and weights for bilingual education programs ranging from 61% to 103%.¹² These are much larger than current adjustments.

Studies that rely on professional judgment panels to prescribe resource configurations can lead to irregular

findings regarding marginal costs associated with variations in district size and student needs.¹³ As an alternative, I use a method recently proposed by Bifulco (2005) to adjust for economies of scale and student needs.¹⁴ This method uses a 3rd order polynomial curve, which represents aggregate findings of costs associated with economies of scale across several states, to adjust costs for differences in district size.¹⁵ Bifulco also uses student need weights derived from education cost function analysis by Duncombe and Yinger (2005).¹⁶

Duncombe and Yinger (2005) show that the marginal costs of achieving comparable outcomes (to the average student) for limited English proficient (LEP/ELL) students is approximately 103% and for children in poverty, as measured by the U.S. Census Bureau, about 149%. When child poverty is alternatively measured by subsidized lunch rates, including those qualifying for free or reduced price lunch, the marginal cost per child in poverty declines to 109%. For alternative cost estimates, I apply Duncombe and Yinger’s LEP/ELL weight of 1.03 to districts’ actual LEP/ELL student populations, rather than bilingual contact hours. In Kansas, LEP/ELL counts are typically 2 to 3 times the reported full-day bilingual contact hour counts. Next, I apply Duncombe and Yinger’s 1.49 weight to the percentage of public school enrolled children between the ages of 5 and 17 from families living in poverty.

Table 3
Comparison of 2004–2005 General Funds to Cost Targets by Size and Poverty

Poverty Quartile (% Qualifying for Free Lunch)	Size Quartile				Average
	<i>Smallest</i> (28 to 298)	<i>Small</i> (299 to 538)	<i>Large</i> (539 to 1,082)	<i>Largest</i> (1,083 to 44,438)	
<i>Lowest Poverty (2.4 to 19.7% Free Lunch)</i>					
GFB Modified per Enrolled Pupil 04-05	\$6,933	\$6,076	\$5,630	\$4,447	\$5,442
AMSB Cost per Pupil (5,420 base)	\$7,877	\$7,362	\$6,927	\$6,114	\$6,835
AMSB Base with Adjusted Weights	\$8,110	\$7,279	\$6,377	\$5,862	\$6,612
<i>Lower Poverty (19.9 to 27.1% Free Lunch)</i>					
GFB Modified per Enrolled Pupil 04-05	\$7,742	\$6,241	\$5,666	\$4,504	\$6,096
AMSB Cost per Pupil (5,420 base)	\$8,437	\$7,631	\$7,113	\$6,439	\$7,452
AMSB Base with Adjusted Weights	\$9,865	\$7,594	\$6,585	\$6,174	\$7,481
<i>Higher Poverty (27.4 to 35.2% Free Lunch)</i>					
GFB Modified per Enrolled Pupil 04-05	\$7,604	\$6,377	\$5,664	\$4,502	\$6,333
AMSB Cost per Pupil (5,420 base)	\$8,541	\$7,773	\$7,270	\$6,779	\$7,749
AMSB Base with Adjusted Weights	\$9,844	\$7,749	\$6,801	\$6,414	\$7,984
<i>Highest Poverty (35.3 to 66.9% Free Lunch)</i>					
GFB Modified per Enrolled Pupil 04-05	\$8,114	\$6,389	\$5,805	\$4,592	\$6,333
AMSB Cost per Pupil (5,420 base)	\$8,736	\$8,106	\$7,810	\$7,228	\$8,001
AMSB Base with Adjusted Weights	\$10,179	\$8,300	\$7,529	\$7,062	\$8,461
Average of GFB Modified per Enrolled Pupil 04 - 05	\$7,722	\$6,258	\$5,675	\$4,510	\$6,047
Average of AMSB Cost per Pupil (5,420 base)	\$8,504	\$7,681	\$7,209	\$6,613	\$7,505
Average of AMSB Base with Adjusted Weights	\$9,737	\$7,676	\$6,727	\$6,374	\$7,629

Source: Simulation available at: <http://www.ku.edu/~bdbaker/genfund.xls>

Table 3 compares district general fund budgets in 2004–05 with the two alternative cost estimates by district size and district subsidized lunch quartile. The cost comparisons show that all districts are underfunded by comparison to cost targets. More importantly, however, the table shows that the shortfalls for some districts are much greater than the shortfalls for others. For example, from the lowest to highest poverty quartile among scale efficient districts (measuring poverty by rates of subsidized lunch—free only), 2004–05 general fund budgets climb by about \$145 per pupil or 3.3%. In contrast, Augenblick and Myers estimate \$1,114 per pupil difference in need, or 18% difference in cost of outcomes between these groups. When applying adjusted weights, the marginal costs of districts in the highest poverty quartile are \$1,200 per pupil, or 20.5%.

Among the lowest poverty districts, the current marginal cost difference between smallest and largest districts is about 56%. AMSB places this difference at 29% and alternative estimates place the difference at 38%.

Some clarification is in order. How can it be that the system is funded so inadequately across the board, if, as articulated by the state at trial, most Kansas children are doing well? Recall that General Fund Budgets represent only the underlying guaranteed annual operating funding by the state. Both the lower court and higher court have made clear that the state must guarantee a level of funding that meets the constitutional mandate, and that other funds, like those raised from local option taxes are for the *extras*.

It can certainly be shown that many of the state’s districts with more advantaged student populations like those in Johnson County are currently spending at sufficient levels to achieve constitutionally adequate student outcomes. While not an apples to apples comparison of similar budget components, Blue Valley (USD 299) reported current operating expenditures per pupil in 2003, of \$7,236 per pupil (including special education, transportation, vocational).¹⁷ Blue Valley’s estimated need excluding special education, vocational programs, and transportation was \$5,471 (A&M) to \$5,640 (A&M with adjusted weights). In contrast, Dodge City’s estimated need ranges from \$9,144 (A&M) to \$9,225 (adjusted weights) excluding special education, vocational

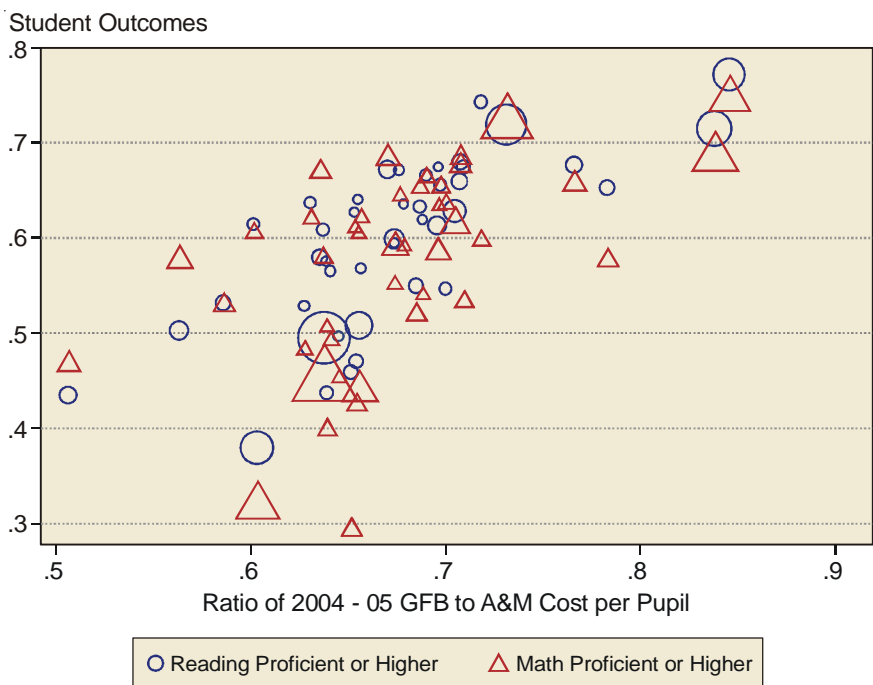
programs, and transportation. Yet Dodge City’s actual current operating expenditures including special education, vocational programs, and transportation were \$5,615 in 2003.

Are Funding Deficits Related to Outcome Deficits?

In the wake of controversial state high court decisions in states including Kansas, New York, and Arkansas, and the increased role of cost studies in these cases, there has been increased scrutiny on the reliability and validity of cost analysis methods and findings. In particular, it has been argued by some that cost analysis methods are so unreliable that measured spending deficits, like those addressed in Table 3, are entirely unrelated to actual outcome deficits.¹⁸ This brief section looks at the relationship between current funding shortfalls and current outcomes on state assessments.

Figure 1 provides a visual analysis of the relationship between funding gaps, relative to AMSB simulated costs, and the percentages of students scoring proficient or higher on state math and reading assessments over the past 5 years (2000 to 2004). The horizontal axis indicates the ratio of current (2004–05) General Fund

Figure 1
Relationship between Gaps and Outcomes for Scale-Efficient Districts (>2,000 pupils)



Budget to AMSB cost estimates (as simulated herein). Only districts enrolling greater than 2,000 students are included. Sizes of the circles and triangles in the graph represent the relative enrollment of districts, with the largest circle and triangle representing Wichita, which sits just above 70% of estimated cost and just below 50% on both reading and math proficiency. In contrast, districts' with General Fund Budgets exceeding 80% (such that with LOB's they may exceed 100%), have proficiency rates at and above 70%. A positive relationship exists, whereby districts with closer to 100% of their cost estimate (in general funding alone) have higher proficiency rates.

Table 4 provides a simple statistical test of the relationships between funding deficits (percent below estimated need) and state assessment proficiency rates. Funding deficits are measured with respect to both AMSB simulated costs and AMSB with alternative weights (inverse of the measure in Figure 1). In the case of reading assessments, funding deficits alone explain more than half of the variation in outcomes, with a 1% increase in deficit associated with a nearly 1% decline in proficiency rate. Funding deficits alone explain one-fifth to nearly one-third of variance in math proficiency rates.

To some extent, these analyses convey the obvious. Districts with more children in poverty and more limited English speaking children have fewer children scoring proficiently on state tests. AMSB cost estimates among large districts differentiate primarily on the basis of those student needs, providing higher estimates of cost to districts with more children in poverty and more limited English speaking children. Among large Kansas districts, those with more children in poverty

and more limited English speaking children receive ostensibly the same need adjusted general funding as districts with far lesser student needs.

Measuring Progress in the Reducing Political Distortions

In this section, I measure the progress made by the legislature in the spring and summer legislative sessions that resulted in a number of incremental changes to SDF. I begin with a review of the changes made to General Fund Budget allocations by the end of the summer 2005 special legislative session on school finance. Next, I focus specifically on the question of whether and to what extent the legislature has, through the incremental changes made thus far, reduced distortions and increased the relationship of actual aid distribution to cost estimates. For this analysis, I evaluate the correlation across districts between formula aid allocations for General Fund Budgets and the two alternative cost estimates – AMSB simulated costs and AMSB costs with alternative weights. Because correlation analysis addresses only the rank order of districts and not whether higher poverty districts have *enough* additional support, I also calculate regression coefficients for both cost estimates and for General Fund Budgets before and after incremental adjustments.

By the close of the spring 2005 regular session, the legislature had adopted House Bill 2247, which, among other things raised base aid per pupil to \$4,222. This increase was accomplished in part by folding the previous correlation weight into the base, such that the increase was actually from \$4,107 to \$4,222 and not from \$3,863 to \$4,222. Correlation weight no longer existed. At risk weighting was increased from 10% of \$3,863 per child to 14.5% of \$4,222 and bilingual program weighting increased from 20% x \$3,863 per 1 full time equivalent student to 39.5%. Of the \$143 million package, about \$115 went to funding adjustments to General Fund Budgets that would move those budgets closer to cost targets. Additional policy changes included increased funding to offset special education costs. Other provisions, included the hotly contested *cost of living* adjustment are addressed in a separate article in this volume.

By the close of the summer special session on school finance, additional incremental changes had been made to some of the core components of the formula. Base aid per pupil was increased from \$4,222 to \$4,257.

Table 4
Regression Analysis of the Relationship between Funding Deficits and Outcomes

	% Below AMSB		% Below AMSB Base with Adjusted Weights	
	Coefficient	Sig.	Coefficient	Sig.
% Proficient or Higher Math ^[a]	-0.875	p<.001	-0.918	p<.001
R-Squared	.2651		.3151	
% Proficient or Higher Reading ^[b]	-1.031	p<.001	-0.987	p<.001
R-Squared	.5146		.5019	

[a] five year average percent of students scoring proficient or higher from 2000 to 2004 on state Math assessments. Kansas State Department of Education.

[b] five year average percent of students scoring proficient or higher from 2000 to 2004 on state Reading assessments. Kansas State Department of Education.

Table 5
Correlations between General Fund Budgets and Cost Estimates

	General Fund 2004-05	HB 2247 (Spring 2005)	Summer 2005
<i>All Districts</i>			
AMSB	0.856	0.870	0.875
AMSB with Adjusted Weights	0.844	0.855	0.862
<i>Scale Efficient Districts (>2,000)</i>			
AMSB	0.598	0.654	0.687
AMSB with Adjusted Weights	0.594	0.649	0.688
<i>Large Districts (>5,000)</i>			
AMSB	0.463	0.554	0.594
AMSB with Adjusted Weights	0.342	0.643	0.721

Correlation weight was reintroduced to chip away further at the margin of difference between small and large districts. Bilingual weighting was left at its HB 2247 level, but at risk weighting was increased to 19.3%. These changes added approximately \$73 million directly toward the goal of closing gaps between current general fund budgets and AMSB targets. This suggests that as much as \$75 million of the \$148 million summer legislation funded areas not directly related to reducing distortions and improving adequacy.¹⁹

Table 5 shows the correlations between General Fund Budgets in 2004–05, estimated General Fund Budgets under HB 2247, estimated General Fund Budgets following the special session, and the two cost estimates. As in previous analyses, the comparable components exclude transportation, vocational education, and special education. Across all districts, correlations between general funds and cost estimates were high to begin with, because smaller districts are estimated to have higher costs and smaller districts receive significant cost adjustment. Correlations edged upward slightly with the passage of HB

2247 and subsequent modifications. Across scale efficient districts, correlations were much lower to begin with, but also show incremental improvement with the passage of HB 2247 and subsequent modifications. Perhaps most importantly, among the state’s largest districts, substantial improvements were achieved in alignment between aid allocations and estimated costs, with correlations between general funds and AMSB base with adjusted weights increasing from .342 to .721.

Table 6 addresses the changes in the magnitudes of the relationship between student needs and allocated funding. In 2004–05, across districts enrolling over 2,000 pupils, a 1% increase in poverty was associated with under \$17 additional per pupil revenue, where the maximum Census poverty rate is approximately 22% (about one-third the maximum subsidized lunch rate). Using AMSB need weights, a district with 1% more children in poverty would have, on average \$105 more in per pupil revenue. Incremental progress was made toward this goal from spring 2005 to summer 2005, bringing the slope to nearly \$35 per 1% difference in poverty rate. The case is similar for actual funding and marginal costs associated with limited English proficient children. With the doubling of the bilingual program weight, the slope of the relationship between limited English proficient student shares and funding doubled. Nonetheless, the need adjustment still falls well short of estimated marginal costs.

Table 6
Actual and Estimated Poverty and LEP/ELL Need Effects (Districts Enrolling >2,000 Pupils)

	Current Policies Implied Marginal Costs			Target Needs Estimated Marginal Costs	
	GFB '04-'05	HB 2247 (Spring)	Summer '05	AMSB Weights	Adjusted Weights
<i>Poverty(U.S. Census)^[a]</i>					
Slope	16.62	28.19	34.90	104.99	125.59
R-squared	0.199	0.314	0.394	0.547	0.660
<i>Limited English Proficiency^[b]</i>					
Slope	11.13	19.83	22.64	63.82	76.34
R-squared	0.292	0.505	0.532	0.643	0.775

[a] percent of public school enrolled children between 5 & 17 in families living in poverty. NCES/U.S. Census Bureau, School District Demographics system.

[b] Number of limited English proficient/English language learners divided by district membership (k-12) as reported in 2003 in the National Center for Education Statistics Common Core of Data, Local Education Agency Universe Survey.

Issues for the Coming Legislative Session

The near future will see the release of findings from two additional studies of the cost of a suitable education in Kansas, both under the supervision of the Kansas Legislative Division of Post Audit. As discussed by Lori Taylor in this volume, one of the two studies will attempt to prescribe research-based prototypes for different size Kansas districts serving different student populations. The other, will involve education cost function estimation of the cost of achieving outcome levels mandated by the Kansas State Board of Education. The outcome-based, education cost function analysis has been subcontracted to William Duncombe and John Yinger of Syracuse University, who have published extensively on this methodology.

Thus far, the Kansas Supreme Court has relied on inflation adjusted basic costs drawn from AMSB recommendations, which paralleled their successful schools cost estimate. Taylor, in this volume shows that the successful schools cost estimate produced by AMSB for Kansas is 4th lowest of 39 studies across states since 1995, adjusted for inflation and regional variation in competitive wages. Further, as shown herein, marginal costs associated with size, poverty, and limited English proficiency were lower in the AMSB study than in other recent studies and reports. As such, it is unlikely that Kansas legislators will see substantial cost savings produced by the new studies, or that the studies will indicate lesser need to distributed additional funds more aggressively to high poverty, large districts.

If the court expects new legislation in the spring 2006 legislative session to mitigate past political distortions in addition to leveling up the system, the court may need to be more explicit regarding not only the level but proposed distribution of any new appropriations across districts. The court will have two new studies to consider. However, such direction from the court will likely be met with much resistance by legislators, because disproportionate allocation of new money to the state's highest need districts is clearly in conflict with the present and recent balance of voting preferences of legislators, even while under recent court oversight.²⁰ The Supreme Court has indicated that voting preferences alone are insufficient rationale for funding differences across districts and children. The Supreme Court has set a relatively high standard that the legislature should provide a cost basis for their policies. While a precise, empirical cost basis may be an elusive standard for each and every component of a state's school finance formula, a reasonable standard and fair remedy for all Kansas children likely lies somewhere between precisely cost-based and purely political.

Notes

¹ Baker, B.D., Duncombe, W.D. (2004) Balancing District Needs with Student Needs: The Role of Economies of Scale Adjustments and Pupil Need Weights in School Finance Formulas. *Journal of Education Finance* 29 (3) 195-222.

² Baker, B.D., Green, P.C. (2005) Tricks of the Trade: State Legislative Actions in School Finance Policy that Perpetuate Racial Disparities in the Post-Brown Era. *American Journal of Education* 111 (3) 372-413. These legislatively created racial disparities are the centerpiece of an ongoing federal equal protection challenge brought against the state of Kansas in the federal district court of Kansas (*Robinson v. Kansas*).

³ Baker, B.D. (2003) Wide of a Reasonable Mark: Evaluating the Suitability of the Kansas School District Finance and Quality Performance Act. Testimony prepared on behalf of plaintiff districts in the case of *Montoy v. Kansas*. <http://www.ku.edu/~bdbaker/Montoy.doc>

⁴ Berger (1998) explains how State Senate Majority Leader Sheila Frahm, from rural Western Kansas, was a "driving force" behind the passage, during the veto session, of the house plan which included the low enrollment weight.

⁵ Andrews, Duncombe & Yinger (2002) Revisiting Economies of Scale in American Education: Are we any closer to consensus? *Economics of Education Review*.

⁶ Note that the add-on of 25% was to be applied to districts general fund, annual operating budgets and was not intended to support the construction of new facilities, which is handled through a separate fund for paying down bonded indebtedness or related capital expenses, which are handled through a separate local mill levy specifically for capital outlay.

⁷ p. 77.

⁸ Baker, 2003.

⁹ Augenblick, J., Myers, J., Silverstein, J, Barkis, A. (2002) Estimating the Cost of a Suitable Education in Kansas in 2000-2001 Using Two Different Analytic Approaches. Report prepared for the Legislative Coordinating Council. Kansas Legislature.

¹⁰ Of 39 cost studies reviewed by Taylor, Baker & Vedlitz, none raised the issue of additional operating costs associated with higher percentages of children attending school in new facilities.

¹¹ The inflated value of AMSB recommended \$4,650 based in 2001. This value is inflated by the Bureau of Labor Statistics *Employment Cost Index*. Note that AMSB never found the actual basic costs to be \$4,650. Rather, their professional judgment analysis led them to a basic cost of \$5,811 and their successful districts analysis identified an average expenditure per pupil across 85 districts at \$4,547.

¹² Baker and Duncombe (2004) and Duncombe and Yinger (2005) explain the importance of using the correct marginal cost weight with the correct need population count. Where poverty, for example, is counted by subsidized lunch rates, which often run two to three times higher than U.S. Census Poverty rates for the relevant population, the marginal cost of a 1% change in poverty will likely be lower. When used in school finance policy, policymakers should not choose to multiply this weight times the lower U.S. Census poverty rate. Rather, an alternative weight based on Census poverty counts would be estimated, and would likely be higher, producing comparable total adjusted funding. Similar issues apply to differences in bilingual program contact hour counts versus limited English student population counts, the latter in this case being preferable.

¹³ See Baker, B.D. (2005) The Emerging Shape of Educational Adequacy: From theoretical assumptions to empirical evidence. *Journal of Education Finance* 30 (3) 259-287.

¹⁴ Bifulco, R. (2005) District Level Black-White Funding Disparities in the United States: 1987 to 2002. *Journal of Education Finance*.

¹⁵ For economies of scale: Cost Index = $10.7028 - 3.41946(\text{enrollment}) + 0.40075(\text{enrollment}^2) - 0.01556(\text{enrollment}^3)$, which indicates that costs drop at a decreasing rate as one moves from the smallest districts to midsize districts, and are roughly equal for districts with greater than 5,000 students. See Also, Baker, B.D. (2005) The Emerging Shape of Educational Adequacy: From theoretical assumptions to empirical evidence. *Journal of Education Finance* 30 (3)259-287.

¹⁶ Duncombe, W.D, Yinger, J. (2005) How Much More does a Disadvantaged Student Cost? *Economics of Education Review*.

¹⁷ U.S. Census Bureau, Fiscal Survey of Local Governments (F-33) Public Elementary and Secondary Education Finances. <http://www.census.gov/govs/www/school.html>. Current Expenditures include: all expenditures except those associated with repaying debts, capital outlays (e.g., purchases of land, school

construction and repair, and equipment), and programs outside the scope of preschool to grade 12, such as adult education, community colleges, and community services. Expenditures for items lasting more than one year (e.g., school buses and computers) are not included in current expenditures. Definition from: <http://www.nces.ed.gov/edfin>

¹⁸ Permission not granted to cite the source of these allegations.

¹⁹ At least by the narrow definition applied here, which focuses on raising and adjusting general fund operating budgets to move them closer to AMSB cost estimates. To other areas to which significant funds were added include special education, which the court has recognized as underfunded, and capital outlay matching aid, which the court has recognized as inequitable.

²⁰ A recent example to this effect is that even during the summer 2005 special session, legislators saw fit to provide slightly more aid for property tax relief than the total increase for at risk programming. In spring 2005 session, legislators proposed a cost of living adjustment for districts with high housing unit values that would have generated an additional \$265 per pupil for Blue Valley and comparable levels in Olathe and Shawnee Mission, while the additions to at risk and bilingual weighting would lead to an increase of only \$202 per pupil in Kansas City.

Measuring Educational Adequacy in Kansas¹

Lori L. Taylor

Shortly, Kansas legislators and litigants will have four estimates of the cost of an adequate education in front of them – one from each of the four major research methodologies. The estimates are unlikely to agree. Therefore, it seems appropriate to examine the advantages and disadvantages of the various approaches, and to point to differences in the methodologies that can explain differences in the results.

An Overview of Adequacy Studies 1995-2004

Over the last decade, many states have been the subject of educational adequacy studies. Such studies can be grouped into two broad categories – bottom-up analyses and top-down analyses. Bottom-up analyses estimate the cost of an adequate education by summing up the costs of building a model school. Top-down analyses look at the spending, performance, and other characteristics of existing schools, and then estimate the cost of an adequate education based on the observed relationship between inputs and outputs.

The most common examples of the bottom-up approach are Resource-Cost studies. Resource-Cost studies develop a recommendation regarding the resources (people, time, space, equipment) needed to provide a given set of educational services and then estimate the cost to provide these resources. In *Professional-Judgment* studies, focus groups of educators and policymakers are typically convened to prescribe the resources required for providing an adequate education. In *Evidence-Based* studies, resources needs are derived from “proven effective” school reform models. The primary distinction between the two approaches is that Evidence-Based studies rely on scholarly research to determine the necessary resources, while Professional Judgment studies rely on the knowledge and experience of local practitioners. John Augenblick and John Myers conducted a Professional-Judgment analysis for Kansas in 2002, and the work currently underway in the Kansas Division of Post Audit is best described as an Evidence-Based analysis.

The most common examples of the top-down approach are Successful-Schools Studies and Cost-Function Studies. Successful-Schools studies use data on student performance to identify a set of schools or districts in a state that meet a chosen standard of success. Some researchers narrow the set further by

excluding districts with peculiar spending patterns. Researchers then estimate the cost of an adequate education as the average level of spending among the chosen set of successful schools. Augenblick & Myers also conducted a Successful-Schools analysis for Kansas in 2002.

Cost-Function studies use statistical methods to predict the cost of achieving a designated set of outcomes, in different districts, serving different student populations. As such, it can be used not only to predict the cost of achieving a desired level of outcomes in an average district, but also to estimate cost differentials arising from differences in school district size or student characteristics. William Duncombe and John Yinger are in the process of conducting a cost function analysis for Kansas based on the State Board of Education’s current performance standards.

Reconciling the Approaches

Since the various methodologies are aimed at the same target – identifying the costs of an adequate education – they should lead to similar predictions about costs, all other things being equal. Ideally, well-informed professionals advising districts on how to meet a specific performance goal would prescribe the same mix of resources as would Evidence-Based consultants, and that mix, when evaluated at market prices, would cost exactly as much as predicted by a cost function.

The four Kansas estimates are likely to be very dissimilar, however. The two estimates already in hand – the Augenblick & Myers estimates using the Professional-Judgment and Successful-Schools approaches – are nearly 28 percent apart. Previous estimates of the per-pupil cost of an adequate education differ by more than 300 percent across states, and by as much as 66 percent within a single state, even after adjustments for inflation and regional cost differences.

There are many reasons why estimates of the cost of an adequate education differ so dramatically. Researchers make an array of judgment calls that can influence the results in large and small ways. Each study needs to be evaluated independently to determine the extent to which those decisions drive the results.

There are a couple of key decisions, however, that can explain many of the differences across studies. First, there can be important differences from one study to the next in the definition of adequate. Second, there can be important differences across studies in the treatment of school district size and student need.

Some of the differences in the definition of adequate are methodological. Top-down methods require some

measure of student performance to be able to calculate costs, so Successful-Schools and Cost-Function analyses generate estimates of the cost of achieving some quantifiable standard that is already being achieved in the state. Bottom-up methods face no such restriction. Instead, professional-judgment panels are frequently asked to prescribe the resources needed to reach performance standards that are difficult to quantify or well beyond those currently being achieved by local schools. Evidence-based consultants may argue that reforms proven effective against other standards will also lead to improvements on state-specific measures, but they can seldom specify how much improvement, so it is hard to pin down the performance standards being evaluated in such studies. Given the inherent methodological differences, it is virtually impossible to ensure that a bottom-up study is using the same adequacy standard as a top-down study.

Differences in the desired level of student performance also lead to differences in cost estimates. Undoubtedly, some states or interest groups set the bar higher than others. Given the subtext of all these studies—money matters in education if it is spent wisely—it should come as no surprise that higher standards yield higher cost estimates. For example, Augenblick & Myers conducted a professional-judgment analysis for Missouri as well as Kansas. It is possible that the 22 percent difference in adjusted cost across the two studies simply reflects higher educational standards in Missouri.

The other major source of cost variation across studies is the treatment of school and district characteristics. Differences in school district size and student needs can lead to substantial differences in per-pupil cost. Schools that are too small to take advantage of economies of scale have higher costs than other schools. Schools with a higher proportion of needy kids also are expected to have higher costs.

Some adequacy studies report basic costs—the costs of providing core educational services in an optimally sized school district assuming no additional student needs—but most report only average cost. Average costs are systematically higher than basic costs because they include higher-cost small districts and costs associated with students with special needs. Furthermore, average costs are systematically higher in some states than in others because the characteristics of the average district vary so much from state to state. Over three-quarters of the districts in Kansas are small enough that they are unable to exploit economies of scale and therefore have higher expected costs, while none of the districts in Maryland are below efficient scale. Nearly half of the students in Arkansas or Kentucky—but fewer than one-third of the students in Washington—receive free or

reduced-price lunches (a customary indicator of student poverty). We would expect that states with a greater share of small districts or a higher proportion of needy students would have higher mean cost estimates than other states, even if their basic costs were identical.

What the Studies Say

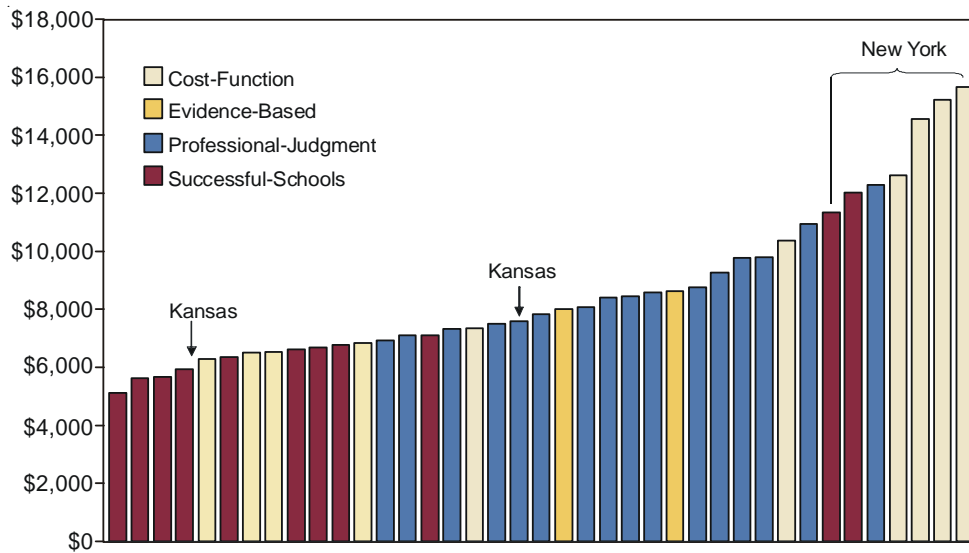
Given these sources of variation, it is not terribly surprising that the adequacy studies of the last decade generate substantially different cost estimates. Adjusted for inflation and state-to-state differences in the price level—but not for differences in the definition of adequate—the estimated per-pupil cost of an adequate education ranges from \$5,124 to \$15,655 (in 2004 dollars). Figure 1 illustrates the range of estimates.

It is readily apparent from Figure 1 that the Successful-Schools method has produced the lowest estimates of the cost of an adequate education. The Successful-Schools approach (which by construction uses a performance standard that some schools already meet) may estimate the cost associated with a lower performance standard than the one implicit or explicit in the other methodologies. However, wherever the same researchers conducted Successful-Schools and Professional-Judgment analysis in the same state in the same year using presumably similar definitions of adequacy, they found that the Successful-Schools approach generated substantially lower cost estimates than did the Professional-Judgment approach.

It is also clear that New York is very different from other states. Even after adjustments for the state's higher cost of labor, estimates of the cost of an adequate education in New York still top the charts. The seven highest estimates of the cost of an adequate education all come from New York. In large part, the higher cost estimates for New York State are driven by the high cost of education in New York City. New York City public schools, which enroll over one-third of the students in the state, face the elevated costs of educating a high-poverty student population in a metropolitan area where labor costs are twenty-three percent above the national average. Including New York City in the calculation of average cost for New York State greatly raises the bottom line. One research team estimated that the average per-pupil cost of providing an adequate education is 37 percent higher in New York City than in an upstate New York district with average student needs. However, at more than \$11,000, the cost estimate for that upstate district was still higher (after inflation and regional-cost adjustment) than the highest estimate from any other state.

The existing Kansas estimates are each well below the medians for their respective methodologies, even

Figure 1
Alternative Estimates of the Cost of an Adequate Education



Missouri, a district with 364 pupils, had costs only nine percent above the minimum. Cost-Function studies tend to be more consistent, typically indicating that costs are minimized for districts with 2,000 to 5,000 pupils and sweep sharply upward for districts with fewer than 300 pupils. Most also show higher costs for very large districts. Cost-Function studies from both sides of the recent legal battle over adequacy in Texas indicate that a district with 400 pupils has costs between 35 and 39 percent above the minimum, while a district with 50,000 pupils has costs that are at most 0.1 percent above the minimum.

after adjustments for the relatively low cost of labor in the state. There are nearly three times as many Professional-Judgment estimates above the Augenblick & Myers estimate for Kansas as there are below it. Only Colorado and Ohio have Successful-Schools estimates that are lower than the Augenblick & Myers estimate for Kansas. In both cases, the Kansas estimates are 10 percent below the national median for the methodology.

Not only do the existing studies differ markedly in their estimates of average or basic costs, but they also can generate wildly different estimates of the variations in costs associated with district characteristics, like size and student demographics.

Consider, for example, the variations across states regarding the impact of school size on the cost of an adequate education. Most Successful-Schools and Evidence-Based analyses make no attempt to estimate the increased per-pupil costs facing very small schools. On the other hand, Professional-Judgment and Cost-Function analyses generally provide estimates of the effects of school district size. Professional-Judgment studies tend to be very inconsistent about the cost implications of economies of scale. Various studies have indicated that a lack of economies of scale push costs upward for districts with fewer than 12,500 students (Nebraska), 11,300 students (Kansas), 8,000 students (Tennessee), 5,200 students (Colorado), 4,380 students (Missouri), 1,740 students (Montana) and 750 students (North Dakota). In Nebraska, a district with 400 pupils had costs 40 percent above the minimum, but in

Choosing a Methodology for Kansas

There are many analytic approaches to answering the critical question, “What level of public funding is needed to provide an adequate public education?” and the choice of methodology can have considerable influence on the subsequent estimate of cost. Therefore, it may be useful to consider the philosophical strengths and weaknesses of the various approaches.

Bottom-Up Strengths

- The methods are relatively simple and transparent and produce easily understood results.
- No need to define or measure an adequate performance level.

Bottom-Up Weaknesses

- Analyses that rest on the judgment of a panel of professionals are vulnerable to the blind spots and biases of individual panel members. If the panel is poorly drawn or unaware of cost-effective educational practices, their cost estimates will be biased.
- While proponents of Evidence-Based analysis infer a strong connection between specific comprehensive school reforms and improved outcomes, research evidence regarding the effectiveness, and more specifically the cost effectiveness of the these reforms is mixed at best. Furthermore, there may be little connection between the outcomes such

Evidence-Based models are “proven” to accomplish and the outcomes policy-makers hope to achieve.

- For practical reasons, Professional-Judgment panels and Evidence-Based consultants generate specific recommendations for only a handful of prototypical districts. This can lead to problems when actual school districts differ from the prototypes. For example, it can be difficult to estimate the costs of operating a district with 600 pupils, when prototypes have been estimated with 200 pupils and 1,000 pupils. Similar issues exist in the accommodation of student needs, where only a limited range of possibilities may be feasibly represented in the prototypes. The greater the difference between the prototypes and the actual schools, the greater the margin for error. This issue is particularly relevant in a state like Kansas where most school districts are too small to take advantage of economies of scale.

Top-Down Strengths

- The primary strength of top-down models is that they establish a direct link between education costs and desired outcomes. Understanding the link between costs and outcomes and designing aid formulas based on this understanding is arguably a critical objective in an era of increased emphasis on standards and accountability.
- Cost estimates are based on actual data about student performance and school-district expenditures in a given state, so there is no question that the analysis is applicable.
- Cost-Function analyses can provide a strong empirical foundation for estimates of the cost differentials associated with variations in student need and economies of scale.

Top-Down Weaknesses

- Policy-makers must designate a measurable performance standard. Achieving such consensus can strain the political system. Many outcomes that policy-makers consider important may be too difficult to measure, and that which is measured well may be a biased representation of that which we hope to achieve.
- The approaches are data intensive, requiring high quality measures of school district performance and expenditures. Many states lack the necessary data to conduct such analyses.
- By design, statistical models describe relationships within the experience of the data. It is problematic to extrapolate beyond that experience to predict the costs associated with a level of

performance that is not regularly achieved, or is not achieved by districts with a particular set of geographic and demographic characteristics.

- Cost-Function analyses are complex and explicitly involve errors of estimation and modeling. While other methodologies are also vulnerable to error and bias, there can be political resistance to methodologies that are difficult to explain and reveal the inherent imprecision of social science.
- Top-down methods like Cost-Function analyses estimate a statistical relationship between spending and outcomes, but they do not provide specific insights into how districts should internally organize their resources to effectively and efficiently produce the desired outcomes.

Conclusions

Clearly, no one approach dominates the others from either a theoretical or a practical perspective. All have been used – and will continue to be used – by policy-makers, litigants, interest groups, and public managers to influence state education policy.

The lack of consensus regarding the appropriate research methodology would be largely moot if all of the methods yielded similar predictions about the cost of an adequate education. Unfortunately, that is not the case. The choice of research method has considerable influence on the nature of the predictions. Adjusted for inflation and regional price variations – but using different methodologies – the estimated per-pupil cost of an adequate education for a single state can range from \$6,612 to \$10,945 (in 2004 dollars). Furthermore, even when two research methods yield roughly similar estimates of the cost of an adequate education in the base-line or average school district in a given state, different methods can yield strikingly different estimates of the variations in costs associated with district characteristics, like size and student demographics.

Given the sensitivity of the cost projections to variations in research methodology and study specifics, no single adequacy study should move billions of dollars. Kansas will be fortunate to have access to several studies using different methods. Each should be examined carefully and evaluated in the context of the other three. A synthesis of four, carefully executed studies would prove particularly helpful to both the legislature and the courts.

Note

¹ This essay draws heavily on “Measuring Educational Adequacy in Public Schools” by Lori L. Taylor, Bruce D. Baker, and Arnold Vedlitz, Bush School Working Paper #580.

Conclusions & Recommendations

The importance of wage variation to the Kansas school finance policy conversation in the spring of 2006 will depend largely on the legislature's and Supreme Court's preference for either the input oriented, research based cost analysis prepared by Legislative Post Audit or the outcome oriented, education cost function analysis. In input based analysis, where prototypical schools are based on collections of inputs required for providing suitable schooling, and where those inputs—primarily teachers—are assumed to be of comparable quality, district level cost calculations must consider competitive wage variation. Ideally, a hedonic wage index would be used and applied at the district level, with appropriate sensitivity to difficult working conditions including both poor-urban and remote-rural contexts. But, individual teacher data, with sufficient information on teacher attributes and job assignments over time are lacking in Kansas compared with other states including Missouri. Until more suitable data are available, the NCES CWI discussed herein may provide some guidance, with consideration for the concerns raised herein.

Where education cost function analyses are used to guide district funding levels, the necessity to evaluate separately how wages and other input prices vary across districts is removed. Education cost function analysis produces a predicted cost of outcomes for each district. Embedded within those predicted costs are underlying variations in competitive wages as well as other cost compensating factors tied directly to the cost of educational outcomes.

Nonetheless, at this stage of the game, legislators should be more cautious than to simply create a category of districts and award arbitrary sums of additional state funding or local tax authority simply in order to garner enough votes. The bar has been raised by the court, and while a precise, empirical cost basis may be an elusive standard for each and every component of a state's school finance formula, a reasonable standard likely lies somewhere between cost-based and purely political.

Notes

¹ This provision is calculated to provide the following sums to the following "sweet 17" districts: Blue Valley, \$4.89 million; DeSoto, \$1.2 million; Olathe, \$6.3 million; Shawnee Mission, \$6.84 million; Andover, \$849,427; Louisburg, \$323,386; Piper, \$303,383; Auburn-Washburn, \$857,348; Basehor-Linwood, \$326,971; Spring Hill, \$286,798; Lawrence, \$1.33 million; Lansing, \$197,917; Maize, \$441,970; Gardner-Edgerton-Antioch, \$223,299; Goddard, \$80,921, Manhattan, \$77,122, & Shawnee Heights, \$50,425.

² Brief submitted on behalf of the Attorney General's office by Ken Weltz, Lathrop & Gage, LLC., p. 5.

³ Background to these findings can be found in Baker, B.D. (2005) Comments on the Kansas Cost of Living Adjustment. <http://www.ku.edu/~bdbaker/COLA.pdf>.

⁴ Rated very competitive or higher according to *Barrons' Profiles of American Colleges*. Rankings include Non-Competitive, Less Competitive, Competitive, Very Competitive, Highly Competitive, and Most Competitive. Factors included in determining the category for each college included: median entrance exam scores for the 2001–2002 freshman class (the SAT 1 score used was derived by averaging the median verbal reasoning and the median mathematics reasoning scores; the ACT score used was the median composite score); percentages of 2001–2002 freshman scoring 500 and above and 600 and above on both the verbal reasoning and mathematics reasoning sections of the SAT 1; percentages of 2001–2002 freshman scoring 21 and above and 27 and above on the ACT; percentage of 2001–2002 freshman who ranked in the upper fifth and upper two-fifths of their high school graduating classes; minimum class rank and grade point average required for admission (if any); and percentage of applicants to the 2001–2002 freshman class who were accepted.

⁵ A standardized national examination adopted by many states, including Kansas, as a requirement for teacher certification. Formerly the National Teachers Examination (NTE).

⁶ Taylor, L.I. (2005) *Comparable Wages, Inflation and School Finance Equity*. Working Paper #540. Bush School of Government and Public Service. Texas A&M University, College Station, TX.

⁷ For a more complete review with analysis of pros and cons of each method, See William Duncombe and Dan Goldhaber (2004) *Estimating Geographic Cost of Education Differences: A Case Study of Maryland*. Paper presented at the Annual Meeting of the Association for Budget and Financial Management. Chicago.

⁸ For a more thorough discussion of Comparable Wage Indices, See Lori Taylor (2005) *Comparable Wages, Inflation and School Finance Equity*. Working Paper #540. Bush School of Government and Public Service. Texas A&M University.

⁹ Podgursky, M., Monroe, R., Watson, D. (2004) *The Academic Quality of Public School Teachers: An analysis of entry and exit behavior*. *Economics of Education Review* 23 (4) 507-518.

¹⁰ Duncombe, W.D., Goldhaber, D. (2004) *Estimating Geographic Cost of Education Differences: A Case Study of Maryland*. Paper presented at the Annual Meeting of the Association for Budget and Financial Management. Chicago.

¹¹ Duncombe and Goldhaber (2004).

¹² Chambers, J.G. (1999) *Patterns of Variation in the Salaries of School Personnel: What Goes on Behind the Cost Index Numbers?* *Journal of Education Finance* 25 (2) 255-281.

¹³ Taylor, L.L. (2005) *Comparable Wages, Inflation and School Finance Equity*. Working Paper #540. Bush School of Government & Public Service. Texas A&M University.