

October 28, 2003

SUMMARY OF SCHOOL FINANCE LITIGATION

Two lawsuits currently are pending that challenge the present system in Kansas for funding elementary-secondary education. One case has been tried in Shawnee County District Court and the other is pending before the United States District Court. Both cases have been brought by essentially the same parties and are represented by the same attorneys. This memorandum has been prepared by the Legislative Research Department and the Office of the Revisor of Statutes to provide a summary of major issues raised in the litigation and to put the current litigation in context with regard to prior challenges to the 1992 School District Finance and Quality Performance Act. The memorandum also relies on information presented to legislative committees by Dan Biles, Attorney for the State Board of Education, and Scott Hesse, Office of the Attorney General.

State Court Case Summary

Montoy, et. al. v. State of Kansas, et.al.
Shawnee County District Court
Case No. 99 C 1788, Div. 6

This case was filed December 14, 1999, by USD 305 (Salina) and USD 443 (Dodge City) and by 31 students from those districts who primarily comprise various protected classes, including African-American, Hispanic, Asian-American, students with disabilities, and those of non-United States origin. Defendants named in the case are the State of Kansas; Governor Kathleen Sebelius; State Treasurer Lynn Jenkins; each member of the State Board of Education; and Commissioner of Education Andy Tompkins.

The plaintiffs bring all of their claims under the *Kansas Constitution*, including a challenge as to whether the Legislature has made "suitable provision for finance of the educational interests of the state" as required by Article 6. They also allege violations of state equal protection and due process principles and specifically challenge the total amount of funds provided to their school districts, the low enrollment weight, the local option budget, special education excess costs, and capital outlay. Finally, they contend that the school funding formula is an encroachment on the constitutional authority of the State Board of Education.

Shawnee County District Court Judge Terry Bullock originally dismissed the plaintiffs' claims for procedural and other reasons when the case came before him, but the Kansas Supreme Court remanded the case to his court.¹ Judge Bullock heard the case in a trial that was completed October 1, 2003. The parties to the case will prepare proposed findings of fact and conclusions of law, which must be filed by November 18, 2003. Final oral arguments before Judge Bullock are scheduled for November 25 and it is expected that a decision will be reached in six to eight weeks. It is almost certain that the case will be appealed to the Kansas Court of Appeals and that the Kansas Supreme Court will take jurisdiction. Speculation is that the Supreme Court will not reach its decision until after the conclusion of the 2004 Session.

¹ *Montoy, et. al. v. State of Kansas, et.al.*, 275 Kan. 145, 62 P 3d 228 (2003).

Federal Court Case Summary

Robinson, et. al v. State of Kansas, et al.
U.S. District Court for the District of Kansas
Case No. 99-1193 MLB

This case was filed May 21, 1999, by 32 students from USD 305 (Salina) and USD 443 (Dodge City) who represent various protected groups. Defendants are the State of Kansas; Governor Kathleen Sebelius; State Treasurer Lynn Jenkins; each member of the State Board of Education; and Commissioner of Education Andy Tompkins.

The plaintiffs present themselves as representatives of mid-sized school districts which do not receive the same amount of school funding per student as the smaller enrollment school districts. They bring their claims under federal law and the *United States Constitution* and contend that the school funding system in Kansas violates the federal Rehabilitation Act of 1973, Title VI of the Civil Rights Act of 1964, the implementing regulations to Title VI, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the *United States Constitution*. They claim there are more minority and disabled students in larger districts than the smaller ones, resulting in a financing scheme that has a discriminatory impact on the students in larger districts.

No trial date has been set in the *Robinson* case. There is speculation that the federal district court may not proceed until Judge Bullock makes his decision in *Montoy*.

Activities Related to *Montoy*

Prior to start of the trial in late September 2003, Judge Bullock issued a pretrial memorandum in which he laid down principles and guidelines that would apply in the case. Observing that "the constitutional school funding mandate is directed at the Legislature alone," he dismissed the Governor and the State Treasurer from the case and proceeded to discuss the following issues:

- Appropriate Level of Judicial Scrutiny. Judge Bullock informed the parties that he will use the "rational basis analysis" in reaching his decision. He explained that the rational basis test requires that, in order to pass constitutional muster, acts of the Legislature must bear a rational or reasonable relationship to a legitimate goal. He observed that the reason for equal funding is to guarantee an equal educational opportunity for every child and that differential funding must be justified by a rational explanation, "based on actual increased costs" necessary to provide an equal educational opportunity, such as the higher cost of educating children in smaller districts. (This is the same level of scrutiny used in prior school finance cases.) With regard to the plaintiffs' allegation that state equal protection and due process principles are being violated, Judge Bullock informed the parties that he will use the same rational basis test in determining due process claims as he will use to determine matters of equity and suitability.
- The Constitutionality of Statutory Funding Schemes. Judge Bullock put the parties on notice that he considers the case to be about equity and suitability. *Equity* involves providing each child with equal educational opportunities and being able to justify varying levels of appropriations among districts on the basis that they are necessary to provide students in one district with educational opportunities that are equal to those provided to other students. To illustrate the point, Judge Bullock offered two examples: (1) School districts need additional funding to transport students who live further from school so that those students

have the same opportunity to attend school as those who live nearer; and (2) schools need additional funding to teach English to non-English-speaking students so that those students can learn subjects regularly taught to all students. *Suitability* is independent of equity and pertains to whether the total amount of money available for education is adequate to provide educational opportunities that meet constitutional requirements. Judge Bullock noted that there is an absence of any appellate court or even legislative suitability standard and concluded that he must craft one. Rejecting the idea of compiling a list of standards that are too specific to meet changing needs and conditions, he arrived at the following general definition:

The Court holds that a constitutionally suitable education (much like an efficient education or an adequate education as provided for in the constitutions of our sister states) must provide all Kansas students, commensurate with their natural abilities, the skills necessary to understand and successfully participate in the world around them both as children and later as adults. Because this is the constitutional right of every Kansas child, whether the legislature has met this standard is ultimately a decision for the judicial branch.

Judge Bullock indicated that, in determining matters of equity and suitability, he intends to take into account the entire funding scheme for school finance, including general purpose funding, capital outlay, sales tax supplements, and special education.

- Usurpation of the Self-Executing Powers of the State Board of Education. The plaintiffs contend that the school funding formula is an encroachment on the constitutional authority of the State Board of Education to provide general supervision of schools, which previously has been deemed to be “self-executing” or derived from the *Kansas Constitution* without need for supplemental legislation. Judge Bullock dismissed this contention by pointing out that the *Constitution* gives the Legislature the authority to provide funding to the public schools and that the Legislature and the State Board of Education play two distinct roles: “The *Kansas Constitution* provides the Legislature with the duty to develop a method with which to provide funding to the public schools and provides the Board with the duty to supervise local school boards to ensure the educational interests of the state are being met. The Board simply does not have the power to develop or alter provisions for funding, nor does it have the power to control the funding of the school districts.”

Judge Bullock also listed the following issues that had been raised by plaintiffs which the Supreme Court asked him to address:

- The state law no longer contains educational goals or standards, nor has the State Board of Education issued any regulations containing academic standards or objective criteria against which to measure the education Kansas children receive.
- The amount of Base State Aid Per Pupil has not kept up with inflation.

- School districts are required to raise capital outlay expenses locally and the four mill levy limit has been removed, allowing wealthier districts even greater access to capital outlay expenditures than poorer districts and thus increasing funding disparities.
- The school finance formula provides widely differing amounts of revenue to different districts.
- The number of minority students in the plaintiff school districts has increased dramatically and a substantial gap exists between the performance of minorities and whites and between students in the free and reduced lunch programs and those not in these programs on the state standardized tests.
- Plaintiff school districts must raise money locally through the “local option budget” or the capital outlay fund to meet the minimum school accreditation requirements.
- Plaintiff school districts raise less money per pupil with each mill levy than wealthier districts and increased reliance on local taxes has resulted in a less advantageous education in the plaintiff school districts than in wealthier districts.

Accompanying Judge Bullock’s pretrial memorandum was a letter to the parties that summarizes his opinions regarding the issues involved in the litigation. The letter concludes with the following sentence: “Finally, in case the Court has not been crystal clear, the Court takes the view that this case is about children and their suitable, and equal educational opportunities. Nothing else. If we all keep our focus on the children, I believe we shall reach the goal our constitution mandates.” [Emphasis in the original.]

Prior Challenges to School Finance Acts

The recent history of school finance legislation is replete with challenges to various school finance acts. The School District Equalization Act (SDEA), enacted in 1973, was a response to a Johnson County District Court decision which found the prior act unconstitutional because the state had not provided enough aid to offset disparities among school districts in taxing efforts and per pupil expenditures. The SDEA was challenged in four lawsuits filed in 1990 and 1991 that were consolidated in the Shawnee County District Court.² Prior to the trial date for the consolidated school finance cases, Judge Bullock—the same judge who will decide the *Montoy* case—scheduled a pretrial conference attended by the Governor and the Legislative leadership at which he announced a series of principles the Court would apply in deciding the pending issues.

Judge Bullock agreed to delay the trial in order to give state policymakers the chance to consider enacting a new school finance formula in light of the principles he had identified. A task force comprised of appointees of the Governor and the Legislature considered school finance and submitted its recommendations prior to the 1992 Session. In 1992, the Legislature enacted the current school finance formula, the School District Finance and Quality Performance Act. In that same year, the Legislature also established the School District Capital Improvements State Aid Program, based on an equalization concept, in order to assist school districts in making bond and interest payments. The latter was enacted in response to Judge Bullock’s pretrial ruling that all

² *Mock v. Kansas*, Case No. 91-CV-1009.

costs—including capital expenditures—are included in the constitutional mandate placed on the Legislature by the Education Article of the *Kansas Constitution*.

In the months immediately following passage of the new act, Judge Bullock dismissed three of the consolidated cases and transferred jurisdiction of the remaining school finance litigation to Judge Marla Luckert, another judge of the Shawnee County District Court. In the fall of 1992, three new suits brought by school districts against the new law were consolidated with pending litigation. The cases were brought to trial the following summer (1993). Judge Luckert issued her opinion in December 1993, in which she found two constitutional infirmities in the law:

- The uniform school district general fund tax levy was construed to be a state property tax and, as such, subject to a constitutional provision which limits such levies to two years in duration. (The legislative response to this finding has been to subject the tax to renewal every two years.)
- The low enrollment weight was found constitutionally deficient because it was not "grounded upon education theory." (Judge Luckert did not, however, reject the principle of an enrollment weight *per se* to reflect economies of scale.) Because the low enrollment provision was so intertwined with other provisions of the formula, Judge Luckert found the entire act unconstitutional.

In order to give the 1994 Legislature time to remedy the Act, Judge Luckert stayed the effective date of the finding until July 1, 1994. Litigants appealed Judge Luckert's opinion to the Kansas Court of Appeals in December 1993. The Kansas Supreme Court took jurisdiction and in December 1994 upheld the constitutionality of the 1992 School District Finance and Quality Performance Act, including its provisions for low enrollment weighting.³ The Court concluded that "there is a rational relationship between the legislature's legitimate objective of more suitably funding public schools and the classifications created in the low enrollment weighting factor." In so concluding, the Supreme Court overruled Judge Luckert's finding that the low enrollment weight was constitutionally deficient. (Judge Luckert's finding that the school district general fund tax levy did not pass constitutional muster was responded to by the legislative practice, begun in 1994, of setting the district general fund tax rate for two-year periods.)

Observations

School finance litigation nationwide has generally been at the state, not federal, court level because it is state constitutions that have the most to say about the responsibility to provide for public schools. Because constitutions vary from state to state, what is decided in one state court often does not have direct applicability to other states. The Kansas Supreme Court decision, issued in 1994, is the only decision issued by Kansas' highest court on a school finance case and the legal precedent established by that case doubtless will have a bearing on the litigation that is proceeding almost a decade later. (It also should be noted that, in the interval that has occurred since the Supreme Court's decision, Judge Luckert has become a Supreme Court justice.)

One of the principles underscored in the 1994 case was that the *Kansas Constitution* makes the Legislature responsible for providing for the funding of the educational interests of the state and that this responsibility does not impede the power of locally elected boards to operate schools. Judge Bullock made a similar finding in his pretrial memorandum in the *Montoy* case when he

³ *Unified School District Number 229 v. State*, 256 Kan. 232, 885 P. 2d 1170.

determined that the Legislature's authority in this area does not infringe upon the general supervision responsibilities of the State Board of Education.

The Supreme Court addressed the matter of what level of scrutiny was appropriate in addressing litigation involving equal protection rights of students and concluded that the rational basis test was the appropriate level. This is the lowest level of judicial scrutiny, meaning that greater deference is given to the Legislature and its role. Indeed, Justice McFarland wrote in the 1994 opinion: ". . . the judiciary's role is very limited in its scope. The wisdom or desirability of the legislation is not before us. The constitutional challenge goes only to testing the legislature's power to enact the legislation."

The original School Finance and Quality Performance Act enacted in 1992 contained a list of ten outcomes-based goals for schools that could be measured and evaluated. These goals were part of the Quality Performance Accreditation system. One example is that "schools have a basic mission which prepares the learners to live, learn, and work in a global society." The Supreme Court in 1994 considered these goals to be the standard of adequacy set by the Legislature and adopted by the State Board of Education in determining whether funding provided by the Legislature was "suitable" in the context of the constitutional requirement. However, the Court quoted the following caveat from the district court opinion:

The issue of suitability is not stagnant; past history teaches that this issue must be closely monitored. Previous school finance legislation, when initially attacked upon enactment or modification, was determined constitutional. Then, underfunding and inequitable distribution of finances lead to judicial determination that the legislation no longer complied with constitutional provisions.

Basically, the Supreme Court in 1994 decided not to substitute its judgment as to what was "suitable" and opted to use standards set by the Legislature. Judge Bullock initially interpreted the Supreme Court's 1994 ruling to mean that the Court had no role in determining whether funding for education was suitable and dismissed *Montoy* when it first came before him. The Supreme Court reversed his ruling and remanded the case to his Court, observing that the ten goals originally contained in the Act had been removed by the 1995 Legislature. In addition, the Supreme Court noted issues raised by the plaintiffs in the case which it wished Judge Bullock to address.

In providing his own definition that a suitable education is one that "must provide all Kansas students, commensurate with their natural abilities, the skills necessary to understand and successfully participate in the world around them . . .", Judge Bullock asserts the role of the Judicial Branch to determine whether the Legislature has met its constitutional responsibilities. His pretrial admonition to the parties that the case is about children indicates that the focus of the case will not be on school districts but on individual students and whether, in the view of the Court, they have been provided suitable and equal educational opportunities.