KANSAS POLICY INSTITUTE
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House / Senate Judiciary Joint Meeting
Potential School Funding Changes in Response to May 27 *Gannon* Order
June 16, 2016
Dave Trabert, President

Chairman Barker, Chairman King and members of the Committees:

We appreciate this opportunity to provide input on potential school funding changes in response to the Supreme Court's May 27 Gannon order. The rationale for our recommendations are fully explained in "Supreme Court contradicts itself, defies constitution in equity ruling" dated May 31 and "Don't let the courts close schools" dated June 4, both of which are attached.

In short, aside from the Supreme Court's thoughtful, student-focused March 2014 remand on adequacy, the 5½ year saga of Gannon litigation has played out like a political soap opera. The lower court has twice defied the Supreme Court's new directive on measuring adequacy. School districts don't know how to define or measure performance against the Rose standards, which means they have no legal basis for claiming they lack sufficient funding for students to meet those standards...yet the lower court ignores that reality.

The Supreme Court has repeatedly said more money isn't needed to remedy equity, but even though the Legislature increased LOB equity funding by more than $100 million at the Court's 'suggestion,' the Court continues to suggest perhaps even more money should be spent. Now the Supreme Court is threatening to violate students' constitutional right to education by closing schools if less than 1% of funding isn't rearranged as they see fit. The schools and courts have made the 5½ year Gannon ordeal largely about money; we call on the Legislature to shift the focus to students by taking the following action in the Special Session:

1. Put a funding mechanism in place to ensure that school districts are paid on time. Rout the money through the Department of Administration if necessary.

2. Indemnify state and school employees from contempt of court or other related charges.

3. If any school districts choose not to open their doors, provide every student in those districts with state-directed vouchers to attend any public or private school of their choice.

4. Make one last attempt to reallocate the same or similar amount of equity funding, even if that means taking money away from districts and giving it others as the Court suggested. The votes may not be there without the hold harmless provision the Court rejected, but that would show good faith and prove the Court wrong about the necessity of hold harmless.

Thank you for your consideration.

Don't let the courts close schools

kansaspolicy.org/dont-let-courts-close-schools/

June 4, 2016

The rhetoric must stop. Now. Nothing is accomplished by the Supreme Court threatening to close schools because a tiny piece of funding isn't allocated as the Court prefers, or by legislators vowing to stand firm against judicial bullying. In the meanwhile, almost a half million students are threatened with loss of their constitutional right to education and 70,000 school employees could lose their paychecks.

Aside from the Supreme Court's very thoughtful, student-focused March 2014 decision, the Court has otherwise directed a political soap opera. The lower court panel even defied the Supreme Court on more than one occasion. The Legislature retaliated by attempting to interfere with court operations. The Legislature also attempted to change how Supreme Court judges are nominated but we don't see that as retaliation so much as preventing a panel controlled by unelected lawyers from directing the nominating process. No other state allows unelected lawyers to control the nominating process and neither should Kansas.

The courts have been the bigger bully but it's time for the Governor and legislators to be the bigger 'person'. Daring the courts to close schools may feel justified, but leaders take actions that put their constituents and students first. Not to concede; we believe the Legislature has made multiple good faith efforts to resolve this equity issue, but to ensure that students' constitutional right to education is not interrupted.

Here's the action we recommend:

1. Governor Brownback should immediately call a Special Session.

2. Put a funding mechanism in place to ensure that school districts are paid on time. If the Department of Education won't send the money, route it through the Department of Administration.

3. Indemnify state and school employees from contempt of court or other related charges.

4. If any school districts choose not to open their doors, provide every student in those districts with state-directed vouchers to attend any public or private school of their choice.

5. Make one last attempt to reallocate the same or similar amount of equity funding, even if that means taking money away from districts and giving it others as the Court suggested. The votes may not be there without the hold harmless provision the Court rejected, but that would show good faith and prove the Court wrong about the necessity of hold harmless.

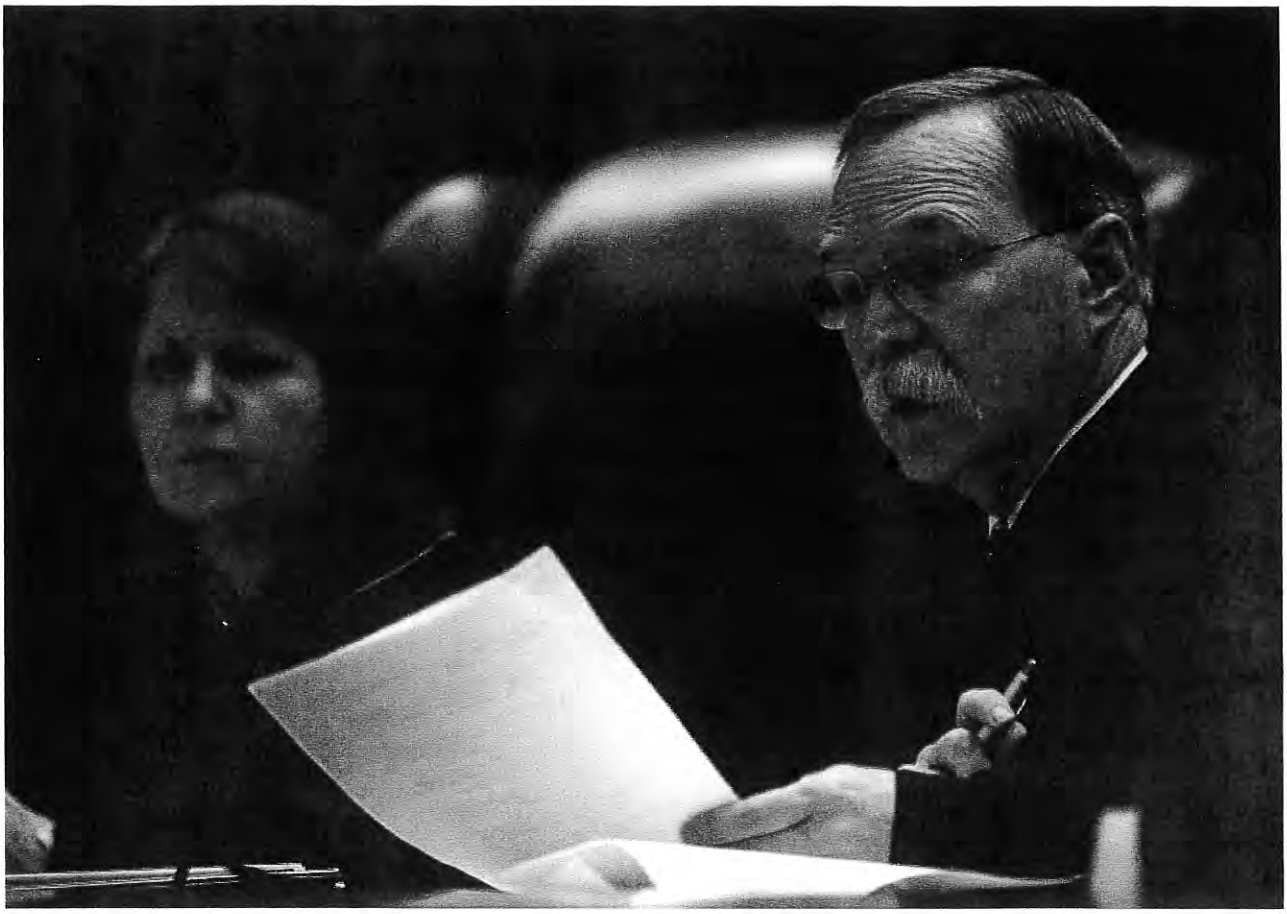
Contrary to many false claims, this isn't a matter of spending more money to resolve equity – even the Supreme Court says equity can be met by reallocating the same amount of money. And it's not because the Supreme Court says schools aren't adequately funded; they oddly haven't even scheduled oral arguments on that larger issue.

This is just about politics. We call on the Governor and legislators to be the adults in the room and ensure that students aren't deprived of their constitutional rights to education.

Supreme Court contradicts itself, defies constitution in equity ruling

kansaspolicy.org/supreme-court-contradicts-defies-constitution-equity-ruling/

May 31, 2016



The Kansas Supreme Court's March 2014 ruling on school funding was a thoughtful, student-focused approach. They said outcomes matter most in determining adequacy, all funding sources (including KPERS) should be considered and said the cost study upon which *Montoy* and the lower court's *Gannon* rulings were based is "more akin to estimates" than certainties. Since then, and certainly with their May 27, 2016 equity ruling, it's been mostly about establishing their desired dominance over the Legislature.

For starters, there is nothing in the state constitution that empowers any court to order schools closed. To the contrary, the Court has found that the constitution guarantees students certain educational rights, so closing schools would deprive students of such rights and thereby violate the constitution. But even if the Court believes it has the right to do so, how are students better served by depriving them of education as opposed to participating in a system where funding might…just maybe in the eyes of seven judges…be inequitably distributed by less than 1 percent of total funding? It seems that education is taking a back seat to the Court's determination to prove it can compel the Legislature to accede to its demands.

The Supreme Court's threat to close schools appears to be prohibited by existing law. K.S.A. 60-2106(d) says "As a part of a remedy, preliminary decision or final decision in which a statute or legislative enactment of this state has been held unconstitutional as a violation of article 6 of the Kansas constitution, the appellate court or any master or other person or persons appointed by the appellate court to hear or determine a cause or controversy or to make or

enforce any order or remedy ordered by a court pursuant to K.S.A. 60-253, and amendments thereto, or any other provision of law, shall not have the authority to order a school district or any attendance center within a school district to be closed or enjoin the use of all statutes related to the distribution of funds for public education."

Mike O'Neal, an attorney, former Speaker of the House and now CEO of the State Chamber, says, "The plaintiffs challenged the school closure prohibition in the District Court. The panel found the challenge to be "not ripe for review" and did not issue a ruling on that claim. Accordingly, the issue was not considered by the Supreme Court and was not addressed in either Friday's decision or the February decision." That measure was passed and signed into law during the 2005 special session by Governor Kathleen Sebelius, following the Supreme Court's threat to close schools in *Montoy*.

O'Neal went on to say, "There are actually two separate state laws containing the school closure prohibition. K.S.A. 72-64b03(b) prohibits the district court panel from imposing that remedy and there is also K.S.A 60-2106 in the Code of Civil Procedure, which deals with appellate court rules and jurisdiction. This statute clearly applies the same prohibition against school closure to the Appellate courts."

Page 12 of their May 27 decision repeats the Court's threat to close schools if the will of the [seven] people is not met.

We cautioned: "In short, if by the close of fiscal year 2016, ending June 30, the State is unable to satisfactorily demonstrate to this court that the legislature has complied with the will of the people as expressed in Article 6 of their constitution through additional remedial legislation or otherwise, then a lifting of the stay of today's mandate will mean no constitutionally valid school finance system exists through which funds for fiscal year 2017 can lawfully be raised, distributed, or spent.

. . . .

"Without a constitutionally equitable school finance system, the schools in Kansas will be unable to operate beyond June 30." 303 Kan. at 743-44.

Since the 'will of the people as expressed in Article 6' is ostensibly the crux of the matter, let's review what the people say in Article 6(b): "The legislature shall make suitable provision for finance of the educational interests of the state." Aside from prohibiting tuition, that's the extent of the people's will on the funding of public schools. Anything else is just the interpretation of seven people on the Supreme Court and a panel of three lower court judges.

That's not to say that equity should not be included in the people's will; it should. But it's hard to imagine that 'the people' would prefer to have schools closed than to have students be exposed to a system with a few (possibly) misplaced dollars. Keep in mind that even this Court said: "[W]e acknowledge there was no testimonial evidence that would have allowed the panel to assess relative educational opportunities statewide." There was no evidence of lack of educational opportunity in fact. Further, anyone who has spent much time discussing school funding with 'the people' knows they are much more concerned about improving outcomes and whether schools are adequately funded rather than the lesser equity issue. This begs the question; why didn't the Court first take on the larger, more important matter of adequate funding?

Some have speculated that they'd rather not deal with the more volatile issue of adequacy while standing for retention. But the Court's March 2014 remand and the lower court's responses on adequacy may point to a different motive. The Court said (on page 77) adequacy "...is met when the public education financing system provided by the legislature for grades K-12—through structure and implementation—is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in Rose and presently codified in K.S.A. 2013 Supp. 72-1127."

Subsequently, school districts and the Department of Education have gone on record saying they don't know how to

measure or define the Rose capacities. And if they can't define the Rose capacities, what is their legal basis for claiming they lack adequate funding to get there? The lower court ignored that obvious conundrum and also ignored the Supreme Court's guidance to not rely on the old Augenblick & Myers cost study. So when the Supreme Court does finally take up adequacy, they may have to dismiss the case on the grounds that the Plaintiffs can't make their case.

If they took up adequacy first and followed their March 2014 ruling, they wouldn't have had the opportunity to express their desire to dominate and flog the Legislature in an election year. So they keep running the clock on equity, hoping that a new Legislature may decide to pay the schools' adequacy ransom and avoid having to say that the Plaintiffs can't make their case.

Finally, there's the circular logic they applied to the Legislature's equity solution. There is no dispute that the Legislature's methods of determining which districts qualify for equity funding are of their own arbitrary design.[i] The Supreme Court has also repeatedly ruled that the Legislature may develop new equalization formulas that could distribute fewer equalization dollars, because the focus is on equitable distribution rather than on the amount of equalization funding.

Yet every time the Legislature does so, the Court finds a way to say that they didn't spend enough money. This time, they said there wasn't enough because the Legislature used a proration factor in its new formula. The Legislature could have developed a formula without a proration factor that would have distributed the same amount of money, but the Court used the proration factor as an excuse to again chastise the Legislature for not providing enough money.

The Court repeatedly says the Legislature can resolve equity in a variety of ways of their own device, but that's like Henry Ford telling customers they could choose whatever color car they wanted as long as it was black.

This equity ruling sadly has nothing to do with the educational interests of students. It's just another attempt to establish the Judiciary as the dominant branch of government.

[i] *Initially, districts below the 81.2 percentile of Assessed Valuation Per Pupil. In HB 2655, an equalization factor is determined by arranging the assessed valuation per pupil (AVPP) of all school districts from largest to smallest, rounding the AVPPs to the nearest $1,000 and identifying the median. The equalization factor of the median is 25 percent. For every $1,000 a school district's AVPP is above the median, the school district's equalization factor is reduced from 25 percent by 1 percent and for every $1,000 a school district's AVPP is below the median, the school district's equalization factor is increased from 25 percent by 1 percent.*