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SECOND DECISION OF THE THREE-JUDGE PANEL ON ADEQUACY AND EQUITY IN GANNON V. STATE ON REMAND FROM THE KANSAS SUPREME COURT

A three-judge panel issued its opinion in *Gannon v. State*, Friday, June 26, 2015, in response to the plaintiffs' motion to alter or amend the panel's December 30, 2014, findings and a further motion from plaintiffs asking for a declaratory judgment finding 2015 House Sub. for SB 7 unconstitutional and asking for injunctive relief. In April 2015, the Kansas Supreme Court invoked the panel's jurisdiction and tasked it with consideration of these motions. The panel conducted two days of hearings on the plaintiffs' motions May 7-8, 2015. This memorandum summarizes the most recent panel opinion, the procedural history of *Gannon*, and legislative action following the March 2014 Kansas Supreme Court opinion and the December 2014 panel opinion.

Note: This memorandum is not intended to be a full legal analysis of the June 26, 2015, panel decision, but rather a summary discussion of important points of the decision in the context of broader school finance policy in Kansas. A full legal analysis of the panel's decision will be provided at a later date by the Revisor of Statutes.

Opinion of the Three-Judge Panel (June 26, 2015)

Adequacy

The panel found House Sub. for SB 7 was unconstitutional in violation of Article 6, Section 6 of the *Kansas Constitution* due to its failure to fund the amounts necessary to provide a constitutionally adequate, *Rose*-factors-compliant education to all Kansas K-12 students. Further, the panel noted the block grant funding did not accommodate ordinary changes in the number and demographics of the K-12 student population.

Equity

Referring to the Kansas Supreme Court's March 2014 opinion, the panel found that while the Legislature's initial efforts to cure inequities in capital outlay and supplemental general state aid funding were in compliance with the opinion, the Legislature's later actions were not. Consequently, the panel withdrew its previous finding of substantial compliance with the Supreme Court's judgment, noting none of the further curative actions assured to be taken if needed in the 2015 Legislative Session have occurred, and reopened equity compliance issues.

Further, the panel held section 38, concerning supplemental general state aid, and section 63, concerning capital outlay state aid, of House Sub. for SB 7 were unconstitutional in

violation of the incorporated equity principles of Article 6, Section 6(b) of the *Kansas Constitution*, because they did not produce reasonably equal access to substantially similar educational opportunity through similar tax effort.

Court Order

The panel issued a temporary restraining order of House Sub. for SB 7's flat-funding mechanism and required any distribution of general state aid to a school district to be based on the weighted student count in the current school year in which a distribution is made.

The panel noted the Supreme Court had directed the panel to "enter such orders as the panel deems appropriate" and to "ensure the inequities in the present operation of the capital outlay statutes . . . are cured," and, consequently, struck sections concerning capital outlay from House Sub. for SB 7 and House Sub. for SB 4 and a section from Senate Sub. for HB 2353 concerning changes to the array of assessed valuation per pupil (AVPP) used to determine Capital Outlay State Aid. The panel also struck provisions that would have repealed the Capital Outlay State Aid statutes as they existed as of January 1, 2015.

The panel indicated its order would allow sections 4-22 of SB 7, titled the Classroom Learning Assuring Student Success (CLASS) Act to proceed, but the block grant funds for fiscal year (FY) 2016 and FY 2017 would include Capital Outlay State Aid, as calculated pursuant to the capital outlay levy statutes as they existed prior to January 1, 2015. The panel indicated that while this will require additional appropriations, it relies on the Legislature to provide this authority. Consequently, the panel directed the Kansas State Board of Education (KSBE), immediately and prior to July 1, 2015, to certify any balance of capital outlay state aid for FY 2015 and the entitlements of each school district so entitled. Further, the panel directed the Secretary of Administration to honor such certification and encumbrances by complying with the law governing distribution of Capital Outlay State Aid and the relevant provisions of 2014 Senate Sub. for HB 2506, and the State Treasurer is directed to honor transfer and payments from the Secretary. The order enjoins the Kansas State Department of Education (KSDE), Kansas Department of Administration, the State Treasurer, and any other executive official of the State of Kansas from issuing or honoring any other directive that would affect the timely accomplishment of these orders.

In regard to supplemental general state aid, the panel struck provisions in House Sub. for SB 7 and Senate Sub. for HB 2353 instructing supplemental general state aid to be determined based on quintiles. Further, the panel stated that if FY 2015 supplemental general state aid yet due as calculated pursuant to the law as amended (ignoring the "null and void" provisions now removed) is not paid, the KSBE is enjoined to distribute a like sum as soon as possible on or after July 1, 2015 from FY 2016 revenues available for supplemental general state aid. These distributions would be credited as a FY 2015 receipt. The opinion directs for supplemental general state aid for FY 2016 and FY 2017 to "conform to that corrected sum due for FY 2015." Again, the panel indicated that while this will require additional appropriations, it relies on the Legislature to increase the funding.

The panel declined to exercise the plaintiff's suggested remedy of immediate injunction of the CLASS Act, staying any remedy in reference to those provisions pending Kansas Supreme Court review. The panel characterized these remedies as the "least disruptive," and stated these remedies would help to avoid uncertainty that would have been created if the

present funding in House Sub. for SB 7 and its method of distribution became too uncertain, especially given school districts' August budgeting deadline.

If the panel's orders are not followed, the panel directed the stay on the order striking the CLASS Act, absent good cause to the contrary, would be lifted; the provisions of the CLASS Act, as well as sections 38 and 63 of House Sub. for SB 7, as amended by Senate Sub. for HB 2353, would be struck as unconstitutional, as well as those sections in these two bills, other than appropriations, that depend on, make reference to, or would not have been amended had it been expected those sections would be declared unconstitutional; and any remaining appropriated funds yet undistributed, would be distributed pursuant to the School District Finance and Quality Performance Act. The panel then specified which portions of House Sub. for SB 7 and Senate Sub. for HB 2353 would remain in place under these circumstances; struck references to the CLASS Act; and instructed, when applicable, which alternate provisions of the law should be construed to apply.

Gannon Procedural History

In November 2011, plaintiff school districts filed suit alleging the Legislature had failed to adequately fund K-12 education. Since FY 2009, each district lost funding due to reductions in base state aid per pupil (BSAPP), the withholding of capital outlay state aid, and the proration of supplemental general state aid. A three-judge panel conducted a trial in Shawnee County District Court in June 2012, and on January 10, 2013, ruled the amount of funding appropriated from the State General Fund (SGF) was constitutionally inadequate under Section 6, Article 6 of the *Kansas Constitution*. Further, the panel held the nonappropriation of capital outlay equalization state aid resulted in an unconstitutional, wealth-based distribution of capital outlay funds, and the proration of supplemental general state aid created unconstitutional, wealth-based disparities among districts. The State and plaintiffs appealed and the Kansas Supreme Court heard oral arguments on October 8, 2013.

The Kansas Supreme Court upheld the panel's ruling that the state created unconstitutional, wealth-based disparities by: (1) withholding all capital outlay state aid payments to which certain school districts were otherwise entitled pursuant to KSA 72-8814(c); and (2) prorating the supplemental general state aid payments to which certain districts were entitled under KSA 72-6434 for their local LOBs. In determining the state violated the requirement of adequacy in public education, however, the Court held the panel did not apply the correct constitutional standard and remanded the case on that issue.

The Court noted a number of state courts have adopted the adequacy rationale and definition articulated in *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), and the Kansas Supreme Court quoted it with approval in previous litigation concerning school finance. The *Rose* opinion requires an efficient system of education to have as its goal to provide each and every child with at least the seven following capacities:

- (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 student 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 and knowledge of his or her mental and 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 or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

The Court expressly adopted these standards for the education adequacy requirement it previously has held is contained in Article 6 and stated the adequacy component would be 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.” The Court did not express an opinion on whether the panel would need to reopen the record to make its adequacy determination, but did state that funds from all available resources, including grants and federal assistance, should be considered. Regardless of the source or amount of funding, however, the Court stated “total spending is not the touchstone for adequacy.”

As to equity, the Court articulated the following test: “School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.” Analyzing the panel’s findings under this test, the Court found those findings were supported by substantial competent evidence. The case was remanded to the panel to enforce the affirmed rulings on equity, fashion appropriate remedies, and apply the correct constitutional standard to plaintiff’s claims as to adequacy. The Court included in its opinion options for the panel on remand. If by July 1, 2014, the Legislature has:

- Fully funded the capital outlay provisions and supplemental general state aid provisions without proration as statutorily prescribed, the panel need not take further action.
- Taken action to cure—whether by statutory amendment, less than full restoration of funding to prior levels, or otherwise—the panel must determine whether the legislative action meets the equity test outlined in the opinion.
- Taken no curative action, transfers from SGF to capital outlay will occur automatically, and no district could utilize the LOB provision.

Ultimately, the Court required the panel to ensure the inequities are cured.

The three-judge panel issued its opinion December 30, 2014, ruling that the Kansas public education financing system provided by the Kansas Legislature for grades K-12—through structure and implementation—was not presently reasonably calculated to have all Kansas public education students meet or exceed the *Rose* factors and, as such, failed to satisfy the education adequacy requirement contained in Article 6 of the *Kansas Constitution*.

The panel’s decision was a declaratory judgment and did not include specific instructions for remedying the inadequacy found, but rather indicated that the case should not be dismissed until the Legislature makes what the panel deemed “appropriate and necessary judgments” to adequately fund K-12 education and some time passes thereafter to gauge the effects of those

judgments. The panel noted that, while the obligation to adequately fund education is imposed by the *Constitution* and is therefore unavoidable, the approach to and timeliness of compliance with the decision may depend on practicality and reasonable accommodation. The panel recommended the parties undertake a renewed effort at mediation to identify a remedy.

In addition to the above finding and recommendations, the panel's opinion contained several other points of analysis used in arriving at its conclusion, which includes the following.

- The principles of the *Rose* standards have been implicit in all Kansas school finance cases since 1994, have been paralleled since 2005 in Kansas statute, and were considered in the *Augenblick & Meyer* and Legislative Post Audit cost studies performed as part of the *Montoy* case.
- The Kansas K-12 school system was functioning to provide a constitutionally adequate education to Kansas children at the beginning of FY 2009. Based upon this conclusion, the panel extrapolated several possible approaches that might ensure a "brightline" of funding and formula structure.
- The local option budget (LOB) cannot stand as constitutionally acceptable support for a constitutionally adequate education without both a fail-safe to ensure that a minimum amount of funds are provided in the event that voluntary local taxation falls short of providing those funds and a floor defining the limits of the State's right to compel the use of such funds in meeting the adequacy requirement of Article 6.
- Due to limits in flexibility and the fact that not all districts receive them, some federal funds should not be considered in establishing a BSAPP amount that will adequately fund all school districts.
- The inclusion of KPERS, capital outlay, bond and interest funding, supplemental state aid, LOB revenues, and special education funding in the BSAPP cannot be considered a setoff or credit against the amount of funding required to provide a constitutionally adequate education.

In addition to the aforementioned findings and recommendations, the panel explicitly incorporated substantial portions of its January 10, 2013, ruling into its current opinion.

Legislative Action Following the March 2014 Kansas Supreme Court Opinion

Senate Sub. for HB 2506 appropriated an additional \$109.3 million for supplemental general state aid (LOB equalization aid) and made a revenue transfer of \$25.2 million to the Capital Outlay Fund from the SGF. Additionally, the bill states the purpose and intention of the Legislature is to provide a K-12 funding system that provides students with the seven *Rose* capacities and required the funding system to be sufficiently flexible for the Legislature to consider and use financing methods from all available resources, such as the following:

- Federal funding to school districts or schools;

- State moneys appropriated for the improvement of public education (the bill included a list of examples of such state funding sources);
- Any provision authorizing local tax levies for school funding purposes; or
- Any transfer of funds or appropriations from one object or fund to another approved for the purpose of funding public schools.

Further, the bill revised KSA 2013 Supp. 72-1127, concerning subjects and areas of instruction, to eliminate a set of goals similar, but not identical, to the *Rose* capacities, and replace these goals with the exact language of the *Rose* capacities. The revised language states the Kansas State Board of Education must design subjects and areas of instruction to achieve the goal established by the Legislature of providing every child with at least the seven *Rose* capacities.

Legislative Action Following the December 2014 Panel Opinion

House Sub. for SB 7, signed by the Governor, March 20, 2015, makes appropriations for K-12 education for FYs 2015, 2016, and 2017. The bill also repeals the existing school finance formula—the School District Finance and Quality Performance Act—and creates the Classroom Learning Assuring Student Success Act. Subsequent legislation amended House Sub for SB 7. The major components of that legislation are described below.

Components of the Block Grant for FYs 2016 and 2017

The block grant includes:

- General State Aid school districts are entitled to receive for school year 2014-15, as adjusted by virtual school aid calculations (described below) and a 0.4 percent reduction for an Extraordinary Need Fund;
- Supplemental general state aid and capital outlay state aid as adjusted in 2014-15 (adjustment described below);
- Virtual state aid as recalculated for FYs 2016 and 2017 (described below);
- Amounts attributable to the tax proceeds collected by school districts for the ancillary school facilities tax levy, the cost of living tax levy, and the declining enrollment tax levy; and
- KPERS employer obligations, as certified by KPERS.

General state aid for school year 2014-15 is adjusted to account for consolidated school districts. Adjustments also are made in all school years to ensure districts eligible for the new facilities weighting will receive that weighting as outlined in current law.

General state aid will be disbursed to districts in the same manner as in current law.

Extraordinary Need Fund

For FYs 2016 and 2017, 0.4 percent of general state aid will be transferred to the Extraordinary Need Fund. Any unencumbered funds remaining in this Fund at the end of the fiscal year will be transferred back to the SGF. Districts can apply to the State Finance Council for payments from this Fund. In reviewing a district's application for payment from the Fund, the Finance Council will consider:

- Any extraordinary increase in enrollment;
- Any extraordinary decrease in the district's assessed valuation; and
- Any other unforeseen acts or circumstances substantially impacting a district's general fund.

Recalculation of Supplemental General State Aid (LOB State Aid)

LOB State Aid is recalculated based on quintiles below the 81.2 percentile of school districts' assessed valuation per pupil (AVPP) in school year 2014-15 and capped at that amount for subsequent school years with gradations as follows based on AVPP, beginning with the districts with the lowest AVPP. (Each quintile equals about 46 school districts.)

- Lowest quintile – 97 percent of LOB State Aid;
- Second lowest quintile – 95 percent of LOB State Aid;
- Middle quintile – 92 percent of LOB State Aid;
- Second highest quintile – 82 percent of LOB State Aid; and
- Highest quintile – 72 percent of LOB State Aid.

Districts continue to be authorized to adopt a LOB and levy a property tax in an amount not to exceed the LOB of the district in school year 2014-15, unless the district approves a higher amount for school year 2015-16, prior to July 1, 2015.

Recalculation of Capital Outlay State Aid

The state aid percentage begins at 75 percent for the district with the lowest AVPP and decreases by 1 percent for each \$1,000 incremental increase in AVPP.

Bond and Interest State Aid

The bill amends the calculation of state aid for general obligation bonds approved for issuance at an election held on or after July 1, 2015, using the same formula as the amended capital outlay state aid formula.

Virtual State Aid

In school year 2014-15, there is no change in the calculation of virtual state aid.

In school year 2015-16, funding for full-time equivalent students will be calculated at \$5,000 per student; part-time students, \$4,045 per student; and students 19 and older, \$933 per 1-hour credit course successfully completed in the school year.

In school year 2016-17, funding for full-time equivalent students will be calculated at \$5,600 per student; part-time students, \$1,700 per student; and students 19 and older, \$933 per 1-hour credit course successfully completed in the school year.

A virtual student must reside in-state for the district to receive state aid for the student.

Special Levies

Districts are authorized to impose special local tax levies (for ancillary facilities, cost of living, and declining enrollment), if the district levied such tax in school year 2014-15 or if the district is qualified to levy such tax under current law.

Fund Flexibility

Districts have fund flexibility at the district level; that is, funds can be transferred to the general fund of the district with no cap on the amount of the transfer. Excluded from this flexibility are three funds: bond and interest, special education, and the special retirement contributions fund.

Other Provisions

The bill uses the assessed valuation per pupil for school year 2015-2016 (instead of the current school year) for the purpose of determining supplemental general state aid (LOB State Aid) for any district if the district has a total assessed valuation for school year 2015-2016 less than the assessed valuation in the current school year; the difference in assessed valuation between the current school year and 2015-2016 is greater than 25 percent; and having such reduction be the direct result of the classification of tangible personal property by 2014 legislation changing the tax classification of commercial and industrial machinery used directly in the manufacture of cement, lime, or similar products.