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KANSAS SUPREME COURT'S SIXTH OPINION IN *GANNON V. STATE*

The Kansas Supreme Court issued its sixth opinion in *Gannon v. State* (*Gannon VI*) on Monday, June 25, 2018. In the fifth opinion, the Court held the State had not met its burden of showing that its legislative response, 2017 SB 19, met the adequacy and equity requirements of Article 6 of the *Kansas Constitution*. Further, the Court extended the stay of the mandate voiding the school finance system to June 30, 2018, and retained jurisdiction over the case. The Legislature subsequently enacted 2018 Sub. for SB 423 (SB 423) and House Sub. for SB 61 (SB 61). This memorandum summarizes the Supreme Court's June 2018 opinion, the procedural history of *Gannon*, and the 2018 legislation.

Note: This memorandum is not intended to be a full legal analysis of the June 25, 2018, Supreme Court 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.

***Gannon VI* (June 25, 2018)**

The Court held the Legislature corrected the *Gannon V* equity issues and created no new constitutional infirmities. The Court held the State has not met the adequacy requirement, determining the Legislature failed to consistently implement its plan to meet the threshold for adequacy identified in the *Montoy* litigation. The Court again extended its stay to June 30, 2019, or until further order of the Court, allowing the Legislature to address the remaining adequacy constitutional infirmities and providing guidance on how the Legislature might remedy those infirmities.

Adequacy

The Court stated with some financial adjustments to the State's 5-year funding plan enacted in SB 423 and SB 61, it agrees that through structure and implementation this plan can bring the K-12 funding system into compliance with Article 6. The plan relies on *Montoy v. State*, 282 Kan. 9 (2006) (*Montoy IV*), in which the Court found the K-12 funding system was in substantial compliance with its prior orders based on a schedule of increased education funding and other changes to the law, as well as the *Gannon* three-judge panel opinion, which found K-12 education funding was constitutionally adequate for school year (SY) 2009-10. The State argued its legislative remedy achieved constitutional adequacy as the Legislature has returned to the basic formula in place at that time and appropriated amounts equal to that amount of funding adjusted for inflation, an amount described as the "*Montoy* safe harbor."

The Court considered an April 23, 2018 Legislative Research Department memorandum describing the considerations and calculations used to arrive at its baseline amount of \$522 million. The Court also referenced a May 1, 2018 Research Department memorandum summarizing the combined fiscal effects of SB 19, SB 423, and SB 61. (Both of these documents are available at: <http://www.kslegresearch.org/KLRD-web/Education.html>.) The Court found the total increased funding outlined in the May 1 memorandum was short of reaching the *Montoy* safe harbor and questioned the baseline amount as inflation was not calculated for SY 2017-18 and 2018-19 in arriving at that amount. The Court advised the State to account for inflation during that period and adjust the baseline amount accordingly. The Court then advised the new, larger principal amount would need to be adjusted again for inflation until it is paid in full. Pursuant to the finance plan enacted by the Legislature, this would occur through SY 2022-23.

The Court noted this level of funding led to the dismissal of *Montoy IV* and resulted in increased student performance. Further, the Court noted the State has taken steps to address the needs of underperforming students, including the increase of the at-risk weighting, modifications to how the high-density at-risk and bilingual weightings are calculated, the dedication of Local Option Budget (LOB) funds to at-risk and bilingual education services, funding for all-day kindergarten, and additional funds for preschool-aged at-risk students. Coupled with overall increases in the Base Aid for Student Excellence (BASE), these changes result in more funding for students qualifying for at-risk services.

The Court concluded saying that if the State implements its *Montoy* safe harbor plan after making timely financial adjustments in response to the plan's identified problems and its accompanying calculations, the State can bring the K-12 funding system into compliance. Consequently, the Court found it did not need to address either whether cost studies commissioned by the Legislature and the plaintiffs since *Gannon V* could be considered for the first time on appeal or the other cost estimates in the record.

Equity

The Court noted the plaintiffs agreed SB 423 and SB 61 addressed three of the four equity issues identified in *Gannon V*. Further, the Court held SB 423 addressed the fourth issue related to use of a protest petition to reach the maximum LOB authority of 33.0 percent as it removed provisions resulting in disparate treatment among districts. The Court also found plaintiffs argument related to the mandatory 15.0 percent LOB (15 percent) did not show inequity as all districts already have a 15 percent LOB, making it more theoretical than likely that a district would want to decrease its LOB below 15 percent. The Court stated the fact that the 15 percent is now mandatory is not inequitable on its face. Finally, the Court stated it could find no basis to conclude the mandatory transfer of LOB funds to the at-risk and bilingual education funds causes a lack of reasonably equal access to substantially similar educational opportunity through similar tax effort.

Remedy

The Court reiterated the need for the State to revise its baseline calculation to include inflation in SY 2018-19 and to adjust for inflation until the principal sum is paid in full. The Court also called for the State to explain whether Virtual School State Aid, which is calculated outside of the funding formula, was included in its original baseline calculations as it was later subtracted from the baseline amount. Finally, the Court advised that in devising its remedy, the

State should be mindful of the connection between equity and adequacy, particularly increased reliance on LOB funds.

The Court retained jurisdiction; continued the stay until June 30, 2019, allowing SB 19 to remain in temporary effect, and SB 423 and SB 61 to go into temporary effect; and set April 15, 2019, as the deadline for briefing on any legislative remedies and April 25, 2019, as the deadline for response briefs. Oral arguments will be held at 9 am, May 9, 2019, and the Court will issue an opinion by June 30, 2019. The Court indicated it would accelerate the deadlines as needed, however, to consider earlier remedial legislation.

Procedural History

In November 2010, 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), withholding of Capital Outlay State Aid, and proration of LOB State Aid. A three-judge panel held a trial in Shawnee County District Court in June 2012 and, in January 2013, ruled funding was constitutionally inadequate under Article 6, Section 6 of the *Kansas Constitution*. Further, the panel held the nonappropriation of Capital Outlay State Aid resulted in an unconstitutional, wealth-based distribution of capital outlay funds, and the proration of LOB State Aid created unconstitutional, wealth-based disparities among districts.

The Kansas Supreme Court issued its first opinion in the case (*Gannon I*) in March 2014 and provided the following test for equity: “School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.” Further, the Court stated adequacy would be achieved when the school finance system is reasonably calculated to have all Kansas public education students meet or exceed the capacities set out in *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), including sufficient oral and written communication skills; knowledge of economic, social, and political systems; understanding of governmental processes; self knowledge and knowledge of one’s mental and physical wellness; grounding in the arts; training or preparation for advanced training in either academic or vocational fields; and academic or vocational skills that enable favorable competition in academics or the job market.

Soon after *Gannon I*, the Legislature enacted 2014 Senate Sub. for HB 2506, which provided additional LOB and Capital Outlay funds. The three-judge panel found this legislation brought the State into compliance with the Supreme Court’s order concerning equity but did not dismiss the issue. Additionally, it found the existing school finance formula, the School District Finance and Quality Performance Act (SDFQPA) was basically sound but actual funding of the formula was not. The 2015 Legislature subsequently enacted 2015 House Sub. for SB 7 (SB 7), which repealed the SDFQPA and replaced it with a two-year block grant of funding.

On remand, the three-judge panel found SB 7 to be unconstitutional and held it “does nothing to alleviate the unconstitutional inadequacy of funding . . . but, rather, exacerbates it.” *Gannon II*, issued in February 2016, affirmed that SB 7 failed to cure inequities in the school finance system, continued the stay of the panel’s order, and ordered the State to satisfactorily demonstrate legislative compliance with the equity standard by June 30, 2016. Absent a showing of compliance, the opinion provided the Court would lift its stay, invalidating the current school finance system. Without a constitutionally equitable school finance system, Kansas schools would not be able to operate beyond June 30. The Supreme Court also stayed the adequacy portion of the appeal. The 2016 Legislature enacted 2016 Senate Sub. for HB 2655 (HB 2655) in response.

Gannon III, issued in May 2016, found that although HB 2655 did remedy constitutional infirmities related to Capital Outlay State Aid, the LOB State Aid funding mechanism was unconstitutional, and use of “hold harmless” funds and the Extraordinary Need Fund was insufficient to mitigate LOB inequities. The Court found the unconstitutional provisions of HB 2655 could not be severed from SB 7 and continued its earlier stay until June 30, 2016, to minimize the threat of disruptions in education funding. On June 28, the Court found 2016 Special Session HB 2001 brought the Legislature into compliance with the equity standard and retained jurisdiction over the issue.

In *Gannon IV*, the Court affirmed the three-judge panel’s holding the financing system is constitutionally inadequate as its structure and implementation are not reasonably calculated to have all Kansas public education students meet or exceed the *Rose* capacities. Looking at the structure, the Court found the block grant is not a financing system, but rather a stopgap measure, which freezes school districts’ funding for two school years at a prior year’s level and only minimally responds to financially important changing conditions such as increased enrollment. Further, the Court held SB 7 does not meet the implementation requirement for adequacy as plaintiffs’ evidence shows the State is failing to provide approximately one-fourth of students with the basic skills of reading and math and is leaving behind significant groups of harder-to-educate students. Additionally, the Court stated plaintiffs have proven student performance reflected in the data is related to funding. The Court retained jurisdiction and called for the State to satisfactorily demonstrate by June 30, 2017, that its proposed remedy is reasonably calculated to address constitutional violations identified in the opinion and comports with previously identified constitutional mandates.

In *Gannon V*, the Court concluded the State had failed to meet its burden of demonstrating constitutional adequacy. The Court rejected Plaintiff’s claims that the structure of SB 19 is unconstitutional due to the underfunding of certain programs, the possible insufficiency of revenue to fund the school finance system, and the potential for future legislatures to refuse to fund inflationary increases to the BASE. Nevertheless, the Court determined the State failed to show the overall level of funding to be adequate and specifically rejected the “successful schools model” put forward by the State and the State’s claim that the “effective base” amount—including both total foundation aid and the LOB of the school districts—is sufficient to meet the inflation-adjusted cost estimates of previous cost studies.

The Court also identified inequities in 2017 SB 19 related to the allowed use of capital outlay funds, the process to reach the maximum LOB authority, the determination of LOB State Aid, and the 10.0 percent floor for the at-risk weighting.

The Court extended the stay of the mandate voiding the school finance system to June 30, 2018, but noted at that time the Court will not “be placed in the position of being complicit actors in the continuing deprivation of a constitutionally adequate and equitable education owed to hundreds of thousands of Kansas school children.” Additionally, the Court retained jurisdiction over the case and scheduled briefing deadlines and oral arguments, which were conducted May 22. The Court advised the State to consider the Legislature has the duty to make suitable provision for finance of the educational interests of the State; the Legislature has a myriad of choices available to perform that duty and no “specific level of funding” is required for adequacy and no “particular brand of equity” is mandated; the State continues to bear the burden of establishing constitutional compliance; the State would help its case by “showing its work,” which involves considerably more than the presentation in the current appeal; and the State should be cautious of challenges arising from an increased reliance on LOB-generated funding.

2018 Legislation

Sub. for SB 423, as amended by House Sub. for SB 61, made appropriations to the Kansas State Department of Education (KSDE) for FY 2019. This bill also created a pilot program for the Mental Health Intervention Team between school districts and community mental health centers (CMHCs). In addition, the bill made several amendments to the Kansas School Equity and Enhancement Act (KSEEA), including amendments to the BASE, preschool-aged at-risk students, the LOB, various weightings in the school finance formula, the State Board of Education's (KSBE) accreditation system, school district funding reporting requirements, and the schedule for audits to be completed by the Legislative Division of Post Audit (LPA). SB 423 also amended statutes relating to capital outlay funds and school district capital improvements. [Note: SB 423 was approved by the Governor on April 17, 2018. SB 61 was approved May 7, 2018.]

Introductory Statement

SB 423 included an introductory statement stating the State's educational interests concern the areas of social-emotional learning, kindergarten readiness, individual plans of study, graduation, and post secondary success, and the State addresses such interests by providing support and services both in the classroom and in the community. Further, the introductory statement summarizes appropriations for K-12 education, as well as appropriations for support services provided by other state agencies and institutions for students from birth to graduation.

Base Aid for Student Excellence

SB 423 amended the BASE for five years beginning in school year 2018-2019. SB 61 revised those amounts. The new BASE amounts are \$4,165 in 2018-2019; \$4,302 in 2019-2020; \$4,439 in 2020-2021; \$4,576 in 2021-2022; and \$4,713 in 2022-2023. Beginning in school year 2023-2024, the BASE will increase by the average percentage increase in the Consumer Price Index for all urban consumers in the Midwest region during the three immediately preceding school years. SB 19 (2017) provided for inflationary increases beginning in school year 2019-2020.

Local Option Budget

Use of LOB

SB 423 required each school district to adopt an LOB equal to 15.0 percent of the school district's Total Foundation Aid. The amount, along with the LOB State Aid attributable to that required LOB, was to be included in a district's Local Foundation Aid. Further, the required LOB dollars were to be included in the BASE amount. SB 61 replaced those provisions with a statement of public policy of the State of Kansas to require an LOB of at least 15 percent of the school district's Total Foundation Aid. The statement further provided that the moneys provided for school districts pursuant to the required portion of the LOB shall be included in determining the adequacy of the amount of total funding and that other moneys provided by LOBs may also be included in determining the adequacy of the amount of total funding. The bill also eliminated the provision created by SB 423 that included the proceeds of a 15 percent LOB as Local Foundation Aid.

Pursuant to SB 61, school districts may adopt an LOB up to the statewide average from the preceding year and may adopt an LOB up to 33 percent of the Total Foundation Aid of the district if the board of education of the district has adopted a resolution providing for such authority that has been subject to a protest petition of the district.

SB 61 reinstated a provision in law prior to SB 423 providing for the Total Foundation Aid for purposes of the LOB to be calculated as if the BASE was \$4,490 in all years in which the BASE is less than \$4,490. The bill also reinstated a provision in law prior to SB 423 providing for districts to use the Special Education Aid amount from school year 2008-2009 for purposes of calculating the district's LOB authority in any year in which the district's actual Special Education Aid amount is less than that year.

Further, SB 423 required school districts to transfer from the LOB an amount proportional to the amounts of its Total Foundation Aid attributable to the at-risk and bilingual weightings to their at-risk and bilingual funds.

LOB Authority

SB 423 voided any resolution providing LOB authority in excess of 30.0 percent adopted by a local school board prior to July 1, 2017, under the provisions of SB 7 and not submitted to the electors of the school district for approval. Any school district affected by this provision must adopt a new resolution subject to protest petition to adopt an LOB above 27.5 percent.

SB 423 increased the protest petition requirements to challenge an LOB increase above 27.5 percent from 5.0 percent of a school district's qualified voters in 30 days to 10.0 percent of voters in 40 days.

SB 423 required any school board seeking to raise its LOB authority for the succeeding school year to notify KSBE of the intended percentage increase in its LOB authority by April 1 of the current school year. School boards are prohibited from adopting an LOB in excess of the authority stated in its notice submitted to KSBE. KSBE must submit all such notifications to the Legislature. The notification requirement takes effect for any planned increases in LOB authority during school year 2019-2020.

LOB State Aid

SB 423 changed the process for calculating LOB State Aid from a school district's LOB for the immediately preceding school year to a school district's current-year LOB.

Formula Weightings

Transportation Weighting

SB 423 amended the transportation weighting in the KSEEA. The transportation weighting will be calculated based on a *per capita* allowance based on a school district's density figure, which is the area of a school district in square miles divided by the number of transported students. The bill also provided for a statutory minimum level of transportation funding; provided for *per capita* allowances based on a cost factor of 5.0 for students more than 2.5 miles away from their school (prior law provided for a cost factor of 2.8); and limited the proportion of a

school district's State Foundation Aid attributable to the transportation weighting to being no more than 110.0 percent of a school district's total transportation expenditures for the immediately preceding school year.

At-Risk and Other Weightings

SB 423 removed language that provided for a 10.0 percent minimum for the at-risk student weighting. The bill also delayed to July 1, 2020, the sunset on the provision in the high-density at-risk weighting that allows for calculation of the weighting at the school-building level.

SB 423 changed the use of the preceding year's data to use of the current year's data for the bilingual and career and technical education (CTE) weightings and repealed the July 1, 2019, sunset for the CTE weighting.