



June 14, 2019

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

The Kansas Supreme Court issued its seventh opinion in *Gannon v. State* (*Gannon VII*) on Friday, June 14, 2019. In the sixth opinion, the Court held the State had not met its burden of showing that its previous legislative response, 2018 Sub. for SB 423 and House Sub. for SB 61, met the adequacy requirement of Article 6 of the *Kansas Constitution*. Further, the Court extended the stay of the mandate voiding the school finance system to June 30, 2019, and retained jurisdiction over the case. The Legislature subsequently enacted 2019 House Sub. for SB 16. This memorandum summarizes the Supreme Court's June 14, 2019, opinion; the procedural history of *Gannon*; and 2019 House Sub. for SB 16.

*[Note: This memorandum is not intended to be a full legal analysis of the June 14, 2019, 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 Supreme Court's decision will be provided at a later date by the Revisor of Statutes.]*

### ***Gannon VII* (June 14, 2019)**

The Court held the State has shown 2019 House Sub. for SB 16 substantially complies with the *Gannon VI* mandate to make timely financial adjustments in response to the inflation-related issues identified in that decision, and the Court retained jurisdiction of the case to ensure continued implementation of the scheduled funding.

#### ***Substantial Compliance***

Prior to addressing inflation-related issues, the Court accepted the State's explanation that virtual state aid was properly considered in the *Montoy* safe harbor concept employed by the State in *Gannon VI*.

The Court noted both parties presented calculations related to school years 2017-2018 and 2018-2019 indicating the cost for inflation for those two years would combine to a total of \$99.6 million. The Court also noted, in assessing the impact of future inflation, the numbers provided by the Kansas State Department of Education (KSDE), the Legislature, and the Governor were merely good faith estimates and noted several variables add to the imprecision of those estimates, creating a sharp contrast to the timeframe in which inflation is already known.

The Court noted, for the present case, labeling remedial funds as new money or old money is of no import. Instead, the Court determined the increases in the Base Aid for Student

Excellence (BASE), and resultant increases in state aid of approximately \$90 million per year for four years, were sufficient to cover the inflationary increase of \$99.6 million for school years 2017-2018 and 2018-2019 and protect against the devaluing effects of any inflation for the duration of the period in which additional aid is phased in.

In rejecting the Plaintiffs' alternative calculation for inflation, the Court recalled its previous standard that the adequacy test for school finance rejects "any litmus test that relies on specific funding levels to reach constitutional compliance."

### *Retained Jurisdiction*

In response to the State's request that the Court should dismiss the case upon a finding of substantial compliance with the *Gannon VI* order, the Court noted the Plaintiffs' citations of the actions by the State following the end of the *Montoy* litigation and more recent legislative proposals that would have "reclaimed educational funds." The Court relied upon its inherent power to enforce its holdings to retain jurisdiction in order to ensure continued implementation of the scheduled funding.

### **Procedural History**

In November 2010, plaintiff school districts filed suit alleging the Legislature had failed to adequately fund K-12 education. Since fiscal year (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 Local Option Budget (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 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 was constitutionally inadequate as its structure and implementation were 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 was 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 did 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 was 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 the structure of 2017 SB 19 (SB 19) was 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 the “effective base” amount—including both total foundation aid and the LOB of the school districts—was sufficient to meet the inflation-adjusted cost estimates of previous cost studies.

The Court also identified inequities in 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 would 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, 2018. 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.

*Gannon VI*, issued in June 2018, found the Legislature corrected the equity issues identified in *Gannon V* and created no new constitutional infirmities. The Court held the State did not meet the adequacy requirement, determining the Legislature did not consistently implement its plan to meet a threshold for adequacy identified through an analysis of the *Montoy* litigation, specifically noting concerns related to inflation and virtual state aid. The Court again extended its stay of the mandate voiding the school finance system to June 20, 2019, or until further order of the Court, and provided guidance on how the Legislature might remedy the remaining infirmities.

**House Sub. for SB 16 (2019)**

House Sub. for SB 16 amended the Kansas School Equity and Enhancement Act (KSEEA), created law and amended statutes related to public schools, and appropriated funds to the KSDE for FY 2020 and FY 2021.

***KSEEA Amendments***

The bill made several amendments to the KSEEA, as follows.

***BASE***

The bill amended the BASE for school years 2019-2020, 2020-2021, 2021-2022, and 2022-2023. The following table shows the BASE former amount and the BASE amount under the bill.

<b>Base Aid for Student Excellence</b>			
<b>School Year</b>	<b>Former Amount</b>		<b>House Sub. for SB 16</b>
2019-2020	\$	4,302	\$ 4,436
2020-2021		4,439	4,569
2021-2022		4,576	4,706
2022-2023		4,713	4,846

### *At-risk Education Programs*

The bill requires the Kansas State Board of Education (KSBE) to identify and approve evidence-based programs provided by state-based national nonprofit organizations that:

- Focus on students who are eligible to receive at-risk program services or who face other identifiable barriers to success;
- Provide evidence-based instruction and support services to such students; and
- Evaluate outcomes data for such students, including, but not limited to, school attendance, academic progress, graduation rates, pursuit of postsecondary education, or other career advancement.

The bill defined “evidence-based instruction” to mean an education delivery system based on peer-reviewed research that consistently produces better student outcomes over a five-year period than would otherwise be achieved by the same students who are receiving at-risk program services.

### *School Finance Audits*

The bill amended the planned schedule of school finance audits to be completed by the Legislative Division of Post Audit. The bill replaced the planned cost-function performance audit in FY 2021 with an audit of school district unencumbered cash balances and moved the audit of bilingual education from FY 2022 to FY 2021. The new audit schedule is as follows:

- FY 2020: At-risk education;
- FY 2021: School district unencumbered cash balances and bilingual education;
- FY 2023: Virtual school programs; and
- FY 2024: Cost-function performance audit.

### *Accountability Reports*

The bill requires KSDE to create one-page performance accountability reports for the state, each school district, and each school building. The performance accountability reports must include information required by the federal Every Student Succeeds Act, or any successor act, and the college and career readiness metrics developed and implemented by the KSBE.

The bill requires KSDE to prepare annual longitudinal reports on student achievement on the state assessment for English language arts, mathematics, and science.

### *School District Funding Report*

The bill amended law that requires KSDE to prepare annual school funding reports. The bill requires the following to be reported:

- The virtual student full-time equivalent (FTE) enrollment in addition to the full FTE for the school district; and
- All expenditures for legal services challenging the constitutionality of the school finance system under Article 6, Section 6 of the *Kansas Constitution*, including any dues or fees paid to an organization participating in such litigation.

### *Accountability and Funding Report Publications*

The bill established uniform Internet publication requirements for all reports the law requires KSDE and school districts to publish. The bill requires KSDE to publish school district budget documents, the one-page performance accountability reports, the annual longitudinal reports on student achievement, and the school district funding report on the homepage of the KSDE website under a prominently displayed link titled “Accountability Reports.”

The bill requires school districts to publish school district budget documents and the school district funding report on the homepages of their websites under a prominently displayed link titled “Accountability Reports.” The bill also requires the school district budget documents and the school district funding report to be posted on the websites of individual schools in the school district, if such schools have separate websites.

The bill required each school district to provide a link to the KSDE webpage where the one-page performance accountability reports and longitudinal reports on student achievement are posted. The link must be prominently displayed on the school district’s accountability reports webpage.

### *ACT and WorkKeys Assessments*

The bill required the KSBE to provide the ACT college entrance exam and the three ACT WorkKeys assessments required to earn a national career readiness certificate to each student enrolled in grades 11 and 12 at no charge to the student. The bill also required KSBE to provide the PreACT college entrance exam to each student enrolled in grade 9. [Note: Sub. for SB 423 (2018) required KSDE to provide the ACT and WorkKeys assessments to students in grades 9 through 12 during FY 2019.]

### **Other Provisions**

#### *Low-income Tax-credit Scholarship Program*

The bill changed the definition of “public school” for purposes of the Low-income Student Scholarship Program from the 100 lowest performing schools to the 100 lowest performing elementary schools. The bill allowed students already receiving scholarships to continue receiving scholarships so no student would become ineligible due to the definition change.

### *Legislative Task Force on Dyslexia*

The bill extended the Legislative Task Force on Dyslexia until June 30, 2022, allowing the Task Force to meet once each year.

### *Extension of 20-mill Property Tax Levy*

The bill extended the statewide 20-mill property tax levy for schools to FY 2020 and FY 2021. The bill also extended the \$20,000 homestead exemption for the 20-mill levy for the same fiscal years.

### *School District Capital Improvements*

The bill made Capital Improvement State Aid a revenue transfer from the State General Fund (SGF) for FY 2020, FY 2021, and FY 2022. Capital Improvement State Aid had been scheduled to revert to a demand transfer from the SGF in FY 2020.

### *Methods of Public Education Financing*

The bill added Jobs for America's Graduates–Kansas (JAG-K) and Boys and Girls Clubs to Communities in Schools in KSA 72-5193, which lists methods of public education financing included in satisfying the requirements under Article 6 of the *Kansas Constitution*. [Note: Communities in Schools is a listed program under continuing law.]

### ***Appropriations***

The bill appropriated \$104.5 million, all from the SGF, for FY 2020 to KSDE. This amount included \$92.7 million for State Foundation Aid; \$10.3 million for Kansas Public Employees Retirement System (KPERS) employer contributions for school districts; and \$1.6 million for KPERS employer contributions for community colleges, technical colleges, and interlocals.

The bill also appropriated to KSDE \$114.2 million, all from the SGF, for FY 2021. This amount included \$89.7 million for State Foundation Aid; \$21.2 million for KPERS employer contributions for school districts; and \$3.3 million for KPERS employer contributions for community colleges, technical colleges, and interlocals.