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KANSAS SUPREME COURT'S FIFTH OPINION IN *GANNON V. STATE*, THIRD OPINION ON ADEQUACY

The Kansas Supreme Court issued its fifth opinion in *Gannon v. State* on Monday, October 2, 2017. In the fourth opinion, the Court held the K-12 public financing system was constitutionally inadequate and gave the Legislature an opportunity to bring the State's education financing system into compliance with Article 6, Section 6 of the *Kansas Constitution* by June 30, 2017. The Legislature subsequently enacted 2017 SB 19, which enacted the Kansas School Equity and Enhancement Act. This memorandum summarizes the Supreme Court's October 2017 opinion, the procedural history of *Gannon*, and SB 19.

Note: This memorandum is not intended to be a full legal analysis of the October 2, 2017, 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 V (October 2, 2017) – Adequacy Part 3

The Kansas Supreme Court held the State has not met its burden of showing that SB 19 meets the adequacy and equity requirements of Article 6 of the *Kansas Constitution*. In making this determination, the Court ruled the education finance system of the State has not been shown to be reasonably calculated to have all Kansas public education students meet or exceed the *Rose* standards and that the system is not providing school districts with reasonably equal access to substantially similar educational opportunity through similar tax effort.

The Court retained jurisdiction of the case and extended to June 30, 2018, the stay of its previous mandate that without a constitutionally valid school finance system the school finance system, would be void and schools would be closed. The Court also provided dates for briefing and oral arguments on legislative remedies of constitutional infirmities.

Adequacy

The Court concluded the State has failed to meet its burden of demonstrating constitutional adequacy. The Court initially noted the *Rose* standards are a minimum threshold for constitutional compliance and then rejected the claims by the Plaintiffs 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 future legislatures could refuse to fund inflationary increases to the base amount.

Next, the Court determined the overall level of funding has not been shown by the State to be adequate. The Court specifically rejected the “successful schools model” put forward by the State due to the State’s failure to demonstrate the validity of the methodology used in arriving at the funding levels. The Court also rejected the State’s claim that the “effective base” amount—including both total foundation aid and the local option budgets (LOB) of the school districts—is sufficient to meet the inflation-adjusted cost estimates of previous cost studies. The Court rejected this approach, noting the Legislative Division of Post Audit (LPA) cost study recommended increases not only with inflation, but also increases above inflation to do more than preserve the *status quo* on student performance.

Finally, the Court noted various changes made to the at-risk weighting, funding, and requirements for expenditures might be beneficial, but concluded they do not meet the State’s burden to demonstrate the school finance system is reasonably calculated to have all Kansas students meet or exceed the *Rose* standards.

Equity

The Court determined four specific elements of SB 19 exacerbate wealth-based inequities and violate the equity test that school districts must have substantially similar educational opportunity through similar tax effort.

First, the Court determined the expansion of the authorized uses of capital outlay funds results in unacceptable levels of wealth-based disparities because of the magnitude of the variance in the ability of school districts to take advantage of this new spending authority.

Second, the Court ruled differing procedures for certain districts to raise their maximum LOB violates the equity requirement because many districts are effectively denied access to the highest reaches of LOB authority while other districts are granted that access.

Third, the Court ruled SB 19’s change to using the prior year LOB in determining the amount of LOB equalization aid (LOB State Aid or Supplemental State Aid) violates the equity requirement because if a property-poor district tries to raise its LOB, it will not receive equalization aid for the first year in which it raises its LOB.

Fourth, the Court ruled SB 19 violates the equity requirement because the 10 percent floor for the at-risk weighting benefits only two school districts, and the State has not demonstrated a justification for why the use of the free lunch student proxy for at-risk weighting is inappropriate for those two districts and appropriate for all other districts.

Remedies

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 announced briefs on any legislative remedies are due by the parties by April 30, 2018, response briefs are due by May 10, and oral arguments will be conducted May 22 at 9:00 a.m.

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.

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 continued the stay of the three-judge panel’s order and its own mandate to give the Legislature an opportunity to bring the State’s education financing system into compliance with Article 6, Section 6 of the *Kansas Constitution*. The Court called for the State to satisfactorily demonstrate by June 30, 2017, that its proposed remedy is reasonably calculated to address constitutional violations identified in this opinion and comports with previously identified constitutional mandates, such as equity.

The 2017 Legislature subsequently enacted SB 19, and the Supreme Court held oral arguments on the adequacy of the legislation July 18, 2017.

2017 SB 19

Among other provisions, SB 19 makes appropriations for the Kansas Department of Education (KSDE) for FY 2018 and FY 2019; enacts the Kansas School Equity and Enhancement Act, the provisions of which are not severable and will expire July 1, 2027; and amends statutes related to Capital Improvement State Aid and capital outlay.

Kansas School Equity and Enhancement Act

The Kansas School Equity and Enhancement Act (Act) provides for State Foundation Aid (SFA) to be provided to school districts. SFA is calculated by multiplying the base aid for student excellence (BASE) by the adjusted enrollment of the district and deducting the local foundation aid of the district. The adjusted enrollment of the district is calculated by adding the weighted enrollments for at-risk students, declining enrollment, high-density at-risk students, bilingual, low enrollment, high enrollment, new school facilities, ancillary school facilities, cost of living, special education and related services, career technical education, and transportation to the enrollment of the district. The BASE is \$4,006 for school year 2017-2018, \$4,128 for school year 2018-2019, and adjusted each year thereafter according to the average percentage increase in the Consumer Price Index (CPI) for all urban consumers for the Midwest region during the three immediately preceding school years.

The Act also allows districts to adopt a local option budget (LOB) by resolution of the school board. The LOB is capped at 33.0 percent of the product of the BASE and the adjusted enrollment of the district. In any year in which the BASE is less than \$4,490, the LOB is capped at 33.0 percent of the product of \$4,490 and the adjusted enrollment of the district. Beginning in school year 2019-2020, the BASE allowed to be used to calculate LOB authority will increase based on a three-year CPI average. Any district adopting an LOB in excess of 30.0 percent will be subject to protest petition.

Enrollment

The enrollment of a district is the number of students regularly enrolled at the district on September 20 of the preceding school year. If the enrollment of the district the preceding school year decreased from enrollment in the prior year, the enrollment will be the enrollment of the district from the second preceding school year. Districts that have military students and receive federal impact aid can use the average enrollment of the three preceding school years.

Students who are not Kansas residents will be counted as 1.0 full-time equivalent (FTE) in school years 2017-2018 and 2018-2019, as 0.75 FTE in school years 2019-2020 and 2020-2021, and as 0.5 FTE in subsequent years. Out-of-state students whose parents or legal guardians are employed by the district or who were enrolled in the district during the preceding school year will continue to be counted as 1.0 FTE.

Each student enrolled in kindergarten full time will be counted as 1.0 FTE. Formerly, each kindergarten student was counted as 0.5 FTE. Any student enrolled in kindergarten in a district in the preceding school year will be counted as 1.0 FTE, regardless of actual attendance during the preceding year.

At-Risk Student Weighting

The at-risk weighted enrollment of a district is determined by multiplying the number of students eligible for free meals under the National School Lunch Act by 0.484. Any district maintaining kindergarten through 12th grade can substitute 10.0 percent of the district's enrollment multiplied by 0.484 for the purposes of this weighting. Beginning with school year 2018-2019, districts must use those funds for at-risk education programs and services contracted for to provide such programs based on programs identified and approved by KSBE as evidence-based best practices.

Bilingual Weighting

The bilingual weighted enrollment of a district is the greater of the FTE enrollment based on hours of contact in bilingual education programs multiplied by 0.395 or the number of students enrolled in bilingual programs multiplied by 0.185.

Low Enrollment Weighting

Low enrollment weighting is available to districts with fewer than 1,622 students enrolled. The weighting is calculated on a linear transition: districts with 100 or fewer students receive a weighting of approximately 101.4 percent of the enrollment of the district, and that amount transitions to approximately 3.5 percent of the enrollment of the district as the enrollment approaches 1,622 students.

High Enrollment Weighting

High enrollment weighting of approximately 3.5 percent is available to districts with more than 1,622 students.

High-Density At-Risk Weighting

If a school or school district's enrollment is at least 50.0 percent at-risk students, the school or school district receives a high-density at-risk weighting equal to 10.5 percent of the at-risk students of the district. If a school or school district's enrollment is between 35.0 percent at-risk students and 50.0 percent at-risk students, the school or school district receives a high-density at-risk weighting on a linear transition downwards from 10.5 percent of the at-risk students of the district. The high-density at-risk weighting is scheduled to expire July 1, 2019.

Beginning with school year 2018-2019, districts must use those funds on at-risk programs and instruction of students receiving at-risk program services identified and approved by the KSBE as evidence-based best practices. The KSBE will notify districts that do not spend the money on such best practices they must either spend such money on best practices or show improvement within three years of notification. Among other factors, improvement can be shown by the percentage of students at grade level or college and career ready on state math and English language arts assessments, average composite ACT scores, or the four-year graduation rate. Districts that do not spend money on best practices and fail to show improvement within five years will not qualify to receive the weighting in the succeeding school year.

Transportation Weighting

The transportation weighting of a district is determined by multiplying the district's per-student transportation cost by the number of students who reside at least 2.5 miles from the school building they attend and are provided transportation to the school building by the district. The district's per-student transportation cost is determined using the curve of best fit of a density-cost graph of the index of density of all districts in the state. A four-year grandfather clause applies to districts that receive less funding pursuant to the transportation weighting than they did during the 2016-2017 school year.

Career Technical Education Weighting

The career technical education weighting of a district is determined by multiplying the FTE enrollment in approved career technical education programs by 50.0 percent. This weighting is scheduled to sunset July 1, 2019. The bill directs KSDE to study the costs of career technical education programs and report its findings on or before January 15, 2018.

New School Facilities Weighting

The new school facilities weighting of a district is determined by multiplying the number of students enrolled in a new school facility by 25.0 percent. A new school facility is a school facility in its first two years of operation that was financed primarily with bonds approved at an election held on or before July 1, 2015.

Cost-of-Living Weighting

The bill allows districts in which the average appraised value of a single-family residence is more than 25.0 percent higher than the statewide average value to apply for additional funding from the KSBE in an amount not to exceed 0.05 percent of the district's foundation aid. The district must have an LOB of 31.0 percent, and the school board must pass and publish a resolution authorizing the levy. The entirety of this weighting is financed by local property taxes.

Ancillary School Facilities Weighting

A district can apply to the State Board of Tax Appeals (BOTA) for authority to levy local property taxes for the purpose of financing costs attributable to commencing the operation of a new school facility that is in excess of the amount financed by any other source. The amount to be levied for this weighting is reduced over a period not to exceed six years. The entirety of this weighting is financed by local property taxes.

Declining Enrollment Weighting

The declining enrollment weighting is available to districts that have lost revenues due to the declining enrollment of the district. The district must apply to the BOTA for authority to receive this weighting, and the weighting is capped at 5.0 percent of the general fund budget of the district. In school year 2017-2018, a district can receive declining enrollment weighting equal to half the amount the district generated pursuant to the weighting in school year 2007-2008. The entirety of this weighting is financed by local property taxes. The declining enrollment weighting is scheduled to expire July 1, 2018.

Special Education and Related Services Weighting

The special education and related services weighting is calculated by dividing the total state aid payments made to a district for special education and related services by the BASE.

Local Foundation Aid

Local Foundation Aid includes the unencumbered balance of a district's general fund, certain grants received by a district, special education and related services aid, any tuition for non-resident pupils of a district, and 70.0 percent of the federal impact aid a district received. These categories were commonly referred to as "local effort" under prior law.

Reauthorization of the 20-Mill Levy

The bill reauthorizes the statewide 20-mill school finance levy for school years 2017-2018 and 2018-2019. The first \$20,000 of assessed valuation of residential properties will continue to be exempt from this levy.

Supplemental State Aid

Supplemental State Aid is paid to any district that has adopted a LOB. The amount of aid a district is eligible to receive is determined by multiplying the district's local foundation budget by an equalization factor that equalizes all districts below the 81.2 percentile of assessed valuation per pupil (AVPP) up to that percentile. For school year 2017-2018, the AVPP used is that of the immediately preceding school year. For school year 2018-2019, the AVPP used is an average of the AVPPs of the three immediately preceding school years.

Capital Outlay Changes

The bill allows capital outlay funds to be used for utility expenses and property and casualty insurance. Additionally, the bill allows capital outlay funds to be used for construction, reconstruction, repair, remodeling, additions to, furnishing, maintaining, and equipping computer software, performance uniforms, building sites, school buses, and other fixed assets. The law already allowed for acquisition of these items using capital outlay funds.

Beginning in school year 2017-2018, any new property tax exemptions granted by BOTAs for property financed by industrial revenue bonds or for economic development purposes pursuant to Article 11, Section 13 of the *Kansas Constitution*, for which the public hearing was not held prior to May 1, 2017, will no longer apply to the capital outlay mill levy. Previously exempted property will continue to be eligible for exemption from the levy.

Beginning July 1, 2017, districts will receive the revenue generated by the capital outlay mill levy on the incremental valuation growth in newly created Neighborhood Revitalization Areas.

Capital Improvement Changes

For all bond issuances approved at an election on or after July 1, 2017, any district with an enrollment of less than 260 students must receive approval from KSBE prior to holding an election to approve the issuance of bonds to be eligible for Capital Improvement State Aid.

In determining the amount of payments a district is obligated to make for bond issuances approved at an election on or after July 1, 2017, KSBE will exclude payments for any capital improvement project, or portion thereof, that proposes to construct, reconstruct, or remodel a facility used primarily for extracurricular activities, unless a State Fire Marshal report, inspection under the Americans with Disabilities Act, or other similar evaluation demonstrates the project is necessary due to concerns relating to safety or disability access.

Additionally, beginning July 1, 2017, in each fiscal year, KSBE can approve for election bond issuances exceeding 14.0 percent of the district's assessed valuation for the election only to the extent of the aggregate amount of bonds retired by districts in the state in the preceding year. A district that has not passed a bond election in the past 25 years is not subject to this limitation.

Appropriations

The bill provides \$1.991 billion in general state aid from the State General Fund (SGF) for FY 2018 and \$2.047 billion in general state aid from the SGF for FY 2019. For FY 2018,

\$480.9 million of supplemental general state aid is appropriated from the SGF, and for FY 2019, \$486.1 million of supplemental general state aid is appropriated from the SGF. Appropriations are also made for KSDE operations, special education state aid, and KPERS employer contributions for districts from the SGF for both fiscal years.