

KANSAS OFFICE of
REVISOR of STATUTES

LEGISLATURE of THE STATE of KANSAS
Legislative Attorneys transforming ideas into legislation.

300 SW TENTH AVENUE ■ SUITE 24-E ■ TOPEKA, KS 66612 ■ (785) 296-2321

**Comprehensive Analysis of the Kansas Supreme Court Opinion in
Gannon v. State, issued February 11, 2016**

Gordon L. Self, Revisor of Statutes
Tamera Lawrence and Nick Myers, Assistant Revisors of Statutes

February 25, 2016

On February 11, 2016, the Kansas Supreme Court (Court) issued its opinion in *Gannon v. State*, Case No. 113,267 (*Gannon II*). This is the Court's second opinion in the *Gannon* litigation regarding the constitutionality of the school funding provisions enacted by the Legislature. On July 24, 2015, the Court stated that the equity and adequacy issues were in different stages of the litigation and that it "recognized the need for an expedited decision on the equity portion of the case."¹ The Court then separated the two issues of adequacy and equity and required the parties to brief and argue the issues separately beginning with equity.² The Court heard oral arguments regarding equity on November 6, 2015 and released the *Gannon II* equity opinion on February 11, 2016. This memorandum provides a comprehensive summary and analysis of the findings, conclusions and orders of the Court's equity opinion in *Gannon II*.

In *Gannon II*, the Court held that the district court Panel (Panel) had authority to review House Substitute for Senate Bill 7 (SB 7) beyond whether SB 7 simply complied the Court's prior equity orders set forth in the first *Gannon v. State* opinion (*Gannon I*)³ issued by the Court.⁴ The Court then clarified that the State ultimately has the burden to prove compliance with the *Gannon* orders because the party asserting compliance with court-ordered remedial action bears the burden of proof of establishing such compliance.⁵ The Court held that the State failed to show sufficient evidence that it complied with the Court's prior equity orders set forth in *Gannon I* and found that the amended supplemental general state aid and capital outlay state aid formulas failed to cure the unconstitutional wealth-based disparities in fiscal year 2015.⁶ The Court also held that because SB

¹ *Gannon v. State*, No. 113,267 (Kan. Sup. Ct. July 24, 2015).

² *Id.*

³ *Gannon v. State*, 298 Kan. 1107 (2014) (*Gannon I*).

⁴ *Gannon v. State*, No. 113,267 at 26 (Kan. Sup. Ct. February 11, 2016) (*Gannon II*).

⁵ *Id.* at 34.

⁶ *Id.* at 56.

7 froze such inequities for fiscal years 2016 and 2017, such unconstitutional inequities carry forward in those fiscal years.⁷ The Court stated that the State's evidence did not show that the changes in the formulas provided students with "reasonably equal access to substantially similar educational opportunity through similar tax effort."⁸

This memorandum will provide a comprehensive analysis and summary regarding: (1) The dismissal of certain state officials joined as defendants; (2) the Panel's authority to review SB 7; (3) the Panel's opinion concluding that the State failed to cure the inequities affirmed to exist in *Gannon I*; (4) the Plaintiff's claim for attorney fees; and (5) the Panel's remedy from June 26, 2015, and the Court's own remedy. A detailed history of the *Gannon* litigation and the events that led to the *Gannon II* decision follows the comprehensive analysis and summary of *Gannon II*.

GANNON II (FEBRUARY 11, 2016)

1. Dismissal of Certain State Officials Joined as Defendants

In the March 16, 2015, order, the Panel directed Plaintiffs to join the Director of Accounts and Reports in the Department of Administration and the Kansas State Treasurer as additional defendants in the case.⁹ Plaintiffs subsequently filed an amended petition to join Ron Estes, State Treasurer, and, Jim Clark, the Secretary of Administration, because the position of Director of Accounts and Reports no longer existed within the Department of Administration.

The Court found that the Panel's order to add Estes and Clark as additional defendants was unnecessary and ordered that Estes and Clark should be dismissed as parties to the litigation.¹⁰ In finding that the joinder of Estes and Clark was unnecessary, the Court analyzed whether complete relief could be granted among the existing parties without Estes and Clark.¹¹ The Court stated that these state officials could ultimately be bound by an injunction against the State whether such officials were parties to the litigation or not and, if such state official refused to comply with a

⁷ *Id.*

⁸ *Id.* at 44.

⁹ *Gannon v. State*, 2010CV1569 (Shawnee Co. Dist. Ct. Mar. 13, 2015). The Panel also directed Plaintiffs to join the Secretary of State and the Revisor of Statutes in their official and individual capacities but five days later the Panel modified this order and withdrew its directive for Plaintiffs to join the Secretary of State and the Revisor of Statutes as defendants.

¹⁰ *Gannon II*, at 24.

¹¹ *Id.* See K.S.A. 2015 Supp. 60-219(a)(1)(A) requiring joinder of a party if in "that person's absence, the court cannot accord complete relief among existing parties."

court order, the state official could be subject to a civil contempt proceeding.¹² Therefore, the Court dismissed Estes and Clark concluding that complete relief could be granted to the Plaintiffs without Estes and Clark as parties in the litigation.¹³

2. The Panel's Authority to Review SB 7

In the Panel's order issued June 26, 2015, the Panel found that the State failed to comply with the *Gannon I* orders and held that the supplemental general state aid and capital outlay state aid formulas as amended by SB 7 were unconstitutional. The State argued that the Panel lacked authority to consider SB 7 beyond its application to fiscal year 2015 and that the Panel only had authority to "evaluate and declare whether SB 7 substantially complied with *Gannon's* mandate as it concerned equity."¹⁴ The State also argued that the new school finance formula created by SB 7 represented a substantial shift in the financing of K-12 education such that the school finance formula at issue in *Gannon* was so fundamentally altered that it no longer exists.¹⁵

The Court concluded that the Panel did not exceed its authority by reviewing SB 7 beyond fiscal year 2015 for compliance with the equity requirement of Art. 6 § 6(b).¹⁶ In reaching this conclusion, the Court found that the State's arguments ignored the Court's guidance issued in *Gannon I*.¹⁷ The Court stated that such guidance clearly intended to grant the Panel broad authority to review future legislation and specifically directed the Panel to review any Legislative action that was taken in response to *Gannon I* for constitutional compliance.¹⁸ The Court also found that SB 7 was not a substantial shift from the school district finance and quality performance act (SDFQPA) because SB 7 essentially froze the funding under the SDFQPA, including the capital outlay state

¹² *Gannon II*, at 24.

¹³ *Id.*

¹⁴ *Id.* at 29.

¹⁵ *Id.* at 31.

¹⁶ *Id.* at 32.

¹⁷ *Id.* at 28-30. The Court in *Gannon I* issued guidance to Panel to determine whether Legislature has cured the inequities in the capital outlay state aid and supplemental general state aid funding. The Court's guidance consisted of four directives to the Panel regarding supplemental general state aid and four directives to the Panel regarding capital outlay state aid. The four directives upon each equalization formula were similar: Option (a) provided that if the Legislature provides full funding, the Panel need not take any additional action; Option (b) provided that if the Legislature acts to cure with less than full restoration of funding, the Panel must apply the equity test to determine whether such action cures the inequities; Option (c) provided that if the Legislature takes no action to cure, the Panel should enter appropriate orders to cure; Option (d) provided that the Panel must ultimately ensure that the present inequities in the equalization formulas are cured.

¹⁸ *Id.*

aid and supplemental general state aid, at fiscal year 2015 levels.¹⁹ In sum, the Court stated that SB 7 was "a mere extension of the fiscal year 2015 funding system."²⁰

3. The State Failed to Cure the Constitutional Inequities Found to Exist in *Gannon I*

In the Panel's order issued on June 26, 2015, the Panel concluded that the Legislature did not comply with the *Gannon I* order to cure the present inequities in the school finance system. The Panel also held that the Legislature, through SB 7, continued such unconstitutional inequities into the next two fiscal years.

*The State has the Burden of Proof to Show Compliance with *Gannon I**

The State argued that any prospective application of SB 7, beyond the State's compliance with *Gannon I* in fiscal year 2015, should be entitled to a presumption of constitutionality and the burden of proof should be on the Plaintiffs to demonstrate otherwise.²¹ The burden of proof is a legal term of art used to distinguish which party to a lawsuit has the initial obligation to provide sufficient evidence to show all the facts necessary to prove a claim. The Court found that the State made a similar argument in the remedial phase of *Montoy III*.²² The *Montoy III* Court rejected the State's argument stating that, although the presumption of constitutionality normally applies to Legislative enactments, the presumption of constitutionality does not apply to Legislative remedies that are done in response to a court order.²³ The Court followed the precedent from *Montoy III* and restated the general rule that "a party asserting compliance with a court decision ordering remedial action bears the burden of establishing that compliance."²⁴

The Court held that the burden of proof is on the State and that no presumption of constitutionality applies to SB 7 in the remedial phase of this litigation.²⁵ Therefore, until the remedial phase of this litigation has ended, the Court will expect the State to show how any remedial action the Legislature takes in response to *Gannon II* meets the constitutional standard for equity.

¹⁹ *Id.* at 32.

²⁰ *Id.*

²¹ *Id.* at 33.

²² *Id.* at 34.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

The Panel Applied the Proper Equity Test

In *Gannon I*, the Court cautioned the Panel against applying a zero-tolerance equity test when reviewing any remedial actions.²⁶ The *Gannon I* Court also directed the Panel to evaluate whether the Legislature made the wealth-based disparity constitutionally acceptable and not whether the Legislature restored equity funding to prior levels.²⁷ Accordingly, the *Gannon I* Court acknowledged that the State could cure the inequities in multiple ways and that one of such ways would be to fully fund the equalization formulas as provided in the SDFQPA.²⁸ The State argued that the Panel failed to adhere to the *Gannon I* Court's directives and failed to apply the proper equity test and instead, applied a zero-tolerance test and rendered unconstitutional anything below full funding of the prior equalization formulas.²⁹

The Court found that the Panel referred back to the *Gannon I* equity guidelines multiple times.³⁰ In *Gannon I*, the Court provided a set of four guidelines upon each equalization formula that instructed the Panel how it should evaluate any subsequent remedial action by the Legislature for constitutional compliance.³¹ The Court noted that at the end of the hearing on June 11, 2015, the Panel stated that it applied the equity test under "Option A" of the *Gannon I* order because Senate Substitute for House Bill No. 2506 (HB 2506) purported to provide full funding of the supplemental general state aid and capital outlay state aid formulas as they existed prior to SB 7.³² When the Panel later retracted its finding of full funding in early 2015, the Panel stated that it would now apply the equity test under "Option B" of the *Gannon I* order.³³ The Court held that because of these actions and because "the Panel quoted the language of the *Gannon I* equity test several times," the Court must presume that the Panel applied the correct equity test.³⁴

The State Failed to Show that it Cured the Capital Outlay Inequities for FY 2015

In its June 26, 2015, order, the Panel held that the amended capital outlay state aid formula in SB 7 failed to cure the wealth-based disparity in fiscal year 2015 and failed to comply with *Gannon I* because it reduced the total capital outlay state aid funding for those lower property

²⁶ *Id.* at 36.

²⁷ *Id.*

²⁸ *Id.* at 37.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 28-29.

³² *Id.* at 37.

³³ *Id.*

³⁴ *Id.* at 37-38.

wealth districts and left the districts with higher property wealth untouched.³⁵ The State contended that it cured the inequities because school districts received millions more dollars in capital outlay state aid than they had in previous years.³⁶

According to the Court, the evidence showed that the capital outlay formula as amended by SB 7 is structurally less equitable because it provides less capital outlay state aid than the previous formula would have provided.³⁷ As a result, the wealthier districts lost nothing and "every district entitled to capital outlay state aid suffered a loss . . . and 28 districts lost their entire amount."³⁸ The Court concluded that there is a remaining disparity between the districts entitled to capital outlay state aid and wealthier districts.³⁹ But, the Court stated that equity still must be measured by whether the Legislature's actions resulted in "reasonably equal access to substantially similar educational opportunity through similar tax effort."⁴⁰

The State argued that it was justified in altering the capital outlay formula to bring the amount of capital outlay state aid closer to the Legislature's financial expectations because there was no evidence showing the school districts' need for capital outlay state aid increased.⁴¹ The Court expressed disapproval with the Legislature changing the formula in the middle of the fiscal year. The Court stated that substantial competent evidence in the record shows that districts' need for capital outlay funds increased as districts budgeted for the fiscal year and raised their mill levies. The Court noted that districts were entitled by statute to levy up to 8 mills for capital outlay expenses pursuant to K.S.A. 2014 Supp. 72-8801 and many districts budgeted for capital outlay expenses and increased their mill levies expecting equalization revenue in fiscal year 2015 to enhance educational opportunities within the district.⁴² The Court found that the Panel reasonably inferred that the needs of district did not vanish after SB 7 was passed and that only "those less-wealthy districts would have to cut their budgets, raise their mill levy, or divert funds from other sources to pay for their educational needs resulting in a denial of reasonably equal access to substantially similar educational opportunities through similar tax effort."⁴³

³⁵ *Id.* at 40.

³⁶ *Id.* at 41.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 42.

⁴⁰ *Id.*

⁴¹ *Id.* 42-43.

⁴² *Id.*

⁴³ *Id.*

The Court refuted the State's argument that the districts' need for capital outlay did not increase and pronounced that "equity is not a needs-based determination."⁴⁴ The Court stated that "equity is triggered when the Legislature bestows revenue raising authority upon school districts through a source whose value varies widely from district to district."⁴⁵

The Court noted that the Plaintiffs provided evidence upon the equity issue even though they had no burden to show that the State failed to cure the wealth-based disparity from *Gannon I*.⁴⁶ Plaintiffs presented testimony that SB 7 negatively impacted a Plaintiff school district due to the reduced capital outlay state aid funding.⁴⁷ Plaintiffs also presented evidence that districts entitled to capital outlay state aid would ultimately receive less funding under the capital outlay state aid formula as amended by SB 7 and that wealthier districts with no state aid entitlement remained unaffected.⁴⁸

The Court analyzed whether the State presented sufficient evidence to show compliance with the *Gannon I* order for capital outlay state aid.⁴⁹ At oral argument, the State presented evidence showing a spreadsheet of the distributions of capital outlay state aid to school districts and that more total money was provided to equalize capital outlay state aid than was provided prior to SB 7.⁵⁰ The Court rejected the State's argument because the State's evidence showing an increase in total equalization funding "may have reduced dollar disparities between districts compared to the previous fiscal year but only because the State had completely eliminated funding for capital outlay state aid beginning in fiscal year 2010."⁵¹

Accordingly, the Court held that the State's evidence failed to show how the total increase in capital outlay state aid "provided students in districts entitled to capital outlay state aid with reasonably equal access to substantially similar educational opportunity through similar tax effort."⁵² Therefore, the Court concluded that "the State failed to carry its burden to show its alterations to the capital outlay state aid formula for fiscal year 2015 cured the unconstitutional wealth based disparity affirmed to exist in *Gannon I*."⁵³

⁴⁴ *Id.*

⁴⁵ *Id.* at 44.

⁴⁶ *Id.* at 44-45.

⁴⁷ *Id.* at 45.

⁴⁸ *Id.*

⁴⁹ *Id.* at 44.

⁵⁰ *Id.*

⁵¹ *Id.* at 41.

⁵² *Id.* at 44.

⁵³ *Id.*

The Capital Outlay State Aid Inequities Persist into Fiscal Years 2016 and 2017

The Panel held that, because SB 7 froze the inequities present in the capital outlay state aid formula and carried such inequities forward for the next two years, the capital outlay state aid funding in fiscal years 2016 and 2017 failed to comply with the constitutional standard for equity.⁵⁴ In affirming the Panel's decision, the Court noted that under SB 7 districts are still authorized to levy up to 8 mills for capital outlay but districts that qualify for aid are still only entitled to the same amount of capital outlay state aid such school district received for fiscal year 2015.⁵⁵ The Court found that under this formula, a qualifying district would not receive any additional aid in subsequent years even if the district raises its capital outlay mill levy or property values increase in the district.⁵⁶

The Court again rejected the State's argument that SB 7 only resulted in a minimal change in state aid.⁵⁷ In rejecting this argument, the Court found that the Panel was not focused on the amount of funding lost by districts, but was focused on the fact that only property poor districts were affected by the losses.⁵⁸ The Court held, that even though data for fiscal years 2016 and 2017 was not yet available to the Panel, "the Panel reasonably inferred that by freezing that already inequitable funding and carrying it into the next 2 fiscal years, the equity test has not been met for those years either."⁵⁹

The State Failed to Show that it Cured the Supplemental General State Aid Inequities for FY 2015

The Panel held that the State failed to comply with the *Gannon I* order because the revised supplemental general state aid formula in SB 7 reduced the amount of money less wealthy districts would have been entitled to receive, which left an unconstitutional wealth-based disparity between wealthy districts and the districts entitled to such aid.⁶⁰ The State argued that SB 7 only marginally reduced the amount of funds that would have been due under the old formula and that the total amount of supplemental general state aid provided in fiscal year 2015 was greater than the funding in previous years.⁶¹

⁵⁴ *Id.* at 57.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 58.

⁵⁸ *Id.*

⁵⁹ *Id.* at 59.

⁶⁰ *Id.* at 49-50.

⁶¹ *Id.* at 50.

The Court noted that local tax efforts became more similar after the Legislature provided the \$109 million dollar increase for supplemental general state aid in HB 2506.⁶² But the Court found that the new formula still deprived certain districts of expected supplemental general state aid funds while allowing other districts to remain the same which "made it more difficult for aid-receiving districts to provide substantially similar educational opportunities through tax efforts similar to their wealthier counterparts."⁶³

The State claimed that regardless of the decrease in supplemental general state aid between what was expected under the prior formula and what SB 7 provided, there was no evidence showing that the need for state aid increased.⁶⁴ Instead, the State contended that the additional aid that would have been required under the prior formula was artificially inflated due to a temporary spike in assessed valuation per pupil (AVPP) at the 81.2 percentile.⁶⁵ The Court noted that it was undisputed that rising property values caused an increase in the amount of supplemental general state aid due under the previous formula.⁶⁶ Still, the State has always been aware that property valuations have historically fluctuated up and down, which changes the requisite amount of state aid due.⁶⁷

The Court again expressed disapproval with amending an equalization formula in the middle of the fiscal year. The Court noted that districts assess their needs, adopt a budget and adopt a local option budget (LOB) at a certain percentage to fund all needs for the fiscal year.⁶⁸ As such, a wealthy district receiving no supplemental general state aid would have received all of the LOB funds from its local mill levy to address its needs while a district that is entitled to supplemental general state aid would have lost LOB funding.⁶⁹ These less-wealthy districts, with three months left in the fiscal year, would have been forced to reassess their needs and cut their budgets or divert funds from other sources to cover the losses.⁷⁰

As with capital outlay, the Court reasserted that equity is not a needs-based determination.⁷¹ Instead, the Court found that "fluctuating AVPPs substantially impact equity

⁶² *Id.* at 51.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 52.

⁶⁸ *Id.* at 54.

⁶⁹ *Id.*

⁷⁰ *Id.* at 53-54.

⁷¹ *Id.* at 54.

when the Legislature grants school districts revenue-raising authority via a local property tax."⁷²

The Court stated that, in order to keep districts with lower property wealth at the 81.2 percentile level, supplemental general state aid must increase if the AVPP at the 81.2 percentile increases.⁷³

The Court held that by not providing this increased aid, the districts below the 81.2 percentile have dropped even further from the wealthier districts.⁷⁴

The Court found that Plaintiffs provided ample evidence to show that the State failed to cure the inequities identified in *Gannon I* even though the Plaintiffs had no burden to provide any evidence in the remedial phase of the litigation.⁷⁵ The Plaintiffs presented evidence that one of the Plaintiff school districts was forced to make budget cuts due to the reduction of supplemental general state aid in fiscal year 2015.⁷⁶ Plaintiffs also presented evidence that each district below the 81.2 percentile would receive less supplemental general state aid in fiscal year 2015 than they would have received under the previous formula and that the districts above the 81.2 percentile would be unaffected.⁷⁷

The Court acknowledged that absolute equality of funding among districts is not necessary, but found that by reducing the supplemental general state aid entitlements, the Legislature has widened the disparity between those districts with higher property wealth and districts with lower property wealth.⁷⁸ Therefore, the Court found that the State failed to carry its burden to show that it cured the inequities by failing to show that "districts had reasonably equal access to substantially similar educational opportunity through similar tax effort in fiscal year 2015."⁷⁹

The Supplemental General State Aid Inequities Persist into Fiscal Years 2016 and 2017

The Panel found that the Legislature reduced the amount of supplemental general state aid in fiscal year 2015 and froze such reduction for fiscal years 2016 and 2017.⁸⁰ The Panel held that the disparity found in fiscal year 2015 would continue into the next two fiscal years and would likely be worsened because tax-wealthy districts could increase their LOB authority and receive what such districts would have expected to receive prior to fiscal year 2015, but those districts

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 55.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 56.

⁸⁰ *Id.* at 60.

entitled to state aid would be burdened by increased and unsubsidized taxation in order to expand budget choices.⁸¹

The Court again rejected the State's argument that the decrease of supplemental general state aid funds was relatively minimal.⁸² The Court found that the "Panel made a reasonable inference that districts with 'no need for such aid are able to generate sufficient tax revenues with less tax levy while those needing such aid will require a greater tax levy to just stay even.'"⁸³ As such, the Court held that the freezing of supplemental general state aid at 2015 levels, which have already been deemed unconstitutional, only continued the unconstitutional supplemental general state aid disparities into fiscal year 2016 and 2017.⁸⁴ Moreover, the Court held that the Legislature's failure to provide additional aid to certain districts that increased their LOB before July 1, 2015, further exacerbates wealth based disparities between districts.⁸⁵

4. Attorney Fees

The Plaintiffs requested attorney fees during the initial litigation phase of *Gannon*. Such request was denied by the Panel in the first Panel opinion. In *Gannon I*, the Court affirmed the Panel's decision to deny the Plaintiffs' request for attorney fees. In *Gannon II*, the Plaintiffs again requested attorney fees.⁸⁶ The Court found that Plaintiffs failed to make a claim for attorney fees with the Panel on remand and that "matters not raised before the district court cannot be raised for the first time on appeal."⁸⁷ Accordingly, the Court stated that "this request is procedurally deficient and must be denied."

5. Remedies

In its June 26, 2015, order, the Panel entered a series of remedial orders on equity after finding that the Legislature failed to cure the inequities in *Gannon I*.⁸⁸ The Panel issued specific orders regarding capital outlay state aid and supplemental general state aid that would have

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 61.

⁸⁴ *Id.* at 61-62.

⁸⁵ *Id.* at 62.

⁸⁶ *Id.*

⁸⁷ *Id.* (citing *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375 at 403 (2011)).

⁸⁸ *Id.*

revived, reinstated and fully funded such formulas as each formula existed prior to SB 7.⁸⁹ On July 30, 2015, the Court stayed the Panel's remedial orders until further notice from the Court.

Courts have the Power to Enforce their Rulings

The Court analyzed the judiciary's power to review and impose remedies. In the Court's analysis, it affirmed the judiciary's power and duty to review Legislative enactments for constitutional compliance and to enforce its holdings.⁹⁰ Also, the Court reaffirmed the Legislature's constitutional duty to create a school funding system that complies with Article 6 §6(b).⁹¹

The Court stated it had previously recognized that "Constitutions are the work, not of Legislatures or of the courts, but of the people."⁹² Courts "must obey the will of the people as expressed in their constitution."⁹³ The judiciary has the power to review the law and determine its constitutionality, but this power is not limited to review. It also includes the "inherent power to enforce" the court's rulings.⁹⁴ To support its conclusion, the Court cited to several other state supreme court rulings that recognized the power to review public school funding systems for constitutionality and to order remedies in such cases.⁹⁵

Actual Remedies

The Court affirmed the Panel's holding that SB 7 fails to cure the inequities affirmed in *Gannon I*.⁹⁶ The Court then determined that the Legislature should be given an opportunity to develop a constitutional school funding system, and accordingly declined to affirm the Panel's orders or address the parties' specific arguments regarding such orders.⁹⁷ As a result, the Court continued the stay of the Panel's orders stating that such stay "remains in effect until further determination" by the Court.⁹⁸

The Court stated that the "constitutional infirmities 'can be cured in a variety of ways—at the choice of the Legislature."⁹⁹ However, the Court suggested the Legislature could comply with Article 6 §6 of the Constitution of the state of Kansas if the Legislature were to "revive the

⁸⁹ *Id.* at 65-67.

⁹⁰ *Id.* at 64.

⁹¹ *Id.*

⁹² *Id.* (quoting *Anderson v. Cloud County*, 77 Kan. 721 at 732 (1908)).

⁹³ *Id.* at 65.

⁹⁴ *Id.* at 67.

⁹⁵ *Id.* at 68-70.

⁹⁶ *Id.* at 71.

⁹⁷ *Id.*

⁹⁸ *Id.* at 72.

⁹⁹ *Id.* at 73 (quoting *Gannon I* at 1181).

relevant portions of the previous school funding system and fully fund them within the current block grant system."¹⁰⁰ The Court went on to say that if the Legislature rejects this solution, "any other funding system it enacts must be demonstrated to be capable of meeting the equity requirements of Article 6—while not running afoul of the adequacy requirement."¹⁰¹ The Court also suggested the State should demonstrate how any other proposed solution enacted by the Legislature complies with *Gannon I.*¹⁰²

The Court held that "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."¹⁰³ Without a constitutionally equitable school finance system, Kansas public schools will not be able to operate beyond June 30, 2016.¹⁰⁴ Any effort to implement a constitutionally invalid system can be enjoined by the courts.¹⁰⁵ The Court acknowledged that the Legislature's work to find a constitutionally equitable system creates uncertainty for school districts and could potentially disrupt the operation of public schools, but noted that the Court must heed its "duty to ensure Kansas students receive the education system guaranteed them by the Constitution" and any disruptions to the educational process will be because "the demands of the Constitution cannot be further postponed."¹⁰⁶

The Court indicated that the Legislature will ultimately determine whether the "schoolhouse doors will be open" for school year 2016-2017 and that "the sooner the Legislature establishes a constitutional funding system, the sooner this case can be dismissed."¹⁰⁷ The Court believes that the Legislature can reach constitutional compliance by June 30, 2016, because the Legislature has previously shown its "commitment and capability" by passing remedial legislation weeks after *Gannon I* during the 2014 Legislative session.¹⁰⁸

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 74

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 75.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 75-76.

The Court stayed its own mandate to "give the Legislature a second, and substantial, opportunity to craft a constitutionally suitable solution and minimize the threat of disruptions of funding for education."¹⁰⁹ The Court found this remedy consistent with school finance litigation in other states.¹¹⁰ The Court maintained that it does not want to be a supervisor of the Kansas school funding system, but reiterated that it has a duty to the people of Kansas under their constitution to review the Legislature's enactments and ensure its compliance with Article 6.¹¹¹ Rather than sending the case back to the Panel as the Court did in *Gannon I*, the Court retained jurisdiction over the case through June 30, 2016, to review possible remedial action by the Legislature.¹¹² Finally, the Court also stayed the adequacy portion of the appeal meaning no further action will be taken upon the adequacy issues until further notice from the Court.¹¹³

HISTORY OF THE GANNON LITIGATION

In January 2010, the *Montoy* Plaintiffs filed a motion with the Court requesting *Montoy* be reopened to determine if the State was in compliance with the Court's prior orders in that case. This was done in response to reductions in the amount of base state aid per pupil (BSAPP) appropriated for fiscal year 2010 and reductions in funding for capital outlay state aid and supplemental general state aid. The Court denied this motion, which led to the filing of *Gannon*.¹¹⁴

The new lawsuit was filed in November 2010 by various Plaintiffs and contained several claims.¹¹⁵ Those claims included an allegation that the State violated Article 6, §6(b) by failing to provide a suitable education to all Kansas students, that the failure to make capital outlay state aid payments created an inequitable and unconstitutional distribution of funds, that Plaintiffs were denied equal protection under both the 14th Amendment to the U.S. Constitution and Sections 1 and 2 of the Kansas Bill of Rights, and that Plaintiffs were denied substantive due process under Section 18 of the Kansas Bill of Rights.¹¹⁶

First District Court Panel Decision (Jan. 11, 2013)

¹⁰⁹ *Id.* at 74.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 76.

¹¹² *Id.* at 77.

¹¹³ *Id.*

¹¹⁴ *Gannon I*, 298 Kan. 1107, 1115 (2014).

¹¹⁵ Currently, the Plaintiffs consist of four school districts (U.S.D. No. 259, Wichita; U.S.D. No. 308, Hutchinson; U.S.D. No. 443, Dodge City; and U.S.D. No. 500, Kansas City).

¹¹⁶ *Gannon I*, at 1116-1117.

The Panel rejected the Plaintiffs' claims of equal protection and substantive due process violations.¹¹⁷ However, the Panel held that the State had violated Article 6, §6(b) by inadequately funding the Plaintiff school districts under the SDFQPA.¹¹⁸ It also held that both the withholding of capital outlay state aid payments and the proration of supplemental general state aid payments created unconstitutional wealth-based disparities among school districts.¹¹⁹ As part of its order, the Panel imposed a number of injunctions against the State which were designed to require a BSAPP amount of \$4,492, and fully fund capital outlay state aid payments and supplemental general state aid payments.¹²⁰

All parties appealed the Panel's decision. The State appealed both the Panel's holdings as to the constitutionality of the State's duty to make suitable provision for finance of the educational interests of the state and the Panel's remedies. The Plaintiffs appealed the Panel's reliance on the BSAPP amount of \$4,492, arguing that cost studies indicated the BSAPP amount should be greater than \$4,492. At the request of the State, two days of mediation were conducted in April 2013, but those efforts were unsuccessful.¹²¹ In October 2013, the Kansas Supreme Court heard oral arguments from both sides.

Kansas Supreme Court Decision—Gannon I (Mar. 7, 2014)

On March 7, 2014, the Court reaffirmed that Article 6 of the Constitution of the State of Kansas contains both an adequacy component and an equity component with respect to determining whether the Legislature has met its constitutional obligation to "make suitable provision for finance of the educational interests of the state."¹²² First, the Court stated that the adequacy component test is satisfied "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 [v. Council for Better Educ., Inc.]*, 790 S.W.2d 186 (Ky. 1989)] and presently codified in K.S.A. 2013 Supp. 72-1127."¹²³ The Court then remanded the case back to the Panel with directions to apply the newly established adequacy test to the facts of the case.

¹¹⁷ *Id.* at 1117-1118.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1116.

¹²⁰ *Id.* at 1118.

¹²¹ *Id.*

¹²² *Id.* at 1163; *see also*, Kan. Const. art. 6 § 6(b).

¹²³ *Id.* at 1170 (citing *Rose*, 790 S.W.2d at 212).

Second, the Court also established a new test for determining whether the Legislature's provision for school finance is equitable: "School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort."¹²⁴ The Court applied the newly established equity test to the existing funding levels for both capital outlay state aid and supplemental general state aid, and found both were unconstitutional under the test. Based on these findings, the Court directed the Panel to enforce its equity rulings and provided guidance as to how to carry out such enforcement.

In response to the Court's decision, the Legislature passed HB 2506, which became law on May 1, 2014. First, the bill codified the *Rose* standards at K.S.A. 2014 Supp. 72-1127, which provides the educational capacities each child should attain from the subjects and areas of instruction designed by the Kansas State Board of Education.¹²⁵ Second, the bill appropriated an additional \$109.3 million for supplemental general state aid and transferred \$25.2 million from the state general fund to the capital outlay fund.¹²⁶

At a hearing on June 11, 2014, the Panel was provided estimates from the Kansas Department of Education about the additional appropriations in HB 2506. Based on such estimations, the Panel determined that HB 2506 fully funded capital outlay state aid and supplemental general state aid and complied with the Court's equity judgment.¹²⁷ The Panel did not dismiss the equity issue despite stating that no further action was necessary at that time.¹²⁸

Second District Court Panel Decision (Dec. 30, 2014)

On December 30, 2014, the Panel issued its second significant *Gannon* opinion. The Panel affirmed its prior equity ruling and held that the State "substantially complied" with the obligations to fund capital outlay state aid and supplemental general state aid.¹²⁹ The key decision by the Panel was that funding levels were constitutionally inadequate because "the Kansas public education financing system provided by the Legislature for grades K-12 – through structure and implementation – is not presently reasonably calculated to have all Kansas public education students meet or exceed the *Rose* factors."¹³⁰

¹²⁴ *Id.* at 1175.

¹²⁵ See K.S.A. 2015 Supp. 72-1127(c).

¹²⁶ L. 2014, ch. 93 §§ 6, 7, and 47; K.S.A. 2014 Supp. 72-8814.

¹²⁷ *Gannon v. State*, No. 2010CV1569, at 24-26 (Shawnee Co. Dist. Ct. June 26, 2015).

¹²⁸ *Id.*

¹²⁹ *Gannon v. State*, No. 2010CV1569, at 7 (Shawnee Co. Dist. Ct. Dec 30, 2014).

¹³⁰ *Id.* at 114-115.

In concluding that funding levels were constitutionally inadequate, the Panel made several findings. The Panel found that the *Rose* factors have been implicitly known and recognized by the Kansas judiciary and that the cost studies the Panel based its opinion upon were conducted with knowledge and consideration of the *Rose* factors.¹³¹ The Panel determined that, by adjusting the cost studies' figures for inflation, the current BSAPP amount of \$3,852 is constitutionally inadequate.¹³² The Panel found that gaps in student performance were likely to continue due to inadequate funding.¹³³ The Panel also determined that federal funding, KPERS, capital outlay funding, bond and interest funding, and LOB funding cannot be included in any measure of adequacy of the school finance formula as it was currently structured.¹³⁴ Regarding the LOB funding mechanism, the Panel stated that LOB funding cannot be included in any measure of adequacy due to the fact that it is solely discretionary at the local level.¹³⁵

The Panel's opinion did not contain any direct orders to either party, but did provide suggestions as to how adequate funding could be achieved. Initially, the Panel suggested that a BSAPP amount of \$4,654 coupled with increases in certain weightings could be constitutional, provided the LOB funding scheme was adjusted to include both a minimum local tax levy and a fail-safe funding mechanism.¹³⁶ Alternatively, the Panel proposed a BSAPP amount of \$4,890 could be an adequate level of funding if the LOB were to remain strictly discretionary.¹³⁷ Finally, the Panel retained jurisdiction to review the Legislature's subsequent actions at a later time.

Subsequent Motions and Legislative Actions

Two post-trial motions were filed shortly after the Panel's December 30, 2014, decision. On January 23, 2015, the State of Kansas filed a motion to alter and amend the Panel's December 30, 2014, opinion arguing the Panel did not clearly identify which facts the Panel used to support its opinion. On January 27, 2015, Plaintiffs filed a motion to alter the previous judgment regarding equity claiming that the State was no longer in substantial compliance and that additional expenditures in fiscal year 2015 were necessary to fully fund equalization aid. Subsequent briefings and responses were then submitted to the Panel upon these two motions.

¹³¹ *Id.* at 11-14.

¹³² *Id.* at 56.

¹³³ *Id.* at 20.

¹³⁴ *Id.* at 62-77.

¹³⁵ *Id.* at 76-77.

¹³⁶ *Id.* at 103.

¹³⁷ *Id.* at 105.

On January 28, 2015, the State appealed the case to the Kansas Supreme Court. On February 27, 2015, the State filed a motion with the Supreme Court to stay any further Panel proceedings until disposition of the State's appeal. On March 3, 2015, Plaintiffs filed a response to the State's motion arguing that the Court should deny the State's motion and instead remand the State's appeal to the Panel for resolution of the all pending post-trial motions with the Panel. On March 5, 2015, the Kansas Supreme Court denied the State's motion to stay further Panel proceedings and remanded the case to the Panel for resolution of all post-trial motions.¹³⁸

On March 11, 2015, the Panel issued an opinion and order upon the State's motion to alter and amend the Panel's judgment in which the Panel granted in part the State's motion and withdrew a paragraph from the its December 30, 2014, opinion that the Panel deemed to be the source of the State's motion.¹³⁹ On March 13, 2015, the Panel issued an order setting a hearing date for May 7, 2015, upon Plaintiffs' motion to alter judgment regarding equity.¹⁴⁰ On March 16, 2015, the State appealed the matter to the Court. Plaintiffs' subsequently responded on March 19, arguing that the case should remain before the Panel until the remaining post-trial motions were resolved.

On March 16, 2015, the Legislature passed SB 7 which was signed by the governor and became law on April 2, 2015. The bill created the Classroom Learning Assuring Student Success Act. The first three sections of SB 7 appropriated funds to the department of education for fiscal years 2015, 2016 and 2017 in the form of block grants for school districts. The block grants are calculated to include: (1) the amount of general state aid a school district received for school year 2014-2015; (2) the amount of supplemental general state aid a school district received for school year 2014-2015; (3) the amount of capital outlay state aid a school district received for school year 2014-2015; (4) virtual school state aid, as amended by SB 7; (5) certain tax proceeds; and (5) KPERS employer obligations. The bill also establishes the extraordinary need fund to be administered by the State Finance Council. Finally, the bill repeals the SDFQPA.

The Legislature amended the supplemental general state aid formulas and capital outlay state aid formulas in SB 7 and applied the amended formulas to the 2014-2015 school year. The supplemental general state aid formula was amended so that state aid would be still be distributed to the districts with an AVPP under the 81.2 percentile with the eligible districts being divided into quintiles based on each district's AVPP. Under the amended supplemental state aid formula,

¹³⁸ *Gannon v. State*, No. 113,267 (Kan. Sup. Ct. Mar. 5, 2015).

¹³⁹ *Gannon v. State*, No. 2010CV1569 (Shawnee Co. Dist. Ct. Mar. 11, 2015).

¹⁴⁰ *Gannon v. State*, No. 2010CV1569 (Shawnee Co. Dist. Ct. Mar. 13, 2015).

the lowest property wealth districts would receive the most aid and the successively wealthier districts would receive less aid depending on the quintile that applied to the district. The capital outlay state aid formula was amended so that the lowest property wealth district would receive 75% of district's capital outlay levy amount with the state aid percentage decreasing by 1% for each \$1,000 increase in AVPP above the lowest district.

On March 26, 2015, Plaintiffs filed a motion for declaratory judgment and injunctive relief asking the Panel to hold SB 7 unconstitutional. On April 2, 2015, Plaintiffs filed a reply with the Kansas Supreme Court notifying the Court of its motion to declare SB 7 unconstitutional and asking the Court to remand the State's appeal on the issue of adequacy for the Panel's resolution of the entire case. On April 30, 2015, the Court issued an order giving the Panel jurisdiction to resolve all pending post-trial matters, including the Plaintiffs' motion to alter judgment regarding equity and Plaintiffs' motion to declare SB 7 unconstitutional.¹⁴¹

A hearing upon Plaintiffs' motions was held before the Panel on May 7-8, 2015.

Third District Court Panel Decision (June 26, 2015)

On June 26, 2015, the Panel issued its Memorandum Opinion and Order and Entry of Judgment on Plaintiffs' motion to alter judgment regarding equity and Plaintiffs' motion for declaratory judgment regarding the constitutionality of SB 7. In its opinion, the Panel examined whether SB 7 provided constitutionally adequate funding reasonably calculated to have every student meet or exceed the *Rose* factors. The Panel also examined whether the amendments made in SB 7 to capital outlay state aid and supplemental general state aid were constitutionally equitable by providing reasonably equal access to substantially similar educational opportunity through similar tax effort. The Panel held that "2015 House Substitute for SB 7 violates Art. 6 §6(b) of the Kansas Constitution, both in regard to its adequacy of funding and in its change of, and in its embedding of, inequities in the provision of capital outlay state aid and supplemental general state aid."¹⁴²

With regard to adequacy, the Panel reiterated its December 30, 2014, finding that the "adequacy of K-12 funding through fiscal year 2015 was wholly constitutionally inadequate." SB 7 froze such funding amounts for fiscal years 2016 and 2017, SB 7, thus it "also stands, unquestionably, and unequivocally, as constitutionally inadequate in its funding."¹⁴³ With regard to equity, the Panel stated that funding levels are inequitable because of the formulaic changes to

¹⁴¹ *Gannon v. State*, No. 113,267 (Kan. Sup. Ct. Apr. 30, 2015).

¹⁴² *Gannon v. State*, No. 2010CV1569, at 6 (Shawnee Co. Dist. Ct. June 26, 2015).

¹⁴³ *Id.* at 54-55.

capital outlay state aid and supplemental general state aid in SB 7 and because the bill does not account for any changes in "the number and demographics of the K-12 student population going forward, except in 'extraordinary circumstances.'"¹⁴⁴

The Panel stated that by altering the capital outlay state aid formula, the amount of the entitlement for eligible districts was reduced and even eliminated, yet property wealthier districts will remain unscathed and any subsequent higher levy authorized by a school district would not be equalized.¹⁴⁵ In addition, "the Legislature has, rather, by not restricting the authority of wealthier districts to keep and use the full revenues for such a levy, merely reduced, not cured, the wealth-based disparity found...unconstitutional in *Gannon*."¹⁴⁶

The Panel found that for supplemental general state aid, SB 7 "reduced local option budget equalization funds that were to be due for FY 2015 and then freezes that FY 2015 state aid amount for FY 2016 and FY 2017."¹⁴⁷ "The new [supplemental general state aid] formula's reductions are not applied equally across the board in terms of the percentage of reduction...and still leaves a constitutionally unacceptable wealth-based disparity between USDs" who need such aid and those that do not.¹⁴⁸ The Panel found that the condition created overall—particularly its retroactive and carryover features—[represents] a clear failure to accord 'school districts reasonably equal access to substantially similar educational opportunity through similar tax effort.'"¹⁴⁹

The Panel issued a temporary order requiring "any distribution of general state aid to any unified school district be based on the weighted student count in the current school year in which a distribution is to be made."¹⁵⁰ The Panel also issued certain orders regarding capital outlay state aid and supplemental general state aid that would have reinstated and fully funded such aid as such state aid provisions existed prior to January 1, 2015, for FY 2015, FY 2016, and FY 2017.¹⁵¹

In addition, the Panel outlined and stayed an alternative order striking certain provisions of SB 7 and requiring distribution of funds pursuant to the SDFQPA, as it existed prior to January 1, 2015. The Panel stated that such stay would be lifted if any remedies or orders outlined fail in implementation or are not otherwise accommodated.¹⁵²

¹⁴⁴ *Id.* at 56.

¹⁴⁵ *Id.* at 33-34.

¹⁴⁶ *Id.* at 35.

¹⁴⁷ *Id.* at 36.

¹⁴⁸ *Id.* at 48.

¹⁴⁹ *Id.* at 49.

¹⁵⁰ *Id.* at 57-58.

¹⁵¹ *Id.* at 65-67.

¹⁵² *Id.* at 79-83.

Subsequent Motions

In response to the Panel's opinion, on June 29, 2015, the State filed a motion to stay the operation and enforcement of the Panel's opinion and order and appealed the case to the Court. On June 30, 2015, the Kansas Supreme Court granted the State's motion to stay the operation and enforcement of the Panel's opinion and order.¹⁵³

On July 24, 2015, the Court stated that the equity and adequacy issues were in different stages of the litigation and that it "recognized the need for an expedited decision on the equity portion of the case."¹⁵⁴ The Court then separated the two issues of adequacy and equity and required the parties to brief and argue the issues separately beginning with equity.¹⁵⁵ The Court heard oral arguments regarding equity on November 6, 2015 and released the *Gannon II* equity opinion on February 11, 2016.

¹⁵³ *Gannon v. State*, No. 113,267 (Kan. Sup. Ct. June 30, 2015).

¹⁵⁴ *Gannon*, No. 113,267 (Kan. Sup. Ct. July 24, 2015).

¹⁵⁵ *Id.*