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Comprehensive Analysis of the Kansas Supreme Court Opinion in *Gannon v. State*, issued May 27, 2016 (*Gannon III*)

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EXECUTIVE SUMMARY

On May 27, 2016, the Kansas Supreme Court (Court) issued its decision regarding whether 2016 Senate Substitute for House Bill No. 2655 (HB 2655) cured the unconstitutional wealth-based disparities in the distribution of capital outlay state aid and supplemental general state aid as required by the Court in its prior decision issued on February 11, 2016. The Court held that HB 2655 cured the capital outlay inequities, but failed to cure the supplemental general state aid inequities. The Court further held that the unconstitutional supplemental general state aid funding mechanism and the local option budget (LOB) provisions cannot be severed from the Classroom Learning Assuring Student Success (CLASS) Act, and therefore, ruled that the CLASS Act, as a whole, is unconstitutional.[1]

In summary, the Court ruled that:

- HB 2655 cures the capital outlay inequities.
- HB 2655 fails to cure the LOB inequities due to disparities in the supplemental general state aid mechanism and is unconstitutional.
- The hold harmless provision of HB 2655 fails to mitigate the LOB inequities.
- The extraordinary need fund is insufficient to mitigate the LOB inequities.
- Despite the existence of a severability clause in HB 2655, the unconstitutional provisions of HB 2655 cannot be severed from the CLASS Act.
- If the State is unable to satisfactorily demonstrate compliance with the Court's mandate to cure the LOB inequities by June 30, 2016, then there will be no constitutionally valid school finance system in existence for fiscal year 2017.

[1] *Gannon v. State*, No. 113,267 (Kan. Sup. Ct. May 27, 2016) (*Gannon III*).

COMPREHENSIVE ANALYSIS

RECENT PROCEDURAL HISTORY

On May 27, 2016, the Kansas Supreme Court (Court) issued its opinion in *Gannon v. State*, No. 113,267 (*Gannon III*) regarding whether 2016 Senate Substitute for House Bill No. 2655 (HB 2655) cured the unconstitutional wealth-based disparities in the distribution of capital outlay state aid and supplemental general state aid.[2] This is the Court's third opinion in the *Gannon* litigation regarding the constitutionality of the school funding provisions enacted by the Legislature. It is also the second opinion concerning the equity portion of the case following the Court's earlier opinion in *Gannon II*.[3]

On February 11, 2016, in *Gannon II*, the Court held that the operation of capital outlay state aid and supplemental general state aid under the Classroom Learning Assuring Student Success (CLASS) Act created unconstitutional wealth-based disparities among school districts.[4] The Court gave the Legislature until June 30, 2016, to pass remedial legislation and demonstrate to the Court how such legislation cures the unconstitutional inequities. If the Legislature failed to cure such unconstitutional inequities by June 30, 2016, the Court indicated that it would hold the Kansas school finance system unconstitutional as a whole, prohibiting the operation of the school finance system for fiscal year 2017.[5]

In response to *Gannon II*, the Legislature passed HB 2655, which reinstated the prior capital outlay state aid formula as it existed before the CLASS Act was enacted, and applied that same equalization mechanism to the calculation of supplemental general state aid.[6] HB 2655 also created a hold harmless provision that provided school district equalization aid for each school district that would have received less total equalization aid in school year 2016-2017 than it did in school year 2015-2016 due to the changes in HB 2655.[7] Finally, the bill moved administration of the extraordinary needs fund to the State Board of Education from the State Finance Council and permitted the Board to disburse those funds to further reduce inequities among school districts.[8]

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[2] *Id*.
[3] *See Gannon v. State*, 303 Kan. 682 (2016) (Kan. Sup. Ct. Feb. 11, 2016) (*Gannon II*).
[4] *Gannon II* at 746.
[5] *Id*. at 741.
[6] 2016 Senate Substitute for House Bill No. 2655, §§ 3, 4 (HB 2655).
[7] *Id*. at § 5.
[8] *Id*. at § 9 (amending K.S.A. 2015 Supp. 72-6476).

The Governor signed HB 2655 into law on April 6, 2016, and the State filed its Notice of Legislative Cure the following day. On May 10, 2016, the Court heard oral arguments on whether HB 2655 cured the unconstitutional inequities identified by the Court in *Gannon II*.

This memorandum provides a comprehensive analysis of the Court's decision in *Gannon III*. A detailed history of the *Gannon* litigation and the events that led to the *Gannon III* decision is also included at the end of the comprehensive analysis.

GANNON III (MAY 27, 2016)

In *Gannon III*, the Court held that HB 2655 cured the capital outlay inequities by reinstating the capital outlay state aid formula that was utilized by the State prior to the enactment of the CLASS Act.[9] However, the Court held that the legislation failed to cure the local option budget (LOB) inequities.[10] Despite the provision of additional hold harmless equalization state aid and the availability of extraordinary need funds, the Court found that the equity disparities between property-wealthy school districts and property-poor school districts had not been mitigated, but rather, had been exacerbated.[11] The existence of such disparities renders the supplemental general state aid provisions of the CLASS Act unconstitutional as they continue to be in violation of Article 6 of the Constitution of the State of Kansas (Article 6).[12]

The Court further held that these unconstitutional provisions cannot be severed from the CLASS Act.[13] Severing the offending provisions would, in the Court's words, "do violence to the legislative intent" of the CLASS Act.[14] Since the Court did not sever the LOB and supplemental general state aid provisions from the CLASS Act, the Court held that HB 2655 is void and indicated that the entire school finance system is therefore unconstitutional as presently enacted.[15]

The Court retained jurisdiction over the equity portion of the case and has further stayed its mandate that the school finance system is unconstitutional as a whole. The Court gave the Legislature until June 30, 2016, to enact a legislative remedy that complies with the equity standard for the provision of school finance under Article 6. If a legislative cure is not enacted

[9] *Gannon III* at 17.
[10] *Id*. at 22.
[11] *Id*. at 18.
[12] *Id*. at 34.
[13] *Id*. at 43.
[14] *Id*. at 43 (quoting *Brennan v. Kansas Insurance Guaranty Ass'n*, 293 Kan. 446, 463 (2011)).
[15] *Id*. at 45.

by that date, or the proposed legislation fails to meet the constitutional standard, then the Court will lift its stay and issue an order holding the entire school finance system unconstitutional.[16]

1. The Equity Standard under Article 6

Since *Gannon I* the Court has continued to affirm, and does so again in *Gannon III*, the equity standard of Article 6 is that "[s]chool districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort."[17] While acknowledging that it has never established any specific application of the standard, the Court did clarify that it has "rejected legislation that increased or exacerbated inequities among districts."[18] Summarizing its application of the standard, the Court stated, "the State may not allow children to receive disparate levels of educational opportunity on the basis of wealth, especially the property wealth of the district where they happen to live."[19]

2. HB 2655 Cures the Capital Outlay Inequities

The Court recognized that HB 2655 enacted the same capital outlay state aid formula that was in law prior to the enactment of the CLASS Act, and that this was the same formula the Court previously indicated would be constitutional.[20] The Court further noted that capital outlay state aid was no longer a part of the block grant funding under the CLASS Act, which allows capital outlay state aid "to be calculated by the total mill levy actually set by a school district, instead of being frozen by the levy level imposed before the enactment of CLASS."[21] Finally, the Court took notice of the fact that the majority of aid-qualifying districts will see substantial increases in capital outlay state aid under HB 2655.[22] Based on its review of this legislative record, the Court held that the state met its burden to show compliance with *Gannon II*'s mandate regarding capital outlay equalization.[23]

[16] *Id*.
[17] *Id*. at 14 (quoting *Gannon v. State*, 298 Kan. 1107, 1175 (2014) (*Gannon I*)).
[18] *Id*. (quoting *Gannon II*, 303 Kan. 682, 709).
[19] *Id*. at 15.
[20] *Id*. at 15. *See Gannon I* at 1191; *see also Gannon II* at 743.
[21] *Id*. at 16.
[22] *Id*. at 17.
[23] *Id*.

3. HB 2655 Fails to Cure the LOB Inequities

HB 2655 applied the same formula used for calculating capital outlay state aid – found by the Court to be constitutional for that purpose – to the determination of supplemental general state aid, which is equalization state aid for districts that authorize a LOB. The Court held such application to be unconstitutional because it increases and exacerbates unconstitutional wealth based disparities among districts.[24]

Application of the Capital Outlay Formula to Supplemental General State Aid Distribution

First, the Court noted that when the formula utilized for capital outlay state aid is used to calculate supplemental general state aid, the total equalization state aid provided to school districts is less than the amount distributed under the CLASS Act, which was held unconstitutional in *Gannon II*.[25] Despite this change in total equalization state aid, the Court pointed out that wealthy school districts that do not qualify for state aid will experience no change in their ability to fund their LOB.[26]

Second, the Court reviewed the equalization point – the point at which school districts are entitled to receive supplemental general state aid – under each of prior formulas and under HB 2655. The Court found that the equalization point was "significantly" lower with the effect of "substantially decreasing the number of aid-qualifying school districts."[27] This analysis was conducted by the Court solely with respect to the calculation of supplemental general state aid, and did not include any consideration of the additional equalization state aid provided under the hold harmless provision of HB 2655.

Finally, the Court addressed the State's argument that a constitutional formula applied to capital outlay funding is necessarily constitutional when applied to LOB funding. In its analysis the Court examined the magnitude and the expenditure flexibility of both funding mechanisms. The Court noted that while funds allocated for a school district's LOB have virtually no limitations and may be used for general operating expenditures of the district, capital outlay funds are statutorily restricted to a finite type of expenditures, such as building fixtures, equipment, and uniforms.[28] In terms of magnitude, the Court also found significant differences. In its example, the Court cited the Wichita school district's LOB revenue of $111 million as

[24] *Id*. at 18.
[25] *Id*. at 19.
[26] *Id*.
[27] *Id*.
[28] *Id*. at 20.

compared to its capital outlay revenue of $28 million.[29] The Court concluded that wealth-based disparities must be proportional to the type of local revenue being equalized.[30] Disparities that may be acceptable with respect to capital outlay become "too great when considering that the LOB has developed into such a major source of basic, and versatile, educational funding."[31]

The Hold Harmless Provision Fails to Mitigate the LOB Inequities

The State, in both its brief and at oral argument, argued that the equity of HB 2655 should be reviewed by taking the entire act into consideration, including the provision of hold harmless equalization state aid. In response to this argument, the Court reviewed the hold harmless provision and found that HB 2655 reduces the total amount of supplemental general state aid. The Court stated that the hold harmless equalization state aid merely restores school districts back to that same level of funding which the Court ruled unconstitutional in *Gannon II*.[32]

The State also proffered charts showing a marked decrease in the mill levy disparity among school districts under HB 2655 compared to the CLASS Act. The Court rejected this as evidence of a constitutionally equitable funding formula.[33] In its rejection, the Court found that such change was likely due to normal fluctuations in the assessed valuation per pupil calculations for school districts.[34] The Court found the State offered no evidence to contradict this conclusion.[35] Furthermore, the Court found that the charts reflected averages and did not show the greater disparities among individual school districts.[36]

While holding that the hold harmless provision was not sufficient to cure the LOB inequities, the Court also concluded the hold harmless provision actually increases disparity among districts qualifying for supplemental general state aid.[37] Funds provided as hold harmless state aid are deposited into a school district's general fund rather than its LOB fund.[38] The Court found this created a choice for aid-qualifying districts. A district could either transfer the hold harmless funds to the LOB fund and thereby fill the gap created by the decrease in supplemental general state aid funding, or a district could retain the hold harmless funds in the district's general

[29] *Id*.
[30] *Id*. at 22.
[31] *Id*.
[32] *Id*.
[33] *Id*. at 24.
[34] *Id*.
[35] *Id*.
[36] *Id*. at 25.
[37] Id. at 26.
[38] *Id*

fund and opt to fill the LOB funding gap by levying additional property taxes under its LOB authority. The Court determined any additional LOB revenue used to backfill the LOB funding gap would be unequalized and therefore further increase LOB inequities.[39] Despite the Court's statement, section 3 of HB 2655 provides that any tax revenue raised under a district's LOB authority is equalized through the supplemental general state aid calculation.[40]

Finally, the Court rejected arguments by the State regarding the political necessity of the hold harmless provision and the need for budget certainty for school districts. Both considerations were rejected by the Court as irrelevant to the issue of Article 6 equity.[41]

The Extraordinary Need Fund is Insufficient to Mitigate the LOB Inequities

The State argued that the funding inequities would be sufficiently mitigated by the use of extraordinary need funds. The Court noted that administration of the extraordinary need fund had been shifted under HB 2655 from the State Finance Council to the State Board of Education.[42] The Court also noted the statutory expansion of the uses of extraordinary need funds – the Board can now consider whether the applicant school district has reasonably equal access to substantially similar educational opportunity through similar tax effort.[43] However, the Court was not persuaded that the extraordinary need funds would be capable of curing the LOB inequities. The Court cited both the reduction in total appropriations for the extraordinary need fund and the increased statutory uses for its conclusion that this source of funding is "an insufficient remedy for the residual inequities in the LOB funding mechanism."[44]

The State Failed to Meet Its Burden with respect to LOB Inequities

In summary, the Court held that the State had failed to meet its burden to demonstrate that HB 2655 cured the inequities in the LOB funding mechanism. The disparities created by applying the capital outlay state aid formula to the calculation of supplemental general state aid were too great to satisfy the Article 6 equity standard. Further, neither the hold harmless provision nor the use of extraordinary need funds would effectively reduce these disparities.[45]

[39] *Id*. at 28.
[40] *See* HB 2655, § 3.
[41] *Gannon III* at 28.
[42] *Id*. at 30.
[43] *Id*. *See* K.S.A. 2015 Supp. 72-6476.
[44] *Id*. at 31.
[45] *Id*. at 32-33.

4. Plaintiffs are Not Entitled to Attorney Fees

The Court held that nothing had changed with respect to the Plaintiffs' request for attorney fees. The Plaintiffs' motion for attorney fees is still under review by the District Court Panel and is not before the Court on appeal, nor have the Plaintiffs filed a motion for appellate attorney fees with the Court. The Plaintiffs' request was denied.[46]

5. The Unconstitutional Provisions Cannot Be Severed From the CLASS Act

After declaring the supplemental general state aid provision of HB 2655 to be unconstitutional, the Court next considered the effect of this ruling on the remainder of the CLASS Act. The State argued that the Court should sever any unconstitutional provisions and allow the remainder of the CLASS Act to continue in effect for fiscal year 2017. The State cited the amended severability provision enacted as part of HB 2655 as support for this argument.[47]

The Court's analysis began by stating the legal test for severing unconstitutional provisions from a statute provided by *Brennan v. Kansas Insurance Guaranty Ass'n*.[48] That test is as follows: "If from examination of a statute it can be said that [1] the act would have been passed without the objectionable portion and [2] if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand."[49] The Court also affirmed case law holding that the existence of a severability clause is not dispositive of the issue; it merely creates a presumption.[50]

The Court then determined that severance of the supplemental general state aid provisions in HB 2655 would also necessitate the severance of the LOB authority for all school districts since severance of only the supplemental general state aid portion would leave in place a local revenue mechanism that was clearly inequitable.[51] Severance of both the supplemental general state aid provisions and the LOB provisions would result in a loss of approximately $1 billion in school funding, or about 25% of the total funding for public schools.[52]

In its analysis of the first part of the test, the Court found five factors weighing against the State's argument that the Legislature would have passed HB 2655 without the unconstitutional provisions. First, the State has been in constant litigation over the adequacy of

[46] *Id*. at 34.
[47] *Id*. *See* K.S.A. 2015 Supp. 72-6484.
[48] *Brennan v. Kansas Insurance Guaranty Ass'n*, 293 Kan. 446 (2011).
[49] *Id*. at 35-36 (quoting *Brennan* at 463).
[50] *Id*. at 37.
[51] *Id*. at 39.
[52] *Id*.

school finance since 2010.[53] Second, there is a pending appeal of the District Court Panel's ruling on the adequacy of school finance.[54] Third, the Court specified in *Gannon II* that any equity cure proposed by the Legislature could "[run] afoul of the adequacy requirement."[55] Fourth, the inclusion of a hold harmless provision shows the Legislature was concerned about the total amount of funding being provided for public schools.[56] Fifth, the budget bill passed by the Legislature at the end of the 2016 Session provided an exemption for public schools from the allotment authority granted to the Governor in 2016 House Substitute for Senate Bill No. 161.[57]

Having concluded that the Legislature would not have passed HB 2655 without the unconstitutional LOB provisions, the Court turned to the second part of the test. The Court found that the CLASS Act could not "operate effectively to carry out the intention of the legislature" without the unconstitutional provisions.[58] In support of its conclusion the Court cited legislative intent statements from the preamble to HB 2655 and Section 2 of HB 2655, as well as from the legislative intent provisions of the CLASS Act, itself.[59] In particular, the Court noted the Legislature's focus on avoiding funding disruptions to public schools and providing certainty in funding. In the Court's opinion, the loss of approximately $1 billion in education funding through the severance of the unconstitutional LOB provisions would "seriously undermine" the Legislature's intent to: (1) Meet its Article 6 obligations; (2) avoid disruptions to public education; (3) provide certainty in education funding; and (4) provide funds needed for educational opportunities.[60]

After finding that both parts of the *Brennan* test failed, the Court concluded that severing the unconstitutional LOB provisions from the CLASS Act would do "violence to legislative intent."[61] For these reasons the Court held that severance was not an option and that the entire CLASS Act was unconstitutional and void.[62]

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[53] *Id*. 40.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*. at 41. *See* 2016 House Substitute for Senate Bill No. 249, § 45.
[58] *Id*. at 43.
[59] *See* HB 2655, preamble, § 2; *see also* KSA 2015 Supp. 72-6463.
[60] *Gannon III* at 43.
[61] *Id*. (quoting *Brennan*, 293 Kan. at 463).
[62] *Id*. at 45.

6. The Court's Mandate Stayed Until June 30, 2016

While the Court held that the CLASS Act was unconstitutional in its entirety due to the Court's inability to sever the LOB provisions from the rest of the act, the Court continued its stay of this ruling. The stay puts a hold on the Court's order going into effect. The Court stated that such stay would remain effective until June 30, 2016, at which time the Court would consider whether a constitutional legislature cure had been enacted.[63] Thus, the mandate issued in *Gannon II* remains in place: "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."[64]

CONCLUSION

In *Gannon III*, the Court held that the State had met its burden to demonstrate that it had cured the inequities in the capital outlay state aid funding mechanism that were identified in its prior opinion in *Gannon II*.[65] However, the Court also held that the inequities found to be present in the supplemental general state aid funding mechanism under *Gannon II* had not been cured, but had been exacerbated by the provisions of HB 2655.[66] The Court rejected arguments by the State that the hold harmless provision and the changes in the extraordinary need fund mitigated any remaining inequities in supplemental general state aid distribution.[67] Due to the continued existence of such inequities in the supplemental general state aid funding mechanism, the Court held that portion of HB 2655 unconstitutional as a violation of Article 6's equity requirement.[68]

The Court further rejected the State's argument that the unconstitutional provisions of HB 2655 could be severed from the CLASS Act allowing the remainder of the Act to continue in effect for school year 2016-2017. The Court held that the Legislature would not have passed HB 2655 without the LOB and supplemental general state aid provisions, and that the CLASS Act

[63] *Id*.
[64] *See Gannon II* at 743-44.
[65] *Gannon III* at 17.
[66] *Id*. at 22.
[67] *Id*. at 26, 31.
[68] *Id*. at 34.

could not "operate effectively to carry out the intention of the legislature" without such provisions.[69] For these reasons the Court declared the entire CLASS Act unconstitutional.[70]

The Court stayed its order holding the CLASS Act unconstitutional until June 30, 2016, and gave the Legislature until such date to enact a legislative cure for the inequities that continue to exist in the supplemental general state aid funding mechanism.[71] If no legislature cure is enacted by that time, the Court may lift its stay meaning "no constitutionally valid school finance system exists through which funds for fiscal year 2017 can lawfully be raised, distributed, or spent."[72]

[69] *Id*. at 43.
[70] *Id*. at 45.
[71] *Id*.
[72] *See Gannon II* at 743-44.

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*.[73]

The new lawsuit was filed in November 2010 by various Plaintiffs and contained several claims.[74] 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.[75]

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

The Panel rejected the Plaintiffs' claims of equal protection and substantive due process violations.[76] However, the Panel held that the State had violated Article 6, §6(b) by inadequately funding the Plaintiff school districts under the SDFQPA.[77] 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.[78] 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.[79]

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

[73] *Gannon I*, 298 Kan. 1107, 1115 (2014).
[74] 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).
[75] *Gannon I*, at 1116-1117.
[76] *Id.* at 1117-1118.
[77] *Id*.
[78] *Id.* at 1116.
[79] *Id*. at 1118.

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.[80] 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."[81] 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."[82] 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.

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."[83] 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.[84] 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.[85]

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

[80] *Id*.
[81] *Id*. at 1163; *see also*, Kan. Const. art. 6 § 6(b).
[82] *Id*. at 1170 (citing *Rose*, 790 S.W.2d at 212).
[83] *Id*. at 1175.
[84] *See* K.S.A. 2015 Supp. 72-1127(c).
[85] L. 2014, ch. 93 §§ 6, 7, and 47; K.S.A. 2014 Supp. 72-8814.

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.[86] The Panel did not dismiss the equity issue despite stating that no further action was necessary at that time.[87]

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.[88] 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."[89]

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.[90] The Panel determined that, by adjusting the cost studies' figures for inflation, the current BSAPP amount of $3,852 is constitutionally inadequate.[91] The Panel found that gaps in student performance were likely to continue due to inadequate funding.[92] 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.[93] 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.[94]

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

[86] *Gannon v. State,* No. 2010CV1569, at 24-26 (Shawnee Co. Dist. Ct. June 26, 2015).
[87] *Id.*
[88] *Gannon v. State,* No. 2010CV1569, at 7 (Shawnee Co. Dist. Ct. Dec 30, 2014).
[89] *Id*. at 114-115.
[90] *Id.* at 11-14.
[91] *Id.* at 56.
[92] *Id.* at 20.
[93] *Id.* at 62-77.
[94] *Id.* at 76-77.

fail-safe funding mechanism.[95] 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.[96] 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.

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.[97]

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.[98] 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.[99] 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

[95] *Id.* at 103.
[96] *Id.* at 105.
[97] *Gannon v. State*, No. 113,267 (Kan. Sup. Ct. Mar. 5, 2015).
[98] *Gannon v. State*, No. 2010CV1569 (Shawnee Co. Dist. Ct. Mar. 11, 2015).
[99] *Gannon v. State*, No. 2010CV1569 (Shawnee Co. Dist. Ct. Mar. 13, 2015).

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, 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.[100]

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

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

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."[101]

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."[102] With regard to equity, the Panel stated that funding levels are inequitable because of the formulaic changes to 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.'"[103]

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.[104] 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*."[105]

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."[106] "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.[107] The Panel found that the condition created overall—particularly its retroactive and carryover features—[represents] a clear failure to accord 'school districts

[101] *Gannon v. State*, No. 2010CV1569, at 6 (Shawnee Co. Dist. Ct. June 26, 2015).
[102] *Id*. at 54-55.
[103] *Id*. at 56.
[104] *Id*. at 33-34.
[105] *Id*. at 35.
[106] *Id*. at 36.
[107] *Id*. at 48.

reasonably equal access to substantially similar educational opportunity through similar tax effort.'"[108]

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."[109] 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.[110]

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.[111]

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.[112]

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."[113] 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.[114] The Court heard oral arguments regarding equity on November 6, 2015 and released the *Gannon II* equity opinion on February 11, 2016.

Kansas Supreme Court Decision—Gannon II (Feb.11, 2016)

On February 11, 2016, in *Gannon II*, the Court held that the operation of capital outlay state aid and supplemental general state aid under the Classroom Learning Assuring Student Success (CLASS) Act created unconstitutional wealth-based disparities among school

[108] *Id*. at 49.
[109] *Id*. at 57-58.
[110] *Id*. at 65-67.
[111] *Id*. at 79-83.
[112] *Gannon v. State*, No. 113,267 (Kan. Sup. Ct. June 30, 2015).
[113] *Gannon*, No. 113,267 (Kan. Sup. Ct. July 24, 2015).
[114] *Id*.

districts.[115] The Court gave the Legislature until June 30, 2016, to pass remedial legislation and demonstrate to the Court how such legislation cures the unconstitutional inequities. If the Legislature fails to cure such unconstitutional inequities by June 30, 2016, the Court indicated that it would hold the Kansas school finance system to be unconstitutional as a whole, which would effectively prohibit the operation of the school finance system for fiscal year 2017.[116]

[115] *Gannon II* at 746.
[116] *Id*. at 741.