



OFFICE OF REVISOR OF STATUTES
LEGISLATURE OF THE STATE OF KANSAS

**Analysis of the Kansas Supreme Court’s Opinion in
Gannon v. State, Case No. 109,335 (March 7, 2014)**

Gordon L. Self, Revisor

Jason B. Long, Senior Assistant Revisor, Eunice Peters and Nick Myers, Assistant Revisors

March 12, 2014

On March 7, 2014, the Kansas Supreme Court issued its opinion in *Gannon v. State*, Case No. 109,335. This is the Court’s first opinion on the constitutionality of the provision of funding for public schools by the Legislature since the *Montoy* series of cases, which ended in 2006.¹ The Court made various holdings which this memorandum will address in detail. However, the Court’s key rulings should be noted at the outset.

First, the Court reaffirmed its prior decision that Article 6 of the Constitution of the State of Kansas (Article 6) contains an adequacy 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.”² The “adequacy component is met 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.”³ These standards now form the basis for the test to determine whether the Legislature has adequately provided funding for

¹ *Montoy v. State (Montoy I)*, 275 Kan. 145, 62 P.3d 228 (2003); *Montoy v. State (Montoy II)*, 278 Kan. 769, 120 P.3d 306 (2005); *Montoy v. State (Montoy III)*, 279 Kan. 817, 112 P.3d 923 (2005); and *Montoy v. State (Montoy IV)*, 282 Kan. 9, 138 P.3d 755 (2006).

² *Gannon v. State*, Case No. 109,335, at 67 (2014); see also Kan. Const. art. 6, § 6(b).

³ *Gannon* at 76 (citing *Rose*, 790 S.W.2d at 212).

education. The Court then remanded the case back to the district court with directions to apply the newly established adequacy test to the facts of the case.

Second, the Court reaffirmed its prior decision that Article 6 also contains 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.”⁴ The Court 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.”⁵ The Court applied the newly established equity test to the current funding levels for both capital outlay state aid and supplemental general state aid, and both were found unconstitutional under the test. Based on these findings, the Court directed the district court to enforce its equity rulings and provided guidance to the district court as to how to carry out such enforcement.

Prior to delving into a more detailed discussion of the various holdings of *Gannon*, this memorandum will first provide a brief history of the litigation leading to the *Gannon* decision.

PROCEDURAL HISTORY

In January 2010, the *Montoy* plaintiffs filed a motion with the Kansas Supreme 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*.⁶

The new lawsuit was filed in November 2010 by various plaintiffs⁷ and contained several claims. Those claims included an allegation that the State violated Article 6, Section 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

⁴ *Gannon* at 67; *see also* Kan. Const. art. 6, § 6(b).

⁵ *Gannon* at 81.

⁶ *Id.* at 11.

⁷ The plaintiffs in *Gannon* 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) and 31 individuals identified as students who attend schools in those districts and their guardians.

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.⁸

The three-judge district court panel (Panel)⁹ rejected the plaintiffs' claims of equal protection and substantive due process violations.¹⁰ However, the Panel held that the State had violated Article 6, Section 6(b) by inadequately funding the plaintiff school districts under the School District Finance and Quality Performance Act (SDFQPA).¹¹ 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.¹² 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.¹³

All parties appealed the Panel's decision. At the request of the State, two days of mediation were conducted in April 2013, but those efforts were unsuccessful.¹⁴ In October 2013, the Court heard oral arguments from both sides. 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.

ANALYSIS

I. Justiciability of plaintiffs' claims

The Court held that the individual plaintiffs did not have standing to bring any claims in the case. As to the plaintiff school districts, the Court held that they did not have standing to bring equal protection or substantive due process claims, but had standing to bring claims under

⁸ *Gannon* at 12.

⁹ *See* K.S.A. 72-64b03 (requiring the appointment of a three-judge panel to preside over any civil action in which there is an allegation of a violation of Article 6 of the Kansas Constitution).

¹⁰ *Gannon* at 14.

¹¹ *Id.* at 13.

¹² With respect to the withholding of capital outlay state aid payments, the Panel certified a class of all unified school districts that would be entitled to receive capital outlay state aid payments under K.S.A. 72-8814 for fiscal years 2010, 2011, and 2012. "While 157 districts qualified as class members, 14 timely opted out before trial." *Gannon* at 12.

¹³ *Id.* at 13-14.

¹⁴ *Id.* at 14-15.

Article 6. Regarding the school districts' claims under Article 6, the Court held that there was no political question barring the Court's adjudication of those issues.

Justiciability is a legal determination of whether the issues presented in a lawsuit are appropriate or suitable for adjudication by a court.¹⁵ Under Kansas law, there are four requirements for justiciability: (1) The parties have standing; (2) the issues are not moot; (3) the issues are ripe for adjudication; and (4) the issues do not present a political question.¹⁶ In *Gannon*, the State argued the case was not justiciable because the plaintiffs did not have standing to bring their claims and because the issues presented a political question.¹⁷ Each of the State's arguments is addressed below.

A. Plaintiffs' standing

Plaintiffs must have standing in order for a court to decide the claims of a lawsuit. To have standing, the plaintiff must demonstrate that the plaintiff has suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.¹⁸

In *Gannon*, two distinct groups of plaintiffs brought suit against the State: Thirty-one individually named plaintiffs and four school districts. With respect to the individually named plaintiffs, the Court held that the evidence was insufficient to establish either element of standing and denied all claims made by the individual plaintiffs.¹⁹ The Court found that: (1) No individual plaintiff actually testified; (2) no evidence was presented regarding the individually named plaintiffs from the Wichita, Hutchinson, and Dodge City school districts other than their names; and (3) the testimony from two Kansas City school administrators was insufficient to establish the elements of standing for any of the individually named plaintiffs.²⁰

With respect to the plaintiff school districts, the Court held that they did not have standing to assert their equal protection and substantive due process claims.²¹ The Court barred the districts from bringing an equal protection claim on behalf of the individual plaintiffs due to the individual plaintiffs' lack of standing to bring such claims.²² The Court further held the districts also lacked standing to bring their substantive due process claim because Section 18 of

¹⁵ *See id.* at 1, Syl. ¶ 2.

¹⁶ *Id.* at 16.

¹⁷ *Id.*

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 6, 25.

²⁰ *Id.* at 23-25.

²¹ *Id.* at 6, 30, 33.

²² *Id.* at 30.

the Bill of Rights of the Constitution of the State of Kansas has been construed to only protect the rights of individual persons and not government entities.²³

The Court, however, did hold that the plaintiff school districts had standing to assert their Article 6 claims.²⁴ First, the Court reviewed whether the districts suffered a cognizable injury and found that the districts met their burden of proof in demonstrating they had suffered a cognizable injury.²⁵ The Court agreed with the districts' argument that the State's violation of Article 6 prevented the districts from meeting their own constitutional obligations under Article 6, Section 5 of the Constitution of the State of Kansas.²⁶ The districts cited student underachievement, reductions in necessary programs and services, and overall decreases in district performance as evidence of their injuries.²⁷ Second, the Court reviewed whether the injury was causally connected to the challenged conduct. The Court held that the injuries suffered by the plaintiff school districts were fairly traceable to the State through the reductions in education funding.²⁸

B. Political question

In addition to challenging the plaintiffs' standing to bring their claims, the State argued that the plaintiffs' claims arising under Article 6 presented a nonjusticiable political question.²⁹ The Court noted its long history of adjudicating such claims, but directly addressed the State's argument because it was one of first impression for the Court.³⁰

Generally, to determine whether a claim or an issue presents a nonjusticiable political question, courts undertake a separation of powers test.³¹ Kansas courts apply the test set forth in *Baker v. Carr*.³² In *Baker*, the U.S. Supreme Court identified six factors one or more of which must be "inextricable from the case at bar" for the case to be dismissed on the grounds of being a political question.³³ The State relied on four of the six factors.³⁴ As discussed in more detail

²³ *Id.* at 33.

²⁴ *Id.* at 30.

²⁵ *Id.* at 29.

²⁶ *Id.* at 28-29. Article 6, Section 5 of the Kansas Constitution provides that local school boards shall maintain, develop, and operate the local public schools.

²⁷ *Id.* at 28-29.

²⁸ *Id.* at 29-30.

²⁹ *Id.* at 34.

³⁰ *Id.* at 35-36.

³¹ *Id.* at 1, Syl. ¶ 2, 16, 36.

³² *Id.* at 36-37 (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

³³ *Id.* at 37 (citing *Baker*, 369 U.S. at 217). The six factors set forth in *Baker* are as follows: (1) Textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially

below, the Court rejected the State’s arguments as to all four and held that the districts’ claims under Article 6 do not present a political question and are justiciable.³⁵

With respect to the first factor, the Court determined that “[t]here is no textually demonstrable constitutional commitment of the issue to a coordinate political department.”³⁶ The Court found that Article 6 expressly imposes a constitutional duty upon the Legislature to make suitable provision for finance of the educational interests of the state, and to provide for educational improvement.³⁷ The Court held these are not assignments left solely to the discretion of the Legislature, but rather, are constitutional commands that are judicially enforceable.³⁸

As to the second factor, the Court found “[j]udicially discoverable and manageable standards exist for resolving the issue.”³⁹ The Court noted that “‘suitable’ necessarily conveys the presence of standards of quality below which schools may not fall.”⁴⁰ Additionally, the Court reiterated its prior point from *Montoy I*, “[t]here is a point where the legislature’s funding of education may be so low that . . . it would be impossible to find that the legislature has made ‘suitable provision for finance of the educational interests of the state.’”⁴¹ Thus, the Court held that there are judicially discoverable and manageable standards for determining whether the State has met its Article 6 constitutional obligations.⁴²

The Court rejected the State’s arguments as to the fourth factor, finding “[t]here is no lack of respect due coordinate branches of the government.”⁴³ The State’s argument relied primarily on the Panel’s remedies. The Court noted it was not affirming the Panel’s decisions on the remedial issue.⁴⁴

discoverable and manageable standards for resolving the issue; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. at 217.

³⁴ See *Gannon* at 37-38 (noting that the State did not argue factors three and five).

³⁵ *Id.* at 2, Syl. ¶ 4, 50, 59, 60-65.

³⁶ *Id.* at 39.

³⁷ *Id.* at 42, 48.

³⁸ *Id.* at 42.

³⁹ *Id.* at 50.

⁴⁰ *Id.* at 52.

⁴¹ *Id.* at 57 (quoting *Montoy I*, 275 Kan. at 155 (citing Kan. Const. art. 6, § 6(b)).

⁴² *Id.* at 50, 59.

⁴³ *Id.* at 59-60.

⁴⁴ *Id.* at 60.

Finally, the Court rejected the State’s arguments as to the sixth factor, finding “there is no potentiality of embarrassment from multifarious pronouncements by various departments on one question.”⁴⁵ The Court held that through the constitutional assignment of different roles to different entities, the people of Kansas wanted to ensure that the educational system is not entirely dependent upon political influence or the voters’ constant vigilance.⁴⁶

II. Constitutional standards of Article 6

The Court reaffirmed its prior rulings that Article 6 contains at least two components which must be satisfied to have a constitutional state school finance system. Constitutional compliance is achieved if the school financing system is adequate and equitable. Adequacy challenges arise from whether the level of funding is insufficient to meet the constitutional standards for education. Equity challenges arise from whether the distribution of funds results in unconstitutional wealth-based disparities among school districts. The next two sections of this memorandum will discuss the new constitutional standards espoused by the Court for determining whether the State met its duty under Article 6.

III. Adequacy component of Article 6

In *Gannon*, the Court established a new test in which to evaluate the adequacy component of Article 6. This test adopted the *Rose* standards, which are presently codified in K.S.A. 2013 Supp. 72-1127(c). The Court then remanded this portion of the case to the Panel to apply the new test.

A. *Adequacy test*

The Court held that the “adequacy component is met 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* and presently codified in K.S.A. 2013 Supp. 72-1127.”⁴⁷

The Court stated that “this [newly established] test necessarily rejects a legislature’s failure to consider actual costs as the litmus test for adjudging compliance with the mandates of Article 6” as previously held in *Montoy* and applied by the Panel in *Gannon*.⁴⁸ The Court,

⁴⁵ *Id.*

⁴⁶ *Id.* at 62.

⁴⁷ *Id.* at 76.

⁴⁸ *Id.*

however, specified that actual costs remained a valid factor to be considered when evaluating constitutional adequacy under Article 6.⁴⁹

In making this decision, the Court expressly adopted the standards articulated in *Rose*, as the minimal standards for providing an adequate education under Article 6.⁵⁰ In *Rose*, the Kentucky Supreme Court announced that an adequate education must contain seven capacities to be sufficient to meet its state constitutional provision.⁵¹

In adopting the *Rose* standards, the Court recognized parallel language found in Kansas statutes. First, the Court indicated similar goals were in K.S.A. 72-6439, prior to their removal through a 1995 amendment.⁵² Second, the Court noted comparable language was currently codified in K.S.A. 2013 Supp. 72-1127.⁵³

K.S.A. 2013 Supp. 72-1127 requires every accredited school to teach subjects and areas of instruction that are adopted by the State Board of Education.⁵⁴ Subsection (c) specifically requires that the State Board of Education design subjects and areas of instruction to achieve the legislatively-determined goals.⁵⁵

In reviewing K.S.A. 2013 Supp. 72-1127, the Court opined that “those statutory goals appear[ed] to signal a deliberate legislative decision to adopt the *Rose* standards”⁵⁶ Despite this apparent legislative decision, the Court cautioned that any act by the Legislature to lower these statutory standards or goals from those which matched *Rose* might not be constitutionally adequate.⁵⁷ Under the Court’s analysis, the Court ultimately has the final authority to determine adherence to constitutional standards.⁵⁸

The underlined text in the next table indicates which language used in the *Rose* standards also appears in subsection (c) of K.S.A. 2013 Supp. 72-1127.

⁴⁹ *Id.*

⁵⁰ *Id.* at 75.

⁵¹ *Id.* at 68. The education clause in the Kentucky constitution states: “‘*General Assembly to provide for school system*—The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.’ Ky. Const. sec. 183.” *Id.* at 55.

⁵² *Id.* at 69. See K.S.A. 72-6439 (providing for a quality performance accreditation system).

⁵³ *Gannon* at 69-70.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 71-72.

⁵⁷ *Id.* at 72.

⁵⁸ *Id.* at 73-74.

Rose
(minimal constitutional standards)

An efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

(iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.
- (not in *Rose*)

K.S.A. 2013 Supp. 72-1127(c)
(legislative standards)

(c) Subjects and areas of instruction shall be designed by the state board of education to achieve the following goals established by the legislature to allow for the:

- (1) development of sufficient oral and written communication skills which enable students to function in a complex and rapidly changing society;
- (2) acquisition of sufficient knowledge of economic, social and political systems which enable students to understand the issues that affect the community, state and nation;
- (3) development of students' mental and physical wellness;
- (4) development of knowledge of the fine arts to enable students to appreciate the cultural and historical heritage of others;
- (5) training or preparation for advanced training in either academic or vocational fields so as to enable students to choose and pursue life work intelligently;
- (6) development of sufficient levels of academic or vocational skills to enable students to compete favorably in academics and the job market; and
- (7) needs of students requiring special education services.

B. Remand to the Panel to apply the adequacy test with guidance

The Court remanded the case to the Panel to determine whether the State met its duty to provide an adequate education through its school financing system, recognizing the newly established adequacy test does not require the Legislature to provide the optimal system.⁵⁹

When applying the adequacy test, the Court advised the Panel to consider funds from all available resources.⁶⁰ This consideration also includes any fund restrictions that would make those additional moneys unable to be used in a manner necessary to provide an adequate education under Article 6.⁶¹ The Court determined that such consideration was warranted since Article 6 intended to “provide a system of educational finance that is sufficiently flexible to be able to utilize such sources.”⁶² Specifically, the Court stated that such sources should include federal moneys, such as grants and federal assistance, and state moneys, such as KPERs employer contributions. The Court specified the inclusion of KPERs employer contributions since “a stable retirement system is a factor in attracting and retaining quality educators—a key to providing an adequate education.”⁶³ Regardless of the source or amount of funding, the Court emphasized that “total spending is not the touchstone for adequacy.”⁶⁴

The Court left the decision to the Panel on whether its determination would necessitate reopening the record to allow new evidence.⁶⁵

IV. Equity component of Article 6

In *Gannon*, the Court established a new test for determining whether the distribution of funds under a school finance system is constitutionally equitable. Under such test, “[s]chool districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.”⁶⁶ Using this test, the Court held that the current funding levels for both capital outlay state aid and supplemental general state aid were unconstitutional. The Court remanded this portion of the case to the Panel to enforce the Court’s equity rulings. The Court also provided guidance to the Panel as to how to carry out such enforcement.

⁵⁹ *Id.* at 78.

⁶⁰ *Id.* at 77.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 81.

A. *Equity test*

The Court held that another component of Article 6 when determining the constitutionality of school finance legislation is equity.⁶⁷ The “equity with which the funds are distributed . . . [is] critical factor[]for legislature to consider in achieving a suitable formula for financing education.”⁶⁸ In discussing equity, the Court stressed its importance, but noted the holding in *Montoy IV* that “[e]quity does not require the legislature to provide equal funding for each student or school district.”⁶⁹

The Court turned to the Texas Supreme Court for guidance in crafting a test for constitutional equity in school finance.⁷⁰ The Court agreed with the principles espoused by the Texas court that education cannot be “restricted to that upper stratum of society able to afford it.”⁷¹ The Court then established its own test for equity: “School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.”⁷² After setting out this new equity test, the Court applied the test to the distribution of funding under the capital outlay statutes, K.S.A. 72-8801 *et seq.*, and the local option budget statutes, K.S.A. 72-6433 and 72-6434.

B. *Capital outlay state aid*

Under K.S.A. 72-8801 *et seq.*, local boards of education are authorized to levy additional property taxes on the taxable tangible property within the school district to pay for capital expenses of the school districts, such as buildings, equipment, and buses. The amount of such additional levy is capped at 8 mills.⁷³

In addition to the revenues from the tax levy, K.S.A. 72-8814 provides that certain school districts are entitled to receive capital outlay state aid to assist in paying for these expenses.⁷⁴ The amount of capital outlay state aid each school district is entitled to receive is determined pursuant to a formula set out in the statute. The formula provides state aid to school districts based on the district’s assessed property valuations per pupil (AVPP) and a state aid percentage

⁶⁷ *Id.* at 67, 78.

⁶⁸ *Id.* at 78 (quoting *Montoy II*, 278 Kan. at 775).

⁶⁹ *Id.* at 79 (quoting *Montoy IV*, 282 Kan. at 22). In *Montoy II*, the Court rejected the plaintiffs’ claim that the school finance act violated the Equal Protection Clause of the U.S. and Kansas Constitutions. *Id.* at 79.

⁷⁰ *Id.* at 80-81 (citing *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989)).

⁷¹ *Id.* at 81.

⁷² *Id.* at 81.

⁷³ K.S.A. 72-8801.

⁷⁴ K.S.A. 72-8814.

factor. Those school districts with an AVPP below the median AVPP for the state have a higher state aid percentage factor than those districts whose AVPP is above the median AVPP. The state aid percentage factor is multiplied by the amount of the district's capital outlay levy. The resulting product is the amount of capital outlay state aid the district is entitled to receive.⁷⁵

Under K.S.A. 72-8814, each school year the State Department of Education is required to certify the amount of capital outlay state aid each school district is entitled to receive and submit such certification to the Director of Accounts and Reports. The Director is then directed to transfer the certified amounts from the state general fund to the capital outlay state aid fund for distribution to school districts.⁷⁶

Beginning in fiscal year 2010, however, no such transfers were made. Thus, no capital outlay state aid payments were distributed to any school district. This nonpayment of capital outlay state aid has continued each subsequent fiscal year.⁷⁷

First, the Court pointed to the existence of K.S.A. 72-8814 itself, as support for the proposition that equalization of the capital outlay property tax authority is needed. "If there was no equalization to be performed, *i.e.*, no inequality or inequity to be solved, the legislature's passage of K.S.A. 2005 Supp. 72-8814 would have been meaningless—a result we assume the legislature did not intend."⁷⁸ The Court then reasoned that if capital outlay state aid was intended to resolve inequities in the taxing authority, then such inequities return when capital outlay state aid is withheld.⁷⁹ The Court found no evidence in the record that such inequities had otherwise been mitigated so as to justify the stoppage of capital outlay state aid.⁸⁰

While the Court agreed with the Panel's findings that the withholding of all capital outlay state aid resulted in unconstitutional wealth-based disparities among the school districts, it stopped short of upholding the Panel's more stringent standard of "zero tolerance" for any wealth-based disparities.⁸¹ The Court returned to its equity test holding that "[t]o violate Article 6, the disparities instead must be unreasonable when measured by our test: School districts must

⁷⁵ K.S.A. 72-8814(b).

⁷⁶ *Id.*

⁷⁷ *Gannon* at 84.

⁷⁸ *Id.* at 86.

⁷⁹ *Id.* at 88.

⁸⁰ *Id.* at 87.

⁸¹ *Id.* at 87-88.

have reasonably equal access to substantially similar educational opportunity through similar tax effort.”⁸²

The Court then agreed with the Panel’s decision to allow the Legislature an opportunity to cure the infirmities of the law by whatever means the Legislature deemed appropriate. “We agree that the infirmity can be cured in a variety of ways—at the choice of the legislature.”⁸³ The final analysis, however, is that “[a]ny cure will be measured by determining whether it sufficiently reduces the unreasonable, wealth-based disparity so the disparity then becomes constitutionally acceptable, not whether the cure necessarily restores funding to the prior levels.”⁸⁴

In its conclusions, the Court remanded the case to the Panel to enforce the Court’s rulings with respect to equity. As part of its remand, the Court provided guidance to the Panel in determining whether the Legislature has cured the present inequities in the capital outlay funding mechanism. Such guidance was expressed by the Court as follows:

- a. If by July 1, 2014, the legislature fully funds capital outlay state provisions as contemplated in K.S.A. 2013 Supp. 72-8814, the panel need not take any additional action on this issue.
- b. If by July 1, 2014, the legislature acts to cure—whether by statutory amendment, less than full restoration of funding to prior levels, or otherwise—the panel must apply our test to determine whether that legislative action cures the inequities it found and which we have affirmed. More specifically, the panel must assess whether the capital outlay state aid—through structure and implementation—then gives school districts reasonably equal access to substantially similar educational opportunity through similar tax effort. If the legislative cure fails this test, the panel should enjoin its operation and enter such orders as the panel deems appropriate.
- c. If by July 1, 2014, the legislature takes no curative action, the panel shall declare null and void that portion of K.S.A. 2013 Supp. 72-8814(c) prohibiting transfers from the state general fund to the school district capital outlay state aid fund. This will enable the funds envisioned by the statutory scheme to be available to school districts as intended.

⁸² *Id.* at 88.

⁸³ *Id.* at 89.

⁸⁴ *Id.*

- d. Ultimately, the panel must ensure the inequities in the present operation of the capital outlay statutes, K.S.A. 72-8801 *et seq.*, are cured.⁸⁵

C. Supplemental general state aid

K.S.A. 72-6433 authorizes school districts to levy a property tax to fund the district's local option budget (LOB). The LOB authority of each district is capped at 31% of the district's state financial aid.⁸⁶

Similar to the capital outlay tax levy authorization, Kansas law provides additional state aid for certain school districts that levy taxes under their LOB authority. This is supplemental general state aid and is distributed to those school districts whose AVPP is below the 81.2 percentile of statewide AVPP. The amount of state aid is determined by a formula provided in the statute.⁸⁷

For fiscal year 2010, the amount appropriated for supplemental general state aid was insufficient to provide each school district with the full amount of supplemental general state aid it was entitled to receive under K.S.A. 72-6434. Thus, the amount each school district received was prorated. This proration of the supplemental general state aid continued in each subsequent fiscal year.⁸⁸

As it did with capital outlay state aid, the Court pointed out the mere existence of K.S.A. 72-6434 acknowledges the inequity in the LOB taxing authority.⁸⁹ The Court also reached the same conclusion that the reduction in the supplemental general state aid payments resulted in the restoration of the inequities the supplemental general state aid payments were designed to eliminate.⁹⁰

The Court agreed with the Panel's findings that the reduction in supplemental general state aid resulted in unconstitutional wealth-based disparities among the school districts.⁹¹ However, it also held that the Panel had applied the incorrect test.⁹² The Court held that the new

⁸⁵ *Id.* at 108-09.

⁸⁶ K.S.A. 72-6433.

⁸⁷ K.S.A. 72-6434.

⁸⁸ *Gannon* at 91.

⁸⁹ *Id.* at 93.

⁹⁰ *Id.* at 93-94.

⁹¹ *Id.* at 96.

⁹² *Id.*

equity test must also be applied to the LOB funding mechanism.⁹³ After applying the equity test to the reductions in supplemental general state aid, the Court concluded that such reductions were unconstitutionally inequitable.⁹⁴

As with capital outlay state aid, the Court agreed with the Panel’s decision to allow the Legislature an opportunity to cure the infirmities of the law by whatever means the Legislature deemed appropriate. “[T]he constitutional infirmity can be cured in a variety of ways—at the choice of the legislature.”⁹⁵ Again, the final analysis is that “[a]ny cure will be measured by determining whether it sufficiently reduces the unreasonable, wealth-based disparity so the disparity then becomes constitutionally acceptable under our equity test, not whether the cure necessarily restores funding to the prior levels.”⁹⁶

As part of its remand, the Court provided guidance to the Panel in determining whether the Legislature has cured the present inequities in the LOB funding mechanism. Such guidance was expressed by the Court as follows:

- a. If by July 1, 2014, the legislature fully funds the supplemental general state aid provision as contemplated in the existing SDFQPA, K.S.A. 72-6405 *et seq.*, without proration, the panel need not take any additional action on this issue.
- b. If by July 1, 2014, the legislature acts to cure—whether by statutory amendment, less than full restoration of funding to prior levels, or otherwise—the panel must apply our test to determine whether such action cures the inequities it found and which findings we have affirmed. If the panel then determines those inequities are not cured, it should enjoin the operation of the local option budget funding mechanism, K.S.A. 2013 Supp. 72-6433 and 72-6434, or enter such other orders as it deems appropriate.
- c. If by July 1, 2014, the legislature takes no curative action, the panel should enjoin the operation of the local option budget funding mechanism, K.S.A. 2013 Supp. 72-6433 and 72-6434, or enter such other orders as it deems appropriate.
- d. Ultimately, the panel must ensure the inequities in the present operation of the local option budget and supplemental general state aid statutes are cured.⁹⁷

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 97.

⁹⁶ *Id.*

⁹⁷ *Id.* at 109.

V. Non-payment of the fiscal year 2010 capital outlay state aid amounts

The plaintiffs had requested an order from the Panel for payment of the capital outlay state aid entitlements from prior fiscal years. The Panel denied the plaintiffs' request and that denial was appealed. The Court conducted a lengthy analysis of the mechanism by which the capital outlay state aid was withheld for fiscal year 2010.⁹⁸ Ultimately, the Court upheld the Panel's decision to deny the plaintiffs' request.⁹⁹

VI. Attorney fees

The plaintiffs also requested attorney fees. This request was also denied by the Panel. On appeal, the plaintiffs argued that the Court should award attorney fees either as part of the recovery for the class action claim for capital outlay payments not made in previous fiscal years, or as a sanction against the State for its bad-faith conduct.¹⁰⁰

The Court affirmed the Panel's denial of attorney fees. First, the Court held that the plaintiffs had not prevailed in their class action claim for capital outlay payments, and therefore, there was no recovery from which to pay attorney fees.¹⁰¹ Second, the Court held that the State had not acted in bad faith, and therefore, the Court would not award attorney fees as a sanction against the State.¹⁰²

CONCLUSION

In *Gannon*, the Court provided clarity with respect to the Article 6 constitutional standards that must be satisfied when determining whether the provision of school finance is constitutional. There are at least two components: Adequacy and equity.

First, the Court adopted new constitutional standards with respect to adequacy. These standards are adopted from *Rose* and presently codified in K.S.A. 2013 Supp. 72-1127. The Court then held that the "adequacy component is met 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* and presently codified in K.S.A. 2013 Supp. 72-1127."¹⁰³ The adequacy of the

⁹⁸ *Id.* at 97-104.

⁹⁹ *Id.* at 104.

¹⁰⁰ *Id.* at 104-105.

¹⁰¹ *Id.* at 105.

¹⁰² *Id.* at 106.

¹⁰³ *Id.* at 76.

current school finance laws is yet to be determined. The Panel will conduct further proceedings to apply the newly established adequacy test to the facts of the case.

Second, the Court established a new test with respect to equity. “School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.”¹⁰⁴ The Court applied this test and held the current funding for capital outlay state aid and supplemental general state aid to be unconstitutionally inequitable. The Panel is directed to review what curative action the Legislature takes, if any, and determine whether the inequities in both the capital outlay funding and the local option budget funding mechanisms have been made constitutional.

¹⁰⁴ *Id.* at 81.