Gannon V Supreme Court Decision October 2, 2017

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In its October 2nd, 2017 decision, the Kansas Supreme Court held that while S.B. 19 makes some positive strides, it does not meet the minimum standards for providing an adequate education for K-12 students. The Court ruled that the legislature failed to demonstrate through "structure and implementation" that S.B. 19's funding is reasonably calculated to have all public education students meet or exceed the Rose standards as codified in K.S.A. 72-1127.

The Supreme Court recognized the legislature has the "power and duty to create a school funding system that complies with Article 6 of the Kansas Constitution. Gannon I, 298 Kan. At 1146-47. The Court has stated the adequacy requirement contained in Article 6 Sec. 6(b) sets minimum standards of adequacy "which are met when the financing system provided by the legislature of grade K-12—through structure and implementation—is reasonably calculated to have all Kansas public education students meet or exceed the standards set in Rose. The Supreme Court concluded the State failed to demonstrate that S.B. 19 met constitutional adequacy.

THE ADEQUACY REQUIREMENT

On the issue of adequacy, the Plaintiffs argued the legislature's failure to fund S.B. 19th special education, the professional development program and the mentor teacher program rendered S.B. 19 unconstitutional. However, the Kansas Supreme Court held that these sections satisfy the structure prong on the adequacy test since S.B. 19 is very similar to the former SDFQPA the legislature had repealed. However, the Court did focus on whether the overall funding in S.B. 19 is adequate to achieve the seven Rose standards and whether the legislature "showed its work" and explained the rationale for the choices they made in S.B. 19.

The Supreme Court analyzed the State's 41 Successful Schools Model and concluded "these 41 selected school districts have not been shown by the State to be appropriate candidates from which to extrapolate the costs of achieving the educational outcomes set out in Gannon I. 298 Kan. at 1165-70. "Simply put, merely performing "better than expected"-while perhaps a test for efficiency-is not our Kansas test for constitutional adequacy." The Court went on to emphasize "Stated simply and starkly, the State's successful schools model does not contain enough schools or districts meeting student performance standards-much less constitutional standards of adequacy-to warrant that label." P.25.

The Supreme Court was troubled by the State's argument that it would need 2.5 or 3 years to see how the new funding levels played out. The Supreme Court focused on the State's 286 school districts and 500,000 students and ruled that during this remedy stage "the State has the burden to show constitutional compliance by demonstrating the validity of any methodology

used in crafting a funding formula or arriving at funding amounts. But simply arguing that it hopes to show it will be compliant years from now does not meet that burden, especially when this litigation was filed in 2010." P. 27.

The Court noted several deficiencies in the State's cost estimating approach including the fact that "Instead of emphasizing success as measured by students' high-test performance, it emphasized success based on a form of efficiency that was primarily, if not solely, measured by what the State considered to be those districts "exceed(ing) their expected performance by the greatest levels." The Court expressed concern about the brevity of the legislature's four-page documentation of their cost-estimating approach and the timeliness of the documentation as it was not provided to the Senate Select Committee on Education Finance until May 12, 2017 and was never presented to the House K-12 Education Budget Committee. P. 30.

The Supreme Court also noted several problems with the process the legislature used to calculate the BASE at $4,080 for fiscal year 2018 including why it included the at-risk and bilingual funds in its sum of expenditures when the A &M study excluded them, its chosen date of the actual expenditures used in its calculations, and the State provided no rationale for using the values of those weightings recommended in 2006 by the LPA. The court stated: "Given these flaws, we must conclude the State has not established any valid figure through its calculations-based upon the schools it calls successful-to show S.B. 19 is constitutionally adequate." P. 32.

Additionally, the Court expressed concerns about the State's poorly demonstrated rationale for appropriating only $4,006 for the BASE in 2018 when it calculated the BASE to be $4,080. P. 33.

The State argued that S.B. 19's funds through BASE computations and projected LOB funds combine to create an effective BASE of $5639 reasonably calculated to remedy the constitutional violations. However, the Court concluded the state's reliance on the LPA study is an "ineffective argument" and does not demonstrate that it has met its burden of showing constitutional compliance. p. 34.

The Supreme Court noted that merely adjusting for inflation only preserves the status quo on student performance and to improve performance inflation adjusted figures need to be further adjusted as Gannon IV had "concluded with 99% confidence that the relationship between student performance and district spending was positive, i.e. that 1% increase in student performance was associated with a .83 % in increase in spending." 305 Kan. at 900 P. 37.

The Court rejects the State's overall argument that adding LOB funds to the LPA study's inflation -adjusted base creates an "effective base" as the funds are fundamentally different with different purposes. The Court used the category of "at risk" students to illustrate these differences. For fiscal year 2018, districts will receive an additional $1,939 - $4,006 BASE multiplied by the at-risk statutory factor of .484. However, the Court noted the at-risk factor does not apply to the LOB funds because they were not included in S.B. 19's total foundation aid calculation and cannot be considered to produce a multiplier effect to increase funds for those districts with at risk students.

The Court noted these funds are even more important when considering the legislature's growing emphasis to shift funding from base aid to LOB. The Court added that LOB funds do not provide the same fixed amount to every student as these funds vary widely because of the difference in property wealth as well as the differences in LOB percentages authorized by individual school boards and the LOB funds can be used by districts in a variety of ways including directly supplementing funding from the base formula.

The Court expressed concerns that the more LOB funds are used to pay the expenses of the basic education owed to students, then less state funds will be necessary to do so. The Court recognized that retaining or increasing the reliance on the LOB funding to provide constitutional adequate education may be a policy issue for the legislature, "But at some point, the constitutionality of the various configurations ultimately created by the legislature that express or promote that policy is a question solely for this court." P. 42.

The Court characterizes S.B. 19 as an "outlier" based on the evidence presented as to "how much new money was needed" and the need for 2018 and 2019 is higher than the $292.5 million provided in S.B. 19. The Court noted that the high end was 1.7 billion calculated by the plaintiffs, the next highest was approximately 893 million presented to the governor by the Kansas State Board of Education and the next highest was $819 million. The court noted that the magnitude of the differences between those calculations and S.B. 19 emphasizes the need for the State to demonstrate the validity of its funding approach and the figures it produces. P. 43.

The Court addressed the State's argument that it cured the constitutional inadequacies by (1) increasing the at-risk weighting; (2) creating the 10% at risk floor; (3) funding all day kindergarten; (4) providing a 2 million dollar increase for preschool-aged-at risk students;(5) requiring at risk funds be spent on best practices; and (6) requiring any year-end balance in the at-risk fund remain there and not be used for other purposes.

The court acknowledged the higher weighting produces an additional 23 million dollars however, there are nearly 200,000 "free lunch students" who are "at risk". The court concluded the State made no effort to indicate how 23 million coupled with the other provisions in S.B. 19 will be adequate for this subgroup to meet the Rose standards nor did it address the thousands of underperforming students who are not receiving free lunches.

The Court concluded the 10% floor for at risk weighting will add 2 million but it only benefits two school districts and the State has not offered any support for its argument that this sum significantly contributes to addressing the adequacy issue.

On the issue of full day kindergarten, the Court agreed that it is a widely accepted approach to improving student achievement. However, the most recent available data indicates that over 91% of eligible students were already attending kindergarten and some districts were charging parents for the portion of all-day kindergarten so this change will not result in new money for all districts. While recognizing this is a move in the right direction the Court stated the State had not demonstrated why this unknown amount is "reasonably calculated to have all Kansas public

education students meet or exceed the standards set out in Rose." Likewise, the Court stated the State has not offered any support for the argument that the $2 million for preschool at-risk students significantly contributes to the adequacy issue. The Court recognized the best practices requirement is an attempt by the State to help at-risk students but the State had not demonstrated how it is going to result in a material improvement over the longstanding requirement that schools have an approved at-risk student assistance program.

The Court noted that S.B. 19 readopts the pre-2012 law that any balance in the at-risk fund at the end of the fiscal year must remain there for the following year. However, the Court ruled the State did not provide any evidence to support the argument that this is a "notable departure" from prior law, and that many districts used those funds for purposes not directly related to the needs of at risk students. The Court found no evidence of the actual impact this provision will have.

THE EQUITY REQUIREMENT

To comply with the equity standards in Article 6 of the Kansas Constitution, the Supreme Court stated that school districts must have "reasonably equal access to substantially similar education opportunity through similar tax effort." The Court has stated that this is not a "zero tolerance test because equity is not necessarily equivalent to equality. The Kansas Supreme Court concluded the State had not met its burden of establishing that school districts have reasonably equal access to substantial similar educational opportunity through similar tax effort after S.B. 19 expanded the authorized uses of the capital outlay fund. P. 52.

In concluding that the State did not meet its burden of proof to demonstrate that school districts have "reasonably equal access to substantially similar education opportunity through similar tax effort", the Court focused its analyses on S.B. 19's provisions that (1) expanded the use of capital outlay (2) imposed different procedures for certain districts to raise their maximum Local Option Budget (LOB) (3) changes to the LOB equalization calculation and (4) changes to the at-risk funding procedures.

In analyzing the equity issue, the court noted that "In reviewing the remedial stages of school finance litigation, we have consistently concluded that wealth based disparities are unreasonable if the remedial legislation increases or exacerbates inequities among the districts" and noted that like the adequacy test, the legislature must also comply with the equity requirement of Article 6 through structure and implementation" Gannon I, 298 Kan. at 1198. P. 52.

In addressing the changes to capital outlay, the Court noted that like LOB's, the amount of revenue raised through capital outlay levies vary depending on the district's assessed valuation. The Court referenced a mill in one district generates $18,000 to $19,000 and in another may raise $350,000 to $400,000. The Court referenced USD 500 and found that during 2016-2017, Plaintiff USD 500 raised around $5.6 million with its $8 mill levy while USD 229 Blue Valley raised more than $22.7 million with its $8 mill levy.

Under S.B. 19, the formula for computing capital outlay equalization remains essentially the same as the formula used during the SDFQPA. In the 2016-2017 school year, USD 229 Blue Valley did not qualify for state aid and USD 500 Kansas City qualified for aid and its $5.6 million capital outlay levy was increased by $3.6 million. USD 500 had $9.2 million in capital outlay for its 20,520 students or about 41% of what USD 229 raised for its 21,620 students through the same tax effort. The Court noted that USD 500 had $448.34 per student to spend while USD 229 had $1,049.95 per student. P. 55.

The Court also expressed concerns that S.B. 19 expanded school district use of capital outlay funds to include property and casualty insurance and utility expenses which represent substantial expenses every year. Traditionally, these expenses would have been paid from the general fund or LOB funds and by allowing the capital outlay fund to become a part of this mix, the Court was concerned of a potential shift from the funds historically used to pay these expenses.

The Court agreed with Plaintiff's argument that S.B. 19 changed the use of the capital outlay fund in a manner that directly ties the fund to its ability to perform its basic function and that for every dollar generated by the discretionary local mill levy, a district receives less equalization aid from the state for its capital outlay than it does from the LOB fund. P.57.

The Court acknowledged that historically the capital outlay equalization point has been significantly lower than the equalization point used in the LOB formula, but noted that the size of the capital outlay fund potentially increases by a substantial amount under S.B. 19 from $295.5 million in 2016-2017 for all schools to approximately $162 million for utilities and property and casualty insurance. P. 55.

Since most districts already levy the $8 mill limit, the Court noted the capital outlay fund will probably not grow enough to pay the full $162 million for these newly authorized expenses and some districts will rely more heavily on these funds to perform their basic educational functions. P. 59.

The Court noted that S.B. 19 provides increased flexibility because utilities and property and casualty insurance which had been paid from the general fund or LOB fund may now be used for other purposes. However, this increased flexibility creates concerns if it creates or increases wealth based disparities for property poor districts.

The Court concluded that S.B. 19 creates wealth based disparities because of the varying ability of districts to take advantage of this shift of certain expenses to capital outlay and that variation is tied to district wealth. Variations among the general fund, capital outlay, and LOB funds constrain the flexibility of USD 500 and other property poor districts while wealthier property districts retain more flexibility with full flexibility retained by those receiving no aid at all. P. 60.

The Court also noted some school districts cannot take advantage of the capacity to shift funds because of the overall disparity in revenue caused by varying property values among districts. If USD 500 used its capital outlay fund to pay for utilities and insurance, which cost $9.3 million in 2016, it would have no capital outlay funds remaining for other purposes. USD 229 Blue

Valley, on the other hand, could pay its $9.2 million insurance and utility costs and still have $13.5 million left to use. P. 61.

The Court noted, that while it has previously allowed some levels of inequality to be "constitutionally tolerable," the amendments to capital outlay in S.B. 19 exacerbate wealth based disparities to unacceptable levels resulting in school districts not having reasonably equal access to substantially similar educational opportunity through similar tax efforts. P. 61.

By imposing different procedures for certain districts to raise their maximum LOB, the Supreme Court held that the State had not met its burden of establishing that school districts of reasonably equal access to substantially similar education opportunity through similar tax effort. P. 62.

The Court found that prior law allowed and S.B. 19 continued to allow approximately 44 districts to increase their LOB authorization to 33% without having to go through an election process and these districts are now grandfathered in for higher LOB authorizations including any related equalization aid. The Court noted there are approximately 200 other districts who, under S.B. 19, must now go through a protest petition process. Pgs. 67 and 68.

The Court concluded that S.B. 19's provision reinstating the LOB protest petition process. For all future increases, violates the equity requirement in Article 6 as many districts are effectively denied an opportunity to "avail themselves of the advantages that would, flow from that tax effort, i.e. a substantially similar educational opportunity." P. 69. Because of the lost access, these districts cannot readily achieve the advantages that would flow from the tax effort. In reaching this conclusion, the Court noted that the Plaintiff's relied on a proposed finding of fact they asserted was adopted by the 3-judge panel in its June 26, 2015 order that concluded allowing "voter discretion" creates inequity and referenced exhibits that included statistics about the success rate of LOB's. The Court noted that the panel found a correlation exists between a district's wealth and its ability to gain voter approval to raise mill levies. From 1995 to 2012, 59% of all LOB elections failed and the election success declined as AVPP declined. Eighty one percent of the LOB elections failed in districts where the AVPP for LOB purposes fell below $50,000, while 60% of the elections failed where the AVPP for LOB purposes was between $50,000 and $100,000. An only 25% failed where the LOB AVPP exceeded $100,000.

The Court concluded the finding supports the panel's conclusion that wealth based disparities exist and that "a disparity in educational opportunity should not be allowed to arise from the difference in property wealth between school districts." Gannon I, 298 Kan. at 1175-76. P. 67.

The Kansas Supreme Court concluded that in changing S.B. 19's LOB equalization calculation, the State has not met its burden of establishing that school districts have reasonably equal access to substantially similar educational similar tax effort. P. 70.

The Plaintiff's argued that S.B. 19 violates Article 6's equity requirement as it calculates supplemental general state aid with a new formula using a school district's LOB percentage from the preceding year rather than the one done under SDFQPA. Plaintiff's argued this look back creates inequity as an aid qualifying district that increases its LOB authority will not receive

an increase in equalization aid in the current year which has a disequalizing effect for district in the current year.

The Court noted that KSDE projections for LOB funding for the 2017-2018 school year will result in $32.1 million in additional local funding and the State would add nearly $16.3 million of supplemental state aid to equalize the local spending. However, with the lookback provisions of S.B. 19, the State avoids paying $16.3 million. The evidence demonstrated Wichita would lose 2 million, Kansas City would lose 1 million, four districts would lose $700,000, and another four would lose $500,000. P. 72.

The State argued that a rational basis exists for the lookback provision as it poses a timing problem with school district budgets being adopted in August, the uncertainty of fluctuating property taxes and that school officials wanted more certainty in funding. However, the Court held that regardless of the policy justifications, the legislature cannot violate Article 6 by creating or exacerbating a wealth based inequity and S.B. 19's lookback provision does not limit this disparate effect on local funding and widens the gap between property poor and property wealthy districts. P. 71.

The Kansas Supreme Court concluded the State did not meet its burden of establishing that schools have reasonably equal access to substantially similar educational opportunity due to S.B. 19'2 changes to the at-risk funding procedures. In addressing funds for at-risk students, S.B. 19 added "a floor" for this weighing. Under the new provision, if fewer than 10% of a district's students qualify for free meals, the district will still receive at-risk weighing as if 10% of its student qualified.

The Court noted that two districts, USD 229 Blue Valley and USD 232 DeSoto, will receive more than 2 million in additional funding. P. 73. The State relied on testimony that this 10% floor addresses the fact that while the funding is generated by poverty, at-risk programs are not exclusively for students in poverty and districts with a low percentage of students in poverty still need funding to address the needs of their at-risk population.

The Court noted that from 2006 until 2016, the legislature addressed the need to provide funding for students who scored below proficiency on State reading and math assessments, but who did not qualify for free meals by including a nonproficient at-risk weighing factor for them. P. 74.

The Court concluded the 10% floor in effect benefits two districts where a proportionately high number of students live in households with income levels above the free meal qualification and S.B. 19 uses an impermissible wealth based standard. The Court also noted a 2 million equity issue might be tolerated if overall funding were adequate, "But it is more troublesome when the overall dollars are inadequate and when information about actual costs has not been provided and perhaps not legislatively considered." P. 75.

REMEDY

The Court concluded its analysis of the adequacy and equity issues by noting that in the Court's opinion the Kansas K-12 public education system has been inadequately funded "for too long" and the inadequacy has been declared by the Court through numerous opinions that exist from 2002 through 2019 except for the three years of substantial compliance under Montoy.

The Court stayed the issuance of any mandate through June 30, 2018, noting that "…after that date we will not allow ourselves to be placed in the position of being complicit actors in the continuing deprivation of a constitutionally adequate and equitable education owed to hundreds of thousands of Kansas school children." P. 77.

The Court noted, the State will have ample time and opportunity to reach constitutional compliance, whether by special legislative session, regular session, or a combination of both.

To assist the legislature in achieving constitutional compliance the Court provided the Legislature the following guidance:

- The Kansas Constitution leaves to the legislature a myriad of choices available to perform its constitutional duty and noted there is no "specific level of funding" for adequacy and no "particular brand of equity" mandated.
- The State bears the burden of establishing compliance with the constitutional requirements and explaining its rationales for the choices made to achieve it.
- The State would help its case by "showing its work." The State should identify other remedies the legislature considered and explain why it made its particular choice for reaching the constitutional standards for adequacy and equity.
- The State should remain cautious of challenges arising from an increased reliance upon LOB-generated funding (and less upon BASE-generated funding)

The Court emphasized that both the equity and adequacy components of Article 6 are involved and the issues are much more numerous and much more complex than before and "will require detailed, comprehensive analysis, including the nonseverability clause of S.B. 19 contained in section 47." P. 80.

The Kansas Supreme Court concluded by retaining jurisdiction over the State's appeal and stayed the issuance of its mandate until June 30, 2018.

The Supreme Court has sent the following schedule:

- April 30, 2018, the parties' concurrent briefs addressing any legislative remedies of constitutional infirmities are due.
- May 10, 2018, response briefs will be due.
- May 22, 2018, oral arguments will be conducted.
- June 30, 2018, the Court's decision will be communicated.

DISSENTING OPINIONS

The Kansas Supreme Court's eighty-eight Opinion in this case also contained 10 pages of "concurring but dissenting" opinions by three of the Supreme Court Justices. These dissenting opinions demonstrate the justices' frustrations with the legislature's continued failure to remedy the constitutional adequacy and equity components of the Kansas school finance system.

Justices Lee Johnson and Eric Rosen supported the majority's finding that SB 19 does not meet Article 6's adequacy and equity requirements but dissented on the remedy as they would require the legislature to submit a proposed remedy to the current unconstitutionality by the end of 2017 to fix "its years-long breach of the Kansas Constitution." P.82

Justice Johnson's dissenting opinion states: "The majority's historical recitation belies the notion that we can expect anything other than last-minute submission that will need revision or at least refining, to pass constitutional muster." Expressing frustration with the continued constitutional violations, Justice Johnson went on to state: "Moreover, the majority's observation that the legislature's provision for public school financing has been constitutionally deficient in 12 of the last 15 years serves to highlight the fact that Kansas has failed an entire generation of its children" and that "…we need to do what we can to avoid failing Kansas school children for yet another school years." P. 81

Justice Biles, who has a long history of working with the Kansas school financing plans concurred that SB 19 fails the constitutional test for adequacy and equity in funding Kansas schools but indicated he would have promptly enjoined the implementation before school district budgets were finalized.

Justice Biles noted, "To be sure, impatience comes naturally for all concerned in this protracted Gannon litigation. But for me, pique turns into intolerance when considering the State's repeated failures to get equity right." Justice Biles went on to state "The Court's majority opinion -in what will now be known as Gannon V-plainly and correctly sets out why the challenged SB 19 provisions create or exacerbate unconstitutional, wealth-based funding disparities among our public school. I join in that reasoning, even though I probably would have questioned more of SB 19 as to equity than plaints did." P.83

Justice Biles noted that even though he is unwilling to force an end of the year plan, "The immediate focus should be to achieve fairness for all Kansas school children regardless of where they live." Justice Biles concluded the student achievement issues related to funding are most likely not going to improve just by adding money to the system and the State will need to justify why any new school funding formula will comply with the Kansas Constitution. Justice Biles suggested that the legislature should focus on the term "reasonably calculated and "It requires a purposeful means for identifying the funding required given the constitutional infirmities at issue. That in turn will arm the State with the information to explain to the Court why the State's preferred level of funding results in acceptable outcomes." P.88

Justice Biles concludes his dissent with a sense of urgency by stating: “In the meantime, it is unacceptable to tolerate even temporarily the inequities this court today has determined violate the Kansas Constitution.”