



Oral, Opponent Testimony before the

**House Committee on Judiciary**

on

**HCR 5029 – Constitutional amendment to declare the power to appropriate funding for education is exclusively a legislative power and not subject to judicial review**

by

**Mark Tallman, Associate Executive Director**

**April 3, 2018**

Mr. Chairman, Members of the Committee,

Thank you for the opportunity to testify on **HCR 5029**, which we oppose for the following reasons.

**The current language of the Kansas Constitution adopted by the people in 1966, which requires the Legislature to provide for a system of public education for educational improvement and to make suitable provision for finance of the educational interests of the state, has served Kansas well.**

- Educational attainment in Kansas has steadily improved and Kansas has been among the highest performing states in the nation across multiple outcomes – until recent years when funding patterns have changed.
- This improvement has had direct economic benefits: higher income, higher employment and allowing Kansas and its people to compete for the growing percentage of higher skill, higher wage jobs.
- This system has worked to keep the tax burden more equal among Kansas taxpayers.
- The overall funding of Kansas education remained relatively stable compared to personal income growth and share of the state general fund and has remained lower than the U.S. average even though outcomes are higher than the U.S. average.

**The so-called “endless cycle of litigation” is actually just four cases in 50 years, each of which had or has a strong basis in facts. The time in court has been increased by the state’s appeals and difficulty reaching remedies.**

- In the 1970’s, the state passed the School District Equalization Act to address major disparities in property taxes in the *Caldwell* case without appealing to the Supreme Court.
- In 1992, the Legislature adopted a new finance system in response to significant disparities in property taxes before a trial was held. (That action was later upheld by the Kansas Supreme Court.)
- The *Montoy* case in the 2000s was based primarily on a cost study the Legislature commissioned specifically to determine constitutionally suitable funding and then failed to follow; and to address wide disparities in student achievement. The Legislature approved funding increases based on a cost study conducted by the Kansas Legislative Post Audit Division and the case was dismissed.
- The current *Gannon* case has been based on the Legislature’s failure to maintain funding levels accepted by the court to end the *Montoy* case, which the court found increased disparity in local property taxes and resulted in declining student achievement.

- The length of time for resolving these cases is a result of the state’s decision on whether to take the case to trial and to appeal from the trial court to the Supreme Court, and the division of the Gannon case into adequacy and equity components.

**Passage of HCR 5029 is unlikely to end constitutional challenges and the “cycle of litigation.”**

- The language of HCR 5029 does not remove the constitutional obligation to promote educational improvement through public education and to provide suitable finance.
- Plaintiffs could continue to challenge education finance on equity grounds due to wealth-based disparities, which have been part of every major school finance case since 1966.
- Plaintiffs could continue to challenge education finance based on disparities in student performance, which have been part of the *Montoy* and *Gannon* cases since the early 2000’s.
- Plaintiffs could continue to challenge education finance on the basis of evidence the public school system is not providing for educational improvement.
- In each of these cases, the courts could determine that constitutional rights or principles are being violated and order for the Legislature to remedy the violation without directing or specifying an amount of funding – which is in fact what the court is ordering in this case.

**A constitutional provision without a means of enforcement is meaningless. The words of the constitution, as adopted by the people, must have a meaning and under the U.S. constitutional system, it is up to the courts to determine what those words mean when a conflict arises.**

- Under the American constitutional system with its three coequal branches of government, the courts have the responsibility to interpret and enforce provisions of the national and state constitutions.
- Since statehood, the people of Kansas have placed the educational responsibilities of state government in their constitution, and in 1966 specified a purpose or goal of educational “improvement” in Section 1 of Article 6 , as well as a division of responsibilities between the State Board of Education, the Legislature and local school boards to achieve that goal.
- If this amendment is designed to make it impossible to challenge legislative decisions about education funding, it also removes the power of the people to use the court system for that purpose – actually weakening the inherent power of the people. If finance is a component of educational improvement – and there is ever-increasing evidence it is – then placing funding solely in the hands of the Legislature without recourse to the courts means that Article 6, section 1 is unenforceable.
- This amendment indicates that the Legislature should have exclusive control over the amount of education funding because “all political power is inherent in the people.” However, the people do not elect only a Legislature. They elect a State Board of Education to provide general supervision of education, to set statewide educational goals and request funding. They elect local school boards which must rely on the Legislature to “make suitable provision for finance” in order to carry out their constitutional duty to “maintain, develop and operate” public schools. To be consistent, this clause should also be inserted in Article 6 before the sections on the elected state board and local boards.
- Furthermore, the people retain the right under their constitution to remove members of the Supreme Court, so if the people disagree with the level of education and the court’s role in setting it, they already have the direct ability to change the court through retention elections.

**Under the current constitutional system, Kansas educational funding is not taking an excessive amount of personal income or state expenditures or crowding out other important programs.**

- School district state aid this year is estimated to be 50.1 percent of the state general fund. The average percentage since the state fully assumed the largest role in funding K-12 education in 1994 is 49.9 percent. It has not been lower than 47 percent or higher than 50 percent in that entire time.
- Funding for all education, including both K-12 and higher education, was 66 percent of the state general fund in 1994 and 63.3 percent in this year. Funding for all education (excluding the statewide 20 mill levy which was only added to the state budget in 2015) was 46.5 percent of the All Funds budget in 1994 and 47.0 percent this year.
- According to the most recent data we have, total school district spending in Kansas last year was 4.39 percent of total Kansas personal income (the income all residents of Kansas from all sources), a decline from the average of 4.66 percent since 1990. Compared to personal income, Kansas is actually investing less in K-12 education than any time since the 1980's, while the need for higher educational attainment is far greater.
- The budget problem is not disproportionate spending on education. The problem is that the state general fund is also declining compared to personal income, due to tax cuts, shifting spending patterns, the proliferation of tax credits and exemptions, and the sluggish growth in the state economy and personal income.

**During the current school finance litigation, both funding and student outcomes have fallen behind other states, at a time the Legislature had endorsed the Rose standards that include preparing students to compete in academics and the jobs market with students from surrounding states.**

- Total revenues per pupil in Kansas were 91 percent of the national average in 2015, compared to an average of 93.3 percent since 1992. Current expenditures per pupil were 83.3 percent of the U.S. average, compared to an average of 92.1 percent since 1992. Since 2008, Kansas dropped from 24th in the nation in per pupil spending to 31st in 2015; and ranked 39th in the percentage of increased funding per pupil since 2008.
- Between 2011 and 2015, Kansas' ranking for all students scoring at "Basic" or higher on the National Assessment of Educational Progress dropped from 10th to 20th and the ranking for students scoring at "Proficient" dropped from 12th to 18th. (The NAEP basic level is similar to "grade level" on Kansas state assessment and proficient is similar to "college ready.")
- While Kansas graduation rates have improved modestly under the new Adjusted Cohort Graduation Rate adopted by most states in 2011, Kansas' national ranking dropped from 12th to 20<sup>th</sup> since that time.
- The most successful states, ranked by 15 measures of student achievement, all spent more than Kansas in 2015, and on average, spend thousands of dollars more per pupil than Kansas.
- The most recent Kansas cost studies, previous Kansas cost studies, the examples of other states, the experience of Kansas in the past, and the cost of successful programs all demonstrate unequivocally that funding matters in student success and that Kansas schools are operating at a highly efficient level.

**Conclusion**

KASB believes the great challenge confronting Kansas is not excessive judicial power or runaway spending on schools. The great challenge is that Kansas is falling behind other states and our own past commitment to education funding, at a time when there is mounting evidence that funding largely determines educational outcomes, and educational outcomes largely determine personal, local, state and national economic prosperity.

If Kansas cannot afford effective and efficient schools as well as other important state programs, we must ask why other states are able to do so.

We suggest it is because our revenue system is broken, not our constitution.