

NO. 13-109335-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

**LUKE GANNON,
by his next friends and guardians, *et al.*,**

Plaintiffs/Appellees/Cross-Appellants,

vs.

STATE OF KANSAS,

Defendant/Appellant/Cross-Appellee.

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

Appeal from the District Court of Shawnee County, Kansas,
Honorable Judges Franklin R. Theis, Robert J. Fleming, and Jack L. Burr,
Case No. 10-c-1569

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INTRODUCTION

In its Response, the State ignores its Constitutional duty to provide a suitable education to Kansas schoolchildren based on the Legislature's own formula and standards and instead tries to frame this case as though it involved merely the money-hungry machinations of political operatives who had been appropriately thwarted in their attempts to devour more state resources by the operation of the democratic process. The State even tries to drum up sympathy for State Legislators in response to Plaintiffs' supposed "attempt to demonize the Legislature". The State essentially argues that this is a "public policy debate" and that the Court would risk engaging in "taxation without representation" should it act contrary to the political will of the Legislature.

Kansas, like the United States, operates under a Constitution, a Constitution which imposes certain duties on the Legislature, including that it make "suitable provision for education." Those duties imply concurrent limits on the powers of that Legislature; i.e., the Legislature *lacks the power* to decide to completely disregard the costs of providing for a suitable education when it makes funding decisions. The Legislature *lacks the power* to base its school funding decisions on political compromise, hazard, or guess. The Legislature lacks these powers because the people of the State of Kansas, in amending Article 6 of the Kansas Constitution, took those powers away from them – precisely because they knew that their children's educations were too important to leave to chance and the changing political winds.

The State points out that "[t]his case is not *Brown v. Board of Education*." The State is correct. In this case, the Legislature has failed to provide a suitable education to a significant number of Kansas schoolchildren regardless of race, sex, religion, or any

other classification. While the harm caused by this equal opportunity dereliction of duty may affect some categories of students more than others, it harms all students. This Court must now act under its constitutional authority to right that wrong.

STATEMENT OF THE FACTS

In the State's Response Brief, *see* Response Brief of Cross-Appellee ("Response"), at 4-6, the State attempts to distract this Court from the many findings the Gannon Panel made in favor of Plaintiffs by pointing to certain of Plaintiffs' proposed findings of fact that were not adopted by the Panel. First, there is no requirement that a party cite only to findings of fact adopted by the Panel. Second, in its litany, the State ignores the following crucial findings *that were* made by the Panel:

- The State did not comply with the commitments it made to this Court in *Montoy*. R.Vol.14, p.1835 (*Gannon* Decision, 116 ("Nevertheless, the bottom line is that any funding short of a BSAPP of \$4433 through FY2009 was not in compliance with the commitment made in 2006 that resulted in dismissal of this suit's predecessor.")); R.Vol.14, p.1836 (*Gannon* Decision, 117 ("In FY2009, the BSAPP was at \$4400, which, due to a cut, was \$33 below the commitment represented to the *Montoy* Court.")).
- Between the time this Court released jurisdiction of *Montoy* and the *Gannon* case was filed, the State had made \$511 million in annual cuts to the additional funding it had committed to provide to the *Montoy* Court. R.Vol.79, p.5486 (Tr.Ex.241); R.Vol.14, pp.1794-95 (*Gannon* Decision, 75-76 (indicating "Plaintiffs' Exhibit 241 accurately summarizes what the legislature and the executive branch undertook to do in regard to the BSAPP and other K-12 school funding resources"))).
- As a result of these cuts, the State not only broke its commitment to this Court, it also caused significant underfunding of Kansas education. R.Vol.14, p.1948 (*Gannon* Decision, 229 ("Plaintiffs have established beyond any question that the State's K-12 educational system now stands as unconstitutionally underfunded.")); R.Vol.14, pp.1775, 1799 (*Gannon* Decision, 56, 80 (adopting ¶260 of Plaintiffs' FOF/COL as true ("Public education in Kansas is currently underfunded."))).
- The demands associated with educating Kansas schoolchildren have continually increased. These ever-increasing demands have only exacerbated underfunding. R.Vol.14, p.1888 (*Gannon* Decision, 169 ("[T]hese standards will increase the costs and expenditures necessary to provide the resources to meet those goals.")); R.Vol.14, p.1877 (*Gannon* Decision, 158 (wherein the *Gannon* Panel made a

factual finding that “there is simply no reliable evidence advanced by the State that indicates that *a reduction in funds available* to the K-12 school system” would result in compliance with the requirements of Article 6)).

- Despite the increasing demands and associated, escalating costs, educational funding in Kansas has decreased since 2008-09. *See e.g.* R.Vol.14, pp.1788-89 (*Gannon* Decision, 69-70 (adopting ¶¶223, 226 of Plaintiffs’ FOF/COL as true)). This has created a gap between the demands and resources in Kansas: while demands have gone up, available resources have decreased. R.Vol.14, p.1785 (*Gannon* Decision, 66 (adopting ¶215 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1645-46 (Plaintiffs’ FOF/COL ¶215 (citing R.Vol.19, p.180; R.Vol.20, pp.253-55, 263; R.Vol.21, p.561; R.Vol.22, p.794; R.Vol.23, pp.1057-58, 1067-68; R.Vol.25, p.1551; R.Vol.27, pp.2051-52; R.Vol.30, p.2462; R.Vol.31, pp.2800, 2857-58, 2899-2900; R.Vol.32, pp.2937-38, 2997-98, 3021; R.Vol.50, p.1787; R.Vol.79, p.5389)).
- The Legislature, the KSBE, and this Court have already put a substantial amount of effort into determining what defines a “suitable education.” R.Vol.14, pp.1867-68 (*Gannon* Decision, 148-49 (referring to “the standards adopted by the Legislature and the State Board of Education that define what the *Montoy* Court accepted, and what is not here challenged, as the measure of a “suitable education”) (emphasis added)).
- The *Montoy* Court accepted K.S.A. 72-6439 “as a standard of suitability” and found it “to be consistent with Article 6, § 6(b)’s intent.” R.Vol.14, p.1877 (*Gannon* Decision, 158).
- The achievement gap still exists and “is still a challenge for Kansas.” R.Vol.14, pp.1877-78, 1880 (*Gannon* Decision, 158-59, 161 (adopting ¶404 of Plaintiffs’ FOF/COL as true)).
- In 2010-11, 211 public schools did not make AYP. R.Vol.14, pp.1877-78, 1881 (*Gannon* Decision, 158-59, 162 (adopting ¶407 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1700 (Plaintiffs’ FOF/COL ¶407). Moreover, in that same year, more than one-third of Kansas school districts did not make AYP. R.Vol.14, pp.1877-78, 1881 (*Gannon* Decision, 158-59, 162 (adopting ¶407 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1700 (Plaintiffs’ FOF/COL ¶407). The students in these districts and schools are not receiving a suitable education. R.Vol.14, pp.1877-78, 1881 (*Gannon* Decision, 158-59, 162 (adopting ¶407 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1700 (Plaintiffs’ FOF/COL ¶407).
- NAEP results reveal an achievement gap similar to the one that exists on Kansas state assessment results. R.Vol.14, pp.1877-78, 1884-85 (*Gannon* Decision, 158-59, 165-66 (adopting ¶423 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1705 (Plaintiffs’ FOF/COL ¶423).
- A significant number of Kansas high school graduates are not ready for college-level coursework as measured by the ACT Benchmarks. R.Vol.14, pp.1877-78, 1885-86 (*Gannon* Decision, 158-59, 166-67 (adopting ¶427 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1706-07 (Plaintiffs’ FOF/COL ¶427). According

to the ACT Benchmark scores, Kansas student preparation for math and science is low. R.Vol.14, pp.1877-78, 1886 (*Gannon* Decision, 158-59, 167 (adopting ¶431 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1707 (Plaintiffs’ FOF/COL ¶431). The ACT Benchmarks also show an achievement gap. R.Vol.14, pp.1877-78, 1886 (*Gannon* Decision, 158-59, 167 (adopting ¶428 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1707 (Plaintiffs’ FOF/COL ¶428).

- In 2011, there were a significant number of Kansas students who did not graduate in either 4 years (19.3%) or 5 years (24.8%). R.Vol.14, pp.1877-78, 1886-87 (*Gannon* Decision, 158-59, 167-68 (adopting ¶433 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1707-08 (Plaintiffs’ FOF/COL ¶433). “During the 2008-2009 school year, 3,003 Kansas students dropped out of school. That is approximately eight students a day or one every three hours. The dropout rates are disproportionately high among African American, Hispanic, and American Indian students, special education students and students from low-income families . . . persistent gaps still [exist] . . . these same student sub-groups experience graduation rates five to ten percent lower than the state average.” R.Vol.14, pp.1877-78, 1887 (*Gannon* Decision, 158-59, 168 (adopting ¶435 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1708 (Plaintiffs’ FOF/COL ¶435).
- The State is not failing to meet its constitutional obligation by just one or two students, or even five percent of students. R.Vol.14, p.1895 (*Gannon* Decision, 176 (adopting ¶453 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1712 (Plaintiffs’ FOF/COL ¶453). The State is failing to meet its constitutional obligation with regard to a significant number of Kansas students. *Id.*
- The *Gannon* Panel made a factual finding that student performance is linked to funding and rejected the State’s arguments otherwise. R.Vol.14, pp.1869-88 (*Gannon* Decision, 150-69). In so finding, the *Gannon* Panel stated, “Here, we disagree substantially with the above suggested findings advanced by the Defendant We find the truth of the matter is contrary to the State’s assertions.” R.Vol.14, p.1877 (*Gannon* Decision, 158).
- The most recent cost study conducted, provided by the State itself, found “a 1% increase in district performance outcomes was associated with a .83% increase in spending – almost a one-to-one relationship.” R.Vol.14, pp.1646-47 (*Gannon* Decision, 61-62 (adopting ¶199 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1637-38 (Plaintiffs’ FOF/COL ¶199).
- Before and during the time the cuts were made, the KSBE, 2010 Commission, A&M Study, and LPA study recommended the base be increased or remain stable. R.Vol.14, p.1837 (*Gannon* Decision, 118 (“Educators, state and local education officials, and even the Legislature’s own established commission recommended to the contrary of what was done.”)); R.Vol.14, p.1779 (*Gannon* Decision, 60 (adopting ¶191 of Plaintiffs’ FOF/COL as true)). The State ignored each of the recommendations and information provided to it, including the recommendations of its own commission, the 2010 Commission, which was established by the Legislature in 2005 to monitor, evaluate, and make recommendations regarding various aspects of the SDFQPA and QPA. *Id.*

- The only conclusion that can be reached from the evidence – and the conclusion that the *Gannon* Panel did reach – is that the State did not, in funding Kansas public education, comply with its constitutional obligation and consider the actual costs of providing a suitable education to Kansas students. R.Vol.14, p.1702 (*Gannon* Decision, 117 (“In truth, and in fact, it appears that the Kansas Legislature . . . wholly disregarded the considerations required to demonstrate a compliance with Article 6, §6(b).”)).
- Cost studies commissioned by the State during the *Montoy* litigation, and updated at the request of Plaintiffs for this litigation, indicate the base should be set significantly higher than the current statutory base of \$4,492. R.Vol.79, p.5389 (Tr.Ex.237) R.Vol.14, pp.1803-04 (*Gannon* Decision, 84-85). For instance, in 2001, the State commissioned the Augenblick and Myers (A&M) study “to determine the cost of a suitable education for Kansas children.” R.Vol.14, p.1799 (*Gannon* Decision, 80 (adopting ¶¶261-62 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1659 (Plaintiffs’ FOF/COL ¶¶261-62). The A&M Study concluded that the BSAPP should have been set at \$4,650 for the 2001-02 year. R.Vol.14, p.1800 (*Gannon* Decision, 81 (adopting ¶264 of Plaintiffs’ FOF/COL as true); R.Vol.13, p.1659 (Plaintiffs’ FOF/COL ¶264). Updates of the A&M study indicate that the base should have been **\$5,965 for the 2011-12 year.** R.Vol.14, p.1777 (*Gannon* Decision, 58 (adopting ¶189(c) of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1634 (Plaintiffs’ FOF/COL ¶189(c)). In 2005, the State commissioned another study, charging the Legislative Post Audit (“LPA”) with conducting “a professional cost study analysis to estimate the costs of providing programs and services required by the law.” R.Vol.14, pp.1799, 1801 (*Gannon* Decision, 80, 82 (adopting ¶¶261, 269 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp.1659-60 (Plaintiffs’ FOF/COL ¶¶261, 269). The LPA study concluded that the base state aid should be set at \$4,167 for 2005-06 and \$4,659 for 2006-07. R.Vol.14, p.1801 (*Gannon* Decision, 82 (adopting ¶270 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1660 (Plaintiffs’ FOF/COL ¶270). In 2006, the LPA projected costs out to 2013-14 in 2006-07 dollars. R.Vol.14, pp.1777, 1801 (*Gannon* Decision, 58, 82 (adopting ¶¶189(d), 271 of Plaintiffs’ FOF/COL as true)); R.Vol.13, pp. 1634, 1661 (Plaintiffs’ FOF/COL ¶¶189(d), 271). The estimates indicated that the base would need to be **\$6,142 in 2012-13; and \$6,365 in 2013-14.** *Id.*
- These cost studies, and their updates, show the base should be significantly higher than the current statutory base of \$4,492. R.Vol.14, pp.1803-04 (*Gannon* Decision, 84-85 (adopting ¶277 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1662-63 (Plaintiffs’ FOF/COL ¶277). These cost studies are reasonable estimates of the actual cost of providing a suitable education. R.Vol.14, p.1804 (*Gannon* Decision, 85 (adopting ¶278 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1663 (Plaintiffs’ FOF/COL ¶278).

In short, the *Gannon* Panel found that the “Kansas Legislature . . . wholly disregarded the considerations required to demonstrate a compliance with Article 6” when, in a time of

increasing “standards [that] will increase the costs and expenditures necessary to provide the resources to meet those goals” the Kansas Legislature cut funding despite the fact that “there is simply no reliable evidence advanced by the State that indicates that a reduction in funds available to the K-12 school system” would result in compliance with the requirements of Article 6. The Panel’s findings are more than adequate to support the relief requested by Plaintiffs, and this Court should not be distracted by the State’s litany of non-dispositive findings that were not adopted.¹

ARGUMENTS AND AUTHORITIES

A. This Court Should Retain Jurisdiction Until the State Wholly Complies With its Constitutional Obligations

In its Response, the State attempts to frighten this Court with the prospect that it will be required to act “as the Permanent Special Master of Educational Finance [i]n Kansas” in order to grant Plaintiffs’ the relief they seek. Response, at 28-35. This argument ignores the fact that it is the State’s own failure to comply with its constitutional obligations that have caused the parties to be before the Kansas courts for this long. Plaintiffs have not asked the Courts to exercise wide-ranging powers. Rather, the Plaintiffs have only requested that the Court retain jurisdiction “until the State fulfills its constitutional obligations.” Opening Brief of Cross-Appellant, at 69. If the Legislature acts to pass funding legislation and appropriates that funding in compliance with the Constitution and orders of this Court, the Court would relinquish jurisdiction at that time. This is consistent with the *Montoy* Court’s precedent retaining jurisdiction for

¹ This is especially true given the State’s reliance in its brief on allegations specifically contradicted by the *Gannon* Panel’s adopted findings of fact; *see, e.g.*, Response, at 10-13 (attacking the reliability of the A&M and LPA Studies despite the Panel’s finding that the cost studies are reasonable estimates of the actual cost of providing a suitable education. R. Vol. 14, p. 1804 (*Gannon* Decision, 85 (Adopting ¶278 of Plaintiffs’ FOF/COL as true)); R. Vol. 13, p. 1663 (Plaintiffs’ FOF/COL ¶278).

the “limited purpose of ensuring compliance with the Court’s prior orders.” Response, at 31, citing *Montoy v. State*, 279 Kan. 817, 826 (2005).

The State repeatedly tries to convince this Court that this case is only about additional money, pointing to the fact that the “Plaintiff Districts also make the notable concession that ‘[t]here is no need for an overhaul of the current school finance system.’” Response, at 29. The State goes so far as to suggest that this distinguishes the case from *Montoy* because there has been no finding that the “underlying Act [presumably the SDFQPA] has not been found unconstitutional.” Response, at 29. The act that has been found unconstitutional by the *Gannon* Panel is the legislative act of underappropriating for education; i.e., not appropriating to the level required by the SDFQPA. R.Vol.14, p.1948 (*Gannon* Decision, 229 (“Plaintiffs have established beyond any question that the State’s K-12 educational system now stands as unconstitutionally underfunded.”) The Kansas Constitution imposes a positive duty on the Legislature to fund a suitable education; in imposing that duty, it is the Kansas Constitution, not Plaintiffs, that directly ties the issue of providing a suitable (i.e., adequate) education to the funding that must be appropriated to provide for that education.

This case is about ensuring that Kansas’ children receive that suitable education. The Legislature has established its own standard for a suitable education, yet continues to ignore that standard in its appropriations. The most appropriate analogy is to a situation where a person is trying to reach a certain destination, in this case, the constitutionally-required suitable education. We know what kind of car we need to get to that destination; we have even designed and acquired that car (i.e., the SDFQPA). But, we remain short of the destination because the Legislature has failed to sufficiently fill the car’s tank. The

Kansas Constitution imposes a positive duty on the Legislature to fill that tank and get Kansas' children to a suitable education.

The State cites *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 273 Neb. 531 (2007) and *Oklahoma Ed. Assoc. v. State of Oklahoma*, 158 P.3d 1058 (2007) for the proposition that as “subsequent waves of school finance litigation often have been only about the *level of funding* rather than educational standards ... courts rightly have become more and more reluctant to be drawn into a central or primary role in resolving disputes about the school finance decisions within their respective states.” Response, at 34 (emphasis in original). These citations are disingenuous for two reasons. First, notwithstanding the State's repeated, and frankly insulting, comments regarding the Plaintiffs' intentions in this suit, this case is about schoolchildren who are not receiving a constitutionally-required suitable education, not just a “level of funding.” Second, both of the cases cited by the State turn on the particular provisions of those State's constitutions, not on some mere “reluctance” on the part of those courts to play a role in “resolving disputes about the school finance decisions within their respective states.” See *Oklahoma Ed. Assoc.*, 158 P.3d at 1065 (decision turned on the fact that Oklahoma's Constitution placed a duty to maintain or establish public schools on the local school districts); *Heineman*, 273 Neb. at 551 (decision turned on the fact that Nebraska Constitution explicitly states that all funds “for the support and maintenance of the common schools” shall be used “as the Legislature shall provide”). The same is true of the *Lobato v. State* case cited by the State, in which the Colorado court stated “this Court's task is not to determine ‘whether a better financing system could be devised, but rather to determine whether the system passes

constitutional muster.’” *Lobato v. State*, 12SA25, 2013 Co. 30, __ P.3d __, 2013 WL 2349302, *45 (May 28, 2013). The supreme courts of other states have continued to exercise their proper authority to interpret the constitutions of their states; they have not shown some “increasing reluctance” based on doomsday scenario threats such as those made by the State.

The language of the Kansas Constitution is also determinative, and it is this language that this Court has interpreted in *Montoy* and the cases which preceded it. By imposing a positive duty on the Legislature to provide for a suitable education, the Constitution has implicitly limited the Legislature’s power to appropriate funds as set forth in Article 2 of the Kansas Constitution. The Legislature does not have the unfettered power over appropriation that the State claims; it is bound by the positive duty imposed on it by Article 6.

The solution to the State’s doomsday scenario is simple, and lies with the Legislature. The Legislature need only enact legislation funding the SDFQPA at the adequate level, thereby utilizing the Legislature’s Article 2 power in harmony with its duties as set forth in Article 6. The Court need not “embrace a presumption that the Legislature always acts in bad faith or unconstitutionally with regard to its school finance decisions,” Response, at 32, nor must it enact specific legislation. Instead, Plaintiffs ask only that the Court exercise its proper function of reviewing the constitutionality of school finance legislation - as previously exercised repeatedly by this Court - to determine if the Legislature’s actions are currently in compliance with the Constitution.

B. Increasing Base State Aid Per Pupil to \$4,492 Will Not Result in the State's Compliance With Article 6 of the Kansas Constitution; Additional Funding is Necessary

1. The Panel Did Not Attempt to Determine the Actual Cost for Suitable Provision for the Finance of K-12 Schools, and Merely Raising the BSAPP to \$4,492 Will Not result in Constitutional Compliance

In responding to Plaintiff's argument that raising BSAPP to \$4,492 will not result in compliance with Article 6 of the Kansas Constitution, the State first repeats its appellate arguments that the courts are essentially utterly powerless to address the State's unconstitutional funding of education. Response, at 35-36. As these specious arguments have been addressed in response to the State's appeal, Plaintiffs will not do so again here. See Response Brief of Appellees/Cross-Appellants, at 20-22, 69-77, 79-81.

However, the State admits in its Response that the Panel did not attempt to determine the actual cost for suitable provision for the finance of K-12 schools. Response, at 8-9. This admission precisely makes Plaintiffs' point in this cross-appeal. In the Panel's Order, the Panel attributed great significance to the State's failure to consider the actual costs of providing a suitable education to Kansas school children, especially in light of recent directives from the Kansas Supreme Court to do so. R.Vol.14, pp.1836-37 (*Gannon* Decision, 117-18 ("[W]e must conclude that the Legislature could not have possibly considered the actual costs of providing an Article 6, § 6(b) suitable education in making its appropriations in its annual sessions after its 2008 session through its 2012 session.")). However, despite its clear conclusion that the State failed to consider the actual costs, the *Gannon* Panel itself inexplicably remedied that failure by ordering the Legislature to set the base at \$4,492. There is no evidence in the record suggesting that a base of \$4,492 will fund the actual costs of providing Kansas schoolchildren with a suitable education; in fact, the *Gannon* Panel acknowledged that

the costs were probably higher. R.Vol.14, p.1963 (*Gannon* Decision, 244 (“[W]e are faced with acting to enforce a precedent which determined an acceptable constitutional funding level for our K-12 system, while, at the same time, we must acknowledge that the dollar denominated findings of *Montoy* have been made stale by the passage of time by way of the indisputable effect of inflation.”)).

Because the State has failed to properly account for the actual costs of providing a suitable education to Kansas schoolchildren, the only evidence before this Court regarding the actual costs of doing so are the LPA and A&M updates commissioned by Plaintiffs. The *Gannon* Panel entered a factual finding that these studies were valid, stating:

[W]e have scrutinized both studies, but particularly, focused on the study consultants recommendations since they were, in fact, the only demonstrated experts. We have considered their reports and accepted them, after review, as valid. Properly viewed, both are quite compatible, each one supportive of the other. . . . Certainly, the recommendations reflected by the cost studies could support a finding for a higher value for the BSAPP . . .

R.Vol.14, pp.1957-58 (*Gannon* Decision, 238-39); *see also* R.Vol.14, p.1828 (*Gannon* Decision, 109 (“[S]imply no evidence has been advanced to impeach the underpinnings of those studies nor the costs upon which they were based.”)); R.Vol.14, p.1869 (*Gannon* Decision, 150 (“[N]o evidence has been presented that would act to impeach the reliability of the A&M cost study[.]”)). The Panel’s findings thus support the Plaintiffs’ request that this Court require the State to fund education at a level no lower than the average cost study base of \$5,944. R.Vol.79, p.5389 (Tr.Ex.237 (A&M recommendation for FY2012 was \$5,965 and LPA recommendation for FY2012 was \$5,922, the average of which is \$5,944)).

2. Article 6 of the Kansas Constitution Does Not Solely Assign
Responsibility of Kansas Education to the Kansas Legislature

The State also argues that Article 6 “does not give the State Board of Education control of education funding.” Response, at 40. Plaintiffs do not argue that the KSBE has sole control of education; instead, Plaintiffs merely point out that neither does the Kansas Legislature. Kansas’ Constitution provides that “[t]he legislature shall provide for a state board of education which shall have general supervision of public schools, educational institutions and all the educational interests of the state except educational functions delegated by law to the state board of regents.” R.Vol.35, p.40 (Tr.Ex.1, 000080 (containing text of Article 6 of the Kansas Constitution)). There is a shared responsibility for the educational interests of the State. And, there are limits to how far the legislature can intrude upon the KSBE’s duties. “Where a constitutional provision is self-executing the legislature may enact legislation to facilitate or assist in its operation, but whatever legislation is adopted must be in harmony with and not in derogation of the Constitution.” *U.S.D. No. 443 v. Kansas State Board of Education*, 266 Kan. 75, 96 (1998) (citing *State ex rel. Miller*, 212 Kan. 4842, 483 (1973)). This Court has made clear the legislature does not have sole power to determine what is a constitutional education under the Kansas Constitution.

Plaintiffs ask “Why do the Plaintiff Districts argue that the Legislature must provide funding to satisfy the State Board’s independently adopted regulations and directive issued in its supervision of local school districts?” Response, at 40. The answer is, “Because the Kansas Constitution requires it.” The Board has a constitutionally established role in supervising Kansas’ public schools, and in order to comply with the Constitution, it is imperative that the actions of all parties “respect [both] the

Legislature’s constitutional responsibility to provide for the suitable finance of education for Kansas students [and] the State Board’s constitutional responsibility for the general supervision of schools, which includes accrediting schools, providing for academic standards and the licensure of teachers.” *See* Opening Brief of Cross-Appellant, Addendum C, at KSBE002286. To this end, the Legislature must fund all aspects of a “suitable education,” including those mandated by the KSBE. The State cannot choose to fund only those portions of a “suitable education” that it wants to fund. While the KSBE may not be a “fourth branch of government”, it does arise from self-executing mandates contained in the Kansas Constitution, and the Legislature is not allowed to arrogate all of the authority and responsibility for education to itself and thereby thwart the KSBE’s self-executing mandates. *See e.g. Colorado Interstate Gas Co. v. Bd. of Morton Cty. Comm’rs*, 247 Kan. 654, 659 (1990) (“It is clear that legislation which would defeat or even restrict a self-executing mandate of the constitution is beyond the power of the legislature.”); *see also State ex rel. Miller*, 212 Kan. at 488-489 (stating the Legislature cannot thwart a self-executing provision of the Constitution).

C. The Right to an Education is a Fundamental Right

1. Education is a Fundamental Right Under the Kansas Constitution

As demonstrated in the Opening Brief of Cross-Appellant, education is a fundamental right under the Kansas Constitution. Brief of Cross-Appellant, at 79-83. The State seeks to avoid this result by first pointing to the fact that there is not fundamental right to education under the Federal Constitution, which is not at all surprising given the lack of a right to education explicitly or implicitly guaranteed by the [federal] Constitution” *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973). The same cannot be said of the Kansas Constitution, under which the right to

education is explicit; the Constitution imposes a mandatory duty upon the legislature to provide it. R.Vol.35, p.40 (Tr.Ex.1, 000080 (containing text of Kansas Constitution, Article 6) (“The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities.”)); R.Vol.35, p.40 (Tr.Ex.1, 000080 (containing text of Kansas Constitution, Article 6) (“The legislature shall make suitable provision for finance of the educational interests of the state.”)); R.Vol.35, pp.106-07 (Tr.Ex.1, 000211-212 (excerpts from *Montoy II*, 278 Kan. at 776H (Beier, concurring, and Davis, joining) (“[I]f we were to regard *Rodriguez* as controlling on the method for determining the existence of a fundamental right to an education, our Kansas Constitution’s explicit education provisions would settle the matter in favor of holding that such a right exists.”))); R.Vol.35, p.105 (Tr.Ex.1, 000209 (excerpts from *Montoy II*, 278 Kan. at 776A (Beier, concurring, and Davis, joining) (“If we were to apply the United States Supreme Court’s straightforward pattern of analysis from *Rodriguez*, we would need to look no further than the mandatory language of [Article 6, § 1 and Article 6, § 6]. Because they explicitly provide for education, education is a fundamental right.”))).

Second, the State is correct that the Supreme Court has not yet held that education is a fundamental right under the Kansas Constitution. This is why Plaintiffs have asked this Court to settle this issue once and for all.

2. If the Court Finds That a Fundamental Right to Education Exists, Then the State’s Acts Should Be Subject to Strict Scrutiny

“Traditionally, when analyzing an equal protection claim, the United States and Kansas Supreme Courts employ three levels of scrutiny: strict scrutiny, intermediate scrutiny, and the rational basis test.” *State v. Limon*, 280 Kan. 275, 283 (2005) (citing

Chiles v. State, 254 Kan. 888, 891-92 (1994)). The Kansas Supreme Court has explained that “strict scrutiny” applies “in cases involving classifications such as race and fundamental rights guaranteed by the . . . Constitution.” *Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 775 (1992) (emphasis added). Strict scrutiny requires the State to demonstrate “that the classification is necessary to serve a compelling state interest.” *Id.* Because education is a fundamental right, the “strict scrutiny” analysis is applicable. R.Vol.14, p.1740 (*Gannon* Decision, 21 (“We, note, however, a significant minority of the Court in *Montoy II* (3 of 7) thought the “strict scrutiny” test for review of constitutional equal protection challenges should have been employed once it is shown that the legislation challenged ‘actually or functionally deny the fundamental right to educate.’”)).

The State’s arguments based on Judge Beier’s concurring opinion in *Montoy II* lack merit for the following reasons. *See* Response, at 50-53. First, the State repeatedly confuses the issue of whether a fundamental right to education exists with the issue of whether strict scrutiny applies. Justice Beier’s arguments in *Montoy II* are addressed to the question of whether a fundamental right exists; it does. As a result, strict scrutiny applies. *Stephenson v. Sugar Creek Packing*, 250 Kan. 768, 775 (1992). Second, the State attempts to read the fundamental right to education very narrowly, in order to essentially argue that unless the State bars the schoolhouse doors, the only basis for review is rational basis review. *See* Response, at 53. But, the language of the Kansas Constitution establishing a fundamental right to education contains within it the right to a “suitable education”; thus, challenged legislation that ‘actually or functionally denies’ that right should be subjected to strict scrutiny. Thus, whether or not a fundamental right

to a suitable education exists under the Kansas Constitution is of immense importance and is determinative to the appropriate level of judicial scrutiny to apply to the challenged legislation.

D. The State Denied Plaintiffs' Equal Protection of the Law Guaranteed by Section 1 - 2 of the Bill of Rights of the Kansas Constitution and the Fourteenth Amendment of the United States Constitution.

1. The State is Not Immune to Suit

In response to Plaintiffs' Fourteenth Amendment Equal Protection Claims, the State argues that it is immune to *any federal claim* the Plaintiff Districts might assert against the "State of Kansas." Response, at 55. This is false. The states surrendered a portion of the sovereign immunity that had been preserved for them by the Constitution and the Eleventh Amendment when the Fourteenth Amendment was adopted. *Alden v. Maine*, 527 U.S. 706, 756 (1999). "By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution.' *Id.* (citations omitted). Furthermore, by accepting federal funding, the State has waived its Eleventh Amendment immunity. *See Robinson v. Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002.) Plaintiffs' claim that the State has violated their rights under the Fourteenth Amendment, and the Eleventh Amendment is no bar to such suit.

2. The School Districts Have Standing to Bring Such A Claim

The State argues throughout its Response that Plaintiff Districts have no standing to raise a Fourteenth Amendment equal protection claim. Response, at 43-45, 56, 62. However, the Plaintiff School Districts have standing to assert how the State's violation of their students' equal protection rights has affected the students within each district, including the individual Plaintiffs, as demonstrated in the Response Brief of

Appellees/Cross-Appellants at 51-66. The State’s response that “the Plaintiff Districts do not cite a single case (and cannot do so) holding that as a matter of federal law local government entities have individual constitutional rights” misses the point. Response, at 45. “A public agency has standing to seek judicial review of governmental action that affects the performance of its duties.” *Washington Utilities & Transp. Comm’n v. F.C.C.*, 513 F.2d 1142, 1151 (9th Cir. 1975). Indeed, the applicable associational standing test was established by the Supreme Court in a case involving a state commission. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 344 (1977). As the Ninth Circuit held in *Central Delta Water Agency v. U.S.*, 306 F.3d 938, 951 (9th Cir. 2002), when the governmental action impinges on interests germane to the governmental agency’s purpose, that agency has associational standing to bring suit on behalf of the individuals in that agency’s jurisdiction. Here, the Kansas Constitution charges Plaintiff School Districts with duties regarding the education of each student within those districts; thus, the School Districts have associational standing to bring suit on behalf of those students.

3. Individual Plaintiffs Have Standing

The State also argues that the individual Plaintiffs have no standing. Response, at 46-47, 56, 59. But “[s]tanding is a question of whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Harrison v. Long*, 241 Kan. 174, 177 (1987) (citing *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)). Thus, to have standing, the individual Plaintiffs will be required to show that they “personally suffered some injury and that there was some causal connection between the claimed injury and the challenged conduct.” *Id.* They must show that they have “a

sufficient stake in the justiciable controversy to obtain judicial resolution of the controversy.” *Id.*

The State contends that the individual Plaintiffs cannot meet this burden. Interestingly, the State contends Plaintiffs presented no “evidence as to how the Legislature’s financing decisions in any way detrimentally affected any particular cognizable class of individual students.” Response, at 56. To the contrary, Plaintiffs presented ample evidence of the damages caused by the underfunding of education. Brief of Cross-Appellant, Statement of the Facts §J, at pp.29-57. Again, the State’s arguments have been thoroughly briefed in response to the State’s appeal. *See* Brief of Appellees/Cross-Appellants at 66-69. Just as Judge Bullock dismissed the State’s standing argument in *Mock v. State*, stating the issue was “moot” because “the legislative duty [pursuant to Article 6 of the Kansas Constitution] inures to the benefit of all Kansas school children, some of whom are Plaintiffs in these consolidated cases.” R.Vol.35, p.87 (containing excerpts from *Mock v. State*, No. 91-cv-1009), this Court should do the same.

4. The State Acted with Deliberate Intent in Denying Plaintiffs’ Equal Protection of the Law

Plaintiffs established the State exercised deliberate indifference to the students’ constitutional rights and ignored a pattern of underlying constitutional violations in a manner that would support a finding that the State has denied certain students equal protection of the law. Nonetheless, the *Gannon* Panel concluded Plaintiffs failed to establish deliberate intent. R.Vol.14, p.1940 (*Gannon* Decision, 221 (“[F]or Plaintiffs’ claim to stand independently as a constitutional equal protection violation, it needs to be

hinged to a deliberate, or so obvious by impact, intent by the actor to do so We find no such intent displayed by the evidence before us.”)).

In responding to Plaintiffs’ claims, the State argues that the “deliberate indifference” standard is “primarily a standard utilized in the prison context in evaluating claims of Eight Amendment violations.” Response, at 58. While it is true that the standard has been used in such cases, Plaintiff’s authorities demonstrate the standard’s applicability to the equal protection context. *See e.g. Distiso v. Cook*, 691 F.3d 226, 240-41 (2d. Cir. Aug. 21, 2012) (holding that “deliberate indifference” can be the basis for claiming denial of equal protection); *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2d. Cir. 1999) (applying deliberate indifference standard to allegations of violations of student’s equal protection rights); *G.D.S. v. Northport-East Northport Union Free Sch. Dist.*, 2012 U.S. Dist. LEXIS 182976, 23 (E.D.N.Y. Dec. 22, 2012).

Even so, the State’s pattern of underlying constitutional violations establishes the intent required to sustain a claim for an equal protection violation. The State knew that, not only was it not providing enough funding, but the cost of a constitutionally suitable education was increasing. In the face of this evidence, the State made an irrational and unreasonable decision: it chose to cut funding. The *Gannon* Panel concluded the underfunding of education in Kansas was knowing and deliberate. R.Vol.14, p.1867 (*Gannon* Decision, 148 (the State had acted with “what appears now to be an obvious and continuing pattern of disregard of constitutional funding obligations under Article 6”)).

Moreover, when the State cut funding, it knew certain students were more expensive to educate. R.Vol.14, pp.1786-87 (*Gannon* Decision, 67-68 (adopting ¶220 of Plaintiffs’ FOF/COL as true)); R.Vol.13, p.1647 (Plaintiffs’ FOF/COL ¶220). Because

of the multiplier effect that the BSAPP has on providing funding for those students, the State also knew that cutting the BSAPP would have a more drastic effect on those students. And it knew that certain school districts lacked the ability to offset those cuts with local dollars and that those school districts would suffer increased harm. As a direct result of the State's actions, some school districts can provide some students with a suitable education. But, some school districts cannot. Some school districts are unable to even meet AYP, one of the most basic indicators of whether that school district is providing its students with a suitable education. And, a significant number of students are not receiving a suitable education. Thus, clearly, the State took action against certain students and certain school districts and, in doing so, denied those students their fundamental right to a suitable education. *See e.g. Rubio v. Turner Unified School Distr. No. 202*, 453 F. Supp.2d 1295, 1303-1304 (D. Kan. 2006).

E. The State Denied Plaintiffs a Substantive Due Process Right in Violation of Section 18 of the Bill of Rights of the Kansas Constitution.

The State's arguments against the Plaintiffs' claim for a violation of their substantive due process rights under the Kansas Constitution seem to assume a false dichotomy between a violation of Plaintiffs' right to a suitable education under Article 6 and a violation of their substantive due process rights in violation of Section 18 of the Bill of Rights of the Kansas Constitution. Response, at 62-64. But this need not necessarily be the case; here, the State has violated the Plaintiffs' Article 6 rights and in doing so has violated their substantive due process rights. Because education is a fundamental right under Article 6, denying that right results in a violation of Section 18 of the Bill of Rights of the Kansas Constitution.

When a statute is attacked as violative of due process, the test is whether the legislative means selected has a real and substantial relation to the objective

sought. This rule has been restated in terms of whether the regulation is reasonable in relation to its subject and is adopted in the interest of the community.

Chiles v. State, 254 Kan. 888, 902 (1994), citing *Clements v. U.S. Fidelity and Guar. Co., Inc.*, 243 Kan. 124, 127 (1988). The *Gannon* Panel has already determined that the school finance scheme does not have any real and substantial relation to the objective sought. R.Vol.14, p.1867 (*Gannon* Decision, 148 (the State had acted with “what appears now to be an obvious and continuing pattern of disregard of constitutional funding obligations under Article 6”)); R.Vol.14, p.1877 (*Gannon* Decision, 158 (“[T]here is simply no reliable evidence advanced by the State that indicates that a reduction in funds available to the K-12 school system” would result in compliance with the requirements of Article 6.)). Therefore, this Court should reverse the ruling of the *Gannon* Panel in finding that Plaintiffs had not established that they were denied a substantive due process right.

F. The Panel Erred by Failing to Direct the State to Make Capital Outlay State Aid Equalization Payments Pursuant to K.S.A. 72-8814.

The State argues that the Panel properly concluded that it should not be ordered to make FY2010 capital outlay aid payments because those funds were removed by the November 2009 allotment. Response, at 68. However, Governor Parkinson never actually removed the funds by allotment.

Trial Exhibit 353 (R.Vol.95, pp.6964-66) “is the only place that the Governor’s allotment addresses the capital outlay equalization funds.” R.Vol.104, pp.8239-42 (Tr.Ex.409, Goossen Depo., at 155:7-158:22). Trial Exhibit 353 does not remove the capital outlay state aid equalization payments by allotment. R.Vol.95, pp.6964-66 (Tr.Ex.353). Mr. Goossen, the former Director of Accounts and Reports, in his deposition, was asked the following question: “[D]oes [the letter] say the transfer does

not need to be made?” He responded, “It does not say that.” R.Vol.104, p.8220 (Tr.Ex.409, Goossen Depo., at 136:5-14).

And, even if Governor Parkinson did remove the funds by allotment, such a removal was improper. The *Gannon* Panel concluded, “we find that Article 2, § 24’s requirement that an appropriation is necessary for monies to be paid out of the state treasury, coupled with the fact that for FY2010 an appropriation was made for the capital outlay state aid fund (L. 2009, ch. 124, § 1(b)), means that the allotment was exercised against that appropriation, not the demand transfer itself, effectively mooting the necessity for the latter” R.Vol.14, p.1925 (*Gannon* Decision, 206). But, the allotment was clearly exercised against the demand transfer. Otherwise, there is no viable explanation as to why the demand transfer was never made. R.Vol.14, p.1923 (*Gannon* Decision, 204 (indicating that notwithstanding an appropriation of “no limit” authority on expenditures within the capital outlay state aid fund, “no funds ever arrived at or were placed in [the fund]”)). And, a demand transfer cannot be subject to a Governor’s allotment, pursuant to an opinion of the Kansas Attorney General, because “their claims against general fund moneys are not made pursuant to appropriations.” R.Vol.98, pp.7262-63 (Tr.Ex.372, 000052 (citing Kansas Attorney General Opinion No. 82-160, 1982 WL 187649, at *11 (July 26, 1982))). If funds were not removed in the allotment process (they were not), the funds were available to be encumbered on June 17, 2010. Thus, Plaintiffs’ Notice of Claims was sufficient to act as an encumbrance. For these reasons, this Court should reverse the finding of the *Gannon* Panel and issue an order requiring the State to make the payments required by K.S.A. 72-8814 for the fiscal year 2009-10.

G. The Gannon Panel Improperly Denied Plaintiffs Attorneys' Fees Related to Plaintiffs' Class Actions Claims

The State's arguments against the award of attorneys' fees essentially presumes that Plaintiffs lose this appeal, and are therefore not entitled to attorneys' fees. First, the State argues that there "is no fund from which attorneys' fees could be awarded or apportioned." Response, at 75. However, should Plaintiffs prevail on their cross-appeal, they will have established that they were entitled to capital outlay state aid equalization payments pursuant to K.S.A. 72-8814. If a class action is successful, courts may use their equitable powers to award fees. *See e.g.* Kansas Attorney General Opinion No. 94-47 (April 8, 1994).² Counsel may be reimbursed reasonable attorneys' fees so long as the fees are assessed against the entire fund. *Id.* Therefore, because Plaintiffs were successful with regard to their class action claim at the lower level, and because they are entitled to damages as a result of that claim, Plaintiffs also seek an order granting Plaintiffs attorneys' fees.

More fundamentally, however, the State's arguments based on the "American Rule" ignore and underplay the Court's inherent power to sanction a party based on that party's conduct in bad faith, regardless of statutory provisions. *See e.g., Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 926 (2006)) (courts have inherent powers to impose sanctions for bad-faith conduct, irrespective of statutory provisions).

The State's bad faith is amply attested to in the Gannon Panel's findings. R.Vol.14, p.1867 (*Gannon Decision*, 148 (the State had acted with "what appears now to be an obvious and continuing pattern of disregard of constitutional funding obligations under Article 6")). Despite the clear directive from *Montoy* that the school finance

² Available at <http://ksag.washburnlaw.edu/opinions/1994/1994-047.htm>.

formula must be based on the actual costs of providing an education to a Kansas student, the State has continued to willfully disregard its own studies which adequately identify those costs. R.Vol.14, pp.1836-37 (*Gannon* Decision, 117-18 (“[W]e must conclude that the Legislature could not have possibly considered the actual costs of providing an Article 6, § 6(b) suitable education in making its appropriations in its annual sessions after its 2008 session through its 2012 session.”)); *see also* K.S.A. 2012 Supp. 46-1226 (act of Legislature refusing to be bound by its own commissioned cost studies.) Allowing the State to continue this behavior without sanction will reward it for failing to meet its constitutional obligations. Therefore, notwithstanding the “American Rule”, this Court should exercise its inherent power to sanction the State and award Plaintiffs’ attorneys’ fees.

CONCLUSION

The Plaintiffs in this case are Kansas schoolchildren, their parents, and the school districts that educate them. They seek the Court’s protection of their rights under the Kansas Constitution to a suitable education, rights that this Court has repeatedly found require the Legislature to fund that education appropriately. Without the Court’s protection, the education and futures of Kansas’ kids will be left at the mercy of the changing political whims of the Legislators who occupy those seats in Topeka at any given time. This is precisely the result that a constitutional form of government is intended to prevent.

The State has stated that the “all parties in this litigation want each Kansas school to be a good school, and want each Kansas child to receive a quality education.” Response, at 23-24. That may be true. But while Plaintiffs may want good schools and

quality educations, the State has the *duty to provide for those goods*. Article 6 does not require the Legislature to want, wish for, hope for, or endorse suitable educations for Kansas schoolchildren. The Kansas Constitution requires them to *provide* it. Lip service will not suffice; actions (in the form of suitable provision through funding) must follow. This Court must hold the Legislature to its duty; Kansas' children deserve the protections of their Constitution.

Dated this 9th day of August, 2013.

Respectfully submitted,



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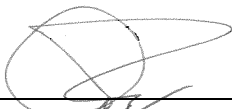
CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2013, I sent two copies of the foregoing to each the following addresses via U.S. First Class Mail, postage prepaid to:

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