

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.

**RESPONSE BRIEF OF APPELLEES/CROSS-APPELLANTS TO *AMICUS CURIAE*
BRIEF OF EDUCATIONAL MANAGEMENT CONSULTANTS IN SUPPORT OF REAL
“REMEDIES” TO ACHIEVE AN EQUAL EDUCATIONAL OPPORTUNITY FOR
EACH K-12 STUDENT IN KANSAS**

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

The *amicus* brief submitted by Educational Management Consultants’ Walt Chappell (“Chappell”) echoes the flawed arguments made by the State in its appeal, and is a self-contained demonstration of the completely reality-free school funding decision-making that would result if this Court accepted Chappell and the State’s suggestion that it disregard its holdings in the *Montoy* decisions. Since Chappell’s brief does not address the important constitutional or legal issues in this case at all, Appellees/Cross-Appellants respond only briefly to indicate how Chappell’s brief demonstrates the harm that would be caused to Kansas schoolchildren were the Court to follow the Walt Chappell’s arguments that the Legislature need not base its school-funding decisions on the actual cost of providing an adequate education.

ARGUMENTS AND AUTHORITIES

I. The Gannon Panel Already Rejected EMC’s and the State’s Arguments That the A&M Study is not Valid

Walt Chappell, like the State, first attempts to argue that the Augenblick & Myers (“A&M”) study is not valid. *See* Amicus, p. 3-5, State’s Response Brief, p. 10-13. Chappell does so, not based on any facts, but on philosophical disagreements and childish candy analogies. Nonetheless, the *Gannon* Panel entered a factual finding that the A&M Study and Legislative Post Audit (“LPA”) studies were not only valid, but also that they supported a finding that the base should be set higher than \$4,492:

[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[.]”)). Factual findings of the district court are granted extreme deference on appeal. The appellate court does not re-determine questions of fact. *See State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775 (2003). And, “a general finding of fact by the district court raises a presumption that it found all facts necessary to sustain and support the judgment rendered.” *Cason v. Geis Irrigation Co.*, 211 Kan. 406, 412 (1973). Just as the State provided no evidence to impeach the A&M study, neither has EMC.

II. The *Gannon* Panel Already Rejected EMC’s and the State’s Arguments That Student Performance is not Linked to Funding as a Factual Finding That is Entitled to Deference on Appeal

Most of Walt Chappell’s amicus brief (p. 5-12) is devoted to the State’s already-and-often-rejected factual allegation that there is no connection between school funding and student performance. 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, at pp. 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, at p.158). Factual findings of the district court are granted extreme deference on appeal. The appellate court does not re-determine questions of fact. *See State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275

Kan. 763, 775 (2003). Second, the most recent cost study conducted, provided for 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.13, pp.1637-38.

But Walt Chappell’s brief does not address these factual findings of the *Gannon* Panel. Instead, it attempts to draw conclusions from the percentage of the state budget devoted to education, a comparison of that percentage to other states’ percentages, and total taxpayer (state, federal, and local) expenditure numbers that do not take account increases in either the student population as a whole or changes in at-risk demographics to suggest that “Kansans are very generous and strongly support K-12 public education.” (Amicus, p. 6). Plaintiffs’ response is that Kansans are not only generous towards K-12 public education, they enshrined a command to the Legislature to ensure cost-based funding of an adequate education as a positive Constitutional duty. It is the Legislature’s duty to ensure adequate funding for the schools, based on cost, not based on comparisons with other budgetary items, amounts spent by other states, or other sources of income.

III. EMC’s and the State’s Arguments Both Ask This Court to Ignore the Effects That The State’s Underfunding Is Having on Kansas’ Most Vulnerable Students

Walt Chappell and the State, would ask the Court to disregard the low performance of the State’s most at-risk students when considering the effects of the State’s failure to adequately fund education. The State contends that “Kansas kids are doing well.” State’s Brief, at 38. While Walt Chappell does not go quite that far, he does place the blame for Kansas’ “below average” scores on “the larger number of ELL, low income and minority students in these districts...” (Amicus, p. 8). Chappell hints at one possible “solution” when he states “No other nation in the world allows students who do not read,

speak and understand their language into K-12 classrooms.” *Id.* He suggests another possible “solution” by asking the Court to change the definition of an “at-risk student” so that it does not include children from low-income households. *Amicus*, 16-17. These statements demonstrate the untethered thinking that arises when the constitutional mandate of Article 6 to provide an adequate education for *all* Kansas schoolchildren is disregarded.

As demonstrated in §J of the Brief of Cross-Appellant (“Kansas Students Are Not Receiving a “Suitable Education” Due to the State’s Underfunding”), at pp. 29-57, there is a plethora of evidence regarding the subpar performance of a significant number of Kansas students across multiple measures of achievement, especially with regard to ELL, low income, and minority students. The legislative duty imposed by the Kansas Constitution is a duty *to each school child of Kansas, equally*. R.Vol.35, p.86 (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009); R.Vol.35, p.84 (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009) (citing *Provance v. Shawnee Mission U.S.D. No. 512*, 231 Kan. 636, 643 (1982), which stated “[t]he ultimate State purpose in offering a system of public schools is to provide an environment where quality education can be afforded to all”) (emphasis added)). The Legislature does not meet this constitutional duty when it ignores, as the State’s arguments do, or excludes, as Walt Chappell’s arguments do, Kansas schoolchildren because they are poor, members of minorities, or English Language Learners. The State’s duty is to all Kansas schoolchildren, and it is not being met.

IV. The Proper Remedy is One That Requires the State to Fund Education at a Level Based on the Actual Costs of Providing a Constitutional Education

Walt Chappell and the State take issue with the remedy ordered within the *Gannon* Decision. So do Plaintiffs. The *Gannon* Panel inexplicably only ordered the BSAPP be set at \$4,492. R.Vol.14, pp.1964-66 (*Gannon* Decision, 245-47). This is the statutory base pursuant to K.S.A. 72-6410(b). This statute has not been amended since 2008. K.S.A. 72-6410. Even if the State could establish the \$4,492 base set for 2013-14 was a cost-based decision at that time, there is no information that it remains an accurate representation of what it currently costs to educate Kansas students and overwhelming evidence to the contrary. Allowing the State to only fund to \$4,492 assumes educational funding has been stagnant since that level was set at the end of *Montoy*. But, “[t]he issue of [the suitability of the school finance system] is not stagnant; past history teaches that this issue must be closely monitored.” *Montoy I*, 275 Kan. at 153 (emphasis added). It is for this reason that Plaintiffs have asked this Court to 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)).

Walt Chappell, in statements that would presumably horrify the State based on its oft-repeated doomsday predictions regarding alleged judicial activism in school funding cases, suggests that instead of following the precedent set by *Montoy*, this Court should force the Legislature to:

- (1) set a limit on the cash reserves local districts can carry forward,
- (2) increase the productivity of Kansas teachers and staff [by requiring teachers to be in the building eight hours per day and each teach six, 50 minute class periods],
- (3) change the definition of At-Risk students,
- (4) reorganize school district boundaries [from the current 286 school districts

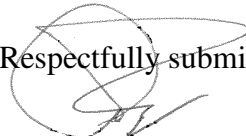
into 40 Regional Education Districts of 10,000 students or more], and (5) stop the unfunded Common Core, MTSS and data collection State and Federal mandates.

Amicus, 12-17. Plaintiffs seek a simpler resolution from this Court – that it order the Legislature to pass legislation that meets its constitutional obligation of providing funding for an adequate education for all Kansas schoolchildren. Walt Chappell’s radical tinkering with the Kansas educational system is not sought by any of the parties to this case, and there is no evidence that it would have any beneficial effect on student achievement.

CONCLUSION

Plaintiffs have asked this Court to protect the constitutional right of all Kansas schoolchildren to an adequate education by requiring the Legislature to perform its constitutional duty of making adequate provision for that education. The Court should not be distracted by arguments, whether put forward by the State or similarly thinking Walt Chappell, that would ignore that duty; ignore the well-founded factual findings of the trial court; and engage in evidence-free experimentation with Kansas’ educational system. The question before the Court is whether the Legislature has met its constitutional duty; the evidence demonstrates that it has not. This Court must now require the State of Kansas to do so in order to protect the futures of Kansas’ kids.

Dated this 27th day of September 2013.

Respectfully submitted,


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