

NO. 113,267

IN THE SUPREME COURT OF THE STATE OF KANSAS

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

Plaintiffs/Appellees,

vs.

STATE OF KANSAS, *et al.*,

Defendants/Appellants.

**PLAINTIFFS' REPLY TO BRIEF OF AMICUS CURIAE,
LEGISLATIVE COORDINATING COUNCIL**

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

For brevity purposes, Plaintiffs use this reply for the sole purpose of responding to arguments made by *amicus curiae* Legislative Coordinating Council (“LCC”) that were not made by the State in its brief, dated 6-30-17. None of the arguments set forth by the LCC support dismissal of this case.

ARGUMENTS AND AUTHORITIES

S.B. 19 is not reasonably calculated to address the constitutional violations identified by this Court. *Gannon v. State*, 305 Kan. 850, 856, 390 P.3d 461 (2017) (“Gannon IV”) (citing *Gannon v. State*, 303 Kan. 682, 743, 368 P.3d 1024 (2015) (“Gannon II”). It does not comport with previously identified constitutional mandates such as equity. The State is not in compliance with Article 6 of the Kansas Constitution and dismissal of this matter is not appropriate.

I. S.B. 19 DOES NOT RADICALLY CHANGE THE FUNDING TO AT-RISK STUDENTS IN A MANNER THAT JUSTIFIES UNDERFUNDING THE FORMULA

In its brief, LCC claims that, based on comments from Justice Biles during oral argument that were not included in the Court’s unanimous opinion, “the better tailored the structure for helping underperforming students, the less overall funding would be required to achieve constitutional compliance.” LCC 6-30-17 Brief, p.4. Notably, the Court has not announce such a finding in any school funding decision, and certainly not in *Gannon IV*.

Any discussion about the validity of the statement is for naught, however. S.B. 19 is not so tailored to helping underperforming students that it justifies an overall reduction in the level of funding. S.B. 19 provides \$74 million *less* than what the LPA estimated that it cost

to educate at-risk students in 2007. Pls’ 6-30-17 Brief, p.33 (citing Appx. N). And, while it requires that the at-risk state aid be used for at-risk students, consistent with best practices, there is simply no indication in the record that this is any different than how at-risk funds were regularly used in the past. The provisions that allegedly target “at-risk” students do not render S.B. 19 constitutional, and certainly do not justify underfunding Kansas public education. This Court specifically instructed the State that more money was needed to make the system constitutional. *Gannon IV*, 305 Kan. at 913 (“As a result of this and other findings, the panel determined that *more money was needed* to make the inadequate CLASS legislation constitutional. *We agree*, based upon the demonstrated inputs and outputs found by the panel[.]”) (emphasis added). There is no indicator on which the State could rely to conclude that S.B. 19, which falls far short of every estimate of what it costs to educate a Kansas student in FY18, is reasonably calculated to have all Kansas students meet or exceed the *Rose* factors.

II. THE SCHOOL FINANCE SYSTEM HAS NOT EVOLVED DRAMATICALLY SINCE THIS LITIGATION BEGAN; S.B. 19 IS “MATERIALLY IDENTICAL” TO THE SYSTEM THAT EXISTED WHEN THE LITIGATION BEGAN

The LCC urges this Court to view this case, procedurally, in a similar fashion to the legislation being considered in *Montoy v. State*, 282 Kan. 9, 138 P.3d 755 (2006) (“Montoy V”). It claims that S.B. 19 represents “a formula that has evolved dramatically since this litigation began seven years ago.” This is false. As the State admits, “SB 19 returns the Kansas school finance system to formulas materially identical to those in the SDFQPA.” State’s Brief, at p.3. The State’s temporary adoption of S.B. 7 – the two-year block grant bill

– was nothing more than an attempt to skirt its obligations to fund the increasing annual costs of public education.

III. S.B. 19’S DECISION TO INTENTIONALLY UNDERFUND THE PROGRAMS THAT IT LEGISLATES RENDERS THE SYSTEM UNCONSTITUTIONAL

The LCC asks this Court to deem S.B. 19 constitutional because it funds teacher mentoring, special education, and parents as teachers. LCC 6-30-17 Brief, pp. 12-13. However, the State has intentionally underfunded each of these programs. Plaintiffs argue that S.B. 19 is structurally unsound because it does not fully fund the programs that it legislates. Pls’ 6-30-17 Brief, pp. 35-39. As set forth in Plaintiffs’ Opening Brief:

- S.B. 19 underfunds Special Education by \$57.5 million in FY18 and \$55.6 million in FY19.
- S.B. 19 under-appropriates the Mentor Teacher Program by \$2.2 million in FY18 and FY19.
- S.B. 19 under-appropriates the Professional Development Program. For both FY18 and for FY19, S.B. 19 only appropriates 20% of the full cost of implementing the program (\$1.7 million each year).

The State’s intentional decision to underfund these programs should not result in a finding of constitutional compliance.

CONCLUSION

Plaintiffs have produced significant material regarding the magnitude of the remedy needed to cure the specific constitutional violations that this Court identified in its March 2 Order. Plaintiffs urge this Court to pay special attention to the KSBE’s recommendation to

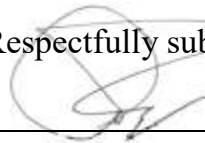
increase funding by \$893 million over the next two years. As this Court recognized in its Order, “the legislature itself necessarily acknowledges that the [KSBE] – which the legislature has entrusted with developing curriculum for Kansas public school students – is capable of understanding, measuring, and implementing the *Rose* educational goals in order to meet its important statutory duty.” *Gannon IV*, 305 Kan. at 864-65. Even the LCC acknowledges the importance of the KSBE and its involvement in the process of determining the level of funding to be dedicated to Kansas public education. LCC 6-30-17 Brief, pp. 13-14. S.B. 19 falls \$600 million short of providing the funding recommended by the KSBE; it funds only one-third of the request. For this reason, Plaintiffs request that this Court:

- (1) Declare S.B. 19 unconstitutional.
- (2) Enter a finding that the Legislature should appropriate at least enough money to meet the KSBE’s request for additional resources. This would require funding a base in FY18 of \$4,604, costing approximately \$567 million, and a base in FY19 of \$5090, costing an additional \$328 million for a total two-year increase of \$893 million. It would also require full funding of Special Education at 92% of Excess Costs as required by statute.
- (3) Disallow the addition of utilities and insurance expenditures to capital outlay authorization.
- (4) Authorize all districts a starting LOB of 33%,
- (5) Remove any requirement that LOB authority be linked to a protest/election requirement.
- (6) Disallow the discriminatory 10% floor to at-risk funding.
- (7) Require that LOB be equalized in the current year rather than the prior year.

Plaintiffs request that the court set a new deadline of September 1, 2017 for these unconstitutional provisions to be remedied. Allowing the unconstitutional system to continue for yet another year upon the hope that next year's legislature might enact a better cure is not appropriate. The children of Kansas have waited long enough. Absent a constitutional cure, Plaintiffs request that the implementation of the finance system be declared void. Plaintiffs would further request the opportunity to brief exceptions to any spending injunction to allow for the preservation and security of district properties and systems should that be necessary. Additionally, Plaintiffs request that this Court retain jurisdiction of the case during any phase-in period of a remedy to assure compliance with constitutional mandates.

Dated this 7th day of July, 2017.

Respectfully submitted,



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I hereby certify that on this 7th day of July, 2017, I electronically served the foregoing

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