

FILED

JUN 29 2015

**HEATHER L. SMITH
CLERK OF APPELLATE COURTS**

**IN THE SUPREME COURT OF THE STATE OF KANSAS
(Proposed for filing in Case No. 113,267)**

**LUKE GANNON, et al,
Plaintiffs,**

v.

**THE STATE OF KANSAS,
Defendant.**

County Appealed From:

District Court Shawnee County, Kansas, in the Matter of Proceedings Before the Three-Judge Panel Appointed Pursuant to K.S.A. 72-64b03 *in re* School Finance Litigation

District Court Case No.: 2010CV1569

Proceeding Under Chapter: 60

Party or Parties Who Will Appear as Appellees: UNIFIED SCHOOL DISTRICT NO. 259; UNIFIED SCHOOL DISTRICT NO. 308; UNIFIED SCHOOL DISTRICT NO. 443; and UNIFIED SCHOOL DISTRICT NO. 500



SUPPLEMENTAL DOCKETING STATEMENT - CIVIL

1. **Civil Classification:** Constitutional Law
2. **Proceedings in the District Court:**
 - a. Panel from whose decision this appeal is taken:

The Honorable Franklin R. Theis
Shawnee County District Court
200 S.E. 7th Street, Room 324
Topeka, KS 66603

The Honorable Robert J. Fleming
Labette County District Court
201 South Central Street
Parsons, KS 67357

The Honorable Jack L. Burr
Sherman District Court
813 Broadway, Room 201
Goodland, KS 67735

113 267

- b. List any other judge who has signed orders or conducted hearings in this matter: None
- c. Was this case disposed of in the district court by: Bench trial and on motions
- d. Length of trial, measured in days (if applicable): The original trial was 16 days; the Panel declined the State's request to present additional evidence.
- e. State the name of each court reporter or transcriptionist who has reported or transcribed any or all of the record for the case on appeal.

Jennifer Olsen, C.S.R., R. P.R.
 Official Court Reporter
 Shawnee County Courthouse, Room 410
 200 SE 7th Street
 Topeka, Kansas 66603
 785-251-4302

Liebe Franges, RPR, CCR
 (no longer employed with the 3rd Judicial District; contact Jennifer Olsen)
 Official Court Reporter
 Shawnee County Courthouse, Division Seven
 200 SE 7th Street
 Topeka, Kansas 66603

- f. State the legal name of all entities that are NOT listed in the case caption (including corporations, associations, parent, subsidiary, or affiliate business entities) but are parties or have a direct involvement in the case on appeal: None.
- g. State the name, address, telephone number, fax number, and e-mail address of every attorney who represented a party in district court if that attorney's name does NOT appear on the certificate of service attached to this docketing statement. None.

3. Jurisdiction:

- a. Date journal entry, judgment form, or other appealable order filed: 6/26/15
- b. Is the order appealed from a final order, *i.e.*, does it dispose of the action as to all claims by all parties? Yes
- c. If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment

- under K.S.A. 60-254(b)? N/A
- d. Date any posttrial motion filed:
- Motion and Memorandum of the State of Kansas to Alter and Amend the Panel Opinion and Order on Remand N/A
- [Plaintiffs'] Motion to Alter and Amend Panel's Previous Judgment Regarding Equity N/A
- e. Date disposition of any posttrial motion filed: (State's Motion to Alter and Amend Panel's Opinion and Order on Remand) 3/11/2015
(Plaintiffs' Motion to Alter and Amend Panel's Previous Judgment on Equity) 6/26/2015
- f. Date notice of appeal filed in district court: 6/26/15
- g. Other relevant dates necessary to establish this court's jurisdiction to hear the appeal, *i.e.*, decisions of administrative agencies or municipal courts and appeals therefrom: None
- h. Statutory authority for appeal: K.S.A. 60-2102(b)(1)
Alternatively K.S.A. 60-2102(a)(4)
- i. Are there any proceedings in any other court or administrative agency, state or federal, which might impact this case or this court having jurisdiction (yes or no)? No.
See *

* *Diane Petrella, et al. v. Sam Brownback, Governor of Kansas, in his Official Capacity, et al.*, Case No. 2:10-cv-02661 pending in the United States District Court for the District of Kansas and, Case No(s). 13-3334 & 14-3023 on interlocutory appeal before the Tenth Circuit Court of Appeals. In this suit, parents and students allege a discrete provision of the Kansas public school funding statutes, which grants limited authority to Kansas school districts to levy taxes (K.S.A. 72-6433(b), the Local Option Budget "Cap"), is unconstitutional. They demand injunctive relief restraining the defendant state officials from enforcing the Local Option Budget "Cap" on the ground that the limitation on the taxing authority granted to local school districts violates the Fourteenth Amendment of the United States Constitution. According to the Plaintiffs' claims in *Petrella*, enforcement of the Panel's judgment in this case would violate the United States Constitution.

4. Constitutional Challenges to Statutes or Ordinances:

Was any statute or ordinance found to be unconstitutional by the district court (yes or no)? Yes

If "yes," what statute or ordinance? Funding under the School District Finance and Quality Performance Act ("SDFQPA"), K.S.A. 72-6405, *et seq.* and under the Classroom Learning Assuring Student Success Act ("CLASS") adopted by 2015 House Substitute for Senate Bill 7 ("SB 7") and amended by 2015 House Substitute for Senate Bill 4 ("SB 4") and parts of 2015 Senate Substitute for HB 2353 ("HB 2353"), 2015 House Substitute for SB 112 ("SB 112").

5. Related Cases/Prior Appeals:

a. Is there any case now pending or about to be filed in the Kansas appellate courts which:

(1) Arises from substantially the same case as this appeal (yes or no)? No

(2) Involves an issue that is substantially the same as, similar to, or related to an issue in this appeal (yes or no)? No

b. Has there been a prior appeal involving this case or controversy (yes or no)? Yes, Case No(s). 109,335 and 113,267

6. Brief statement (less than one page), without argument, of the material facts.

This is an appeal from a judgment in a "school finance" case brought only against "the State" generally, rather than against any particular agency or official, by four school districts – U.S.D. 259 in Wichita, U.S.D. 308 in Hutchinson, U.S.D. 443 in Dodge City and U.S.D. 500 in Kansas City, Kansas.

Plaintiffs asked a three-judge panel ("Panel"), appointed under K.S.A. 72-64b03, to hold that the School District Finance and Quality Performance Act ("SDFQPA"), K.S.A. 72-6405, *et seq.*, and the State's associated primary and secondary education appropriations violate Article 6, § 6 of the Kansas Constitution. After a bench trial in the summer of 2012, the Panel rejected most of the Plaintiffs' claims and arguments, but concluded: (1) the then failure to fully fund "equalization aid" in certain parts of the Act was unconstitutional and (2) the then amount of Base State Aid Per Pupil ("BSAPP") provided under the SDFQPA was unconstitutional. The Panel ordered full funding of Local Option Budget ("LOB") state equalization aid under K.S.A. 72-6434 and capital outlay equalization state aid under K.S.A. 72-8801, *et seq.* Rather than giving the State an opportunity to consider appropriate remedies, the Panel ordered the BSAPP be funded at \$4492 for FY2014 and adjusted afterward to account for inflation. The State appealed and Plaintiffs cross-appealed asserting the BSAPP should be much higher than \$4492.

On March 7, 2014 the Kansas Supreme Court issued its opinion. It affirmed, in part, the

Panel's judgment concerning funding of LOB and capital outlay aid, holding that the Legislature needed to address inequities in the funding of this state aid. *Gannon v. State*, 298 Kan. 1107, 1176-89, 319 P.3d 1196 (2014). However, the Kansas Supreme Court rejected the Panel's ordered "cures." It remanded to the Panel instructing that the State's response to the inequities was to "be measured by determining whether it sufficiently reduces the unreasonable, wealth-based disparity so the disparity becomes constitutionally acceptable, not whether the cure necessarily restores funding to the prior levels." *Id.* at 1181, 1188-89.

The Court reversed the Panel's judgment regarding SDFQPA's funding because the Panel had applied the wrong constitutional standard concerning adequacy of funding required under Article 6. It remanded the case to the Panel for findings and conclusions as to "whether the State met its duty to provide adequacy in public education as required under Article 6 of the Kansas Constitution[.]" *Gannon*, 298 Kan. at 1199. The Court instructed:

The panel shall promptly make findings as appropriate, consider whatever evidence it deems relevant—whether presently in the record or after reopening—and apply the adequacy test articulated in this opinion. More specifically, the panel must assess whether the public education financing system provided by the legislature for grades K-12—through structure and implementation—is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), and as presently codified in K.S.A. 2013 Supp. 72-1127.

Id. at 1199-1200.

After the Supreme Court's decision, legislation was promptly passed which addressed the inequities found in the funding of capital outlay and LOB aid. The Panel conducted a hearing on June 11, 2014. At the conclusion of the hearing, the Panel announced the legislation complied with the Supreme Court's order regarding capital outlay and LOB aid.

Plaintiffs filed a "Motion for Judgment on Existing Record" regarding the "adequacy" of the present finance of K-12 public education under Article 6. The State opposed this motion. As early as June 9, 2014, the State contended that the Panel needed the latest available information about the current system of finance and revenues in order to make a determination of current adequacy. It pointed out, among other things, that there was no evidence at all before the Panel concerning the 2012-2013 and 2013-2014 school years. Nor was there evidence in the trial record about the financing of K-12 public education, federal funds available, or monies placed into the KPERs system for the benefit of Kansas teachers for the 2014-2015 school year. The State asked permission to conduct discovery and to present additional evidence. It noted judgment was, in fact, proper in favor of the State on Plaintiffs' adequacy claims if no further evidence was submitted to the Panel. In fact, on August 28, 2014, the State filed a motion for judgment, under K.S.A. 60-252(c), after Plaintiffs effectively elected to not present any additional evidence.

On November 14, 2014, the Panel sent counsel an email stating no further hearings or arguments were needed and that its opinion was forthcoming.

On December 30, 2014, the Panel released its Memorandum Opinion and Order on Remand. It reaffirmed that the State had complied with the Supreme Court's order regarding capital outlay and LOB aid. However, the Panel entered a declaratory judgment that the Kansas public education financing system provided by the Legislature for grades K-12 — through structure and implementation — is not presently reasonably calculated to have all Kansas public education students meet or exceed the Rose factors and, therefore, is unconstitutional in violation of Article 6 of the Kansas Constitution. In the conclusion of the Panel's order, it provided an alleged "bright-line" for required for compliance with Article 6. As part of this, the Panel concluded 2014 changes to weightings in the SDFQPA's formula violated the equity part of the mandates in Article 6. The Panel would not dismiss the litigation. It stated that it retained jurisdiction "to assure a constitutional commitment to constitutionally acceptable funding has been reached." Remand Opinion, 12/30/14, p. 115.

On January 23, 2015, the State filed a motion to alter and amend to obtain clarification of the Panel's December 30, 2014 order and additional findings of fact. It then, on January 28, 2015, timely filed a notice of appeal. At about the same time, it notified the Panel that its appeal was under K.S.A. 60-2102(b)(1) which requires filing of a notice of appeal within 30 days of the entry of a decision finding a violation of Article 6 of the Kansas Constitution. The State explained, K.S.A. 60-2103(a) (extending the deadline for filing a notice of appeal by the timely filing of motions to alter and amend or for additional findings) does not appear to apply to an appeal under K.S.A. 60-2102(b)(1) if, as is the case here, the rulings appealed are not final orders. *See* K.S.A. 60-254(a). The State requested a prompt decision from the Panel on its motion.

On March 11, 2015, the Panel entered a Memorandum Opinion and Order denying the State's Alter and Amend.

On March 13, 2015, the Panel set a hearing on [Plaintiffs'] Motion to Alter and Amend Panel's Previous Judgment Regarding Equity for May 7-8, 2015.

On March 16, 2015, Plaintiff Districts filed a Motion for Injunction and Declaratory Relief in which they asked the Panel to enjoin 2015 House Substitute for Senate Bill 7 ("SB 7"), a law which has substantively changed the Kansas public education financing system for grades K-12.

The hearing on Plaintiff Districts' Motion to Alter and Amend Panel's Previous Judgment Regarding Equity was conducted on May 7 and 8, 2015. After the hearing, HB 2353, § 8 and SB 112 § 20 became law.

On June 26, 2015, almost immediately after the longest Kansas Legislative session in history concluded, the Panel filed a "Memorandum Opinion and Order and Entry of Judgment Regarding Panel's Previous Judgment Regarding Equity and Plaintiffs' Motion for Declaratory Judgment and Injunctive Relief" (hereafter "Order"). In the Order, the Panel reversed and withdrew its December 30, 2014 finding that the State had substantially complied with Article 6's equity requirements articulated in *Gannon*. The Panel found SB 7, parts of 2015 House Substitute for Senate Bill 4 ("SB 4") and parts of 2015 Senate Substitute for HB 2353 ("HB 2353"), 2015 House Substitute for SB 112 ("SB 112"), each of which amended or supplemented

SB 7, unconstitutional in violation of Art. 6, § 6(b) of the Kansas Constitution, but stayed “what would otherwise be the consequence demanded of our ruling pending appeal,” subject to a “temporary restraining order.”

The State filed its notice of appeal on June 26, 2015. Then, on June 29, 2015, the State filed a Motion for Stay of Operation and Enforcement of the Panel’s Judgment.

7. Concise statement of the issues proposed to be raised.

The State contends that the Panel ignored or misapplied the Supreme Court’s directions as expressed in *Gannon*. The Panel also exceeded the mandate issued with the remand. The mandate directed the Panel to make findings as appropriate concerning compliance with the adequacy part of Article 6. Under the directions supplied by the Supreme Court in *Gannon*, *current* adequacy was the question to be resolved, and that question was not to be determined by using the *Montoy* remedy or outdated costs study estimates as a floor. The Supreme Court’s directions required the Panel to apply the presumption of constitutionality to current school finance legislation, to recognize that the Legislature has considerable discretion in school finance matters, and to count all sources of funding in making the adequacy determination. Furthermore, the mandate did not permit the Panel to evaluate Article 6 equity questions beyond the narrow equity issue which had been remanded.

The Panel continues to second-guess the fiscal and policy judgments made by elected officials. The Panel did not properly consider the hundreds of millions of dollars Kansas schools received from other sources such as federal funding and state funds that support teachers and schools in ways other than base state aid per pupil. The Panel also refused to consider the millions of dollars that some school districts held and continue to hold in reserve funds and their decisions to not pursue additional local revenue as provided by law. The Panel substituted a bright-line for compliance with Article 6 for the standard articulated in *Gannon* that public education financing system provided by the legislature for grades K-12 is constitutional if — through structure and implementation — it is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), and as presently codified in K.S.A. 2014 Supp. 72-1127.

The Panel should have entered judgment for the State against Plaintiffs’ adequacy claim. Alternatively, it should have allowed discovery and additional evidence and then followed the directions provided by the Supreme Court. The appeal will raise the following issues:

- a. Should judgment be entered in the State’s favor, as a matter of law, because the Plaintiffs have not proven and cannot prove that the presumptively valid school finance system violates Article 6 of the Kansas Constitution, particularly from the outdated evidence submitted at trial?
- b. Do the SDFQA and now the CLASS and appropriations to “make suitable provision for finance of the educational interests of the state” bear a presumption of constitutionality, a presumption that cannot be overcome by the Panel’s substitution of its findings of fact in place of the Legislature’s

presumed findings which support the Act and the Legislature's appropriations?

- c. Did the Panel err by applying the wrong standard for review of Legislative actions, thereby, refusing to give any deference and substituting its judgment for that of the Legislature?
- d. Did the Panel err by failing to consider all sources of revenue provided to Kansas schools in determining whether the State has made "suitable provision for the finance of the educational interests of the state"?
- e. Did the Panel err by applying a bright-line for Article 6 compliance based upon mistaken legal conclusions that: (1) Article 6 of the Kansas Constitution creates a guarantee to successful completion of an education satisfying the *Rose* goals/standards to almost each, if not each, student as opposed to requiring legislation reasonably calculated to afford the opportunity for each student to receive an education that meets or exceed the goals/standards set out in *Rose* and as presently codified in K.S.A. 2014 Supp. 72-1127; and/or (2) outdated studies aimed at estimating the cost to comply with the then federal requirement under the No Child Left Behind Act and/or historical funding levels approved in *Montoy* state the floor for adequate funding, as opposed to test set out by the Supreme Court in *Gannon*?
- f. Did the Panel err by relying on opinion testimony which was predicated on witnesses' improper legal interpretations concerning the State's obligations under Article 6 of the Kansas Constitution?
- g. Did the Panel err by ignoring uncontroverted facts, including the following evidence: Billions of tax dollars will be spent on K-12 education; the Legislature has arranged funding for this year's K-12 public education that will provide Kansas schools with record levels of funding overall and per student, the highest levels of revenue in history; the Legislature has given even more flexibility in how the funds are spent; the State has adopted and is implementing nationally recognized, rigorous academic standards, including revised accountability measures approved by the federal government; Kansas K-12 education is among the best in the country according to all objective standards, and all of our schools are accredited; and there is no evidence, no information whatsoever, that local school districts cannot provide the opportunity to each and every student to receive the minimal educational floor outlined by the *Rose* goals/standards adopted in both *Gannon* and by the Legislature?
- h. Did the Panel err by essentially applying a rule of no tolerance to less state capital outlay and LOB aid then it ordered before the first *Gannon* appeal, rather than the test adopted by the Supreme Court in *Gannon*?

- i. Is there substantial competent evidence to support the Panel's purported findings of fact on the adequacy and/or equity of present school finance systems?
- j. Did the Panel exceed its jurisdiction under the Supreme Court's mandate and remand by finding 2014 changes to weightings in SDFQPA's formula violated the equity requirements in Article 6 of the Kansas Constitution?
- k. Did the Panel exceed its jurisdiction under the Supreme Court's mandate and remand by finding the CLASS unconstitutional?
- l. Did the Panel err by refusing to allow the State to conduct limited discovery and refusing to allow the State to present additional evidence?
- m. Did the Panel err by failing to require amended pleadings, other due process and a trial before it ruled on the constitutionality of the CLASS?
- n. Is this case, in its current posture, justiciable and properly before the courts?
- o. Was the Panel's remedy of "temporary restraining order" proper?
- p. Was the Panel's alternate remedy of selectively invalidating and rewriting duly-enacted legislation proper?

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of June, 2015, a true and correct copy of the above and foregoing was mailed, postage prepaid, to:

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