IN THE SUPREME COURT OF THE STATE OF KANSAS

15-113267-S

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

Appellees/Plaintiffs,

v.

STATE OF KANSAS,

Appellant/Defendant.

County Appealed From: Shawnee

District Court Case No.: 10-C-1569

RESPONSE TO MOTION OF THE STATE OF KANSAS FOR STAY OF OPERATION AND ENFORCEMENT OF THE PANEL'S JUDGMENT

Plaintiffs respectfully request that this Court deny the Motion of the State of Kansas for Stay of Operation and Enforcement of the Panel's Judgment for the reasons stated below. S.B. 7 was adopted not in compliance with the Order the Supreme Court's March 2014 Order, but *in defiance* of it. The Panel's attempts to remedy the State's continued constitutional violations should be applauded, not stayed. The State has been repeatedly warned of the dangers of continuing down the path of unconstitutional funding: **in December of 2009**, the 2010 Commission (established by the Legislature to monitor, evaluate, and make recommendations regarding various aspects of educational funding) warned that the State "cannot sacrifice a generation of Kansas students because the economy is weak." Since then, the State has repeatedly failed to meet its constitutional duties. And, the State's request for a stay is extremely troublesome in light of the fact that, if the stay is granted, the availability of the approximately $54 million in equalization funds to which the school districts are entitled **will expire tonight** – upon the conclusion of the state fiscal year (June 30, 2015). The State's request for a stay should be denied.

The State, in filing its Motion for Stay, purports to asks this Court to maintain the *status quo* with regard to the Kansas educational system. First, it is a misnomer for the State to suggest that the block grant bill (S.B. 7) that would be applicable to funding education for the FY16 school year is the *status quo*. The *status quo* is the SDFQPA, as amended by H.B. 2506, which existed immediately prior to the adoption of S.B. 7. In fact, preserving the Panel's Order – which directs the State to distribute funds pursuant to weighted enrollment as was done under the SDFQPA and fully fund the equalization mechanisms as provided in H.B. 2506 – is much more akin to preserving the *status quo* than the relief requested by the State.

Second, maintaining that "*status quo*" will merely subject Kansas schoolchildren to the ongoing effects of an unconstitutional school funding scheme. More than two years ago, the *Gannon* Panel stated that "a continuation of the status quo would only deepen the reflection of opportunities lost. For past students and future students, "all that they can be" was, is currently, and will be, compromised." Panel's January 11, 2013 Order, at p. 189. The unconstitutionalitics present then have not been cured and continue to plague the State of Kansas. Instead, the State wants to prolong those unconstitutionalities *for another two years* while they – just now – "fully consider[] and explore[] the complicated methods and formulas for school funding." That process should have started in 2009, when Plaintiffs put the State on notice of the numerous constitutional deficiencies that operated to deny Kansas schoolchildren a constitutional education.

ARGUMENTS AND AUTHORITIES

A. *Standard for Granting Requested Stay*

The State requests a stay under K.S.A. 60-262(f)(1). Generally, to be entitled to such a stay, a party must demonstrate four elements: (1) that the appeal rests on a strong legal position; (2) that the appellant will suffer irreparable harm in the absence of the stay; (3) that the stay will not cause injury to the appellee; and (4) that the stay will not be adverse to the public interest. *See Planned*

Parenthood of Kansas and Mid-Missouri v. Brownback, 799 F. Supp. 2d 1218, 1236 (D. Kan. Aug. 17, 2011) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)) (citing requirements under F.R.C.P. 62(c), which is substantially similar to K.S.A. 60-262(f)). The State makes no attempt to show any of these elements, which alone weighs in strong favor of denying the State's request.

B. *The Stay Will Significantly Harm Plaintiff School Districts, All Kansas School Districts, All Kansas Schoolchildren, and Will be Adverse to Public Interest*

As this Court has made clear, "A remedy that is never enforced is truly not a remedy." *Montoy v. State of Kansas*, 279 Kan. 817, 821, 825-26 (2005) (citing *DeRolph v. State*, 2000 Ohio 437 (2000)). Plaintiffs have secured a ruling that the school funding scheme is inequitable under applicable constitutional standards. This Court required the State to cure those inequities. So far, the State has been able to completely dodge its requirement to do so. If the requested stay is granted, the State will be able to dodge that requirement yet again. The availability of the equalization funds to which the school districts are entitled **will expire tonight** – upon the conclusion of the state fiscal year (June 30, 2015). If this Court stays the Panel's Order, Plaintiffs will never be able to access the money to which they are entitled. This threat of irreparable harm is not illusory. This exact situation has played out in this very case. The Panel has previously acknowledged: "Unless encumbered, the availability of the appropriated funds for the purpose expires after the period for which the appropriation was made." *See* Panel's January 11, 2013 Decision, at p. 203 (citing *Hyre v. Sullivan*, 171 Kan. 309 (1951)). **Therefore, if the Panel's Order is stayed, the funds to which the school districts are entitled will forever expire.**

And, as Plaintiffs have shown in their Proposed Findings of Fact (which were adopted by the Panel and will be entitled to deference on appeal), allowing S.B. 7 to dictate funding levels will result in the following additional harms:

- A $53,734,035 reduction in equalization funding for FY15;

- Systematic discrimination by the State against disadvantaged districts that qualify for capital outlay state aid and LOB state aid by way of average cuts that exceed $100 per pupil;

- Removal of the weightings that ensure equal educational opportunities for students that cost more to educate, resulting in districts being forced to educate any influx of more costly students without a corresponding increase in funding;

- Tangible damages to Plaintiff School Districts by way of deferred maintenance and cancellation of a planned replacement of the student information system;

- Inequitable access to educational opportunity unconstitutionally hinged on whether a school district can successfully pass an (inherently unfair) election before July 1, 2015; and the wealth of the district;

- The operation of a formula that the State admitted did not meet the Supreme Court's adequacy test and instead simply freezes in place the funding provided for FY15, which has already found to be unconstitutionally inadequate[1]; and

- The requirement of additional operational cuts to programs by school districts on top of the ones that they have already made since the educational funding cuts began in 2009; these cuts are being made solely because of reductions in funding and not because they are anticipated to increase educational opportunity.

C. *The State's Appeal Does Not Rest on a Strong Legal Position*

In March of 2014, this Court tasked the Panel with "ensur[ing] the inequities in the present operation of the capital outlay statutes [and] the local option budget and supplemental general state aid statutes are cured." *Gannon v. State*, 298 Kan. 1107, 1170-72 (2014). The Kansas Supreme Court gave the State discretion to cure the inequities that the Kansas Supreme Court found within the system. *Gannon*, 298 Kan. at 1198-99. One of those options allowed the Kansas Legislature to fully fund the equalization mechanisms, in which case the Panel "need not take any additional action on that issue." *Id.* The State took action to purportedly comply with the Court's equity mandate and adopted 2014 Senate Substitute for House Bill 2506 (H.B. 2506), which the State contended would

[1] Any allegations by the State the funding levels increase under the operation of S.B. 7 are demonstrably false.

fully fund the equalization mechanisms. At the Panel's hearing to determine the State's compliance, the State represented to the Panel that they would fully fund the equalization mechanisms, stating "We won't fund short of it, we'll go the full amount." Based on the State's representations that the equalization mechanisms would be fully funded through the adoption of H.B. 2506, the Panel found that the State was in compliance with the Court's mandate.

Shortly after the State secured a favorable equity ruling by representing to the Panel that it would fully fund H.B. 2506 and "go the full amount," Governor Brownback called upon the Legislature to revoke the full funding of the equalization mechanisms. He instead asked the Legislature "to stall the increase of $54 million in Local Option Budget State Aid and Capital Outlay State Aid spending that was not appropriated by the Legislature in the Fiscal Year 2015 budget bill." The Legislature followed Governor Brownback's request and adopted S.B. 7. That bill was signed into law by Governor Brownback on March 25, 2015 and became law on April 2, 2015. S.B. 7, among other things, revokes the current school finance system, including the provisions of H.B. 2506 that purported to fund and cure the inequities identified by the Supreme Court. As a result, Kansas school districts will receive only a fraction of the full funding that they expected to receive by operation of H.B. 2506 for FY15. **It is undisputed that the State reduced equalization funding for FY15 by $53,734,035.**

The Supreme Court indicated that if the State less than fully funded equalization – as it did when it adopted S.B. 7 and repealed H.B. 2506 – that the State would be required to show that the new law (S.B. 7) meets the equity test and "through structure and implementation . . . gives school districts reasonably equal access to substantially similar educational opportunity through similar tax effort." *Gannon*, 298 Kan. at 1198-99. The State cannot meet this burden. In fact, the State has admitted that the Legislature's intent in adopting S.B. 7 was to prevent the districts from receiving

"any more capital outlay and LOB state aid in FY2015 beyond the approximate $4 million the Legislature appropriated in SB 7." The Legislature's stated intent "'reflects no other reason than a choice based on the amount of funds desired to be made available' by the legislature" and, as such, is improper. *Gannon*, 298 Kan. at 1185.

The State does not spend much effort arguing that it is in compliance with its constitutional obligations. Instead, the State focuses almost entirely on one argument: that the Panel violated the separation of powers doctrine when it entered its Order. This Court gave the Panel the authority to fashion a remedy if the State failed to comply with its March 2014 mandate. *Gannon*, 298 Kan. at 1198-99 (stating that if the Legislature's equity fix (here, S.B. 7) failed the Court's equity test, "the panel should enjoin its operation and enter such orders as the panel deems appropriate"). More importantly, the Panel did not order any appropriations and the State's separation of powers arguments should be disregarded. The Panel merely ordered that existing funds be distributed in a constitutional manner. This is consistent with Kansas law that provides the Panel with the authority to direct that moneys for school finance "shall be given first priority and be paid first from existing state revenues." K.S.A. 72-64c03.

The State should not be allowed to preserve the powers vested to it by Article 2 of the Constitution while wholeheartedly repudiating Article 6's limitations on that power. Both articles of the Kansas Constitution must be given meaning. Allowing the Kansas Legislature to appropriate funds with no regard for Article 6 is itself a violation of the Kansas Constitution. By amending Article 6, the people of Kansas directed their Legislature to exercise their Article 2 powers in Article 2 in a particular way (*i.e.*, by appropriating adequate, equitable funding to public education). Disregarding the people's mandate, the State itself calls for a violation of the separation of powers. It seeks to give the Legislature the power to legislate, the power to appropriate, *and the judiciary's*

power to review the constitutionality of laws that the Legislature enacts. This Court should prevent such an improper result by denying the State's requested relief.

As to adequacy, the State half-heartedly advances only one argument: that the Panel did not have jurisdiction over the State's docketed Article 6 adequacy appeal. This argument directly flies in the face of this Court's April 30, 2015 Order. That Order clearly stated that the Panel had authority to consider the "March 26 motion for declaratory judgment and injunctive relief," which specifically raised issues related to the adequacy of S.B.7.

D. *The State Will Suffer No Harm in the Absence of the Stay*

The State makes no attempt to demonstrate how the absence of a stay will result in any harm to the State, aside from asserting that all K-12 funding will be lost by operation of the Panel's Order. And, while that would perhaps be true if the Panel had actually found that the severability clauses operated the way that the State contends that they do, *see* Motion for Stay, at pp. 15-16, that is not the case. Instead, after careful consideration of the State's intent in adopting S.B. 7, the Panel concluded that its remedy comported with the statutory language. The theoretical harm that the State raises is just that: theoretical. It will not actually result because the Panel did not find that the statutes must fall entirely.

Surprisingly, the State points the finger at the Panel and blames it for intentionally delaying the Panel's decision for "political" reasons. This argument should be disregarded for three reasons. First, it was the State's bad faith that caused any delay. If the State did not intend to fully fund the equalization mechanisms, it should have made that clear at the *first* hearing that the Panel held on equity on June 11, 2014. Instead, the State adopted H.B. 2506 in order to feign compliance with the Supreme Court's March 2014 Order. At the June 2014 hearing, the State fully defended H.B. 2506 and the State's intent to fully fund the equalization mechanisms, indicating that the State deserved "a pat on the back." The charade worked; as a result, the Panel found that the Legislature had

substantially complied with the Supreme Court's mandate However, after securing a favorable ruling, the State backed out on the promises it made in H.B. 2506 and instead adopted S.B. 7. The State knowingly and intentionally adopted S.B. 7 to provide less than full funding for the equalization mechanisms, despite previously telling this Panel that it intended to fully fund those mechanisms. Had the State accurately and honestly represented its intentions at the June 2014 hearing, this entire situation could have likely been avoided.

Second, the State should not blame the Panel because the Legislature did not make good use of its time during the legislative session and instead waited to fund a budget on the last possible day.

Third, the State's arguments regarding timeliness are undermined by its continued allegations that the Panel refused to give the State an opportunity to consider appropriate remedies. *See e.g.* Motion for Stay, at p. 6. The State is well aware of the constitutional infirmities present in S.B. 7, admitting during the May 2015 hearing that the funding scheme likely violates the adequacy component of Article 6 of the Kansas Constitution. The Panel allowed the Legislature up to the very last minute to cure these known deficiencies. The Legislature declined to do so, necessitating the Panel's Order.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny the State's request for a stay.

Dated this 30th day of June, 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2015, a true and correct copy of the above and foregoing was sent by first-class mail and e-mail to the following:

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