

No. 15-113267-S

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,

Defendant/Appellant.

**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
District Court Case No. 2010-CV-001569**

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Legislative Coordinating Council of the Kansas Legislature (“LCC”), as the body created by state law to “represent the legislature when the legislature is not in session[,]” has a substantial interest in this litigation. K.S.A. 46-1202. The Court has recognized repeatedly that “the legislature has the power—and duty—to create a school funding system that complies with Article 6 of the Kansas Constitution.” *Gannon v. State*, 390 P.3d 461, 483 (March 2, 2017) (“*Gannon IV*”) (citing *Gannon v. State*, 298 Kan. 1107, 1146, 319 P.3d 1196 (2014) (“*Gannon I*”).

As the branch of government responsible for the state budget and the school finance system, the Kansas Legislature has a significant interest in the Court’s understanding of Senate Bill 19, its interpretation of Article 6 of the Kansas Constitution, and its application of that law to SB19. In addition to its constitutional duty “to create a school funding system,” the Legislature has unique insight on the months of hearings and deliberation that culminated in passage of SB19. This brief (and the response brief to follow) provides the Legislature with the forum through which to impart this perspective.

SUMMARY OF THE ARGUMENT

“We are mindful of the fact that the funding of public education is extraordinarily complex, just as we are mindful of the realities of the legislative process.” *Montoy v. State*, 282 Kan. 9, 24 (2006) (“*Montoy V*”).

Almost 11 years ago, this Court used the preceding sentence to announce the constitutionality of a new K-12 finance formula and the end of the last school funding lawsuit. This sentence is as true today as it was in July 2006, a fact of which the Kansas

Legislature (and this Court) are keenly aware. The 2017 Legislature undertook the herculean task of constructing a new formula that followed the Court's *Gannon IV* mandate and placed hundreds of millions of new dollars annually into Kansas schools, while facing one of the largest budget crises in state history. The task was “extraordinarily complex.” The legislative “realities” were beyond challenging.

Nonetheless, the Legislature succeeded. In this brief, the Legislature will provide a short synopsis of the thousands of hours of analysis, testimony, debate, and amendments that created Senate Bill 19. The Legislature does not, and will not, claim that SB19 is perfect. No legislation ever is.

Instead, the Legislature will illustrate how it processed the Court’s constitutional guidance by highlighting the portions of *Gannon IV* on which it focused. For each of these provisions, the Legislature will show “that its proposed remedy is reasonably calculated to address the constitutional violations identified...” *Gannon IV*, 390 P.3d at 469. It will further, as the Court directed, “explain[] its rationales for the choices made to achieve” compliance. *Id.*

The result of this analysis is clear. The Legislature’s K-12 funding hikes are substantial and well-targeted. The Legislature provides unprecedented aid for underperforming students. It partners with the State Board of Education to create a comprehensive structure for assessing student performance and new funding flexibility to fit those changing needs. The new formula substantially complies with *Gannon IV* and warrants dismissal of this litigation.

ARGUMENT AND AUTHORITY

Through months of deliberation following *Gannon IV*, the Kansas Legislature parsed this ruling for constitutional guidance. Using the Court’s key pronouncements, the Legislature worked diligently to craft a school finance formula that remedied these perceived violations. Those operative *Gannon IV* holdings, the Legislature’s responses to them and the rationales for these actions are set forth below:

1. The Legislature Focused on Both the Structure and Amount of K-12 Funding.

- Courts “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*” *Gannon IV*, 390 P.3d at 468 (quoting *Gannon I*, 298 Kan. at 1199–1200).

This holding formed the crux of the new adequacy test both in *Gannon I* and *Gannon IV*, guided much of the Legislature’s school finance debate and shaped the form of Senate Bill 19. In responding to *Gannon IV*, the Legislature tailored the K-12 formula structure towards student success under the *Rose* standards and reasonably calculated the total funding needed to allow students to satisfy those standards. See May 25 Campbell Explanation of Vote at 1045 (http://kslegislature.org/li/b2017_18/chamber/documents/daily_journal_house_20170525111747.pdf) (“As chair of the K-12 Education Budget Committee, my focus has been to ‘reasonably calculate’ K-12 funding to best help students meet or exceed the *Rose* standards.”); May 31 Denning Explanation of Vote at 806 (http://kslegislature.org/li/b2017_18/chamber/documents/daily_journal_senate_20170531132510.pdf) (“As chair of

the Select Committee on Education Finance, I tasked my committee with ‘reasonably calculating’ K-12 funding to help students meet or exceed the Rose standards.”).

The Legislature viewed structure and implementation as interlinked, relying on this Court’s direction that the better tailored the structure for helping underperforming students, the less overall funding would be required to achieve constitutional adequacy. *See* May 9 House Committee Minutes at 2 (Representative Aurand discussing Justice Biles questions about the possibility of lowering implementation requirements by structuring the formula towards underperforming students; *Gannon IV*, 390 P.3d at 469 (“Finally, we emphasize that the *Gannon I* test for adequacy is one reflecting minimal standards. Once they are satisfied, the requirements of Article 6 are satisfied and the court’s role ends.”); Attachment 3 of the May 9 House Committee Minutes (attaching a transcript of the Justice Biles Oral Argument discussion). This approach informed many, if not most, of the Legislature’s deliberations. *See generally* May 18 Minutes of the Senate Select Committee on Education Finance (“Senate Committee”) at 1-3 (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/minutes/20170518.pdf).

2. The Legislature Satisfied Its Constitutional Duty on “Implementation” in Two Independent Ways: an Outcomes-Based Test and a Cost-Study Approach.

- “To determine whether the *Gannon I* test for adequacy is being met through implementation, it is appropriate to look—as did the panel—to both the financing system’s inputs, e.g., funding, and outputs, e.g., outcomes such as student achievement.” *Gannon IV*, 390 P.3d at 488.

Turning first to implementation, the Legislature took the Court’s guidance to heart and provided two ways to reasonably calculate overall funding sufficient for students to meet or exceed the *Rose* standards. *Id.* at 488. Following the Court’s guidance, the

Legislature based one method – the “successful schools” approach – on student outcomes and the other – the Legislative Post Audit/*Montoy* (“LPA”) model – on inflation-adjusted inputs. *See* May 18 Minutes of the Senate Select Committee on Education Finance at 2-3 (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/minutes/20170518.pdf) (discussion between Chair Denning and counsel on these two approaches and “the considerable effort taken and evidence considered by the Legislature in responding to Gannon's overall K-12 funding concerns”).

3. The Legislature Ensured that Overall Funding under Senate Bill 19 Exceeded that Recommended in the Inflation-Adjusted 2006 LPA Study.

- *“Accordingly, we will first look at whether the evidence in the record demonstrates that the funding levels and other resources produce an education system reasonably calculated to achieving those Rose standards.” Gannon IV, 390 P.3d at 488.*
- *“Regarding consideration of funding inputs on remand, in Gannon I we instructed that “[i]n the panel’s assessment, funds from all available resources, including grants and federal assistance, should be considered...” [T]he panel should have given greater consideration and some value to the other various sources of funds and not rejected their applicability to the adequacy calculus.” Id. at 489-90 (quoting Gannon I, 298 Kan. at 1171).*

Noting that “actual costs remain a valid factor to be considered... for determining constitutional adequacy under Article 6[.]” the Legislature reasonably calculated overall K-12 funding through the oft-cited 2006 LPA study. *Gannon IV*, 390 P.3d at 490-91 (quoting *Gannon I*, 298 Kan. at 1170). Throughout this litigation, Plaintiffs and third-parties have used the LPA study and post-*Montoy* 2009 funding levels adjusted for inflation to seek almost a billion dollars more annually to meet constitutional adequacy. *See, e.g.,* May 19 Senate Testimony of Schools for Fair Funding at 6 (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/testimony/20170519.pdf)

n_finance_1/documents/testimony/20170519_07.pdf) (relying on an inflation adjusted LPA study and the Panel number without accounting for their failure to consider LOB and other funds).

Their analysis, as well as that of the Panel, ignored the Court's new *Gannon* focus on "funds from all available resources" when determining adequacy. *Id.* at 489-90. Because the LPA study relied on the test in *Montoy*, which explicitly excluded monies such as LOB, a current use of this study to reasonably calculate adequate funding must include LOB dollars. According to Post Auditor Scott Frank, an auditor of the LPA study,

At the time of our 2006 cost study..., districts' general fund budgets (set by formula) was supposed to cover the cost of meeting all requirements.... Since then, the purpose of the LOB has clearly changed. The idea that the LOB is only to pay for extras has been abandoned, and it is commonly used to pay for a share [of] a district's basic operating costs. Because the LOB is now viewed as a component of basic operating funding, **if we were to repeat the comparison from our 2006 cost study, we would include both the state and local share of the LOB, whether it was mandatory or not.**

March 17 LPA Memo to Representative Aurand (March 30 House Minutes Appendix) (emphasis added).

The Legislature relied on this updated version of the LPA study, as presented to the House Committee on March 30, to reasonably calculate overall funding for Senate Bill 19. As House Education Committee Chairman Clay Aurand confirmed during debate on a predecessor bill to SB19, the committee:

examined all funds and actual costs (as calculated by Legislative Post-Audit) in helping to design Sub HB 2410.... Adjusting that cost study for inflation and including LOB, Post Audit confirmed (through a memorandum on which the committee relied) that Sub HB 2410 exceeds the overall K-12 funding level recommended by its cost study.

Aurand May 25 Explanation of Vote at 1045.

SB19's overall funding and base aid exceeds the LPA/*Montoy* plus inflation analysis. SB19 has \$195 million in new state K-12 funding in 2017-18 and an additional \$98 million in 2018-19. *See* SB19 Legislative Summary at 6-7 (http://kslegislature.org/li/b2017_18/measures/documents/summary_sb_19_2017.pdf). This yields over \$3.25 billion in K-12 general fund expenditures for 2017-18. KSDE SB19 Expenditure Spreadsheet (<http://www.ksde.org/Portals/0/School%20Finance/Action%20Items/SF17-232.xlsx>).

SB19 and HB2410 set base aid at \$4128 for school year 2018-19. *Id.* at 1. When \$4128 is added to authorized LOB spending divided by weighted enrollment, SB19's per pupil spending exceeds \$5000 per student. May 23 KLRD Chart (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/testimony/20170523_02.pdf). Because this amount outpaces required spending under the LPA/*Montoy* plus inflation test, SB19's overall funding is reasonably calculated to satisfy *Gannon's* input analysis. *Id.*

4. The Legislature Implemented the “Successful Schools” Approach to Total K-12 Spending by Ensuring that Every School Has Access to the Average Per Weighted Pupil Dollars Used by the 41 Most Successful Kansas Districts.

- “Then second, we will also look to the results of the State’s input efforts to determine to what degree these standards are actually being met—as this would be a strong signal as to whether the system as a whole is reasonably calculated to achieve them.” *Gannon IV*, 390 P.3d at 488.

As the Court instructed, the Legislature also reasonably calculated overall K-12 funding based on the dollars needed by the most successful school districts in Kansas. This approach derived from multi-year research currently being conducted by the Kansas

Department of Education. Commissioner Watson testified to the Senate Committee that “We know this, 40 percent of how people actually score are based upon those risk factors. 60 percent of how they score are based upon something else that we don't know yet.” May 10 Testimony of Commissioner Randy Watson to the Senate Committee at 37-38 (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/testimony/20170510_06.pdf). He calls a district’s expected results based on its risk factors “the predictive effective rate.” *Id.* at 35

Senate Bill 19 uses district performance significantly above the predictive effective rate to calculate new base state aid. The Legislature established “successful schools” as districts that “exceeded their expected results on all 4 measures” or had “average scaled difference on all 4 measures” exceeding expected results by at least one standard deviation. May 12 KLRD Memo at 1 (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/testimony/20170512_02.pdf). Those four measures are:

the percent of students at grade level on state math and English language arts assessments, the percent of students at college and career ready level on state math and English language arts assessments, the average composite ACT score, and the 4 year graduation rate.

Id. The Kansas Legislative Research Department (“KLRD”) then calculated “a per weighted pupil base amount” for these 41 “successful” districts by adding:

general fund, supplemental general fund, at-risk funds, and bilingual fund... divided by the weighted enrollment according to the weightings recommended by the Legislative Division of Post Audit cost study... divided by 1.4, to account for the fact that local option budgets are approximately 40 percent of general fund budgets.

Id. KLRD thus determined the per weighted pupil base amount for the 41 districts at \$4080.

The Legislature relied on this \$4080 conclusion to reasonably calculate base funding in Senate Bill 19. Chairman Denning, who requested the “successful schools” calculation from KLRD, described how his committee relied on “the Kansas State Board of Education's process of analyzing districts whose students exceeded their expected performance by the greatest levels.... examine[d] the per student funding provided to those forty districts and set[] that amount as the base state aid for all districts.” May 31 Denning Explanation at 804. Chairman Campbell stated how his “committee's extended expert testimony showed me the wisdom of a ‘successful schools’ funding approach. We identified overachieving districts (the ones who have most exceeded state board expectations of student achievement), provided their funding levels to all districts, and indexed this amount to inflation.” May 25 Campbell Explanation at 1045. With 2018-19 funding above \$4080 and the CPI-U Midwest index guaranteeing future increases, SB 19 reasonably calculates overall funding under the “successful schools” output analysis.

5. Senate Bill 19 Maintains Adequate Overall Funding in Perpetuity by Indexing Base Aid to the CPI-U Midwest.

- *“The Kansas 2010 Commission recommended... that this amount [BSAPP] be adjusted annually for inflation.” Gannon IV, 390 P.3d at 491.*
- *“[P]rovisions regarding establishment of the 2010 Commission and mandating annual increases based upon the Consumer Price Index may satisfy these [adequacy] demands....” Montoy v. State, 279 Kan. 817, 846 (2005).*

The Legislature will sustain the constitutional adequacy of its K-12 formula by following the suggestion of this Court and the 2010 Commission and indexing base aid to a three-year rolling average of the CPI-U Midwest. Considerable testimony, including

from some Plaintiff districts, emphasized the importance of CPI-U indexing for funding certainty and to address annual cost increases. *See generally* May 19 Senate Testimony of KCK Public Schools (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/testimony/20170519_56.pdf) (“Other aspects of SB 251 that merit recognition include the provision of an annual increase in foundation aid, based on the Midwest Consumer Price Index....”).

The Legislature heard these concerns and satisfied them in SB19. According to KSDE, this provision will result in base aid of “estimated \$4,190 in 2019-20, estimated \$4,253 in 2020-21, and estimated \$4,317 in 2021-22” with increased state spending of approximately \$55-56 million annually. KSDE Major Policy Provisions Memo (June 5, 2017) at 6-7 (http://www.ksde.org/Portals/0/School%20Finance/Action%20Items/SF17-232--Major%20Provisions%20%26%20Est_%20State%20Aid--6-5-17.doc). With \$65-70 annual increases in base aid likely extending into perpetuity, SB19 on its face avoids the adequacy pitfalls that this Court identified post-*Montoy*.

6. The Legislature Structured Senate Bill 19 to Provide Far More Help to Underperforming Kansas Students.

- “*We conclude as a matter of law that CLASS fails this [structure] requirement because it... [is] only minimally responsive to financially important changing conditions such as increased enrollment, in general or by subgroup—which can include those ‘to whom higher costs are associated.’*” *Gannon IV*, 390 P.3d at 488 (quoting *U.S.D. No. 229 v. State*, 256 Kan. 232, 244 (1994)).
- “*We complete our outputs examination by concluding that, at a minimum, the results on various standardized tests reveal that an achievement gap, or proficiency gap..., between “all students” and certain subgroups persists as of school year*

2015–2016. And the numbers of all students failing to reach proficiency in core subjects each year continue to be significant.” *Id.* at 500.

- “There is no one specific way for this funding to be achieved.... Our adequacy test, as described in *Gannon I*, rejects any litmus test that relies on specific funding levels to reach constitutional compliance” *Id.* at 502.

Noting that “total spending is not the touchstone of adequacy[.]” the Legislature devoted substantial effort to create a formula tailored to help all students attain the *Rose* standards, particularly ones who have failed to do so in the past or are most at risk of falling short in the future. *Gannon IV*, 390 P.3d at 503 (quoting *Gannon I*, 298 Kan. at 1172). The legislative history is replete with both committees’ emphasis on providing as much new money as possible for underperforming students. *See* May 23 Senate Minutes at 2 (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/minutes/20170523.pdf) (indicating that “[t]he Committee supported this additional at-risk funding and agreed that these provisions would add accountability to the bill”); March 27 House Minutes at 2 (http://kslegislature.org/li/b2017_18/committees/ctte_h_k12_education_budget_1/documents/minutes/20170327.pdf) (KCK Superintendent “Dr. Lane promoted the assessment tools and guidepost expressed in the Kansas CAN effort of the State Board and the need to target the weightings of the formula at those students who need the most help.”).

The words of Representative Karleskint echo those stated throughout the legislative debate when he wrote, “[t]he Kansas Supreme Court has ordered us to reduce ‘the numbers of all students failing to reach proficiency in core subjects.’ I helped design [the school finance legislation] specifically to accomplish that goal.” May 25 Representative

Karleskint Explanation of Vote at 1045. *See also* May 31 Baumgardner Explanation of Vote at 805 (“The Senate listened to the Kansas Supreme Court’s concerns about underperforming students and... target[ed] money toward those individuals. S Sub HB 2186 ends the use of at-risk dollars for general expenses, instead we mandate their use for ‘At-risk educational programs [and services] based on best practices...’”).

The Legislature converted these words into results, reasonably calculating the optimal spending on underperforming students. Senate Bill 19 heeded the recommended weighting levels from the LPA study. It created at-risk weighting at the exact level, 0.484, recommended by the LPA study. *See* KSDE Major Policy Provisions Memo at 2. Likewise, SB19 exceeded the LPA recommendation with bilingual weighting based on service hours multiplied by 0.395 or the number of ESL students multiplied by 0.185. *See id.* at 4; May 16 Senate Committee Minutes at 2 (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/minutes/20170516.pdf) (“Mr. Penner stated that this bifurcated bilingual approach followed recommendations from the Post Audit study, but provided funding at a higher level than Post Audit recommended.”). The Legislature also fully funding all-day kindergarten because it is: (1), a proven aid for underperforming students (2) currently funded primarily from at-risk monies. *See Gannon IV*, 390 P.3d at 491 (citing all-day kindergarten as a proven way to improve student performance, especially for those likely not to attain *Rose* standards); Karleskint May 25 Explanation of Vote (same). SB19 added additional funds for such underperforming student programs as: 4-year-old at-risk, teacher mentoring,

special education, parents as teachers and the 10% at-risk floor. *See* KSDE Major Policy Provisions Memo at 2-6; May 16 Senate Minutes at 1-3.

7. The Legislature, in Partnership with the State Board, Ensured the Best and Most Dynamic Use of this New Funding to Help Underperforming Students.

- *“More important, all of the KSDE’s measurements are still designed to determine student achievement according to its chosen standards, regardless of how they may be described at any time. No party has challenged that department’s ability... [to] help accurately measure student performance, e.g., proficiency, for any given year.” Gannon IV, 390 P.3d at 496.*

Beyond the dollar amounts, Senate Bill 19 ensures results by tying these funds directly to underperforming students and proven best practices for helping them improve performance. SB19 creates a dynamic partnership between ongoing research efforts of the State Board and the Legislature’s funding for underperforming students. It forces districts to spend all of their at-risk, high-density at-risk and bilingual dollars on underperforming students or those who have a high risk of underperforming in the future. *See* KSDE Major Policy Provisions Memo at 2-4. SB19 ensures that at-risk and high-density-at-risk funds are used “on the at-risk best practices developed by the state board...” CCR for SB19 at 55-58.

The State Board is in the midst of a multi-year effort to identify the causes of low student performance and the best methods for bolstering these results. *See* May 10 Watson Transcript at 38 (discussing the multi-year study to identify and counter what impacts student performance other than the risk factors). The Legislature, recognizing this expertise (as has the Court and the Kansas Constitution), ensured through SB19 that its at-risk dollars are as effective as possible at enhancing underperforming student results.

Furthermore, by establishing a series of LPA audits and committee reviews of weightings and “successful schools” calculations, SB19 is responsive to new data and research trends that maximize student performance.

The Legislature entered into this “partnership” with the State Board mindful (and fully supportive) of its new emphasis on “the post-secondary effective rate” rather than math and reading test scores for evaluating student performance. For example, Representative Patton explained that he supported predecessor of Senate Bill 19 (which contained similar provisions regarding the State Board), because it:

empowers the state board, closely tying school finance to the Board's Kansas CAN student success effort... [and] links the Board's accreditation, research on improving student outcomes and accounting of district expenditures to ensure that schools use these new dollars and Board-vetted best practices to promote real growth for under-performing students.

May 25 Patton Explanation of Vote at 1046.

This legislative reasoning follows from the testimony of Commissioner Watson to the Senate and House committees. Commissioner Watson, while acknowledging a role for “a reading or math score[,]” challenged the Legislature to instead:

focus on what happens to those graduation [rates] post-secondary and are they hitting it; and if they are not, ask questions of the state board and your local boards, challenge that detail data all along the way so [the State Board] can help monitor that. That's what -- that's what policy ought to drive.¹

May 10 Watson Senate Testimony at 30-31. *See also* May 22 Senate Committee Minutes at 3 (http://kslegislature.org/li/b2017_18/committees/ctte_spc_select_committee_on_education_finance_1/documents/minutes/20170522.pdf) (“[Commissioner Watson]

¹

further commented that the system's focus over the last 15 years almost exclusively on reading and math scores has not contributed to long-term student success because such life success is based on far more than such test scores.”).

CONCLUSION

As in *Montoy V*, the Court is examining substantial new money from a responsive Legislature contained in a formula that has evolved dramatically since this litigation began seven years ago. The record shows the research-based effort undertaken by the Legislature to improve student performance (especially for those students who are most struggling) and optimize the expenditure of funds to do so. The Legislature has provided hundreds of millions in new K-12 spending. It has indexed these funds to inflation. It has reasonably calculated the formula in both structure and implementation. It has provided a clear and compelling rationale. And, it has accomplished all of these tasks in the midst of a daunting budget crisis. The Legislative Coordinating Council respectfully requests that the Court hold that SB19 is constitutionally compliant and dismiss this litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 30th day of June, 2017, I hereby certify that I electronically filed the above and foregoing with the Clerk of the Appellate Court by using the CM/ECF system, which cause the following counsel to be served electronic copies of this brief:

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