

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.

RESPONSE TO BRIEF OF APPELLANT STATE OF 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 current levels of student achievement – combined with unrefuted evidence that the achievement has decreased because funding has decreased – is the reason why this Court has twice held that the State must increase the level of funding that it provides in order to increase achievement levels. *Gannon v. State*, 305 Kan. 850, 913-914, 390 P.3d 461 (2017) (“Gannon IV”); *Gannon v. State*, 306 Kan. 1170, 1179, 402 P.3d 513 (2017) (“Gannon V”) (“We further agreed with the panel that more money was needed.”).

The State must now demonstrate how the \$252 million in “new money” provided to school districts via S.B. 423 will be used to remediate the 67% of Kansas students who are failing math and the 58% who are failing reading. It cannot and does not even attempt to do so. *Instead*, the State focuses on arguments previously rejected by this Court, such as its oft-repeated argument that it is spending more money on education than it has in the recent past and that it restored funding to *Montoy* levels. The State’s burden is to demonstrate that S.B. 423 is “reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.” The State again fails to meet that burden. S.B. 423 should be declared unconstitutional.

ARGUMENTS AND AUTHORITIES

I. The State did not increase funding by \$1 billion.

Many of the State’s arguments stem from its assertion that S.B. 423, along with S.B. 61 and S.B. 19, “provide more than one *billion* dollars in additional annual funding to schools by 2022-23 above funding levels in the 2016-17 school year[.]” State’s Br.,

p.8. This is misleading. Only \$368 million of the increase is attributable to S.B. 423 and S.B. 61. State’s App. #001248.

“Approximately \$485.5 million of the increase is attributable to 2017 SB 19 for FY 2018 through FY 2023.” *Id.* In taking credit for the increases in the 2017-18 school year (which are wholly attributable to S.B. 19), the State artificially increases the purported effect of the new legislation (S.B. 423, as amended by S.B. 61). More than one-quarter of the “billion dollar increase” is solely attributable to increases that took place in 2017-18 pursuant to S.B. 19, *which this Court already deemed unconstitutional.*

S.B. 19 increased funding by \$194 million in FY18 and \$97 million in FY19. The Court determined that was an insufficient amount. S.B. 423 *does nearly the same thing*, increasing funding in FY19 by \$192 million and then increasing funding by slightly more than \$100 million in each of the out years. *See* Pls’ Appx. 20. These yearly amounts have already been deemed unconstitutional by this Court. The only difference is that the State now extends this insufficient amount of funding over a five-year period.

When considering the effects of inflation, it is clear that S.B. 19 did not increase funding by enough money. By FY23, the amount of “new money” in the system amounts to only \$252 million. Pls’ Appx. 20. Kansas schools need to remediate large numbers of failing students, and the State only provides between \$12 million and \$19 million in “new money” in each year between FY20 and FY23 for them to accomplish this result. Once again, the State does not even attempt to demonstrate how this amount of funding will be used to remediate the 67% of Kansas students who are failing math and the 58% who are failing reading. *See* Pls’ Appx. 1.

The State **cannot** demonstrate S.B. 423 is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.

Further, to calculate the “\$1 billion” number that the State touts, it relies on approximately \$95.8 million that is entirely attributable to increased employer contributions for the Kansas Public Employees Retirement System (“KPERS”). State’s App. #001249. As Plaintiffs have shown throughout this litigation, KPERS “pass through” funding will not go to Kansas classrooms. All of that money will be deposited into the general funds of the school districts only to be immediately moved to the proper accounts for purposes of dispersing KPERS State Aid. The Panel properly concluded that there was simply no increase in operational funds caused by this type of pass through when it evaluated S.B. 7. R.Vol.137, pp. 1429-30, 1474 (Panel’s 6/26/15 Order, pp.10-11, 55); *see also* R.Vol.24, p. 3050, 3107-08 (Panel’s 12/30/14 Order, pp. 4, 61-62) (criticizing “pass through” nature of KPERS funds). And, since KPERS spending was not included in WestEd Report, the increases to KPERS are not relevant for comparing the funding increase to the need calculated by WestEd. Pls’ Appx. 10, at LEG006416 (indicating that the removal of consideration of the KPERS spending would have no effect on the recommendation in the WestEd Report because they “were not included in the analysis of a school district’s operational spending”).

This Court has noted the limited effect that KPERS pass through funds have on providing a constitutional education, stating:

We acknowledge the State’s practice of placing those funds, *i.e.*, employer contributions, in school districts’ treasuries where they merely pause before being forwarded to KPERS—an act described as a simple “pass-through”

that the State argues helped it to create “record high levels” of funding for education. **And we further observe these funds do not affect the districts’ ability to operate on a day-to-day basis or increase the retirement benefits.** Nevertheless, we also acknowledge that by whatever route the funds travel, or for however briefly they stay in the districts’ treasuries, they ultimately have some value to the thousands of individual recipients in the education system and help to create a competitive hiring environment for Kansas schools. After the panel considered KPERS funds, it should have given them some level of value in the adequacy analysis, even if that value is ultimately determined to have insufficient impact on the Rose standards to offset other problems created by CLASS.

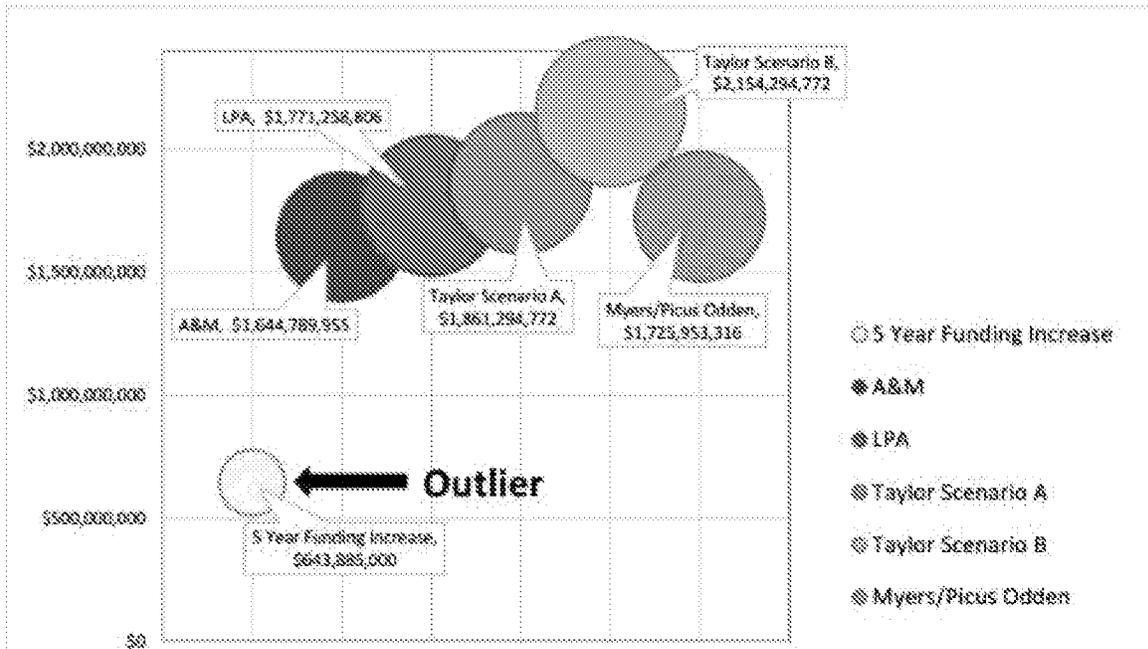
Gannon IV, 305 Kan. at 919 (internal citations omitted and emphasis added). Here, this Court should determine that – while there may be value in the State’s decision to fund KPERS as they are obligated to do – fulfilling that obligation will have little to no effect on the 67% of Kansas students who are failing math and the 58% who are failing reading. *See* Pls’ Appx. 1.

This Court repeatedly warned that adequacy is not determined simply by looking at spending levels. *Gannon v. State*, 298 Kan. 1107, 1172, 319 P.3d 1196 (2014) (“*Gannon I*”) (“[R]egardless of the source or amount of funding, total spending is not the touchstone for adequacy.”). Instead, the State must demonstrate that the funding increase in S.B. 423 is “reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.” *Gannon V*, 306 Kan. at 1207. The State’s own expert refutes that the funding provided by S.B. 423 is reasonably calculated to meet the adequacy test.

II. The State did not fund more than WestEd recommended.

The State does not attempt to demonstrate that it funded the recommendations of the WestEd Report. It did not. It fell far short. *See* Pls’ Appx. 11, 12, 15.

**Unmet Need:
Cost Study Estimates for FY19
Compared to Funding Increase over 5 Years**



At the end of a five-year phase-in, the total funding needed to reach the WestEd Report’s recommendation would be somewhere between \$2.402 billion and \$2.718 billion. Pls’ Appx. 11. Comparatively, at the end of S.B. 423’s five-year phase-in, funding will only increase by \$644 million. *Id.* The State is not even funding one-third of the need by the end of five years. *Id.*

Further, this Court should entirely disregard the State’s arguments regarding maintenance level funding. The State incorrectly argues that S.B. 423 is constitutional

because “the Legislature has provided more funding than the [WestEd Report’s] no-compensatory-support scenario of \$5.103 billion.” State’s Br., p.22. But, (1) funding the “no compensatory support” scenario of \$5.103 billion does not result in constitutional compliance and (2) even if it did, the State failed to fund it.

1. *Funding the “no compensatory support” scenario of \$5.103 billion does not result in constitutional compliance.*

The WestEd Report, and its authors, never recommended the “no compensatory support” scenario as a method of reaching constitutional compliance, instead stating:

Our estimate is that the level of long-run maintenance would be . . . 5.103 billion dollars or about a 10 percent increase over current levels of spending. That would not be adjusted for inflation with Scenario A. To be on the path towards the performance thresholds of Scenario A would require 6.4 billion dollars; to be on the path toward Scenario B, 6.7. Okay. These are best understood as temporary transitional funding under Scenario A and Scenario B to get to the point of a long-run scenario where the maintenance run level is required to sustain, **but first you have to catch up, that there are some – as we showed you in the previous graphics, there are some districts that are not particularly close to the graduation rate that’s being cast out here, which is 95 percent, and they’re not particularly close to a 90 percent of the students passing at Level 2 . . .**

So there would need to be some additional funding to bring the students, basically, up to grade level – and in some sense and then, once they are at grade level, it is the maintenance cost would represent the long-run cost required to sustain that level of student performance.

Pls’ Appx. 9, at 60:19-61:22 (emphasis added).

The State – taking the Report and its recommendations out of context – forms a haphazard, after-the-fact justification for the Legislature’s adoption of S.B. 423 premised on the falsity that the Legislature funded “maintenance” because it believed that doing so

would “improve overall statewide achievement.” State’s Br., p.22. But, each of the statements regarding maintenance funding the State relies on in its brief first assume the State heeded the warning: “**but first you have to catch up.**” *See, e.g.,* Pls’ Appx. 9, at 60:19-61:22 (emphasis added).

When asked to explain the difference between the maintenance and compensatory scenarios, the WestEd Report authors stated:

As the label implies, the maintenance scenarios is the necessary funding level in order to maintain, on average, a specified level of performance. In this case a 95% graduation rate and an annual growth of a 0.50 NCE score.¹ Also, important to note is that the maintenance scenario would accomplish an outcome of raising the overall, statewide achievement average but would not close gaps between school districts that are performing below the current state average. *That is, the maintenance scenario can be considered an ongoing and perpetual investment in the public education system to improve overall statewide achievement.*

State’s App. #001209. The “no compensatory support” scenario merely places a price tag on what all parties already know: “our educational system cannot be static or regressive but *must* be one which ‘advances to a better quality or state.’” *Gannon I*, 298 Kan. at 1146.

The “no compensatory support” scenario does not estimate the costs associated with “catching up” districts that are not currently performing at or above the *Rose* standards. The problem with maintenance level funding is exactly what its name suggests. The WestEd Report warns against “simply forecast[ing] the cost associated

¹ The 0.50 NCE annual growth is referred to as “normal academic progress” and the WestEd Report considered this annual growth as necessary to ensure school districts and the students they serve continue to make progress year after year. Appx. 6, at LEG006510. “A Conditional NCE score of 50 indicates that (on average) the students performed exactly as expected given their prior test performance[.]” Appx. 6, at LEG006524.

with a common Conditional NCE score. After all, if everyone grows at the same rate, existing performance gaps will never close.” Pls’ Appx. 6, at LEG006532 (emphasis added).

To close those performance gaps, the State must fund the compensatory scenarios, which are “the amount of necessary, additional resources for school districts and the state overall to close the gap between current and desired performance” and to allow “school districts and their respective students to ‘catch-up’ and achieve the identified performance thresholds.” Pls’ Appx. 6, at LEG006510; State’s App. #001209. These compensatory support scenarios “would aim to significantly increase the capacity of schools and school districts to achieve higher levels of performance then allow for a level of maintenance to sustain that achievement over a longer period of time.” State’s App. #001209-1210 (emphasis added).

The WestEd Report does not – as the State claims – indicate that the maintenance scenario will result in achieving a 95% graduation rate. It merely estimates what it would cost to maintain that 95% graduation rate once the State appropriately invests the amount of money that it costs to get every district there first. But, just spending the maintenance levels of funding will not get the State where it needs to be.

If an individual were told that she could purchase a new car for an initial investment of \$100,000, with the expectation that it would cost an additional \$1,000 per month to maintain that vehicle and “keep it running”, would it be reasonable for that individual to assume that merely spending \$1,000 per month on maintaining her current vehicle would somehow transform the current car into the new one? According to the

State, yes. Plaintiffs recognize the absurdity of this position. Plaintiffs ask the Court to disregard it. Neither the WestEd Report nor its authors provided any information on which this Court or the State could rely to conclude that the State will be in compliance with the Constitution if the State funds \$5.659 billion during a five-year phase-in period.

2. *The State failed to fund the WestEd Report's "no compensatory support" scenario.*

A system that is designed to maintain current failure rates (where 67% of all Kansas students are failing math and 58% are failing reading) does not comply with the Constitution. Nevertheless, at no time will the system be funded even close to the amounts recommended in the Report. The State argues that it is funding the WestEd Report's "no compensatory support" scenario because S.B. 423 "would bring total school funding at the end of the phase in period to \$5.659 billion, well above the \$5.103 billion no compensatory support scenario." State's Br., at p.22. This is not an apples to apples comparison. The State is comparing FY23 numbers to FY17 numbers, once again inappropriately ignoring the ravaging effects of inflation.

The WestEd Report indicated that the "no compensatory support" scenario would require annual spending of \$5.103 billion *in 2016-17 dollars*. Appx. 6, at LEG00614; *see also* Appx. 9, at 60:19-23 (indicating that the \$5.103 billion is not adjusted for inflation); State's Br., at p.22 (acknowledging the amounts were "for the 2016-17 fiscal year"). Inflation on \$5.103 billion at 2.1% is \$107 million per year. At the end of S.B. 423's phase in period, the "no compensatory support" scenario need will increase to \$5.746 billion. And, because the maintenance level funding is considered an "ongoing and

perpetual investment,” the necessary increases would need to be made *each year*. Pls’ Appx. 10, at LEG006410. The State is not funding the “no compensatory support” scenario. By FY23, the end of S.B. 423’s phase-in period, the State will still be spending *less* than what the WestEd Report identified would be needed to “maintain,” despite the fact that it never provided any of the compensatory support that the WestEd Report indicated was initially necessary to increase performance. Based on all available evidence, the State should expect that achievement will continue to decline during S.B. 423’s phase-in period.

The State is not funding the WestEd Report’s “no compensatory support” scenario, and that argument should be disregarded.

III. The WestEd Report estimated the cost of complying with *Rose*.

The State, as Plaintiffs anticipated, now attempts to argue that the WestEd Report did not estimate the costs of constitutional compliance. *See, e.g.*, State’s Br., p.17 (“The study focused on the costs of satisfying the State Board of Education’s aspirational ‘moon shot,’ which exceeds the *Rose* standards.”). This is a baffling argument in light of: (1) the State’s admission that it hired WestEd to provide the State with guidance on how to reach constitutional compliance, *see* State’s Br., p.3; (2) the State’s admission that WestEd used the same metrics to measure adequacy as this Court has used “in prior *Gannon* rulings,” *see id.*; and (3) the State’s admission that the WestEd Report relied on the KSBE’s goals combined with its admission that the KSBE is one of three bodies that are responsible for defining the applicable standards, *see id.*, pp.17-18.

It is unbelievable that the Legislature would hire WestEd to “provide evidence of overall funding amounts and allocation of resources between districts that would produce an education system reasonably calculated to achieving those Rose standards” and then allow the study to estimate the cost of some other standard. See Pls’ Appx. 5 (emphasis added). The State’s argument in this regard is merely an attempt to distance itself from the WestEd Report, which was at all times focused on identifying the cost of providing an education that meets constitutional standards.

Neither the WestEd Report, nor the KSBE’s goals (on which it relied), are “too ambitious.” Plaintiffs incorporate §II.E. of its Arguments and Authorities contained within their Opening Brief (“The WestEd Report, based largely on the KSBE’s Consolidated State Plan, is not too ambitious.”). Pls’ Br., pp. 34-39. The KSBE is the constitutional body charged with supervising the educational interests of the State. Pls’ Appx. 28, at 33:5-10 (“Well, the state board as you know by Constitution sets the standard, sets the goals, you set the funding.”). The KSBE has set performance targets. Whether they are aspirational is for it to decide. It has been clear that these goals are crucial, not aspirational.

IV. The State is not funding a purported *Montoy* “safe harbor.”

The State contends that it is funding K-12 public education at a level that “this Court concluded satisfied Article 6” and thus is currently in constitutional compliance. There are several flaws with this argument, including: (1) the *Montoy* levels of funding were never deemed constitutional; (2) *Montoy* does not create a “safe harbor”; (3) it is

inappropriate to merely fund education at levels believed to be necessary nine years ago; and (4) S.B. 423 does not provide *Montoy* level funding.

First, the *Montoy* levels of funding were never deemed constitutional. *Montoy v. State*, 282 Kan. 9, 33, 138 P.3d 755 (Kan. 2006) (“*Montoy V*”) (declining “to allow the plaintiffs to amend their pleading to challenge the new funding formula” and “electing instead to end this litigation.”). And, the evidence at trial and in the record since shows that spending at the *Montoy* pre-cut levels still produced the unacceptable failure rates noted by this Court. *See* Plaintiffs/Appellees Opening Br. Regarding Adequacy of 2017 S. B. 19, dated Jun. 30, 2017, pp. 30-49. This would indicate that even those post-*Montoy* spending levels were insufficient.

Second, *Montoy* does not create a “safe harbor,” as the State argues. State’s Br., p.15. This assumption was incorrect. The Court has explicitly told the State, on numerous occasions, that the test for adequacy is whether the funding level is “reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.” *See, e.g., Gannon V*, 306 Kan. at 1207.

Third, it is inappropriate to merely fund education at levels believed to be necessary nine years ago. The State cannot merely adopt a base that would have been sufficient in FY09 to fund education ten years later, especially in light of (1) increased standards; (2) changed demographics; and (3) inflation. Simply adjusting for inflation alone would require a base of \$5,248 in FY19. Pls’ Appx. 18. The State’s argument in this regard also ignores another very important and universally accepted fact in this case: because the system has been underfunded for at least 12 of the last 15 years, the amount

of money needed to fix the problem is substantially larger. The number of students that need to be remediated has grown because of the past underfunding. The problem the State is tasked with fixing in *Gannon V* is far worse than the problem that existed in *Montoy IV*. The achievement gap has grown. The number of “all” students testing at non-proficient levels has grown. Because of this, it will take more money to get the State back to a “constitutional state.” *See, e.g.,* WestEd Report, Pls’ Appx. 6 (estimating that it will cost somewhere between \$1.786 billion and \$2.067 billion to “close the gap between current and desired performance”).

Finally, S.B. 423 does not provide *Montoy* level funding. Eight years after the State committed to providing a base of \$4,492², the State is only providing a base of \$4,165 per student. This alone demonstrates that the State is not in compliance with the Constitution. R.Vol. 24, p.3147 (“[T]he long time consensus of expert opinion and expertise reflected that any sum less than the value of \$4492 as the BSAPP . . . would be inadequate from any expert or evidential perspective.”).

At no time during the five-year phase-in will S.B. 423 even come close to the \$4,492 base, as adjusted for inflation.³

² The State has never actually funded the base at that level. *Gannon V*, 306 Kan. at 1177 (“And although the 2009 legislature had initially established BSAPP at \$4,492 for fiscal year 2010 and beyond, the actual appropriation for fiscal year 2010 was reduced to \$4,012—a difference of \$480 per pupil”).

³ The data in this Chart is also available at Appendix 18.

Year	2009-10	2018-19	2019-20	2020-21	2021-22	2022-23
Statutory Base	\$4,492	\$4,165	\$4,302	\$4,439	\$4,576	\$4,713
\$4,492 Base Inflated		\$5,248	\$5,359	\$5,471	\$5,586	\$5,703
Difference		\$1,089	\$1,057	\$1,032	\$1,010	\$990

Further, S.B. 423 does not provide anywhere near the amount of funding to at-risk students (those students the State is allegedly intending to target via S.B. 423) that would have been provided under the previous formula. Updated for inflation, a school district would have received \$9,933 per at-risk student in FY10. *See* Appx. 47: How close are we to the *Montoy* \$4,492 Base for an At-Risk Student? However, in FY19, the State only provides \$8,133 per at-risk student (\$1,801 less *per* student) and, provides \$9,092 less per at-risk student in FY23 (\$841 less *per* student). *Id.* There is simply no evidence in the record or legislative history that suggests an at-risk student costs less to educate in FY19 or FY23 than he or she cost to educate in FY10. This comparison demonstrates that S.B. 423 is unconstitutional.

The State does not have the burden to merely show that it has restored funding to *Montoy* levels. Funding education at FY10 levels is not reasonably calculated to having all Kansas public education students meet or exceed the standards set out in *Rose* today. The Kansas Constitution “imposes a *mandate* that our educational system cannot be static or regressive but *must* be one which ‘advances to a better quality or state.’” *Gannon I*, 298 Kan. at 1146.

V. Phasing in a long term “stream” of funding is only appropriate if adjusted for inflation.

The State argues that its decision to “phase in” an increase over “five years” is “well-supported” and “responsible.” State’s Br., p.23. Citing to testimony of the WestEd Report authors on March 19, 2018, the State reiterates the WestEd recommendation that any funding increase be phased-in. The State wholly ignores the later testimony, however, in which Dr. Taylor indicated that the recommendation would “[m]ost definitely” also include a recommendation that there be an “inflation adjustment” over the period of the phase-in. State’s App. #000979-980. Dr. Taylor testified:

It would be crucially important to incorporate something related to the Consumer Price Index, and the Midwest CPI seems like a very reasonable strategy to use for Kansas, but it – I used to work with the Federal Reserve System. So we’re very much totally into the whole inflation measurement thing, and it’s important to recognize that these are estimates of real resources and that, as the prices change over time, one would need to also change the – the dollar estimates.

Pls’ Appx. 9, at 89:4-19.

The State did not follow this costly advice. At the end of the five-year phase-in contemplated by S.B. 423, the total funding needed to reach the WestEd Report’s recommendation would be somewhere between \$2.402 billion and \$2.718 billion. Pls’ Appx. 11.⁴ Comparatively, at the end of S.B. 423’s five-year phase-in, funding will only

⁴ There is no consensus on what rate should be used for inflation. Even the WestEd Report authors use two different rates. Originally, the authors used a 2.4% CPI. Appx. 8, at LEG006723. When they provided the Legislature with additional data in Appx. 10, the authors calculated inflation using the 5-year historical CPI of 0.965%. Appx. 10, at LEG006414. Plaintiffs use a 2.1% change in its calculations of inflation. *See, e.g.*, Appx. 11. Plaintiffs base this off the 2.1% change in 2017. *See* Pls’ Appx. 45: Consumer Price Index (CPI) Average; Pls’ Appx. 46: Inflation. Plaintiffs urge this Court to use the 2.1% change. An inflation rate of 0.965% is far too low in light of the 2.2% average since 1997, the 1.7% average since 2010, and the 2.1% change in 2017. *Id.*

increase by \$644 million. *Id.* The State is not even funding one-third of the need over its five-year phase-in. *Id.*

When it adopted S.B. 423, the State did not consider that inflation will increase the cost of providing an education in the out years of the five-year phase-in period. When inflation is accounted for, funding will only increase by \$60 million between FY20 and FY23. Pls' Appx. 20. The State bears the burden to demonstrate how this amount of money is reasonably calculated to have all students meet or exceed the standards set out in *Rose*. It cannot. The State's decision to ignore inflation over the phase-in period is not "well-supported"; rather, it renders S.B. 423 unconstitutional.

Presumably, the State will argue that Plaintiffs have over-estimated the cost of inflation. This is wrong. The cost of inflation is correctly calculated in Plaintiffs Appendix 46. Dr. Taylor used all "school level operating expenditures excluding food, transportation, capital outlay for construction, community service, debt service, fund transfers and adult education" to calculate inflation. Appx. 6, at LEG006496. She included all state, local, and federal funding sources other than the limited excluded funds set out above. Since her cost study finds, *on an "all funds" basis*, what the costs are to meet the constitutional achievement targets, inflation should be applied on this same "**all funds**" basis, as Plaintiffs did in Appendix 46. To solely maintain the status quo in purchasing power costs an additional \$97,692,000 per year.

The State may argue that it should only be held accountable for inflation on the state general fund contribution or on some other lesser amount. This argument should be disregarded. It is the constitutional duty of the Legislature to adequately fund the

schools, *i.e.* the entire system. This constitutional duty includes a duty to account for inflation for the entire funding system upon the Legislature. The Legislature will certainly desire to take credit for federal funds. It did in the WestEd Report and it did during the federal ARRA two-year temporary funding era during the Great Recession. The Legislature must also bear the burden of accounting for inflation on the purchasing power of federal and local funds if those funding sources do not keep pace with inflationary increases. Local LOB funding is statutorily capped with the use of the \$4,492 false base and cannot increase with inflation. The federal government is not increasing federal funding to reflect inflation. This is the State's responsibility. Additionally, if those funding sources diminish, as they are now, the burden to back-fill those sources also falls on the Legislature.⁵ The Legislature must fund the entire inflationary burden of \$97,692,000 per year in addition to any funding necessary to impact achievement.

Finally, the Legislature misrepresents the advice of the WestEd Report authors. They never indicated that the State should provide "one-time funding that would be taken away from districts in the near future," as the State suggests. *See* State's Br., p.21. The WestEd author advised to fund education in two stages: (1) first, through compensatory support, which would "aim to significantly increase the capacity of schools and school

⁵ On May 8, 2018, Commissioner Randy Watson informed the State Board of Education that Kansas is taking the largest reduction in the nation in federal Title I funding loss, a nearly 9% cut, nearly \$10 million. Since the federal government is reducing its participation in the "total cost" for Kansas schools, it falls to the legislature to back-fill this amount together with inflation on all federal funds to maintain spending at levels found needed by Dr. Taylor. *See* Pls' Appx. 48: Watson informs State Board of Education about Kansas losing Title 1 funds.

districts to achieve higher levels of performance” followed by (2) a level of maintenance to sustain that achievement over a longer period of time.” State’s App. #001209-1210.

VI. Students are not doing well.

Kansas students are not “doing well overall.” If students were performing well, this Court would not have deemed the system unconstitutional in *Gannon IV* and *Gannon V*. *Gannon IV*, 305 Kan. at 855 (“[N]ot only is the State failing to provide approximately one-fourth of all its public school K-12 students with the basic skills of both reading and math, but that it is also leaving behind significant groups of harder-to-educate students.”); *Gannon V*, 306 Kan. at 1189 (“Many of the 41 [districts the State chose as successful] have high rates of students not on grade level in either reading or math.”) (internal quotations omitted). The State makes this argument by contending that “this Court found an adequacy violation in *Gannon IV* based on the performance of certain subgroups of students the Court described as ‘underperforming’ and ‘harder-to-educate.’” State’s Br., p.26. This entirely misstates the Court’s finding.

In fact, in *Gannon V*, the Court corrected the State’s understanding in this regard, stating:

And given the above table showing results of “all” students tested, we must also expressly reject the State’s occasional contention throughout its brief that in *Gannon IV* we were concerned exclusively with the underperforming subgroups and that only their performance caused by inadequate funding was the basis for the Article 6 violation.

Gannon V, 306 Kan. at 1202.

Current assessment data demonstrates that the failure rates that must be corrected exist among subgroups and “all” students. The assessment data was poor enough in *Gannon IV* and *Gannon V* for this Court to deem the system unconstitutional. It is worse when Level 1 and Level 2 data is considered. According to the KSDE, “**Level 1 and 2 are categorized as not proficient. Levels 3 and 4 are proficient.**” Pls’ Appx. 2, at KSBE002501. According to 2016 assessment results, 58% of all Kansas students are non-proficient in reading (at Levels 1 and 2) and 67% of all students are non-proficient in math. See Pls’ Appx. 1, at SFFF001125.

Subgroups	Reading/ Language Arts: Baseline Data (% scoring in Level 3 & Level 4) 2016	Percentage Not Proficient (% not scoring in Level 3 & Level 4) 2016	Reading/ Language Arts: Long-term Goal (% scoring in Level 3 & Level 4) 2030	Math: Baseline Data (% scoring in Level 3 & Level 4) 2016	Percentage Not Proficient (% not scoring in Level 3 & Level 4) 2016	Math: Long-term Goal (% scoring in Level 3 & Level 4) 2030
All students	42.0	58.8%	75.0	33.0	67.0%	75.0
Economically disadvantaged students	27.7	72.3%	75.0	19.8	80.2%	75.0
Children with disabilities	15.4	84.6%	75.0	10.9	89.1%	75.0
English learners	19.7	80.3%	75.0	15.4	84.6%	75.0
African-American students	21.0	79.0%	75.0	13.2	86.8%	75.0
Hispanic students	26.1	73.9%	75.0	18.7	81.3%	75.0
White students	48.4	51.6%	75.0	38.7	61.3%	75.0
Asian students	55.7	44.3%	75.0	54.6	45.4%	75.0
American Indian or Alaska Native students	31.5	68.5%	75.0	21.8	78.2%	75.0

The “harder-to-educate” students are faring worse. Now, **72.3%** of economically disadvantaged students are **not proficient** in reading and **80.2%** are **not proficient** in

math. *Id.* And, **79%** of African-American students **are not proficient** in reading and **86.8% are not proficient** in math. *Id.* ***More than 75% of African-American students are testing non-proficient (at Level 1 or 2) in reading and math.*** The current level of funding cannot cure the declining achievement.

The disturbing downward trend in student achievement is also documented in the KSBE's 2016-17 Annual Report. *See* Appx. 3. Plaintiffs incorporate §I of its Statement of the Facts contained within their Opening Brief ("The State Has Continued to Underfund Education, Causing Achievement to Continue to Decline."). Pls' Br., pp. 4-8.

VII. The targeted funds are insufficient to remediate the students at whom they are aimed.

A. Providing small amounts of targeted funding to programs does not cure more than 12 years of underfunding education.

S.B. 423 provides some funding for small programs that will likely have a positive impact on student achievement (if the funds directed to these programs are not cannibalized to pay for other under-funded education programs, like SPED). *See, e.g.,* R.Vol.24, p. 3088-90 (Panel's 12/30/14 Order, pp. 42-44) (noting that if any program or learning opportunity available to Kansas schoolchildren was successful, it was "most likely at some other program's or learning opportunity's expense" due to the "wholly cannibalistic" nature of the funding system).

The State may attempt to argue that these targeted educational resources will cure the constitutional deficiencies. In reality, these programs will only minimally affect the level of education that Kansas public schoolchildren are receiving. The State can provide no evidence that the programs funded in Section 1 of S.B. 423 will cure the achievement

failure rates noted by this Court, which continue to worsen as the system remains unconstitutional.

For instance, S.B. 423 appropriates \$2.8 million for the “ACT and workkeys assessments program.” S.B. 423, Sec. 1(a). Pursuant to the bill, no student enrolled in grades nine through twelve will be required to pay any fees or costs to take the ACT college entrance exam and the three ACT workkeys assessments that are required to earn a national career readiness certificate. *Id.* And, while this certainly will increase the number of students that take the exam and/or assessments, this additional funding will do nothing to increase their scores on the exam and/or assessments.

Similarly, S.B. 423 provides a one-time appropriation for FY19 of \$4.1 million for a mental health intervention team pilot. S.B. 423, at Sec. 1(a). That pilot, however, will only provide services to a limited number of schools for only one year. The total amount spent on these programs only totals \$12.8 million. *See, e.g.,* Pls’ Appx. 21, at KSDE142192 (\$2 million to four-year-old at-risk, \$7.5 million for the mental health pilot program, \$2.8 million for ACT/workkeys, and \$500,000 to teacher mentoring). The State cannot demonstrate how providing \$13 million to fund targeted programs at specific schools will cure a \$2 billion statewide funding deficit.

B. The mandatory transfer of at-risk and bilingual funds from LOB disturbed equity with no positive impact on adequacy.

Under S.B. 423, the education of at-risk and bilingual students will be partly dependent on LOB-generated funds. This is not equitable; “LOB-generated funds do not provide the same fixed amount to every student regardless of their locale.” *Gannon V,*

306 Kan. at 1203-04. Plaintiffs incorporate §II.K of its Arguments and Authorities from their Opening Brief (“S.B. 423 further violates Article 6’s equity requirement by requiring a transfer from the LOB to the at-risk and bilingual funds.”). Pls’ Br., pp. 47-48. While this change disturbs equity, it will not – as the State argues – solve any adequacy issues. The reality is that most districts are already spending more money on at-risk programs and students than this change will require. *See id.* This change only compromises the equity of funding, while providing no positive impact on adequacy.

VIII. The \$188.6 million for support services outside classroom is not new money.

The State attempts to take credit for the fact that it “has invested more than \$188.6 million for support services outside the classroom, much of which directly impacts student learning and achievement.” State’s Br., p.30. This is not new money, however. The State basically attempts to argue that somehow achievement results will be better if the Court looks at the funding provided to services outside the classroom. But, the evidence shows that the unacceptable failure rates that resulted in the findings in *Gannon IV* and *Gannon V* existed despite the State funding these support services. All of those funds were *already* impacting the education of the students. Any argument that these funds render S.B. 423 constitutional must fail because this funding was impacting student learning all along, and did not result in constitutional compliance.

IX. Holding school districts “accountable” does not render S.B. 423 constitutional since the bill denies already-efficient districts access to necessary funds.

S.B. 423 fails to give school districts the amount of funding they need to comply with the State’s accountability provisions, but – at the same time – incorporates new

“penalties” for districts that do not meet accreditation standards. *See* S.B. 423, §11. In other words, the State penalizes districts for failing to meet standards while knowingly refusing to provide the resources necessary to meet those standards. The State then argues this measure holds school districts accountable in such a manner as to transform the system from unconstitutional to constitutional.

This argument may have merit if the school districts were not already “spen[ding] efficiently and as intended.” State’s Br., at p. 32 (“[A] robust accountability system is needed to ensure the additional funding is spent efficiently and as intended.”). School efficiencies are not the problem. The WestEd Report found that “buildings were producing nearly 96% of their potential output, on average.” Appx. 6, at LEG006508. One of the WestEd authors testified “The Kansas schools are already highly efficient in their use of spending. Kansas schools are operating at levels that we have not seen anywhere else in the country . . . Kansas schools are using dollars well given what they are tasked to do with it.” Appx. 9, at 66:17-25. The adoption of Section 11 was not intended to make schools more efficient and does not render S.B. 423 constitutional.

X. The State cured only 3 of 4 equity violations, and created 2 more.

S.B. 423 cured three of the four equity violations identified in *Gannon V.* However, by retaining the protest petition and election process, the State did not fully ensure that S.B. 423 comports with this Court’s equity test. S.B. 423 also created two new equity violations. Plaintiffs incorporate §II.I (“S.B. 423 violates Article 6’s equity requirement because it retains a protest petition and election process regarding LOB.”) and §II.J (“S.B. 423 further violates Article 6’s equity requirement by mandating that all

districts adopt a 15% Local Option Budget.”) of its Arguments and Authorities contained within their Opening Brief. *See* Pls’ Br., pp. 42-47.

In addition to the two new equity violations, S.B. 423 also exacerbates inequities among districts by retaining a protest petition and election process relating to efforts to increase a school district’s LOB authority. S.B. 423, at Sec. 4. The State incorrectly argues that the equity violation stemmed only from previous “grandfathering.” State’s Br., p.34. This misconstrues the Court’s holding in *Gannon V.* 306 Kan. at 1213. It is the entire protest petition and election process that violates the equity test. *See, e.g.*, Pl’s Appx. 32; *see also* R.Vol. 131, at Pls’ Ex. 503-504; R.Vol. 135, p.1409; R.Vol. 140, p.15 (FOF ¶40). This Court concluded:

In short, many districts are effectively denied an access reasonably equal to the one afforded these other districts—access that is needed in order to make a similar tax effort, *e.g.*, impose a comparable mill levy. So it logically follows that because of this lost access they cannot as readily avail themselves of the advantages that would flow from that tax effort, *i.e.*, a substantially similar educational opportunity. *See Gannon I*, 298 Kan. at 1175. In other words, the State has failed to meet its burden of establishing that the LOB provision complies with the equity standard of Article 6. *See Gannon IV*, 305 Kan. at 856.

Gannon V, 306 at 1229.

S.B. 423 retains the protest petition requirement for any district that wants to increase its LOB above 30% of Total Foundation Aid. S.B. 61, at Sec. 5. This is an equity violation. The State offers no justification for its decision to include a provision that this Court has explicitly told it violates the Kansas Constitution. S.B. 423 should be deemed unconstitutional for its violation of the equity requirement of Article 6.

CONCLUSION

Plaintiffs request that this Court:

- (1) Declare S.B. 423 unconstitutional.
- (2) Enter a finding that the Legislature should appropriate at least enough money to meet the KSBE's request for additional resources for FY19. Funding a base of \$5,090 for FY19, will cost an additional \$506 million *this year*.
- (3) Enter a finding requiring the full funding of Special Education at 92% of Excess Costs as required by statute.
- (4) Phase in additional increases in the out-years to reach the approximate additional \$1.786 – \$2.067 billion (in 2016-17 dollars) indicated by WestEd.
- (5) Incorporate a CPI increase during any phase-in period to reach adequacy.
- (6) Remove any requirement that LOB authority be linked to a protest/election requirement.
- (7) Remove any requirement that LOB funding be mandatory, or equalize any mandatory LOB to the 100th percentile.
- (8) Remove any provisions that require mandatory transfers from LOB that discriminate based upon the percentage of LOB adopted.

Plaintiffs request that the Court maintain its June 30, 2018 deadline for these unconstitutional provisions to be remedied. 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 necessary preservation and security of district properties and systems.

Dated this 14th day of May, 2018.

Respectfully submitted,

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APPENDICES

47. **Appendix 47:** How close are we to the *Montoy* \$4,492 Base for an At-Risk Student?
48. **Appendix 48:** Watson informs State Board of Education about Kansas losing Title 1 funds.

Appendix 47:
How Close are we to the *Montoy*
\$4,492 Base for an At-Risk Student

Appendix 47 is a demonstrative exhibit created from data in the record regarding cost estimates and the base funding for FY19 and FY23 contained in H. Sub. for S.B. 61. It is appropriate for this Court to take judicial notice of this data, and Plaintiffs respectfully request that this Court do so. K.S.A. 60-409(b)(4); K.S.A. 60-412(c).

How close are we to the *Montoy* \$4,492 Base for an At-Risk Student?

	FY10 Statutory Base in FY10 dollars	Funding Comparison		
		FY10 Statutory Base in FY19 dollars	FY19 SB 61 Base in FY19 dollars	FY23 SB 61 Base in FY19 dollars
Base	\$4,492	\$5,248	\$4,165	\$4,713
At-Risk Funding at 0.456 x Base	\$2,048	\$2,393	\$2,016	\$2,281
At-Risk Funding at 0.484 x Base				
30% LOB on Base	\$1,348	\$1,574	\$1,347	\$1,414
30% LOB using False 4490 Base				
30% LOB on At-Risk Funding	\$615	\$718	\$605	\$684
Total Funding for At-Risk Student	\$8,502	\$9,933	\$8,133	\$9,092

Amount short from FY10:	\$1,801 in FY19	\$841 in FY23
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Appendix 48: **Kansas loses \$10 million of annual share of Title 1 funding**

Appendix 48 is coverage of Kansas Education Commissioner Randy Watson informing the State Board of Education that Kansas's share of Title 1 funding was decreased. Appendix 48 is publically available at: <https://kash.org/0408-2/>. It is appropriate for this Court to take judicial notice of the Consolidated State Plan, and Plaintiffs respectfully request that this Court do so. K.S.A. 60-409(b)(4); K.S.A. 60-412(c).



08 May Watson informs State Board of Education about Kansas losing Title 1 funds

Newsroom

Kansas will be the nation's biggest percentage loser in the next school year in federal Title 1 funds, which is used to serve students from low-income households.

Nationally, Title 1 funding will increase 1.94 percent, but the state-by-state allocations vary widely based on several factors, Kansas Education Commissioner Randy Watson told the State Board of Education on Tuesday.

Kansas' annual share of Title 1 funding will decrease nearly \$10 million, or 9 percent.

Watson said the allocation is based on a formula that includes state per pupil funding in Kansas in fiscal year 2016, when state funding decreased during a block grant year. The formula also is based on the number of children age 5-17 receiving free lunch, the number of children receiving Temporary Assistance for Needy Families and the number of children in foster care.

Watson said he doesn't expect to see an increase in Title 1 funding to Kansas until 2020-21 when the formula is applied to increased K-12 funding approved the past two years.

He also said that the Kansas State Department of Education will absorb the brunt of the funding reduction to reduce harm to districts but that also means KSDE will not be able to provide as much administrative support to schools. He said most districts will see an approximately one percent decrease in Title 1 funding.

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