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CASE NUMBER: 113267

IN THE SUPREME COURT OF THE STATE OF KANSAS

LUKE GANNON, *et al*,

Plaintiffs/Appellees,

v.

THE STATE OF KANSAS, *et al.*,

Defendants/Appellants.

Case No. 15-113,267-S

RESPONSE OF THE STATE OF KANSAS
TO PLAINTIFFS' MOTION
TO MODIFY COURT'S ORDER TO CLARIFY CERTAIN LANGUAGE

The Court must reject Plaintiff Districts' request to expand the scope of the remedy the Court recently ordered. *See Gannon v. State*, No. 15-113,267-S, slip op. at 73, 2016 WL 540725 (Kan. Feb. 11, 2016) ("*Gannon II*"). The Districts do not seek clarification of the Court's opinion in any ordinary sense. Rather, their motion asks the Court to contradict its guidance that the Legislature enact a "constitutionally valid school finance system . . . through which funds for fiscal year 2017 can lawfully be raised, distributed, or spent beyond June 30" of this year. *Id.* at 74. No clarification is necessary. If the Court chooses to clarify its opinion, it should simply reiterate that the Legislature's task now is to adopt a "constitutionally equitable school finance system" so that schools will be able "to operate beyond June 30." *Id.* at 75.

1. The Court's Order Contemplates Prospective Relief Only

The remedy this Court ordered is prospective; it addresses required public school funding for fiscal year 2017 (the 2016-2017 school year). The Court's opinion makes this clear in several ways.

First, the Court's discussion of the remedy in *Gannon II* focused on the 2017 fiscal year. The Court specifically gave the Legislature until "*the close of fiscal year 2016, ending June 30*"

to "satisfactorily demonstrate to this court that the legislature has complied with . . . Article 6 . . . through additional remedial legislation or otherwise." *Gannon II*, slip op., at 74 (emphasis added). The Court explained that if the Legislature missed the June 30, 2016 deadline "a lifting of the stay of today's mandate will mean no constitutionally valid school finance system exists through which funds *for fiscal year 2017* can lawfully be raised, distributed, or spent." *Id.* at 74 (emphasis added). And "[w]ithout a constitutionally equitable school finance system, the schools in Kansas will be *unable to operate beyond June 30*." *Id.* at 75 (emphasis added). "Accordingly, the legislature's chosen path during the 2016 session will ultimately determine whether Kansas students will be treated fairly and the schoolhouse doors will be open to them in August *for the beginning of the 2016-17 school year*." *Id.* (emphasis added).

Second, like the remedial order at issue here, this Court's past remedial orders in school finance litigation have been prospective. In declining to enforce the Panel's proposed remedy here, the Court found persuasive the Court's history of allowing the Legislature the "opportunity to craft a constitutionally suitable solution and minimize the threat of disruptions in funding for education." *Id.* at 72. Using the Legislature's response to *Gannon I* as an example, the Court observed that "[r]eaching constitutional compliance by the end of June 30 is definitely achievable by the legislature, as demonstrated in 2014. At that time the legislature showed its commitment and capacity by passing remedial legislation within mere weeks of our *Gannon I* decision." *Id.* at 75-76. As the Court acknowledged earlier in the *Gannon II* opinion, the Legislature's response to *Gannon I* in 2014 was purely prospective, relating only to fiscal year 2015. *Id.* at 11. The Court expressed confidence that the Legislature could "do [this] again"—bring the existing school finance system into line with a recently-announced decision of this

Court for the *upcoming* school year. The Plaintiff Districts' suggestion that the Court's order requires retrospective relief flies in the face of years of precedent.

Third, all of the out-of-state cases the Court cited to support its decision to give the Legislature "further opportunity to cure," *id.* at 72-73, recognize that any legislative remedy must be prospective. *See Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 799 (Tex. 2005) (acknowledging that it was "unlikely that material changes could be made in the public education system that would affect the current school year" and "postpon[ing] the effective date of the district court's injunction to June 1, 2005" to "allow the system time to adjust to those changes" for the following school year); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 499 & nn. 16, 17 (Tex. 1991) (setting separate, forward-looking deadlines for the Texas legislature to "enact a constitutionally sufficient plan" and to "implement[]" that plan, recognizing that the "modified system" might not be fully implemented by the deadline set); *DeRolph v. State*, 93 Ohio St. 3d 309, 324, 754 N.E.2d 1184 (2001) (ordering the Ohio legislature to "fully fund [parity aid] no later than the beginning of fiscal year 2004"—more than a year after the court's order); *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 476-77, 703 A.2d 1353 (1997) ("Because the legislature must be given a reasonable time to effect an orderly transition to a new system, the present funding mechanism may remain in effect through the 1998 tax year."); *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 59, 769 P.2d 684 (1989) ("[T]his Court specifically retains jurisdiction until July 1, 1989, and on that date the holdings of this opinion shall become fully in effect for all school terms *commencing after that date*." (emphasis added)).

2. Expanding The Court's Order As The Districts Request Is Not Legal Or Practical

The Districts' claim that the Legislature must fully fund LOB and Outlay aid for school years 2014-15 and 2015-16 makes no legal or practical sense in this case.

First, the Districts' claims are only for prospective relief. They seek permanent injunctions "prohibiting the State from administering, enforcing, funding, or otherwise implementing the unconstitutional provisions of the current funding formula" and "requiring the Legislature to appropriate sufficient amounts of money to fund the school funding formula to the level required by Article 6 of the Kansas Constitution." Pretrial Order, Vol. 7, p. 948.

It is a "self-evident proposition" that "acts done whether lawful or unlawful, cannot be corrected or prevented by injunction." *Andeel v. Woods*, 174 Kan. 556, 557, 258 P.2d 285 (1953) (*citing* 28 Am. Jur., Injunctions, §§ 5, 7; *Frizell v. Bindley*, 144 Kan. 84, 94, 58 P. 2d 95 (1936)). Injunctions are not appropriate to obtain relief for past or completed acts but operate only to prevent future acts—injunctions necessarily operate only prospectively.

Under the guise of a motion to clarify, the Districts attempt to change their claims for relief at this late date in the litigation—after trial, an appeal, remand, and a second appeal. The Districts have provided no authority to justify expanding their claims in this way, and this Court should reject their attempt to do so now. The availability of only prospective relief is no surprise to the Districts—this case has been expedited at various stages precisely because *only* prospective relief is proper and available.

Second, the Districts' assertion that past potential funding should be due and payable is impractical and violates Kansas law. Neither the Districts nor this Court can turn back time or resurrect expired appropriations bills. Because monies appropriated in fiscal year 2015 have been re-appropriated and monies appropriated in fiscal year 2016 are insufficient to "fully fund" LOB

and Outlay aid under former school funding statutes, the Districts effectively seek an order of mandamus directing both specific appropriations and payments.

But Article 2, § 24 of the Kansas Constitution provides: "No monies shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Accordingly, funds cannot be withdrawn from the treasury "except in pursuance of an act of the legislature setting apart or assigning such money to a particular public use." *State ex rel. Anderson v. Fadley*, 180 Kan. 652, 661, 308 P.2d 537 (1957). "This use must be specific in amount and specific in purpose to indicate to the public officials who are authorized to withdraw and use funds the purpose to be accomplished by the appropriation." *Id.*; *accord Leg. Coordinating Council v. Stanley*, 264 Kan. 690, 709-10, 957 P.2d 379 (1985).

Thus, under Article 2, § 24, no state expenditure from an appropriation can be legally made after its expiration date, *Hyre v. Sullivan*, 171 Kan. 307, 311-12, 232 P.2d 474 (1951), and the State cannot be compelled by mandamus to pay appropriated sums after such monies are no longer in the State's treasury, *see Panhandle E. Pipe Line Co. v. Fadely*, 189 Kan. 283, 287, 369 P.2d 356 (1962) (holding that plaintiff, by mandamus, could not recover back taxes even though the law under which the taxes were paid had been declared unconstitutional); *Hyre*, 171 Kan. at 311-12 (refusing to issue an order of mandamus directing payment of a salary increase to a state employee after the appropriation had expired).

Third, the Districts' request to expand the Court's opinion to require a retrospective remedy implicates serious separation of powers concerns, the very same concerns the State raised when this Court stayed the Panel's "temporary restraining orders." That the Court did not resolve these separation of powers issues on the merits, *Gannon II*, slip op. 71, further indicates that the Court contemplated only a prospective remedy. If the Court now were to consider

rewriting its ruling to try to impose a retrospective remedy, the Court necessarily would have to address and decide the separation of powers and other related issues the State has raised. *See* State's Opening Equity Brief at 38-55, dated Sept. 2, 2015; State's Response Equity Brief at 25-30, dated October 2, 2015.

Fourth, the legality of the Districts' request aside, there are several practical concerns that demonstrate relief can only be prospective relief in nature. The Districts claim they are entitled to roughly $54 million dollars for the school year that ended in June of 2015, and they want another roughly $71 million dollars for the present school year, which is three-quarters complete. But the State's financial resources are finite. If the Court rewrites *Gannon II* to expand it to require the Legislature to come up with the roughly $125 million—in addition to funds for fiscal year 2017—valuable state programs will suffer substantial cuts. Even assuming that raising additional revenue might be an avenue to satisfy *prospective* demands for more LOB and Outlay aid, any additional revenue probably (if not certainly) could not be raised and made available for a payment of $125 million dollars before June 30, 2016.

Furthermore, it is too late to address any LOB and Outlay issues for the 2014-2015 and 2015-2016 school years. Obviously, the 2014-2015 school year's LOB and Outlay taxes were levied, collected and spent or placed into cash reserves. This school year, by August 25, 2015, local districts established their budgets assuming they would receive the amounts of LOB and Outlay aid incorporated into SB 7's block grants. Vol. 138, pp. 148, 165. Thus, each district's LOB and Outlay levies were set at that time. *Id.* The counties' tax bills were issued around the first of November 2015. *Id.*, p. 164. A substantial part of the local property tax levies were received in January 2016, and the next and last major chunk will be received shortly in March

2016. *Id.*, pp. 164-65. The clock cannot be unwound now in order to change the districts' fiscal year 2016 LOB and Outlay levies.

Moreover, there are good reasons to be confident that ordering distribution of additional LOB aid to local districts would not materially benefit the districts in this school year. The "cap" on the amount of LOB revenue a district may have raised, K.S.A. 2014 Supp. 72-6434(a)(1) (now repealed), impacts whether increased state aid operates to reduce local tax levies (providing property tax relief) or to provide more funds for school operations. Vol. 138, pp. 154-55. In other words, a district like Hutchinson could see more state aid money. Yet, having set its levy assuming fiscal year 2014 aid, that district would be required to place additional money it receives that exceeds its LOB into the bank. These unspent monies would only operate to reduce the aid the district receives the following year. K.S.A. 2014 Supp. 72-6433(j)(4). Moreover, districts are prohibited from overspending their budgets. Vol. 138, p. 148. There is no way that districts could create new budgets now, republish them, and allow for public comment before the school year effectively ends, much less spend any new money sensibly and constructively.

Indeed, most fundamentally, forcing the State to provide aid this late in the school year and effectively insisting that districts spend the money yet this fiscal year is not sound fiscal practice. Decisions and plans concerning staffing levels, required maintenance and all other aspects of school spending by this time of the year have long since been made. All should be legitimately concerned that if districts receive such last-minute funds to spend before June 30, they may well do so improvidently. *See State v. Montoy*, 279 Kan. 817, 845, 112 P.3d 923 (2005) (recognizing there are "limits on the amount the system can absorb efficiently and effectively").

For the reasons stated above the Districts' motion to "clarify" the Court's order should be denied. If the Court concludes clarification is warranted, the Court should simply reiterate that

the remedial task for the Legislature is to enact a school finance system that will satisfy the Court's equity test for fiscal year 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of February, 2016, a true and correct copy of the above and foregoing response was filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and was electronically mailed to:

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