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No. 113,267

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In the Supreme Court of the State of Kansas

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**Luke Gannon, et al.,**  
Plaintiffs-Appellees,

v.

**State of Kansas, et al.,**  
Defendants-Appellants.

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Appeal From Appointed Panel  
Presiding in the District Court of Shawnee County, Kansas

Honorable Franklin R. Theis  
Honorable Robert J. Fleming  
Honorable Jack L. Burr

District Court Case No. 2010C001569

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**BRIEF OF APPELLANT STATE OF KANSAS**

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Stephen R. McAllister, KS Sup. Ct. No. 15845  
Solicitor General of Kansas  
Memorial Bldg., 2nd Floor  
120 SW 10th Avenue  
Topeka, Kansas 66612-1597  
Tel: (785) 296-2215  
*Counsel for Appellant State of Kansas*

Oral Argument Requested: One Hour

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## NATURE OF THE CASE

This is the second appeal from a judgment in this “school finance” case brought against the State by the four school districts that remain as plaintiffs – U.S.D. 259 in Wichita, U.S.D. 308 in Hutchinson, U.S.D. 443 in Dodge City, and U.S.D. 500 in Kansas City, Kansas (“Districts”) – alleging that the State has failed to comply with Article 6, § 6 of the Kansas Constitution. It is the first appeal since this Court formally adopted the so-called “*Rose* standards” as a requirement of Article 6. This appeal addresses only the adequacy requirement under Article 6; matters related to equity are under consideration by this Court in a separate proceeding pursuant to this Court’s Order of July 24, 2015.

On March 7, 2014, this Court adopted the *Rose* standards as a requirement of Article 6 and held:

[W]e must remand for the panel to make an adequacy determination, complete with findings, after applying the test to the facts. We express no opinion whether the panel needs to reopen the record to make its adequacy determination. That decision is best left to the panel as the factfinder.

In the panel’s assessment, funds from all available resources, including grants and federal assistance, should be considered. The legislative history of Article 6 reveals the intent to provide a system of educational finance that is sufficiently flexible to be able to utilize such sources. We appreciate the panel’s concern about overreliance on unpredictable federal funding. But there was an obvious increase in federal monies during the years at issue in this litigation, and the legislature was constitutionally empowered to respond with adjustments in state spending. Moreover, state monies invested in the Kansas Public Employees Retirement System (KPERS) may also be a valid consideration because a stable retirement system is a factor in attracting and retaining quality educators – a key to providing an adequate education.

The panel may consider the restrictions on the use of these federal, pension, and other funds and determine that even with the influx of these additional monies the school districts are unable to use them in the manner necessary to provide adequacy under Article 6. But regardless of the source or amount of funding, total spending is not the touchstone for adequacy.

In short, the panel should apply the Rose-based test articulated in this opinion for adequacy in school finance to the evidence it deems relevant to its analysis, recognizing the test does not require the legislature to provide the optimal system. While the wisdom of the legislature’s policy choices in allocating financial resources is not relevant to this analysis, the panel can consider how those choices impact the State’s ability to meet the *Rose* factors. Ultimately, the panel must assess whether the public education financing system provided by the legislature for grades K-12 – through structure and implementation – is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose* and as presently codified in K.S.A. 2013 Supp. 72-1127.

*Gannon v. State*, 298 Kan. 1107, 1171-72, 319 P.3d 1196, 1237-38 (2014) (internal citations omitted).

Soon after this Court’s *Gannon* decision, the Legislature and the Governor enacted 2014 Senate Substitute for House Bill 2506. Although that measure was addressed principally to equity considerations, it nonetheless appropriated an additional \$134,465,786 toward the funding of public schools. The Legislature and the Governor were mindful of this Court’s direction that “[a]lthough adequacy and equity are distinct components of Article 6, they do not exist in isolation from each other. So curing of the equity infirmities may influence the panel’s assessment of the adequacy of the overall education funding system.” *Gannon*, 298 Kan. at 1199.

After remand from this Court’s decision in *Gannon*, the Panel on December 30, 2014, released a Memorandum Opinion and Order on Remand (“December Order”) declaring that the Kansas public education financing system provided by the Legislature for grades K-12 violates the adequacy component of Article 6. Vol. 24, p. 3047. Despite this Court’s direction that the Panel’s review for compliance with the *Rose* standards should be “complete with findings,” *Gannon*, 298 Kan. at 1171, the December Order contained no new findings. It merely referenced the findings it made nearly two years



earlier, before this Court had adopted the *Rose* standards as the constitutional requirement.

On January 15, 2015, at the start of the first annual session of the Legislature since this Court decided *Gannon*, Governor Brownback delivered his annual State of the State message in which he referenced the Panel's December Order and called upon the Legislature to begin a process of fundamentally reforming the statutory system for financing public schools:

For decades now, Kansas has struggled under a school finance formula which is designed not to be understood – to frustrate efforts at accountability and efficiency. A formula designed to lock in automatic, massive increases in spending unrelated to actual student populations or improved student achievement.

A formula which calculates that we have added more than 100,000 new students to the public schools while the actual census has grown by a fraction of that number – an accounting scheme that claims cuts to per pupil spending even as budget increases dramatically outpace increases in student population.

Not surprisingly, that formula has been under litigation in Kansas for the past 40 years. \* \* \*

Friends, it is time for a new school finance formula.

That formula should reflect real-world costs and put dollars in classrooms with real students, not in bureaucracy and buildings and artificial gimmicks.

That formula should be about improving student achievement and school accountability, not bureaucratic games.

My suggestion is simple, and I believe necessary – a timeout in the school finance wars.

In this two-year budget, the Legislature should appropriate money directly to school districts, so it can be spent where it is needed most, and that's in the classroom.

At the same time, the Legislature should repeal the existing school finance

formula and allow itself sufficient time to write a new modern formula that meets our needs for great 21<sup>st</sup> Century schools.

And as we go about that process, it should be accountable to local parents and voters, because here the people rule.

Governor Sam Brownback, State of the State Address, January 15, 2015, pp. 9-11, *available at* <https://www.governor.ks.gov/media-room/speeches/2015/01/16/state-of-the-state-2015> (“2015 State of the State Address”) (last visited Nov. 22, 2015).

The Governor’s call for reforming the school finance system in order to “meet[] our needs for great 21<sup>st</sup> Century schools” that “improv[e] student achievement” was not made in a vacuum – it came amid his broader call to manage state finances in a manner that can sustain vital services, including but not limited to public education:

[A] growing economy that is adding private sector jobs and increasing personal income can fix a government budget. A growing government budget cannot bring lasting prosperity to its citizens by appropriating ever more of their earnings. If we could spend our way to paradise, we would already be there. 40 Governors held office before the State General Fund Expenditures reached \$1 Billion for the first time. The next 4 Governors saw that number hit \$6 Billion. That government spending growth was not reflective of the trajectory of our population or of the economy. It was government getting too big too fast. The era of ever expanding government is over, because it has to be.

*Id.* at 7-8.

On January 23, 2015, the State moved the Panel to alter and amend its December Order. Vol. 25, p. 3186.

On March 5, Senate President Susan Wagle and House Speaker Ray Merrick proposed the “K-12 Block Grant Funding Bill,” which eventually would become known as 2015 House Substitute for Senate Bill 7 (“SB 7”). The announcement was joined by, *inter alia*, two members of the Kansas State Board of Education. It described the reasoning behind the proposal as follows: “The block grants are designed to be a bridge

to a new, modernized school finance formula still under development. Across the state, there is widespread consensus among education officials that the current formula is outdated and needs to be updated to reflect modern educational circumstances.” Press Release, Kansas Legislature, Legislative Leaders Introduce New Plan to Put More Money Into Classrooms, Mar. 5, 2015, *available at* <http://www.kasb.org/assets/Advocacy/15/BlockGrantRelease030515.pdf> (last visited Nov. 22, 2015) (“Kansas Legislature Press Release”).

Less than one week later, on March 11, 2015, the Panel released another Memorandum and Order that removed a minor portion of its December Order but otherwise overruled the State’s motion to alter and amend (“March Order”). Vol. 128, p. 5.

On March 13, the House of Representatives approved SB 7. The Senate approved the bill on March 16. On March 25, Governor Brownback signed SB 7 into law, noting that because of its enactment the State for the first time “will spend more than \$4 billion to support K12 education in Kansas” and emphasizing that the bill is a “critical first step in developing a new formula that recognizes the high quality of Kansas schools and provides a stable source of funding that makes them great for generations of Kansas students to come.” Press Release, Governor Sam Brownback Signs Senate Bill 7, Mar. 25, 2015, <https://governor.ks.gov/media-room/media-releases/2015/03/25/governor-sam-brownback-signs-senate-bill-7>. He reiterated, as he did in his State of the State address, that the objective of this statutory overhaul is to establish a funding system that will “provide[] more money to the classroom [and] is sustainable, stable and predictable.” *Id.*

On March 26, 2015, the Districts filed a motion for declaratory judgment and injunctive relief pertaining to 2015 House Substitute for Senate Bill 7 (“SB 7”). Vol. 130, p. 12. The State opposed the motion both on its merits and because the Districts sought decision on issues that were not part of the pleadings in the case.

Over the State’s objection that the merits of the newly enacted SB 7 were not properly before the Panel, and despite the strong and consistent statements from the Governor and Legislative leaders and individual members of the State Board of Education that SB 7 is a necessary first step to reform the school finance system, the Panel on June 26, 2015, entered another Memorandum and Order (“June Order”) in which it declared that SB 7 violated both the equity and adequacy requirements of Article 6. Vol. 136, p. 1420.

The State has appealed the Panel’s December 2014, March 2015, and June 2015 Orders. Vol. 25, p. 3277; Vol. 128, p. 21; Vol. 137, p. 1507.

### **STATEMENT OF THE ISSUES**

1. Is the question whether the Legislature has made suitable provision for the financing of the State’s educational interests under Article 6 a nonjusticiable political question?
2. Did the Panel err in concluding that the Legislature’s provision for school finance violates Article 6, § 6, of the Kansas Constitution?

### **STATEMENT OF FACTS**

#### **1. The Legislature Made An Informed Judgment On What Is Required To Make Suitable Provision For Financing Of The Public Schools**

The decisions by the Legislature and the Governor to respond thoughtfully to this Court’s directive in *Gannon* through adoption of 2014 Senate Substitute for House Bill

2506, and then of SB 7 as a “first step” toward thorough review and overhaul of the state’s school funding system, were both well-informed and reasonable. Unfortunately, the record in this case does not reflect the nature of the Legislature’s thoughtful consideration, including what information it had before it in enacting SB 7, because the Panel declined the State’s request to allow presentation of evidence and discovery on that question. *Infra*, pp. 75-19. The stale record from the trial in this case preceded this Court’s adoption of the *Rose* standards and thus is largely inapposite to the question now before this Court. In short, because the Panel improperly elected to consider the Districts’ challenge to the constitutionality of SB 7 as it relates to the adequacy requirement this Court has found in Article 6, and did so without development of a factual record, this Court is in the unenviable position of reviewing the Panel’s conclusions without any way of knowing what information supposedly supports them.

The State’s current block grant approach to school funding under SB 7 represents the Governor’s and the Legislature’s reasoned decision that “it is time for a new school finance formula” in the State of Kansas, one that is more focused on “improving student achievement and school accountability, not bureaucratic games.” *See* 2015 State of the State Address. The Governor came to this conclusion in response to this Court’s decision in *Gannon*, the decades of school finance litigation that preceded *Gannon*, and the overall lack of accountability and efficiency in the former school finance system. *Id.* The Governor recommended the block grant model as a “timeout in the school finance wars” – to break the cycle of litigation and allow the Legislature time to craft a comprehensive new funding formula that better meets the needs of the schools and the students they serve. *Id.*

It was the judgment of the Governor that this initial step of repealing the existing formula and replacing it with temporary block grants was “necessary” to accomplish reform. *Id.* That judgment was shared by the top constitutional officers of each house of the Legislature as well as at least two individual members of the State Board of Education. *See* Kansas Legislature Press Release (including statements by Senate President Susan Wagle and House Speaker Ray Merrick, joined by Board of Education Members Steve Roberts and Ken Willard; describing block grants as “designed to be a bridge to a new, modernized school finance formula still under development”). Surely the reasoned judgment of these senior legislative and executive officials about what is required procedurally in the Legislature to accomplish any school funding changes required by this Court’s *Gannon* decision should not be subject to judicial, school-employee or interest-group second-guessing.

The Speaker of the House, Ray Merrick, explained that the “block grant bill [was] vital for getting money into the classroom where it can positively impact student outcomes.” *Id.* at 1. Senator Ty Masterson, Chairman of the Senate Ways and Means Committee, announced that the block grant plan was a “collaborative” effort based on input from “superintendents and school board members” intended to “increase flexibility and create full certainty for our school districts.” *Id.* Senator Susan Wagle, President of the Senate, described the process that led to development of the bill as introduced – even before any committee or other legislative deliberations – as “networking with superintendents, state and local school board members along with their leadership and committee members.” *Id.* at 2.

Once the bills were introduced, House and Senate committees held hearings on the plan, receiving input from supporters and detractors alike. *See* Minutes of House Appropriations Committee, Mar. 9, 2015, *available at* [http://www.kslegislature.org/li/b2015\\_16/committees/ctte\\_h\\_apprprtns\\_1/documents/minutes/20150309.pdf](http://www.kslegislature.org/li/b2015_16/committees/ctte_h_apprprtns_1/documents/minutes/20150309.pdf); Minutes of Senate Ways & Means Committee, Mar. 10, 2015, *available at* [http://www.kslegislature.org/li/b2015\\_16/committees/ctte\\_s\\_wam\\_1/documents/minutes/20150310.pdf](http://www.kslegislature.org/li/b2015_16/committees/ctte_s_wam_1/documents/minutes/20150310.pdf) (both last visited Nov. 22, 2015). While considerable media attention focused on the arguments advanced by detractors of this proposal – nearly all of whom are active participants in the status quo – far less public attention has been paid to the substance of the arguments advanced by proponents of the reforms – the arguments ultimately found persuasive by a majority of the Legislature and by the Governor. *See*, for example, Minutes of House Appropriations Committee, Mar. 9, 2015, and Minutes of Senate Ways Committee, Mar. 10, 2015, both of which list Mike O’Neal, CEO, Kansas Chamber of Commerce, a representative of the Kansas Policy Institute, and Chris Brown and Craig Gabel, Kansans for Liberty, as proponents of the House and Senate block grant bills, HB 2403 and SB 273, respectively.

In the House Appropriations Committee hearing and the Senate Ways and Means Committee hearing, the Kansas Chamber of Commerce, led by Mike O’Neal, former Speaker of the House, Chair of the House Education Committee and Special Committee on Education Funding, supported the block grant bill. The Legislature received, *inter alia*, this testimony from the Kansas Chamber:

The current formula, while well intentioned at the time of its passage over 20 years ago, has become so complicated and unwieldy that it has resulted in unintended consequences, some bordering on the absurd. As hundreds of millions of dollars of funds appropriated for education are either

diverted to non-instructional priorities or left unspent altogether, Kansas finds itself, ironically, facing yet another lawsuit claiming state funding is inadequate! Every perceived failure by the Legislature to meet school district budgeting demands, in the face of the irrefutable reality that student funding continues to increase, is met with the false claim that school funding is being reduced. The formula has lost touch with the core principal [sic] of K-12 education – to educate.

Mike O’Neal, Testimony Before House Appropriations Committee, Proponent, HB 2403 – CLASS Act, Mar. 9, 2015, at 1, *available at* [http://kslegislature.org/li/b2015\\_16/committees/ctte\\_h\\_apprprtns\\_1/documents/testimony/20150309\\_02.pdf](http://kslegislature.org/li/b2015_16/committees/ctte_h_apprprtns_1/documents/testimony/20150309_02.pdf); Mike O’Neal, Testimony Before Senate Ways & Means Committee, Proponent, SB 273 – CLASS Act, Mar. 10, 2015, *available at* [http://kslegislature.org/li/b2015\\_16/committees/ctte\\_s\\_wam\\_1/documents/testimony/20150310\\_14.pdf](http://kslegislature.org/li/b2015_16/committees/ctte_s_wam_1/documents/testimony/20150310_14.pdf) (both last visited Nov. 22, 2015) (together, “O’Neal Testimony”).

As a representative of Kansas employers, the Chamber of Commerce has a strong stake in the operations of the state’s K-12 system of public education – a perspective not represented by the many advocates on the other side of this legislative debate:

“As the most significant consumers of the ultimate educational product of the state, Kansas businesses and industries have a huge stake. The Kansas Chamber, as a part of its overall Legislative Agenda for 2015, has an Education section. Our overarching education goal is to “support an excellent education system which produces a well-trained Kansas workforce for tomorrow’s business needs.”

*See* O’Neal Testimony, *supra* at 1.

Further Criticism of the status quo was presented to the Legislature by James Franko, Vice President and Policy Director for the Kansas Policy Institute, who testified in support of the bill, explaining that education funding – not including inflation and pension costs – had increased \$713 million in the last 10 years and that school districts had substantially increased their cash reserves since 2005. *Id.* He went on:



There may be fewer than five people in Kansas who truly understand the Kansas school funding formula, and that is only one reason that the current formula should be replaced.

\* \* \*

On average, only 55 cents of every education dollar goes to Instruction by the choice of local school boards. Administrators could make a lot more money available for Instruction but they choose to operate inefficiently ... Administrators even acknowledged that they often choose to spend more than necessary in testimony before the K-12 Efficiency Commission. That's another flaw in the current school funding formula – it gives districts more than is necessary to educate students and doesn't require efficient use of taxpayer money.

\* \* \*

The block grant proposal also provides considerably more latitude to districts to decide how to spend most of the money they would receive.

James Franko, Testimony Before House Appropriations Committee, Proponent, HB 2403 – CLASS Act, Mar. 9, 2015, at 1-2, *available at* [http://kslegislature.org/li/b2015\\_16/committees/ctte\\_h\\_apprprtns\\_1/documents/testimony/20150309\\_03.pdf](http://kslegislature.org/li/b2015_16/committees/ctte_h_apprprtns_1/documents/testimony/20150309_03.pdf); *see also* Dave Trabert, Testimony Before Senate Ways & Means Committee, Proponent, SB 273 – CLASS Act, Mar. 10, 2015, at 1-2, *available at* [http://kslegislature.org/li/b2015\\_16/committees/ctte\\_s\\_wam\\_1/documents/testimony/20150310\\_15.pdf](http://kslegislature.org/li/b2015_16/committees/ctte_s_wam_1/documents/testimony/20150310_15.pdf) (both last visited Nov. 22, 2015) (giving similar testimony on behalf of the Kansas Policy Institute).

During the Committee process, Legislators also had the benefit of analysis of SB 7 by legislative staff. *See* Minutes of House Appropriations Committee, Mar. 9, 2015 (noting that Jason Long, Office of the Revisor of Statutes, presented an overview of the bill); Minutes of Senate Ways Committee, Mar. 10, 2015 (same). They also heard from private citizens interested in repeal of the existing finance formula and enactment of a new formula. *See* Chris Brown, Testimony Before House Appropriations Committee, Proponent, HB 2403 – CLASS Act, *available at* [http://kslegislature.org/li/b2015\\_16/](http://kslegislature.org/li/b2015_16/)

committees/ctte\_h\_apprprtns\_1/documents/testimony/20150309\_23.pdf; Chris Brown, Testimony Before Senate Ways & Means Committee, Proponent, SB 273 – CLASS Act, *available at* [http://kslegislature.org/li/b2015\\_16/committees/ctte\\_s\\_wam\\_1/documents/testimony/20150310\\_16.pdf](http://kslegislature.org/li/b2015_16/committees/ctte_s_wam_1/documents/testimony/20150310_16.pdf); Craig Gabel, Testimony Before House Appropriations Committee, Proponent, HB 2403 – CLASS Act, *available at* [http://kslegislature.org/li/b2015\\_16/committees/ctte\\_h\\_apprprtns\\_1/documents/testimony/20150309\\_26.pdf](http://kslegislature.org/li/b2015_16/committees/ctte_h_apprprtns_1/documents/testimony/20150309_26.pdf); Craig Gabel, Testimony Before Senate Ways & Means Committee, Proponent, SB 273 – CLASS Act, *available at* [http://kslegislature.org/li/b2015\\_16/committees/ctte\\_s\\_wam\\_1/documents/testimony/20150310\\_17.pdf](http://kslegislature.org/li/b2015_16/committees/ctte_s_wam_1/documents/testimony/20150310_17.pdf) (all last visited Nov. 22, 2015).

When the bill reached the House floor, legislators continued to debate the bill and offered numerous amendments to it. After much debate and consideration, some of the amendments passed; others did not. *See, e.g.*, Journal of the House, March 12, 2015, at 351-55, *available at* [http://www.kslegislature.org/li/b2015\\_16/chamber/documents/daily\\_journal\\_house\\_20150312150856.pdf](http://www.kslegislature.org/li/b2015_16/chamber/documents/daily_journal_house_20150312150856.pdf) (last visited Nov. 22, 2015). This process of hearings, debate, and amendment reflects a deliberative process aimed at implementing the reasoned judgment of the Kansas House that the interim block grant funding would give the Legislature the time it needed to replace the dysfunctional school funding system with one that better serves the needs of Kansas students. House leaders’ explanations of their votes confirm this. *See, e.g.*, Journal of the House, March 13, 2015, at 366, *available at* [http://www.kslegislature.org/li/b2015\\_16/chamber/documents/daily\\_journal\\_house\\_20150313103235.pdf](http://www.kslegislature.org/li/b2015_16/chamber/documents/daily_journal_house_20150313103235.pdf) (last visited Nov. 22, 2015) (statement of Rep. Marvin Kleeb) (House Substitute for SB 7 “provides the opportunity to create a new school finance formula that

is fair, equitable, flexible, and restores local control to the school boards and administrator”); *id.* at 367 (statement of Reps. Kyle Hoffman, Ron Ryckman, Joe Seiwert, Sharon Schwartz, Sue Boldra, Charles Smith, Travis Couture-Lovelady, Jack Thimesch, Bud Estes, John Barker, and Randy Garber) (House Substitute for SB 7 “provides a bridge to a new funding formula that will help equip rural schools with the tools they need to help students succeed”); *id.* at 367-68 (statement of Rep. John Rubin) (“The current school finance formula propagates unintended consequences harmful to our student . . . . Our priority is and should always be our children and the classrooms where they learn, and more local control for their schools. This bill accomplishes that.”); *id.* at 368 (statement of Rep. Kasha Kelley) (“Being mired in the destructive diversion of litigation and thus focused on quantity over quality takes energy, creativity and devotion away from educational opportunity . . . . Through maximum fiscal freedom and increased local oversight, we step toward greater innovation and equality in education for all students.”).

After the Senate Ways and Means Committee hearing and much debate, by a vote of 25 to 14, the Senate likewise passed the House Substitute to SB 7. *See* Journal of the Senate, March 16, 2015, at 258-59, *available at* [http://www.kslegislature.org/li/b2015\\_16/chamber/documents/daily\\_journal\\_senate\\_20150316184723.pdf](http://www.kslegislature.org/li/b2015_16/chamber/documents/daily_journal_senate_20150316184723.pdf) (last visited Nov. 22, 2015); *see also id.* at 260 (statement of Sen. Ty Masterson) (“The block grant will provide adequate financing over the next two years as we develop a formula to thrive in the modern education environment. The new formula should reward good outcomes and good teachers with less emphasis on structures.”).

To be sure, there was strong opposition to this bill and vigorous dissent from the final vote. Even the Chaplain of the House of Representatives opened the session on the day of the vote with a customary prayer that stated,

The last couple of days have been rough, [m]any discussions, debates, arguments and agreements have occurred. Some of our legislators may feel tired, discouraged, weary, frustrated, and maybe even mad. I ask that You be especially near to each one today. There is a big final vote today, Lord.

Journal of the House, March 13, 2015, at 362.

But the vigor of the dissent reaffirms the State’s position, and is not detrimental to it. The fact that both the House and Senate were divided over the bill – which passed the House by a vote of 64 to 57, Journal of the House, March 13, 2015, at 365, and the Senate by a vote of 25 to 14, Journal of the Senate, March 16, 2015, at 258 – demonstrates the obvious: That even among the People’s elected representatives, reasonable minds differ regarding the best approach to school funding. *See Gannon*, 298 Kan. at 1149 (quoting *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W. 3d 746 (Tex. 2005), that “there’s much else on which reasonable minds should come together, and much over which they may differ”).

Notably, the *only* forums in which there has been unanimity on school funding issues are this Court and the Panel. Many other issues of constitutional concern have been handled in the Legislature with close votes and sharply worded dissents, and yet this Court has upheld the democratic resolution of such contested issues. *See, e.g., State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 186 P.3d 183 (2008) (upholding as constitutional the Kansas Lottery Act, which was enacted by a single vote over bitter dissent). That is the nature of the representative institution.

Governor Brownback echoed the legislators' view when he signed SB 7, calling it a "critical first step in developing a new formula that recognizes the high quality of Kansas schools and provides a stable source of funding that makes them great for generations of Kansas students to come." Press Release, Governor Sam Brownback Signs Senate Bill 7, <https://governor.ks.gov/media-room/media-releases/2015/03/25/governor-sam-brownback-signs-senate-bill-7>.

When the Legislature made school financing decisions, all of the information and data described at trial also was available. *See, e.g.*, Vol. 11, pp. 1327-30, ¶ 20. The Legislature had detailed information about each local school district's previous and current student demographics, staffing, budgets, revenues and spending. Vol. 11, pp. 1328-30, ¶ 20(a)-(g), (j), (k). The Legislature had its earlier commissioned cost studies to be given the weight they deserved. Vol. 11, pp. 1329-30, ¶ 20(l). It had testimony and information about the effects of reductions in state funding on school districts and about the districts' budget cuts. Vol. 11, pp. 1328-29, ¶ 20(f), (g). It also had the information about student performance on state assessment and other standardized tests. Vol. 11, p. 1329, ¶ 20(h), (i). It received this information and data from agencies, committees, educators, lobbyists and citizens. Vol. p. 11, 1330, ¶ 20(n)-(p).

In the end, the Legislature and the Governor made a thoughtful, informed decision based on what they reasonably calculated was necessary to make suitable provision for financing public schools while the Legislature worked on comprehensively reviewing and revising the State's system for funding public schools. The majority of legislators elected to both houses, and the Governor elected by the people of the State as a whole, reached the conclusion that SB 7 is a necessary first step toward reforming the school finance

system to comply with this Court’s interpretation of Article 6 of the Kansas Constitution. Those who disagree with this process are free to criticize it, to challenge it, to attempt to alter it during future legislative sessions – but this Court should not permit their attempt to gain constitutional approval of the rejected policy judgments of the minority.

## **2. School Spending In Kansas Is At Record High Levels**

### **a. With All Sources Of Revenue Considered, Overall Spending In Actual Dollars And Per Pupil Is At An All-Time High In Kansas**

As reported by the Kansas State Department of Education (“KSDE”), FY14 expenditures for K-12 education were \$204,506,873 higher than FY12, \$308,785,689 higher than in FY09, and they were *higher than any other time* in Kansas history. Appx. 1, p. 1. Per pupil expenditures in FY14 of \$12,960 were the highest in State history. *Id.* That year total operating expenditures per pupil were also the highest in State history. *Compare* Appx. 2, p. 1 *with* Vol. 10, pp. 10238-44. The State set a new record for K-12 spending in FY15, Appx. 3; and will set yet another new record in FY16. Appx. 3, 4.

The Plaintiff Districts’ spending continues to surpass or remain roughly equal to spending in FY09, the year in which the Panel held K-12 was last adequately funded. Vol. 24, p. 3139 (“At the beginning of FY 2009 (July 1, 2008), the evidence established that the Kansas K-12 school system was functioning as a K-12 school system should in order to provide a constitutionally adequate education to Kansas children”).

- Wichita budgeted to spend \$648,448,278 in FY16. Appx. 5, p. 3.6. It estimated that it would spend \$13,619 per pupil. *Id.* Excluding capital outlay and bond expense, it estimated \$11,969 would be spent per pupil. *Id.* By comparison, Wichita spent \$573,938,129 in FY09 and \$12,332 per pupil. Vol. 83, p. 4338.
- Hutchinson budgeted to spend \$69,420,740 in FY16. Appx. 5, p. 29. It estimated that it would spend \$14,822 per pupil. *Id.* Excluding capital outlay and bond

expense, it estimated \$12,726 would be spent per pupil. *Id.* By comparison, Hutchinson spent \$60,502,157 in FY09 and \$13,076 per pupil. Vol. 84, p. 4457.

- Dodge City budgeted to spend \$98,416,884 in FY16. Appx. 5, p. 29. It estimated that it would spend \$14,822 per pupil. *Id.* Excluding capital outlay and bond expense, it estimated \$12,726 would be spent per pupil. *Id.* By comparison, Dodge City spent \$71,420,455 in FY09 and \$11,903 per pupil. Vol. 86, p. 4712.
- Kansas City budgeted to spend \$352,018,946 in FY16. Appx. 5, p. 42. It estimated that it would spend \$16,436 per pupil. *Id.* Excluding capital outlay and bond expense, it estimated \$14,931 would be spent per pupil. *Id.* By comparison, Kansas City spent \$300,759,934 in FY09 and \$16,322 per pupil. Vol. 87, p. 4897.

#### **b. Direct State Funding Has Increased Since 2009**

Local districts' revenue comes from several sources: state funds (from the State General Fund ("SGF"), other sources of state funds, and each districts' 20 mill tax levy against its local property), local funds (mostly local property taxes funding districts' local option budgets ("LOB")), and federal funds.

Since 2000, more than half of the SGF, which is itself about half of the State's total budget, has gone to K-12 education. Vol. 33, pp. 1119-20. For FY16, nearly two-thirds of the State General Fund was spent on Kansas education, including K-12 education. Appx. 4, p. 2.

The State approved a \$3.93 billion FY16 budget for its portion of the funding of primary and secondary education, which includes special education, block grants, capital outlay aid discretionary grants, KPERS, pre-kindergarten, parent education and miscellaneous items. Appx. 6.

In 2014, the State increased FY15's BSAPP to \$3,852 from \$3,838. *Compare* Appx. 8 *with* Vol. 143, p. 2115. After a spring 2015 allotment, the Legislature appropriated \$27,346,783 to keep the BSAPP at \$3,838. SB 7, § 1. For FY16, the Legislature appropriated \$2,751,326,659, to be added to the 20 mill levy of each district,

for funding of block grants to school districts. An SGF appropriation of \$500,000 was made to the Information Technology Education Opportunities Account (“ITEOA”), a program to pay for credentialing high school students in information technology fields. SB 7, § 2. Also under SB 7, other smaller K-12 appropriations were made. For FY17, the Legislature has appropriated \$2,757,446,624 from the SGF as a block grant to school districts. An SGF appropriation of \$500,000 will be made to the ITEOA. SB 7, § 3. Other smaller K-12 appropriations will be made too.

The State’s contribution toward K-12 funding has increased and will increase through FY17 whether the State’s contribution to KPERS is included or not.

FY Year	State Aid Funding	Increase	State Aid Funding excluding KPERS	Increase without KPERS
13-14	\$3,262,850,907		\$2,950,583,742	
14-15	\$3,407,573,315 <sup>1</sup>	\$144,772,408	\$3,092,773,312	\$142,189,570
15-16	\$3,491,873,449	\$84,300,134	\$3,097,273,451	\$4,500,139
16-17	\$3,551,030,858	\$59,157,407	\$3,114,404,856	\$17,131,405

Sources: Vol. 143, pp. 2164, 2177-78, totals from columns S, T, AA, AB, AI, AJ and Vol. 143, p. 2181

**c. The Districts Have Received And Will Receive Substantial LOB Funding**

In FY15, local districts taxed to receive \$1,056,637,742 in LOB for K-12 spending. For FY16, indications are that the aggregate local districts’ LOB will be even higher. The Districts have received and will receive substantial LOB revenue each year:

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<sup>1</sup> SB 7 block grants exclude special education, bond expense and interest aid. The calculation also does not include a few smaller aid programs such as juvenile detention facilities, parents as teachers, pre-K pilot and school food service.



- Wichita’s LOB budget in FY15 was \$111.4 million and had been \$95 million in FY09. *Compare* Appx. 7, p. 2 *with* Vol. 120, p.10401. Its LOB budget for FY16 is \$111.3 million. Appx. 5, p. 8.
- Hutchinson’s LOB budget in FY15 was \$10 million and had been \$7.3 million in FY09. *Compare* Appx. 7, p. 4 *with* Vol. 120, p. 10401. Its LOB budget for FY16 is \$10.3 million. Appx. 5, p. 21.
- Dodge City’s LOB budget in FY2015 was \$16 million and had been \$14.9 million in FY2009. *Compare* Appx. 7, p. 8 *with* Vol. 120, p. 10405. Its LOB budget for FY16 is \$16 million. Appx. 5, p. 34.
- Kansas City’s LOB budget in FY2015 was \$49.9 million and had been \$39.4 million in FY2009. *Compare* Appx. 7, p. 2 *with* Vol. 120, p. 10407. Its LOB budget for FY16 is \$49.973 million. Appx. 5, p. 47.

**d. The Districts Also Receive Substantial Federal Funds**

Federal funding to local districts in FY16 is estimated at approximately \$520 million and funding in FY15 was approximately \$510 million. Appx. 3.

Under the Elementary and Secondary Education Act, federal funds for local districts include Title I (for supplemental services to schools and school districts historically with a high percentage of students from low-income families), Title IIA (for teacher professional development), and Title III (for bilingual education). In FY16 allocations of federal Title I, IIA, III and migrant funds to districts totaled approximately \$115 million. Appx. 8.

After 2012, Kansas has been allowed to direct the federal funds to “priority schools” – the lowest 5% achieving schools over the past 5 years – and “focus schools” – 10% of schools with the largest standardized testing gaps between student scores over the last five years. Vol. 128, pp. 15653, 15687; State’s Proposed Findings,<sup>2</sup> Ex. 1516, 1517.

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<sup>2</sup> A request for the inclusion of these findings and the exhibits proffered to the Panel is pending.

Doing so provides Kansas with greater flexibility to direct federal aid where it can be best put to use.

The Districts have received substantial federal funding.

- Wichita will receive \$80.9 million in federal funds in FY16, Appx. 5, p. 8, as compared with \$56.2 million in FY09. Vol. 83, p. 4338.
- Hutchinson received \$8.6 million in federal funds in FY16, Appx. 5, p. 21, as compared with \$7.1 million in FY09. Vol. 84, p. 4457.
- Dodge City received \$10.9 million in federal funds in FY16, Appx. 5, p. 34, as compared with \$9.2 million in FY09. Vol. 86, p. 4712.
- Kansas City received \$45.9 million in federal funds in FY16, Appx. 5, p. 47, as compared with \$26.8 million in FY09. Vol. 87, p. 4897.

The FY14 budgets of the Plaintiff Districts show anticipated federal revenue, exclusive of special education, vocational and food services funding, in the following amounts: Wichita, \$37,225,001; Hutchinson, \$5,119,000; Dodge City, \$7,239,705; and Kansas City, \$22,900,000. Appx. 5, pp. 8, 21, 34, 47.

### **3. Spending On Instruction And Operations Has Increased, Both In The Aggregate And Per Pupil**

“Instructional” spending – direct spending on classroom education – generally continued to increase after the reductions in the BSAPP in FY10. Vol. 120. The most recent available data from FY14 shows \$3,033,444,556 in instructional spending. This was the highest in Kansas history. *Compare* Ex. 1037A *with* Appx. 2, p. 1.

Instructional spending in the Districts has increased. In Wichita, instructional spending went from \$286,676,689 in 2008-09 to \$306,702,847 in 2013-14. *Compare* Vol. 120, p. 10212 *with* Appx. 2, p. 2. Wichita budgeted instructional spending in FY16 for \$320,820,297. Appx. 5, p. 3. In Hutchinson, instructional spending went from \$27,245,024 in 2008-09 to \$30,903,790 in 2013-14. *Compare* Vol. 120, p. 10219 *with* Appx. 2, p. 3.

Hutchinson budgeted \$37,895,008 for instructional spending in FY16. Appx. 5, p. 16. In Dodge City, instructional spending went from \$36,020,253 in 2008-09 to \$39,123,206 in 2013-14. *Compare* Vol. 120, p. 10227 with Appx. 2, p. 4. Dodge City budgeted \$47,981,198 for instructional spending in FY16. Appx. 5, p. 29. In Kansas City, instructional spending went from \$134,157,945 in 2008-09 to \$135,640,968 in 2013-14. *Compare* Vol. 120, p. 10234 with Appx. 2, p. 5. Kansas City budgeted \$189,492,878 for instructional spending in FY16. Appx. 5, p. 42.

The increase in spending did not happen just because of an increase in students. Rather, per pupil instructional spending also has increased. Moreover, even accounting for inflation, the per pupil instructional and per pupil current expenses will increase for three of four Districts from FY09 to FY16, with Wichita’s total spending outpacing inflation, but FY16 budgeted per pupil instructional and current expense spending lagging only marginally behind inflation. This is show in the following tables.

Table – USD 259 (Wichita)

	Est. 2015-2016	Actual 2008-2009	Actual 2008-2009 in 2015 dollars
Total Expenditures	\$648.4 million	\$563.8 million	\$622.81 million
Instructional Expenditures Per Pupil	\$6,738	\$6,303	\$6,962
Total Expenditure Per Pupil Current Expenditures (as defined by US Census Bureau)	\$11,969	\$11,329	\$12,515

Table – USD 308 (Hutchinson)

	Est. 2015-2016	Actual 2008-2009	Actual 2008-2009 in 2015 dollars
Total Expenditures	\$69.4 million	\$56.1 million	62.0 million
Instructional Expenditures Per Pupil	\$7,709	6,044	\$6,677
Total Expenditure Per Pupil Current Expenditures (as defined by US Census Bureau)	\$12,116	10,018	\$11,067

Table – USD 443 (Dodge City)

	Est. 2015-2016	Actual 2008-2009	Actual 2008-2009 in 2015 dollars
Total Expenditures	\$98.4 million	\$71.4 million	\$78.9 million
Instructional Expenditures Per Pupil	\$7,226	\$6,489	\$7,168
Total Expenditure Per Pupil Current Expenditures (as defined by US Census Bureau)	\$12,726	\$10,749	\$11,874

Table – USD 500 (Kansas City)

	Est. 2015-2016	Actual 2008-2009	Actual 2008-2009 in 2015 dollars
Total	\$352.0	\$300.76	\$332.2

Expenditures	million	million	million
Instructional Expenditures Per Pupil	\$8,848	\$7,280	\$8,042
Total Expenditure Per Pupil Current Expenditures (as defined by US Census Bureau)	\$14,931	\$12,094	\$13,360

Sources: Appx. 1, pp. 2-5; Appx. 5, pp. 3, 4, 16, 18, 29, 31, 42, 44; Vol. 120, pp. 10212,10219,10227,10234.

**4. All Kansas Schools Are Subject To Rigorous Accreditation Standards, And Each And Every Kansas School Presently Is Accredited**

There was no evidence that any local district is unable, because of lack of funds, to satisfy rigorous accreditation requirements. All primary and secondary public schools in Kansas are accredited. Vol. 11, p. 1371, ¶ 162 (citing Vol. 23, p. 1075; Vol. 27, p. 2124; Vol. 112, pp. 12765-833).

Kansas accredits K-12 schools according to administrative regulations, known as Quality Performance Accreditation (“QPA”). Schools are assigned accreditation status annually based upon performance and quality criteria. Vol. 122, p. 12351. The QPA quality criteria are based upon eleven specific processes, programs and policies that are required to be in place in each school. K.A.R. 91-31-32.

Every year, each school district submits a QPA summary report to the KSDE in which the school district provides written assurances to the KSDE that it has fully satisfied the QPA performance and quality criteria. Vol. 11, p. 1333, ¶ 29 (citing Vol. 27, pp. 2126-27). The KSDE also independently audits licensed personnel reports from the

school districts for compliance with that quality criteria. Vol. 11, p. 1333, ¶ 30 (citing Vol. 27, pp. 2128-89).

Furthermore, pursuant to K.S.A. 72-1127, as amended, the Kansas State Board of Education (“KSBOE”) has directly and indirectly imposed high school graduation requirements, making graduation contingent upon successful completion of multiple courses in core and elective areas of study. K.A.R. 91-31-34. The State “standards” shape the local districts’ curricula for the required areas of study. The KSBOE has published “standards” for college and career-ready, English for speakers of other languages; English arts; mathematics; science; social studies; communication/marketing; driver’s education; fine arts; library; media; technology; physical education/health; social, emotional and character development; and world languages. *See* <http://community.ksde.org/Default.aspx?tabid=4754> (last visited Nov. 21, 2015).

The most recent set of educational quality standards, known as Common Core Standards (“CCS”), were adopted by the KSBOE on October 12, 2010. Vol. 123, p. 12672-705; Vol. 126, pp. 15522, 15553-54, 15770; Vol. 37, pp. 2084, 2114-15; Vol. 127, pp. 15936-38. The CCS is designed to provide students with the required knowledge and skills to be “college or career ready” upon graduation. Vol. 37, p. 2084; Vol. 127, pp. 15933, 15936-40. It is benchmarked so that students can be successful in either post-secondary education or with businesses and industry. *Id.* The Board of Regents committed to allowing high school graduates who score proficient or above in subjects on Kansas assessment tests aligned with the CCS to immediately take credit courses in those subjects. Vol. 127, pp. 15937-38; Vol. 126, pp. 15522, 15771-73.

The QPA also has an accountability element. To obtain federal funds under the Elementary and Secondary Education Act, known as the No Child Left Behind Act of 2001 (“NCLB”), 20 U.S.C. §§ 6301, *et seq.*, compliance with Annual Yearly Progress (“AYP”) targets were an integral part of the QPA. Under a federal approved “Waiver,” however, Kansas implemented a multi-dimensional (four-part) look at student performance, in contrast to the federal NCLB’s single focus on assessment test scores. Vol. 126, pp. 15522, 15608-09. The first look is achievement, still measured by math and reading scores on the Kansas assessment tests. *Id.* While test scores continue as part of measuring student performance, AYP targets have been replaced by an index, the Annual Performance Index (“API”). *Id.*, pp. 15556-57, 155597, 15607-33. Growth is the second look, which is measured by improvement of test scores. *Id.*, pp. 15608-09, 15633-35. Reduction of the gap between the students that score the highest and lowest on the tests is the third look. *Id.*, pp. 15608, 16636-38. Reduction of the number of students below standard is the last look. *Id.*, pp. 15608, 16639-41. Thus, progress based upon multiple Annual Measurable Objectives (“AMOs”) replaced AYP performance targets for schools and local districts. *Id.*, pp. 15608-09; Vol. 127, pp. 15902-03, 15908-09, 15939.

The Waiver also helps ensure students are being instructed by “highly effective teachers,” as defined by federal law. Vol. 126, pp. 15729-41. In its waiver request, Kansas committed to having a model evaluation system that districts can use to review teacher performance. *Id.* Kansas has been piloting the Kansas Educator Evaluation Protocol (“KEEP”), developed by the KSDE and a consultant. *Id.* The Teaching in Kansas Commission II was formed to recommend how student achievement will be integrated into KEEP. *Id.*

There was no showing that current accreditation standards are inadequate. The Panel expressly held that districts *failed* to prove that the educational standards, which are the bedrock Kansas’ accreditation requirements, are too low. Vol. 14, pp. 1870 (Panel’s Jan. 11, 2013 Opinion, “No standards currently in effect, or in the process of implementation, stand here challenged [as] to their suitability by education professionals, except by Plaintiff Districts’ expert Dr. Baker who raises, but which we find Plaintiff Districts have not proved, questions of whether, in fact, they are too low.”).

Then KSDE Commissioner Dr. Diane DeBacker testified, without contradiction, that the Waiver’s student performance criteria (AMOs) are achievable. Vol. 127, pp. 15916-17, 15969. No evidence was presented that Kansas schools will be unable to successfully meet the AMOs under current funding levels.

#### **5. Kansas Standardized Testing Results Have Improved In Recent Years**

The Kansas assessment tests are designed to test required knowledge and skills outlined in standards adopted by the KSBOE. Vol. 41, p. 2703. Cut scores on the assessments are set within categories. There are five performance categories – academic warning, approaches standard, meets standards, exceeds standard and exemplary – with a cut score for each category. *Id.*, p. 2685. For example, for high school math, the cut scores are 50 to 67. The 50 here is not the same as in the classroom; the 50 represents a very specific approach to how students perform on assessments. In the process of determining the cut scores, a large group of experts determined that to be an appropriate score. The federal government also reviewed the cuts scores and determined them to be appropriate. *Id.*, p. 2686-87.



Kansas schools have made progress in advancing students not only across the proficiency line, but into the highest performance levels and across all levels of the spectrum of the test since the enactment of NCLB. Vol. 41, pp. 2721-23; Vol. 22, pp. 12509-13; Vol. 126, pp. 15380-81; Vol. 126, pp. 15390-91; Vol. 126, p. 15611. Evidence at trial showed that Kansas students' proficiency on assessment tests has increased 40% over the last decade and now exceeds 80% at each level. Vol. 69, p. 2735; Vol. 126, p. 156161. The State saw improvement on state assessment test scores for all student groups in math and reading. Vol. 126, pp. 15348-49, 15378-79 15392-93. Math scores for all students increased from 73.5% proficient in 2003 to 87.6% in 2011 for 4<sup>th</sup> grade; increased from 60% proficient in 2003 to 81.6% in 2011 for 7<sup>th</sup> grade; and increased from 45.6% proficient in 2003 to 81.5% in 2011 for 11<sup>th</sup> grade. *Id.* Reading scores for all students increased from 68.7% proficient in 2003 to 86.7% in 2011 for 5<sup>th</sup> grade; increased from 75.1% proficient in 2003 to 87.1% in 2011 for 8<sup>th</sup> grade; and increased from 60.6% in 2003 to 88.3% in 2011 for 11<sup>th</sup> grade. *Id.*

Kansas test scores for "free and reduced lunch" students improved from 2003 to 2011 on state assessments in math and reading. Among the "free and reduced lunch students," math scores increased from 61.1% proficient in 2003 to 81.9% in 2011 for 4<sup>th</sup> grade; increased from 40.7% proficient in 2003 to 72.1% in 2011 for 7<sup>th</sup> grade; and increased from 25.8% proficient in 2003 to 69.9% in 2011 for 11<sup>th</sup> grade. Vol. 126, pp. 15348-49, 15402-505. Reading scores increased from 55.1% proficient in 2003 to 79.8% in 2011 for 5<sup>th</sup> grade; increased from 70.5% proficient in 2003 to 78.9% in 2011 for 8<sup>th</sup> grade; and increased from 42.9% proficient in 2003 to 80% in 2011 for 11<sup>th</sup> grade. *Id.*

The Kansas Report Card for 2011-12 is the last meaningful report showing the apples-to-apples comparisons from which improvement on Kansas standardized testing can be analyzed. The Report Card, Vol. 125, p. 3210, citing to <http://online.ksde.org/rcard/summary/fy2012/state.pdf>, shows that the percentage proficient on the math test increased for all students and for free and reduced lunch, English Language Learners (“ELL”), African-American, Hispanic, White, Asian, American Indian/Alaska Native and Native Hawaiian/Pacific Islander above 2010-11 percentages. The percentages increase on the reading test for Students with Disabilities, White, Asian, American Indian/Alaska Native and Native Hawaiian/Pacific Islander. The all-student percentage proficiency was only 0.1% less than in 2010-2011. *Id.*, p. 1.

Below are the statewide results for the percentages of students who tested at or above proficient in Reading, including 2011-12 results.

Reading	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
All students	70.5	73.7	80.3	81	84.3	85.8	86.3	87.8	87.6
Free & Reduced Lunch	57.8	62.7	67.7	70.4	74	76.5	77.7	80.5	79.8
Students with Disabilities	45.2	50.3	57.4	64.3	66.6	69.4	69.6	71.6	71.2
ELL Students	55.3	64.2	49.8	55.1	63.5	65.5	57.4	72.2	71.8
African-American Students	48.9	53.7	60.3	61.4	66.1	68.2	69.4	73	71.1
Hispanic	56	61.5	61.5	63.8	69	71.9	75.2	78.4	77.9
White	74.6	77.6	85.2	86.8	89	90.4	90.7	91.7	91.7
American Indian	59.9	64.7	75.3	77.3	79.5	80.7	81.4	84.3	84.7
Multi-Racial	68.8	70.3	77.7	68.2	82.6	83.5	85	86.9	85.9
Asian/Pacific Islanders	69.5	74.7	80.8	81.7	86	86.8			
Asian							88	89	89.1
Native Hawaiian/Pacific Islander							85.7	81.6	84.8

Sources: Vol. 123, pp. 13326-452 (FY03-11); Vol. 116, p. 8299 and Vol. 126, pp. 15410-19 (FY12 Preliminary Data). Below are the statewide results for the percentages of students who tested at or above proficiency in Math, including 2011-12 results.

Math	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
All students	65.3	68.6	74.7	78.3	82	83.5	83.6	85.4	85.9
Free & Reduced Lunch	52.2	56.6	62.6	68.4	72	74.3	75	77.8	78.2
Students with Disabilities	46.4	50.5	52.7	59.8	64.9	67.2	66.8	69.5	68.6
ELL Students	45.1	48.7	55.7	61.6	68.3	69.9	71.2	74.8	75.2
African-American Students	40.9	44.4	51.5	57.2	61.3	63.8	64.2	67.4	67.7
Hispanic	48.1	51.6	59.3	65.2	70.1	72.4	74.2	77.4	77.8
White	70.2	73.6	79.4	83.4	86.3	87.7	87.7	89.1	89.8
American Indian	52.5	58.2	66.5	72.3	74.5	76.8	76.8	79.4	81.4
Multi-Racial	62	64.5	72.2	66	79.7	80.5	81.0	82.2	83
Asian/Pacific Islanders	70.9	74.8	82.4	84.7	88.3	89.5			
Asian							90.5	91.9	92.3
Native Hawaiian/Pacific Islander							80.9	80	86.5

Sources: Vol. 123, pp. 13326-452 (FY03-11); Vol. 116, p. 8299 and Vol. 126, pp. 15410-19 (FY12 Preliminary Data).

The Kansas assessment tests had to be redesigned because of the adoption of the CCS. Vol. 41, p. 2707. However, while CCS was the basis for K-12 curriculum by the 2012-13 school year, the assessment tests administered starting in 2006, which were based on the standards that predated adoption of the CCS, Vol. 41, pp. 2683-84, were used in 2012-13. The standardized test based upon CCS standards was not finalized. As a result, the assessment tests premised on measuring progress against the pre-CCS

standards were used even though students received instruction under the CCS standards.

The KSDE explained the impact as follows:

As Kansas continues its transition to higher education standards for college and career readiness, many schools experienced a decline in the results of their students' latest state assessment scores. While this is never a desired outcome, in a time of transition it is certainly not altogether unexpected. Assessments are a critical component of the education process, but this transition period has created a bit of an anomaly. Because the new standards assessment was not available for the 2012-13 assessment period, students were assessed using the existing testing tool which is no longer aligned with the new instruction. *As such, we caution the use of recent assessment scores as a true indication of the student's progress.*

Vol. 25, p. 3209 (emphasis added); *accord* Ex. 1522 to State's Proposed Findings of Fact. Further, the results for the 2013-14 test are not available; they have been found invalid because the testing computer systems were hacked. Vol. 45, p. 97. *See* Appx. 9 (Message from Interim Commissioner, KSDE explains the validity of the 2013-14 results could not be verified because of cyber attack on testing computers).

## **6. Kansas Is Closing Achievement Gaps In Recent Years**

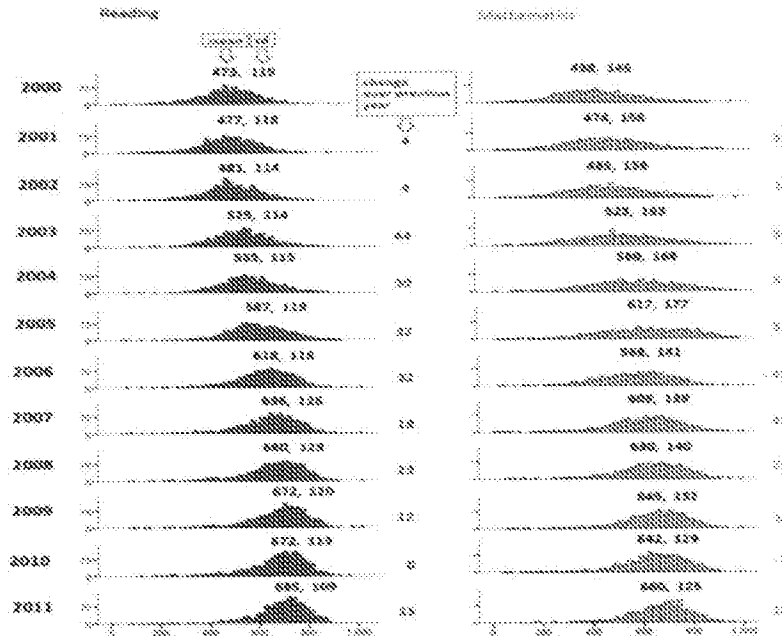
The Districts say averages can hide problems. The Districts and the Panel point out that a large percentage of certain subgroups do not perform as well on assessment tests. "Gap" is the term used to describe the difference in scores on assessment tests between groups of students, usually between non-free or reduced lunch white students and the other groups, *e.g.*, Hispanic or African American. Vol. 41, p. 1396.

But the undisputed fact is that no teacher, school, district, or State – anywhere in the United States or around the world – has found a way to satisfactorily educate *every* student. Achievement gaps have always existed and are a national problem. Vol. 37, p. 2123; Vol. 35, pp. 1524-26. No school district anywhere has been able to fully close

the gaps. *Id.* This fact is not surprising given that the social and family background factors that influence achievement gaps are generally far beyond a school's ability to control. *Id.*

However, Kansas has been addressing these gaps. For example, in 2006, every major subgroup was below 65 percent proficient in math; by 2011, every major subgroup was above 65 percent and had an average increase of 15 percentage points from 2006. Vol. 69, pp. 2734-36; Vol. 33, p. 1126; Vol. 37, p. 2123. In 2006, every major subgroup was below 70 percent proficient in reading; by 2011, every major subgroup was above 70 percent and had increased at least 10 percentage points from 2006. *Id.* The Kansas Report Card for 2011-12 shows that by 2012 the proficient percentages of every major subgroup remained above 65 percent in math and 70 percent in reading. Vol. 25, pp. 3215-16; *see also* Vol. 33, pp. 1127-28; Vol. 69, pp. 2734, 2737-38 (showing that in 2012, KASB ranked Kansas public education in the top 10 of all states in the all-student and free-and-reduced-lunch categories for reading and math based on National Assessment of Educational Progress ("NAEP") scores).

When analyzed against the API, presently used under the Waiver, two important conclusions emerge: (1) Kansas test scores within every performance category have *increased* since 2000; and (2) the gap between the lowest performing students and highest performing students *has narrowed*. The API graphs, Vol.126, p .15615 (below), show Kansas math and reading assessment test score distributions starting in 2000 through 2011. *Id.* Rightward movement demonstrates improvement on test scores across all categories. *Id.* The clustering proves the gap between students who score the lowest on the tests and students who score the highest is narrowing. *Id.*



**7. The Education Provided To Kansas Students Compares Favorably To The Education Offered In Other States**

Recently, the Kansas Association of School Boards (“KASB”) ranked Kansas Number 5 in the country based on an overall average ranking on fourteen national indicators. See “Kansas Progress Report and Fact Sheet, September 2015 Brochure,” <https://kasbresearch.wordpress.com/publications/>. And the KSDE reported that Kansas high school students scored better this year than their peers across the country on the ACT college entrance exam. “More Kansas Students Meeting ACT College Readiness Benchmarks,” <http://www.ksde.org/Home/QuickLinks/NewsRoom/tabid/586/aid/127/Default.aspx>. The report added that a higher percentage of Kansas students appear ready for college courses than the national average. *Id.*

The NAEP statistics tell a similar story of relative success. NAEP administers nationwide assessments that aim to gauge students’ progress over time. Vol. 41, pp.

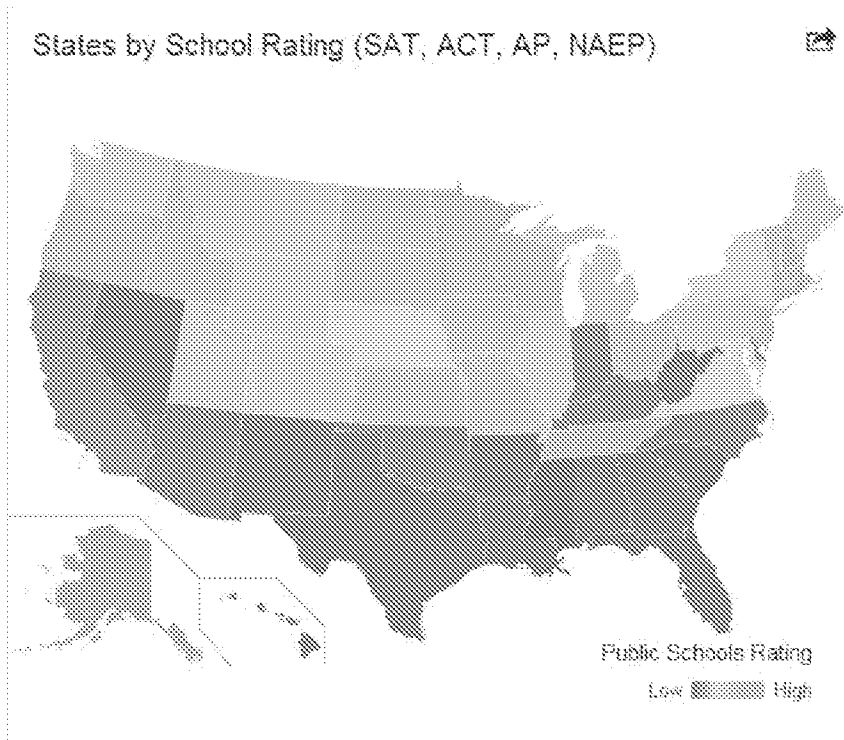
2673-74. It is often called the Nation's Report Card. *Id.* Because each state uses different assessment tests, scores on the NAEP tests are the only way to judge how Kansas schools are performing compared to other states. Vol. 38, pp. 2214-15.

For the years 2003, 2005, 2007, 2009, 2011 and 2013, Kansas test scores on the NAEP were higher than the national average, and the scores generally have improved over those years. Vol. 25, p. 3216. The 2013 NAEP results demonstrate that Kansas students continue to perform well in comparison to other states:

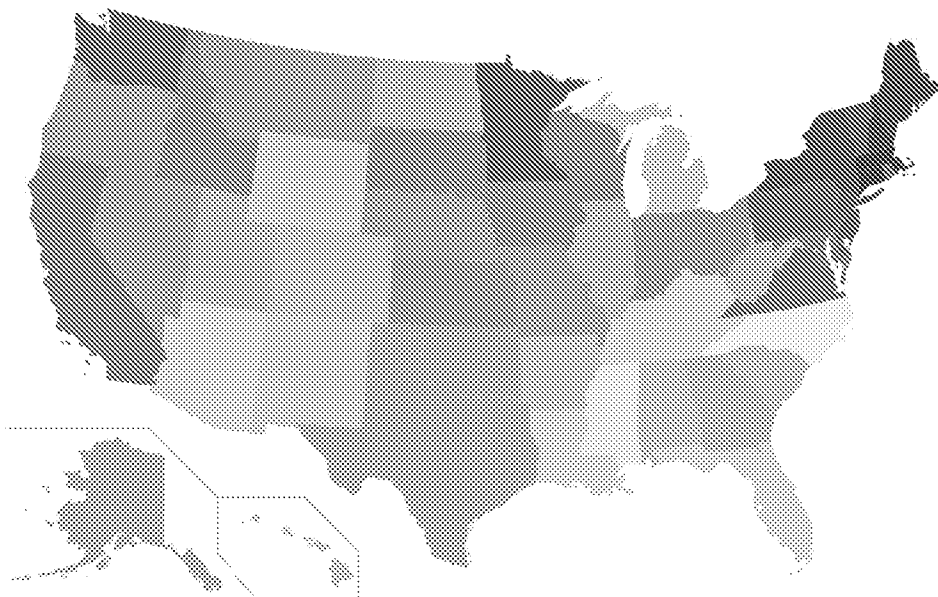
- Only 4 states scored better on the 2013 NAEP 4th grade math test for all students.
- Only 5 states scored better on the 2013 NAEP 8th grade math test for all students.
- Only 9 states scored better on the 2013 NAEP 4th grade reading test for all students.
- Only 15 states scored better on the 2013 NAEP 8th grade reading test for all students.

Vol. 25, p. 3217.

The Figure below is reprinted from the KASB's website, [http://tallmankasb.blogspot.com/2014\\_05\\_01\\_archive.html](http://tallmankasb.blogspot.com/2014_05_01_archive.html). It displays a state-by-state comparison on the basis of student performance on various 2012 standardized tests. Kansas is among the highest ranked states and ranks equal to Missouri and above Nebraska, Colorado and Oklahoma, its surrounding sister states.

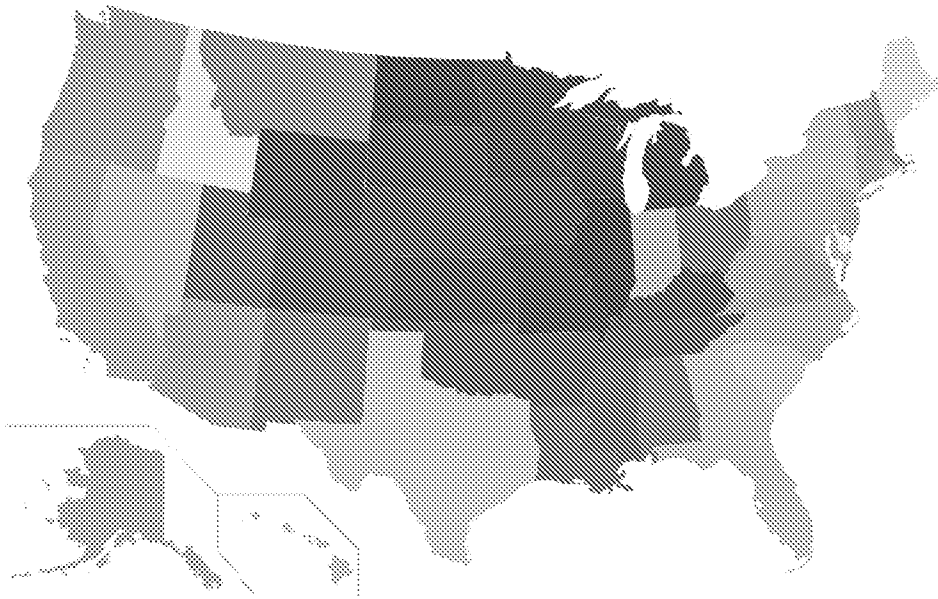


National ranking on standardized tests are depicted in the following figures from <http://public-schools.findthebest.com>. The darker the blue, the higher the state average score.

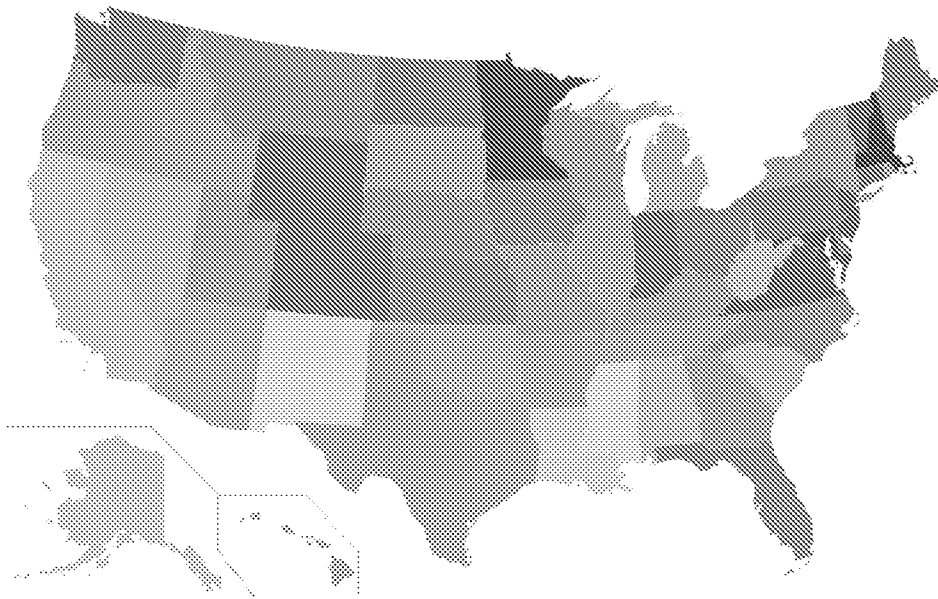


ACT Average Scores

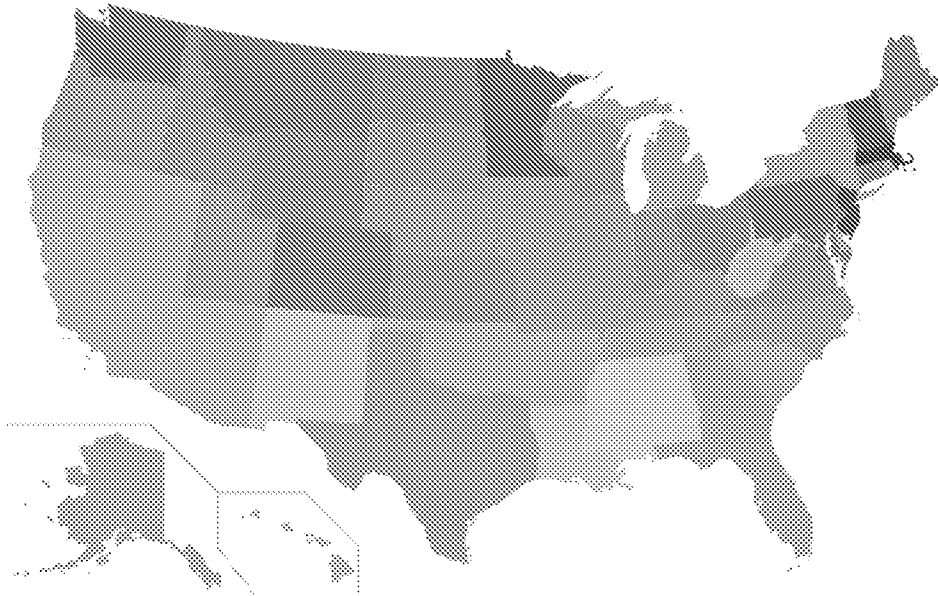




SAT Average Scores



4<sup>th</sup> Grade NAEP Assessments



8<sup>th</sup> Grade NAEP Assessments

Vol. 25, pp. 3218-20. These figures were also provided to the Panel in the State’s Proposed Findings of Fact.

**8. Statewide, Kansas Graduation Rates Have Improved, Both For All Students And In The Major Subgroups**

Kansas started measuring graduation rates on 4-year and 5-year cohorts in the 2010-11 school year. The KSDE explains:

When reviewing graduation rates, the current four-year rate should be compared to the previous four-year rate and the current five-year rate should be compared to the previous five-year rate. It is not appropriate to compare the current four-year rate to the current five-year rate. This is because the current four- and five-year rates both ended in 2014, with the four-year rate starting four years earlier and the five-year rate starting five years earlier.

Appx. 10; *see also* Vol. 22, p. 3211.

The following tables show graduation rates, for all students and major subgroups, have steadily improved at present funding levels.

All Students

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
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2010-11	80.7	63.1	80.6	82.7	59.7
2011-12	83	66.2	82.4	82	62.9
2012-13	84.9	74.1	83.2	84.2	66.8
2013-14	85.5	N/A in this format	N/A in this format	N/A in this format	N/A in this format

Free and Reduced Lunch Students

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	70.1	61.6	72.9	80.1	59.4
2011-12	72.2	70.1	74.3	78.8	62.2
2012-13	76	69.2	76.9	82.6	65.9
2013-14	77.2	N/A in this format	N/A in this format	N/A in this format	N/A in this format

Hispanic

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	70.3	59.3	82	78.4	55.1
2011-12	72.9	70.3	81.4	76.2	58.3
2012-13	76.4	70.2	83.8	83.6	63.2
2013-14	78.8	N/A in this format	N/A in this format	N/A in this format	N/A in this format

African American

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	66.2	59.9	73.1	80	65.8
2011-12	69	66.2	76.2	75	69.6
2012-13	75.9	73.2	77.8	85.7	71.9
2013-14	77	N/A in this format	N/A in this format	N/A in this format	N/A in this format

White

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	84.5	65.5	80.8	86.8	51.3
2011-12	85.5	84.5	82	89.3	52.4
2012-13	87.7	74.8	82.6	84	57.3
2013-14	88.4	N/A in this format	N/A in this format	N/A in this format	N/A in this format

**Percentage Graduation Rate on 5-Year Cohort**

All Students

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	75.2	60.2	68.7	77.7	48.3
2011-12	82.1	66.7	80.7	82.8	61.9
2012-13	84.4	69.3	83.2	81.4	66.2
2013-14	86.7	N/A in this format	N/A in this format	N/A in this format	N/A in this format

Free and Reduced Lunch Students

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	63.3	59.2	60.5	72.6	50.2
2011-12	72.2	65.5	73	80.8	62
2012-13	75.3	66.4	75.1	78.3	65.6
2013-14	78.2	N/A in this format	N/A in this format	N/A in this format	N/A in this format

Hispanic

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	62.1	52.6	64.3	77.7	46.9
2011-12	72.9	64.3	82	78.9	58
2012-13	75.2	62.1	83.3	76.2	61.3
2013-14	80.9	N/A in this format	N/A in this format	N/A in this format	N/A in this format

African American

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	50	58.1	70.8	60.5	53.4
2011-12	69	61.4	73.1	80	67.5
2012-13	74.6	70.5	80	83.3	72.6
2013-14	78.5	N/A in this format	N/A in this format	N/A in this format	N/A in this format

White

Year	State	Wichita	Hutchinson	Dodge City	Kansas City
2010-11	81.1	64.2	75.7	85.7	43.9
2011-12	85.5	68.3	80.9	86.4	53.2
2012-13	87.3	71.1	82.3	86.9	56.9
2013-14	88.8	N/A in this format	N/A in this format	N/A in this format	N/A in this format

State Proposed Findings, Ex. 1521 at 1, 1523 at 1, 1524 at 1; Appx. 10. Source: Kansas Department of Education, <http://cpfs.ksde.org/cpfs/> (accessed April 7, 2015).

**9. More Kansas Students Are Prepared For College Than In The Past**

Kansas schools are preparing more students for college than in the past. Vol. 41, p. 1147; Vol. 69, pp. 2734, 2739-40. Kansas scores for college-bound students *rank in the top 10 of all states* and have improved over the past 15 years. *Id.* While ACT Benchmarks are different than the Kansas standards currently in place and thus are not designed for comparison with the Kansas standards, Kansas has a higher percentage of students who meet the ACT College Readiness Benchmarks (“Benchmarks”) than the national average. Vol. 75, p. 3289.

**10. Any Change in Funding From the Great Recession Did Not Affect the Classroom**

In 2009-10, local districts made decisions about services and staffing based on budgets prepared on or before August 2009. When a district’s revenue was reduced because of allotments, the district reduced their planned spending, *i.e.*, made “cuts.” This kind of “cut” is very different from the term’s political meaning, which is used to refer either to (a) reductions from the previous year’s funding levels or (b) a variance between revenue received and the revenue districts would have received had the BSAPP remained at \$4,492, with capital outlay and LOB aid fully funded the BSAPP remained at \$4,492, with capital outlay and LOB aid fully funded. *E.g.*, Vol. 90, p. 5486 (comparing actual funding for General State Aid and Supplemental State Aid with the funding if the BSAPP had been \$4,492 and aid had been fully funded after FY10).

The only testimony at trial was that districts attempted to keep any “cuts” they made out of the classroom. *See, e.g.*, Vol. 40, p. 2526-27; Vol. 42, p. 3151; Vol. 42, p. 2997. As a result most evidence of the “cuts” described in the evidence relates to programs and staffing in 2009-10. No state-wide evidence was presented that school

districts generally were required to make additional cuts to personnel or programs after FY11.

None of the evidence presented at trial applies to school programs and staffing after 2012. No statewide evidence has been provided of actual cuts in FY12, FY13 or FY14, or of cuts planned for FY15. For example, the data proves more teachers have been employed by the Districts since FY09 and student teacher ratios have only modestly increased.

	Total Certified Employees 2008-09	Total Certified Employees 2014-15	Increase	Total PK-12 and Spec. Ed Teachers 2008-09	Total PK-12 and Spec. Ed Teachers 2014-15	Increase
Wichita	4,229.8	4,388.7	158.9	3,477.4	3,649.5	172.1
Hutchinson	443.6	440.8	-2.8	349.7	352.3	2.6
Dodge City	413.9	473.5	59.6	338.9	389	50.1
Kansas City	1,796.9	2,074.0	277.1	1,490.7	1,732	241.3

Appx. 11. *See also*, State’s Proposed Findings of Fact, Exhibit 1525.

Furthermore, there have been only modest changes in pupil-teacher ratios since the “cuts” to the BSAPP. There is no evidence that the *Rose* goals cannot be satisfied by the where there have been modest increases in these ratios.

Pupil Teacher Ratios	FY09	FY13	FY15
State	14.4	15.1	15
Wichita	15.5	15.6	15.4
Hutchinson	15.1	16.2	16.2
Dodge City	16.5	15.8	16.8
Kansas City	15	16.7	14.6

Appx. 11; State’s Proposed Findings, Ex. 1525 at 2, 3, 5, 6 (2013-14) and 2, 5, 6 (2008-08).

**11. Many Districts Have Unspent Reserves That Should Be Considered Part of Their Overall Funding**

The unspent cash carried by local districts in reserve – from the cash balances for unplanned contingencies to unencumbered cash balances – has been increasing each fiscal year for nearly each District. Vol. 45, pp. 138-39. Statewide cash balances increased from \$1.16 billion in 2006 to \$1.71 billion in 2011, and then to \$1.746 billion in 2015. Vol. 126, pp. 15338-39; Appx. 12. *See* Vol. 143, pp.1980-2083 (cash balances data through July 2014). By the end of FY15, districts held in excess of \$525 million in unspent, unencumbered cash which could, at local districts’ discretion, have been used to increase spending on providing all students the education required by the *Rose* standards. Appx. 12, pp. 13-14, columns 6, 8, 10-16, 18, 19, 22, 26, 29, 33, 34, 42, 44, 45, 47, 53 and 55.

**ARGUMENT**

As this litigation continues and the facts, circumstances and underlying law change, the Court should reconsider whether the Kansas Article 6 “adequacy” determination presents an ongoing legal question resolvable by the Judiciary. The proceedings below following this Court’s remand and the briefs filed in this Court amply demonstrate the policy-laden nature of any determination whether the Kansas school finance system makes suitable provision for financing education. Setting educational and fiscal policy for Kansas is the constitutional responsibility of the Legislature, not the courts. Absent a determination that “adequacy” presents a nonjusticiable question, this Court risks being indefinitely and intimately involved in the Kansas school funding

system in ways that ensure conflict between the branches and do not promote the long-term interests of any branch.

Even if this matter were justiciable, the Legislature's determination that it has made "suitable" provision for the finance of Kansas schools is entitled to substantial – indeed, virtually conclusive – deference. The Panel refused to grant that deference and instead summarily concluded that the State's funding of schools was constitutionally inadequate for three reasons: (1) some students are not testing proficient or above on the Kansas Assessment Tests, Vol. 24, pp. 3066-94; (2) the current level of funding is less than the average of two cost studies, Vol. 24, pp. 3094-3132; and (3) the Districts' administrators and teachers, with agreement of KSBOE and a former legislative commission, believe more K-12 funding is required, Vol. 24, pp. 3132-39. This three-legged stool, however, provides no support for the Panel's legal conclusion that the public education financing system provided by the Legislature for grades K-12 – through structure and implementation – is not reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*. Instead, each leg is built from: (1) the Panel's improper insistence on substituting its own policy judgments for those of the Legislature and (2) its flawed legal conclusions.

The Panel also erred in refusing to consider new evidence beyond the limited information that it judicially noticed *sua sponte*. Vol. 24, pp. 3054-55. Essentially, the Panel restated and relied upon the purported findings of fact it had made in its original decision in 2013. Moreover, the Panel conducted its own policy analysis of supposed actual cost studies which had been performed years ago. The Panel's December 2014 Opinion does not separately set out "findings of fact" as directed by K.S.A. 2014 Supp.



60-252(a) and as expressly ordered by this Court in *Gannon*. The Panel refused to adopt or reject proposed findings of fact based on uncontroverted testimony where facts, even though true, were inconveniently unsupportive of the Panel’s legal conclusions. *See* Vol. 25, pp. 3186-232.

The actual current evidence in fact demonstrates that Kansas schools are doing quite well. Kansas school funding is at record high levels, the test scores of Kansas students are above average, and the State is closing achievement gaps. Given this evidence, the Legislature could rationally conclude that the current levels of school funding are reasonably calculated to not only meet—but to exceed—the *Rose* standards.

**I. Deciding Whether The Legislature Has Made Suitable Provision For The Financing Of The State’s Educational Interests Under Article 6 Is A Nonjusticiable Political Question**

The adequacy component of this case is nonjusticiable under the political question doctrine because there are no “judicially discoverable and manageable standards for resolving” the adequacy of school funding. In other words, this Court cannot make such an assessment without engaging in “policy determination[s] of a kind clearly for nonjudicial discretion.” *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *VanSickle v. Shanahan*, 212 Kan. 426, 438, 511 P.2d 223 (1973) (adopting the *Baker v. Carr* factors); *see also, State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896-97, 179 P.2d 366 (2008). The political question doctrine – rooted in the separation of powers – is part of the Kansas case-or-controversy requirement. *Morrison*, 285 Kan. at 896-97.

The *only* possible standard in the text of Article 6 is the word “suitable.” Kan. Const. art. VI, § 6(b) (“The legislature shall make suitable provision for finance of the educational interests of the state.”). In *Gannon*, this Court indicated that “suitable” means

“fitting, proper, appropriate, or satisfactory.” 298 Kan. at 1150. But those terms are not *legal* standards; whether a particular level of funding is “fitting, proper, appropriate, or satisfactory” depends entirely on one’s policy views, opinions, biases, and perspective.

This Court in *Gannon* attempted to address the lack of judicially manageable standards by embracing the so-called “*Rose* standards” the Kentucky Supreme Court articulated in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (1989):

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

*Gannon*, 298 Kan. at 1164 (quoting *Rose*, 790 S.W.2d at 212).

The fundamental and inescapable problem with that approach, however, is that the “*Rose* standards” are not judicially manageable. Instead, they are extremely nebulous and vague. Any *one* of the *Rose* standards could mean many different things to many different people. There is simply no principled legal way to determine what the *Rose* standards mean, much less what level of funding is reasonably calculated to meet them. The ultimate answer necessarily turns *entirely* on “policy determination[s] of a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 217.

The New Hampshire Supreme Court properly recognized that courts are not able to engage in traditional or principled judicial review of the *Rose* standards. In *Londonderry School District SAU No. 12 v. State*, 154 N.H. 153, 907 A.2d 988 (2006), the state legislature had adopted standards very similar to the *Rose* standards. *See id.* at 157 (quoting N.H. Rev. Stat. Ann. § 193-E:2); *id.* at 161 (noting that N.H. Rev. Stat. Ann. § 193-E:2 “largely mirrors” the *Rose* standards). When school funding under those standards was challenged in litigation, the New Hampshire Supreme Court held it could not engage in judicial review of those [the *Rose*] standards, because “there is no way a citizen or a school district in this State can determine the distinct substantive content of a constitutionally adequate education. Consequently, its cost cannot be isolated. Such a system is also impervious to meaningful judicial review.” *Id.* at 160. To the contrary, “[d]etermining the substantive educational program that delivers a constitutionally adequate education is a task replete with policy decisions, best suited for the legislative or executive branches, not the judicial branch.” *Id.*

To be clear, the State does not dispute that the Legislature has a constitutional duty to “make suitable provision for finance of the educational interests of the state.” *See Gannon*, 298 Kan. at 1141-48. But the whole premise of the separation of powers and political question doctrines is that there are some constitutional duties beyond the capacity or role of the courts to enforce. What is “suitable” is necessarily in the eye of the beholder and varies with the context presented and various assumptions that must be made. Thus, the conclusion is inescapable that determining whether a particular level of funding is constitutionally “adequate” (a term Article 6 never uses) is a policy question outside the “judicial power” the Kansas Constitution vests in this Court.

This does not mean the duty to make suitable provision to finance the educational interests of the State is meaningless. Members of the Legislature and the Governor, just like the Justices of this Court, take an oath to support the Kansas Constitution. Kan. Const. art. 15, § 14; K.S.A. 54-106.

Furthermore, “the People” also have at least two important and practical mechanisms – elections and constitutional amendments – to ensure that the political branches are performing their constitutional duty under Article 6. Indeed, the funding of public schools has been at issue in almost every recent contested election for Governor and for the Legislature, and “the People” have, with full knowledge of this debate and dispute, continued to return legislators and governors who have adopted the funding laws now being challenged. For the Court to grant itself authority to second-guess the policy judgments of elected officials is, in effect, to grant itself authority to second-guess the “the People’s” judgment, *i.e.*, judgments the People make every two years under Kansas law.

In addition, if “the People” are truly dissatisfied with the current state of affairs with respect to school finance, they have a ready mechanism to change the rules in a fundamental way: by amending the Kansas Constitution. It was such an amendment that provided the current standard under Article 6 nearly 50 years ago. Nothing precludes the People from at any time deciding either to define “suitable” as currently used in the Constitution, or to replace it with another standard altogether.

## **II. The Legislature Is Entitled To Substantial Deference. Applying That Standard Here, The Legislature Has Provided “Suitable” Funding.**

Even if this case is justiciable, this Court must accord substantial deference to the Legislature’s determination that existing school funding is suitable and is reasonably calculated to meet the requirements of Article 6. Courts always accord deference to laws passed by the Legislature. As this Court explained in *Barrett v. U.S.D. No. 259*, 272 Kan. 250, 255, 32 P.3d 1156 (2001) (citation omitted):

The burden of one asserting the unconstitutionality of a particular statute is a weighty one. This is as it should be for the enacted statute is adopted through the legislative process ultimately expressing the will of the electorate in a democratic society. Thus, when approaching the review of a claim of unconstitutionality, certain basic principles of review are observed. First, the constitutionality of a statute is presumed and all doubts must be resolved in favor of its validity. Before a statute may be stricken down the statute must clearly violate the constitution. This court’s duty is to uphold the statute under attack rather than defeat it, if there is any reasonable way to construe the statute as constitutionally valid, that should be done. Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt.

*Accord Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 236, 885 P.2d 1170 (1994)

(“When a statute is attacked as unconstitutional a presumption of constitutionality exists and the statute must be allowed to stand unless it is shown to violate a clear constitutional inhibition.”); *State v. Cook*, 286 Kan. 766, 768, 187 P.3d 1283 (2008) (“We presume that legislative enactments are constitutional and resolve all doubts in favor of a statute’s validity. We will not declare a statute unconstitutional as applied unless it is clear beyond a reasonable doubt that the statute infringes on constitutionally protected rights.” (citations omitted)).

In *Blue v. McBride*, 252 Kan. 894, 915, 850 P.2d 852 (1993), the Court acknowledged: “Our function is not that of a super-legislature which weighs the wisdom

of the legislation.” Instead, “the propriety, wisdom, necessity and expedience of legislation are exclusively matters for legislative determination and courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute in the public interest of the state, since, necessarily, what the views of members of the court may be upon the subject is wholly immaterial and it is not the province nor the right of courts to determine the wisdom of legislation touching the public interest as that is a legislative function with which courts cannot interfere.” *State ex rel. Tomasic v. Unified Gov’t of Wyandotte Cnty./Kansas City, Kan.*, 264 Kan. 293, 300-01, 955 P.2d 1136 (1998).

Likewise, under rational basis review, courts are required to defer to actual or even conceivable conclusions of the Legislature. In *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 273 P.3d 709 (2012), which *Gannon* cited with approval, the trial court held that a cut-off date grandfathering continued smoking at businesses was “arbitrary and therefore could have no rational basis.” Reversing, the Supreme Court wrote:

Downtown Bar contends the State has produced no evidence that the 2010 legislature actually chose the January 1, 2009, date to prevent drinking establishments from circumventing the ban. But no such evidence is necessary. “[A] legislative choice is not subject to courtroom factfinding and may be based on *rational speculation* unsupported by evidence or empirical data.” And instead of a State obligation to provide evidence, it was Downtown Bar’s obligation to negate every conceivable basis for the cut-off date of January 1, 2009.

294 Kan. at 198 (citations omitted); *see also, Cardarella v. Overland Park*, 228 Kan. 698, 701-02, 620 P.2d 1122 (1980) (“[T]he law does not require scientific studies to support a legislative decision.”); *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 404, 412, 141 P.2d 655 (1943) (it is “immaterial” what the court finds on the quality of milk with additives “if the legislature ha[d] some basis for believing the product is inferior to whole

milk or evaporated whole milk and that the sale of the product offers an opportunity for fraud and deception and that prohibition rather than mere regulation of its sale is necessary for the adequate protection of the public health or general welfare”); *Meehan v. Kansas Dep’t of Revenue*, 25 Kan. App. 2d 183, 189, 959 P.2d 940 (1998) (“Where scientific opinions conflict on a particular point, the legislature is free to adopt the opinion it chooses, and a court will not substitute its judgment on this issue.”). In *State v. Consumers Warehouse Market, Inc.*, 183 Kan. 502, 329 P.2d 638 (1958), this Court acknowledged that the “judgment of the legislature cannot be superseded by that of the court if questions relating thereto are *reasonably debatable*.” 183 Kan. at 509 (emphasis added); *accord Sage Stores*, 157 Kan. at 413 (“[T]he legislature is entitled to its own judgment, and *its judgment cannot be superseded by the views of the court*” (emphasis added)).

In the school finance context in particular, this Court should grant *substantial* (if not virtually conclusive) deference – beyond the normal deference due legislative decisions – to the Legislature’s well-informed determination that a particular level of funding is adequate. This deference is justified given the vagueness of the constitutional provision requiring “suitable” provision for school finance as well as the fact that whether a particular level of funding is “adequate” is first and foremost a matter of policy.

As the Texas Supreme Court recognized in *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W. 3d 746 (Tex. 2005), the constitutional standards governing school funding “import a wide spectrum of considerations and are admittedly imprecise.” *Id.* at 778. After discussing extremes, the Court observed that “in between, there’s much

else on which reasonable minds should come together, and much over which they may differ.” *Id.* Accordingly, the Court held that as long as the legislature did not act arbitrarily, the Texas Constitution’s education clause had been satisfied. In *Gannon*, this Court quoted and cited *Neeley* twenty-eight times, *Gannon*, 298 Kan. at 1139-40, 1143, 1145, 1147-50, 1152, 1154-57, 1159, 1168, strongly indicating agreement with the approach the *Neeley* Court took with respect to the constitutional issues at issue here. This Court should look favorably on *Neeley*’s deference to legislative judgments as well.

Other jurisdictions also have applied a form of rational basis review to school finance decisions. *See, e.g., Lobato v. People*, 218 P.3d 358, 364-65 (Colo. 2009); *Danson v. Casey*, 33 Pa. Comm. 614, 631-32, 382 A.2d 1238 (1978) (using a fair and substantial relationship test to review Pennsylvania’s school finance system against the constitutional obligation to “provide for a thorough and efficient system of public education to serve the needs of the Commonwealth”). This Court should follow suit. Perhaps in theory “[t]here is a point where the legislature’s funding of education may be so low that . . . it would be impossible to find that the legislature has made ‘suitable provision for finance of the educational interests of the state,’” *Montoy v. State*, 275 Kan. 145, 155, 62 P.3d 228 (2003) (*Montoy I*), for instance, if the public education system was “limited to teaching first-grade reading.” *Gannon*, 298 Kan. at 1151 (quoting *Neeley*, 176 S.W.3d at 778). But so long as the Legislature could reasonably conclude that it has made suitable provision for school finance, neither the Panel nor this Court should second-guess that determination and impose its own policy preferences.

In the March 7, 2014, *Gannon* ruling, this Court stated that to be constitutionally permissible a school finance system must be “reasonably calculated” to meet or exceed



the *Rose* standards. As the Court stated: “We hold its adequacy component is met when 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* and presently codified in K.S.A.2013 Supp. 72-1127.” *Gannon*, 298 Kan. at 1170. Moreover, the Court said: “[O]ur Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty; but when the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances.” *Id.* at 1151.

So the question before the Court in this appeal is whether the actions taken by the Legislature and the Governor after *Gannon* are among the “myriad of choices” available that are “reasonably calculated” to obtain compliance with the *Rose* standards. Here, the actions by the Legislature and the Governor were not only rational, but were reasonably calculated to meet or exceed the *Rose* standards. Indeed, the Legislature took its directions from this Court, as described above.

In prompt response to this Court’s decision in *Gannon*, the Legislature enacted and the Governor signed HB 2506, which appropriated an additional \$134,465,786 in school funding. Further, in prompt response to the Panel’s December 2014 Order, the Governor in his January 2015 State of the State Address called on the Legislature to: (a) enact broad state economic policy that could “fix a government budget” – obviously, a prerequisite to providing added funding for public schools – and (b) take the “necessary” step of repealing the existing finance formula, enacting temporary block grants, and engaging in a thoughtful process of creating a new school funding system that would be

“about improving student achievement and school accountability, not bureaucratic games.” 2015 State of the State Address.

The Legislature promptly responded by enacting SB 7, a measure consistently described by its proponents as appropriate to allow for transition from the old school finance formula to a new one. A majority of legislators reached the decision to vote in favor of SB 7 after hearing extensive testimony for and against it, and extensive debate for and against it, and ultimately concluding that the arguments in favor were more persuasive than the arguments against. The Court should defer to the Legislature because its choice, from among a myriad of choices, was to enact the SB 7 block grant, an approach that was “reasonably calculated” to obtain compliance with the *Rose* standards. Truncating that choice – particularly, as here, upon an undeveloped record – would improperly interfere with the reasonably calculated attempt to comply with this Court’s directive.

### **III. The Panel’s Rationales For Finding A Constitutional Violation Are Flawed**

In concluding that the State had failed to provide suitable funding for public education, the Panel misstated the standard and relied on three erroneous lines of reasoning. First, the Panel noted that some students have not scored “proficient” on the State’s assessment tests. Second, the Panel found that the amount of funding falls below the amount recommended by certain cost studies. Finally, the Panel relied on the subjective opinions of educators who testified that school funding is not adequate in their view. None of these lines of reasoning support the Panel’s conclusion that the adequacy component of Article 6 has not been satisfied.

**A. The Panel’s Finding That *Some* Students Have Not Scored “Proficient” On State Assessment Tests Does Not Support Its Legal Conclusion That Present Funding Is Unconstitutional**

The first basis for the Panel’s conclusion that the State has failed to provide adequate funding was the fact that some students score less than proficient on state assessment tests. *See* December Order at 31-37. There are at least three flaws with this reasoning.

*First*, there is no basis to suppose that Kansas standardized tests are intended to measure only the basic education identified by the *Rose* standards. The standardized tests measure mastery of what Kansas educators want students to know during different periods of their schooling. The tests try to measure, for example, whether a 4<sup>th</sup> grader’s reading and math skills have developed to what Kansas educators have targeted the student should know by the 4<sup>th</sup> grade. These targets may very well exceed the *Rose* standards.

The State cannot be found to have inadequately funded schools if students have failed to pass tests that measure knowledge above and beyond what the *Rose* standards contemplate. Kansas should be encouraged to offer a public education that exceeds the minimum requirements of the *Rose* standards. Equating the education required by the *Rose* standards with the curriculum and educational goals that the State has in place could act to discourage Kansas public education, for fiscal reasons, from providing an opportunity for a challenging and better education than the basic education Article 6 requires.

*Second*, the *Rose* standards do not express a guaranty or promise of student performance. In fact, guaranties and promises are antithetical to the Court’s directive that

the standard is whether the structure and implementation of school finance is “reasonably calculated” to achieve the *Rose* standards.

In both *Gannon* and *Rose*, the “*Rose* standards” are expressly described as “goals.” *Gannon*, 298 Kan. at 1170 (*Rose* described the “seven characteristics [that] should be considered as minimum *goals* in providing an adequate education” (emphasis added)); *Rose*, 790 S.W.2d at 212 (“We concur with the trial court that an efficient system of education must have as its *goals* to provide each and every child with at least the seven following capacities: . . . .” (emphasis added)). Indeed, the word “goal(s)” appears more than 20 times throughout the *Gannon* opinion. Likewise, K.S.A. 2014 Supp. 72-1127, as amended by Senate Substitute for House Bill No. 2506 (HB 2506) § 32(c), lists the *Rose* standards as “goals”: “Subjects and areas of instruction shall be designed by the state board of education to achieve the following *goals* established by the legislature of providing each and every child with at least the following capacities: . . . .” (Emphasis added.)

Article 6 mandates the “opportunity for a sound basic education.” *Montoy v. State*, 279 Kan. 817, 845, 112 P.3d 923 (2005) (quoting *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 616, 599 S.E.2d 365 (2004)); accord *Montoy v. State*, 282 Kan. 9, 22, 138 P.3d 755 (2006) (“What is required is an equitable and fair distribution of the funding to provide an opportunity for every student to obtain a suitable education.”). It does not guarantee that every child will take advantage of or succeed in that opportunity. The impracticality and the irrationality of imposing a constitutional promise of student performance are well-recognized in the case law. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995) (“numerous external factors beyond the control of the [school district] and

the State affect . . . student achievement”); *Paynter v. State of New York*, 100 N.Y.2d 434, 441, 797 N.E.2d 1225, 1229 (2003) (“The causes of academic failure may be manifold, including such factors as the lack of family supports and health care”); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 61 (R.I. 1995) (because of indeterminate relationship between funding and student performance, “[w]e are particularly troubled by a definition of ‘equity’ that requires a sufficient amount of money [to be] allocated to enable all students to achieve ‘learner outcomes’”); cf. *Finstad v. Washburn University*, 252 Kan. 465, 476, 845 P.2d 685 (1993) (quoting the concurring opinion in *Donohue v. Copiague Union Free Sch. Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375, 379 (1979) (“The practical problems raised by a cause of action sounding in educational malpractice are so formidable that I would conclude that such a legal theory should not be cognizable in our courts. . . . Factors such as the student’s attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning.”)).

*Third*, the fact that some students score less than proficient on state assessments is not necessarily attributable to a lack of funding. While the State does not contend spending money on education is unnecessary or makes no difference, the Legislature reasonably could conclude that current public education spending does not adversely impact Kansas students’ opportunity for a quality education. The Panel should not have substituted its judgment for that of the Legislature in this respect.

It cannot be assumed that providing more money is automatically the solution whenever students do not achieve desired academic success. The State does not question that the vast majority of Kansas schools, administrators and teachers do an exceptional

job. Yet, if we have learned anything from the NCLB, it is that after more training and money have been tried (as the approaches have been tried in Kansas), some schools may need to be reorganized, and some administrators and teachers may need to be replaced. That is the NCLB's model of accountability. *See* Vol. 111, pp. 12452-53.

Experts and social science studies disagree about whether and how more spending can increase student performance *en masse*. The Panel acknowledged this. Vol. 14, p. 1871. The assumption that undirected increases in money to Kansas school districts increases academic achievement was disputed by Kansas State University Professor Dr. Florence Neymotin's peer-reviewed and published statistical study, which reviewed Kansas data. Vol. 11, pp. 1442-43, ¶ 366 (citing Vol. 108, pp. 8825-47). She found there is no strong relationship between increased spending and outputs. *Id.* Her study is in lockstep with an earlier study by the Legislative Post Audit, "Performance Audit Report, Analyzing the Relationship Between Funding Levels and the Quality of Education in Kansas School Districts," January 1991, which found lack of correlation. Vol. 11, pp. 1340-41, ¶ 56 (citing Vol. 108, pp. 8904-57). Finally, the authors of the Legislative Post Audit Study of 2005 reviewed the literature regarding the effect of spending on education outputs. Vol. 11, p. 1443, ¶ 368 (citing Vol. 27, pp. 2021-32). They reported to the Legislature that there were mixed opinions on that subject: some said spending was related to improved student performance, others said there was no relationship. Vol. 11, p. 1443, ¶ 368 (citing Vol. 27, pp. 2021-31).

The testimony at trial confirmed all of this. The State called two experts on this topic. Vol. 11, 1439-40, ¶ 361. Both experts reviewed Kansas data. Vol. 11, pp. 1440-41, ¶¶ 362-63. They concluded:

- “[T]here’s no reason to expect better performance simply by adding more money.” Vol. 11, p. 1440, ¶ 362 (citing Vol. 28, p. 2261);
- “These data show there is no systematic or stable positive statistical relationship between spending per student in a district and student achievement. Indeed, it is much more common to find a negative relationship between the two variables. This does not mean that higher spending causes lower student achievement. Rather, it simply indicates that reliable statistical relationship between the two variables does not exist.” Vol. 11, p. 1441, ¶ 363 (citing Vol. 114, p. 14675);
- “Simply put, it is not possible to identify a level of district spending per student that can reliably predict any given level of student achievement.” Vol. 11, p. 1441, ¶ 364 (citing Vol. 114, p. 14675);
- “There are political ways, which is the way we normally do it, but there’s not a scientific way to [estimate needed funds to achieve desired educational outputs].” Vol. 11, p. 1441, ¶ 364 (citing Vol. 28, p. 2266).

According to these experts, what makes assessing the impact of spending issue so difficult, particularly where closing test scores are the focus, is that there are so many variables which can impact student academic achievement, including parents addicted to alcohol, methamphetamine or other drugs, incarcerated parents, erosion of the nuclear family, parents who do not take advantage of the tutoring offered to their children, illness and lack of health insurance. Vol. 11, pp. 1444-45, ¶¶ 373-74 (citing Vol. 32, pp. 3112-13, 3134, 3044-45, 3053; Vol. 22, pp. 954-55).

Notably, the Panel pointed to the Emerson Elementary School in KCK as an example that allegedly proves “money makes a difference.” Vol. 24, pp. 3067-77. But the evidence does not support the Panel’s proposition. First, the Emerson success story happened under the existing public education financing system, which “through [its] structure and implementation” contemplates and permits federal grants to schools. Second, even after the extraordinary influx of money and changes to Emerson, 15% of its students were not testing proficient on the Kansas standardized tests. *Id.*, p. 3077.

The Legislature had the Kansas assessment test score data, but it also considered the reduction of “gaps” between subgroups of students on the NAEP, SAT and ACT assessments, and expert opinions to reasonably conclude that its students were doing quite well and that the amount of funding provided to schools was sufficient to ensure the opportunity of a quality of education for every child in this state. The Panel was required to defer to the Legislature’s policy judgments and its actual and presumed findings of fact, but did not.

**B. The Panel’s Finding That Present Funding Falls Short Of Averaged Cost Studies Does Not Support Its Legal Conclusion That The Level Of Funding Is Unconstitutional**

In concluding the State failed to provide adequate funding, the Panel compared current school funding to the amount of funding recommended by certain cost studies. The Panel erred by treating cost studies as the absolute measure of seeking to achieve the *Rose* standards. Its reasoning can be paraphrased as:

The averaged actual costs studies measure the education required under the *Rose* standards; An average of the studies sets a floor for adequate funding of the education necessary under Article 6; Federal and LOB funds are not considered in whether adequate funding exists, Kansas K-12 funding is less than that floor, particularly when federal and LOB revenue is ignored; and, Therefore, present funding is unconstitutionally inadequate.

Vol. 24, pp. 3094-132. Thus, the Panel failed to utilize the proper standard, which is whether there is substantial competent evidence that Kansas public education financing, through structure and implementation, is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.

There are a number of problems with the Panel’s reliance on cost studies. *First*, such reliance is inconsistent with this Court’s holdings in *Montoy* and *Gannon*. In



*Montoy*, this Court stated, “[t]he legislature is not bound to adopt, as suitable funding, the ‘actual costs’ as determined by the A&M [Augenblick & Myers, “Calculation of the Cost of a Suitable Education in Kansas in 2000-2001 Using Two Different Approaches,” dated May 2002 (“A&M study”)] and LPA [“Elementary and Secondary Education in Kansas: Estimating the Costs of K-12 Education Using Two Approaches,” dated January 2006 (“LPA study”)] studies.” 282 Kan. at 24. In fact, the Legislature expressed its intent *not* to be bound by the study’s recommendations with the passage of K.S.A. 2013 Supp. 46-1226 (L. 2005, ch. 2, § 15 [Special Session]; L. 2008, ch. 112, § 1). K.S.A. 2014 Supp. 46-1226 now provides:

(a) Any cost study analysis, audit or other study commissioned or funded by the legislature and any conclusions or recommendations thereof shall not be binding upon the legislature. The legislature may reject, at any time, any such analysis, audit or study and any conclusions and recommendations thereof.

(b) A cost study analysis, audit or study shall include, but not be limited to, any cost study analysis, audit or study conducted pursuant to K.S.A. 46-1225, prior to its repeal, K.S.A. 2007 Supp. 46-1131, prior to its repeal, and K.S.A. 2014 Supp. 46-1132, and amendments thereto.

The Panel’s adoption of an average BSAPP from the A&M and LPA studies is only a relabeling of the Panel’s earlier finding, which this Court rejected in *Gannon*, that the Legislature had failed to satisfy Article 6 because it did not consider “actual costs.” The relabeled position ignores *Gannon*’s holding that the Panel’s emphasis on “actual costs” led it to accord improper legal weight to empirical evidence about costs,” and that the focus on cost estimates in *Montoy* was only a product of its evaluation of remedy from the record before it “at that time.” *Gannon*, 298 Kan. at 1163. The Court rejected any claim that *Montoy* “meant to suggest that cost estimates are the proper measures of whether the State has provided the education required under Article 6.” *Id.* Thus, while

*Gannon* noted actual costs are a “valid factor to be considered during application of our test for determining constitutional adequacy under Article 6,” *id.* at 1170, the Panel was wrong – again – to use cost studies to set the floor for constitutionally adequate funding. Further, in this context, the Court stated that the proper test – that funding must be “reasonably calculated” to meet the *Rose* goals –

necessarily rejects a legislature’s failure to consider actual costs as the litmus test for adjudging compliance with the mandates of Article 6. For example, even if a legislature had not considered actual costs, a constitutionally adequate education nevertheless could have been provided – albeit perhaps accidentally or for worthy non-cost-based reasons. And actual costs from studies are more akin to estimates than the certainties the panel suggested.

*Id.*

*Second*, there is no evidence that the cost studies were based on the *Rose* factors. Instead, both the A&M and LPA Studies were specifically designed to estimate the amount of money needed for students to meet the then-existing state achievement standards as measured by AYP. Vol. 82, pp. 4122, 4125-26; Vol. 81, pp. 3950, 4072. As noted above, however, state achievement standards may (and hopefully do) exceed the minimum requirements of Article 6. It is wrong to equate the State’s own aspirations for the education of its students with constitutional minimum requirements.

*Third*, the Legislature had ample reason to question the validity of the estimates in the A&M and LPA Studies. Once again, the Panel substituted its judgment for the Legislature’s actual or presumed findings of fact, re-weighing and analyzing evidence about cost studies, disregarding statutory language that cost studies are merely informational rather than binding, and disregarding other sources of funding available to

schools. Use of the cost studies as a floor for adequate funding was “debatable” at best, particularly in light of *Gannon*. The authors of the LPA Study explained:

It's important for the reader to understand that any study involving the estimation of costs for something as complex as K-12 education involves a significant number of decisions and assumptions. Different decisions or assumptions can result in very different cost estimates. For example, in the input-based cost study, the estimated cost of funding enough teachers in all school districts to achieve an average class size of 20 students is significantly more expensive than funding enough teachers to achieve an average class size of 25 students. Our goal was to make decisions and assumptions in both cost studies that were reasonable, credible, and defensible. Because K-12 education funding levels ultimately will depend on the Legislature's policy choices, we designed the input-based cost study to allow different "what if" scenarios. For the outcomes-based cost study, we can adjust certain variables, such as the performance outcome standards, to develop other cost estimates. In either study, we could adjust assumptions about the level of efficiency at which districts are expected to operate. *In other words, it's important to remember that these cost studies are intended to help the Legislature decide appropriate funding levels for K-12 public education. They aren't intended to dictate any specific funding level, and shouldn't be viewed that way.*

Vol. 81, p. 3836 (emphasis supplied).

Moreover, neither the A&M nor the LPA consultant studies attempted to estimate FY15, FY16 or FY17 costs. The A&M Study estimated costs for three to five years, but recommended a new study thereafter. Vol. 35, pp. 1661-62. The LPA Study was only designed to estimate costs for 2006 and 2007. Vol. 37, pp. 2044-45.

All experts testifying at trial criticized both of the methods the A&M Study used to arrive at its cost estimates. None of the experts felt that the A&M Study's first approach to determining costs – the “successful school approach” – which the authors used as a foundation for recommending BSAPP, Vol. 82, p. 4158, had any value. *E.g.*, Vol. 34, pp. 1421-23. The A&M Study acknowledged that the “professional judgment” methodology, the Study's second approach, generates higher cost estimates. Vol. 82,

p. 4128; Vol. 35, p. 1666. Dr. Eric Hanushek explained the professional judgment methodology generates a “wish list.” Vol. 38, p. 2272. Dr. Hanushek testified that teachers and administrators are not able to estimate actual costs to achieve desired outcomes, in part, because social scientific studies have not identified the strategies that can produce the desired outcomes. *Id.*, pp. 2267-81. The Districts’ expert, Dr. Bruce Baker, acknowledged that teachers and administrators are likely to be biased in favor of the strategies they themselves are using in classrooms, even though there often may be superior or equally effective strategies that cost less to implement. Vol. 34, pp. 1417-21.

The LPA Study also reported two approaches to calculate baselines for both total required funding and proper distribution of funding. Vol. 81, pp. 3948, 3997-98. The inputs part of the study produced cost estimates resulting in a range of proposed BSAPPs. *Id.*, 3948. The inputs methodology did not include school finance weighting factors. *Id.* The study’s “output” analysis was based on a debatable premise – that undirected increases in money to school districts will increase academic achievement. Vol. 81, pp. 3997-98, 4072-73. A peer-reviewed and published statistical study, reviewing the same data used by the LPA Study, concluded there was little or no correlation between the amounts Kansas schools spent and their students’ achievement. Vol. 119, pp. 8825-47; *see also*, Vol. 81, 3989-3992 (LPA concluding educational research offers mixed opinions about whether increased spending for educational inputs is related to improved student outputs).

The LPA Study calculated the spending baseline by employing data about how much Kansas schools spent in the 1999-2000 to 2003-04 school years. Vol. 81, pp. 3552, 3997, 4071. The economic efficiency of that spending was not questioned, so the LPA

Study necessarily failed to evaluate whether there are less costly methods to produce achievement on the Kansas assessment tests than those used in the 1999-2000 through 2003-04 school years. Vol. 81, pp. 3998, 4075-76; Vol. 34, pp. 1431-38.

*Fourth*, even if the cost studies are given some credence, the Legislature could reasonably conclude that it fulfilled its duty by providing multiple sources of revenue to local school districts, including authorizing local school districts to levy taxes for education spending. “Kansas school districts have no inherent power of taxation and never have had. They have always been funded through legislation.” *U.S.D. No. 229*, 256 Kan. at 252. The Legislature reasonably could have concluded that increased LOB and sustained federal monies would adequately cover any shortfall between the cost studies’ estimates and revenues provided by the State for the funding of local districts’ general funds.

The Panel’s bright-line for compliance with the adequacy component of Article 6 purposely ignores the multiple sources of revenue available to local districts to fund the “base” or “core” education targeted by the studies. The Panel noted that the A&M and LPA Studies arrived at their estimates of required funding assuming the desired education was funded *exclusively* through State Financial Aid, not counting funds the Districts would receive from the federal government and could raise from LOB. Vol. 34, pp. 3143-44. Using its interpretation of these studies, the Panel determined a \$4,654 BSAPP was required if the weightings included in the State Financial Aid formula were changed and increased into alignment with at least the weighting suggested by the LPA Study’s consultant. The Panel determined at least a \$4,980 BSAPP was required if LOB continued to be used, in part, to satisfy Article 6 of the Kansas Constitution.

If the weighting piece of the Panel’s bright-line tests is set aside, *when only the additional LOB revenue is considered*, FY15 funding provided \$525,637,074 more than is required under the Panel’s test at the BSAPP of \$4,654 and \$293,662,989 more with the BSAPP at \$4,980. These figures are arrived at by comparing state financial aid (“SFA”) calculated by the Panel’s BSAPP to actual FY15 SFA plus LOB. State financial aid under the Panel’s BSAPP would have generated the following:

<b>FY15 Weighted FTE (Special Ed Excluded)</b>	<b>\$4,492 Inflated to 2015 dollars</b>	<b>Calculated SFA (Weighted FTE times BSAPP)</b>
680,902.1	\$4,654	<b>\$3,168,918,373</b>
680,902.1	\$4,980	<b>\$3,390,892,458</b>

FY15’s actual SFA when combined with LOB was \$3,684,555,447. Appx. 7 (State Totals, FTE (Special Ed Excluded) & Legal LOB columns).

Furthermore, if the BSAPP of \$4,433 for 2008-09, approved as in substantial compliance with the Court’s orders in *Montoy*, 282 Kan. at 17, is inflated to 2015 dollars it is \$4,897. Meaning, again, the Legislature could reasonably conclude that it has fulfilled its duty by providing multiple sources of revenue that exceeded the state financial aid calculated with a BSAPP of \$4,897 by at least \$350 million.

It is rational for the Legislature to rely on local school boards – the entities most familiar with how their schools are performing – to decide the necessary level of LOB funding, thereby ensuring a level of local control, which is a predominant feature of public education in Kansas (and virtually all States). Under Article 6, § 5 of the Kansas Constitution, local boards of education, elected by and accountable to local electors, make the decisions on how educational funds will be spent and on many aspects of

primary and secondary public education, subject only to general supervision by the State Board of Education.

That the Legislature must “make suitable provision for finance” does not mean that the State must exclusively provide the funding. In *Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470 (1988), the South Carolina Supreme Court noted that a Legislature is only to choose the means of funding from all available sources to satisfy the constitutional requirement that it “shall provide for” maintenance and support of schools. The phrase “shall provide for” maintenance and support of schools does not equate to “shall pay” for maintenance and support. *Id.*

The Panel’s December and June Orders, however, do not permit the Legislature to consider local districts’ other sources of revenue beyond the State Financial Aid provided under the School District Finance and Quality Performance Act (“SDFQPA”) formula that employs the BSAPP as a key component. This Court expressly rejected this approach in *Gannon*. It made clear that *all* sources of funding are directly relevant in making the Article 6 adequacy determination:

In the panel’s assessment [of adequacy], *funds from all available resources*, including grants and federal assistance, *should be considered*. The legislative history of Article 6 reveals the intent to provide a system of educational finance that is sufficiently flexible to be able to utilize such sources. . . . Moreover, state monies invested in the Kansas Public Employees Retirement System (KPERs) may also be a valid consideration because a stable retirement system is a factor in attracting and retaining quality educators—a key to providing an adequate education.

*Gannon*, 298 Kan. at 1171 (emphasis added). The Panel simply will not acknowledge this.

Fifth, the Panel improperly calculated what it believed was the bright-line required BSAPPs by averaging the numbers from studies that addressed different

weightings than those found in the SDFQPA when the Districts challenged some of those weightings and lost. Thus, law of the case doctrine precluded reliance on studies relying on weightings that were different than those in the SDFQPA.

The Panel's use of the studies' weighted averages becomes significant here in two respects. First, the Panel would impose the bright-line BSAPPs set out in its opinion only if present weightings are adjusted. Thus, compliance with the Panel's orders requires funding that coincides with the Panel's summary and analysis of the cost studies, effectively enshrining the parts of studies (or an average of the studies) as the expression of Article 6's requirements. Second, applying different weightings for each local district than those provided under the SDFQPA necessarily treats districts differently. This explains the Panel's finding that the Districts are disproportionately shorted if the BSAPP is not raised, Vol. 24, pp. 3123-29, and that simply raising the BSAPP "could overpay some school districts statewide" Vol. 24, p. 3152. But had the Panel used the SDFQPA's weighting, there is mathematically no disproportionate or percentage difference from an increase or reduction of the BSAPP.

After *Montoy*, the Legislature adopted the LPA's recommendation for weightings with modifications. *Montoy*, 282 Kan. at 19. The LPA study did not entirely adopt its consultants' conclusions, Vol. 81, p. 3999, so that weighting and calculations for funding in the SDFQPA vary from those used in the studies. Furthermore, the finance formula weighting adopted by the Legislature and in place at the trial in this case were different in some respects from the weighting recommended by the LPA Study. *Montoy*, 282 Kan. at 20. As a result, the BSAPP and averaging of the BSAPP of the cost studies, which the



Panel employed to justify its conclusions, presumed different weighting than those found in the SDFQPA.

Yet the Panel rejected the Districts' challenge that the weightings in the SDFQPA were unconstitutional under Article 6. After noting that, except for the bilingual weighting in LPA consultants' study, the average of the weightings for bilingual students, at-risk students and special education students are lower in the formula than those recommended by both the A&M and the consultant's studies in its initial opinion, Vol. 14, pp. 1948-49, the Panel found the districts had failed to show the weighting violated Article 6. *Id.*, pp. 1949-50. The Districts did not appeal the Panel's ruling, which is now law of the case.

An appeal must be taken from an appealable ruling in order to prevent it from controlling further proceedings. *See, e.g., Estes v. Edgar Zinc Co.*, 97 Kan. 774, Syl. ¶ 2, 156 P. 758 (1916); *A.J. Harwi Hardware Co. v. Klippert*, 73 Kan. 783, 783, 85 P. 784 (1906) (*quoting Headley v. Challiss*, 15 Kan. 602, Syl. (1875)); *see also, Grohusky v. Atlas Assurance Co.*, 194 Kan. 460, 462, 399 P.2d 797 (1965). "Right or wrong – that ruling, from which no appeal was taken, became the law of the case." *Grohusky*, 194 Kan. at 462. The law of the case doctrine "promotes the finality and the efficiency of the judicial process" – two virtues that are particularly important in this ongoing litigation – by eliminating "indefinite relitigation of the same issue." *State v. Collier*, 263 Kan. 629, Syl. ¶ 2, 952 P.2d 1326 (1998).

**C. The "Expert" Testimony At Trial Does Not Support The Panel's Legal Conclusion That Funding Is Unconstitutional.**

At the trial, over a continuing objection, *e.g.*, Vol. 29, pp. 106-08, the Districts' witnesses testified to what they considered a "suitable education." The Panel adopted this

testimony as support for the proffered conclusion that present funding is inadequate. Yet *Gannon* and constitutional law principles foreclosed this approach.

Notably, Article 6 does not use the phrase “suitable education.” The phrase crept into *Montoy* because the Plaintiff Districts there and here, then and now, persistently use it to mislabel the Article 6 mandate and because it had been used in the formulation of the cost studies. In *Gannon*, the Supreme Court explained that a “suitable education” was only relevant in *Montoy* with respect to whether the State had complied with orders after the school finance system had been found unconstitutional. *Gannon*, 298 Kan. at 1162-63.

Use of the phrase “suitable education” improperly conflates the Article 6 mandate that school funding must be reasonably calculated to meet the *Rose* goals with the Districts’ witnesses’ own views of what constitutes a “suitable education.” For example, the Kansas City, Kansas administrator, Dr. Cynthia Lane, opined that “suitable education” was compliance with the federal NCLB. Lane Tr., Vol. 29, pp. 108-09, 121-22, 136. This conclusion has no legal basis and led to her claim that if any single child failed to score proficient on any state assessment test, the State is constitutionally obligated to provide more funding. How could NCLB, a product of recent years, be the measure of what is required by Article 6, which was adopted decades ago?

Moreover, such a standard is both self-serving (schools will *always* get more and more funding under such an approach) and utterly unrealistic, but here is the testimony:

Q. Until we get that goal, as you understand it, and as you said, the State said it exists, funding will never be adequate, and you’ll always be back in court asking for more money, won’t you?

A. What we want to be able to do is access those resources that we know work, and they cost money. It's not unlimited but we need to be able to provide kids intervention, tutoring, extended –

Q. (By Mr. Chalmers) And that is, you indicated in your last answer there is some ending point where enough money is enough, where it's adequate, where it's suitable?

A. I believe what I talked about were the kinds of things that we need to be able to provide children. If we had the resources to provide those, then we can be successful with our kids.

Q. Is there an ending point where enough is enough?

A. I think you're suggesting that what I'm advocating for is unlimited resources, and that misses the point. What I'm advocating for is to implement for children the strategies they need to be successful, and they cost money.

Q. You don't want unlimited resources?

A. What I want is for our kids to be successful.

Q. You can agree that you don't want unlimited resources?

A. I want whatever it takes.

Q. There is a limit where you don't have to go anything more?

A. That limit is based on kids being successful.

Q. And you define that on every kid, no matter their circumstances, no matter what conditions, being able to satisfy the meets standards on the Kansas assessment tests?

A. Perhaps, Mr. Chalmers, it's not as important what I say as what the law is now requiring. Right now, No Child Left Behind says, 100 percent by 2014.

Vol. 29, pp. 325-27.

Similarly, Dr. Shelly Kiblinger admitted that her definition of a school's ability to provide a "suitable education" turned on whether there was a failure by any student to score proficient on the state assessment test or graduate on time. She contended this was

the case regardless of whether the student's lack of success had anything to do with Kansas schools, much less the funding of the schools. She testified:

Q. We got a kid that moves into your high school, transfers in his or her junior year and is woefully behind, you do your best to educate that kid. They don't graduate, at least in the four years, or maybe they didn't even graduate in that five years. Has your district failed to provide to that kid a suitable education?

A. If they came from the State of Kansas, then Kansas has failed them.

Q. . . . Say that they came in from Samoa.

A. Well, we – you know, they won't be able to graduate if – if they aren't college and career – if they're that far behind, you know, then they're going to become a dropout statistic so . . . I said, they'll – you know, they're going to become a dropout statistic. If we haven't – if we haven't gotten them to their full potential by the time they get out of high school, then we – we have failed them.

Vol. 42, pp. 3205-06. Also see superintendent and administrator testimony: Allison (Vol. 40, pp. 2501-03, 2509-10, 2514, 2560), Cunningham (Vol.36, pp. 1857-58, 1863-37, 1909-10), Kiblinger (Vol. 42, pp. 3154-55, 3202-06) and from teachers or principals Davis (Vol. 42, pp. 3043-47), Doyle (Vol.41, p. 2874), Hungria (Vol. 41, p. 2900), Ortiz-Smith (Vol. 36, p. 1753), Ramsour (Vol. 36, p. 1780), Roehm (Vol. 42, pp. 3063-64), Stroh (Vol. 42, pp. 3096-97). Rather, each testified, in various ways, that students did not receive a "suitable education" if they did not score proficient on a state assessment test – apparently at any time, did not graduate within 5-years or were not ready for college. See principal and teacher testimony: Principal Stewart said cuts affected what her high school had wanted to do (Vol. 32, p. 920); Teacher Feist said she had to do things that were less effective for students because of her increased class size (Vol. 36, p. 1700); Teacher Rathbum testified focus on AYP has short-changed kindergarten and first grade students

at her school so that they received less attention because they are not given assessment tests (Vol. 42, pp. 3110-11).

That this interested party testimony, masquerading as “expert” testimony, is not dispositive of the ultimate constitutional adequacy requirement is illustrated by this Court’s reversal and remand in *Gannon* even after the Court acknowledged that the following findings of fact, made by the Panel, were supported by substantial competent evidence:

[T]he panel made several findings of fact that are supported by substantial competent evidence. It found that each of the plaintiff districts had experienced substantial reduction in funds due to the legislative cuts. *Citing test scores for the students and certain schools in the district, as well as graduation rates, each superintendent essentially testified his or her district did not have the resources to provide all of its students with what they described as “a suitable education.”*

*Gannon*, 298 Kan. at 1129-30 (emphasis added). The Court reversed the Panel’s entry of judgment on the adequacy claim and remanded for findings. The Court necessarily rejected the argument that inability to provide a “suitable education,” as defined by the Districts’ witnesses, is the proper Article 6 constitutional standard. Otherwise, the Court could have affirmed the Panel on the basis of the finding set forth above because, as the Districts point out, an appellate court may affirm a lower court judgment that relied on the wrong legal standard if factual findings support judgment under the correct legal standard. *Hall v. Kansas Farm Bureau*, 274 Kan. 263, 273, 50 P.3d 495 (2002). This Court’s reversal in *Gannon* demonstrates the “expert witness” testimony does not address the Article 6 standard for adequacy.

More fundamentally, just as the Panel cannot substitute its judgment for the Legislature’s, the opinions of the self-interested individuals and groups identified as

“experts” by the Panel cannot replace the Legislature’s judgment on actual and presumed facts. Reasonable people may disagree about the optimal level of funding. The fact that some educators believe more funding would be desirable does not demonstrate that the Legislature has violated Article 6.

Finally, if compliance with Article 6 is a matter of which “expert” the court finds most persuasive, there will be no end to school finance litigation. Article 6 was never intended to create annual judicial review of school funding. There is certainly no evidence whatsoever that Kansas voters in the 1960s intended to amend their Constitution to require that schools be funded to whatever level “experts” deem proper.

**D. Article 6 Does Not Require That “Suitable” School Funding Include The Funding Of General Social Services**

Educators have testified that schools have been providing their indigent students (and in some instances the students’ families) with basic social services such as food, clothing, health care and psychological counseling. Vol. 11, pp. 1431-32, ¶¶ 349-50 (citing Vol. 32, pp. 3044-46, 3094-95; Vol. 31, pp. 2847-48, 2882, 2884-85). They have asserted funding is not adequate if schools do not have the financial resources to address the social problems of their students, not because these problems interfere with the opportunity to obtain a quality education, but because they may affect the ultimate success of the students in taking advantage of the education offered. This may be a worthy objective, but Article 6 does not mandate social welfare programs in the guise of providing suitable finance for *education*. Instead, the Legislature has discretion to determine whether and how to provide social support services to Kansans; it is not constitutionally compelled to provide and fund such programs through the public schools.

Policy judgments regarding the proper response to social problems are not the

province of the Judiciary. The Legislature is politically accountable to the citizens of Kansas and fully understands that its appropriation and taxing decisions impact all Kansans. The debate as to how to best provide social services to those in need is a quintessential policy debate that should be left to the Legislature.

The Panel's analysis accounts for none of this. The Panel erred by refusing to give deference to Legislative findings, by not even recognizing the application of a presumption of constitutionality, by not evaluating whether the Legislature's decisions were arbitrary, and by narrowing its focus to false funding floors, outdated studies, and self-interested opinions based upon a misunderstanding of what Article 6 requires.

**IV. The Panel Erred By Refusing To Accept Current Evidence, And Instead Considering Only Dated Information And Select Documents The Panel Judicially Noticed**

On remand, the Districts elected not to present any additional evidence on whether the current public education financing system “is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.” The Districts argued no new evidence was proper and “elected to proceed on the existing record.” Vol. 128, p. 12. The State opposed this course, arguing that the Panel needed to consider the most recent information, but the Panel sided with the Districts and refused to receive new evidence.

By limiting its consideration to the record at the 2012 trial, the Panel had virtually no information about the current status of Kansas school finance. It could not make the findings contemplated by the mandate in *Gannon* beyond a simple dismissal of the Districts' claims. Nor could it adjudicate whether the *current* Kansas school finance system is reasonably calculated to meet or exceed the *Rose* standards.

It is important to recognize that the Districts properly and expressly seek only *prospective* relief, not adjudication of whether past funding levels were inadequate. The relief the districts seek is described in the Pretrial Order as follows:

- a. A judgment and order declaring some of the components *of the current funding formula* combined with the under-appropriation of money to fund the formula, are in violation of the Kansas Constitution;
- b. A permanent injunction prohibiting the State from administering, enforcing, funding, or otherwise implementing the unconstitutional provisions *of the current funding formula*;
- c. A permanent injunction *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*; . . .

Vol. 7, p. 948 (Pretrial Order) (emphasis added).

It is a “self-evident proposition” that an injunction is not an appropriate action to obtain relief for past or completed acts but operates only *in futuro* to prevent later acts. *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)). “[W]rongs already committed, or acts done whether lawful or unlawful, cannot be corrected or prevented by injunction.” *Andeel*, 174 Kan. at 559. Although the Panel issued a declaratory judgment, that relief was based on *past* school funding levels. The real issue here is the *current* system of funding schools, not past funding for any particular years which, even if determined to have been constitutionally inadequate, could not be remedied by the courts today.

That point is driven home by the Court’s mandate that directed the Panel to determine whether the public education system “*is*” reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*. The Panel



was not directed to answer whether the system failed to do so in the past. Under the Court's directions, *current* adequacy was the issue to be resolved, and that issue could not be determined by using the *Montoy* remedy as a floor. The Court's directions required the Panel to apply the presumption of constitutionality to current school finance legislation, to recognize that the Legislature has considerable discretion in school finance matters, and to count all sources of funding in making the adequacy determination. To make a determination of current adequacy, the Panel needed the latest available information about the current system of finance and revenues.

The trial in this case occurred more than three years ago. Some of the evidence presented was already stale at that time. There was no evidence at all before the Panel concerning the 2012-13 and 2013-14 school years. Nor was there evidence in the trial record about the financing of K-12 public education, federal funds available, or monies placed into the KPERS system for the benefit of Kansas teachers for the 2014-15 school year.

The Stae alerted the Panel, in its opposition to the Districts' motion for judgment on the existing record, that additional evidence would need to be presented about all present sources of local district revenue; current educational standards; current school accreditations; implication of the present federal "waiver"; local districts satisfying requirements tied to the goals described in *Rose* under present funding levels; LPA Studies on district efficiency and common core implementation performed and completed after trial; data and information about present funding levels and finance system calculations aimed at satisfaction of the *Rose* standards/goals; and legislative history relating to recent legislative enactments. It also anticipated presenting evidence about

2014 legislation that appropriated additional equity and adequacy funding, allowed additional LOB revenue, and made other substantive changes to the SDFQPA.

The State also requested leave to conduct discovery necessary to find and present relevant evidence. The State's request concerned discovering evidence about the Districts' compliance with QPA, the availability of funds in their cash reserves, an absence of any continuing "cuts" in services relating to educating students, expansion of services and facilities since the trial in 2012, implementation of the Common Core Standards, and the Districts' budgets and audited financial reports.

The procedural posture of this case was similar to the situation after the remand in *Knowles v. State Board of Education*, 219 Kan. 271, 547 P.2d 699 (1976). In *Knowles*, the Supreme Court held it could not determine the constitutional issues presented there on the existing record because of intervening 1975 amendments to the 1973 Kansas School District Equalization Act. Thus, the Court remanded the case to district court for reconsideration in light of intervening changes in the Act. *Id.* at 279-80.

It is well established that on remand "new facts that have occurred since the original trial and that related to the balance of equities are relevant to the determination of injunction relief." 42 Am. Jur. 2d, Injunction, § 3, p. 593 (rev. ed. 2010) (*citing Bauer v. Waste Mgmt.*, 239 Conn. 515, 524-25, 686 A.2d 481 (1996)); *see also, Duke Power Co. v. Greenwood Cnty*, 299 U.S. 259 (1936) (in a case seeking an injunction to prevent the government from making a loan for electric power plants construction, the district court on remand improperly refused to consider new evidence of a contract entered into after the initial judgment). Similarly, in *Franks v. State Highway Commission*, 182 Kan. 131, 319 P.2d 535 (1957), *overruled on other grounds, Brock v. State Highway Comm'n*, 195

Kan. 361, 404 P.2d 934 (1965), the Supreme Court followed the rule that whether a suit in equity should stand or fall is not determined by facts at the time the suit was filed, or even at the time of trial if an appeal is taken. The Court held a change of circumstances made rendering an injunction useless and dismissed the case as moot. *Id.* at 136.

After the Districts elected not to present additional evidence in this case, the State moved the Panel to enter judgment in its favor pursuant to K.S.A. 60-252(c), which provides:

Judgment on partial findings. If during a trial without a jury *a party has been fully heard on an issue* and the court finds *against* the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(Emphasis added). The statute “allows the district court to make factual findings *against* a party *once that party has been fully heard on an issue.*” *Lewis v. R & K Ranch, L.L.C.*, 41 Kan. App. 2d 588, 589, 204 P.3d 642 (2009) (emphasis added) (“plaintiffs had fully presented their case before the district court ruled against them”).

The Panel overruled the State’s motion. It had requested some information about levels and kinds of funding available for school districts in FY15 and KSDE’s records reporting the results of the Kansas standardized tests administered in 2012-13. The State provided this information, but objected to its consideration if the State was prevented from also submitting evidence after remand. The Panel relied on the data that it had requested *sua sponte* but did not grant leave for the State to conduct discovery and refused to take any other additional evidence. The Panel stated it had requested “proffers for the facts or issues that would alter [its] original judgment or change the course of the one [it ultimately] issue[d].” December Order at 9. The State does not agree with this

statement and cannot locate any record of such an order, but the State did provide detailed proposed findings of fact which outlined the evidence it had available to it without additional discovery. Nevertheless, the Panel concluded that it could not “perceive of any [testimony] but a pure recantation of prior testimony that would cause us to consider any had it been offered.” *Id.*

To the State’s knowledge, there is no procedure which allowed the Panel to request and take recognition of evidence after a party “rests,” with a motion for judgment pending. There is no procedure which allowed the Panel to cherry-pick the “new” information that it wanted to consider without offering the State the opportunity to present its new evidence once the Panel decided consideration of new evidence was proper. The results of 2012-13 standardized tests were not a proper subject for judicial notice because, at a minimum, the validity of those results were challenged, Vol. 25, p. 3209 (Ex. 1522 to State’s Proposed Findings of Fact). *See* K.S.A. 60-409(b) (limiting *sua sponte* judicial notice to certain categories). And the Panel abused its discretion by not allowing the State to conduct additional discovery.

The State has expressed concern that judicial review of the adequacy of public school funding, under Article 6, pushes judges into the field of legislative policy decisions. The Panel’s actions demonstrate this. Understandably, the Panel had the difficult task of attempting to make findings concerning present/current conditions which are always changing. But it is the legislative function that “looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.” *Gawith v. Gage’s Plumbing & Heating Co., Inc.*, 206 Kan. 169, 178, 476 P.2d 966 (1970) (quoting *Noble State Bank v. Haskell*, 219 U.S. 104

(1911)). In this respect, the Panel’s deviation from the usual course of adversarial proceedings, including its willingness to conduct its own “investigation” and consider information no party had placed before it, is improper.

As the case stands, this Court should hold that the Districts’ deliberate decision to rest on the evidence presented at trial foreclosed consideration of the records the Panel requested and considered *sua sponte*. With absolutely no evidence of the current status of school finance, judgment should be entered in favor of the State on the Districts’ claims for an alleged violation of Article 6.

**V. The Panel Erred When It Adjudicated The Suitability Of School Funding Under SB 7**

The Districts brought this case as a challenge to school funding under the SDFQPA, K.S.A. 2014 Supp. 72-6405, *et seq.* But in SB 7, the Legislature repealed the SDFQPA and replaced it with the CLASS Act, rendering any challenge to school funding under the SDFQPA moot. The Districts did not seek to amend their pleadings to challenge SB 7. Nevertheless, the Panel proceeded to consider SB 7 and declared that it violated the adequacy component of Article 6. In doing so, the Panel stepped outside its jurisdiction and denied the State due process.

The Panel held SB 7’s block grants unconstitutional not only because the funding levels were allegedly insufficient, Vol. 136, p 1473, but also because, according to the Panel, the Extraordinary Need Fund is not the “failsafe” mechanism the Panel had concluded was necessary if LOB was relied upon to fund a *Rose* standard’s education, *id.* at 55, and because the calculation of the block grants does not make adjustments for changes in enrollment and demographics, *id.* at 1475.

None of these subjects was before the Panel at the 2012 trial. They could not have been because SB 7 did not become law until 2015. Likewise, and necessarily, none of the subjects were challenged in the District's pleadings or listed as a claim in the Pretrial Order which frames the issues in this litigation.

The Districts argue that the Panel properly adjudicated the constitutionality of SB 7 because this Court directed it to do so. Appellees' Equity Brief, at 39, 44. On April 30, 2015, Chief Justice Nuss issued an order providing, in part:

The district court has jurisdiction to resolve all pending post-trial matters, including the Plaintiffs' January 27 motion to alter the December 30 order on the issue of equity and their March 26 motion for declaratory judgment and injunctive relief, and any additional motions filed after the date of this order.

Order of April 30, 2015, *Gannon v. State of Kansas*, No. 113,267, at 3.

Jurisdiction to "resolve" the March 26 motion for declaratory judgment and injunctive relief is very different than the Court's blessing to ignore basic principles of due process and civil procedure. The Order did not grant the Panel jurisdiction to do more than either: (1) refuse to grant declaratory and injunctive relief pertaining to SB 7 or (2) decide whether an amendment of the pleadings would be allowed (had the Districts sought such an amendment) to initiate complete litigation on SB 7's constitutionality. The Order cannot excuse the Panel's erroneous consideration of SB 7.

The Panel's consideration of whether SB 7 violates Article 6 was improper and its rulings on this issue must be reversed.

## **VI. The Legislature Has Provided More Than "Suitable" School Funding**

The Panel obviously eschewed the State's request that it should analyze the Article 6 constitutional issue with due deference to the Legislature and instead substituted

its own policy views for those of the Legislature. However, this Court can and should give proper deference to the Legislature's policy choices and find that the current funding of K-12 public schools is constitutionally adequate.

**A. The Legislature Has Made Suitable Provision For The Financing Of The State's Educational Interests And Kansas Schools Are Performing Well By Numerous Measures**

*First*, the State made suitable provision for finance of the educational interests of the Kansas using traditional techniques for determining the level of funding for governmental services. The Legislature evaluated budgets, historical spending, fund year-end balances, available sources of revenue [much of which was only collected after] and advice from a variety of sources. With all sources of revenue (state, local and federal) considered, Kansas public K-12 schools are receiving funds *at record high levels*. Kansas K-12 schools meet state accreditation requirements and its teachers are licensed and are, with rare exception, qualified or highly qualified. Moreover, individual districts have held millions of dollars unspent, in reserve, in recent years.

*Second*, presently, the State's rigorous accreditation standards, and its attendant graduation requirements, have been adequately funded. All of the *Rose* standards/goals are addressed by the programs and services in place under these requirements. In particular, required curricula and areas of instruction are interrelated, but the curricula for computer literacy, library services, foreign language and language arts (which must include reading, writing, literature, communication and grammar) are reasonably calculated, at a minimum, to provide "oral and written communication skills" (standard 1); the curricula for history, government, family and consumer science and business are reasonably calculated, at a minimum, to provide "knowledge of economic,

social and political systems” (standard 2); the curricula for history and government are reasonably calculated, at a minimum, to provide “understanding of governmental processes” (standard 3); the curricula for physical education, which shall include instruction in health and human sexuality are reasonably calculated, at a minimum, to provide “knowledge of . . . mental and physical wellness” (standard 4); the curricula for fine arts (which may include art, music, dance, theatre, forensics, and other similar studies), language arts and library services are reasonably calculated, at a minimum, to provide “grounding in the arts” (standard 5). The training or preparation for advanced training in either academic or vocational fields” (standard 6) and “academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states” (standard 7) are provided in the curricula for each of the first five standards and in the curricula for mathematics, science, industrial and technical education.

Thus, the law and circumstances today are similar to those present when *U.S.D. 229* was decided. As in *U.S.D. 229*, 256 Kan. at 257-58, here there is no evidence that schools are not funded sufficiently to provide the elements of the accreditation system in place, measured by both inputs and outputs.

*Third*, the State also considered that Kansas students are performing well, generally and in all subcategories, when compared to regional states and nationally. Student performance and graduation data paint the picture of an overall successful educational system. The State possessed scientific evidence and recent history supporting the policy determination that infusion of additional funding at a macro level will not



enhance student performance, graduation rates or preparation either generally or by subgroups of students.

*Fourth*, the Legislature had grounds to determine that the funding that it provided was not being spent efficiently. The LPA proposed setting BSAPP at \$4,433 BSAPP to generate the revenue necessary to produce desired student achievement at the 66<sup>th</sup> percentile. Vol. 34, pp. 1435, 1934-35, Vol. 81, p. 3948. Accordingly, it was assumed that districts in the upper 33<sup>rd</sup> percentile of efficient spending would receive more revenue than the LPA proposed as necessary. *Id.* Also, if all districts' efficiency in the years studied (1999-2004), could be improved, funding only for 66<sup>th</sup> percentile efficiency level was artificially high.

*Fifth*, former Kansas Education Commissioner, Dr. DeBacker, was asked to explain how Kansas has made steady improvement in Kansas assessment test scores, for all groups of students, over the last 10 years in light of recent reductions in the BSAPP. She attributed this to: (a) teachers knowing the state standards, knowing the assessments, knowing how to prepare students (including use of formative assessments to check student learning along the way), and (b) the momentum which has built up where “we look at what’s happening within the actual classrooms with the teachers and with the students and the community getting students ready. We then always say, too, you set a mark for us and Kansans want to meet that mark. And whether the mark is at 87.5 percent or 91, we seem to – seem to be able to do it.” Vol. 127, pp. 15966-67.

*Sixth*, Kansas also has continued to make steady progress toward narrowing achievement “gaps” when compared to the circumstances presented at the trial in *Montoy*. In 2006, every major subgroup was below 65 percent proficient in math; by

2011, every major subgroup was above 65 percent and had an average increase of 15 percentage points from 2006. Vol. 69, pp. 2734-36; Vol. 33, p. 1126; Vol. 37, p. 2123. In 2006, every major subgroup was below 70 percent proficient in reading; by 2011, every major subgroup was above 70 percent and had increased at least 10 percentage points from 2006. *Id.* The Kansas Report Card for 2011-12 shows that by 2012 the proficient percentages of every major subgroup remained above 65 percent in math and 70 percent in reading. Vol. 25, pp. 3215-16; *see also*, Vol. 33, pp. 1127-28; Vol. 69, pp. 2734, 2737-38 (showing that in 2012, KASB ranked Kansas public education in the top 10 of all states in the all-student and free-and-reduced-lunch categories for reading and math based on NAEP scores).

*Seventh*, and finally, the Panel initially ordered that State Financial Aid funding should be calculated using a \$4,492 BSAPP. Vol. 14, 1964-65. Inflated the FY2015 BSAPP would have been \$4,981. *See* Bureau of Labor Statistic inflation calculator. [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm). Addition of just LOB revenue eclipses the panel's previously ordered remedy. Assuming the same adjusted FTE as last year, at least \$278,110,100 more was provided than what the Panel ordered the State to provide directly to satisfy constitutional adequacy. The sum is calculated by adding: (a) the increase in FY2015 funding over FY2014 in State Aid, Supplemental State Aid and LOB (\$37,341,959 according KSDE's estimate), (b) the FY2014 general fund for all districts, excluding special education funding, (\$2,634,625,788) and (c) the FY2014 LOB (\$1,010,020,200) and then dividing the sum by the FY2014 weighted FTE, without special education weighting (683,317.2). This provides the effective FY2015 BSAPP of \$5,388.4 when LOB revenue is considered. The \$278,110,100 figure is the comparison of

a \$5,388 effective BSAPP with a \$4,981 previously ordered BSAPP ((5388-4981) x 683,317.2 = 278,110,100). *Compare Appx. 7 with Vol. 143, pp. 2101-07.*

**B. Supreme Courts In Other States Give Substantial Deference To Their Legislatures With Respect To School Funding Determinations**

Cases from other jurisdictions, with facts similar to those presented here, have given the Legislature substantial deference in determining that the level of funding was adequate to satisfy their constitution. In *Lobato v. State*, 2013 Colo. 30, 304 P.3d 1132 (2013), the Colorado Supreme Court described a per-pupil formula which sets a per pupil amount which is then adjusted to account for district-specific “factors” such cost of living, concentrations of at-risk students, etc. In response to statewide budget reductions, the state uniformly reduced each district’s total program by a “negative factor” that reflected statewide funding cuts. Notwithstanding the district’s claims, and noting that it might not provide the “optimal” amount of funds, the Court applied a rational basis test and held the public school financing system was rationally related to the state’s “thorough and uniform” education mandate because it funds a system of free public schools that is of a quality marked by completeness, is comprehensive, and is consistent across the state.

In *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981), the trial court rejected an “inadequacy of educational opportunity” claim, holding that “[u]nder the Constitutional Provision [stating] ‘an adequate education for the citizens shall be a primary obligation of the State,’ the quantum of education provided would be almost exclusively for the General Assembly to determine and certainly there is no indication of an abdication of that responsibility in this case.” *Id.* at 640 (alterations in original). On appeal, the Georgia Supreme Court held “there ha[d] been no legislative disregard of the constitutional command that the state provide an adequate education for its citizens”

because “[t]he state’s financial commitment to public education [was] massive – currently in excess of one billion dollars per year . . . .” *Id.* at 644.

In *Davis v. State*, 804 N.W.2d 618 (S.D. 2011), the South Dakota Supreme Court stated the plaintiffs’ burden was to show the educational system “fails to provide students with an education that gives them the opportunity to prepare for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.” *Id.* at 628. Plaintiffs claimed that the system was arbitrary and irrational because funding was not based on the actual costs of providing students with a constitutionally adequate education and does not align funding with need. The Court rejected this argument: “Even if the Legislature used historical education costs instead of actual costs, the formula may still be valid.” *Id.* at 631.

Like here, the State pointed to the districts’ ability to maintain healthy general fund and capital outlay reserve balances despite their fiscal issues and highlighted evidence that all of the 161 school districts met their state imposed accreditation and curriculum standards. In response to the plaintiffs’ argument regarding achievement gaps, the Court observed: “A complex set of socioeconomic factors and experiences contributes to the achievement gap, and no other state has been able to eliminate the gap, including those spending nearly twice the average per pupil amount that South Dakota spends.” *Id.* at 640. In the end, the Court held the plaintiffs failed to show that the state funding system was “clearly and unmistakably” unconstitutional. *Id.* at 641.

Cases finding a failure to provide adequate funding are readily distinguishable. In *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court held that the general assembly had failed to “provide an efficient system of

common schools throughout the state” as required by the Kentucky Constitution. *Id.* at 189. The achievement data in that case was far different than in Kansas: Kentucky was “ranked nationally in the lower 20-25% in virtually every category that is used to evaluate educational performance.” *Id.* at 197. With respect to the average teacher compensation, for example, Kentucky was 7<sup>th</sup> among its eight neighbors and 37<sup>th</sup> nationally. *Id.* High school dropouts made up thirty-five percent of Kentucky’s adult population. *Id.* Further, there was evidence of a substantial difference in the curricula offered in the districts across the state, differences that correlated directly with the resources or lack thereof available to the districts, as well as evidence that student-teacher ratios were higher in the districts with less resources. *Id.*

In another case finding inadequate school funding, *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1996), a study revealed that one half of Ohio’s school buildings were fifty years old or older, and 15% were over 70 years old. *Id.* at 206. Only a little over half of these buildings contained satisfactory electrical systems, only 31% had roofs which were deemed satisfactory, and only 30% had adequate fire alarms. *Id.* In one instance, three hundred students were hospitalized due to carbon monoxide leaking from heaters and furnaces. *Id.* Schools had insufficient funds to purchase textbooks, and therefore had to rely on old, outdated books. *Id.* at 208. In some classes there were no textbooks at all. *Id.* One school started with no books for Spanish I class, but later in the year obtained a limited number, which the school then distributed by lottery: students who picked the lucky numbers received a book. *Id.* There also was evidence that Ohio students’ performance on test scores also was poor overall. *Id.* at 209.

The conclusion to be drawn from these cases is that constitutional adequacy does not turn on whether a school system is perfect or achieves 100% success with every student. Instead, the question is whether the system is reasonably calculated to—and operates to—provide a quality education to a State’s students. As demonstrated in this brief, Kansas schools are succeeding in numerous ways and across a wide spectrum of measures. There is no evidence in this case remotely approaching anything like that in the Kentucky and Ohio cases where the state supreme courts understandably found constitutional deficiencies.

### CONCLUSION

In response to this Court’s decision in *Gannon*, the Governor and Legislature took action not only to provide more than \$135 million in additional funding but also to comprehensively review and revise the school finance system to ensure it meets the requirements of Article 6 as interpreted by this Court. To date, the work in response to *Gannon* has been substantial, and it is ongoing. Regrettably, rather than embracing that process, the Districts have objected to it at every turn and instead advanced an all-out defense of the status quo. That approach is not helpful to ensuring compliance with the Kansas Constitution, and it is not helpful to sorting through the competing interests involved in school-funding decisions to ensure the focus remains squarely on how best to educate Kansas children. This Court should not reward that approach.

Particularly in light of the overwhelming evidence that Kansas students are excelling, the Legislature reasonably concluded that it has made suitable provision for the financing of the State’s educational interests. Its bold and ongoing actions toward reforming the school funding system are reasonably calculated to ensure continued

compliance. This Court should not allow a small number of school districts to second-guess the Legislature's reasoned judgment. The State continues to believe the adequacy determinations by the Legislature and the Governor are not justiciable, but even if they are this Court should give substantial deference to the reasonable and well-informed determinations by the Legislature and the Governor -- based on thorough inquiry and subject to biennial review by the People of Kansas -- that the Kansas school funding system satisfies the adequacy requirement of Article 6 of the Kansas Constitution.

For the reasons above, the State urges the Court to grant judgment in its favor.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL  
DEREK SCHMIDT

By: /s/ Derek Schmidt

Derek Schmidt, KS Sup. Ct. No. 17781

Attorney General of Kansas

Jeffrey A. Chanay, KS Sup. Ct. No. 12056

Chief Deputy Attorney General

Stephen R. McAllister, KS Sup. Ct. No. 15845

Solicitor General of Kansas

M. J. Willoughby, KS Sup. Ct. No. 14059

Assistant Attorney General

Dwight R. Carswell, KS Sup. Ct. No. 25111

Assistant Solicitor General

Bryan C. Clark, KS Sup. Ct. No. 24717

Assistant Solicitor General

Memorial Bldg., 2nd Floor

120 SW 10th Avenue

Topeka, Kansas 66612-1597

Tel: (785) 296-2215

Fax: (785) 291-3767

Email: jeff.chanay@ag.ks.gov

stevermac@fastmail.fm

mj.willoughby@ag.ks.gov

dwight.carswell@ag.ks.gov

bryan.clark@ag.ks.gov



and

Arthur S. Chalmers, KS Sup. Ct. No. 11088  
Gaye B. Tibbets, KS Sup. Ct. No. 13240  
Jerry D. Hawkins, KS Sup. Ct. No. 18222  
Rachel E. Lomas, KS Sup. Ct. No. 23767  
HITE, FANNING & HONEYMAN, LLP  
100 North Broadway, Suite 950  
Wichita, Kansas 67202  
Tel: (316) 265-7741  
Fax: (316) 267-7803  
E-mail: chalmers@hitefanning.com  
tibtets@hitefanning.com  
hawkins@hitefanning.com  
lomas@hitefanning.com

*Attorneys for the State of Kansas*

#### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 23rd day of November 2015, the above brief was electronically 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 copies were electronically mailed to:

Mr. Alan L. Rupe  
Alan L. Rupe  
Jessica L. Skladzien  
Mark A. Kanaga  
LEWIS BRISBOIS BISGAARD & SMITH  
1605 North Waterfront Parkway, Suite 150  
Wichita, KS 67206-6634  
Alan.Rupe@lewisbrisbois.com  
Jessica.Skladzien@lewisbrisbois.com  
Mark.Kanaga@lewisbrisbois.com

John S. Robb  
Somers, Robb & Robb  
110 East Broadway  
Newton, KS 67114-0544  
johnrobb@robblaw.com  
*Attorneys for Plaintiffs*

Steve Phillips  
Assistant Attorney General

OFFICE OF ATTORNEY GENERAL DEREK SCHMIDT  
120 S.W. 10th, 2nd Floor  
Topeka, KS 66612  
steve.phillips@ag.ks.gov  
*Attorney for State Treasurer Ron Estes*

Philip R. Michael  
Daniel J. Carroll  
Kansas Department of Administration  
1000 SW Jackson, Suite 500  
Topeka, KS 66612  
philip.michael@da.ks.gov  
dan.carroll@da.ks.gov  
*Attorneys for Secretary of Administration Jim Clark*

/s/ Arthur S. Chalmers  
Arthur S. Chalmers