KANSAS POLICY INSTITUTE

Testimony before House K-12 Budget Committee

SB 142 – written opposition

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Madam Chairman and members of the Committee

On behalf of the Kansas Policy Institute, thank you for the opportunity to appear as an opponent on SB 142, dealing with additional K-12 appropriations.

Needless to say, no matter what your particular position may be with regard to the school finance litigation, everyone is in agreement that the litigation should end. How it ends is a matter for some debate. It has to be frustrating for the Legislature, which is not a party in the lawsuit, to be responsible for satisfying the moving funding target that has been the *Montoy* and now *Gannon* experience.

Indeed, there is a compelling case to be made for politely telling to Court to stay in its own lane under the separation of powers doctrine. The very Court that decided *Gannon* also decided *Solomon v. State*, where the Court held the Legislature had violated the separation of powers doctrine by encroaching on the power of the Chief Justice to appoint local chief judges of the judicial districts. The Court emphatically pronounced that "...by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that **it is the duty of each to abstain from, and to oppose encroachments on either."**

The Supreme Court opposes encroachments on the Judicial Branch by putting pen to paper and rendering an opinion. How does the Legislative Branch oppose encroachments by the Judiciary? Justice Harold Herd, a former Democrat legislator from Coldwater, wrote a remarkable concurring opinion in the 1984 case of *State, ex rel Stephan v. House of Representatives*, where the separation of powers doctrine was at issue. He stated, in pertinent part:

> "...In ruling the legislature, which is not before us, is usurping executive powers in violation of the separation of powers, this court is violating the constitutional prohibition against giving advisory opinions, an executive function, and thus itself is in violation of the separation of powers.
>
> While the majority opinion makes much of the dangers of a violation of the

> separation of powers doctrine between the executive and legislative branches, **the danger of the judiciary usurping executive or legislative powers is more destructive."**

Quoting from I Montesquieu, *The Spirit of Laws*, Justice Herd went on to say:

> "[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; **for the judge would be then the legislator…."**

A prior Supreme Court decision interpreting Art. 6, Sec. 6, *USD 229 v. State* (1994) made it clear that "…the issue for judicial determination was **whether the Act provides suitable financing, not whether the level of finance is optimal or the best policy."** (This language was quoted by the Court in *Gannon I)* The *USD 229* Court found that the 1964 constitutional amendment in question (the same language that exists today) "…reaffirmed the inherent powers of the legislature, and through its members, the people, to shape the general course of public education and provide for its financing."

The Legislature has already protected the schools and our school-aged children from any order of the Court that would attempt to close schools or enjoin the distribution of school funds by appropriation. (See K.S.A. 60-2106(d)) The Legislature and the Legislature alone has the power over appropriations. (See Kansas Constitution Art. 2, Sec. 24) Besides, no order of the Court could override Federal law protecting special education students, our state compulsory attendance law, or existing contracts., e.g. Accordingly, any decision of the Court that would purport to tell the Legislature how much to appropriate for K-12 education would be advisory only.

However, we expect that the Legislature will be do as it has always done in the past, in the absence of litigation, i.e., consider the needs of K-12, along with the needs of all the other agencies, departments and constituencies that you must consider, and make appropriate funding decisions. We are here today to consider the funding of K-12 education. In that regard, *Gannon* has provided a focus for our attention. The Court has acknowledged that the vast majority of our K-12 students are performing at levels that meet our articulated goals. Of concern are those who are at-risk, for whatever reason, of not meeting our articulated goals.

In *Gannon,* the Court has stated that "[r]egardless of the source or amount of funding, total spending is not the touchstone for adequacy in education required by Article 6 of the Kansas Constitution." The *Gannon* Court has engrafted a requirement of "adequacy" in determining whether the Legislature has "made suitable provision for the finance of the educational interests of the state." That test is: "whether the public education financing system provided by the legislature for grades K-12 – <u>through structure and implementation</u> – is reasonably calculated to have all Kansas public

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education students meet or exceed the standards set out in *Rose* and as presently codified in K.S.A 2013 Supp. 72-1127."

Specifically, the *Gannon* Court noted that "[w]hile the wisdom of the legislature's policy choices in allocating financial resources is not relevant to this analysis, the panel can consider how these choices impact the State's ability to meet the *Rose* factors."

It is clear from the Court's language and, indeed, the test of adequacy the Court has laid out, that the Court acknowledges and even asserts the Legislature's role in both structuring the system of school finance but also implementing that structure by allocating the financial resources. Herein lies the current problem. The Court, in determining whether the Legislature's appropriations have been "adequate" has failed to take into account that, while the Legislature has a funding formula and distributes funds through the formula, the actual allocation of funds has been left to local districts over whom the Legislature has exercised no control. Indeed, some of the very districts, in allocating their own funds, are now heard to complain bitterly that they don't have sufficient funds to assist a population of their at-risk student in meeting their goals. Yet, those districts had the ability and latitude to allocate sufficient resources toward that very task; they just didn't. Many of those districts are sitting on ever-increasing unencumbered funds they choose not to spend. **(Operating cash reserves statewide are now over $951M, up from $928M last year.)**

The Court appears to assume it is the State that must meet the Rose standards. This assumption is naïve at best as we know that the Rose goals are outcomes that only the education establishment can deliver. We depend on the schools to allocate resources in a manner that will allow our educators to achieve outcomes. The State's "ability" ends with distribution of funds to KSDE.

The good news is that this disconnect can be easily remedied, and in a manner wholly consistent with the views articulated by the Court. Assuming, as we do, that the Court will retain jurisdiction of *Gannon*, it is incumbent on the Legislature to fully embrace the role of financing K-12 education that the Court has either envisioned or presumed to exist. That is, the Legislature must assume control of both the structure and implementation of funding by ensuring allocation of funds in a manner that is reasonably calculated to get our underperforming students up to the goals set forth in statute. This does not mean controlling all the various funding silos, just the ones that impact learning for those at-risk of not meeting the statutory goals.

Some may argue that this proposal would seem to fly in the face of "local control". That "local control" has not, with all due respect, led to better student outcomes and an end to litigation, at least insofar as funding outcomes-based learning goes. But, we need look no further than the KSDE's own *Accounting Handbook for Unified School Districts* for direction. Last updated in March of last year and published by the Kansas State Department of Education, it sets out the KSDE Mission and describes the various funds and functions within the budget. It is a school district budget roadmap, if you will.

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First the Mission: *"To prepare Kansas students for lifelong success through rigorous, quality academic instruction, career training and character development according to each student's gifts and talents."*

"Instruction" is broadly defined and is classified as account code 1000. According to KSDE, as set forth in their *Handbook*, the significance of "Instruction" is as follows"

> **Although all other functions are important, this function acts as the most important part of the education program, the very foundation on which everything else is built. If this functions fails to perform at the needed level, the whole educational program is doomed to failure regardless of how well the other functions perform. Instruction not only incudes the regular face to face classroom teaching but also such things as lab sessions, independent work, and educational field trips."**

Given this strong statement on the importance of instruction as being the "foundation "of the school budget, and given the Court's challenge to the Legislature to structure and implement a system of finance reasonably calculated to ensure our students can meet our statutory goals, the Legislature can and must take steps to require the districts to build their budgets from the classroom up, rather than the administration building down.

How can this be accomplished? Budgets will continue to be developed at the district level. But the Legislature should require that the districts, as a first step in the budgeting process, allocate a sufficient amount of funds in a manner reasonably calculated to have those students enrolled in the district achieve the statutory educational goals. The districts should be required to certify that they have done so and further certify that they have assigned sufficient personnel adequately trained in providing curriculum and/or have contracted with bona fide programs that can deliver adequate at-risk programs. In the next year and years thereafter, if performance does not improve satisfactorily, districts should be required to submit a remediation plan for achieving those outcomes. The consequence for two or more years of unsatisfactory improvement should be that affected students may leave the district and choose another public or non-public school option. The State is not in litigation because the districts don't have enough, e.g., administration, IT personnel, janitors, food service workers, busses or SUV's.

There should be legal reform that prevents the Court from shifting the burden of proof from the Plaintiffs to the State. There should also be a legal presumption that all funds made available by the State were utilized first by the districts to ensure that all students meet the statutory goals. Gone should be the days where the districts are allowed to spend their funds in other areas and then be heard to argue they didn't have sufficient funds "left over " to accomplish their core mission. Remember, the KSDE's *Accounting Handbook* states that "instruction" is the foundation on which

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everything else is built. It stands to reason, in this litigation environment, that this directive should be codified.

Since 2005, what has been the consequence of allowing the districts total control over spending on instruction? In the process of responding to the Court's mandate in *Montoy in 2005,* the Legislature ended up paying the sum of money the Court ordered. But in so doing the Legislature also passed some school finance reforms, including the reforms mentioned earlier regarding the prohibition against the Court ordering school closures or enjoining the distribution of school funds. The Legislature also established a public policy goal that at least 65% of the funds appropriated be expended in the classroom or otherwise for instruction. In addition, all new funds were required to be spent in the classroom or otherwise for instruction. "Instruction" was given the definition that appears in KSDE's *Accounting Handbook for USD's.* (Former K.S.A. 72-64c01)

Unfortunately, at the time districts were only allocating a little over 54% of total spending, on average, for instruction. Equally unfortunate is the fact that, in spite of the statutory policy passed with bi-partisan support, districts have never allocated above 55.3% of total spending for instruction in the intervening years. In 2018, the average was less than it was in 2005, at 53.9%. **Had the districts, on average, met the state policy goal in statute in the intervening years, nearly $7.8B more would have been spent on instruction!** To be clear, we are not here to advocate for a specific percentage for instruction spending. Districts should decide but then be held accountable for those allocation decisions. However, this calculation of funds diverted from the classroom, together with the fact that it's the State and not the districts being sued, underscores the need for the Legislature to assume a greater degree of control over allocation of funds needed to address the needs of the underperforming students at risk of not attaining the statutory goals.

Although not required, it is likely that the Legislature will increase funding for schools again this year. (Per-pupil funding has increased every year since the recession with the exception of 2016 when a KPERS payment was delayed. KSDE estimates funding will exceed $14,000 per-pupil this year and funding already approved by the Legislature will exceed $16,000 per-pupil in 2023.)

Our suggestion this year, however, is to target any new funds toward the task the Court has challenged you with – helping the underperforming students reach your articulated educational goals. Simply running more funds through your current weighted formula , as SB 142 does, will dilute the effect of your efforts, given that approximately $.46 of every dollar will be spent on something other than instruction. Consider increasing the at-risk weighting or simply do as the Legislature did in 2005 and require that any new funds be used for instruction. The Court has said that "total" spending is not the touchstone of adequacy; it's how the money is spent. The crux of the case is about those students who are at-risk of not reaching the statutory goals.

Finally, as the *Accounting Handbook* states: "By far the biggest cost items in this function [Instruction] are teacher salaries and associated costs such as social security, fringe benefits, and workers' compensation. Other major costs in the function are costs in providing substitutes and

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paraprofessionals who work with the teachers. All the materials needed in the delivery of the instructional program by the teacher and helpers are another major cost." Allocating sufficient resources means addressing teacher compensation. Teacher compensation has lagged significantly behind administrative raises. And, effective teachers, those whose efforts increase student performance in a measurable way, should be rewarded with compensation that matches their talent.

One passage in KSDE's *Accounting Handbook* is troubling and bears mentioning. In the section on "Reviewing Budget Costs", while promoting transparency in the budgeting process, the *Handbook* states:

> "This system also allows the public to see the salaries of employees, especially teachers, and their associated costs (like social security, fringe benefits, etc.) make up a large percentage of the operational costs. If patrons support improved teacher salaries, **it can easily be shown that this can cause a major increase in the total budget since it represents such a large percentage of the total."**

We hope this was not intended as an argument against teacher salary increases. If it is, this passage flies in the face of the *Handbook's* strong statement on the importance of the function "Instruction". It assumes all other aspects of the budget are off limits, baked in the cake, if you will, such that adding to instruction must add to the budget. This is simply not true. Recall that the *Handbook* says that "[i]f this function [instruction] fails to perform at the needed level, the whole educational program is doomed to failure regardless of how well the other functions perform."

Budgets must be built from the classroom up. Paying Superintendents and other non-instructional staff ever increasing amounts of salary, e.g., at the expense of teachers is self-defeating. Shifting valuable funding to other aspects of the budget without first taking care of the very foundation of the education budget is self-defeating. If districts don't get the instructional calculus right, it doesn't matter how well the non-instructional pieces work. The educational program is "doomed".

The Legislature must act now to embrace its role in ensuring the proper and effective allocation of resources toward the mission of education and the statutory goals. The Court acknowledges this role. Codifying a "performance goals first" budgeting process and requiring the Districts to certify compliance, will not only meet the adequacy test laid out by the Court but will also be a huge step forward in addressing the needs of our under-performing students.

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