

IN THE SUPREME COURT OF THE STATE OF KANSAS

15-113267-S

LUKE GANNON,
By his next friends and guardians, *et al.*,

Appellees/Plaintiffs,

County Appealed From: Shawnee

v.

District Court Case No.: 10-C-1569

STATE OF KANSAS, *et al.*,

Appellants/Defendants.

RESPONSE TO STATE’S MOTION FOR REHEARING OR MODIFICATION

On February 11, 2016, this Court declared that the State had failed to cure the inequities that it had previously affirmed to exist and that caused the school finance system in Kansas to be unconstitutional. *Gannon v. State*, 2016 Kan. LEXIS 8, *107-108 (Kan. Feb. 11, 2016) (“Gannon II”). As a result, this Court found that it was appropriate to give the State “another, albeit shortened, opportunity to develop a constitutional funding system” and gave the Legislature “a second, and substantial” chance to comply with *Gannon I*.¹ *Id.*, at *107-108, 111-112 (“[T]he State would help its case by showing its work in how it determined that any other proposed solution complies with *Gannon I*.”). Ultimately, in response, the State adopted Senate Substitute for House Bill 2655 (“H.B. 2655”). However, in *Gannon v. State*, No. 15-113,267-S, ___ Kan. ___, slip op. (May 27, 2016) (“Gannon III”), this Court again held that the State had failed to meet to meet its constitutional duty to equitably fund education in Kansas and reiterated its holding that absent timely legislative enactment of a remedy that met the

¹ As used herein, *Gannon I* refers to this Court’s decision in *Gannon v. State*, 298 Kan. 1107, 1157 (2014).

Kansas Constitution's requirements, "the schools in Kansas will be unable to operate beyond June 30".

Although the Governor, quite wisely, has called the Legislature into special session to "resolve the matter," *see* State's Motion for Rehearing or Modification ("State's Motion"), at p.2, the State is now attempting to short-circuit this process by asking this Court to remove any remedial pressure that the State's elected officials might feel during that session. The State's Motion does so by insinuating that this Court would somehow *necessarily* violate the Kansas Constitution by "enter[ing] an order that would result in the closing of Kansas public schools." State's Motion, at p.1. But the State's concern arises from a fundamental misreading of this Court's decisions in *Gannon*. As this Court stated in *Gannon III*,

without a constitutionally equitable school finance system, the schools in Kansas will be unable to operate... the inability of Kansas schools to operate *would not be because this court would have ordered them closed*. Rather, it would be because this court would have performed its sworn duty to the people of Kansas under their constitution to review the legislature's enactments *and to ensure the legislature's compliance with its own duty under Article 6*.

Gannon III, slip. op. at 45. (emphasis added). The Court then gave the State "yet another opportunity to treat Kansas students fairly and 'to craft a constitutionally suitable solution and minimize the threat of disruptions in funding for education.'" *Id.* at 45-46 (citation omitted). In doing so, the Court demonstrated extreme deference to the Legislature and gave it the opportunity to craft a constitutionally equitable funding system. Absent appropriate action by the Legislature, the Court indicated that it would act on its own to either implement constitutionally equitable system itself (as the Panel below did) or enjoin operation of the unconstitutional system (effectively closing Kansas schools). Now the State must act under the threat of this Court's action.

THE STATE'S MOTION STAYS THE COURT'S ORDER

Pursuant to Supreme Court Rule 7.06, the filing of a motion for rehearing or modification “stays the issuance of the mandate pending determination of the issues raised by the motion.” Rule 7.06(b). Therefore, Plaintiffs respectfully urge this Court to dispose of the State’s motion before the special session (currently scheduled to begin on June 23, 2016), so that the Kansas Legislature cannot argue that the State’s obligation to comply with the Court’s May 27, 2016 Order was stayed during the pendency of this motion.

ARGUMENTS AND AUTHORITIES

It is disheartening that the State – without knowing how the Kansas Legislature will respond to the Court’s most recent order – is asking this Court to determine the appropriate remedy for further constitutional violations by the State. Even at this late date, instead of placing the focus on fixing the equity problem identified by this Court multiple times, the State is focused on minimizing the pressure that the Legislature feels for deliberately choosing to maintain an unconstitutional funding system. Plaintiffs acknowledge that the stakes are currently as high as they possibly can be due to the State’s continued failure to meet its constitutional duty. One point, however, must be clear: the State – and not the Court – is the only entity currently in the position to lower those stakes. The State’s Motion does not ask for any timely, appropriate relief; rather, it merely asks this Court to – without the benefit of any further action by the State – remove any of the pressure currently placed on the Legislature as a direct result of its failure to comply with its constitutional obligations. Such a result is both inappropriate and premature.

The State does not need the benefit of its Motion to ensure that no school shutdown results. It merely needs to comply with the Kansas Constitution and this Court's previous orders. Plaintiffs are hopeful that, after the special session has run its course, the Kansas Legislature will uphold its constitutional obligations. However, ultimately, as the State admits, "[i]t is impossible to predict the outcome of the special session until the votes are actually cast." State's Motion at 2. In the meantime, the Legislature must understand that its votes are not cast in a vacuum, and its votes have serious consequences for the children of Kansas.

Even if the State does continue its pattern of ignoring its constitutional obligations, the State's entire Motion is based on a fundamentally flawed premise: that if the Court finds that the Legislature still has not complied with its constitutional duty to equitably fund schools, this Court will issue a blanket order requiring all Kansas public schools to be closed. In a series of "the sky is falling" arguments, the State then asserts that such an order would necessarily: (1) violate the Kansas Constitution; (2) violate K.S.A. 60-2106(d) (precluding a court order "enjoining the use of all statutes related to the distribution of funds for public education"); (3) violate federal law such as the Individuals with Disabilities Education Act and jeopardize federal funding under a variety of programs; and (4) would harm students, parents, teachers, and the Kansas economy, and thereby, the public interest. State's Motion, at pp. 4-7.

It is entirely inappropriate to assume that the State's predictions are a foregone conclusion. As the State itself has acknowledged, "there are many ways in which this Court could sever provisions *or applications* of HB 2655 and the CLASS Act that, although perhaps controversial, would be far less offensive to the Constitution than an order closing public schools." State's Motion, at p.9 (emphasis in original); *see also id.* at p.10, p.10, n.7

(identifying a potential remedy, short of complete shutdown, that would be “at least arguably consistent with the Kansas Constitution, Kansas statutes, the express legislative preference for severability, and also would avoid or at least minimize the risk of causing violations of federal law”).

One remedy available to the Court is to *require* the State to fulfill its constitutional duties to equitably fund the local option budget formula rather than close the schools. As Justice Johnson noted in his dissent in *Gannon III*, such an option clearly remains open to this Court: “the majority leaves open the possibility of lifting the stay on the district court’s remedial orders on July 1, 2016.” *Gannon III*, slip op. at 47. Through the acknowledgments and concessions in the State’s Motion, the State has essentially stated its preference for such an order, as opposed to a complete school closure and reiterated the “Legislature’s repeated and unequivocal expressions of its intent to keep public schools open” *See* State’s Motion at 3. In other words, this Court has options available to it. And those options entirely avoid “the sky is falling” arguments made in the State’s Motion.

For instance, if this Court were to follow the suggestions in Justice Johnson’s dissent, and craft a remedy that gave effect to the Panel’s remedial orders (*i.e.*, striking only portions of S.B. 7 so that the total money appropriated for public education spending can be distributed to the local school districts under the previous school funding provisions), the Court would avoid *all* of the concerns raised by the State in its Motion. The State would be able to “maintain” public schools. *See* State’s Motion, at p. 4. The remedy would comport with K.S.A. 60-2106(d), since not all statutes related to the distribution of funds for public education would need to be enjoined to effectuate such a remedy. *See id.* at 5. Finally, the remedy would give

school districts the ability to comply with federal law, including the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (“IDEA”). Again, the State has signaled that this alternative would be superior to a wholesale shutdown. Plaintiffs certainly agree that – short of constitutional compliance – such a remedy would be preferable and have argued for a similar remedy in prior briefing. *See* Response Brief of Appellees, filed 4-25-16, at pp. 35-36.

Nonetheless, because the deadline for determining whether the State is in compliance with the Kansas Constitution has not yet expired, and because it is still not clear whether the State will be in compliance with the Kansas Constitution on that date, Plaintiffs request this Court deny the State’s premature Motion for Rehearing or Modification.

CONCLUSION

As it has found throughout this case, this Court has the power and the duty to remedy the unconstitutional inequities created and perpetuated by the legislature’s failure to comply with its constitutional duties. Plaintiffs remain hopeful that the legislature, in its special session, will follow the Court’s suggested safe harbor and fully fund the LOB equalization formula as it existed prior to the passage of the CLASS Act. In any scenario, however, the State’s current Motion is premature.

For the reasons stated above, Plaintiffs request this Court deny the State’s premature Motion for Rehearing or Modification. The constitutionality of any remedial legislation enacted by the Legislature during the Special Session and signed by the Governor should be adjudicated by this Court’s precedent and earlier rulings in this case. Plaintiffs respectfully suggest that, at that time, if the Court finds continued noncompliance by the State with its constitutional duties,

the Court should allow further briefing on these issues to allow the Court to craft a remedy that takes into consideration the remedial issues raised in this appeal.

Dated this 17th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

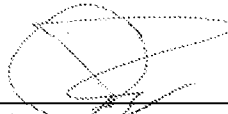
I hereby certify that on this 17th day of June, 2016, I electronically sent the foregoing to:

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