RUTGERS UNIVERSITY LAW REVIEW

VOLUME 71 | ISSUE 5 SUMMER 2019

STATE CONSTITUTIONAL LAW—EDUCATION FINANCE—THE ONGOING BATTLE FOR ADEQUATE SCHOOL FUNDING IN THE STATE OF KANSAS. *GANNON V. STATE*, 390 P.3D 461 (KAN. 2017)

*Caroline DiBartolomeo**

TABLE OF CONTENTS

I. INTRODUCTION

Gannon v. State ("*Gannon IV*") is the fourth decision of the *Gannon* series involving the school districts and the State of Kansas.[1] This case

* J.D. Candidate, Rutgers School of Law, May 2019.

1. Gannon v. State (*Gannon IV*), 390 P.3d 461, 467 (Kan. 2017) (per curiam).

was brought before the Kansas Supreme Court by the public-school districts as a part of the ongoing battle of inadequate school funding against the legislature. In *Gannon IV*, the court considered whether the State's public education financing system complied with the minimum standards of adequacy set forth in the Kansas Constitution.[2] This Comment will provide the history of inadequate education finance in Kansas and the background of the previous *Gannon* decisions leading up to *Gannon IV*. Next, this Comment will discuss the relevant legal issues and the court's analysis of those issues. Furthermore, this Comment will argue that although the *Gannon* series of litigation and the issue of inadequate school funding is far from over, the Kansas Supreme Court made the right decision by continuing to fight for the educational needs of every student in the State of Kansas.

II. HISTORY OF EDUCATION FINANCE IN KANSAS

A. Adequacy of State Funding in Kansas

In 1992, the State of Kansas enacted the School District Finance and Quality Performance Act ("SDFQPA"), which set forth a funding formula and mechanism for which the Kansas school districts obtained funds for K-12 public education.[3] The formula under the SDFQPA set a fixed amount of funding for each student in the public-school system through "base state aid per pupil" ("BSAPP").[4] The two main sources of funding for the BSAPP came from local effort of the school districts and state financial aid.[5] Local effort funds from the school districts were raised primarily from property taxes, but, because property values differed between amongst districts, the less wealthy districts needed additional aid from the State.[6] The State provided a financial aid entitlement known as "general state aid" and, if the district's local effort funds did not equal the amount of financial aid entitlement, the district would be eligible for general state aid.[7] Although local effort and state financial aid made up most of the funds available for K-12 public education, the school districts were able to raise additional funds through additional mill levies on property.[8]

2. *Id.* at 469.
3. *Id.* at 481.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

The structure of funding in the SDFQPA was challenged in the *Montoy v. State* series of cases.[9] When the SDFQPA was first enacted in 1992 the BSAPP was $3600, and the amount gradually increased until the BSAPP reached $3890 in 2002.[10] As a result of the *Montoy II* ruling, the legislature issued a $63.3 million increase in state funding, which increased the BSAPP from $3890 to $4222.[11] The court found the state's increase in funding to be inadequate, and shortly thereafter, the legislature issued a funding increase of $289 million for the 2005–06 school year.[12] In 2006, as a result of the *Montoy III* decision[13] and the Legislative Division of Post Audit studies, the legislature increased funding by an additional $466.2 million for the upcoming three years.[14] This increase provided BSAPP raises from $4257 to $4316 for 2007, to $4374 for 2008, and up to $4433 for 2009.[15] The court found that the state's new finance system complied with the court's previous orders and dismissed the *Montoy* cases.[16]

During the 2009 recession, the State made significant cuts to education funding which reduced the BSAPP to $4012 for the 2010 fiscal year.[17] The decrease in funding continued into the 2011 and 2012 fiscal years, resulting in a decrease in BSAPP down to $3780 and an overall loss of more than $511 million in funding to the public-school districts.[18]

9. *Id.*; *see* Montoy v. State (*Montoy IV*), 138 P.3d 755 (Kan. 2006) (per curiam); Montoy v. State (*Montoy III*), 112 P.3d 923 (Kan. 2005) (per curiam); Montoy v. State (*Montoy II*), 102 P.3d 1160 (Kan. 2005) (per curiam); Montoy v. State (*Montoy I*), 62 P.3d 228 (Kan. 2003). Similar to the *Gannon* cases, the *Montoy* series of litigation began in 2003 when various groups of students, along with two school districts, challenged the State's public education financing scheme. In *Montoy I*, the plaintiffs claimed the financing scheme violated: (1) the requirements under article 6, section 6 of the Kansas Constitution; (2) equal rights protection; and (3) substantive due process rights under the Kansas Constitution. *Montoy I*, 62 P.3d at 230.

10. *Gannon IV*, 390 P.3d at 481.

11. *Id.* at 482. In *Montoy II*, the Kansas Supreme Court held that the State failed to meet its burden under Article 6, Section 6 of the Kansas Constitution to "'make suitable provision for finance' of the public schools." *Montoy II*, 102 P.3d at 1163 (quoting KAN. CONST. art. 6, § 6).

12. *Gannon IV*, 390 P.3d at 482.

13. The Kansas Supreme Court held, in *Montoy III*, that the legislature's recent increase in funding did not bring the school financing formula into compliance with article 6, section 6 of the Kansas Constitution. *Montoy III*, 112 P.3d at 925.

14. *Gannon IV*, 390 P.3d at 482.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

B. The Gannon *Decisions*

In 2010, the first *Gannon* case was filed by the school districts against the State to challenge the constitutionality of school funding under article 6 of the Kansas Constitution on both adequacy and equity grounds.[19] Article 6, the education article of the Kansas Constitution, requires the legislature to "make suitable provision for finance of the educational interests of the State."[20] In *Gannon v. State* ("*Gannon I*")[21] a three-judge panel[22] held that the State violated article 6 of the Kansas Constitution by inequitably and inadequately funding education.[23] The State appealed, and the Kansas Supreme Court affirmed the judgment of the panel in part, reversed in part, and remanded. The court affirmed that article 6 contained an adequacy component, and interpreted the article to include the seven educational "capacities" set forth by the Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*[24] The court determined that the *Rose* standards were the "minimal standards of an adequate public education system" and had been adopted and codified in statute by the Kansas Legislature in 2005.[25]

On remand, the court examined whether the State met the equity and adequacy requirements set forth in the education article of the

19. *Id.* at 467.

20. *Id.* (quoting KAN. CONST. art. 6, § 6(b)); *see also* FRANCIS H. HELLER, THE KANSAS STATE CONSTITUTION: A REFERENCE GUIDE 102 (1992).

21. Gannon v. State (*Gannon I*), 319 P.3d 1196 (Kan. 2014) (per curiam).

22. *Gannon I* consisted of a sixteen-day bench trial, a 21,000-page record, and a 250-page memorandum opinion issued by the panel. *Gannon IV*, 390 P.3d at 467.

23. *Id.*

24. *Id.* at 468 (citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

25. *Id.* (citing *Gannon I*, 319 P.3d at 1236). Section 72-1127 of the Kansas Statutes Annotated has since been changed to section 72-3218. The statute states in relevant part:

> (c) Subjects and areas of instruction shall be designed by the state board of education to achieve the goal established by the legislature of providing each and every child with at least the following capacities: (1) Sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (4) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (6) 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 (7) 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.

KAN. STAT. ANN. § 72-3218 (2014).

Kansas Constitution.[26] Through a series of decisions by the Kansas Supreme Court in *Gannon II*[27] and *Gannon III*[28] and a special session of the legislature, the court resolved the equity issue and held that "the legislative response cured the constitutional inequities confirmed to exist in our previous decisions."[29] On the issue of inadequacy, the panel determined that the financing under the SDFQPA was constitutionally inadequate under the *Rose* standards set forth in *Gannon I*.[30] In response to this ruling, the legislature enacted the Classroom Learning Assuring Student Success Act ("CLASS") in 2015 to replace the SDFQPA.[31]

The legislature enacted CLASS to act as a "block grant" to the school districts, which would "essentially freez[e] K-12 funding levels for fiscal years 2016 and 2017 at the fiscal year 2015 level until the Act expire[d] on June 30, 2017."[32] In the time between the enactment of CLASS and the expiration date, the legislature had to develop and implement a replacement financing formula.[33] The school districts challenged the adequacy of CLASS, arguing that it was "merely an extension of the repealed, underfunded, and unconstitutional SDFQPA."[34] On the second remand, the panel found that CLASS failed to improve the inadequacy of funding and was therefore unconstitutional for substantially the same reasons the court had deemed SDFQPA to be unconstitutional.[35] The State appealed, thus bringing us to the current case, *Gannon IV*.

III. STATEMENT OF THE CASE

In *Gannon IV*, the State set forth five claims relating to the decisions of the panel:

> (1) that the panel did not have jurisdiction to adjudicate the constitutionality of CLASS; (2) the state's compliance with Article 6 is a nonjusticiable political question; (3) the panel erred in not reopening the trial record and admitting additional

26. *Gannon IV*, 390 P.3d at 468.
27. Gannon v. State (*Gannon II*), 368 P.3d 1024 (Kan. 2016) (per curiam).
28. Gannon v. State (*Gannon III*), 372 P.3d 1181 (Kan. 2016) (per curiam).
29. *Gannon IV*, 390 P.3d at 468. The issue of inequity is the primary focus of *Gannon II* and *Gannon III*, while the primary focus of this case, *Gannon IV*, is inadequacy.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 470.
35. *Id.* at 468.

> evidence; (4) the panel's memorandum and order of December 2014 failed to adequately set out its findings of fact and conclusions of law pursuant to [section 60-252(a) of the Kansas Statutes Annotated]; and (5) the panel erred in holding that the state's K-12 public education financing system under CLASS is constitutionally inadequate.[36]

The Kansas Supreme Court rejected the State's claims and affirmed the panel's decision that CLASS was constitutionally inadequate and did not satisfy the *Rose* standards under the *Gannon I* test.[37] In regards to remedy, the court decided to afford the State an opportunity to improve the financing system and bring it into compliance with article 6 by June 30, 2017.[38] The State has the burden to address and cure the constitutional violations.[39] The *Rose* standards set forth in *Gannon I* are the minimum standards, and the choice to exceed those minimum standards is left in the hands of the legislature.[40] The court emphasized that once the State satisfies the minimum standards set forth in *Gannon I*, the court's role in the matter ends.[41]

IV. THE COURT'S REASONING

In support of its decision, the Kansas Supreme Court first focused on the compelling evidence that was brought forth by the plaintiffs, and then proceeded to address both the procedural and substantive claims from the State. The court found that CLASS did not implement a change that differed from that of SDFQPA because CLASS only froze the school's funding at the prior year's level.[42] CLASS was also minimally responsive to increased enrollment in the State's public schools.[43] The court concluded from the evidence produced by the school districts at trial and updated standardized testing scores that "the State fail[ed] to provide approximately one-fourth of all its public school K-12 students with basic skills of both reading and math . . . [and left]

36. *Id.*
37. *Id.* at 468–69.
38. *Id.* at 469. The court stated that its "general practice with previous school finance decisions has been to retain jurisdiction and continue to stay the orders of the panel and our own mandate to provide the legislature an opportunity to bring the state's education financing system into compliance with Article 6 of the Kansas Constitution." *Id.*
39. *Id.*
40. *Id.* at 469–70.
41. *Id.* at 469.
42. *Id.* at 468.
43. *Id.*

behind significant groups of harder-to-educate students."[44] Statistics from the 2015–16 school year showed that nearly one-half of African-American students (approximately 15,000) and one-third of Hispanic students (approximately 33,000) were not proficient in reading and math.[45] Additionally, more than one-third of the students who receive free and reduced lunches in the State's public schools were not proficient in math and reading.[46] According to the court, the plaintiffs proved by substantial evidence the correlation between funding levels and academic performance.[47]

The court addressed the five issues that the State brought before the court on appeal and ultimately held that: (1) the panel had jurisdiction to consider the constitutionality of CLASS;[48] (2) the State's compliance with article 6 of the Kansas Constitution did not constitute a nonjusticiable political question;[49] (3) the panel did not abuse its discretion by not reopening the record on remand;[50] (4) the panel's memorandum and order satisfied the statutory requirements;[51] and (5) the State's public education financing system, CLASS, "through its structure and implementation, is not reasonably calculated to have all Kansas public education students meet or exceed the minimum constitutional standards of adequacy."[52]

A. The Panel Had Jurisdiction to Adjudicate the Constitutionality of CLASS

The court rejected the State's argument that the panel did not have jurisdiction to make a ruling on CLASS when CLASS was passed after the remand decision in *Gannon I*.[53] The school districts requested that the panel enjoin CLASS's operation because it failed to improve the inadequacies of SDFQPA.[54] The State asserted that if the school districts wanted to challenge the new law, the court must require the plaintiffs to amend their pleadings and introduce evidence supporting their challenge of CLASS.[55] The State argued that the funding element

44. *Id.* at 469.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 471.
49. *Id.* at 472.
50. *Id.* at 475.
51. *Id.* at 478.
52. *Id.* at 469.
53. *Id.* at 471.
54. *Id.*
55. *Id.*

of CLASS was different from that of SDFQPA, and therefore the panel did not have the authority to declare CLASS as unconstitutional.[56] The court rejected the State's jurisdictional argument on the ground that CLASS did not present a "substantial shift" in the law and was essentially an extension of SDFQPA.[57] In citing to past school finance rulings, the court noted that it has "continuing jurisdiction over legislation passed subsequent to, or as a remedy for, an order declaring the preceding law unconstitutional."[58] CLASS was passed as a result of the panel's judgment holding SDFQPA unconstitutionally inadequate and, therefore, the panel had the authority to exercise jurisdiction over CLASS to determine if it properly remedied the inadequacies of SDFQPA.[59]

B. The Legislature's Compliance with Article 6 Is a Justiciable Issue

As the court previously rejected in *Gannon I*, the State asserted that compliance with article 6 of the Kansas Constitution is a nonjusticiable political question.[60] In *Gannon I*, the court held that "whether the legislature has made suitable provision for the finance of the State's educational interests under Article 6 was not a political question and was therefore justiciable."[61] The State continued to argue that the legislature's duty under article 6 is outside the scope of the court's authority and specifically pointed to the *Rose* standards adopted in *Gannon I*, arguing that the standards are "'not judicially manageable' and are 'extremely nebulous and vague.'"[62] The court rejected the State's argument and cited to supreme courts outside of the State's jurisdiction, as well as Kansas's own history in school finance litigation, in support of its conclusion.[63] The court found that a majority of supreme courts have held that the education article in their own state constitutions was a justiciable issue.[64] Additionally, the court

56. *Id.*
57. *Id.* at 472 (citing *Gannon II*, 368 P.3d 1024, 1041 (Kan. 2016)).
58. *Id.*
59. *Id.*
60. *Id.* at 472–73.
61. *Id.* at 472.
62. *Id.* at 473.
63. *Id.* at 473, 475.
64. *Id.* at 473 ("[C]ourts are frequently called upon, and adept at, defining and applying various, perhaps imprecise, constitutional standards. The Texas Supreme Court in Neeley [v. West Orange-Cove, 176 S.W.3d 746 (Tex. 2005)] observed that disagreements about the meaning of the state constitutional language 'are not unique to the [state's education clause]; they persist as to the meanings and application of due course of law, equal protection, and many other constitutional provisions.'" (second and third alterations in original) (quoting *Gannon I*, 319 P.3d 1196, 1228 (Kan. 2014))).

pointed to Kansas's own history in school finance litigation and stated that "our court would not previously have established procedures for the trial court and counsel to follow when handling any 'suitable provision' for finance claims if indeed 'there were no manageable standards for the courts to apply.'"[65]

The State contended that the *Rose* standards are vague, which demonstrates the existence of a nonjusticiable political question; however, the Kansas Legislature codified the *Rose* standards and "expressly required the State Board of Education (SBE) to develop curriculum to meet those seven goals."[66] The court cited to the language of the statute, which provides that "[s]ubjects and areas of instruction shall be designed by the state board of education to achieve the goal established by the legislature of providing each and every child with at least the following capacities [the *Rose* standards]."[67] The court pointed out that this statutory language demonstrates the legislature's acknowledgement that the State Board of Education "is capable of understanding, measuring, and implementing the *Rose* educational goals in order to meet its important statutory duty."[68] This leads to the conclusion that the *Rose* standards are not "extremely nebulous and vague," which completely undermines the State's argument that a nonjusticiable political questions exists.[69]

The court's conclusion is also supported by the language of CLASS, which designates the *Rose* standards as part of the legislature's "guiding principles for the development of subsequent legislation for the finance of elementary and secondary public education."[70] The State failed to produce any evidence to show that, because the court adopted the *Rose* standards as the minimum standards for compliance, the requirements of article 6 are less "judicially manageable."[71] The court held that the legislature's compliance with article 6 of the state constitution is a justiciable question and thus falls within the scope of the court's authority.[72]

65. *Id.* (quoting *Gannon I*, 319 P.3d at 1226).
66. *Id.* at 474.
67. *Id.* (quoting KAN. STAT. ANN. § 72-3218(c) (2014) (formerly cited as KAN. STAT. ANN. § 72-1127)).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 475.
72. *Id.*

C. The Panel Did Not Abuse Its Discretion in Refusing to Reopen the Record and Admit Additional Evidence on Remand

The court held that the panel's decision not to reopen the record and formally admit additional evidence brought forth by the State was not an abuse of discretion.[73] On remand from the judgment in *Gannon I*, the panel concluded that it would only review the existing trial record made up of 21,000 pages, with the exception of updated data concerning statewide district budgets and student performance statistics.[74] The State asserted that the panel erred in their decision not to allow additional evidence into the record and further erred by subsequently ruling on the adequacy of the State's funding system without admitting the current statistics into evidence.[75] The State provided various statistical data concerning past and current funding and local option budget funds, as well as information related to how other state programs addressed the *Rose* standards.[76] Additionally, the State presented various subject proficiency levels in both the districts and state and a breakdown of student demographic categories.[77] The panel reviewed the information submitted by the State and subsequently determined that the submissions did not provide any specific facts or issues that were of significance to the court to change their original judgment.[78]

The State challenged the panel's decision, arguing that "the panel should not have taken judicial notice of facts or information without allowing the parties to contest them."[79] More specifically, the State argued that the panel should not have considered the statistics on student proficiency scores from the 2012–13 school year because the validity of the standardized testing results from that particular year were disputed.[80] The standard of review for a case on appeal is abuse of discretion and, more specifically, "[w]hether [the] trial court erred in refusing to permit a party to reopen a case to introduce additional evidence . . . ."[81] The abuse of discretion standard is well established in

73. *Id.* at 478.
74. *Id.* at 475.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 475–76.
81. *Id.* at 476.

Kansas.[82] The party alleging abuse of discretion must prove that the judicial action is:

> (1) arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would take the view adopted by the trial court; (2) based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) based on an error in fact, *i.e.*, substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based.[83]

The court noted that the State did not specifically allege one of the three categories of abuse of discretion, but the State appeared to argue that no reasonable person would have agreed with the decision of the panel.[84] The panel contested this claim and stated that, although the panel focused primarily on the existing record, it did take judicial notice of the public information concerning funding and student proficiency levels.[85] The panel reviewed the evidence offered by the State and ultimately determined it to be unpersuasive and not significant enough to influence the panel's decision.[86]

Contrary to the State's argument, the proficiency scores from the 2012–13 school year were not in "dispute" as defined by section 60-409(b) of the Kansas Statutes Annotated.[87] The statute states that "[j]udicial notice may be taken without request by a party, of . . . (4) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination *by resort to easily accessible sources of indisputable accuracy*."[88] The State did not dispute the accessibility or accuracy of the record of test results themselves—instead, the State just claimed that the scores were not an accurate depiction of the student performance that year and, therefore, should not be considered by the panel.[89] The court rejected the State's argument, concluded that the panel thoroughly reviewed the record along with additional evidence, and found the evidence brought forth by the State to be unpersuasive.[90] The Kansas Supreme Court held that

82. *Id.*
83. *Id.* (quoting State v. Davisson, 370 P.3d 423, 425 (Kan. 2016)).
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 477.
88. *Id.* (quoting KAN. STAT. ANN. § 60-409(b) (2014)).
89. *Id.*
90. *Id.* at 478.

the panel had the authority on remand to decide whether to reopen the record and admit additional evidence, and it found that the panel did not abuse its discretion in deciding not to reopen the record.[91]

D. The Panel's Memorandum and Order Satisfied the Requirements of Section 60-252(a) of the Kansas Statutes Annotated

The State claimed that the panel failed to separately set out findings of fact in the *Gannon I* decision, which is required under section 60-252(a) of the Kansas Statutes Annotated.[92] The court noted one of the purposes of the statute is to "benefit . . . this court in facilitating appellate review."[93] Accordingly, the court cited to its previous statement that the statute requires the findings to be "sufficient to resolve the issues, and in addition they should be adequate to advise the parties, as well as the appellate court, of the reasons for the decision and the standards applied by the court which governed its determination and persuaded it to arrive at the decision."[94]

The court concluded that the State's claims had no merit and pointed specifically to the extensive record that was developed by the panel in the *Gannon I* ruling.[95] The State failed to prove that the *Gannon I* decision prevented the court from being able to "meaningfully review the panel's findings and conclusions."[96] The *Gannon I* judgment consisted of a 117-page decision resulting from a 16-day bench trial and 21,000 pages.[97] The court deferred to the judgment of the panel to readopt the findings of fact and found no fault in the panel's decision not to address specifically every piece of submitted evidence or expand on its decision.[98]

91. *Id.*

92. *Id.* at 478. The statute states:

> *Findings and conclusions*. (1) *In general*. In an action tried on the facts without a jury or with an advisory jury or upon entering summary judgment, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of evidence, or may appear in an opinion or a memorandum of decision filed by the court.

Id. at 479 (quoting KAN. STAT. ANN. § 60-252(a)(1) (2014)).

93. *Id.* at 480 (quoting Henrickson v. Drotts, 548 P.2d 465 (Kan. 1976)).

94. *Id.* (quoting Andrews v. Bd. of Cty. Comm'rs, 485 P.2d 1260, 1266 (Kan. 1971)).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

E. CLASS Failed to Comply with the Adequacy Requirement Under Article 6 of the Kansas Constitution

The Kansas Supreme Court affirmed the panel's conclusion that "the Kansas [public] financing system currently provided by the legislature for grades K-12 was not reasonably calculated through structure and implementation to have all public education students meet or exceed the *Rose* standards."[99] The State argued that "the panel (1) failed to apply the proper adequacy test; (2) failed to afford the proper deference to the legislature's policy decisions; (3) improperly shifted the burden of proof; and (4) reached the wrong conclusion."[100]

The court first pointed out that the legislature "has the power—and duty—to create a school funding system that complies with Article 6 of the Kansas Constitution."[101] The court reiterated that the *Gannon I* decision resulted in the adoption of the *Rose* standards as the minimum standards of adequacy.[102] In *Rose v. Council for Better Education., Inc.,* the Supreme Court of Kentucky set forth the following seven capacities to be provided to every child in order to reach an adequate standard of education:

> (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.[103]

99. *Id.* at 482–83.
100. *Id.* at 483.
101. *Id.*
102. *Id.*
103. *Id.* at 483–84 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

The *Rose* standards were adopted not only by the Kansas Supreme Court, but by the Kansas Legislature as well.[104]

The State argued that the panel applied the improper adequacy test, and instead should have applied a test where the panel gave the legislature deference in order to evaluate the constitutionality of the public education system.[105] The court found that when reviewing legislative compliance under article 6, the State is not entitled to "virtually conclusive deference."[106] In rejecting the State's argument, the court pointed to the history of Kansas school finance litigation, which "shows that the people have empowered the judiciary with determining whether the State has met the requirements of the constitution's education article."[107]

The court found that the structure and implementation of CLASS violated article 6 of the Kansas Constitution.[108] The structure of CLASS was unconstitutional because it was not a sufficient replacement finance formula and was minimally responsive to increased enrollment in the school districts.[109] The court pointed to the governor's statements concerning the replacement of SDFQPA, which showed that CLASS was created to "merely freeze the K-12 funding levels for fiscal years 2016 and 2017 at the levels for fiscal year 2015."[110] The court turned next to the implementation of CLASS and whether the test for adequacy set forth in *Gannon I* was met.[111] To determine whether the implementation of the financing system was adequate, the court looked at both inputs (funding) and outputs (student achievement).[112] The court pointed to the state supreme courts in Arkansas, Kentucky, and Ohio in support of this "dual approach of examining inputs and outputs."[113]

104. *Id.* at 484.
105. *Id.*
106. *Id.*
107. *Id.* at 484; *see also Gannon I*, 319 P.3d 1196, 1235 (Kan. 2014) ("Just as only the people of Kansas have the authority to change the standards in their constitution, the Supreme Court of Kansas has the final authority to determine adherence to the standards of the people's constitution."); *Montoy III*, 112 P.3d 923, 930 (Kan. 2005) ("[T]he final decision as to the constitutionality of legislation rests exclusively with the courts.").
108. *Gannon IV*, 390 P.3d at 488.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* (first citing Lake View v. Huckabee, 91 S.W.3d 472 (Ark. 2002) (looking to level of expenditures for student education, resources available to the school districts, and various student educational benchmarks); then citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197–98 (Ky. 1989) (examining the quality of curricula—including music, art, and foreign language courses); and then citing DeRolph v. State, 677 N.E.2d

In the court's analysis of inputs and outputs, the court first concluded that the findings of the panel in *Gannon I*—that the State's financing formula was unconstitutionally inadequate—was supported by substantial, competent evidence.[114] The panel in *Gannon I* rejected local option budget ("LOB") funds and federal funds as sources of funding for adequacy under article 6.[115] Since those sources were not included, the panel found that the present funding for K-12 public education was less than the floor, and thus unconstitutionally inadequate.[116] The panel found that while the costs and demands on public education had been increasing since 2007, the State reduced the BSAPP funds to $3780.[117] This reduction was in "direct opposition to the recommendations of several expert bodies," including the Legislative Division of Post Audit and the Kansas State Board of Education which had recommended that the BSAPP actually be increased to $4492.[118]

As a result of the decrease in funding, the school districts had to eliminate school programs, including arts, music, and sports that were "directly beneficial to the achievement of the *Rose* standards."[119] Additionally, the budget cuts in 2009 forced the school districts to cut 1,567 teaching positions.[120] The State asserted that outputs of student achievement results, and not funding inputs, are the most important consideration for adequacy.[121] However, the court disagreed and felt that it could not disregard the panel's findings "detailing the loss of vital resources and its additional finding that this occurred as a result of cuts to state funding through reductions in BSAPP levels."[122]

The State provided evidence, including standardized testing scores, college entrance exams, and graduation rates, which demonstrated great improvement in student performance, particularly in math and reading, from the 2003–04 school year until the 2011–12 term.[123] When the court took note of these improvements, however, it became clear that this period of increased achievement occurred during a period of increased funding and, predictably, student performance declined in

733 (Ohio 1997) (looking at school building deficiencies, lack of funds for textbooks, and test performances)).

114. *Id.* at 489.
115. *Id.* at 490.
116. *Id.* at 489–90.
117. *Id.* at 491.
118. *Id.*
119. *Id.* at 491–92.
120. *Id.* at 492.
121. *Id.* at 494.
122. *Id.*
123. *Id.* at 494–95.

2011–12 once the State decreased its funding.[124] During the 2011–12 school year, 12.4% of all Kansas students in all grade levels did not meet Kansas's own minimum proficiency standards in reading.[125] Between 2011 and 2016, the percentage of African-American students who did not meet the reading proficiency standards increased from 28.9% in 2011–12 to 44.7% in the 2015–16 school year.[126] The percentage of Hispanic students who did not meet reading proficiency standards also increased from 22.1% in 2011–12 to 36% in 2015–16.[127] Additionally, the standardized testing results for math show very similar statistics.[128]

The court found that the State of Kansas failed to provide nearly one-fourth of all public-school K-12 students with the basic skills of math and reading.[129] The court agreed that "[b]ased upon [the panel's] finding that a correlation existed between funding and achievement . . . the inadequacy was caused by underfunding."[130] In accordance with the panel's ruling, the Kansas Supreme Court concluded "as a matter of law that through its implementation, CLASS [was] not reasonably calculated to have all Kansas K-12 public school students meet or exceed the *Rose* standards."[131]

V. ANALYSIS AND IMPLICATIONS

Although the Kansas Supreme Court reached the right decision in *Gannon IV*, this decision does not mark the end of the ongoing battle for adequate school funding in Kansas. The *Gannon* series of cases represent the court's fight for adequate funding for all K-12 students in the public-school districts but exposes the conflict that exists between the court and the legislature. This section of the Comment will address the impact that this decision has had on the State of Kansas and how the *Gannon* decisions are just one part of the national question of inadequate state funding to public schools.

Since the *Gannon IV* decision, the Kansas Supreme Court has ruled twice more on this issue of inadequate school funding. In both of these subsequent cases, *Gannon V*[132] and *Gannon VI*,[133] the legislature failed,

124. *Id.* at 495.
125. *Id.* at 496.
126. *Id.*
127. *Id.*
128. *Id.* at 497.
129. *Id.* at 497–98.
130. *Id.* at 500.
131. *Id.* at 501.
132. Gannon v. State (*Gannon V*), 402 P.3d 513, 539 (Kan. 2017) (per curiam).

yet again, to meet the requirements for adequate school funding. Following the March 2017 ruling in *Gannon IV*, the legislature enacted Senate Bill ("S.B.") 19 which included "appropriations, several revenue raising features, and a formula for distributing money," as well as laws concerning education policies for Kansas.[134] S.B. 19 set forth the new financing formula, the Kansas School Equity and Enhancement Act ("KSEEA"), for K-12 public education.[135] Under S.B. 19, the "[b]ase aid for student excellence" or "BASE aid" for the 2017–18 school year is $4006 and $4128 for the 2018–19 school year.[136] In *Gannon V*, the court rejected the State's "successful schools" model and found the State did not establish a valid rationale for its BASE calculations.[137] The court rested its conclusions on the fact that the State failed to show that its public education financing system "is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*."[138] The court gave the State until June 30, 2018, to bring the public school financing formula into compliance with article 6 of the Kansas Constitution.[139]

Following the June 30, 2018 mandate in *Gannon V*, the legislature responded by enacting S.B. 423 and S.B. 61.[140] Despite the State's attempt to remedy the funding problem, the court found that the new financing plan failed to "adjust two years of funding for inflation through the approaching 2018–19 school year" and to "adjust for inflation until the memo's calculated principal sum . . . is paid in full."[141] The court found that the State had still not met the adequacy requirements set forth in article 6 of the Kansas Constitution.[142]

The Kansas Supreme Court's most recent decisions seem to be a bittersweet victory for the Kansas school districts. While the court continues to force the legislature's hand to implement a financing system that will provide every student with an adequate education, the school districts have been in this position before. The burden and frustration of this continuous litigation is not just on the State and the court; it greatly affects all of the students, families, teachers, and employees within every school district in Kansas. After the *Gannon V*

133. Gannon v. State (*Gannon VI*), 420 P.3d 477, 491 (Kan. 2018) (per curiam).
134. *Gannon V*, 402 P.3d at 521.
135. *Id.*
136. *Id.* at 522.
137. *Id.* at 529, 531.
138. *Id.*
139. *Id.* at 518.
140. *Gannon VI*, 420 P.3d 477, 480 (Kan. 2018) (per curiam).
141. *Id.* at 494.
142. *Id.* at 480.

ruling, Kansas City Superintendent Cynthia Lane stated, in reference to the school districts, "[w]e're pleased and hopeful, but we've been here before . . . . We're a little bit cautious because we've experienced these things several times over the last decade."[143] Within the past eight years, the Kansas City school district has had to cut $55 million, which according to the superintendent, has "dramatically affect[ed] the district's ability to retain teachers, expand early education resources and support a high school career and college readiness program."[144] It is clear that the students have been suffering the most throughout this eight-year *Gannon* litigation and all the way back to the *Montoy* series of cases in the early 2000s.

The tension between the Kansas Supreme Court and the legislature has grown stronger with each *Gannon* decision. Time and time again, the court has expected the State to bring forth a solution to cure the inadequate funding problem, but the State has failed to do so. The court made its position clear:

> Suffice it to say that in our view the Kansas K-12 public education system has been inadequately funded for far too long. Including today's decision, by our count inadequacy has been judicially declared to exist from school years 2002-2003 through 2018-2019 . . . .
>
> With that regrettable history in mind, while we stay the issuance of today's mandate through June 30, 2018, after that date we will not allow ourselves to be placed in the position of being complicit actors in the continuing deprivation of a constitutionally adequate and equitable education owed to hundreds of thousands of Kansas school children.[145]

This tension is not solely the fault of the State's failed legislation; the tension comes from the separation of powers between the judicial and legislative branches in education finance adequacy litigation.[146] The

143. Hunter Woodall & Katy Bergen, *Kansas Supreme Court Rules New School Finance Formula is Unconstitutional*, KAN. CITY STAR (Oct. 2, 2017), http://www.kansascity.com/news/politics-government/article176606731.html.

144. *Id.*

145. *Gannon V*, 402 P.3d 513, 552–53 (Kan. 2017) (per curiam).

146. Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 746 (2010) ("[T]here clearly are differences in the ways in which states have applied separation of powers doctrine in education finance adequacy litigation. As Table 2 shows, almost a third (8/26) of the highest courts in states where these challenges have been brought have dismissed them on explicit separation of powers grounds. The other

court has ruled after each *Gannon* case that the funding formula is unconstitutionally inadequate but does not set forth guidelines as to how the State can actually attain adequacy. The court reiterated what it has said in previous *Gannon* decisions that "[w]e do not dictate to the legislature how it should constitutionally fund K-12 public school education; we only review its efforts to ensure they do not run afoul of the Kansas Constitution."[147] The rulings of *Gannon IV*, *Gannon V*, and *Gannon VI* all point back to the *Rose* standards that were adopted by the court in *Gannon I*.[148]

The court has made it clear that the *Rose* standards, set forth by the Kentucky Supreme Court in 1989, are the minimum standards of an adequate education.[149] The *Rose* standards list seven goals of proficiency for all students, including: (1) sufficient communication skills; (2) knowledge of economic, social and political systems; (3) understanding of governmental processes; (4) self-knowledge of mental and physical wellness; (5) knowledge in the arts; (6) preparation for advanced training; and (7) sufficient levels of academic or vocational skills.[150] After the *Rose* decision, other state courts looked inward at their own education clauses to address the question of adequacy.[151] These seven standards cover all aspects of a student's education, and it seems that they have become the aspirational goals that each state should work to achieve. In the *Gannon* decisions, the constitutionality of the State's finance formula was dependent on whether it satisfied the *Rose* standards. This ongoing conflict between the court and the

roughly two-thirds have engaged in some level of adjudication and remediation. Several of these latter courts follow what has been termed a dialogic approach, adjudicating the merits of the alleged constitutional violation but abstaining from the remedial phase, sometimes merely stating that a constitutional violation exists and other times both identifying a violation and providing the legislature with clues to guide, but not compel, its remediation.").

147. *Gannon IV*, 390 P.3d 461, 502 (Kan. 2017) (quoting *Gannon III*, 372 P.3d 1181, 1189 (Kan. 2016)); *see also Gannon II*, 368 P.3d 1024, 1056–57 (Kan. 2016) ("We . . . reaffirm[] the legislature's power and duty to create a school funding system . . . . [W]e have also consistently affirmed our own power and duty to review legislative enactments for constitutional compliance . . . .").

148. *Gannon IV*, 390 P.3d at 467–68.

149. *Id.* at 468.

150. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

151. *See* Bauries, *supra* note 146, at 722 ("Beginning in the early 1990s, and in response to the then-recently decided landmark case of Rose v. Council for Better Education in Kentucky, which many credit as ushering in the 'adequacy' theory as the dominant one, scholars began to examine whether the newly-ascendant adequacy-based suits would prove more effective than the previously dominant suits presenting equity-based theories of relief." (footnote omitted)).

legislature is centered around the *Rose* standards. The question remains: how does a state actually reach that goal?[152]

VI. CONCLUSION

The Kansas Supreme Court in *Gannon IV* held that the funding formula enacted by the legislature did not comply with the *Rose* standards and article 6 of the Kansas Constitution and was, therefore, constitutionally inadequate. The court found that the legislature failed to provide nearly one-fourth of all public-school K-12 students with the basic skills of math and reading. The decreased student performance levels between the 2011–12 school year and the 2015–16 school year were directly related to underfunding by the State. In its fourth decision in the *Gannon* series, the Kansas Supreme Court reached the correct conclusion by continuing to make students' need for an adequate education a top priority.

152. Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2254–55 (2003) ("The *Rose* decision initiated the current wave of education article cases with a decision requiring the state to improve seven outputs. Even advocates of adequacy challenges have questioned the basis upon which *Rose* listed these outputs. . . . While the *Rose* criteria may form an attractive statement of school policy goals, it is difficult to connect them to state educational clauses. . . . Although quantifiable tests may create relatively easy means for courts to identify inadequacy, they will find themselves without satisfactory remedies for inadequate schools. Faced with chronic inadequacy in particular schools, a court could order the state to increase test scores, but would have no basis for ordering any particular steps to reach that goal.").