

Moving Beyond Constant Litigation: Principles for a Legislative Response to *Gannon V*

Once again, the Kansas Supreme Court has found the existing K-12 education finance law unconstitutional. The Court declared in *Gannon V* that SB 19, known as the Kansas School Equity and Enhancement Act (KSEEA), failed to meet the requirements found in Article 6 of the Kansas Constitution providing for school finance. Specifically, the Court said “the state’s public education financing system still has not been shown by the State to be ‘reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*...’”

Over the near decade-long *Gannon* journey, the Court has continually set a moving target. Initially, the justices moved away from measuring constitutionality based on total dollars, as they did in the final *Montoy* decision in 2005. In the first *Gannon* decision, the Court said the constitutional test was all about student outcomes and not dollars spent. However, in the most recent opinion, the justices made the presumptive declaration that SB 19 is not “reasonably calculated,” largely because the base state aid element of the new formula is lower than it was in 2008. The Court chose to ignore the fact that total funding to K-12 education continues to grow and set records. The justices stopped short of giving a specific number but they strongly stated that more money is needed to pass a constitutional test. They cited other “calculations” that range from \$893 million to \$1.7 billion – annually – as being in the record as what the Court calls “new money needed.”

The Court established hard deadlines through 2018 to provide this remedy. Both the State and the plaintiffs are to file briefs “addressing any legislative remedies” no later than April 30. Oral arguments will be conducted on May 22 and the Court has given themselves until June 30 to communicate what will be *Gannon VI*.

The Court has left the Legislature with a daunting task. Absent any specific remedy, the Legislature, in order to comply with

the Court, must analyze, interpret, and synthesize the *Gannon V* ruling. Then they will have to turn that into legislation that will be debated, amended, and ultimately approved at committee levels and by both chambers of the entire legislative body.

Kansas Policy Institute believes the Legislature should put certain principles front and center when crafting a new law that meets the “reasonably calculated” standard prescribed by the Court. Legislators should keep in mind that, contrary to claims by the Court and the education lobby, the volume of money does not drive outcomes. The Court relied on the 2006 Legislative Post Audit (LPA) study¹ to draw what they believe to be a correlation between spending and outcomes. However, missing from this position is that LPA themselves qualified their conclusions on the relationship between money and outcomes with this statement:

“Educational research offers mixed opinions about whether increased spending for educational inputs is related to improved student performance. Well-known researchers who have reviewed that body of research have come to opposite conclusions. Likewise, individual studies of specific educational inputs we reviewed sometimes concluded additional resources were associated with improved outcomes, and sometimes concluded they weren’t. Because of perceived shortcomings in many of the studies that have been conducted in these areas, many researchers think more and better studies are needed to help determine under which circumstances additional resources actually lead to better outcomes.”²

Regardless of the LPA study, there is no research that provides evidence that adding more money will cause student outcomes to increase.

Here are four principles KPI believes should be part of a response to the latest *Gannon* ruling and a foundation of public school financing in Kansas.

Principle 1 — The legislative response must contain provisions for schools to remain open so students can continue to get an education regardless of Court directives. The Courts cannot be allowed to deny the students of Kansas an education based on a subjective interpretation of the state constitution.³

- a. The Court must be prevented from shutting off the flow of money to the schools by authorizing the Department of Administration or Division of the Budget to pay schools if necessary.
- b. In the event local school boards choose not to open in response to a Court-ordered shutdown, allow students in those districts to go elsewhere with a public-funded scholarship. One way this could be accomplished is through arrangements similar to those found in New England states dating from the 1800s.⁴

Principle 2 — The Legislature should take to heart the Court's statement that there are "literally hundreds of ways" to create a K-12 funding law that passes constitutional muster by changing the basis of education funding.

- a. The new law should not be made in the image of the 1992 School District Finance and Quality Performance Act (SDFQPA), as was SB 19. The Court rejected SB 19 – one based upon a foundation of per-pupil base state aid, supplemented with a complex series of student weightings – because they viewed it as a redux of SDFQPA, but with a lower per-pupil base state aid, even though the latest KSDE data show that total per-pupil funding levels continue to set records.⁵ Given the opinion in *Gannon V*, if the new law is simply a beefed-up version of SB 19, the Court will likely once again base its constitutionality on a financial comparison to SDFQPA. In short, submitting a new formula based on the 1992 law allows the court to reject it again unless upwards of \$1 billion more is added.
- b. An alternative approach to SDFQPA, such as the one found in HB 2347 introduced in 2017, prevents misleading comparisons to the old formula. It employs a model rooted in funding cost centers, including: instruction, student support, staff support, administration, and operations/maintenance based on varying per-pupil levels. It represents a fundamental change from per-pupil funding found in SDFQPA.

- i. There was little, if anything, 'reasonably calculated' about SDFQPA. What's more, there was no focus on outcomes approaching specific goals. Indeed, the Legislature was repeatedly criticized in the *Montoy* and earlier *Gannon* proceedings for having no rational basis for its funding decisions. SB 19 differed from the old formula in that an attempt was made to "reasonably calculate" the base of the formula, using a version of the Successful Schools Model, but was otherwise very similar in structure and money to SDFQPA.
- ii. The formula proposed in HB 2347 is essentially an honest version of the Augenblick & Myers' (S&M) Successful Schools Model. A&M was supposed to identify districts that were academically successful and base funding recommendations upon the subset of those districts that were also efficient spenders. Instead, A&M deviated from their own methodology and ignored efficiency.⁶ The formula for calculating Enrollment State Aid Per-Student in Section 5 of HB 2347 is, in our opinion, a reasonable method of calculating funding that meets the Supreme Court test of adequacy.

Principle 3 — The new law should hold schools accountable for improving student achievement by employing an incentive and consequence approach to support this end.

- a. There should be financial incentives for schools that meet defined student achievement outcome goals. State assessment scores or reaching improvement targets in some other determined student-based outcome measure are examples of such measurements.
- b. There should be academic choice opportunities for students stuck in chronically low-performing schools. The new law should allow students in failing schools to escape with a state-funded scholarship to go elsewhere.

Principle 4 — The new law must include spending accountability and contain a mechanism for spending oversight.

- a. As recommended in the state efficiency audit,⁷ a cap should be placed on districts' operating carry-over cash balances, with excess balances deducted from state aid payments. Statewide carry-over cash balances in 2017 set another record with an excess of \$928 million, which is nearly double the amount in 2005. Much of that carry-over could be spent in the classroom instead of being held back in a particular account.
- b. At-risk dollars, the largest source of targeted funding, should be directed to those truly academically at-risk

students. The use of at-risk funds by local districts is emblematic of the larger issue of accountability. As KPI revealed in a 2015 report,⁸ the hundreds of millions of at-risk dollars spent annually has failed to increase the achievement of at-risk students. The primary reason for this is that schools are not held accountable for actually targeting the money toward those students. Schools have been allowed to use at-risk funding as if it were nothing more than a supplement to per-pupil base state aid. The new law should tighten up the program to assure the money is spent on those truly at academic risk. Several changes should be included in the new law to accomplish this:

- i. Census poverty data should supplant the school lunch program as the basis for at-risk funding. The Census data is a much better proxy, and an independent metric, for the real number of low-income students in a district and would distribute the funds more effectively.
- ii. The current definitions used to identify at-risk students who receive additional academic support should be discarded and redefined. The criteria should stipulate that only those truly academically at-risk receive additional services. The current definition allows schools to spend at-risk money on students who are not scholastically challenged.
- iii. The program needs to be more transparent. Current at-risk funding is about \$400 million per year with no public reporting of how the money is spent to reduce income-based achievement gaps, which is the stated goal of the program. Taxpayers and decision makers deserve to know how that money is being spent.
- iv. The new law should include financial incentives for those districts successful in using at-risk dollars to reduce income-based achievement gaps. Again, reducing income-based achievement gaps is the fundamental objective of the program.

CONCLUSION

Ultimately, legislators should recognize that Kansas continues to muddle along, with student achievement about average in a country in which student outcomes are far too low. In the 2017 state assessments, less than one in four 11th graders are college/career ready in math and only 30% of those students are college/career ready in English language arts (ELA). A mere 29% are considered college ready from ACT scores. Along with that fact is the reality that achievement gaps are unacceptably universal, significant and persistent. While about half of non-low-income students are college/career ready in ELA, only one in six of low-income students achieve that status. While 35% of white students are college ready according to ACT, only 6% of black students and 14% of Hispanic students meet the same ACT definition. Simply put, income-based achievement gaps are too big and are not getting any smaller, despite record spending on education in Kansas, which now is closing in on \$14,000 per-pupil. As the Legislature prepares to fashion yet another school finance law, they should keep this question in mind: How will this law improve student outcomes and close achievement gaps?

ENDNOTES

1 <http://www.kslpa.org/assets/files/reports/05pa19a.pdf>

2 *Ibid.*, p. 107

3 After the Court threatened school closure in 2005 in Montoy, legislators and Gov. Sebelius took the statutory initiative to protect schools from being closed - KSA 60-2106 (72-64b03d) - and prevent education funding streams from being interrupted. This law has now been in Kansas statute for over a decade.

4 Maine: https://www2.ed.gov/parents/schools/choice/educationoptions/report_pg15.html#maine
Vermont: https://www2.ed.gov/parents/schools/choice/educationoptions/report_pg21.html#vt

5 <https://kansaspolicy.org/kansas-school-spending-13647-per-pupil-2018/>

6 More detail on how Augenblick & Myers deviated see: <https://kansaspolicy.org/2288-2/> and link to former KPI scholar and current Kansas Supreme Court justice Caleb Stegall's analysis of the Augenblick & Myers study.

7 The Statewide Efficiency Report prepared by Alvarez & Marsal in 2016 for the Kansas Legislature identified a potential savings of \$193 million over a five-year period by capping school district carry-over cash balances. See <http://www.kslegresearch.org/KLRDweb/Publications/AppropriationsRevenue/KansasStatewideEfficiencyInterimRpt2016Jan12.pdf>, pages 171-174.

8 <https://kansaspolicy.org/kpi-paper-at-risk-funding-increased-money-fails-to-increase-achievement/>



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About the Author

David Dorsey is a Senior Education Policy Fellow with Kansas Policy Institute. His primary emphasis in this role is combining his time spent as a public school teacher with policy research on issues related to K-12 finance, student achievement, and education reform. Prior to joining KPI, David spent 20 years as a public school elementary teacher, 17 in Kansas. He was both a classroom and specialty teacher and served in various leadership capacities in those schools. David finished his teaching career with eight years as a mathematics interventionist at Lowman Hill Elementary School in Topeka USD 501 working with at-risk students. Prior to teaching he spent 15 years working in state and local government in Arizona as a city administrator, research analyst for the Phoenix Police Department, and a program evaluator for the largest state agency in Arizona. He earned a Master of Arts in Political Science from Arizona State University with an emphasis on research and statistical analysis in 1980. David was born and raised in South Dakota and received a BS degree from the University of South Dakota in 1977 with a major in Political Science and a minor in Economics.