IN THE SUPREME COURT OF THE STATE OF KANSAS

Case No. 15-113267-S

LUKE GANNON, *et al*,
Plaintiffs,

v.

THE STATE OF KANSAS,
Defendant.

County Appealed From:
District Court Shawnee County, Kansas, in the Matter of Proceedings Before the Three-Judge Panel Appointed Pursuant to K.S.A. 72-64b03 *in re* School Finance Litigation

District Court Case No.: 2010CV1569

Proceeding Under Chapter: 60

Party or Parties Who Will Appear as Appellees: UNIFIED SCHOOL DISTRICT NO. 259; UNIFIED SCHOOL DISTRICT NO. 308; UNIFIED SCHOOL DISTRICT NO. 443; and UNIFIED SCHOOL DISTRICT NO. 500

MOTION OF THE STATE OF KANSAS FOR STAY OF OPERATION AND ENFORCEMENT OF THE PANEL'S JUDGMENT

Pursuant to Supreme Court Rule 5.01, K.S.A. 2014 Supp. 60-262(f)(1), and K.S.A. 60-2101(b), the State of Kansas moves for an order staying the operation and enforcement of the judgment entered by the Three-Judge Panel ("Panel") on June 26, 2015. See attached "Memorandum Opinion and Order and Entry of Judgment Regarding Panel's Previous Judgment Regarding Equity and Plaintiffs' Motion for Declaratory Judgment and Injunctive Relief" (hereafter "Order").

An immediate stay is warranted in order to maintain the status quo while this Court reviews and considers the Panel's unprecedented ruling. Among other unprecedented aspects of the decision, the Panel declares unconstitutional the entire block grant school funding system the

Legislature adopted earlier this year, and then purports to revive repealed statutes, even though many of those provisions already have been repealed (effective date in April 2015) and Kansas Constitution Article 2, Section 16 imposes very clear and explicit requirements for any statute to be "revived," and those requirements do not authorize any court to "revive" a repealed statute. Furthermore, the Panel orders the immediate payment of approximately $50 million in State funds that legally cannot be disbursed as the Panel directs. Obviously, the Panel's unprecedented decision has massive implications for the State's budget and finances.

Finally, in a move that can only be perceived by the public and objective observers as cynical, calculated and unfortunately "political," the Panel issued its decision on the very day and barely one hour after the Legislature finally adjourned, *sine die*, for the 2015 session, notwithstanding that the Panel has had these issues before it for several months and had a hearing on these matters in early May. Given all of these circumstances, as well as the likelihood that this Court will identify errors in the Panel's decision on appeal, the public interest is not served by the extraordinary relief the Panel purports to order, some of which is supposed to occur in the next two days.

In many respects, to rule as it did here, the Panel had to ignore fundamental due process principles and rules of procedure that require pleadings, pretrial proceedings, discovery, and a trial. Indeed, the Panel declared unconstitutional legislation enacted less than three months ago, concluding that it violates *both* Article 6's adequacy and equity components after conducting a hearing (in early May) the ostensible purpose of which was to address the Plaintiff Districts' motion to alter and amend the Panel's December 30, 2014 decision. The Panel instead clearly addressed and ruled upon constitutional challenges to Kansas' school finance statutes enacted in

2015, statutes which by definition were never part of underlying the 2012 trial which resulted in the first appeal to this Court. *See Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (2014).

In June 2014, after the remand from this Court, the Panel found that the State had substantially complied with this Court's mandate requiring remedy of public school finance equity infirmities. However, Plaintiff Districts asked the Panel to alter or amend this finding in early 2015. Then the Panel scheduled a May 7-8 hearing that "[would] be limited to equity and equity compliance," explaining: "We intend to consider the effect of all measures taken or not taken by State officials since the [*Gannon*] Mandate was issued that affect the equity aspects of the Mandate." Panel's April 20, 2015 e-mail to counsel. The State prepared accordingly.

This last school year the State provided approximately and distributed to local districts $138 million more in LOB and capital outlay aid in response to the Court's decision in *Gannon*. Exhibit 507, p. 2; L. 2014, ch. 93; 2015 House Substitute for Senate Bill 7, §§ 1(a) & 63(c)(2); 2015 Senate Substitute for HB 2353, §§ 8 & 63; 2015 House Substitute for SB 112, § 20(b) & (d). *See also* Opinion, at 47. This amount was *more than* the KSDE had estimated was necessary to comply with this Court's decision when the Legislature passed the legislation in 2014.

The Panel changed its mind just before the May 7-8 hearing, however, eschewing procedures designed to afford due process and overlooking that it lacked jurisdiction over the matters that are the subject of the State's docketed Article 6 adequacy appeal. *E.g.*, *State v. Fritz*, 299 Kan. 153, 155, 321 P.3d 763 (2014) (district court loses jurisdiction over case after direct appeal is docketed). On Friday, June 26, 2015, the Panel filed a "Memorandum Opinion and Order and Entry of Judgment Regarding Panel's Previous Judgment Regarding Equity and Plaintiffs' Motion for Declaratory Judgment and Injunctive Relief" (hereafter "Order"). In the

Order, the Panel reversed and withdrew its December 30, 2014 finding that the State had substantially complied with Article 6's equity requirements articulated in *Gannon*. *Id.* at 2-3.

HB 2353 and SB 112 *were not even written* until after the May 7-8 hearing, yet the Panel found portions of those laws unconstitutional in its June 26 order.

Remarkably, the Panel found 2015 House Substitute for Senate Bill 7 ("SB 7"), parts of 2015 House Substitute for Senate Bill 4 ("SB 4") and parts of 2015 Senate Substitute for HB 2353 ("HB 2353"), 2015 House Substitute for SB 112 ("SB 112"), each of which amended or supplemented SB 7, unconstitutional in violation of Art. 6, § 6(b) of the Kansas Constitution, but stayed "what would otherwise be the consequence demanded of our ruling pending appeal," subject to a "temporary restraining order." Order, pp. 62, 78-79.

The Panel's "temporary restraining order" (a misnomer if there ever was one) purports to require the following:

1. Additional supplemental general state aid ("LOB aid") and capital outlay state aid must be paid under the terms of the "before January 1, 2015" version of state aid statutes K.S.A. 72-6434 and K.S.A. 72-8814. Order, at 69-70.
2. The Kansas State Board of Education is made a party to the case now and, with the Kansas Secretary of Administration and Treasurer of the State of Kansas and "other executive official of the State of Kansas," is ordered to comply with the Panel's directive and enjoined from doing anything contrary. *Id.*
3. State funds necessary for payment of the additional capital outlay aid are "encumbered" for FY 2015 distribution. *Id.* at 70.
4. State funds necessary for payment of the additional FY 2015 LOB aid will be distributed from "FY 2016 revenues available for supplemental general state aid." *Id.* at 76. The

State understands these revenues are in SB 7's FY 2016 block grant appropriation because strictly speaking there is no longer separate supplemental general state aid under SB 7.

5. Distribution of general state aid in FY 2016 and FY 2017, under the Classroom Learning Assuring Student Success Act ("CLASS") adopted by SB 7, will be based upon weighted student count in the current school year in which distribution is to be made, not the weighted or unweighted student count in FY 2015 (the just completed 2014-15 school year). *Id.* at 58; and
6. LOB and capital outlay state aid portions of districts' block grants under CLASS must be calculated as the statutes providing for such aid existed before January 1, 2015. *Id.* at 67-68, 75-76.

Under these orders, the State must hold funds appropriated for other State programs or raise funds and then pay immediately to qualifying local districts about $16.6 million in capital outlay state aid and about $33.4 million in LOB aid. Order, at 29, 42-43. The Panel acknowledged that its order will require additional appropriations by the Legislature. *Id.* at 68, 76.

In another unprecedented and remarkable move, the Panel alternatively, entered orders that would rewrite SB 7 and associated subsequent legislation, striking and substituting language so that the School District Finance and Quality Performance Act ("SDFQPA"), K.S.A. 72-6405, *et seq.*, as it existed in January 1, 2015, replaced CLASS. Order, at 80-83. That portion of the decision looks precisely like a bill "markup" that takes place in the legislative process, with the Panel striking words, phrases and sentences to write the statute it prefers. The only possibly

positive thing that can be said about this part of the Panel's decision is that the Panel "stayed" implementation of these alternative orders for the time being. *Id.* at 79.

Using the words of the Plaintiff Districts' counsel, in the worst case, the "temporary restraining order" places Kansas on the road to educational "Armageddon" because non-severability provisions in SDFQPA and CLASS will leave no funding mechanisms. While less dramatic, if not stayed, the "temporary restraining order" will cause other irreparable harms, including violation of separation of powers, reduction of general state aid to all local districts and reductions in funding to some districts that are advantaged by SB 7, as amended.

I. Background of Motion and Appeal

This is an appeal from a judgment in a "school finance" case brought only against the State generally by four school districts – 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.

Plaintiff Districts asked the three-judge Panel, appointed under K.S.A. 72-64b03, to hold that the SDFQPA and the State's associated primary and secondary education appropriations violate Article 6, § 6 of the Kansas Constitution. After a bench trial in the summer of 2012, the Panel rejected most of the Plaintiff Districts' claims and arguments, but concluded: (1) the then failure to fully fund "equalization aid" in certain parts of the Act was unconstitutional and (2) the then amount of Base State Aid Per Pupil ("BSAPP") provided under the SDFQPA was unconstitutional. The Panel ordered full funding of Local Option Budget ("LOB") state equalization aid under K.S.A. 72-6434 and capital outlay equalization state aid under K.S.A. 72-8801, *et seq.* Rather than giving the State an opportunity to consider appropriate remedies, the Panel ordered the BSAPP be funded at $4492 for FY2014 and adjusted afterward to account for

inflation. The State appealed; and Plaintiff Districts cross-appealed asserting the BSAPP should be much higher than $4492.

On March 7, 2014 the Kansas Supreme Court issued its opinion. It affirmed, in part, the Panel's judgment concerning funding of LOB and capital outlay aid, holding that the Legislature needed to address inequities in the funding of this state aid. *Gannon,* 298 Kan. at 1176-89. However, the Court rejected the Panel's ordered "cures." It remanded to the Panel instructing that the State's response to the inequities was to "be measured by determining whether it sufficiently reduces the unreasonable, wealth-based disparity so the disparity becomes constitutionally acceptable, not whether the cure necessarily restores funding to the prior levels." *Id.* at 1181, 1188-89.

The Court reversed the Panel's judgment regarding SDFQPA's funding because the Panel had applied the wrong constitutional standard concerning adequacy of funding required under Article 6. It remanded the case to the Panel for findings and conclusions as to "whether the State met its duty to provide adequacy in public education as required under Article 6 of the Kansas Constitution[.]"*Id.* at 1199.

After the Supreme Court's decision, legislation was promptly passed which addressed the inequities found in the funding of capital outlay and LOB aid. On May 1, 2014, 2014 Senate Substitute for House Bill 2506 ("HB 2506") became law. 33 Kansas Register, No. 18, p. 438 (May 1, 2014). The KSDE had estimated and advised legislators that:

> a. The FY 2015 appropriation needed to provide 100 percent funding of Supplemental General State Aid, under the SDFQPA, was $103,865,000 if calculated with a base state aid per pupil of $4,433;
>
> b. An additional FY 2015 appropriation of approximately $5 million in Supplemental General State Aid was needed as a result of the ability of local school district to increase their local options budgets under HB 2506; and

c. One hundred percent funding of capital outlay state aid would amount to $25,200,786 in FY2015.

Exhibit 507, p. 2. Passing HB 2506 into law, the Legislature funded LOB state aid by providing $109,265,000 in additional funding appropriated during the 2014 legislative session. The Legislature appropriated capital outlay state aid, with "no limit," and the State's FY 2015 budget included $25,200,786 million for the aid.

The Panel conducted a hearing on June 11, 2014. At the conclusion of the hearing, the Panel announced the legislation complied with the Supreme Court's order regarding capital outlay and LOB aid.

On December 30, 2014, the Panel released its Memorandum Opinion and Order on Remand. It reaffirmed that the State had complied with the Supreme Court's order regarding capital outlay and LOB aid. However, the Panel entered a declaratory judgment that the Kansas public education financing system for grades K-12 failed to meet the adequacy test articulated in *Gannon*. It held the system—through structure and implementation—is not presently reasonably calculated to have all Kansas public education students meet or exceed the *Rose* factors and, therefore, is unconstitutional in violation of Article 6 of the Kansas Constitution. The Panel did not order any affirmative relief to "remedy" the violation that it found.

On January 23, 2015, the State filed a motion to alter and amend to obtain clarification of the Panel's December 30, 2014 order and additional findings of fact. K.S.A. 60-2102(b)(1) requires filing of a notice of appeal within 30 days of the entry of a decision finding a violation of Article 6 of the Kansas Constitution. On January 28, 2015, the State filed such notice of appeal.

On February 12, 2015, SB 4 became law. 34 Kansas Register, No. 7, p. 129 (Feb. 12, 2015). This law amended K.S.A. 2014 Supp. 72-8814 by directing a demand transfer of

$25,300,000 for capital outlay aid on February 20, 2015 and another transfer on June 20, 2015 of "the remaining amount of moneys to which the school districts are entitled to receive from the state general fund to the school district capital outlay state aid fund." *Id.*, p. 135, § 54(d).

But, on April 2, 2015, SB 7 became law. 34 Kansas Register, No. 14, p. 267 (April 2, 2015). Effective as of April 2, 2015, SB 7

- Appropriated an additional $27,350,000 for districts' general funds (effectively replacing reductions in BSAPP made by an allotment in 2015). SB 7, § 1(a).
- Amended the calculation of LOB aid in K.S.A. 2014 Supp. 72-6434. SB 7, § 38.
- Appropriated an additional $1,803,566 for FY2015 LOB aid. SB 7, § 1(a).
- Amended the calculation of capital outlay state aid in K.S.A. 2014 Supp. 72-8814 as amended by SB 4. SB 7, § 63(b).
- Authorized an additional $2,200,000 for FY15 capital outlay state aid. SB 7, § 63(c)(2).
- Appropriated $4,000,000 for distribution, through a new fund, to districts that show extraordinary needs. SB 7, § 1(b).
- Repealed both K.S.A. 2014 Supp. 72-6434 and K.S.A. 2014 Supp. 72-8814 as amended by SB 4. SB 7, § 80.

Also under SB 7, effective July 1, 2015, CLASS will replace the SDFQPA. SB 7, §§ 4-22; 81. CLASS changes K-12 public school finance, awaiting a complete overhaul of school finance formulas, by:

- Providing districts with fund flexibility at the district level; that is, funds can be transferred to the general fund of the district with no cap on the amount of the transfer. Excluded from this flexibility are three funds: bond and interest, special education, and the special retirement contributions fund. SB 7, § 62.
- For FY 2016, appropriation of $2,751,326,659 from the State General Fund (SGF) as a block grant to school districts. A demand transfer from the SGF to the School District Extraordinary Need Fund will be made in an amount not to exceed $12,292,000. An SGF appropriation of $500,000 will be made to the Information Technology Education Opportunities Account (a program to pay for credentialing

high school students in information technology fields, funded previously in the Board of Regents' budget). SB 7, § 2.

- For FY 2017, appropriation of $2,757,446,624 from the SGF as a block grant to school districts. A demand transfer from the SGF to the School District Extraordinary Need Fund will be made in an amount not to exceed $17,521,425. An SGF appropriation of $500,000 will be made to the Information Technology Education Opportunities Account. SB 7, § 3.

- The block grants for FY 2016 and FY 2017 include General State Aid equal to what school districts are entitled to receive for school year 2014-15, as adjusted by virtual school aid calculations and a 0.4 percent reduction for an Extraordinary Need Fund; supplemental general state aid and capital outlay state aid as adjusted in 2014-15; Virtual state aid as recalculated for FYs 2016 and 2017; Amounts attributable to the tax proceeds collected by school districts for the ancillary school facilities tax levy, the cost of living tax levy, and the declining enrollment tax levy; and KPERS employer obligations, as certified by KPERS. SB 7, §§ 4-22.

- Providing the funding for FY 2016 and FY 2017 above the General State Aid school districts were entitled to receive for school year 2014-15, as adjusted by virtual school aid calculations and a 0.4 percent reduction, is distributed to each district in proportion to the school district's enrollment. SB 7, § 6(f).

On March 11, 2015, the Panel entered a Memorandum Opinion and Order denying the State's Alter and Amend. On March 16, 2015, the State filed a second notice of appeal which included the March 11 order.

On March 16, 2015, Plaintiff Districts filed a Motion for Injunction and Declaratory Relief in which they asked the Panel to enjoin 2015 House Substitute for Senate Bill 7 ("SB 7"), a law which has substantively changed the Kansas public education financing system for grades K-12.

The hearing on Plaintiff Districts' Motion to Alter and Amend Panel's Previous Judgment Regarding Equity was conducted on May 7 and 8, 2015. After the hearing, HB 2353, § 8 and SB 112 §20 became law which effectively increased FY 2015 capital outlay and LOB aid by $1,756,400 and $1,976,818 respectively.

On June 26, 2015, almost immediately after the longest Kansas Legislative session in history concluded, the Panel issued its Order. The State filed its notice of appeal on the same date. See attached Notice of Appeal.

II. Argument

This Court stayed the Panel's judgment for the duration of the last appeal, with good reason. There is even more reason to stay the Panel's decision pending this appeal.

The immediate stay the State requests targets the Panel's "temporary restraining order" because the Panel itself stayed several aspects of its judgments in its June 26 Order. The "temporary restraining order," however, is to take immediate effect and suffers from several legal flaws. First, the "temporary restraining order" is no such thing. A temporary restraining order is designed to preserve the *status quo,* until a hearing on a whether a temporary injunction should be imposed. K.S.A. 60-903(b). *See State v. Alston,* 256 Kan. 571, 579, 887 P.2d 681 (1994); *Unified School Dist. v. McKinney*, 236 Kan. 224, 227, 689 P.2d 860 (1984). A temporary restraining order must not last, absent exceptional circumstances, more than 14 days. K.S.A. 60-903(b). Generally, a bond is required. *Id.*, 903(f). Similarly, a temporary injunction concerns the period before final judgment is entered. K.S.A. 60-902. *See also Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 461, 726 P.2d 287 (1986) (temporary injunction is not proper if it effectively accomplishes the whole object of the suit without bringing the cause or claim to trial). Again, bond is generally required. K.S.A. 60-905(b).

The Panel's "temporary restraining order" is, in fact, simply part of the Panel's *final judgment* which the Panel has not stayed. If this Court does not stay the "temporary restraining order," that ruling is certain to produce some or all of the following adverse consequences:

1. Violation of separation of powers.

An affront to the constitutional powers of a branch of government is hard to quantify, but is by no measure insignificant. The confidence of the public in its institutions hangs in the balance here. Not only did the Panel time its ruling in a way that suggests "political" consideration, the ruling is unprecedented in its direct and substantial intrustion into the legislative process. The Panel's rulings should not take effect unless and until this Court, as the final arbiter of the Kansas Constitution, has had the opportunity to carefully consider and address all of the issues in play.

Ordering payment of state aid to districts is tantamount to ordering appropriations, a power granted to the Legislature and denied to the Judicial Branch. *See* Kan. Const., art. 2, §§ 1, 24 (power of appropriation is a core legislative power). Under Kansas law, the "legislative power" – which includes the power to tax – is a power vested exclusively in the legislature by Kan. Const., art. 2, §§ 1, 24. These provisions give the Legislature the exclusive power to pass, amend, and repeal statutes. *State ex rel. Stephan v. Finney*, 251 Kan. 559, 577, 836 P.2d 1169 (1992). *Accord, State ex. rel. Morrison v. Sebelius*, 285 Kan. 875, 179 P.3d 366 (2008). The power of appropriation is a core legislative power that is exercised when appropriations are "made by law." Kan. Const., art. 2, §§ 1, 24. Thus, an order compelling the Legislature to make appropriations necessarily and unconstitutionally usurps the legislative power. *See State ex. rel. Morrison v. Sebelius*, 285 Kan. 875, 898-99, 179 P.3d 366 (2008) ("[W]hen the legislature is considering legislation, a court cannot enjoin the legislature from passing a law. This is true whether such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law.") (internal quotations omitted).

Furthermore, the Panel lacks the power to segregate and encumber money in the State's general fund. K.S.A. 60-723(d) provides:

> All property, funds, credits and indebtedness of the state or of any agency of the state shall be exempt from garnishment, attachment, levy and execution and sale, and no judgment against the state or any agency of the state shall be a charge or lien on any such property, funds, credits or indebtedness.

2. *Reduction in 2016-17 funding for K-12 operational costs.*

SB 7 was enacted to maintain K-12 school funding at current levels for the next two years while the Legislature fully considers and explores the complicated methods and formulas for school funding, and then ultimately adopts a new system for the State's future. The law includes in its definition of general state aid the FY 2015 calculations of capital outlay and LOB state aid. SB 7, § 6(a)(1)(D). The funds appropriated do not allow for distribution of more or less capital outlay and LOB state aid because of changes in enrollments or student weightings in FY 2016 and 2017 or different levels of local districts' levies for capital outlay and LOB. *Id.*

However, the Panel's "temporary restraining order" is a game changer. The Panel clearly contemplates and expects that more money will be appropriated to cover any additional general state aid required by its orders, but the Panel did not order increased general state aid funding.

As a consequence FY 2016-17 funding for local districts' operational costs will be reduced in proportion to any increases in LOB or capital outlay state aid because of FY 2016-17 changes in enrollments and weightings. The districts unfairly impacted by the Panel's order are those which do not raise much LOB and capital outlay. For example, the Galena school district does not levy any capital outlay taxes and, therefore, receives no capital outlay state aid. Exhibit 3008, column "USD Total Actual Levies." If general state aid is prorated down to offset increased sums spent on LOB or capital outlay state aid, districts like Galena will be the losers.

3. *Reduction in funding to some districts.*

Plaintiff Districts are just four of 285 local districts. They lack standing to assert claims or demand remedies for these other districts. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1255 (10th Cir. 2008) ("A plaintiff may challenge a statute . . . on an as-applied basis 'only insofar as it has an adverse impact on his own rights,'" *quoting County Court of Ulster County v. Allen*, 442 U.S. 140, 155 (1979)). *See also, State v. Thompson*, 221 Kan. 165, 172, 558 P.2d 1079 (1976) (holding that "unconstitutional governmental action can only be challenged by a person directly affected and such a challenge cannot be made by invoking the rights of others").

Plaintiff Districts' and the Panel's sentiments about SB 7 may not be shared by all 285 districts. For example, SB 7 changed the formula for funding virtual students. Some districts may be benefitted by that change. In fact, the Shawnee Mission District, which attempted to intervene in this case, disagrees with the relief the Plaintiff Districts sought and the Panel ordered. If nothing else, this divergence among the interests of various districts in the State illustrates the impropriety of treating this case as if it is a class action in which all Kansas school districts share the same views and positions.

The Panel's "temporary restraining order" inherently pits district against district. The "temporary restraining order" takes from some districts to give to others by requiring calculation of general state aid under 2016-17 enrollments and weightings. The local district which loses students in 2016-17 receives less general state aid as a result of the Panel's requirement. Such a district's average assessed value per pupil is increased, reducing its ability to get capital outlay and LOB state aid. Moreover, districts also lose the opportunity to continue to receive state aid even if they reduce their local tax levies for capital outlay and LOB.

However, Districts shorted or disadvantaged by the Panel's "temporary restraining order" have no remedy if the Panel's Order is not stayed and then subsequently reversed.

4. *Instability for local districts' FY 2016 budgeting.*

The "temporary restraining order" injects uncertainty into local district budgeting decisions. This likely will produce results that the Panel did not intend and, in process, force choices that reduce some districts willingness to fund programs or additional salaries.

Local districts must prepare and publish for public comment and vote to approve their 2015-16 school year budgets before mid-August 2015. The district boards will not know what to expect in available revenues. If the districts calculate their budgets assuming revenues ordered by the Panel and the Panel's judgments are reversed, even in part, districts intended to be advantaged by the "temporary restraining order" will be confronted with fewer funds than planned to meet commitments made during the budgeting process. Thus, some may conservatively choose to assume funding will ultimately be provided under CLASS. However districts disadvantaged by the "temporary restraining order" are likely forced to reduce spending on programs which they believe are valuable to their students' education, losing the advantages accorded them by CLASS, if the "temporary restraining order" is not stayed.

5. *Loss of all K-12 Funding.*

The SDFQPA is the only authority for state funding for K-12 operational expenses in FY 2015. CLASS assumed that mantle for FY 2016 and 2017. Also, the local districts' LOB taxing authority was provided exclusively by the SDFQPA and now CLASS. The Panel's conclusion that provisions in both the SDFQPA and CLASS are unconstitutional necessarily invalidates both acts in their entirety because both statutes include explicit non-severability provisions. Thus, the interrelated nature of the SDFQPA, *see* K.S.A. 72-6405(b), and now CLASS, *see* SB 7,

§ 22, may produce an earlier, if not immediate, halt to *all* state and local funding for K-12 schools.

As matters stand, the Panel has found K.S.A. 72-6434, as amended by SB 7 (LOB aid) [before it was absorbed into SB 7's block grants for FY 2016 and 2017], to be unconstitutional, and the Panel has purported to strike portions of the statute. The statute, however, is part of the SDFQPA which has a non-severability clause. The SDFQPA explicitly provides that if any part of the Act is found "invalid or unconstitutional," the entire Act is to be held invalid:

> "b) Except for the provisions of K.S.A. 75-2321, and amendments thereto, the provisions of the school district finance and quality performance act are not severable. Except for the provisions of K.S.A. 75-2321, and amendments thereto, if any provision of that act is stayed or is held to be invalid or unconstitutional, it shall be presumed conclusively that the legislature would not have enacted the remainder of such act without such stayed, invalid or unconstitutional provision.

K.S.A. 72-6405(b).

In *Petrella v. Brownback*, 980 F. Supp. 2d 1293 (D. Kan. 2013), *aff'd* 2015 U.S. App. LEXIS 9088 (10th Cir. Kan. June 1, 2015), the federal court refused to enter a temporary injunction against the cap on the amount of LOB a district can vote and raise each year, K.S.A. 2014 Supp. 72-6434(a)(1), reasoning as follows:

> Specifically, the Court concludes that plaintiffs cannot show that their alleged harm in being subject to the LOB cap outweighs the harm to the State and to the public from an injunction against enforcement of the cap. The Court has previously analyzed the issue and concluded that the LOB cap is not severable from the rest of the statutory school funding scheme under Kansas law. Thus, because the school funding scheme may not be applied without the LOB cap, the injunction sought by plaintiffs would also completely upend the entire system of public education in Kansas. Such a result would work a tremendous hardship on public-school students and the rest of the public throughout Kansas, and that potential hardship easily outweighs plaintiffs' alleged harm from continued enforcement of the LOB cap pending the outcome of this litigation.

980 F. Supp. 2d at 1310.

The significance of the invalidation of the SDFQPA should be marginal because FY 2015 is over. However, the Panel relies on the SDFQPA to replace CLASS, the latter of which the Panel also found to be unconstitutional. In CLASS, the Legislature provided:

> New Sec. 22. (a) The provisions of sections 4 through 22 [CLASS], and amendments thereto, shall not be severable. If any provision of sections 4 through 22, and amendments thereto, is held to be invalid or unconstitutional by court order, all provisions of sections 4 through 22, and amendments thereto, shall be null and void. (emphasis added).

Thus, the Panel cannot selectively invalidate and rewrite parts of CLASS. The Legislature expressly retained the right to fashion statutes that govern the Kansas school finance system.

In spite of the non-severability clause in CLASS, the Panel purported to invalidate only certain provisions of the statute, including the provisions which provide the authority for distribution of LOB and capital outlay aid as part of the Act's block grants, and provisions which distribute general state aid based upon FY 2015 entitlements.

III. Relief Requested

Kansans – including students, parents, teachers, legislators, other government officials, and concerned citizens – recognize the importance of the Kansas constitutional goal of making suitable provision for finance of the educational interests of the State. There are many ways to achieve that goal, and appropriate processes for doing so. There are serious and substantial factual and legal disputes about whether that goal has been achieved. Unfortunately, the Panel's decision not only attempts to resolve those disputes but also orders extraordinary and unprecedented relief that may well exceed the bounds of judicial power. It is uncumbent upon this Court to ensure an orderly process for hearing this appeal and protecting the interests of all involved while this Court ultimately resolves the constitutional, legal, and factual issues in play.

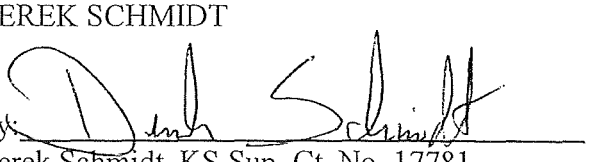
The State has the right to appeal the Panel's conclusion that the State has violated Article 6, § 6 of the Kansas Constitution. K.S.A. 60-2101(b). The issues in this appeal are important, indeed compelling, and among the most fundamental to all Kansans.

The Panel's decision merits careful and deliberative review by this Court, and the State should not be put to a Hobson's Choice between proceeding with no operative school finance system or capitulating to the Panel's decision without this Court's review.

Pursuant to K.S.A. 2014 Supp. 60-262(f), the State respectfully requests that this Court grant an immediate stay that suspends all of the Panel's Order and maintains the real *status quo* until the Court can review the Panel's decision and issue its own mandate in this case. A stay may be granted under this Court's plenary powers, K.S.A. 20-101, K.S.A. 2014 Supp. 60-262(f) and/or K.S.A. 60-2101(b). No bond or other security may be required because this appeal and request is by the State of Kansas. K.S.A. 2014 Supp. 60-262(e).

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

By: 

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CERTIFICATE OF SERVICE

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