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**Potential Remedial Orders Following *Gannon III***

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On May 27, 2016, in *Gannon III*, the Kansas Supreme Court (Court) issued its decision regarding whether 2016 Senate Substitute for House Bill No. 2655 (HB 2655) cured the unconstitutional wealth-based disparities in the distribution of capital outlay state aid and supplemental general state aid. The Court held that HB 2655 cured the capital outlay inequities, but failed to cure the supplemental general state aid inequities.<sup>1</sup> The Court further held that neither the supplemental general state aid provisions in HB 2655 nor the entire local option budget (LOB) mechanism can be severed from the Classroom Learning Assuring Student Success (CLASS) Act.<sup>2</sup> Therefore, the Court held that the CLASS Act was unconstitutional as a whole and continued to "stay the issuance of our mandate—and the stay of the panel's broad remedial orders—until June 30, 2016."<sup>3</sup>

If no legislative action is taken on or before June 30, 2016, the Court could issue a remedial order lifting the stay. Such an order could: (1) Lift the stay declaring the CLASS Act unconstitutional while continuing the stay of the district court panel's (panel) remedial orders; (2) lift the stay declaring the CLASS Act unconstitutional and lift the stay on the panel's remedial orders reinstating the equalization formulas as they existed prior to the CLASS Act; or (3) lift the stay declaring the CLASS Act unconstitutional and lift the stay on the panel's remedial order nullifying the CLASS Act and reinstating the entire School District Finance and Quality Performance Act (SDFQPA).

This memorandum will analyze these three potential scenarios that could occur if the Court were to lift the stay on its order or the panel's orders. This is not meant to be a complete list of scenarios that could occur if the Court were to take further action. Uncertainty still exists

<sup>1</sup> *Gannon v. State*, No. 113,267, at 32 (Kan. Sup. Ct. May 27, 2016) (*Gannon III*).

<sup>2</sup> *Id.* at 43.

<sup>3</sup> *Id.* at 43-46.

regarding the particular details of each scenario and also whether or how much the Court would modify any of the scenarios. In addition, the Court could issue a remedial order that is not contemplated in this memorandum.

(1) Lift Stay Ordering CLASS Act Unconstitutional – Continue Stay of Panel's Orders

In *Gannon III*, the Court declared the CLASS Act unconstitutional as a whole but continued to stay the issuance of its order until June 30, 2016.<sup>4</sup> Under *Gannon II*, the Court declined to affirm any of the panel's orders and also declined to address the parties' specific arguments regarding the panel's orders.<sup>5</sup> As such, the Court suggested that lifting the stay on the Court's order declaring the CLASS Act unconstitutional would be the only remedial option that the Court would follow.

Lifting the stay on its order holding the CLASS Act unconstitutional would mean that "no constitutionally valid school finance system exists through which funds for fiscal year 2017 can lawfully be raised, distributed, or spent."<sup>6</sup> Without a constitutionally equitable school finance system, Kansas public schools will not be able to operate beyond June 30, 2016.<sup>7</sup> Also, any efforts to implement such a constitutionally invalid system could then be enjoined by the Court.<sup>8</sup>

(2) Lift Stay on Panel's Remedial Orders Reinstating Equalization Formulas

Despite the lack of attention given to the panel's orders in *Gannon II*, under *Gannon III* the Court seemingly left open the possibility that the Court could lift the stay on some or all of the panel's remedial orders stating that the Court would "continue to stay the issuance of our mandate—and the stay of the panel's broad remedial orders—until June 30, 2016."<sup>9</sup> Because the Court's focus in *Gannon II* and *III* was equity, assuming the Court remains focused solely on equity considerations, the Court could lift the stay on the panel's remedial orders concerning equity so as to cure the unconstitutionally inequitable provisions of the CLASS Act.

The equity portion of the panel's remedial orders issued on June 26, 2015, reinstated and required full funding of the capital outlay state aid formula and the supplemental general state aid formula as each formula existed on January 1, 2015, prior to the enactment of the CLASS

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<sup>4</sup> *Id.*

<sup>5</sup> *Gannon v. State*,

<sup>6</sup> *Gannon II* at 1062.

<sup>7</sup> *Id.* at 75.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 45-46 (emphasis added).

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Act.<sup>10</sup> The panel specifically struck certain sections and textual language of 2015 House Substitute for Senate Bill 7 (SB 7) to reinstate the prior capital outlay state aid and the supplemental general state aid formulas.<sup>11</sup> The panel also required full funding of such formulas for fiscal years 2015, 2016 and 2017. To assure full funding, the panel directed the Kansas State Board of Education to immediately certify the amounts due and required executive officials to honor such certifications and make such payments.<sup>12</sup>

If the Court were to lift the stay on the panel's remedial orders concerning equity without any modification, such orders would seemingly require the Legislature and other executive officials to issue back payments to schools for amounts owed pursuant to the reinstated equalization formulas in fiscal years 2015 and 2016. In addition, such order also would continue to require operation of and full funding of the reinstated capital outlay state aid and supplemental general state aid formulas for fiscal year 2017. However, the Court could modify the panel's remedial orders regarding equity so as to only require payments for fiscal year 2017 and not require payments for fiscal years 2015 and 2016.

There is prior precedent suggesting that the Court would modify the panel's remedial order so as to not include any back payments for prior fiscal years.<sup>13</sup> In *Gannon I*, plaintiffs requested an order requiring payment of capital outlay state aid entitlements from prior fiscal years but the Court affirmed the panel's denial of such request. If the Court modifies the panel's remedial orders concerning equity so as to not require back payments, the equalization formulas as they existed in the SDFQPA would be reinstated and certain executive officials and the department would be required to fully fund such formulas in fiscal year 2017.

(3) Lift Stay on Panel's Remedial Order Reinstating the SDFQPA

The prior scenario would require the Court to sever the unconstitutional equalization formulas from the CLASS Act with a remedial order reinstating the equalization formulas as they existed in the SDFQPA. However, in *Gannon III*, the Court declined to sever the unconstitutional supplemental general state aid provisions from the CLASS Act finding that severance would do "violence to legislative intent."<sup>14</sup> If the Court were to again find that severing the unconstitutional equalization formulas and reinstating the prior formulas runs afoul

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<sup>10</sup> *Gannon v. State*, No. 2010-CV-001569, at 65-76 (Shawnee Co. Dist. Ct. June 26, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Gannon v. State*, 298 Kan. 1107, 1189-95 (Mar. 7, 2014) (*Gannon I*).

<sup>14</sup> *Gannon III* at 43.

of legislative intent, the Court could choose to lift the stay on the panel's broad alternative order as a cure for the unconstitutional CLASS Act.

The panel's broad alternative order struck certain provisions of SB 7, including the CLASS Act, reinstated the entire SDFQPA and required appropriated funds to be distributed pursuant to the SDFQPA.<sup>15</sup> Under this remedial order, the SDFQPA would be judicially reinstated as the school finance formula for fiscal year 2017. The Panel's alternative order did not contain a discussion regarding whether the Panel would require distribution of funds for amounts due pursuant to the SDFQPA for fiscal years 2015 or 2016.

### CONCLUSION

The Court gave the Legislature another opportunity to "craft a constitutionally suitable solution" and continued to "stay the issuance of our mandate — and the stay of the panel's broad remedial orders—until June 30, 2016."<sup>16</sup> If no legislative action is taken on or before June 30, 2016, the Court would likely issue a remedial order lifting the stay of its order and potentially the panel's orders. The Court in *Gannon II* appeared to suggest that the Court's remedial order would lift the stay declaring the CLASS Act unconstitutional thereby prohibiting the distribution of funds pursuant to the CLASS Act which would lead to school closures.

In *Gannon III*, the Court seemed to leave open the possibility that the Court's remedial order could also include lifting the stay on the panel's broad remedial orders. Lifting the stay of the panel's orders creates two different scenarios. First, the Court could lift the stay on the equity portion of the panel's remedial orders. Under this scenario, the capital outlay state aid and supplemental general state aid formulas would be reinstated as they existed under the SDFQPA and full funding of such formulas would be required. Second, the Court could lift the stay on the panel's alternative order which judicially reinstated the SDFQPA as the school finance system.

Any subsequent remedial order to lift the stay and enjoin the operation of the school finance system would be unprecedented action on the part of the Court. No prior Kansas Supreme Court order has actually prohibited the operation of a school finance formula or reinstated statutory provisions to cure certain unconstitutional provisions in a school finance system. As such, predicting the details of a potential future remedial order is challenging. In addition, the Court could always adjust or modify any of the above remedial orders or it could create a wholly new remedial order that is not contemplated in this memorandum.

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<sup>15</sup> *Id.* at 79-83.

<sup>16</sup> *Id.* at 45-46.