

But as the State currently professes to provide adequacy, it does not indicate why, how, or by how much, any of these levels are going to be improved by its proposed level of funding in S.B. 19—whether for "all students" or all subgroups (except perhaps for at-risk). Cf. 305 Kan. at 855, 906-07 (approximately 15,000 African-American students and approximately 33,000 Hispanic students not proficient in reading and math). And given the above table showing results of "all" students tested, we must also expressly reject the State's occasional contention throughout its brief that in *Gannon IV* we were concerned exclusively with the underperforming subgroups and that only their performance caused by inadequate funding was the basis for the Article 6 violation.

We contrast the State's present failure with the example of its 2006 LPA study which concluded it would cost \$500 more per year in base aid per pupil to meet inflation and improve student performance to specified levels. LPA study, p. 35. This improvement included, but was not limited to, raising 10th grade math proficiency to reach the new standard that increased by 9% and raising 5th grade reading proficiency to reach the new standard that increased by 7%. LPA study, p. 35. And it is the plaintiffs who argue—without dispute by the State—that during fiscal year 2018 and fiscal year 2019, inflation will consume approximately \$158 million of S.B. 19's \$292.5 million "increase," leaving an average of approximately \$67 million each year for actually improving proficiency. The State makes no effort to show how even this amount of new money could improve performance. See, e.g., *Gannon IV*, 305 Kan. at 892, 900 (substantial competent evidence supported panel's finding that money makes a difference in public education).

Ultimately, we must also reject the State's overall argument that (1) simply adding LOB funds to the LPA study's inflation-adjusted "base" (2) can create an "effective base." Inherent in this argument is the contention that the two bases are somehow comparable. But this is a false equivalency because they are fundamentally different with frequently different purposes.

The category of at-risk students readily illustrates some of those differences. For fiscal year 2018, school districts will receive \$4,006 BASE for every student in their district. See L. 2017, ch. 95, § 4(jj). For each at-risk student, the districts will receive an additional \$1,939—\$4,006 BASE multiplied by the at-risk statutory factor of .484. L. 2017, ch. 95, § 23(a). But the at-risk factor does not apply to LOB funds because they are not included in S.B. 19's calculation of total foundation aid. So it cannot produce a multiplier effect to increase these funds—by nearly 50 cents on the dollar—for the hundreds of districts with these students. The difference becomes even more important when considering the legislature's growing emphasis to shift away from funding education through base aid toward a greater reliance on LOB funds. See *Gannon III*, 304 Kan. at 501 (acknowledging shift, with BSAPP decreasing as LOB cap steadily increased).

For example, the extra funds provided for at-risk students that are lost because of a \$10 reduction in the underlying BASE cannot be replaced by LOB funds that merely restore the \$10 to the level of BASE. This result runs counter to the acknowledgment that at-risk students "require more resources for their education than others" and to the legislature's accompanying rationale for S.B. 19's increase of the at-risk ratio from .456 to .484. *Gannon IV*, 305 Kan. at 877; see also *U.S.D. No. 229*, 256 Kan. at 244.

In a more general contrast to the BASE, LOB-generated funds do not provide the same fixed amount to every student regardless of their locale. The individual districts that levy those discretionary mills not only retain these funds, but the amounts of those funds can also vary widely among the districts because of differences in property wealth, as well as differences in the LOB percentage of their general state aid authorized by their individual school boards. See *Gannon I*, 298 Kan. at 1182-83; L. 2017, ch. 95, § 15(h) (LOB-generated funds remain in the local district). Not even the supplemental general state aid ensures that every student receives the same amount of LOB funding. See 298

Kan. at 1187; L. 2017, ch. 95, §§ 4(jj), 15, 17. So for the State to essentially argue that every student in every district is the beneficiary of the same "effective base," *i.e.*, BASE plus LOB-generated funds, is simply incorrect.

We observe that in fiscal year 2016, LOBs generated more than \$1 billion, which KSDE projects to rise to approximately \$1.1 billion in fiscal year 2018. See *Gannon IV*, 305 Kan. at 893. Instead of being included in the total foundation aid formula, and being subject to any of those limitations, the LOB funds can be used by the districts in a myriad of other ways, *e.g.*, to directly supplement funding from the base formula. See *Gannon IV*, 305 Kan. at 893 (LOB funds, generally unrestricted in their use by local districts, now pay for nearly one-fourth of districts' operating expenses.). In short, the more that LOB funds are used to pay the expenses of the basic education owed to students, then the less that state funds will be necessary to do so. See *Gannon III*, 304 Kan. at 501 (BSAPP decreased as LOB cap increased). It logically follows that even less funding then will go to benefit the weighted pupils—whether bilingual education, vocational, at-risk, or otherwise—through the total foundation aid formula. And those funds will continue to be reduced as long as school boards, and their voters, are able to increase their LOB authorizations and mill levies and use surrogate funds—with the legislature's empowerment and encouragement.

Continuing that trend to its ultimate conclusion would mean that all the expenses of the basic education, *i.e.*, BASE, would instead be paid for with LOB funds. That would result in statutory weights—assuming they continued to exist—having no effect and large losses being suffered by the numerous districts whose enrollments would not be adjusted. So the greater the reliance on LOB-generated funds, and the less the reliance on BASE-generated funds, the more the specter of unconstitutional structure looms.

Finally, accepting the State's argument about "effective BASE" would be akin to believing that if 20 districts each received \$10 million in extra funding, the resulting \$200

million had been added to the total funding of all districts, then divided by the total number of students to produce an effective rate for the State. Because only the students in the 20 districts would receive the benefit, however, the "effective rate for all" argument cannot be accepted. Cf. *Gannon I*, 298 Kan. at 1173 ("[E]ven if the *total appropriation* for schools is *ample*, a system of finance that allocated the entire amount to half of the school districts in the state, while leaving the other half with none, cannot be considered a suitable provision for finance." [Emphasis added.]) (quoting Levy, *Gunfight at the K-12 Corral: Legislative v. Judicial Power in the Kansas School Finance Litigation*, 54 Kan. L. Rev. 1021, 1069 [2006]).

Although related, this particular problem should not be confused with another one that is also potentially created by the legislature's increased reliance on LOB funding. Specifically, some school boards or their voters may reject raising their LOB percentages to obtain funding—whether through higher mill levies alone or together with supplemental state aid—to replace those monies that have been lost by a lowered BASE. See *Montoy IV*, 282 Kan. at 30-31 (Rosen, J., concurring) ("[B]ecause the LOB is optional and some school boards or taxpayers may reject a local tax to support their school district, children in districts in which base level funding is inadequate and in which an LOB is not adopted, or is not adopted at the full cap, may not have the funds necessary for a constitutionally adequate education.").

Retaining or even increasing the reliance on LOB funding as a means of providing a constitutionally adequate education may, of course, be a policy question for the legislature. But at some point the constitutionality of the various configurations ultimately created by the legislature that express or promote that policy is a question solely for this court.

"[O]ur Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty; but when the question becomes whether the legislature has