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CASE NUMBER: 113267

IN THE SUPREME COURT OF THE STATE OF KANSAS

15-113267-S

LUKE GANNON,
By his next friends and guardians, *et al.*,

Appellees/Plaintiffs, **County Appealed From:** Shawnee

v. **District Court Case No.:** 10-C-1569

STATE OF KANSAS, *et al.*,

Appellants/Defendants.

RESPONSE TO STATE'S MOTION TO STRIKE

Plaintiffs respectfully request this Court deny the State's Motion to strike Appendix B to Plaintiffs' Response Brief. Appendix B is accurate, authentic, relevant, and useful. Therefore, this Court should allow it to be used as demonstrative evidence at the May 10, 2016 hearing. *See, e.g.*, *State v. Williams*, 299 Kan. 509, 563-64 (2014); *Howard v. Stroughton*, 433 P.2d 567 (Kan. 1967); *City of Wichita v. Jennings*, 199 Kan. 621, 626 (1967). While the State, in defending H.B. 2655, may disagree with Plaintiffs' arguments, demonstrated and supported by Appendix B, that is not a valid basis for striking it. Despite its stated objections, the only reason the State truly wants to strike Appendix B is because it disaggregates the legislative actions taken in H.B. 2655 and reveals them each for what they truly are: further erosion of any equity in the distribution of money to fund Kansas public schools.

I. Appendix B is Relevant and Useful

The State does not want the Court to look at the impact of each isolated aspect of H.B. 2655. It only wants the Court to look at the aggregate effect of the bill; namely, that the State did not, overall, take any funding away from any school district. And, as the Plaintiffs will (and have) admit, most districts are glad that they will "not receive less than last year" under H.B. 2655. *See, e.g.*, Plaintiffs' Response Brief, at p.34. But, the State's attempts to justify H.B. 2655 in a broad, overgeneralized manner is exactly why Plaintiffs needed to demonstrate the individual effects of *each* aspect of H.B. 2655. When each of these effects are taken into consideration, it becomes obvious that the manner in which the State chose to re-distribute the same amount of funds to the districts under H.B. 2655 caused further inequities among the districts, rather than curing them.

The purpose of Appendix B was not to show the actual funding per pupil that districts will receive under H.B. 2655. Nor was it to show the overall effect of H.B. 2655. The purpose was to demonstrate what H.B. 2655 did to the calculation of supplemental general state aid (referred to as LOB equalization). Appendix B is an integral part of Plaintiffs' explanation and demonstration of how H.B. 2655 wholly violates this Court's previous orders and the Kansas Constitution. But, it is only *one part* of that explanation and in no way purports to be a comprehensive exhibit demonstrating all of the effects of H.B. 2655.

As Plaintiffs demonstrated in their Response Brief, H.B. 2655 causes increased harm to those districts that are already negatively impacted by their lack of property wealth. *See, e.g.*, Plaintiffs' Response Brief, at pp. 19-20. This inequity is significant, as the following explanation shows:

1. Generally speaking, H.B. 2655 did three things:
    a. Decreased districts' LOB equalization aid by a significant amount;
    b. Increased districts' capital outlay aid by a lesser amount than the decrease in LOB equalization aid; and

c. Distributed "hold harmless" aid in an amount equal to the loss in LOB equalization aid *minus* the increase in capital outlay aid.

2. Consider a hypothetical district that has a LOB of $100, receives $30 of that in LOB equalization, and receives $10 in capital outlay state aid. Under this hypothetical, that district receives $40 from the State as "equalization aid." Also assume that under H.B. 2655's new methods of calculating equalization aid, that district would receive:

a. A decrease in LOB equalization aid from $30 to $10 (a $20 reduction); and

b. An increase in capital outlay state aid from $10 to $20 (a $10 increase).

Under H.B. 2655, to compensate that district for its overall loss ($10), the State will distribute $10 to the district in "hold harmless" aid. The State is still distributing $40 to that district in "equalization aid": $10 in LOB equalization, $20 in capital outlay state aid, and $10 in "hold harmless" aid.

3. To demonstrate how dis-equalizing the "hold harmless aid" is, it is important to understand that a district's LOB is funded in part by local funds and in part by state funds (called LOB equalization in Appendix B). For instance, before the adoption of H.B. 2655, the hypothetical district described above with the LOB of $100 would have received $30 of its LOB from state aid (the LOB equalization) and would have been responsible for raising the remaining $70 through local funds.

4. H.B. 2655 did not take away any district's statutory entitlement to its LOB, but affected the way that the districts would receive that money. As Appendix B demonstrates, through the operation of H.B. 2655, almost every district lost LOB equalization (the State portion). For the vast majority of districts, changing the equalization method resulted in *less* LOB equalization. Consider the hypothetical district described above and again assume that under H.B. 2655, the State

is only going to contribute $10 of LOB equalization (instead of the $30 it contributed last year). That hypothetical district still has LOB authority of $100. Therefore, it has authority to "backfill" its LOB with additional local money. The district could either:

a. Raise the local mill levy to allow it contribute $90 of local money to the LOB (allowing the district to have access to the full LOB ($100)); or

b. Leave the local mill levy where it was at last year and only contribute $70 local money (resulting in the district only being able to use part of its statutory LOB authority ($80)).

5. Districts that are politically able to "backfill," will now receive the *same* amount of state equalization aid under H.B. 2655, and will have access to additional funds in the amount equal to whatever the district chooses to backfill.

a. If the hypothetical district backfill its LOB, it will receive its full $100 LOB ($90 locally, $10 from the State), plus $20 in capital outlay state aid and $10 in hold harmless aid, for a total of $130.

b. If our hypothetical district cannot backfill its LOB, it will only have $80 in its LOB ($70 locally, $10 from the State), plus $20 in capital outlay state aid and $10 in hold harmless aid, for a total of $110.

c. In both scenarios, the State is still paying the district the exact same amount of equalization aid: ($10 in LOB equalization, $20 in capital outlay state aid, and $10 in hold harmless aid). But, in one scenario, the district has access to additional local funding.

Through H.B. 2655's operation, some districts *gain* the ability to raise additional local funds. And, that is not where the inequities stop. The districts that can raise additional local funds are able to use those funds *for classroom purposes*. But, those districts that cannot backfill[1] will be entitled to less classroom dollars. This is because their LOB aid was reduced. The State argues "no harm, no foul" because those funds were "replaced" with a combination of capital outlay state aid and "hold harmless" aid. But, capital outlay aid can only be used for restricted purposes. And, while it is used for important purposes (*e.g.*, fixing roofs, updating technology, purchasing buses, *etc.*), it can only be used for those purposes. On the other hand, any money distributed in the LOB fund or the general fund can go straight into the classroom. Therefore, because of H.B. 2655, those districts that cannot backfill will lose access to additional local funds <u>and</u> will also be denied the ability to use those funds in the classroom.

Clearly, the data displayed in Appendix B helps demonstrates some, while not all, of these points. The State consistently attempts to gloss over the effects of their decision to recalculate LOB equalization in H.B. 2655; that is the motivation for the State's objections to Appendix B and for the State's attempts to add the "hold harmless" aid into its version of Appendix B. But, since the decrease in money attributed to LOB equalization aid *solely* determines the advantage that a district will have by backfilling (namely, more access to local money and the ability to use that money in the classroom), it is important to consider how LOB equalization was affected *without adding in the*

[1] As Plaintiffs pointed out in their brief, due to political factors and wealth, some districts will likely be unable to increase their local mill levy for purposes of backfilling or will only be able to backfill a portion of their LOB.

hold harmless aid. Plaintiffs' Appendix B accomplishes that and is a relevant, useful, demonstrative exhibit.

Finally, to the extent that the State contends that this information is irrelevant or argumentative, such concerns are ameliorated by the fact that the evidence is being submitted to the Court and not a jury. *See e.g. United States v. Kienlen*, 349 F. App'x 349, 351 (10th Cir. 2009)(unpublished) ("For a bench trial, we are confident that the district court can hear relevant evidence, weigh its probative value and reject any improper inferences.") (citing *Gulf States Utils. Co. v. Ecodyne Corp*., 635 F.2d 517, 519 (5th Cir. 1981)).

II. Appendix B is Accurate and Authentic

Plaintiffs' goal – to demonstrate the effects of H.B. 2655 on LOB equalization aid – is in no way misleading. At all times in their briefing, Plaintiffs were up-front and direct about what Appendix B was examining (*i.e.* – the effects of H.B. 2655 on LOB equalization). An important part of Plaintiffs' overall argument is that the individual components of H.B. 2655, when considered individually and in conjunction, contribute to a funding scheme that is more inequitable than the one that this Court has already affirmed was unconstitutional. *Supra*.

The State is not truly objecting to the "accuracy" of the data. *See generally*, Motion to Strike (in which the State never takes issues with the accuracy of the numbers that Plaintiffs relied on in creating Appendix B). As the State admits, all of the data that Plaintiffs used to create Appendix B (SF16-116, SF16-117, and SF16-126) was available to the Legislature during the 2016 session. *See* Affidavit of Eddie Penner, at ¶6. Nonetheless, Plaintiffs respond to the State's "accuracy" arguments as follows:

1. The information relied on to create Appendix B was presented to the Legislature.

Appendix B is not "new" evidence. Nor does it demonstrate a "new" concept. Obviously, in adopting H.B. 2655, the Legislature was aware that it was *decreasing* the LOB equalization to which the districts were entitled (otherwise, why would the State need to hold any districts harmless?). While the information may not have been provided to the Legislature in the exact form of Appendix B, the State admits that all of the data that Plaintiffs used to create the chart (SF16-116, SF16-117, and SF16-126) was available to the Legislature during the 2016 session. *See* Affidavit of Eddie Penner, at ¶6. Plaintiffs do not ask the Court or the Legislature to "weigh" new evidence. Rather, Plaintiffs ask this Court to consider what the evidence that was presented to the Legislature actually demonstrates.

2. Appendix B is accurate *because* it omits "hold harmless" aid.

As demonstrated above, it is necessary to exclude "hold harmless" aid from Appendix B to demonstrate the effects of recalculating the method for distributing LOB equalization. Admittedly, if Appendix B were designed to show the total funding per pupil under H.B. 2655, Plaintiffs' version of Appendix B would be inaccurate. But, that was not its intended purpose. Likewise, the State's version of Appendix B does not accomplish this purpose; it does not include (1) capital outlay state aid; or (2) the effects of the increased local money that districts can access through "backfilling."

Second, the State assumes that "hold harmless" will be distributed in the amount of the current estimates. But, those are not final numbers. The amount of "hold harmless" aid could change for any district that qualifies for capital outlay state aid. If, for instance, a district increases its FY17 capital outlay mill levy, the amount of hold harmless aid to which the district is entitled will decrease and *vice versa*.

3. Appendix B is accurate *because* it omits the extraordinary needs fund.

H.B. 2655 left the Kansas State Board of Education with the discretion to determine whether and how to distribute the funds within the extraordinary needs fund. There was no requirement imposed by H.B. 2655 that these funds be distributed to the poorest districts. The Legislature could have made such a requirement in H.B. 2655, but chose not to. The fact that all districts' funding has been frozen means that there will be multiple districts with increased students, increased costs, and extraordinary needs. It seems unlikely – and is certainly not guaranteed – that the Kansas State Board of Education would allocate all of the remaining money within the extraordinary needs fund to provide LOB equalization for the poorest districts as the State's version of Appendix B assumes.

4. Appendix B is accurate despite omitting the effects of the statutory cap.

The LOB cap is certainly an important part of the statutes and does help keep the wealthy districts from outspending the poor districts. But, Appendix B would look identical (and be wholly accurate), if it were recalculated to demonstrate the LOB Budget per pupil with a 1-mill LOB levy (as opposed to a 20-mill levy). The scale on the left axis identifying the dollar amount would change (each per pupil amount would need to be divided by 20), but the remainder of the chart would stay the same.

Moreover, as the State acknowledges in its Motion, the LOB Cap affects the districts "at the higher end." For the most part, considering the statutory cap in creating Appendix B would have only affected the plotting of the 54 wealthiest districts, which experienced no change in LOB equalization. The effect on LOB equalization to those districts (who never qualified for LOB equalization aid under either formula) is irrelevant to Plaintiffs' arguments regarding Appendix B.

III. <u>The State's Allegedly "Objective" Version of Appendix B Demonstrates the Inequities that Plaintiffs Have Identified</u>

The State takes the position that its chart is somehow more objective because it was created by the Legislative Research Department, which – while non-partisan – is still a state entity. It is a stretch for the State to claim that the evidence created by the State for the State is wholly objective. And, the State's version of Appendix B has its own flaws. As pointed out above, the State's inclusion of the "hold harmless" aid and the emergency needs funds makes the chart inaccurate because the ability of districts to access those funds is contingent.

Nonetheless, even the State's version of Appendix B shows the inequities that are caused by H.B. 2655. Comparing the green line with the blue line shows that there is now even more disparity between the districts; the level line caused by the "safe harbor" equalization mechanism has been significantly disrupted.

Finally, the State's version of Appendix B completely misses the point. It is necessary for this Court to understand the specific effect of the Legislature's decision to change the LOB equalization mechanism on the equity of funding under H.B. 2655. Again, since the decrease in money attributed to LOB equalization aid *solely* determines the advantage that a district will have by backfilling, it is important to consider how LOB equalization was affected *without adding in the hold harmless aid*. The State's version of Appendix B attempts to hide from the Court the dis-equalizing effects of H.B. 2655 caused by the "hold harmless" aid and backfilling.

CONCLUSION

For the reasons stated herein, this Court should deny the State's Motion to Strike. Appendix B, which is accurate, authentic, relevant, and useful, should be allowed to be used as demonstrative evidence at the May 10, 2016 hearing.

Dated this 6th day of May, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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