

CONSTITUTIONAL PROTEST
Protest of Senator Hensley
Against Certain Provisions Contained in House Substitute for Senate Bill 61
April 30, 2018

Madam President: I hereby exercise my right under Article 2, Section 10, of the Kansas Constitution to protest certain provisions of **House Substitute for Senate Bill 61 (“H Sub SB 61”)**.

New Section 1(a) of H Sub SB 61, known as the “Patton Fix,” creates a bifurcated classification of the local option budget (“LOB”) for school districts. Until now, the LOB has been a discretionary levy allowing school districts to decide whether to adopt an LOB and at what percentage up to 33%. Under H Sub SB 61, the first 15% of the LOB now becomes mandatory with the remaining portion between 15% and 33% to be discretionary (although districts going above 30% are subject to a protest petition). New Section 1(b) of H Sub SB 61 then requires that the mandatory 15% LOB to be included “in determining the adequacy of the amount of total funding provided by the legislature in making suitable provision for finance of the educational interests of the state.” The same section also allows the discretionary portion of the LOB to be included in the same determination.

Supporters of the inclusion of the 15% mandatory LOB – and requiring that mandatory portion be counted as part of the total funding provided by the legislature for purposes of adequacy – are emphatic that these provisions “don’t do anything.” This justification, on its face, makes little sense. However, it seems much more ill-advised when considering that we are at a critical juncture in the remedy phase of the *Gannon* case. While these provisions may not have a practical effect in the school finance formula, they very well may “do something” in terms of violating Article 6 of the Kansas Constitution.

Additionally, the resolution required to be adopted and published by local school districts who increase their LOB levy above 30% requires that a percentage proportional to that amount of such school district’s total foundation aid attributable to the at-risk student weighting and bilingual weighting as compared to such district’s total foundation aid be spent on at-risk and bilingual education funding. *See* Section 5(h)(i)(A)-(B). This was adopted as new law in H Sub for SB 423. This is a further erosion of the discretionary aspect of the LOB levy. For example, USD 500, Kansas City, Kansas, which has 83% at risk and bilingual, would be required to spend at least 83% of their LOB fund for at risk and ELL services. USD 229, Blue Valley, which has 8% at risk and bilingual, would only have to spend 8% of their LOB fund for at risk and ELL services. This likely creates a substantial adequacy, equity, and structure issue.

1. The Patton Fix appears to codify the State’s “effective base” argument soundly rejected by the Court in *Gannon V*

In the State’s defense of 2017 SB 19 on adequacy grounds, the State advanced an argument that calculated an “effective base” by adding the funds from the authorized increases in the LOB to the new BASE amount. The State argued that “[w]ith LOB considered, SB 19 provides \$118,297,424 more funds in FY 18 than if the LPA study’s base – as calculated by the panel – were applied without LOB funding . . .” *See* Brief of Appellant State of Kansas, pg. 14-15. The State went on to argue that when the increased LOB funds are calculated into the BASE, the “effective base” for FY 18 increases from \$4,006 to \$5,639. This, of course, sounds very

familiar to the Aurand Amendment to H Sub SB 423 which inflated the BASE with the 15% mandatory LOB to \$4,900 for the 2018-2019 school year.

In *Gannon V*, the Court addressed the State's "effective base" argument and soundly rejected it. The Court stated that it is a false equivalency to contend that the BASE and LOB funds are comparable because they "are fundamentally different with frequently different purposes." *Gannon V*, slip op. pg. 39. This is because LOB-generated funds "do not provide the same fixed amount to every student regardless of their locale." *Id* at pg. 40. The amounts of funding each school district receives from levying these mills vary widely from district to district because of differences in property wealth as well as differences in the LOB percentages of their general state aid authorized by their respective school boards. Suffice it to say, it is clear that not every student receives the same amount of LOB funding. This is true even when considering supplemental state aid. *Id*.

The Court also pointed to the fact that LOB funds are not subject to the same limitations as BASE funding. "[L]OB funds can be used by districts in a myriad of other ways, *e.g.*, to directly supplement funding from the base formula" and now pay for nearly one-fourth of districts' operating expenses. *Id* at 41. Continuing this trend of greater reliance on LOB funding to displace BASE funding will result in less funding benefiting the weighted pupils through the funding formula. Such a trend would only further exacerbate the achievement issues identified by the Court through the application of the *Rose Standards*.

The adoption of the Patton Fix essentially codifies the "effective base" argument by continuing to mandate the 15% LOB for every school district then requiring that mandatory 15% LOB be counted in the "amount of funding provided by the legislature" It will be unsurprising if the State advances a similar argument that the BASE is really \$4,900 when you consider the mandatory 15% LOB and even more if you consider the discretionary portion of the LOB. This is a troubling path for the legislature to go down in an attempt to "fix" the Aurand Amendment.

2. 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

Not only does the Patton Fix raise concerns because of its codification of the previously rejected "effective base" argument, it has the potential to raise structure and equity issues. As was pointed out *infra*, the Court has repeatedly warned against overreliance on LOB-generated funds to provide for school finance funding. While there are a number of reasons for this, two reasons deserve particular note in connection with the Patton Fix. First, even with the supplemental state aid (equalization), not every Kansas student receives the same amount of funding from the LOB. In recognizing that the State's decision to rely on increased LOB funding to adequately fund K-12 education has brought various challenges and those challenges are difficult to manage, the Court stated:

Nevertheless, the effort to mitigate the effects of these problems cannot extinguish the constitutional obligations to provide equitable funding. As we have previously cautioned: '[I]f local funding is to continue, this disparate effect has to be limited so it complies with Article 6.'

Gannon V, slip op. at 71 (citing *Gannon III*, 304 Kan. at 501). Currently, the State provides supplemental state aid (equalization) at 81.2%. Taking the step to codify the “effective base” argument after its wholesale rejection in *Gannon V* and another attempt to count LOB-generated funds as state funds provided by the legislature jeopardizes equity yet again. It is estimated that if the State would be required to go to 100% equalization with regard to the mandatory 15% LOB, it would cost approximately \$200 million per year in additional funding. Justice Biles made this exact point during oral arguments with regard to 2017 SB 19:

And I think greater reliance on the LOB to meet basic educational needs squarely creates an equity problem. Because you’re not equalizing at 100%, so that, so even though you’re at 81.2, the more you rely on LOB for basics, you’re going to have to look at that equalization number because otherwise just to meet the basics some taxpayers are going to have to tax themselves harder than other taxpayers and that seems to me to be a pretty big problem the way this thing is set up right now.

(Kansas Supreme Court Archived Oral Arguments, *Gannon v. State*, July 18, 2017, at 33:09-33:49, retrieved April 30, 2018 at www.kscourts.org).

Second, changing the LOB levy from discretionary to partially mandatory – even with no practical effect – raises potential structure issues. While the Court has previously found that the structure of the previous school finance formula and the new – nearly identical one – passed in SB 19, are constitutional with regard to structure, it has warned that greater reliance on LOB-generated funds risks such constitutionality in the future. The Court noted that:

[T]he 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. 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, their voters, are able to increase their LOB authorizations and mill levies and use surrogate funds – with the legislature’s empowerment and encouragement.

Gannon V, slip. op. 41. “[T]he greater the reliance on LOB-generated funds, and the less reliance on BASE-generated funds, the more the specter of unconstitutional structure looms.” *Id* at 41. To make such a change at this critical juncture seems ill advised. Especially when considering the provisions of Section 5(h)(i)(A)-(B) contained in H Sub SB 423.

3. The “do nothing” provisions in H Sub SB 61 carry a high likelihood of a special session to avoid a school shutdown this fall

In Justice Biles’ concurring and dissenting opinion, he concurred in the majority’s approach to stay the mandate on adequacy until June 30, 2018. However, he advocated for enjoining the implementation of the inequitable features of SB 19 from being operational during the 2017-18 school year. *Gannon V*, slip op. at 82. Justice Biles then went on to recount the lengthy history of the failings by the State in regard to equitable funding of K-12 education. Given this view and the clear frustration the Court as a whole has with the legislature regarding

the school finance issue, rolling the dice on provisions that “do nothing” yet raise potential equity and structure issues seems extremely risky.

While there are serious problems with the adoption of the Patton Fix and there is more than enough justification to vote against H Sub for SB 61, time is short and rejecting this bill creates a substantial risk of not fixing the Aurand Amendment. This would leave flaws in the formula in place preventing the expenditure of portions of the already appropriated funds. Unfortunately, the most prudent approach at this juncture is to vote in favor of H Sub for SB 61 and let the Court play its role as a co-equal branch of government. – SENATOR ANTHONY HENSLEY.