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ATTORNEY GENERAL OPINION NO. 90- 30

The Honorable Nancy Parrish
State Senator, Nineteenth District
State Capitol, Room 403-N
Topeka, Kansas 66612

Re: Constitution of the State of Kansas--Education--
State Board of Education and State Board of
Regents; Outcomes-Based Accountability System; 1990
Senate Bill No. 456

Constitution of the State of Kansas--Legislative--
Legislative Power; Outcomes-Based Accountability
System; 1990 Senate Bill No. 456

Synopsis: Under Article 6, § 2 of the Kansas Constitution,
the state board of education has the power of
"general supervision" of public schools,
educational institutions and all the educational
interests of the state, except educational
functions delegated by law to the state board of
regents. The power of "general supervision" is
deemed to be limited to matters which will equalize
and promote the quality of education for the
students of this state, including such matters as
the accreditation of schools, certification of
school personnel, and establishment of minimum
curriculum and graduation requirements. As to
those matters, the state board of education may
alter, amend, waive, revoke, or adopt rules and
regulations without submitting those rules and
regulations to legislative review.

As to those matters beyond the bounds of "general
supervision", an express legislative delegation of

authority, accompanied by adequate standards and guidelines, must exist before the state board of education may legislate in those areas. Rules and regulations regarding such matters are subject to legislative review, and may only be altered, amended, waived, revoked, or adopted by following the procedure set forth by state statute.

The legislature has authorized the state board of education to administer matters beyond the bounds of "general supervision". Therefore, the authority to waive "any requirements of law administered by the state board" or of rules and regulations of the state board," conferred upon the state board of education in 1990 Senate Bill No. 456, would permit the state board of education to legislate in areas beyond the realm of "general supervision", and to waive rules and regulations without submitting them to legislative review and without sufficient guidelines. Such a delegation of authority constitutes a violation of article 2, § 1 of the Kansas Constitution. Cited herein: K.S.A. 72-963; 72-1106; 72-1206; 72-4518; 72-4921; 72-5017; 72-5113; 72-6202; K.S.A. 1989 Supp. 72-7043; 72-7045; 72-7047; 72-8803; 72-9403; 72-9504; K.S.A. 72-9603; K.S.A. 1989 Supp. 72-9903; Kan. Const., Article 2, § 1; Article 6, § 1; Article 6, § 2.

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Dear Senator Parrish:

As Senator for the nineteenth district and ranking minority member of the Senate Education Committee, you request our opinion regarding the constitutionality of 1990 Senate Bill No. 456. The bill attempts to ensure maintenance of quality educational programs through the establishment of an outcomes-based accountability system. Specifically, you ask whether a provision of the bill permitting the state board of education to suspend state statutes for individual districts on a case-by-case basis constitutes an unconstitutional delegation of authority and whether the state board of education may waive rules and regulations of the state board without following the procedure for adoption of rules and regulations set forth by state statute.

Article 6 of the Kansas Constitution mandates that both the state legislature and the state board of education have responsibilities regarding public school and educational institutions. Art. 6, § 1 states:

"The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law."

Art. 6, § 2(a) states:

"The legislature shall provide for a state board of education which shall have general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents. The state board of education shall perform such other duties as may be provided by law."

The Kansas Constitution limits rather than confers power. NEA-Fort Scott v. U.S.D. 234, 225 Kan. 607, 612 (1979). Article 6, § 2 limits the power of the state board to "general supervision" of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents. The legislature is authorized by the constitution to provide for "related activities." Id. at 612. Thus, while the state board lawfully may adopt rules and regulations governing areas within the realm of "general supervision" relying upon its constitutional authority and disregarding any statutory authority or lack thereof, Attorney General Opinion No. 81-236, the state board cannot regulate educational functions or activities falling beyond "general supervision" unless the legislature expressly delegates such authority to the state board. If the legislature chooses to delegate its authority to the state board, the delegation must be circumscribed by sufficient guidelines to cover the nature and extent of the legislative function intended to be delegated. State, ex rel. v. Bennett, 219 Kan. 285, 300 (1976).

Under article 6, §§ 1 and 2, the state board is authorized to perform any duties pertaining to the educational interests of

the state which the legislature deems wise and prudent to impose upon the state board, and the legislature has authority to delegate to the state board the power to perform duties which, in the general classification of powers of government, are legislative in character. State, ex rel. v. State Board of Education, 215 Kan. 551, 556 (1974). The basic mission of the state board is to equalize and promote the quality of education for the students of this state. NEA-Fort Scott v. U.S.D. 234, 225 Kan. at 611. The authority of the state board to exercise general supervision of public schools, educational institutions and all the educational interests of the state, except those functions delegated to the state board of regents, has been deemed to be limited to matters which will equalize and promote the quality of education for the students of this state, including such matters as the accreditation of schools, certification of school personnel, and establishment of minimum curriculum and graduation requirements. Attorney General Opinion No. 83-154.

A provision of S.B. 456 attempts to extend to the state board authority to waive "any requirements of law or of rules and regulations of the state board. . . ." This would permit the state board to waive laws that fall beyond the parameters of "general supervision". The laws could be waived upon a determination by the state board that the laws are "obstructive or inhibitive of the design or effectuation of an outcomes-based accountability system." The standards or guidelines for making such a determination are left to the state board. Such a delegation of authority extends beyond the authority of the state board as provided in the state constitution, and in our opinion would result in an unlawful delegation of legislative power in violation of article 2, § 1 of the Kansas Constitution since sufficient guidelines are lacking.

Because of concerns expressed by some legislators, S.B. 456 has been amended so that "any requirements of law [administered by the state board] or of rules and regulations of the state board" may be waived by the state board. Such an amendment fails to bring the delegation of authority within the bounds of constitutionality because the state board has been granted authority by the legislature to administer a wide array of activities connected with education. See K.S.A. 72-963 (state plan for exceptional children); 72-1106 (school term); 72-1206 (hearing tests); 72-4518 (adult basic education programs); 72-4921 (proprietary schools); 72-5017 (driver training); 72-5113 (food service programs); 72-6202 (federal fund applications); K.S.A. 1989

Supp. 72-7043 (state aid determination); 72-7045 (local effort rate); 72-7047 (transportation aid); 72-8803 (building-based education); 72-9403 (minimum competency evaluation program); 72-9504 (bilingual education); K.S.A. 72-9603 (inservice education opportunities); K.S.A. 1989 Supp. 72-9903 (educational excellence grant program). The amendment to S.B. 456 would continue to permit the state board to waive state statute beyond those deemed to fall within the "general supervision" powers of the state board without providing sufficient guidelines or parameters for such waiver.

The rules and regulations adopted by an administrative board to carry out the policy declared by the legislature in the statutes have the force and effect of law. Agency regulations are issued for the benefit of both the agency and the public, and an agency must be held to the terms of its regulations. Tew v. Topeka Police and Fire Civil Service Commission, 237 Kan. 96, 100 (1985). As a general rule an administrative agency may not violate or ignore its own regulations, and where it fails to follow the regulations it has promulgated, its orders are unlawful. Vandever v. Kansas Department of Revenue, 243 Kan. 693, 697 (1988). Therefore, as to those regulations regarding matters beyond the state board's powers of "general supervision" and relying strictly on a legislative delegation of authority, the state board does not have the authority to alter, amend, waive, revoke, or adopt regulations unless the state board permits legislative review of its modifications by adhering to the procedure set forth by state statute. Attorney General Opinion No. 75-35.

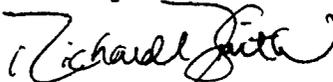
However, the state board proceeds under authority of the constitution in matters of "general supervision" of public schools, educational institutions and educational interests of the state, except those delegated by law to the state board of regents. The state board may lawfully adopt rules and regulations governing the accreditation of schools, certification of school personnel, and adoption of minimum curriculum and graduation requirements, relying upon constitutional authority and disregarding any statutory authority or lack thereof. Attorney General Opinion No. 81-236. The state board may, in regards to rules and regulations addressing matters within the state board's power of "general supervision", alter, amend, waive, revoke, or

adopt rules and regulations without regard to the procedure
set forth in state statute.

Very truly yours,



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