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ATTORNEY GENERAL OPINION NO. 90- 79

Dr. Michael G. Barricklow
Superintendent of Schools
Silver Lake Unified School District No. 372
Box 39
Silver Lake, Kansas 66539

Re: Schools--Capital Outlay Levy, Fund and Bonds--
Capital Outlay Levy, Use of Proceeds; Procedure;
Constitutionality

Synopsis: The Kansas system for financing capital outlays does not operate to the disadvantage of a suspect class or impinge on a fundamental right. Because the system has a rational relationship with the state objective of promoting local control over educational matters, the system does not violate the equal protection clause of the fourteenth amendment to the United States Constitution or sections 1 & 2 of the Kansas bill of rights. The system does not violate article 6 of the Kansas constitution as the article does not require equalization of funding or prohibit funding based on the assessment value of taxable tangible property located within the school district. Cited herein: K.S.A. 72-7030; K.S.A. 1989 Supp. 72-8801; 72-8804; K.S.A. 72-8805; Kan. Const., Bill of Rights, sec. 1; Kan. Const., Bill of Rights, sec. 2; U.S. Const., 14th Amend.

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Dear Dr. Barricklow:

As superintendent for Unified School District No. 372, Shawnee county, Kansas, you request our opinion regarding capital outlay funds of unified school districts. Specifically, you ask whether, in light of school district equalization, it is constitutional to base capital outlay funding on local property values.

Expenditures from the capital outlay fund of a school district may be used for "the acquisition, construction, reconstruction, repair, remodeling, additions to, furnishing and equipping of buildings necessary for school district purposes, . . . architectural expenses incidental thereto, the acquisition of building sites, the undertaking and maintenance of asbestos control projects, the acquisition of school buses and the acquisition of other equipment." K.S.A. 1989 Supp. 72-8804. The funding is raised through an annual tax levy upon the assessed taxable tangible property in the individual school district. K.S.A. 1989 Supp. 72-8801. Under certain circumstances, the school district may issue and sell general obligation bonds in lieu of making all or part of a tax levy under K.S.A. 1989 Supp. 72-8801. K.S.A. 72-8805. While there has been an attempt under the school district equalization act, K.S.A. 72-7030 et seq., to equalize general state aid available to all of the school districts for operating expenses, the ability to raise funding for capital improvements is controlled by the assessed value of taxable tangible property located in each individual school district. The effect of such funding is that school districts with a higher assessed value on taxable tangible property are able to raise more capital outlay funding than those school districts with a lower assessed value on taxable tangible property.

In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), the United States Supreme Court addressed the issue of whether the Texas school-financing system violated the equal protection clause of the fourteenth amendment to the United States Constitution.

"The [Texas Minimum Foundation School] Program calls for state and local contributions to a fund earmarked specifically for teacher salaries, operating expenses, and transportation costs. The State, supplying funds from its general revenues, finances

approximately 80% of the Program, and the school districts are responsible--as a unit--for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State. Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county. The district, in turn, finances its share of the Assignment out of revenues from local property taxation." Id. at 9, 93 S.Ct. 1284.

Locally expendable funds in excess of the amount necessary to satisfy a district's local fund assignment under the foundation program were derived from local property taxes. This is similar to the Kansas situation.

In Texas the dual system of finance had led to the existence of substantial disparities in the funding available to the various school districts. School districts in largely urban areas generally had higher assessment values on taxable property within the district, and were able to raise more funding for educational purposes. Those districts in rural areas or in areas having little commercial or industrial property were generally considered "poorer" and, despite imposing higher tax rates, were unable to collect an equivalent amount of funding. The Supreme Court considered whether the scheme for financing operated to the disadvantage of a suspect class (wealth discrimination) or impinged on a fundamental right (education), thereby subjecting the system to strict scrutiny.

In determining whether the system operated to the disadvantage of a suspect class, the Court found that the argument asserted by the appellees was not that the children in district's having relatively low assessable property values were receiving no public education, but rather that such children were receiving a poorer quality education than that available to children in districts having more assessable wealth. "[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense." 411 U.S. at 24, 93 S.Ct. at 1291. The Texas system guaranteed the availability of a public education to all children. "The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." 411 U.S. at 28, 93 S.Ct. at 1294. Based on this premise, the Court concluded that the Texas system did not operate to the disadvantage of a suspect class.

The Court then addressed the issue of whether education is a fundamental right. "[T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. [Citations omitted.]" 411 U.S. at 33, 93 S.Ct. at 1297. Because there is no such guarantee under the United States Constitution, education was held not to be a fundamental right.

Because the finance system is not operated to the disadvantage of a suspect class and does not impinge on a fundamental right, the legislation will not be subjected to strict scrutiny, but rather must meet a minimal level of scrutiny. The "Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States. . . . The constitutional standard under the Equal Protection Clause is

whether the challenged state action rationally furthers a legitimate state purpose or interest." 411 U.S. at 55, 93 S.Ct. at 1308. The use of local property taxation to advance goals of local control over schools fulfills such a rational relationship. Therefore, a system of financing public education which ensures a minimal level of education will not be unconstitutional even though the system is based on property taxation, resulting in wide discrepancies in available funding.

Because the financing system considered in Rodriguez is analogous to the system used in Kansas, it is our opinion that the Kansas system does not violate the United States Constitution.

It must then be determined whether the system violates the equal protection clause or the education provisions of the state constitution. Similar issues have been litigated in a number of states. Fourteen states have rejected both constitutional claims; six states have held that their respective systems violate the state's education article; four have found violations of the state's equal protection clause. Abbott v. Burke, _____ A.2d _____, 1990 U.S.L.W. 73058 (N.J. 1990).

"Before taking up the specific challenges to the [legislation], we first state the principles and guidelines . . . which come into play upon the determination of challenges to the constitutionality of legislative enactments whether they be statutes, city ordinances or county resolutions. The constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear that the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt. The propriety, wisdom, necessity and expediency of legislation are

exclusively matters for legislative determination. Courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute to be in the public interest; what the views of the court may be upon the subject is wholly immaterial. It is not the province nor the right of courts to determine the wisdom of legislation touching the public interest, as that is a legislative function with which courts cannot interfere. [Citations omitted.]"
Moody v. Board of Shawnee County Commissioners, 237 Kan. 67, 74 (1985).
See also State v. Eaton, 244 Kan. 370 (1989).

An equivalent to the equal protection clause of the fourteenth amendment is contained in the Kansas Constitution, Bill of Rights, sections 1 and 2. These sections state:

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

"All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. . . ."

"The protections afforded by sections 1 and 2 being duplicative of those provided by the Fourteenth Amendment, the test for constitutional transgression should also be identical -- i.e., if a law does not violate the Fourteenth Amendment to the United States Constitution, neither does it violate sections 1 and 2 of the Bill of Rights of the Kansas Constitutions." Leiker v. Employment Security Board of Review, 8 Kan.App.2d 379, 387 (1983). See also Ferguson v. Garmon, 643 F.Supp. 335 (D.Kan. 1986); Moody, supra, 237 Kan. at 74. Because a system of financing based upon property values of a school district does not operate to the disadvantage of a suspect class or impinge on a fundamental right, and has a rational relationship to a state objective under the fourteenth amendment, the system will not be deemed violative of sections 1 and 2 of the bill of rights of the Kansas constitution. The Kansas system of

funding thus does not violate sections 1 and 2 of the bill of rights of the Kansas constitution.

The system of financing does not violate article 6 of the Kansas constitution either.

Article 6, section 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."

Further, article 6, § 6 states in part:

"(b) The legislature shall make suitable provisions for finance of the educational interests of the state. No tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law. . . ."

The constitution of the state of Kansas limits, rather than confers, power and where a statute is attacked as unconstitutional, the question to be determined is not whether its provisions are authorized by the constitution but whether they are prohibited by it. Leek v. Theis, 217 Kan. 784, 795 (1975). The constitution specifically states that the legislature must establish public schools and provide for the financing of those interests. It excludes only one manner of financing - tuition. There is no indication that the funding must be equalized throughout the state or that the funding cannot be based on property taxes. Therefore, the system of financing capital improvements does not violate article 6 of the Kansas constitution.

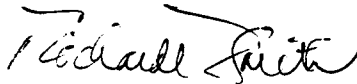
In conclusion, a system of financing public education based on assessments on taxable tangible property does not operate to the disadvantage of a suspect class or impinge on a fundamental right, and such financing must have a rational relationship to a state objective. Promoting local control over educational interests fulfills such a rational

relationship. The system for funding capital outlay projects does not violate either the federal constitution or the Kansas constitution.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
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