



STATE OF KANSAS

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Attorney General

February 3, 1975

Opinion 75- 35

The Honorable Joseph C. Harder
State Senator
Senate Chamber - 3rd Floor
State Capitol Building
Topeka, Kansas 66612

Dear Senator Harder:

You inquire whether the Legislature has the power to amend, modify or revoke rules and regulations adopted by the State Board of Education. Article 6, § 2(a) of the Kansas Constitution provides thus:

"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."
[Emphasis supplied.]

In State ex rel. Miller v. Board of Education, U.S.D. 398, 212 Kan. 482, 511 P.2d 705 (1973), the plaintiff sought a declaratory judgment respecting the validity of a regulation adopted by the State Board of Education, K.A.R. 91-15-1, which required the board of education of every unified school district to adopt rules of conduct governing students and personnel. In addition to the constitutional basis of authority cited above, the State Board relied also upon a statutory grant of authority, K.S.A. 72-7513, by which the Legislature has authorized the adoption of certain rules and regulations thus:

"In general, but not by way of limitation, consonant with other applicable statutory provisions, the state board of

education shall:

(a) Adopt and maintain standards, criteria, guidelines or rules and regulations for the following:

(1) School libraries and textbooks and other educational materials;

(2) Courses of study and curriculum;

(3) Accredit schools including elementary, secondary and junior colleges, public and nonpublic;

(4) Certification of administrators, teachers, counselors and supervisors of school districts and of the state department of education and of teachers and administrators of nonpublic schools;

(5) Have general supervision of school nurses.

(b) Administer the laws of this state concerning the matters named in this section and all other matters relating to the general supervision of the public schools and institutions under supervision of the state board of education."

In challenging the regulation, the local board found itself in the curious position of defending its right of local control by asserting its right not to adopt a code of conduct for persons subject to its jurisdiction. The court summarized the contentions thus:

"The state board has taken the position in this case that the provisions of article 6, § 2(a) are self-executing so far as its power of general supervision is concerned and that, in addition, it is authorized by statute to exercise supervisory powers over local public schools. The district board takes a quite contrary view and insists that the regulation encroaches upon the authority granted local boards by § 5 of article 6 of the constitution."

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The court resolved this dispute thus:

"[I]n the restricted sense of exercising general supervision, article 6, § 2(a) is self-executing. In other word it is our view that the state board may exercise its constitutional power of supervision without ancillary legislation and that its authority in that limited respect could not be thwarted by legislative failure to adopt supplementary legislation."

The court stated further:

"§2(a) is self-executing in part, but not in its entirety; for instance, it is the legislature which must provide for the establishment of the state board of education in the first place and which must delegate to the board 'such other duties as may be provided by law.'" [Emphasis by the court.]

As noted above, K.S.A. 72-7513 provides a statutory base for rule-making by the State Board of Education, independently of its constitutional authority. Concerning this and other statutory provisions, the court stated thus:

"It appears that the present statutory pattern, quite aside from constitutional provisions, is one of entrusting the operation of local public schools to local boards of education subject to the general supervision of the state board of education, such supervision being restricted, however, by the limitations which inhere in the nature of supervision.

We see no flaw in the statutory pattern by reason of the legislature having listed

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in 72-7513(a) five general areas in which the state board should adopt and maintain standards, criteria, guidelines, or rules and regulations. The statute makes it clear that the enumeration is 'not by way of limitation.' Legislative intent is made even plainer in this respect by subsection (b) which provides that the state board shall administer the laws concerning the matters named and all other matters relating to the general supervision of the public schools." [Emphasis by the court.]

The court found it unnecessary for the purposes of that case to distinguish sharply between the separate bases of authority of the State Board, constitutional and statutory.

Your questions requires a sharper distinction, K.S.A. 1974 Supp. 77-426(b) commences thus:

"At the commencement of each regular session of the legislature, the revisor of statutes shall submit to each house of the legislature one copy of all rules and regulations, except emergency rules and regulations, filed in his office prior to October 1 of the preceding year." [Emphasis supplied.]

The phrase "rules and regulations" is defined by K.S.A. 77-415(4) as:

" . . . a rule, regulation, standard, statement of policy or general order, including amendments or repeals thereof, of general application and having the effect of law, issued or adopted by an agency to implement or interpret other legislation enforced or administered by such agency or to govern the organiza-

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or procedure of such agency." [Emphasis
supplied.]

Thus, rules and regulations subject to the provisions of K.S.A. 77-415 et seq. are those adopted either 1) to implement or interpret other legislation enforced or administered by the agency, or 2) to govern the organization or procedure of the agency. A regulation which is adopted to implement or interpret a self-executing constitutional provision, and not to implement or interpret statutory provisions, is not one which falls within the scope of K.S.A. 77-415 et seq.

Thus, for the purpose of legislative review authorized by K.S.A. 1974 Supp. 77-426, those regulations of the State Board of Education which are adopted to implement its statutory rule-making authority, as, e.g., K.S.A. 72-7513, are subject to legislative review. Those regulations adopted by the State Board in the exercise of its constitutional general supervisory power, and not in reliance upon any statutory grant, are not subject to legislative review. As the court pointed out in State ex rel, Miller, supra, at p. 489, "[i]n any event the legislature could not thwart a self-executing provision of the constitution. . . ."

To our knowledge, the State Board of Education has not, in drafting its regulations, sought to differentiate between constitutional and statutory bases of authority therefor. K.S.A. 77-416 provides that "each such regulation shall include a citation of the authority pursuant to which it, or any part thereof, was adopted." A regulation adopted by the State Board based only upon its constitutional, as distinguished from its statutory, authority, would not be subject to this or any other requirement of K.S.A. 77-415 et seq., and would not necessarily be presented to us for review. It is our belief, however, that prior to this time, every regulation adopted by the State Board has included a citation to statutory authority therefor. Every such regulation is subject to legislative review. Those regulations not subject to legislative review are those which cite and rely upon as authority therefor only Article 6, § 2(a) of the Kansas Constitution.

As the court pointed out in the cited case above, the constitutional and statutory grants of authority are broadly overlapping. However, to the extent that the State Board of Education relies not upon any statutory rule-making authority, but exclusively upon Article 6,

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§2(a) to support any regulation adopted in the implementation of its constitutional general supervisory authority over "public schools, educational institutions and all the educational interests of the state, "except those delegated to the State Board of Regents, any such rule or regulation is not subject to legislative review pursuant to K.S.A. 1974 Supp. 77-426(b). Every other regulation adopted by the State Board of Education which cites statutory provisions as authority therefor are, under the existing law, subject to legislative review pursuant to K.S.A. 1974 Supp. 77-426(b).

Yours very truly,



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