



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 92-3

Joseph W. Zima
Clerk and Counsel for Unified
School District No. 501
624 West 24th Street
Topeka, Kansas 66611

Re: Schools--Organization, Powers and Finances of
Boards of Education--Organization Order for Unified
School District; Affirmative Action Contracting
Program

Synopsis: A board of education for a unified school district
may establish and implement an affirmative action
contracting program. Any racial classification set
forth in the program must be justified by a
compelling governmental interest and the means
chosen to effectuate the purpose for the program
must be narrowly tailored to the achievement of
that goal. Cited herein: K.S.A. 44-1009, as
amended by L. 1991, ch. 147, § 6; K.S.A. 1990
Supp. 72-6760, as amended by L. 1991, ch. 226, §
10; K.S.A. 72-8201; 72-8205; Kan. Const., Bill
of Rights, §§ 1, 2; Kan. Const., art. 6, § 5;
U.S. Const., amend. 14, § 1.

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Dear Mr. Zima:

As attorney for unified school district no. 501, Shawnee
county, Kansas, you request our opinion regarding whether a
board of education for a unified school district possesses the
authority to develop and implement an affirmative action

contracting program which would give preference to minority-owned business enterprises. The contracting program would be implemented to remedy past unlawful discrimination occurring within the boundaries of the unified school district. You also ask, if it is determined that a board of education does have such authority, whether the appropriate method for implementing such a contracting program is detailed in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

"Public schools, like other public employees, operate under two interrelated constitutional duties. They are under a clear command from this Court, starting with Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary. North Carolina State Board of Education v. Swann, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971). On the other hand, public employers, including public schools, also must act in accordance with a 'core purpose of the Fourteenth Amendment' which is to 'do away with all governmentally imposed discriminations based on race.' Palmore v. Sidoti, 466 U.S. at 432, 104 S.Ct. at 1881-1882." Wygant v. Jackson Board of Education, 476 U.S. 267, 277, 106 S.Ct. 1842, 1848, 90 L.Ed.2d 260 (1986).

School districts are creations of the state legislature. NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, 517 (1983); Miller v. U.S.D. No. 470, 12 Kan.App.2d 368, 372 (1987). The districts have only such power and authority as is granted by the legislature and its power to contract is only such as is conferred either expressly or by necessary implication. Id. Any reasonable doubt as to the existence of such power should be resolved against its existence. Hobart v. U.S.D. No. 309, 230 Kan. 375, 383 (1981).

The people of Kansas have, by constitutional fiat, placed the maintenance, development and operation of local public schools with local boards of education, subject to the general supervision of the state board of education. State ex rel.

v. Board of Education (Peabody), 212 Kan. 482, 492-93 (1973); see Kan. Const., art. 6, § 5. The legislature has conferred upon local boards of education the authority to exercise the usual powers of a corporation for public purposes, K.S.A. 72-8201, and those powers and authorities expressly conferred by law. K.S.A. 72-8205. Pursuant to K.S.A. 72-8201, each unified school district is authorized to execute contracts. The power to execute contracts necessarily includes the authority to fix the terms of the contracts, provided such terms do not contravene statutory law or public policy. Ritchie Paving, Inc. v. Kansas Department of Transportation, 232 Kan. 346, 352 (1982). The power includes the authority to determine the parties with whom the school districts wish to contract. The local boards of education may, for purposes of exercising such choices, implement policies and procedures to be followed by the school districts, provided the policies and procedures are consistent with present law. See Board of Education (Peabody), 212 Kan. at 490. A properly formulated affirmative action contracting program does not violate state statute or public policy. See K.S.A. 44-1009(b). Local boards of education may implement as part of their policies and procedures an affirmative action contracting program which would give preference to minority-owned business enterprises.

An affirmative action contracting program will not be applicable to those purchases subject to a bidding requirement. K.S.A. 1990 Supp. 72-6760, as amended by L. 1991, ch. 226, § 10, states "[n]o expenditure involving an amount greater than \$10,000 for construction, reconstruction, or remodeling or for the purchase of materials, goods, or wares shall be made by the board of education of any school district except upon sealed proposals, and to the lowest responsible bidder." The matter of determining who is the lowest responsible bidder is vested in the discretion of the board of education. Warner v. City of Independence, 121 Kan. 551, 557 (1926). Such a determination implies that the bidder possesses the necessary skill, judgment and integrity to faithfully perform the contract, as well as sufficient financial resources and ability. Williams v. City of Topeka, 85 Kan. 857, Syl. ¶ 1 (1911). Status as a minority is not a consideration in determining whether a bidder is the lowest responsible bidder. Therefore, those expenditures and purchases involving expenditures greater than \$10,000 for those purposes designated in K.S.A. 1990 Supp. 72-6760, as amended, may not be subject to an affirmative action contracting program developed by the board of education of a unified school district.

A state or local subdivision, if delegated the authority from the state, has the authority to eradicate the effects of discrimination within its own legislative jurisdiction. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491-92, 109 S.Ct. 706, 720, 102 L.Ed.2d 854 (1989). However, such authority must be exercised within the constraints of section 1 of the fourteenth amendment of the United States constitution and sections 1 and 2 of the bill of rights of the Kansas constitution. The protections afforded by these provisions are duplicative and the test for constitutional transgression is identical. 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 v. Board of Shawnee County Commissioners, 237 Kan. 67, 74 (1984). Racial and ethnic distinctions of any sort, including those which operate against a group that historically has not been subject to governmental discrimination, are inherently suspect and call for the most exacting judicial examination. Wygant v. Jackson Board of Education, 476 U.S. 267, 273, 106 S.Ct. 1842, 1846, 90 L.Ed.2d 260 (1986). The standard of review under the equal protection clause is not dependent on the race of those burdened or benefitted by a particular classification. City of Richmond, 488 U.S. at 494, 109 S.Ct. at 721. The examination is two-fold; first, any racial classification must be justified by a compelling governmental interest; and second, the means chosen by the state to effectuate its purpose must be narrowly tailored to the achievement of that goal. Wygant, 476 U.S. at 274, 106 S.Ct. at 1847. See City of Richmond, 488 U.S. at 498, 109 S.Ct. at 723. Racial classifications are suspect, and simple legislative assurances of good intention will not suffice. City of Richmond, 488 U.S. at 500, 109 S.Ct. at 724. Only if the affirmative action contracting program can withstand such heightened scrutiny will the program be upheld.

Very truly yours,


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Richard D. Smith
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