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June 13, 2019

ATTORNEY GENERAL OPINION NO. 2019- 5

The Honorable Anthony Hensley
Senate Democratic Leader
State Senator, 19th District
State Capitol, Room 318-E
Topeka, Kansas 66612

Re: Constitution of the State of Kansas—Education—State Board of Education and State Board of Regents; State Board of Education; General Supervision; Licensure; Consideration of Felony Convictions of Applicants for Licensure by State Agencies

Schools—Teacher Licensure—Cancellation of Teachers' Licenses; Grounds; Issuance, Renewal, Reinstatement and Registration of Licenses; Rules and Regulations; Restrictions on Issuance and Renewal of Licenses; Hearings upon Denial

State Boards, Commissions and Authorities—Miscellaneous Provisions—Consideration of Felony Convictions of Applicants for Licensure by State Agencies

Synopsis: The Kansas State Board of Education is subject to the requirements of subsection (b) of K.S.A. 74-120. Cited herein: K.S.A. 58-4113; 65-1751; 65-1820a; 65-1908; 65-1947; 72-2155; 72-2165; 74-120; 74-5818; 75-6102; Kan. Const., Art. 2, § 1; Kan. Const., Art. 6, §§ 1, 2, 5, 7; L. 2018, Ch. 86, § 1; L. 2015, Ch. 94, § 23; L. 2005, Ch. 69, § 1; L. 1998, Ch. 171, § 1; L. 1972, Ch. 231, § 12; L. 1945, Ch. 282, § 38; L. 1905, Ch. 392, § 1.

* * *

Dear Senator Hensley:

As State Senator for the 19th District, you request our opinion regarding whether subsection (b) of K.S.A. 74-120 applies to the Kansas State Board of Education (State Board). The issue arises because the State Board possesses certain authority under the Kansas Constitution and licensure of school personnel is subject to statutory provisions.

Beginning in 1972, K.S.A. 74-120 stated that “any person, board, commission or similar body who¹ determines the qualifications of individuals for licensure, certification or registration may consider any felony conviction of the applicant, but such a conviction shall not operate as a bar to licensure, certification or registration.”² In 2018, subsections (b) and (c) were added to the statute.³

Subsection (b) of K.S.A. 74-120 requires a licensing body to “revise their existing requirements to list the specific civil and criminal records that could disqualify an applicant from receiving a license, certification or registration.”⁴ “[I]n no case shall non-specific terms, such as moral turpitude or good character, or any arrests that do not result in a conviction be used to disqualify an individual's application for licensure, certification or registration.”⁵ The statute then restricts the authority of the licensing body to consider certain disqualifiers that occurred more than five years immediately preceding the application for licensure, certification or registration.⁶ An individual seeking licensure may obtain from the licensing body “an informal, written advisory opinion concerning whether the individual's civil or criminal record will disqualify the individual from obtaining such license, certification or registration.”⁷ The licensing body is required to “adopt and publicly maintain all necessary rules and regulations for the implementation of [subsection (b)].”⁸

Through subsection (c) of the statute, 11 state boards, commissions and offices, any municipality as defined in K.S.A. 75-6102,⁹ and “any profession that has an educational requirement for licensure that requires a degree beyond a bachelor's degree” are expressly exempt from the requirements of subsection (b).¹⁰ The Kansas State Board of Education is not included in the list of exempt boards, commissions and offices.

¹ In L. 2018, Ch. 86, § 1, “who” was amended to “that.” This language is now in subsection (a).

² L. 1972, Ch. 231, § 12.

³ See L. 2018, Ch. 86, § 1.

⁴ K.S.A. 74-120(b)(1).

⁵ *Id.*

⁶ K.S.A. 74-120(b)(2).

⁷ K.S.A. 74-120(b)(3).

⁸ K.S.A. 74-120(b)(4).

⁹ “Municipality” means any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof.” K.S.A. 75-6102(b). The statute differentiates between “municipality” and “state,” which is defined in K.S.A. 75-6102(a) as “the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.” The Kansas State Board of Education is a state agency, rather than a political or taxing subdivision of the state. See *U.S.D. No. 443 v. Kansas State Bd. of Ed.*, 266 Kan. 75 (1998); *State ex rel. Schneider v. City of Kansas City*, 228 Kan. 25 (1980).

¹⁰ See K.S.A. 74-120(c).

In determining whether the State Board is subject to K.S.A. 74-120(b), we follow the rules of statutory interpretation and construction.

[T]he interpretation of statutes and administrative regulations presents questions of law subject to de novo review. In this endeavor, [the courts] must give effect to the intent expressed by the plain language of the text. This means [the courts] give common words their ordinary meanings, without adding to or subtracting from the text as it appears. [The courts] only resort to textual construction when the language is ambiguous.¹¹

K.S.A. 74-120(b) applies to “any person, board, commission or similar body that determines the qualifications of individuals for licensure, certification or registration,” unless the person, board, commission or similar body is named in subsection (c) of K.S.A. 74-120. By the statute’s plain language, the Legislature intended the statute apply to any governing body that determines the qualifications of individuals for licensure, certification, or registration. We find no indication that the reference in K.S.A. 74-120(b) to “board” is not intended to include the Kansas State Board of Education. As the State Board is not included in the list of exempt persons, boards, or commissions enumerated in K.S.A. 74-120(c), the State Board is required to abide by K.S.A. 74-120(b).

Kansas Constitution

We now review whether K.S.A. 74-120(b)’s inclusion of the State Board violates the Kansas Constitution. “It is fundamental that our state constitution limits rather than confers powers. Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby.”¹² “Th[e] court need not attempt to search out constitutional authority for enacting a challenged statute, but rather must determine if the legislation so clearly violates a constitutional prohibition as to place it beyond legislative authority.”¹³ “When a statute’s constitutionality is attacked, the statute is presumed constitutional and all doubts must be resolved in favor of its validity.”¹⁴

Courts do not strike down legislative enactments on the mere ground they fail to conform with a strictly legalistic definition or technically correct interpretation of constitutional provisions. The test is rather whether the legislation conforms with the common understanding of the masses at the time they adopted such provisions and the presumption is in favor of the natural and popular meaning in which the words were understood by the adopters.

¹¹ *Central Kansas Med. Center v. Hatesohl*, 308 Kan. 992, 1002 (2018) (internal citations omitted).

¹² *State ex rel. Tomasic v. Unified Gov’t of Wyandotte County/Kansas City*, 264 Kan. 293, 300 (1998), quoting *Hunt v. Eddy*, 150 Kan. 1, 4-5 (1939).

¹³ *U.S.D. No. 380, Marshall Cty. v. McMillen*, 252 Kan. 451, 457 (1993), quoting *NEA-Fort Scott v. U.S.D. No. 234*, 225 Kan. 607, 608-09 (1979).

¹⁴ *Miller v. Johnson*, 295 Kan. 636, 646 (2012).

The propriety, wisdom, necessity and expedience of legislation are exclusively matters for legislative determination and courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute in the public interest of the state, since, necessarily, what the views of members of the court may be upon the subject is wholly immaterial and 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.¹⁵

“In ascertaining the meaning of a constitutional provision, the primary duty of the courts is to look to the intention of the makers and adopters of that provision.”¹⁶

Article 6 of the Kansas Constitution was amended in 1966 to provide:

§ 1: Schools and related institutions and activities. 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.

§ 2: State board of education and state board of regents. (a) 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.

....

§ 3: Members of state board of education and state board of regents. (a) There shall be ten members of the state board of education with overlapping terms as the legislature may prescribe. The legislature shall make provision for ten member districts, each comprised of four contiguous senatorial districts. The electors of each member district shall elect one person residing in the district as a member of the board. The legislature shall prescribe the manner in which vacancies occurring on the board shall be filled.

....

§ 5: Local public schools. Local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards. When authorized by law, such

¹⁵ *State ex rel. Tomasic*, 264 Kan. at 300 (internal citations and quotation marks omitted).

¹⁶ *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 562-63 (2008), quoting *State ex rel. Stephan v. Finney*, 254 Kan. 632, 654 (1994).

boards may make and carry out agreements for cooperative operation and administration of educational programs under the general supervision of the state board of education, but such agreements shall be subject to limitation, change or termination by the legislature.

“These constitutional provisions must be read in conjunction with Art. 2, Sec. 1, which vests the legislative power in the house of representatives and senate.”¹⁷ “[T]he amendment reaffirmed the inherent powers of the legislature—and through its members, the people—to shape the general course of public education and provide for its financing.”¹⁸

The Kansas Supreme Court has commented on the interplay of the various entities having duties in educational matters.

[U]nder the Kansas Constitution many entities play roles in public education in Kansas. Playing one major role are the people of Kansas, who approved the Kansas Constitution in 1859 and its Article 6 amendments in 1966. . . . [I]t also includes the legislature, created and empowered, but obligated, by the constitution created by the people.

Also playing roles are the local boards of education, the State Board of Education, and the Board of Regents. Like the legislature, these entities were created, empowered, and obligated by the constitution created by the people.

As for the constitutional relationship between the legislature and the State Board of Education, this court has made clear that the general supervisory powers of the board under Article 6, Section 2(a) are “self-executing,” *i.e.*, not requiring empowerment by the legislature. And this power could not be thwarted by legislative failure to adopt supplementary legislation.

As for the constitutional relationship between the legislature and local school boards, . . . the legislature does not have *carte blanche* over the duties and actions of local school boards. Rather, their respective constitutional duties and obligations must be read together and harmonized so both entities may carry out their respective obligations.¹⁹

“[I]t 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.’”²⁰ Once the State Board was established, its authority to exercise general supervision under Article 6, § 2(a) was self-executing and could be

¹⁷ *State ex rel. Dix v. Kansas State Bd. of Ed.*, 215 Kan. 551, 556 (1974).

¹⁸ *U.S.D. No. 229 v. State*, 256 Kan. 232, 241 (1994).

¹⁹ *Gannon v. State*, 298 Kan. 1107, 1158-59 (2014) (internal citations and quotation marks omitted).

²⁰ *State ex rel. Miller v. Bd. of Ed. of U.S.D. No. 398, Marion County (Peabody)*, 212 Kan. 482, 487 (1973).

exercised without ancillary legislation.²¹ However, “even when a constitutional provision is self-executing the legislature may enact legislation to facilitate or assist in its operation so long as the legislation is in harmony with and not in derogation of the provisions of the constitution.”²²

The rule is that a self-executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution and further the exercise of constitutional right to make it more available. Thus, even in the case of a constitutional provision which is self-executing, the legislature may enact legislation to facilitate the exercise of the powers directly granted by the constitution; legislation may be enacted to facilitate the operation of such a provision, prescribe a practice to be used for its enforcement, provide a convenient remedy for the protection of the rights secured or the determination thereof, or place reasonable safeguards around the exercise of the right. And, even though a provision states that it is self-executing, some legislative action may be necessary to effectuate its purposes. But legislative authority to provide the method of exercising a constitutional power exists only where the constitutional provisions themselves do not provide the manner and means and methods for executing the powers therein conferred. Procedure prescribed in a self-executing provision must be followed to the exclusion of that prescribed by statute, and failure to comply with the provisions of a statute which differ from those in the constitutional provision is not a defect.

It is clear that legislation which would defeat or even restrict a self-executing mandate of the constitution is beyond the power of the legislature. Also, the legislature is neither required nor permitted to enact laws purporting to confer rights in excess of and different from those contemplated by the constitution. A liability imposed by a self-executing provision is absolute and not subject to legislative enlargement or lessening or restriction as to manner of enforcement.²³

The State Board serves much the same function and purpose as had been served by the state superintendent of public instruction.²⁴ The basic mission of the State Board is “to equalize and promote the quality of education through statewide accreditation and

²¹ *State ex rel. Miller v. Bd. of Ed. (Peabody)*, 212 Kan. at 486.

²² *NEA-Fort Scott*, 225 Kan. at 609. See also *Hainline v. Bond*, 250 Kan. 217, 220 (1992); *State ex rel. Miller v. Bd. of Ed.*, 212 Kan. at 488.

²³ *Kansas Enterprises, Inc. v. Frantz*, 269 Kan. 436, 452 (2000), quoting *Colorado Interstate Gas Co. v. Board of Morton County Comm’rs*, 247 Kan. 654, 659-60 (1990) (internal quotation marks omitted).

²⁴ *State ex rel. Dix*, 215 Kan. at 556. Prior to amendment in 1966, Article 6, § 1 of the Kansas Constitution stated, “The state superintendent of public instruction shall have the general supervision of the common-school funds and educational interests of the state, and perform such other duties, as may be prescribed by law.”

certification of teachers and schools.”²⁵ The Legislature cannot prevent the State Board from performing its basic mission by failing to enact further legislation or by enacting legislation that unduly interferes with or hamstring the State Board in performing its constitutional function.²⁶

In Attorney General Opinion Nos. 81-236 and 83-154, it was determined that the authority of the State Board “is 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,” and that the State Board may regulate such matters without reliance on legislative action. With this much, we are in agreement.

The Attorney General Opinions then state that “[t]he legislature may not prescribe, amend, modify, or otherwise alter the content of . . . rules and regulations” regarding these matters²⁷ and that “[w]ithin such matters, measures adopted by the State Board have priority over conflicting legislation.”²⁸ The opinions insinuate that the test is between the statute and the State Board’s regulation. With this, we do not agree. The test for whether the legislation is valid is not determined by the existence of a conflicting State Board regulation; it is whether the legislation unduly interferes with or hamstring the State Board in performing its constitutional function.²⁹ The portions of Attorney General Opinion Nos. 81-236 and 83-154 insinuating otherwise are withdrawn.

We can find no provision in the Kansas Constitution that clearly precludes the Legislature from enacting legislation that addresses licensure of school personnel. Given the strong “presumption of constitutionality and with all doubts resolved in favor of the statute’s validity,”³⁰ we cannot conclude that K.S.A. 74-120 unduly infringes upon the authority of the State Board in performing its constitutional duty.

Statutory Authority

K.S.A. 72-2155 sets forth the historical policy of the State of Kansas:

Any license issued by the state board of education . . . may be canceled by the state board of education in the manner provided by law, on the grounds of immorality, gross neglect of duty, annulling of written contracts with boards of education without the consent of the board which is a party to the

²⁵ *Unified School Dist. No. 279, Jewell County v. Secretary of Human Resources*, 247 Kan. 519, 535-36 (1990); *NEA-Fort Scott*, 225 Kan. at 610-11.

²⁶ See *Gannon*, 298 Kan. at 1128, *Unified School Dist. No. 229*, 256 Kan. at 253 and *Unified School Dist. No. 380, Marshall County*, 252 Kan. at 464, which reviewed the respective duties between the Legislature under § 1 of Article 6 and local boards of education under § 5 of Article 6, a provision that is not self-executing.

²⁷ Attorney General Opinion No. 81-236.

²⁸ Attorney General Opinion No. 83-154.

²⁹ See fn. 26.

³⁰ *Unified School Dist. No. 380, Marshall County*, 252 Kan. at 464. See fn. 13.

contract, or for any cause that would have justified the withholding thereof when the same was granted.³¹

Since 1998, K.S.A. 72-2165 has precluded the State Board of Education from issuing a license to a person who has been convicted of designated crimes.³² Pursuant to K.S.A. 72-2165, the State Board “shall not knowingly” issue a license to or renew the license of any person who has been convicted of any of the crimes listed in subsections (a)(1) through (26) of the statute. Further, absent a finding of rehabilitation or satisfaction of the terms and conditions of a criminal diversion agreement, the State Board “shall not knowingly” issue a license to or renew the license of any person who has been convicted of, or who has entered into a criminal diversion agreement after having been charged with, any of the crimes set forth in subsections (b)(1) through (11) of K.S.A. 72-2165.³³ The procedure for the State Board to deny a license has also been provided by statute:

Before any license is denied by the state board of education for any of the offenses or acts specified in subsections (a) and (b) [of K.S.A. 72-2165], the person shall be given notice and an opportunity for a hearing in accordance with the provisions of the Kansas administrative procedure act.³⁴

The majority of crimes listed in K.S.A. 72-2165 are felonies or class A misdemeanors. However, depending on circumstances, some of the crimes are class B or class C misdemeanors.³⁵

“It is a settled rule of statutory construction that where an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede, repeal or supplant the earlier by implication.”³⁶ K.S.A. 72-2155 and 72-2165 were last amended in 2005³⁷ and 2015,³⁸ respectively. As previously noted, K.S.A. 74-120 was amended in 2018. To the extent that the provisions of K.S.A. 72-2155 and 72-2165 may conflict with K.S.A. 74-120,

³¹ See also L. 1905, Ch. 392, § 1; L. 1945, Ch. 282, § 38. Section 7 of Article 6 of the Kansas Constitution includes a savings clause, stating, “All laws in force at the time of the adoption of this amendment and consistent therewith shall remain in full force and effect until amended or repealed by the legislature.”

³² See L. 1998, Ch. 171, § 1, codified at K.S.A. 72-1397 and transferred to K.S.A. 72-2165.

³³ K.S.A. 72-2165(c).

³⁴ K.S.A. 72-2165(d).

³⁵ See K.S.A. 72-2165(a)(23) and (24).

³⁶ *Richards v. Etzen*, 231 Kan. 704, 707 (1982). We are aware that another rule of statutory construction is when two statutes are in conflict, the more specific statute controls over a more general statute. *In re Mental Health Ass'n of Heartland*, 289 Kan. 1209, 1215 (2009). Here, the specific statutes, K.S.A. 72-2155 and 72-2165, govern the State Board issuing a license to a person who has been convicted of designated crimes. However, the application of this rule would render K.S.A. 74-120 meaningless as several licensing agencies that are not listed in K.S.A. 74-120(c) are subject to specific statutes containing qualifications for licensure. See, e.g., K.S.A. 58-4113 (Real Estate Appraisal Board); 65-1751 (Board of Mortuary Arts); 65-1820a (Board of Barbering); 65-1908 (Board of Cosmetology); 65-1947 (Board of Cosmetology); 74-5818 (Board of Hearing Aid Examiners). “When the legislature revises an existing law, it is presumed that the legislature intended to change the law from how it existed prior to the amendment, and it is presumed that the legislature does not intend to enact useless or meaningless legislation.” *Kansas Dep't of Revenue v. Powell*, 290 Kan. 564, 570–71, (2010), quoting *State v. Van Hoet*, 277 Kan. 815, 826 (2004).

³⁷ See L. 2005, Ch. 69, § 1.

³⁸ See L. 2015, Ch. 94, § 23.

the provisions of K.S.A. 74-120 are controlling. Therefore, the State Board is subject to K.S.A. 74-120(b), and its regulations regarding licensure must list the specific civil and criminal records that could disqualify an applicant from receiving a license, being sure to avoid non-specific terms such as moral turpitude or good character or any arrests that do not result in a conviction.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
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/s/Richard D. Smith

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DS:AA:RDS:sb