No. 14-3280

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COPE (A.K.A. CITIZENS FOR OBJECTIVE PUBLIC EDUCATION, INC.), *et al.*,
Plaintiffs-Appellants,

v.

KANSAS STATE BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
For the District of Kansas (No. 13-CV-4119-DDC-JPO)
Honorable Daniel Crabtree, United States District Judge

BRIEF OF DEFENDANTS-APPELLEES

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ORAL ARGUMENT IS NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER

PRIOR OR RELATED APPEALS

None.

JURISDICTIONAL STATEMENT

In addition to the grounds for jurisdiction cited in Appellant's Opening Brief, this Court's jurisdiction arises under 28 U.S.C. § 1291.

STATEMENT OF ISSUES FOR REVIEW

1. Have Plaintiffs suffered an actual or imminent injury as a result of the Kansas State Board of Education's adoption of the Science Standards when there is no allegation that the Science Standards are being implemented in any school attended by the Plaintiff children and when state law allows local school districts to determine their own curriculum?

2. Have Plaintiffs suffered a concrete and particularized injury as a result of the Board's mere adoption of the Science Standards, apart from their potential implementation in local schools, when Plaintiffs are not directly affected by the adoption?

3. Are Plaintiffs' alleged injuries fairly traceable to the Defendants and likely to be redressed by a favorable decision when local school boards retain authority to determine whether and how to implement the Science Standards?

4. Do any Plaintiffs have standing to challenge the Science Standards by virtue of paying taxes in Kansas, despite the general rule against taxpayer standing?

STATEMENT OF THE FACTS

Plaintiffs are a group of Kansas schoolchildren, their parents, two Kansas taxpayers, and the nonprofit organization Citizens for Objective Public Education (COPE). They seek to enjoin implementation of the Next Generation Science Standards and the related Framework for K-12 Science Education Practices, Crosscutting Concepts and Core Ideas (collectively "Science Standards"), which the Kansas State Board of Education adopted on June 11, 2013.[1] Plaintiffs sued the Kansas State Board of Education, the individual members of the State Board of Education in their official capacities, the Kansas State Department of Education, and the Kansas Commissioner of Education.

The Science Standards that Plaintiffs challenge do not prescribe a specific curriculum. Instead, as the Executive Summary of the Standards explains, they establish "performance expectations" for what students should know and be able to do at each grade level:

> The [Next Generation Science Standards ("NGSS")] are standards, or goals, that reflect what a student should know and be able to do—they do not dictate the manner or methods by which the standards are taught. The performance expectations are written in a way that expresses the concept and skills to be performed but still leaves curricular and instructional decisions to states, districts, school and

[1] Technically, the Board only adopted the Next Generation Science Standards. *See* Aplt. App. at 1072 (Minutes of June 11, 2013, Kansas State Board of Education Meeting). The Framework was the first step in the process of creating the Standards and was essentially incorporated into the Standards. Aplt. App. at 545-47.

> teachers. The performance expectations do not dictate curriculum; rather, they are coherently developed to allow flexibility in the instruction of the standards. While the NGSS have a fuller architecture than traditional standards . . . the NGSS do not dictate nor limit curriculum and instructional choices.

Aplt. App. at 543.

Plaintiffs' Complaint alleges that the Science Standards "endorse a non-theistic religious worldview" in violation of the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In particular, Plaintiffs appear to challenge the teaching of scientific concepts such as evolution, and they advocate "objective" science education, by which they presumably mean a science curriculum that includes the teaching of intelligent design. According to Plaintiffs, the Science Standards represent a materialistic explanation of origins science that conflicts with what they call the "teleological hypothesis," which teaches "that the apparent design that may be observed in many naturally occurring patterns may be real and therefore due to an intelligent cause." Aplt. App. at 17, Doc. 1 (Complaint ¶ 72).

Because Plaintiffs incorporate the Science Standards by reference in their Complaint, this Court may consider what the Science Standards actually say and is not bound by Plaintiffs' mischaracterizations of them.[2] *See, e.g.*, *Berneike v. CitiMortgage, Inc*, 708 F.3d 1141, 1146 (10th Cir. 2013). Contrary to Plaintiffs'

[2] The Framework begins on page 136 of the Appellants' Appendix, while the Next Generation Science Standards begin on page 538.

claims, the Science Standards do not address religious questions such as the existence of a god or gods, the purpose of life, or whether life exists after death. The Science Standards also do not condemn any specific religion or religion generally. Plaintiffs' description of the Science Standards as "atheistic" is a gross mischaracterization.

On December 5, 2013, Defendants filed a Motion to Dismiss and Memorandum in Support arguing that Kansas State Board of Education and the Kansas State Department of Education are entitled to sovereign immunity, that Plaintiffs lack Article III standing, and that Plaintiffs' Complaint fails to state a claim for relief on the merits. Aplt. App. at 86–135, Doc. 29 and 30.

By Memorandum and Order filed December 2, 2014, District Judge Daniel Crabtree granted Defendants' Motion to Dismiss for lack of jurisdiction, finding that the Kansas State Board of Education and the Kansas State Department of Education are entitled to sovereign immunity and that Plaintiffs lack standing. Aplt. App. at 1142, Doc. 50. Because the District Court determined that it did not have jurisdiction, the District Court did not address the merits of Plaintiffs' claims.

On December 30, 2014, Plaintiffs filed a Notice of Appeal. Aplt. App. at 1180, Doc. 52. On appeal, Plaintiffs challenge only the District Court's standing analysis and do not contest the sovereign immunity of the Kansas State Board of Education and the Kansas State Department of Education.

SUMMARY OF ARGUMENT

The District Court properly granted the Motion to Dismiss for lack of standing.

1. Plaintiffs fail to allege an injury that is actual or imminent. Because they have not alleged that the Science Standards are being implemented in any school attended by the Plaintiff children, they must show that implementation is "certainly impending." Plaintiffs attempt to carry this burden by arguing that state law requires local schools to implement the Science Standards, but this argument is wrong. Under the Kansas Constitution, the operation of public schools is entrusted to local school boards, subject to "general supervision" by the State Board of Education. K.S.A. 72-6439, the statute giving the State Board authority to adopt curriculum standards, recognizes this constitutional relationship in that it prevents the State Board from "imping[ing] upon any district's authority to determine its own curriculum." Because local schools retain authority to determine their own science curriculums, Plaintiffs' alleged injuries are not certainly impending.

Plaintiffs' argument that Kansas statutes and regulations regarding student assessments, school accreditation, and teacher professional development will force local schools to adopt the Science Standards was not raised in the District Court and is therefore forfeited. Even if the argument were before this Court, whether these provisions will cause any particular local school to implement the Science

Standards as predicted by Plaintiffs is speculative, and therefore implementation is not certainly impending.

The exhibits attached to Plaintiffs' opening brief also do not support Plaintiffs' claim that implementation of the Science Standards is certainly impending. At most, these exhibits show that the Science Standards are being implemented in some school districts, but not specifically in any school attended by the Plaintiff children.

2. Plaintiffs also argue that the Board's mere adoption of the Science Standards causes them to suffer actual and immediate injuries, even if the Science Standards are never adopted in public schools. But many of the injuries Plaintiffs identify as actual and immediate will occur only if the Science Standards are implemented. Plaintiffs' arguments regarding why implementation is unnecessary all lack merit. Plaintiffs' fear of future injury is not sufficient for standing purposes unless the injury is certainly impending, and it is not here. Plaintiffs also are not the "objects" of the Science Standards, nor would they have standing even if they were. The cases Plaintiffs cite regarding voluntary religious exercises with an option to opt out are all inapposite because in those cases the religious exercises were actually occurring. Here, the District Court's standing analysis did not rest on the ability of parents to opt their children out of educational activities under K.S.A.

72-1111(f) but rather on the fact that state law does not require local school districts to implement the Science Standards.

Several other arguments advanced by Plaintiffs, such as their claim that the Board's adoption of the Science Standards breached their trust that the Board would not violate the Constitution, rest on an assumption that an alleged constitutional violation itself gives standing. But it is not enough to claim a constitutional violation. A plaintiff must allege a personal injury as a result of the constitutional violation, and Plaintiffs have not done so here. Plaintiffs' argument that an allegation of a constitutional violation in a public school automatically provides standing is incorrect.

Plaintiffs also lack standing under a message of endorsement theory. Unlike the plaintiffs in this Circuit's religious symbol cases, Plaintiffs here do not allege personal and unwelcome contact with the Science Standards. Neither does this Court's opinion in *Awad v. Ziriax*, 670 F.3d 1111 (2012), support Plaintiffs' message of endorsement theory. *Awad* is distinguishable in two key ways: Unlike the constitutional amendment in that case, the Science Standards do not condemn Plaintiffs' religion and are not legally binding. Cases from other circuits also support the District Court's standing analysis.

3. Plaintiffs also lack standing because their alleged injuries are not fairly traceable to the Defendants and because their alleged injuries will not likely

be redressed by a favorable decision. Local school boards, not the State Board of Education, are responsible for determining what curriculum should be taught in local schools. Even if the State Board's adoption of the Science Standards were binding on local schools, local schools could still teach more than is included in the Standards, including a curriculum consistent with Plaintiffs' interpretation of the Establishment Clause.

An injunction against the State Board would not likely redress Plaintiffs' injuries. Local school boards would still need to adopt a science curriculum, and they would likely either implement the Science Standards or adopt some other curriculum objectionable to the Plaintiffs. An injunction against the State Board would not require local school districts to teach Plaintiffs' views on science.

4. Plaintiffs' opening brief does not argue that any Plaintiffs have standing by virtue of paying taxes in Kansas, and therefore their taxpayer standing argument is waived. In any event, the narrow exception to the general rule against taxpayer standing does not apply here because Plaintiffs are not challenging a legislative appropriation.

ARGUMENT

This Court reviews the District Court's dismissal of Plaintiffs' Complaint for lack of standing *de novo*. *See Niemi v. Lasshofer*, 770 F.3d 1331, 1344 (10th Cir. 2014). To have standing, Plaintiffs must show an "injury in fact" that is (1) "concrete, particularized, and actual or imminent;" (2) "fairly traceable to the challenged action;" and (3) "redressable by a favorable ruling." *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing these elements. *See id*. at 1148.

Plaintiffs allege violations of the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Although "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases," *see Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012), the standing test described above applies to all of Plaintiffs' claims.

The injuries alleged by Plaintiffs fall into two categories—injuries that will allegedly occur due to the potential future implementation of the Science Standards by local school districts and injuries that allegedly occurred as result of the Board's mere act of adopting the Science Standards, even without their implementation in local schools. Both theories of injury are flawed.

I. Plaintiffs Fail to Allege an Actual or Imminent Injury Because Kansas Law Does Not Require Local School Districts to Implement the Science Standards.

As the District Court noted, Plaintiffs do not allege that the Science Standards have actually been implemented in any of the local schools attended by the Plaintiff children. Thus, to the extent Plaintiffs' alleged injuries are based on implementation of the Science Standards, they must show that an allegedly unconstitutional implementation is "certainly impending." *Clapper*, 133 S. Ct. at 1143. Plaintiffs attempt to meet this burden by arguing that state law requires local school districts to implement curriculum standards adopted by the State Board of Education, but this argument is incorrect as a matter of law.

A. The Kansas Constitution and K.S.A. 72-6439 allow local school districts to determine their own curriculum.

Article VI, § 1, of the Kansas Constitution provides that the State Board of Education "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," and "shall perform such other duties as may be provided by law." The Constitution also provides that "[l]ocal public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards." Kan. Const. art. VI, § 5. Under this framework, local school boards operate public schools, while the State Board of Education exercises only "general supervision."

See State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398, Marion County, 212 Kan. 482, 490-93, 511 P.2d 705 (1973). The Kansas Supreme Court has defined "general supervision" in this context as "something more than to advise but something less than to control." *Id*. at 492.

K.S.A. 72-6439, the statute giving the State Board of Education authority to adopt curriculum standards, reflects this constitutional relationship.[3] While subsection (b) of the statute provides that the Board "shall establish curriculum standards which reflect high academic standards for the core academic areas of mathematics, science, reading, writing and social studies," it goes on to provide that "[n]othing in this subsection shall be construed in any matter so as to impinge upon any district's authority to determine its own curriculum." K.S.A. 72-6439(b). Thus, while the Board may adopt curriculum standards to guide local schools, it has no authority to actually set their curriculum.

Plaintiffs argue that because subsection (b) of K.S.A. 72-6439 uses the phrase "[n]othing in this subsection," the Board may rely on *other* statutory provisions to impinge on local school districts' authority to determine their curriculum. This reading would be absurd. If the State Board could use other

[3] The Kansas Legislature has passed, and the Kansas Governor has signed, a bill that repeals K.S.A. 72-6439 effective July 1, 2015. *See* 2015 House Substitute for Senate Bill No. 7, published at 34 Kan. Reg. 267 (April 2, 2015) and soon to be published as 2015 Kansas Session Laws Ch. 5. But Section 20 of the bill adopts a new statute that contains all of the provisions currently in K.S.A. 72-6439. The relevant portions of the bill are included in the Addendum to this brief.

statutes to force local schools to adopt a particular curriculum, then local school districts would not have a right to determine their own curriculum as recognized by K.S.A. 72-6439(b). The plain meaning of K.S.A. 72-6439(b) is clear: The State Board has authority to adopt curriculum standards to guide local school districts, but the Board's adoption of curriculum standards does not force local school districts to adopt a particular curriculum.

Plaintiffs also argue that the Science Standards are "subjects and areas of instruction" that local school districts must teach under K.S.A. 72-1127. As the District Court correctly explained, however, the phrase "subjects and areas of instruction" in K.S.A. 72-1127 refers to broad topics, not specific curriculum. This is demonstrated by the text of the statute, which authorizes the State Board of Education to identify subjects or areas of instruction "[i]n addition to [the] subjects or areas of instruction required by" several other statutes, including K.S.A. 72-1101. And the "subjects and areas of instruction" listed in K.S.A. 72-1101 are broad topics: "Every accredited elementary school shall teach reading, writing, arithmetic, geography, spelling, English grammar and composition, history of the United States and of the state of Kansas, civil government and the duties of citizenship, health and hygiene, together with such other subjects as the state board may determine." "Science" is a subject or area of instruction, *see* K.A.R. 91-31-35(a)(3), but the Science Standards are not.

When it comes to curriculum within the subjects and areas of instruction that local schools must teach, the Board's authority is limited to adopting curriculum standards for the guidance of local schools. As K.S.A. 72-1101 goes on to provide: "The state board shall be responsible for the selection of subject matter within the several fields of instruction and for its organization into courses of study and instruction for the *guidance* of teachers, principals and superintendents." (Emphasis added). The decision whether to follow the State Board's guidance remains with local school boards. *See* K.S.A. 72-6439(b).

Contrary to Plaintiffs' arguments, this understanding of "subjects and areas of instruction" is fully consistent with the Kansas Supreme Court's decision in *Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (2014). *Gannon* adopted a set of standards from *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989), as the minimum standards for the educational adequacy requirement contained in Article VI of the Kansas Constitution. *Gannon*, 298 Kan. at 1170. *Gannon* also observed that the *Rose* standards appear to correlate with the capacities listed in K.S.A. 72-1127(c). *Id*. at 1165-67. But *Gannon* nowhere held that curriculum standards adopted by the Board under K.S.A. 72-6439 are "subjects and areas of instruction" that local schools must teach under K.S.A. 72-1127.

B. Legal provisions regarding student assessments, school accreditation, and professional development do not require local school districts to adopt the Science Standards.

In their opening brief, Plaintiffs also claim that several Kansas statutes and regulations regarding student assessments, school accreditation, and professional development force local school districts to adopt the Science Standards.

There are a number of problems with this argument. Most importantly, Plaintiffs never made it before the District Court. Nowhere in their response to Defendants' Motion to Dismiss did Plaintiffs even mention student assessments or professional development. And while they did include one sentence in their response alleging that "in order to receive and maintain accreditation, local schools [sic] boards must adhere to the Defendants' guidelines and standards," they cited K.S.A. 72-7513(a)(3), not the accreditation regulations they now argue support their interpretation. Aplt. App. at 1000, Doc. 40. Because Plaintiffs present their arguments regarding assessments, accreditation, and professional development for the first time on appeal, these arguments are forfeited, and Plaintiffs' failure to argue for plain error in their opening brief waives the arguments in this Court. *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127-28, 1131 (10th Cir. 2011).

Even if Plaintiffs' arguments regarding assessments, accreditation, and professional development were properly before this Court, the legal provisions cited by Plaintiffs do not demonstrate that an allegedly unconstitutional

implementation of the Science Standards in the local schools attended by the Plaintiff children is certainly impending.

To be sure, K.S.A. 72-6439(c) requires the State Board to "ensure compatibility between the statewide assessments and the curriculum standards established pursuant to subsection (b)" and K.A.R. 91-31-32(c)(3) requires local schools to develop "locally determined assessments that are aligned with the state standards." But while assessments must be compatible with the curriculum standards adopted by the State Board, this does not mean that local schools are required to adopt a particular curriculum. It is entirely possible that a science curriculum that includes a discussion of Plaintiffs' views would enable students to pass the assessments. Plaintiffs' argument that assessments aligned with the Science Standards will force local schools to adopt an allegedly unconstitutional curriculum is purely speculative.

Even if state and local assessments did require local school districts to teach scientific topics such as evolution with which the Plaintiffs disagree, this would not prevent local schools from teaching *more* than is contained in the Science Standards. As the introduction to the Science Standards explains, the Science Standards "are not intended to be an exhaustive list of all that could be included in a student's science education nor should they prevent students from going beyond the standards where appropriate." Aplt. App. at 549. And this is critical because

Plaintiffs' alleged injuries arise from what is not included in the Science Standards. Plaintiffs do not argue that the teaching of scientific concepts such as natural selection in itself violates the Establishment Clause. Instead, they claim that teaching only these scientific concepts and not what they refer to as the "teleological hypothesis" (i.e., intelligent design) is unconstitutional. *See, e.g.*, Aplt. App. at 40-41, Doc. 1 (Complaint ¶¶ 10-12) (alleging that the Science Standards fail to "adequately explain to students the nature, use and effect of use of the Orthodoxy"); *id*. at 42 (¶ 19) (alleging that the Science Standards teach only one side of a religious controversy); *id*. at 43 (¶ 23) (alleging that the Science Standards fail to "objectively inform[] children about the actual state of our scientific knowledge concerning the cause and nature of life and the universe"); *id*. at 50-53 (¶¶ 67-68, 71-86) (alleging that the Science Standards offer only "materialistic and atheistic explanations" of science and not "supernatural or teleological explanation[s]"); *id*. at 53-60 (¶¶ 87-122) (alleging that the Science Standards, by means of misrepresentations and omissions, fail to teach students the shortcomings of certain scientific theories and that "an evidence-based teleological alternative to unguided evolutionary theory exists"). The Science Standards themselves do not prohibit local schools from also discussing Plaintiffs' views on science, although the Establishment Clause may.

Plaintiffs' fear that the State Board's school accreditation process will cause local schools to implement the Science Standards as predicted by Plaintiffs is just as speculative as their claims regarding student assessments. The Board accredits schools based on the four performance criteria and the eleven quality criteria specified in K.A.R. 91-31-32. Based on their achievement of these criteria, schools are assigned one of four classifications: accredited, accredited on improvement, conditionally accredited, or not accredited. K.A.R. 91-31-38(a). A school that is accredited on improvement and fails to meet one or more of the performance criteria or four or more of the quality criteria shall be reclassified as conditionally accredited. K.A.R. 91-31-38(e). A conditionally accredited school only becomes not accredited if it fails to meet one or more of the performance criteria or four or more of the quality criteria for five consecutive years. K.A.R. 91-31-38(g).

This accreditation process does not force local schools to adopt an allegedly unconstitutional curriculum. The only performance criteria related to the Science Standards is the requirement in K.A.R. 91-31-32(b)(1) of "having met the percentage prescribed by the state board of students performing at or above the proficient level on state assessments or having increased overall student achievement by a percentage prescribed by the state board." As discussed above, however, the fact that state assessments will be aligned with the Science Standards does not mean that local schools are required to adopt any particular curriculum.

Only two of the eleven quality criteria for accreditation are even remotely related to the Board's curriculum standards. K.A.R. 91-31-32(c)(3) requires schools to use "locally determined assessments that are aligned with the state standards." As with the state assessments, however, this does not require local schools to implement the Science Standards, especially when they can align the local assessments with their own curriculum as well. And while K.A.R. 91-31-31(c)(4) requires schools to provide "formal training for teachers regarding the state assessments and curriculum standards," the fact that teachers must receive training on the curriculum standards does not mean that schools must adopt any particular curriculum, particularly when K.S.A. 72-6439(b) guarantees local schools the right to determine their own curriculum.

The fact that the Board must approve professional development programs in order for them to obtain state funding also does not force local schools to implement the Science Standards. Nothing in the professional development statutes, K.S.A. 72-9601 *et seq*., requires schools to implement the Science Standards in order to obtain professional development funding. While an application for funding must describe "the manner in which the professional development program is aligned with the mission, academic focus, and quality performance accreditation school improvement plan," K.S.A. 72-9606(c), this does not mean that an application must describe how professional development is

aligned with the Board's curriculum standards, much less that schools must implement a particular curriculum to obtain funding.

Even considering the assessment, accreditation, and professional development statutes and regulations as a whole, these provisions at most provide an incentive for local school districts to adopt curriculum consistent with the Science Standards. But whether local school districts decide to do so remains their choice.

C. The exhibits accompanying Plaintiffs' opening brief do not demonstrate that the local schools attended by the Plaintiff children are implementing the Science Standards.

In their final attempt to demonstrate that implementation of the Science Standards is "certainly impending" in the local schools attended by the Plaintiff children, Plaintiffs attach several documents from the State Board of Education's website. None of these documents, however, support the Plaintiffs' arguments.

Take, for example, Exhibit C-5. Plaintiffs cite this exhibit to argue that local school districts have four years to write curriculum consistent with the Science Standards and that implementation is currently in its second year. Plaintiffs' Opening Brief at 8, 33. But this is a mischaracterization of the document. Exhibit C-5 is the "Example 4-year implementation plan" mentioned in Exhibit C-4 that was "put together with Kansas teachers and curriculum directors as an *example* of what a multi-year implementation might look like." Exhibit C-4 (emphasis added).

The document itself is not an implementation plan that local schools must follow but only a resource to assist them in implementing the Science Standards should they decide to do so.

Likewise, the other documents attached to Plaintiffs' brief at most show that *some* school districts are implementing the Science Standards and that the State Department of Education is assisting those districts that choose to implement them. The exhibits do not show that the Science Standards are specifically being implemented in any particular school attended by the Plaintiff children, nor does Plaintiffs' Complaint allege such implementation. Accordingly, to the extent Plaintiffs' injuries depend on implementation of the Science Standards, their injuries are speculative and hypothetical, not actual or imminent.

II. The Plaintiffs Have Not Suffered a Legally Cognizable Injury as a Result of the Board's Mere Adoption of the Science Standards.

Alternatively, Plaintiffs argue that even if the Science Standards are never implemented in the local schools attended by the Plaintiff children, they have been injured by the Board's mere adoption of the Science Standards. Plaintiffs refer to these alleged injuries as their "actual" injuries. As the District Court correctly recognized, however, the injuries allegedly caused by the Board's adoption of the Science Standards are abstract and hypothetical, not concrete, particularized, and actual or imminent as required for standing.

A. Many of the injuries allegedly caused by the Board's mere adoption of the Science Standards actually depend on their implementation in local schools.

Although Plaintiffs recognize a distinction between injuries allegedly caused by the mere adoption of the Science Standards and injuries caused by potential future implementation, they misclassify some of the injuries alleged in the Complaint as actual injuries arising from adoption of the Science Standards. For example, they claim that the Board's adoption of the Science Standards "caused an immediate and actual taking of, and interference with, (a) legally protected interests of the Parents to direct the religious education of their children and (b) the rights of the Children to not be indoctrinated by state schools to accept a non-theistic religious worldview." Plaintiffs' Opening Brief at 9; *see also id*. at 14, 17, and 35. But the education of the Plaintiff children will be affected only if the Science Standards are implemented in the schools attended by the Plaintiff children. If the Science Standards are not implemented, the children will not be "indoctrinated" by them.

Plaintiffs advance several incorrect theories as to why their injuries do not depend on implementation of the Science Standards. First, Plaintiffs claim that the potential future implementation of the Science Standards causes them to suffer current, actual injuries in the form of fear and anxiety about potential harm to their children. Plaintiffs' Opening Brief at 21. But as the Supreme Court held in *Clapper*

v. Amnesty International USA, 133 S. Ct. 1138 (2013), a fear of future injury does not confer standing unless the injury is "certainly impending," even when plaintiffs suffer present costs and burdens based on that fear. *Id*. at 1151 ("[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). Because implementation of the Science Standards is not certainly impending in any school attended by the Plaintiff children, Plaintiffs' fear of such implementation is not a legally cognizable injury.

Second, Plaintiffs claim that they were immediately injured by the Board's adoption of the Science Standards because they were the "objects" of the action. They cite the Supreme Court's statement in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), that when "the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id*. at 561-62.

Because the Science Standards were designed to guide local schools in developing their science curriculum, the schools, not the students, are more appropriately described as the "objects" of the Science Standards. The children do not become "objects" of the Science Standards unless and until the Science Standards are actually implemented in local schools.

Even if the Plaintiff children could be described as the "objects" of the Science Standards, that still would not mean the Plaintiffs have standing. Although *Lujan* said there "ordinarily" will be no question that a plaintiff who is an object of a challenged action has standing, the Court was not propounding a new or different standing test. Plaintiffs must still allege an injury in fact that is concrete, particularized, and actual or imminent. *Id*. at 560. And here they do not.

Third, Plaintiffs argue that even non-binding policies can cause actual injuries, citing cases involving voluntary religious exercises with an option to opt out. Plaintiffs' Opening Brief at 19-21. But the cases cited by Plaintiffs are inapposite. The District Court here did not conclude that Plaintiffs failed to allege a legally cognizable injury because their children could opt out of science classes under K.S.A. 72-1111(f). Instead, the District Court concluded that Plaintiffs lacked standing because they did not allege that the Science Standards were actually being implemented in the schools attended by the Plaintiff children and because that implementation is not certainly impending. None of the cases cited by Plaintiffs stand for the proposition that schoolchildren or their parents suffer actual or imminent injuries in these circumstances.

B. Defendants' failure to comply with Plaintiffs' view of the Constitution does not, in itself, constitute a concrete and particularized injury.

Plaintiffs also claim that they have suffered an actual injury because they trusted the State Board of Education would comply with their view of the Establishment Clause, and the Board breached this trust and took their rights by adopting the Science Standards. Plaintiffs' Opening Brief at 17. Plaintiffs' "breach of trust" theory is essentially an argument that the Defendants' alleged violation of the Constitution in itself gives them standing. The plaintiffs in almost any case alleging a constitutional violation could make such a claim. For example, the plaintiffs in *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982), could have argued that they trusted the government would not violate the Establishment Clause and that the government breached this trust by transferring property to a Christian college.

Yet it is well established that "offense at the behavior of the government, and a desire to have public officials comply with (plaintiffs' view of) the Constitution, differs from a legal injury." *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011). As this Court explained in *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2014), "it is not enough for litigants to claim a constitutional violation;" they must also "identify a[ ] personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the

psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 1121-22 (brackets and emphasis in original) (citing *Valley Forge*, 454 U.S. at 485); *see also Valley Forge*, 454 U.S. at 482-83 ("This Court repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." (internal quotation marks omitted)).

At times, Plaintiffs seem to argue that cases involving schoolchildren are different, claiming that courts "nearly always find standing in the face of an alleged violation of the Establishment Clause in a public school context." Plaintiffs' Opening Brief at 41. It is true that parents generally have standing to assert *legally cognizable* Establishment Clause injuries to their children, but the mere allegation of an Establishment Clause violation is not enough. The parents must still show that their children are "directly affected" by the alleged violation. *See Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1398 (1985) (holding that the standing of parents in such circumstances arises when their children are "subjected to unwelcome religious exercises or [are] forced to assume special burdens to avoid them."). When, as here, the children are not directly affected by the challenged action, their parents lack standing.

Plaintiffs' argument that they have standing because they allege a lack of equal treatment fails for the same reason. The mere allegation of an Equal

Protection Clause violation is not sufficient to confer standing; plaintiffs must be personally affected by the challenged discrimination. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 755 (1984). And the Plaintiffs here are not personally affected by the Board's adoption of the Science Standards unless the Science Standards are implemented in the local schools attended by the Plaintiff children.

C. The Board's adoption of the Science Standards does not send a message of endorsement that directly affects Plaintiffs.

Plaintiffs also allege that the Board's adoption of the Science Standards sends a message of endorsement that causes them injury. Although disagreement with a governmental message ordinarily would not be sufficient to confer standing, this Court has held that "allegations of personal contact with a state-sponsored image suffice" to confer standing in the context of an Establishment Clause violation. *Awad*, 670 F.3d at 1122 (citing *American Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010)). This holding is based on cases where the Supreme Court has decided Establishment Clause claims on the merits without considering the issue of standing. *Id*. at 1121 n.6; *but see Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."). In *Awad*, this Court stretched the reasoning of its religious symbols cases to hold that a Muslim had standing to challenge a state constitutional amendment that prevented state

courts from considering or using Sharia law. Based on these cases, Plaintiffs somehow reach the conclusion that "governmental endorsements of a particular religious view *always* carry a present message that itself produces present injury." Plaintiffs' Opening Brief at 37 (emphasis added).

That is not an accurate statement of the law. Not every governmental message in the Establishment Clause context confers standing. To suffer a legally cognizable injury, Plaintiffs must be "directly affected" by the message. *See, e.g.*, *Awad*, 670 F.3d at 1121. Were it otherwise, "every government *action* that allegedly violates the Establishment Clause could be re-characterized as a governmental *message* promoting religion," thereby granting standing to sue. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (D.C. Cir. 2008) (emphasis in original). For example, the plaintiffs in *Valley Forge* could have argued that they were injured by the message of endorsement sent by the government's transfer of property to a religious school, but the Supreme Court found that the plaintiffs in that case lacked standing. *See Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) ("[I]f offense at a public official's support of religion were enough, the plaintiffs would have had standing in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).").

The Plaintiffs in this case lack standing because they are not directly affected by the Science Standards. They do not experience a "personal and

unwelcome contact" with religious objects, and so the religious symbol cases like *American Atheists, Inc. v. Davenport*, 637 F.3d 1096 (10th Cir. 2010), are not on point.

Neither does this Court's decision in *Awad* support Plaintiffs' standing argument. The *Awad* Court identified two factors that were central to its conclusion, neither of which is present here. First, the Court noted that the constitutional amendment at issue in *Awad* "*expressly* condemn[ed]" the plaintiff's religion. 670 F.3d at 1122 (emphasis in original). For this reason, the court noted that Mr. Awad's injuries went beyond the "personal and unwelcome contact" present in the religious symbols cases.

In their opening brief, Plaintiffs argue that the Science Standards condemn their religion, but this allegation is not found in Plaintiffs' Complaint and was not argued before the District Court. And in any event, this Court is not required to accept Plaintiffs' characterization of the Science Standards given that the Standards are incorporated by Plaintiffs' Complaint and may therefore be considered in the context of a motion to dismiss. *See, e.g., Berneike v. CitiMortgage, Inc*, 708 F.3d 1141, 1146 (10th Cir. 2013). Contrary to Plaintiffs' assertions on appeal, nothing in the Science Standards condemns any religious faith. At most, the Science Standards address scientific concepts like evolution that Plaintiffs see as inconsistent with their faith, but the Science Standards do not

"expressly target and condemn a specific religion" as the constitutional amendment in *Awad* did. 670 F.3d at 1122-23. For this reason, this case is also distinguishable from the Ninth Circuit's decision in *Catholic League for Religious and Civil Rights v. City and Cnty. of San Francisco*, 624 F.3d 1043 (9th Cir. 2010) (en banc), which involved a resolution that condemned Catholicism.

The second key factor relied on by this Court in *Awad* was the fact that unlike the "non-binding city resolution in *Catholic League*," the "Oklahoma amendment convey[ed] more than a message; it [imposed] a constitutional command." *Id*. at 1123 (internal quotation marks and citation omitted). In this case, however, the Science Standards are not legally binding on Kansas schools for the reasons discussed above, and so Plaintiffs cannot demonstrate that they are "directly affected" by the Science Standards as required for standing.

The District Court's decision is not only consistent with *Awad*; it is also in line with decisions from several other circuits. The Plaintiffs attempt to distinguish the cases relied on by the District Court, but none of their arguments are persuasive.

Plaintiffs claim that two of the cases relied on by the District Court, *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) and *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012), are inapposite because the courts found standing in those cases. But both cases involved multiple issues or plaintiffs, with

the courts finding standing with respect to some claims but not with respect to others. And the distinction between the claims where the courts found standing and those where they did not supports the District Court's standing analysis.

In *Newdow*, the Ninth Circuit held that a plaintiff had standing to challenge the placement of "In God We Trust" on coins and currency because "unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing." 598 F.3d at 643. That holding is consistent with this Circuit's religious symbol cases. But the Ninth Circuit held that the plaintiff *did not* have standing to challenge 36 U.S.C. § 302, which recognizes "In God We Trust" as the national motto, because that statute does not "authorize or require the inscription of the motto on any object." *Id*. at 642-43. Therefore, the plaintiff lacked "unwelcome direct contact" with the motto and suffered only an "abstract stigmatic injury." *Id*. at 643.

The Science Standards are not a religious symbol like the coins in *Newdow*. Rather, they are more like the statute establishing the national motto. Apart from knowledge of their existence, Plaintiffs lack "unwelcome direct contact" with the Science Standards and therefore suffer nothing more than an abstract stigmatic injury.

The Fourth Circuit's decision in *Moss* also supports the District Court's analysis. *Moss* involved a public school district's decision to allow students to take

a religious class at a private school for academic credit. The court found that one of the plaintiffs lacked standing because the child in question had no "personal exposure" to the course apart from abstract knowledge of the school district's policy, and a "simple disagreement" with the policy did not constitute an injury in fact. *Id*. at 606. The court found another child and her father did have standing, however, because they were personally exposed to the policy as a result of receiving a promotional letter and because they were forced to change their behavior as a result. *Id*. at 607.

Plaintiffs here are more like the first plaintiff in *Moss*. Other than knowledge of their adoption, Plaintiffs have not been personally exposed to the Science Standards. In fact, Plaintiffs' alleged injuries here are even more abstract than the injuries in *Moss*. There, the school district had at least adopted the challenged policy, while here there is no allegation that any school attended by the Plaintiff children has implemented the Science Standards.

Plaintiffs also fail to convincingly distinguish the other two cases cited by the District Court, *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011) and *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008). The best they can argue is that these two cases did not arise in the public school context, but they fail to explain why this matters. There is no special standing analysis for public school cases. They also claim that the plaintiffs in those cases

were not personally affected by the challenged conduct. While true, that does not distinguish this case; the Plaintiffs here are not personally affected by the State Board's mere adoption of the Science Standards. And "[w]hen plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action, they have not shown injury-in-fact to bring an Establishment Clause claim, at least outside the distinct context of the religious display and prayer cases." *In re Navy Chaplaincy*, 534 F.3d at 764-65.

The District Court correctly concluded that the State Board's mere adoption of the Science Standards does not directly affect Plaintiffs in a concrete and particularized way. Their offense at the message allegedly sent by the Board's action is nothing more than an abstract injury insufficient to confer standing.

III. None of Plaintiffs' Alleged Injuries Are Fairly Traceable to the Defendants or Likely to Be Redressed by a Favorable Ruling.

The District Court also correctly concluded that Plaintiffs lack standing because their alleged injuries were not caused by the Defendants and likely would not be redressed by a favorable outcome.

Even if Plaintiffs had alleged that a school district attended by one of the Plaintiff children had implemented the Science Standards, this action would not be fairly traceable to the Defendants. As discussed above, the State Board's authority to adopt curriculum standards may not "impinge upon any district's authority to determine its own curriculum." *See* K.S.A. 72-6439(b). Local school boards

remain responsible for determining what is actually taught in classrooms. And the causation requirement for standing is not met when the alleged injury is the "result [of] the independent action of some third party not before the court." *See Lujan*, 504 U.S. at 561 (brackets in original) (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-41 (1976)); *see also Clapper*, 133 S. Ct. at 1150 (noting that the Supreme Court has been reluctant "to endorse standing theories that rest on speculation about the decisions of independent actors").

In addition, because Plaintiffs' alleged injuries arise from what is *not* included in the Science Standards, these injuries are not fairly traceable to the Defendants. Even if the State Board's adoption of the Science Standards were binding on local schools, the Science Standards would even then only set a floor on what local schools must teach. The Science Standards themselves do not prevent local schools from going beyond the Standards and discussing the Plaintiffs' "teleological hypothesis" (i.e., intelligent design). Although the Establishment Clause may prevent local schools from teaching Plaintiffs' views, that "injury" is traceable to the Establishment Clause, not the Defendants.

Plaintiffs' alleged injuries would not be redressed by a favorable ruling for much the same reason. Even if the Court were to enjoin the State Board from taking any action with regard to implementation of the Science Standards, local school districts would still need to adopt a science curriculum, and they could still

rely on the Science Standards (or some other set of standards that involves the teaching of evolution), whether or not those standards are formally adopted by the State Board. In fact, given the allegations in their Complaint, it is likely the Plaintiffs would object to almost any widely-accepted science curriculum. Because an injunction against the State Board would not prevent local school districts from teaching scientific concepts with which Plaintiffs disagree or force the school districts to teach Plaintiffs' views on science, Plaintiffs' injuries are not likely to redressed by a favorable decision.

IV. Plaintiffs Have Waived Any Argument for Taxpayer Standing by Failing to Raise It in Their Opening Brief, and the Argument is Meritless in Any Event.

Plaintiffs' Complaint alleged that in addition to being injured by the message sent by the Board's adoption of the Science Standards, certain Plaintiffs are also injured because they are required "to pay taxes to fund the state's endorsement of the tenets of non-theistic religions that conflict with their theistic belief." Aplt. App. at 60, Doc. 1 (Complaint ¶ 123(d)). Plaintiffs defended this theory of taxpayer standing below, *see* Aplt. App. at 1009, Doc. 40, but their arguments were rightly rejected by the District Court.

In their opening brief on appeal, Plaintiffs fail to present an argument in support of a theory of taxpayer standing. Instead, they defend the standing of the taxpayer Plaintiffs solely on the message of endorsement theory refuted above.

Plaintiffs' Opening Brief at 33, 51. Because Plaintiffs have failed to address the issue of taxpayer standing in their opening brief, the issue has been waived. *See Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) ("An issue or argument insufficiently raised in the opening brief is deemed waived.").

In any event, the theory of taxpayer standing Plaintiffs raised in the District Court is without merit. The Supreme Court "has rejected the general proposition that an individual who has paid taxes has a continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442-43 (2011) (internal quotation marks omitted). And although the Supreme Court has adopted a narrow exception to this rule against taxpayer standing for certain Establishment Clause cases, that narrow exception does not apply here because Plaintiffs do not challenge the exercise of legislative power to tax and spend. *See Hein v. Freedom from Religion Found. Inc.*, 551 U.S. 587, 604 (2007) (plurality opinion). The District Court correctly concluded that Plaintiffs do not have standing by virtue of paying taxes in Kansas.

CONCLUSION

Plaintiffs have not alleged an injury in fact that is concrete, particularized, and actual or imminent; fairly traceable to the Defendants; and likely to be

redressed by a favorable outcome. Accordingly, Defendants-Appellees respectfully ask the Court to affirm the District Court's order dismissing Plaintiffs' complaint for lack of standing.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested as counsel for Defendants do not believe it would materially advance the disposition of this case.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 8,256 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Word 2007.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface—14-point Times New Roman—using Microsoft Word 2007.

CERTIFICATE OF PRIVACY REDACTIONS

As required by Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5, the undersigned attorney certifies that all required privacy redactions have been made.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing BRIEF OF DEFENDANTS-APPELLEES as submitted in digital form is an exact copy of the written document filed with the Clerk.

CERTIFICATE OF SCANNING

I hereby certify that the digital form of the foregoing BRIEF OF DEFENDANTS-APPELLEES has been scanned for viruses using the Sophos Endpoint Security and Control updated daily, and, according to the program, is free of viruses.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on June 8, 2015, the foregoing BRIEF OF DEFENDANTS-APPELLEES was electronically filed with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused seven paper copies to be delivered by Federal Express to the Clerk's Office.

DATED: June 8, 2015 /s/ Dwight Carswell

ADDENDUM

Table of Contents

Constitutional Provisions

Kansas Statutes Annotated

Session Laws

Kansas Administrative Regulations

Kansas Constitution

Article VI - Education

§ 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.

(b) The legislature shall provide for a state board of regents and for its control and supervision of public institutions of higher education. Public institutions of higher education shall include universities and colleges granting baccalaureate or postbaccalaureate degrees and such other institutions and educational interests as may be provided by law. The state board of regents shall perform such other duties as may be prescribed by law.

(c) Any municipal university shall be operated, supervised and controlled as provided by law.

. . .

§ 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 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.

. . .

Kansas Statutes Annotated

K.S.A. 72-1101. Required subjects in elementary schools

Every accredited elementary school shall teach reading, writing, arithmetic, geography, spelling, English grammar and composition, history of the United States and of the state of Kansas, civil government and the duties of citizenship, health and hygiene, together with such other subjects as the state board may determine. The state board shall be responsible for the selection of subject matter within the several fields of instruction and for its organization into courses of study and instruction for the guidance of teachers, principals and superintendents.

History: Laws 1943, ch. 248, § 37; Laws 1945, ch. 282, § 57; Laws 1968, ch. 20, § 1; Laws 1972, ch. 253, § 1; Laws 1979, ch. 220, § 11.

K.S.A. 72-1127. Accredited schools; mandatory subjects and areas of instruction; legislative goal of providing certain educational capacities

(a) In addition to subjects or areas of instruction required by K.S.A. 72-1101, 72-1103, 72-1117, 72-1126 and 72-7535, and amendments thereto, every accredited school in the state of Kansas shall teach the subjects and areas of instruction adopted by the state board of education.

(b) Every accredited high school in the state of Kansas also shall teach the subjects and areas of instruction necessary to meet the graduation requirements adopted by the state board of education.

(c) Subjects and areas of instruction shall be designed by the state board of education to achieve the goal established by the legislature of providing each and every child with at least the following capacities:

(1) Sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

(2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;

(3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;

(4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

(d) Nothing in this section shall be construed as relieving the state or school districts from other duties and requirements imposed by state or federal law including, but not limited to, at-risk programs for pupils needing intervention, programs concerning special education and related services and bilingual education.

History: Laws 2005, ch. 152, § 6; Laws 2014, ch. 93, § 32, eff. May 1, 2014.

K.S.A. 72-6439. School performance accreditation system; pupil assessments; curriculum standards, establishment and review by state board; performance levels to represent academic excellence; school site councils

(a) In order to accomplish the mission for Kansas education, the state board of education shall design and adopt a school performance accreditation system based upon improvement in performance that reflects high academic standards and is measurable.

(b) The state board shall establish curriculum standards which reflect high academic standards for the core academic areas of mathematics, science, reading, writing and social studies. The curriculum standards shall be reviewed at least

every seven years. Nothing in this subsection shall be construed in any manner so as to impinge upon any district's authority to determine its own curriculum.

(c) The state board shall provide for statewide assessments in the core academic areas of mathematics, science, reading, writing and social studies. The board shall ensure compatibility between the statewide assessments and the curriculum standards established pursuant to subsection (b). Such assessments shall be administered at three grade levels, as determined by the board. The state board shall determine performance levels on the statewide assessments, the achievement of which represents high academic standards in the academic area at the grade level to which the assessment applies. The state board should specify high academic standards both for individual performance and school performance on the assessments.

(d) Each school in every district shall establish a school site council composed of the principal and representatives of teachers and other school personnel, parents of pupils attending the school, the business community, and other community groups. School site councils shall be responsible for providing advice and counsel in evaluating state, school district, and school site performance goals and objectives and in determining the methods that should be employed at the school site to meet these goals and objectives. Site councils may make recommendations and proposals to the school board regarding budgetary items and school district matters, including but not limited to, identifying and implementing the best practices for developing efficient and effective administrative and management functions. Site councils also may help school boards analyze the unique environment of schools, enhance the efficiency and maximize limited resources, including outsourcing arrangements and cooperative opportunities as a means to address limited budgets.

History: Laws 1992, ch. 280, § 35; Laws 1995, ch. 263, § 1; Laws 2004, ch. 124, § 3; Laws 2006, ch. 197, § 22. [Repealed effective July 1, 2015, by 2015 Kansas Session Laws, ch. 5 (2015 House Substitute for Senate Bill No. 7).]

K.S.A. 72-9605. State aid; requirements for obtaining; applications for

(a) In each school year, each board which has established and is maintaining a professional development program in compliance with the requirements of this act and which desires to secure state aid for part of the cost of maintaining the program

shall certify and file an application with the state board for approval of the program.

(b) Each board which is maintaining an approved professional development program and which desires to secure state aid in any school year for part of the cost of exploring and implementing innovative and experimental procedures, activities and services to be provided in the program for enhancement thereof shall certify and file an application with the state board for approval of such procedures, activities and services.

(c) Applications shall be in a form prescribed and furnished by the department, shall contain such information as the state board may require and shall be filed annually at a time to be determined and specified by the state board. Approval by the state board of the program, any innovative and experimental procedures, activities or services provided therein, and the application shall be prerequisite to payment of state aid to any board.

History: Laws 1984, ch. 260, § 5; Laws 1992, ch. 89, § 4; Laws 2003, ch. 9, § 6.

K.S.A. 72-9606. Applications for state aid; required information

In order to be approved for payment of state aid, any application under K.S.A. 72-9605, and amendments thereto, shall contain the following information:

(a) The number of certificated personnel of the school district who are participating in the program;

(b) a description of the scope, objectives, procedures and activities of and the services provided by the professional development program for the school year;

(c) the manner in which the professional development program is aligned with the mission, academic focus, and quality performance accreditation school improvement plan;

(d) a description of the performance measures utilized in meeting the evaluation standards and criteria established under subsection (b) of K.S.A. 72-9603, and amendments thereto;

(e) the amount budgeted by the board for its professional development program;

(f) the amount of the actual expenses incurred by the school district in maintaining an approved professional development program;

(g) the amount of the actual expenses, if any, incurred by the school district for the provision of innovative and experimental procedures, activities and services in its professional development program; and

(h) such additional information as determined by the state board.

History: Laws 1984, ch. 260, § 6; Laws 1994, ch. 172, § 4; Laws 2003, ch. 9, § 7.

2015 Kansas Session Laws, Ch. 5

House Substitute for SENATE BILL No. 7

AN ACT concerning education; relating to the financing and instruction thereof; making and concerning appropriations for the fiscal years ending June 30, 2015, June 30, 2016, and June 30, 2017, for the department of education; creating the classroom learning assuring student success act; amending K.S.A. 12-1677, 12-1775a, 72-1414, 72-6622, 72-6757, 72-8190, 72-8230, 72-8233, 72-8236, 72-8309, 72-8908, 79-2001 and 79-5105 and K.S.A. 2014 Supp. 10-1116a, 12-1770a, 12-1776a, 72-978, 72-1046b, 72-1398, 72-1923, 72-3607, 72-3711, 72-3712, 72-3715, 72-5333b, 72-6434, 72-6460, 72-64b01, 72-64c03, 72-64c05, 72-6624, 72-6625, 72-67,115, 72-7535, 72-8187, 72-8237, 72-8249, 72-8250, 72-8251, 72-8302, 72-8316, 72-8415b, 72-8801, 72-8804, 72-8814, as amended by section 54 of 2015 House Substitute for Senate Bill No. 4, 72-9509, 72-9609, 72-99a02, 74-32,141, 74-4939a, 74-8925, 74-99b43, 75-2319, 79-201x, 79-213 and 79-2925b and repealing the existing sections; also repealing K.S.A. 72-6406, 72-6408, 72-6411, 72-6415, 72- 6418, 72-6419, 72-6424, 72-6427, 72-6429, 72-6432, 72-6436, 72-6437, 72-6444, 72-6446 and 72-6447 and K.S.A. 2014 Supp. 46-3401, 46-3402, 72-3716, 72-6405, 72-6407, 72-6409, 72-6410, 72-6412, 72-6413, 72- 6414, 72-6414a, 72-6414b, 72-6415b, 72-6416, 72-6417, 72-6420, 72-6421, 72-6423, 72-6425, 72-6426, 72-6428, 72-6430, 72-6431, 72-6433, 72-6433d, 72-6434, as amended by section 38 of this act, 72-6434b, 72-6435, 72-6438, 72-6439, 72-6439a, 72-6441, 72-6441a, 72-6442b, 72-6443, 72-6445a, 72-6448, 72-6449, 72-6450, 72-6451, 72-6452, 72-6453, 72-6455, 72-6456, 72-6457, 72-6458, 72-6460, as amended by section 39 of this act, 72-6461, 72-8801a, 72-8814, as amended by section 63 of this act, 72-8814b, 72-8815 and 79-213f.

Be it enacted by the Legislature of the State of Kansas:

. . .

New Sec. 4. (a) The provisions of sections 4 through 22, and amendments thereto, shall be known and may be cited as the classroom learning assuring student success act.

(b) The legislature hereby declares that the intent of this act is to lessen state interference and involvement in the local management of school districts and to provide more flexibility and increased local control for school district boards of education and administrators in order to:

(1) Enhance predictability and certainty in school district funding sources and amounts;

(2) allow school district boards of education and administrators to best meet their individual school district's financial needs; and (3) maximize opportunities for more funds to go to the classroom. To meet this legislative intent, state financial support for elementary and secondary public education will be met by providing a block grant for school years 2015-2016 and 2016-2017 to each school district. Each school district's block grant will be based in part on, and be at least equal to, the total state financial support as determined for school year 2014-2015 under the school district finance and quality performance act, prior to its repeal. All school districts will be held harmless from any decreases to the final school year 2014-2015 amount of total state financial support.

(c) The legislature further declares that the guiding principles for the development of subsequent legislation for the finance of elementary and secondary public education should consist of the following:

(1) Ensuring that students' educational needs are funded;

(2) providing more funding to classroom instruction;

(3) maximizing flexibility in the use of funding by school district boards of education and administrators; and

(4) achieving the goal of providing students with those education capacities established in K.S.A. 72-1127, and amendments thereto.

(d) The provisions of this section shall be effective from and after July 1, 2015, through June 30, 2017.

. . .

New Sec. 20. (a) In order to accomplish the mission for Kansas education, the state board of education shall design and adopt a school performance accreditation system based upon improvement in performance that reflects high academic standards and is measurable.

(b) The state board shall establish curriculum standards which reflect high academic standards for the core academic areas of mathematics, science, reading, writing and social studies. The curriculum standards shall be reviewed at least every seven years. Nothing in this subsection shall be construed in any manner so as to impinge upon any district's authority to determine its own curriculum.

(c) The state board shall provide for statewide assessments in the core academic areas of mathematics, science, reading, writing and social studies. The board shall ensure compatibility between the statewide assessments and the curriculum standards established pursuant to subsection (b). Such assessments

shall be administered at three grade levels, as determined by the board. The state board shall determine performance levels on the statewide assessments, the achievement of which represents high academic standards in the academic area at the grade level to which the assessment applies. The state board should specify high academic standards both for individual performance and school performance on the assessments.

(d) Each school in every district shall establish a school site council composed of the principal and representatives of teachers and other school personnel, parents of pupils attending the school, the business community, and other community groups. School site councils shall be responsible for providing advice and counsel in evaluating state, school district, and school site performance goals and objectives and in determining the methods that should be employed at the school site to meet these goals and objectives. Site councils may make recommendations and proposals to the school board regarding budgetary items and school district matters, including, but not limited to, identifying and implementing the best practices for developing efficient and effective administrative and management functions. Site councils also may help school boards analyze the unique environment of schools, enhance the efficiency and maximize limited resources, including outsourcing arrangements and cooperative opportunities as a means to address limited budgets.

(e) Whenever the state board of education determines that a school has failed either to meet the accreditation requirements established by rules and regulations or standards adopted by the state board or provide the curriculum required by state law, the state board shall so notify the school district in which the school is located. Such notice shall specify the accreditation requirements that the school has failed to meet and the curriculum that the school has failed to provide. Upon receipt of such notice, the board of education of such school district is encouraged to reallocate the resources of the school district to remedy all deficiencies identified by the state board. When making such reallocation, the board of education shall take into consideration the resource strategies of highly resource-efficient districts as identified in phase III of the Kansas education resource management study conducted by Standard and Poor's (March 2006).

(f) The provisions of this section shall be effective from and after July 1, 2015, through June 30, 2017.

. . .

Sec. 81. From and after July 1, 2015, K.S.A. 12-1677, 12-1775a, 72-1414, 72-6406, 72-6408, 72-6411, 72-6415, 72-6418, 72-6419, 72-6424, 72-6427, 72-

6429, 72-6432, 72-6436, 72-6437, 72-6444, 72-6446, 72-6447, 72-6622, 72-6757, 72-8190, 72-8230, 72-8233, 72-8236, 72-8309, 72-8908, 79-2001 and 79-5105 and K.S.A. 2014 Supp. 10-1116a, 12-1770a, 12-1776a, 46-3401, 46-3402, 72-978, 72-1046b, 72-1398, 72-1923, 72-3607, 72-3711, 72-3712, 72-3715, 72-3716, 72-5333b, 72-6405, 72-6407, 72-6409, 72-6410, 72-6412, 72-6413, 72-6414, 72-6414a, 72-6414b, 72-6415b, 72-6416, 72-6417, 72-6420, 72-6421, 72-6423, 72-6425, 72-6426, 72-6428, 72-6430, 72-6431, 72-6433, 72-6433d, 72-6434, as amended by section 38 of this act, 72-6434b, 72-6435, 72-6438, 72-6439, 72-6439a, 72-6441, 72-6441a, 72-6442b, 72-6443, 72-6445a, 72-6448, 72-6449, 72-6450, 72-6451, 72-6452, 72-6453, 72-6455, 72-6456, 72-6457, 72-6458, 72-6460, as amended by section 39 of this act, 72-6461, 72-64b01, 72-64c03, 72-64c05, 72-6624, 72-6625, 72-67,115, 72-7535, 72-8187, 72-8237, 72-8249, 72-8250, 72-8251, 72-8302, 72-8316, 72-8415b, 72-8801, 72-8801a, 72-8804, 72-8814, as amended by section 63 of this act, 72-8814b, 72-8815, 72-9509, 72-9609, 72-99a02, 74-32,141, 74-4939a, 74-8925, 74-99b43, 75-2319, 79-201x, 79-213, 79-213f and 79-2925b are hereby repealed.

Sec. 82. This act shall take effect and be in force from and after its publication in the Kansas register.

(Published in the Kansas Register April 2, 2015.)

Kansas Administrative Regulations

K.A.R. 91-31-31. Definitions.

(a) "Accredited" means the status assigned to a school that meets the minimum performance and quality criteria established by the state board.

(b) "Accredited on improvement" means the status assigned to a school that, for two consecutive years, is described by any of the following:

(1) The school fails to meet one or more of the performance criteria applicable to the school.

(2) The school has a prescribed percentage of students in one or more student subgroups that fails to meet one or more of the performance criteria applicable to the school.

(3) The school fails to meet three or more of the quality criteria applicable to the school.

(c) "Conditionally accredited" means the status assigned to a school that, for three consecutive years, is described by either of the following:

(1) The school has a prescribed percentage of all students assessed that scores below the proficient level on the state assessments.

(2) The school fails to meet four or more of the quality criteria applicable to the school.

(d) "Curriculum standards" means statements, adopted by the state board, of what students should know and be able to do in specific content areas.

(e) "External technical assistance team" means a group of persons selected by a school for the purpose of advising school staff on issues of school improvement, curricula and instruction, student performance, and other accreditation matters.

(f) "Local board of education" means the board of education of any unified school district or the governing body of any nonpublic school.

(g) “Not accredited” means the status assigned to a school that, for five consecutive years, is described by either of the following:

(1) The school has a prescribed percentage of all students assessed that scores below the proficient level on the state assessments.

(2) The school fails to meet four or more of the quality criteria applicable to the school.

(h) “On-site visit” means a visit at a school by either the school's external technical assistance team or a state technical assistance team.

(i) “School” means an organizational unit that, for the purposes of school improvement, constitutes a logical sequence of elements that may be structured as grade levels, developmental levels, or instructional levels.

(j) “School improvement plan” means a multiyear plan for five years or less that is developed by a school and that states specific actions for achieving continuous improvement in student performance.

(k) “Standards of excellence” means the expectations for academic achievement that the state board has set for Kansas schools.

(l) “State assessments” means the assessments that the state board administers in order to measure student learning within the Kansas curriculum standards for mathematics, reading, science, history and government, and writing.

(m) “State board” means the state board of education.

(n) “State technical assistance team” means a group of persons appointed by the state department of education to assist schools in meeting the performance and quality criteria established by the state board.

(o) “Student subgroup” means those students within a school who, for monitoring purposes, are classified by a common factor, including economic disadvantage, race, ethnicity, disability, and limited English proficiency.

(p) “Unit of credit” means a measure of credit that may be awarded to a student for satisfactory completion of a particular course or subject. A full unit of credit is

credit that is awarded for satisfactory completion of a course or subject that is offered for and generally requires 120 clock-hours to complete. Credit may be awarded in increments based upon the amount of time a course or subject is offered and generally requires to complete. Individual students may be awarded credit based upon demonstrated knowledge of the content of a course or subject, regardless of the amount of time spent by the student in the course or subject.

This regulation shall be effective on and after July 1, 2005.

(Authorized by and implementing Article 6, Section 2(a) of the Kansas Constitution; effective July 1, 2005.)

K.A.R. 91-31-32. Performance and quality criteria.

(a) Each school shall be assigned its accreditation status based upon the extent to which the school has met the performance and quality criteria established by the state board in this regulation.

(b) The performance criteria shall be as follows:

(1) Except as provided in subsection (d), having met the percentage prescribed by the state board of students performing at or above the proficient level on state assessments or having increased overall student achievement by a percentage prescribed by the state board;

(2) having 95% or more of all students and 95% or more of each student subgroup take the state assessments;

(3) having an attendance rate equal to or greater than that prescribed by the state board; and

(4) for high schools, having a graduation rate equal to or greater than that prescribed by the state board.

(c) The quality criteria shall consist of the following quality measures, which shall be required to be in place at each school:

(1) A school improvement plan that includes a results-based staff development plan;

(2) an external technical assistance team;

(3) locally determined assessments that are aligned with the state standards;

(4) formal training for teachers regarding the state assessments and curriculum standards;

(5) 100% of the teachers assigned to teach in those areas assessed by the state or described as core academic subjects by the United States department of education, and 95% or more of all other faculty, fully certified for the positions they hold;

(6) policies that meet the requirements of S.B.R. 91-31-34;

(7) local graduation requirements that include at least those requirements imposed by the state board;

(8) curricula that allow each student to meet the regent's qualified admissions requirements and the state scholarship program;

(9) programs and services to support student learning and growth at both the elementary and secondary levels, including the following:

(A) Computer literacy;

(B) counseling services;

(C) fine arts;

(D) language arts;

(E) library services;

(F) mathematics;

(G) physical education, which shall include instruction in health and human sexuality;

(H) science;

(I) services for students with special learning needs; and

(J) history, government, and celebrate freedom week. Each local board of education shall include the following in its history and government curriculum:

(i) Within one of the grades seven through 12, a course of instruction in Kansas history and government. The course of instruction shall be offered for at least nine consecutive weeks. The local board of education shall waive this requirement for any student who transfers into the district at a grade level above that in which the course is taught; and

(ii) for grades kindergarten through eight, instruction concerning the original intent, meaning, and importance of the declaration of independence and the United States constitution, including the bill of rights, in their historical contexts, pursuant to L. 2013, ch. 121, sec. 2 and amendments thereto. The study of the declaration of independence shall include the study of the relationship of the ideas expressed in that document to subsequent American history;

(10) programs and services to support student learning and growth at the secondary level, including the following:

(A) Business;

(B) family and consumer science;

(C) foreign language; and

(D) industrial and technical education; and

(11) local policies ensuring compliance with other accreditation regulations and state education laws.

(d) If the grade configuration of a school does not include any of the grades included in the state assessment program, the school shall use an assessment that is aligned with the state standards.

(Authorized by and implementing Article 6, Section 2(a) of the Kansas Constitution and K.S.A. 2013 Supp. 72-1130; effective July 1, 2005; amended Jan. 10, 2014.)

K.A.R. 91-31-35. Graduation requirements.

(a) Each local board of education shall adopt a written policy specifying that pupils are eligible for graduation only upon completion of at least the following requirements:

(1) Four units of English language arts, which shall include reading, writing, literature, communication, and grammar. The building administrator may waive up to one unit of this requirement if the administrator determines that a pupil can profit more by taking another subject;

(2) three units of history and government, which shall include world history; United States history; United States government, including the Constitution of the United States; concepts of economics and geography; and, except as otherwise provided in S.B.R. 91-31-32, a course of instruction in Kansas history and government;

(3) three units of science, which shall include physical, biological, and earth and space science concepts and which shall include at least one unit as a laboratory course;

(4) three units of mathematics, including algebraic and geometric concepts;

(5) one unit of physical education, which shall include health and which may include safety, first aid, or physiology. This requirement shall be waived if the school district is provided with either of the following:

(A) A statement by a licensed physician that a pupil is mentally or physically incapable of participating in a regular or modified physical education program; or

(B) a statement, signed by a lawful custodian of the pupil, indicating that the requirement is contrary to the religious teachings of the pupil;

(6) one unit of fine arts, which may include art, music, dance, theatre, forensics, and other similar studies selected by a local board of education; and

(7) six units of elective courses.

(b) A minimum of 21 units of credit shall be required for graduation.

(c) Any local board of education may increase the number of units of credit required for graduation. Any additional requirements of the local board of education that increase the number of units of credit required for graduation shall apply to those students who will enter the ninth grade in the school year following the effective date of the additional requirement.

(d) Unless more stringent requirements are specified by existing local policy, the graduation requirements established by this regulation shall apply to those students who enter the ninth grade in the school year following the effective date of this regulation and to each subsequent class of students.

This regulation shall be effective on and after July 1, 2005.

(Authorized by and implementing Article 6, Section 2(a) of the Kansas Constitution; effective July 1, 2005.)

K.A.R. 91-31-38 Accreditation status.

(a) Each school shall be classified as one of the following:

(1) Accredited;

(2) accredited on improvement;

(3) conditionally accredited; or

(4) not accredited.

(b) Each school that has accredited status from the state board on June 30, 2005 shall retain its accreditation status until that status is replaced with a status specified in subsection (a) of this regulation.

(c) Each school that seeks initial accreditation by the state board shall be designated as a candidate school and shall be granted accredited status until the school's status can be determined using the criteria prescribed in S.B.R. 91-31-32.

(d) If a school is accredited on improvement or conditionally accredited, the school shall develop and implement a corrective action plan approved by the state technical assistance team assigned to the school and shall implement any corrective action required by the state board.

(e) Each school that is accredited on improvement and that fails to meet one or more of the performance criteria in regard to all students assessed or four or more of the quality criteria shall be classified as conditionally accredited.

(f) Any school that is accredited on improvement or conditionally accredited may attain the status of accredited or accredited on improvement, respectively, by meeting, for two consecutive years, the criteria for that accreditation status.

(g) Each school that is conditionally accredited and that, for a fifth consecutive year, fails to meet one or more of the performance criteria or four or more of the quality criteria shall be classified as not accredited.

(h) If a school is not accredited, sanctions shall be applied.

This regulation shall be effective on and after July 1, 2005.

(Authorized by and implementing Article 6, Section 2(a) of the Kansas Constitution; effective July 1, 2005.)