

2. Appoint Regent to Serve as Presiding Officer to Handle, on Remand, DCCC et. al. v. Board of Regents

**Julene Miller,
General Counsel**

Summary and Staff Recommendation

The Shawnee County District Court has entered an order remanding Board of Trustees of Dodge City Community College, et al., v. Kansas Board of Regents, No. 2009-C-1046, and has ordered the Board “to determine the amount Plaintiffs would have received [in FY2011] had the Board awarded them Other Institutions Aid for Technical Education funding instead of Community College Operating Grant funding in that fiscal year, treating Plaintiffs in the same manner that the Intervenor were treated in FY 2011.” The Court Order also states that, “[o]nce recalculation is had, or as a precedent thereto, all parties should have appropriate input into any basis used for such recalculation before it becomes final, including, if necessary, an agency hearing in regard thereto.” Staff recommends that the Board appoint a Regent to serve as Presiding Officer to conduct any proceedings he or she deems necessary or appropriate to comply with the Court’s Order. Specifically, the Presiding Officer should be given authority to hold and conduct scheduling conferences, pre-hearing conferences, mediation proceedings, and/or any other proceedings, and to make any necessary findings, conclusions and recommendations to forward to the Board for consideration and final action.

Background

In 2009, the Boards of Trustees of Pratt Community College, Cowley County Community College, and Dodge City Community College sued the Board of Regents claiming that the Board had misinterpreted the statutes providing for Postsecondary Aid to certain institutions, and that these three colleges should have been deemed institutions eligible to receive that type of state aid. They claimed that had they been included in this funding source, they would have received significantly more total state aid since 1999 than they have been receiving. The Board responded with a motion to dismiss denying those claims, and explaining that the relevant statutes had been interpreted consistently by the Board of Education and the Board of Regents since their enactment (1974 for Postsecondary Aid), and that to interpret them any other way at this point in time would be to the detriment of all the institutions that now share in the distribution of those funds. When the Court refused to dismiss the case, four of the community colleges that have received a portion of the Postsecondary Aid appropriation (Kansas City Kansas, Highland, Seward and Hutchinson Community Colleges) joined as intervenors; eventually Johnson County Community College joined as an intervenor as well. Two other institutions that receive Other Institutions Aid for Technical Education, Coffeyville Community College and Washburn Institute of Technology, have chosen not to intervene.¹

During the 2011 Session, at the Board’s request, the Legislature enacted Senate Bill No. 143. That bill, and one that was passed the year prior, repealed the Postsecondary Aid statutes and the provisions for calculating Community College Operating Grant, replacing them with a new structure for determining state aid for technical education based on the cost of providing those courses. The bill was passed resoundingly, but unfortunately there were no funds made available to implement its provisions. Instead, the Legislature attached *provisos* to the two relevant appropriations – Postsecondary Tiered Technical Education State Aid and Non-tiered Course Credit Hour Grant – requiring the Board to total for each institution the primary state appropriations it received in FY2011, reduce the amount by approximately 1%, and distribute the difference. (2011 Senate Substitute for House Bill No. 2014, sec. 128(a).) Under these appropriation *provisos*, each institution would receive the same amount of state aid it received in FY2011 for Community College Operating Grant and Postsecondary Aid less approximately 1%.

¹In FY 2011, the Legislature split Postsecondary Aid into two separate line item appropriations for FY2011, one being called Technical College Aid for Technical Education and the other being called Other Institutions Aid for Technical Education.

On July 7, 2011 the Shawnee County District Court issued a ruling against the plaintiff community colleges for any back damages (fiscal years up to and including FY2011) and found that the passage of Senate Bill 143 during the 2011 Session addressed the plaintiffs' complaints going forward, but retained jurisdiction and indicated that if prior years' amounts (that had been calculated using the pre-SB 143 methodology) would be used by the Board in determining the FY2012 appropriation, he might take action to affect that distribution.

On July 22, 2011, during a telephone conference call, the Judge indicated his intent to remand the case back to the Board of Regents with instructions to recalculate the FY2011 allocation of Other Institutions Aid for Technical Education as though plaintiffs had been treated the same as the intervenor community colleges and included in the distribution of that fund for that year, for the sole purpose of establishing a new base from which the legislative proviso set forth in House Bill No. 2014 could be calculated for FY2012.

Summary and Staff Recommendation

On October 7, 2011, the Court entered its Order stemming from the July 22 conference call. The Court has ordered the Board "to determine the amount Plaintiffs would have received [in FY2011] had the Board awarded them Other Institutions Aid for Technical Education funding instead of Community College Operating Grant funding in that fiscal year, treating Plaintiffs in the same manner that the Intervenors were treated in FY 2011." The Court Order also states that, "[o]nce recalculation is had, or as a precedent thereto, all parties should have appropriate input into any basis used for such recalculation before it becomes final, including, if necessary, an agency hearing in regard thereto."

Staff recommends that the Board appoint a Regent to serve as Presiding Officer to conduct any proceedings he or she deems necessary or appropriate to comply with the Court's Order. Specifically, the Presiding Officer should be given authority to hold and conduct scheduling conferences, pre-hearing conferences, mediation proceedings, and/or any other proceedings, and to make any necessary findings, conclusions and recommendations to forward to the Board for consideration and final action.

A copy of the Court's Order follows.

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

2011 OCT -7 P 2:13

BOARD OF TRUSTEES OF DODGE)
CITY COMMUNITY COLLEGE,)
BOARD OF TRUSTEES OF PRATT)
COMMUNITY COLLEGE, and)
BOARD OF TRUSTEES OF COWLEY)
COUNTY COMMUNITY COLLEGE,)
)
Plaintiffs,) Case No. 2009-C-1046
)
v.)
)
KANSAS STATE BOARD OF)
REGENTS,)
)
Defendant.)
)
and)
)
BOARD OF TRUSTEES OF KANSAS)
CITY KANSAS COMMUNITY)
COLLEGE, BOARD OF TRUSTEES)
OF SEWARD COUNTY COMMUNITY)
COLLEGE, BOARD OF TRUSTEES)
OF HIGHLAND COMMUNITY)
COLLEGE, and BOARD OF)
TRUSTEES OF HUTCHINSON)
COMMUNITY COLLEGE,)
)
Intervenors.)
)

JOURNAL ENTRY

NOW ON this 22nd day of July, 2011, this matter comes before the Court pursuant to the Court's continuing jurisdiction under its July 7, 2011 Memorandum Order and Opinion. All parties, including intervenors, appear by and through their counsel of record.

The purpose of this review is to ensure that the failure by the Kansas Board of Regents ("Board") to award postsecondary aid funding to the Plaintiffs in prior years, specifically FY 2011, would not adversely impact Plaintiffs' technical education funding in the future, specifically FY 2012. In accordance with the July 7, 2011 Order, the Board submitted documentation on July 14, 2011, showing that the distribution of FY 2012 Postsecondary Tiered Technical Education State Aid approved at the Board's meeting of July 19, 2011 was based on FY 2011 funding. The Board asserts that the use of FY 2011 as a base is in accordance with the legislative provisos in 2011 Senate Substitute for House Bill No. 2014, sec. 128(a). Such a funding distribution would, as this Court noted in its July 7,

2011 Order, carry forward the "institutional injustice" created by the Board's past practices.

Therefore, to prevent this injustice, the Court, pursuant to K.S.A. 60-801 *et seq.* and K.S.A. 60-901 *et seq.*, as incorporated into the Kansas Judicial Review Act (KJRA) by K.S.A. 77-622, hereby orders and mandates:

1. Insofar as it is dealing with the FY 2011 base year, the Court has jurisdiction over this matter. To the extent any party has objected to this Court's continuing jurisdiction, those objections are overruled.

2. The Court hereby incorporates its prior opinions, including those issued July 7, 2011, July 9, 2010, and February 3, 2010.

3. The Plaintiffs' respective amounts of Other Institutions Aid for Technical Education and Community College Operating Grant funding for FY 2011 must be recalculated to determine the amount Plaintiffs would have received had the Board awarded them Other Institutions Aid for Technical Education funding

instead of Community College Operating Grant funding in that fiscal year, treating Plaintiffs in the same manner that the Intervenor Community Colleges were treated in FY 2011. Once recalculation is had, or as a precedent thereto, all parties should have appropriate input into any basis used for such recalculation before it becomes final, including, if necessary, an agency hearing in regard thereto.

4. For the purpose of the provisos in 2011 Senate Substitute for House Bill No. 2014, Sec. 128(a), the recalculated FY2011 amounts shall be considered as the amounts that were properly to be due and received in FY2011. These adjusted, recalculated FY2011 amounts are sums the Court has found, subject to such calculation, were sums that should have been due and paid in FY2011, but, notwithstanding, for reasons previously determined, such sums were not adjusted, and Plaintiffs' entitlements thereto were *not made subject of an order for payment by the Court*. As such, such recalculated sums are to be utilized in calculating and making any FY2012 distributions as well as any future

Tiered Technical Education State Aid and Non-Tiered course credit hour distributions that would rely upon FY2011 Other Institutions Aid for Technical Education and Community College Operation Grant distributions as a base.

5. The recalculation of FY 2011 funding in accordance with this Order is hereby remanded to the Board.

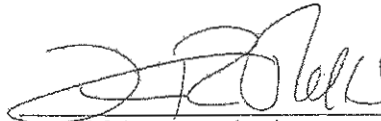
6. The Board may proceed to distribute the first half of FY 2012 Postsecondary Tiered Technical Education State Aid and Non-Tiered Course Credit Hour Grant aid on August 1, 2011, as shown on the Attachment A Spreadsheet to the Board's July 14, 2011 supplemental brief. Any and all overpayments and underpayments resulting from the recalculation ordered herein shall be made with the January 1, 2012 distribution.

7. The Court shall retain jurisdiction to enter any such orders as may be necessary to carry out the rulings set forth in this Order or its July 7, 2011 Order.

8. To the extent not otherwise set forth in this

Order, the Court incorporates the transcript of the
July 22, 2011 hearing and any and all rulings set forth
therein.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'F. Theis', written over a horizontal line.

Franklin R. Theis
District Court Judge
Division Seven

10/7/11