STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

#95095

NB.
STATE OF NEBRASKA
OFFICIAL
DEC 12 1995
DEPT. OF JUSTICE

DATE: December 12, 1995

SUBJECT: Legal implications of making "quality education" a "fundamental right" and making a "thorough and efficient" education the "paramount duty" of the State.

REQUESTED BY: State Senator Kate Witek

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested the opinion of the Attorney General on a series of legal questions related to a proposed constitutional amendment to Article VII, §1 of the Nebraska Constitution which may be introduced in the upcoming session of the Nebraska Legislature. The proposed amendment is as follows:

> ~~The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.~~ Quality education is essential to the survival of a free society and is a fundamental right of each individual. It is the paramount duty of the State to provide for the thorough and efficient education for all individuals between the ages of five and twenty-one years who are enrolled in the common schools of the State. The Legislature may provide for the education of other persons in educational institutions owned and controlled by the state or a political subdivision thereof.

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quality education" in the event they do not approve of their arents' choice of schools. Such a procedure is already the law in ebraska with respect to a minor's fundamental right to an bortion. See Neb. Rev. Stat. §71-6903 (Cum.Supp. 1994).

7. In the second sentence of the new language, the state's uty to provide a thorough and efficient education is a "paramount uty." What is a paramount duty?

Research indicates that the only State with a comparable rovision is the State of Washington. Article 9, § 1 of the ashington Constitution provides, "It is the paramount duty of the tate to make ample provision for the education of all children esiding within its borders. . . ." The meaning of "paramount uty" was determined by the Washington Supreme Court in ***Seattle ch. Dis. No. 1 of King City v. State***, 585 P.2d 71 (Wash. 1978).

The court in ***Seattle Sch. Dis. No. 1*** held that this provision does not merely seek to broadly declare policy, explain goals, or esignate objectives to be accomplished. It is declarative of a onstitutionally imposed duty." ***Id.***, at 85. The court further eld this duty has not been directed solely to the Legislature. d., at 86 (concluding the courts could enforce the "paramount uty").

The court concluded that " 'paramount' is not a mere synonym f 'important'. Rather, it means superior in rank, above all thers, chief, preeminent, supreme, and, in fact, dominant." ***Id.***, t 91 (emphasis added). The court further held:

> By imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a "duty" that is supreme, preeminent or dominant. Flowing from this constitutionally imposed "duty" is its jural correlative, a correspondent "right" permitting control of another's conduct. Therefore, all children residing within the borders of the State possess a "right," arising from the constitutionally imposed "duty" of the State, to have the State make ample provision for their education. Further, since the "duty" is characterized as *paramount* the correlative "right" has equal stature.

d. (emphasis added).

The ***Seattle*** court did not stop here, but held, "the State's onstitutional duty goes beyond mere reading, writing and

arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas." *Id.*, at 94. Under this provision, the State must provide "fully sufficient funds" for the schools "as a first priority." *Id.*, at 95 (emphasis added). Such funding, the court held, "must be accomplished by means of dependable and regular tax sources. . . ." *Id.*, at 96-97. Finally, this funding is not limited to the revenue derived from sources specified in the constitution. *Id.*

Thus a "paramount" duty means one that is above all others[3].

8. If this new amended language requires the state to have such a "paramount duty" then can the state delegate any authority to local school districts and local school boards? Would the state be forced to control the quality of education in each school district and place local school boards in a subservient role? Also, if education is the "paramount duty" then what effect will this have on state spending priorities as state government prepares the state budget?

As to whether the state's paramount duty to provide a thorough and efficient education may be delegated to local school boards, we know of no legal reason that the details of education could not still be handled by local school boards. However, since the proposed amendment transfers responsibility over education funding from local school districts to the State, and imposes the duty to ensure quality education on the State rather than the local districts, the school districts are clearly placed in an inferior role.

The answer to your question regarding state spending priorities is actually provided in the immediately preceding section. Education would be placed in the preeminent position, above all other spending priorities including the historic duty to

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[3] A similar constitutional amendment was defeated by voters in Illinois in 1992. During legislative debate on the proposed amendment, it was acknowledged by proponents of the amendment that the provision would require education to receive priority funding above all other agencies and problems. ***Senate Debate on SJR Const.Amend. 130***, 87th Illinois Gen. Assembly, April 23, 1992 p45.

provide for the public safety. *Seattle Sch. Dist. No. 1*, 585 P.2d at 91[4].

Summary

In summary, the language of the Amendment would leave it to the Nebraska Supreme Court, rather than the Legislature or local school district, to determine what is required for a "quality education." Because the Amendment makes quality education a "fundamental right", differences in spending, equipment, quality of buildings, and differences in programs or teaching methods at different schools may be held unconstitutional. It is likely that Nebraska's current school financing system would be ruled unconstitutional since there are spending differences between school districts. Because education is made the "paramount duty" of the State, education, for purposes described in the Amendment, would apparently have to be fully funded to the satisfaction of the Nebraska Supreme Court before the Legislature would be allowed to spend funds for public health and safety, law enforcement, roads, welfare, or other purposes.

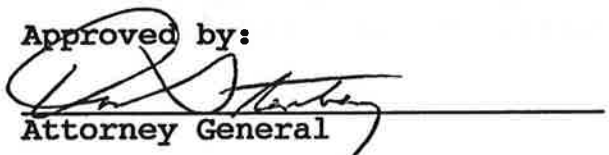
To put it another way, in our opinion, the Amendment you describe would take the ultimate power to make key public policy decisions about education away from the Legislature and local school districts and give that power to the Nebraska Supreme Court.

Sincerely,

DON STENBERG
Attorney General

Steve Grasz
Deputy Attorney General

Approved by:



Attorney General

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[4] As discussed above, the proposed amendment would create a "Category IV" education clause. See William E. Thro Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision As a Model, 35 Boston College L. Rev. 597, 606 (May 1994). Under such a clause, "the needs of the public school system must be addressed before the state's needs for roads, parks and other social services." *Id.*