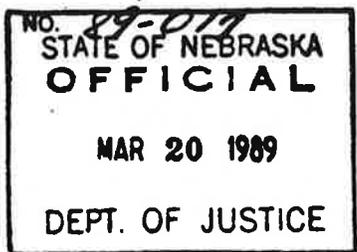


Linda Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA
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DATE: March 16, 1989.

SUBJECT: Constitutionality of LB 183, as amended - Open Enrollment Option for Nebraska Public School Students

REQUESTED BY: Senator Howard Lamb
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion concerning a portion of LB 183, as amended. Generally, LB 183 would provide an "open enrollment" option, allowing the parent or guardian of a student attending public school in Nebraska to apply to enroll the student in any school district in the state. Sections 13 and 14 of the bill, as amended, establish a mechanism to provide financial support to school districts accepting students exercising the option to enroll in a school district other than their resident district. Each resident school district is required to remit to the State Department of Education an amount equal to its annual cost per pupil for each option student attending school in an option district. The funds received by the State Department of Education are to be remitted to the State Treasurer and credited to the "Option Support Fund." Payments are to be made from the Fund to option districts based upon the annual cost per pupil of each option district. The bill further provides that, in the event that monies available from the Option Support Fund are insufficient to cover payments to option districts based on their annual costs per pupil, the Department of Education is to advise the Legislature of such deficiency and request the Legislature to make an emergency appropriation to make such payments. The specific question you have raised for our consideration concerns whether this funding mechanism violates Article VIII, Section 1A of the Nebraska Constitution, or any other constitutional provision.

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Senator Howard Lamb
March 16, 1989
Page -2-

Article VIII, Section 1A, provides: "The state shall be prohibited from levying a property tax for state purposes." In construing this constitutional provision, the Nebraska Supreme Court, in State ex rel. Meyer v. Banner County, 196 Neb. 565, 244 N.W.2d 179 (1976), stated the following:

Article VIII, section 1A, first adopted in 1954, became effective in its present form in 1966. It provides: "The state shall be prohibited from levying a property tax for state purposes." Prior to 1966, there was no income or sales tax, and the principal tax source for the support of state government was a property tax, imposed by a state levy, separate and distinct from the levies imposed by counties, cities, and other political subdivisions. The amendment became effective with the adoption of an income and sales tax by the State in 1966.

The amendment, by its terms, prohibits only the State from levying a property tax, and then only for state purposes. It does not affect the use of property taxes by a county, city, or other local subdivision. Counties, cities, and other taxing subdivisions of state government have traditionally relied and still rely upon property taxes as their major source of revenue. Historically and currently the governmental activities supported by a county property tax at the time the amendment was adopted were and are serving substantial local purposes. The constitutional amendment was not intended to disturb that tax structure nor effect any change in the use of property taxation by any governmental unit except the State itself.

Id. at 567-68, 244 N.W.2d at 181.

Article VII, Section 1 of the Constitution of Nebraska provides, in part, that "[t]he 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." In the early case of Affholder v. State, 51 Neb. 91, 70 N.W. 544 (1897), the Nebraska Supreme Court, discussing the effect of identical language contained in a prior version of the State Constitution, stated: "What methods and what means should be adopted in order to furnish free instruction to the children of the state has been left by the constitution to the legislature." Id. at 93, 70 N.W. at 545.

Historically, the obligation and duty to raise funds for the common schools has been delegated by the Legislature to local school districts by requiring the levy of a tax on property by each county board of equalization for the benefit of the local school districts, in order to provide the funds necessary for public

education. Consistent with the decision in State ex rel. Meyer v. Banner County, it is clear that the adoption of Article VIII, Section 1A, was not intended to alter or affect the use of property taxes by a county, city, or other local subdivision which had historically been imposed to support local purposes, which would, in our view, include local property taxes levied to support the education of students in the common schools in accordance with the long-standing tradition of funding compulsory free public education in Nebraska in this manner.

Upon examination of LB 183, as amended, it is apparent that the bill does not alter this historical pattern of local levies on property for purposes of raising funds for public education. No state levy of a tax on property is proposed under the bill which could be construed to contravene Article VIII, Section 1A. Rather, the bill simply provides that some portion of funds raised by levies on property in resident school districts will be sent into a general fund to be distributed by the state to provide reimbursement for costs associated with educating non-resident students attending school in an option district. This funding mechanism in no way alters the local nature of the underlying property tax levies employed to fund public education, and does not result in the imposition of any state tax on property, within the meaning of Article VIII, Section 1A. Accordingly, we conclude that LB 183, as amended, does not violate this constitutional provision.

We do, however, have some concern as to whether this proposed legislation will, in operation, violate constitutional requirements as to uniformity of taxation (Neb. Const., Art. VIII, Section 1 and U.S. Const., amend. XIV), as well as the constitutional prohibition against the commutation of taxes (Neb. Const., Art. VIII, Section 4). In this regard, we note the Nebraska Supreme Court decision in Peterson v. Hancock, 155 Neb. 801, 54 N.W.2d 85 (1952). In Peterson, the court invalidated what was known as the Blanket Mill Tax Levy Act adopted by the Legislature in 1949. In an effort to encourage consolidation, a four mill levy was required to be levied and held in a special fund. All school districts participated the first year in distribution from the fund but, thereafter, only districts having five or more pupils were to receive distributions from the fund. Residents of districts which had less than five students were required to pay the four mill tax but received no benefits therefrom, and were also required to support their schools from the regular tax levied for their district. Id. at 804-806, 54 N.W.2d at 88-89. In holding the Blanket Mill Tax Levy Act unconstitutional as violative of Article VIII, Section 4, of the Nebraska Constitution, the court stated:

The only conclusion that can logically be drawn is that districts having less than five pupils are required to pay the blanket levy on all their property into the

Senator Howard Lamb
March 16, 1989
Page -4-

fund for the sole benefit of districts with five or more pupils. As a result, the regular school district taxes in such districts are thereby released, discharged, or commuted at the expense of districts having less than five pupils, who are required not only to pay the blanket tax levy in full to others without any benefit to them, but also to pay all regular school taxes required to maintain the school in their own respective districts.

Id. at 812, 54 N.W.2d at 92.

In addition, the court in Peterson found the Act to violate Article VIII, Section 1, stating: "[T]he blanket mill levy tax is also discriminatory as one levied upon one district of the county for the exclusive benefit and local purpose of other districts and that it is not levied uniformly and proportionately." Id. at 813-14, 54 N.W.2d at 93.

Furthermore, in a prior decision, High School District v. Lancaster County, 16 Neb. 147, 82 N.W. 380 (1900), the court declared invalid an act which provided that students from a district without a high school were to be admitted to any high school district in the county upon payment of 75 cents a week per pupil to the receiving district by the district from which the students came. The act was challenged on the basis that the payment was arbitrary and violated the constitutional rule of uniformity and the prohibition against commutation of taxes. In declaring the act invalid, the court stated:

We quite agree with counsel for plaintiff that, under this act, the county is the proper unit of taxation; but we have already shown that, in the event the cost of tuition should exceed or fall below the amount provided by section 3 of the act to be raised by taxing the property of the whole county, it would indirectly violate the rule of uniformity prescribed in section 6 of the article of the constitution named. It would also violate section 4 of said article, as an advantage would accrue to the taxpayers resident in the one or the other of the two portions of the county affected thereby, and it would clearly be a commutation of the taxes to be paid by the taxpayers resident in the one or the other of the two localities. It may be true that such commutation would be brought about indirectly, that is, in case the cost of tuition exceeded the amount provided to be paid by the general tax upon the whole county, the taxpayers resident within the school district would be compelled to supply the deficiency by another levy upon the property within such district, whence it would follow that the difference would be a commutation in favor of those portions of the

county outside the district; or, in case the cost of tuition should fall below the specified amount, the taxpayers within the limits of the district would profit at the expense of those without its limits; and it is clear that in either event a commutation of taxes would result.

Id. at 819-20, 82 N.W. at 382.

The decisions in Peterson v. Hancock and High School District v. Lancaster County are consistent with other Nebraska cases establishing that it is a violation of constitutional requirements providing for uniformity of taxation and forbidding commutation of taxes to compel taxpayers of one taxing district to pay taxes which are for the sole benefit of citizens in another taxing district. See also Wilkinson v. Lord, 85 Neb. 136, 122 N.W. 699 (1909); Peterson v. Anderson, 100 Neb. 149, 158 N.W. 1055 (1916). An examination of LB 183 reveals that, in operation, this legislation may violate the principle of uniformity of taxation and may result in unlawful commutation of taxes to the extent the taxpayers in option school districts may be compelled to pay additional taxes to support the education of students from outside the option district in the event the option district is not reimbursed the actual cost of providing such education. In this regard, it should be noted that Section 14 of the bill, as amended, provides that if payments made to the Option Support Fund are insufficient to cover payments required to be made to reimburse option districts, the State Department of Education ". . . shall advise the Legislature and request an emergency appropriation to make such payments." (Emphasis added). In the event the Legislature does not grant such a request and appropriate funds to cover any deficiency in the Option Support Fund, it appears inevitable that taxpayers in option districts receiving payments which are insufficient to pay for any increased costs incurred in educating option students will be subjected to increased property tax levies in order to pay for the additional unreimbursed costs incurred by the option district. To the extent taxpayers in option districts may thus be compelled to pay additional taxes to support the education of non-resident students attending school in the option district, such a situation may violate the principle of uniformity, and may operate to release or discharge taxpayers of the district in which the option student resides from a portion of the tax obligation imposed for the education of students from the resident district. Such a result would conflict with the principle enunciated in Peterson v. Hancock and High School District v. Lancaster County that it is unlawful to compel taxpayers in one district to pay taxes for the benefit of citizens in another taxing district.

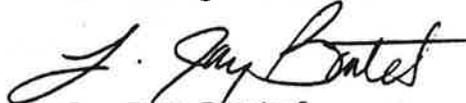
In pointing out this potential constitutional defect, we note that we are not suggesting that LB 183, as amended, is

Senator Howard Lamb
March 16, 1989
Page -6-

unconstitutional on its face. Rather, we draw your attention to this issue to illustrate that, in application, the bill could conceivably operate in violation of certain constitutional provisions in the manner discussed. It should be noted that the constitutionality of an act is not to be determined by what has been or possibly may be done under it, but is to be adjudged by what the law authorizes to be done under and by virtue of its provisions. Bachus v. Swanson, 179 Neb. 1, 136 N.W.2d 189 (1965). Therefore, we believe a serious constitutional question may arise to the extent that the implementation of LB 183, as amended, may result in violations of the constitutional requirement of uniformity of taxation and the prohibition against the commutation of taxes in the event the effect of the bill is to create such a situation in relation to particular school districts impacted by its operation.

Very truly yours,

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cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:



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