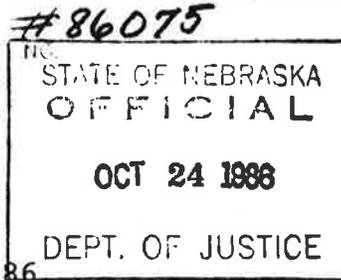


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: October 23, 1986

SUBJECT: Constitutionality of the free nonresident high school tuition law, specifically, Neb.Rev.Stat. §79-4,102 (Supp. 1986).

REQUESTED BY: Senator Howard Lamb
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Harold Mosher, Assistant Attorney General

In your letter of inquiry you state that the "District Court of Scotts Bluff County recently ruled that LB 930 (Laws 1984) is unconstitutional in its entirety." As a result thereof, you state "a great many Nebraska high schools have given notice pursuant to Section 79-4,100 Neb. R.R.S. 1943 (Supp. 1986) that they will not serve nonresident students beginning in 1987-88." You then ask two (2) questions, each of which is hereinafter discussed.

1. "If LB 930 is in fact unconstitutional in its entirety, could not the high school districts set nonresident high school tuition based upon per pupil cost pursuant to LB 933 (Laws 1982) (the predecessor statute to LB 930) or, if LB 933 is also unconstitutional, under its predecessor codified as Section 79,4,102 Neb. R.R.S. 1943?"

The District Court of Scotts Bluff County, Nebraska (hereinafter, District Court), did not, in our opinion, find section 1 of LB 930, Laws of Nebraska, Eighty-eighth Legislature, Second Session (1984), unconstitutional in its entirety. The District Court did find the Legislature had unconstitutionally delegated its authority in LB 930 when it granted receiving school districts the option of using the nonresident high school tuition charges certified by the State Department of Education or to set a nonresident high school tuition charge between a stated maximum and minimum. The District Court noted that the situation is analogous to "signing a blank check and leave the decision for the amount up to the recipient." Consequently, we can not answer your question in the form that it is cast even if it were otherwise proper for us to do so.

L. Jay Bartel
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Dale A. Comer
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Senator Howard Lamb

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October 23, 1986

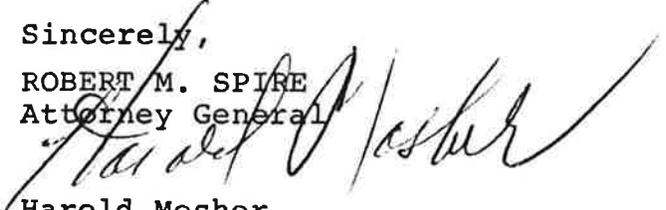
There is another reason why we can not answer your question. This office represents the State Department of Education which is one of the defendants in the case described and above and, together with the named school districts, have appealed that case to the Nebraska Supreme Court. The pre-hearing conference in that appeal was held yesterday and both the appellants and the appellees have raised a number of constitutional issues. Consequently, it would be improper for this office at this time to offer our opinion as to the course of action that school districts should take because the District Court has found a portion of section 1(2)(f) of LB 930 to be unconstitutional when one of the arguments that we intend to present to the Nebraska Supreme Court on appeal is that LB 930 is constitutional. We trust, however, that what we perceive to be the holding of the District Court (which is discussed above) is sufficient to permit you "to introduce legislation in the next session of the Legislature to correct the situation" should you deem it necessary or advisable.

2. "If high school districts may charge nonresident tuition equal to the cost per pupil to educate nonresident students then does not section 79-4,100 Neb. R.R.S. 1943 (Supp. 1986) require the high school districts currently serving nonresident students to continue to do so.?"

Obviously, a state cannot tax itself for the benefit of the people of another state. So too, the imposing of a tax on one municipality or part of the state, for the purpose of benefiting another municipality or part, violates the rule as to uniformity. No taxing district can be taxed for the exclusive benefit of another district. Thus, the ultimate question here is not whether high school districts may charge nonresident tuition equal to the cost per pupil (assuming it can be legally determined), but whether "the amount of nonresident high school tuition as fixed in section 79,4102 is * * * compensatory." See, Neb.Rev.Stat. §79-4,100 (Supp. 1986). If it is not, "[a]ny public high school district may refuse admission to any or all nonresident pupils."

Sincerely,

ROBERT M. SPIRE
Attorney General

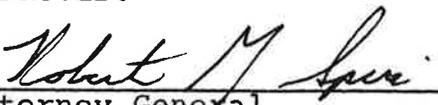

Harold Mosher
Assistant Attorney General

HM:jem

cc: Patrick J. O'Donnell, Clerk

2/03

APPROVED:



Attorney General