

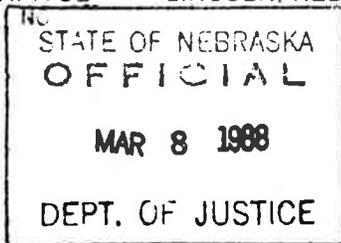
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DEPARTMENT OF JUSTICE

STATE OF NEBRASKA
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STATE CAPITOL • LINCOLN, NEBRASKA 68509

88019



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DATE: March 4, 1988

SUBJECT: (1) Whether LB 1225 unlawfully delegates power which is reserved to the Legislature; and
(2) Whether LB 1225 permits the creation of a special board of education in violation of the "one man-one vote" rule?

REQUESTED BY: Senator Ron Withem
Nebraska State Legislature

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

If enacted into operative law, LB 1225 of the Ninetieth Legislature, Second Session (1988) would amend certain statutes and provide procedures whereby Class I school districts, or portions thereof, may combine with a Class II, III, IV, or V school district to create an affiliation of school districts. The stated procedures include the filing of a petition with the county superintendent signed by not less than a stated percentage of the legal voters of the Class I school district. The petition, pursuant to section 6 of LB 1225, shall include:

- (a) A description of the proposed boundaries of the affiliation of school districts and the legal name by which the affiliation shall be known;
- (b) A map of the area described in (a) above;
- (c) A specification of the grade levels to be provided by the affiliation of school districts;
- (d) Specific accounting procedures to be used by the affiliation of school districts to differentiate the expenditures of the parent Class II, III, IV, or V school district for those grades not provided by the affiliation from the expenditures of the affiliation of school districts for facilities, staff, administrative costs, transportation expenses, if any, debt service, and any other costs;
- (e) Transportation plans, if any, will be provided;

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- (f) The number of board members to constitute the special board of education of the affiliation of school districts and the number of board members who shall come from the parent district and the number of members who shall come from affiliate districts or portions thereof;
- (g) A statement of presumed value of the assets owned by the parent Class II, III, IV, or V school district to be used whether in whole or in part for the delivery of services for the affiliation of school districts (but no statement of presumed value of the assets owned by the Class I school district need be stated); and
- (h) The existing bonded indebtedness, if any, which will be assumed by the affiliation of school districts.

Other procedures in LB 1225 include the acceptance or rejection of the petition by the board of education of the Class II, III, IV or V school district and certain powers and duties of the special board of education of an affiliation of school districts authorized by this legislative bill. The questions submitted are discussed in the order stated.

A STATUTE REPOSING, IN EFFECT, AN ABSOLUTE UNREGULATED AND UNDEFINED DISCRETION IN THE CREATION OF A POLITICAL OR GOVERNMENTAL SUBDIVISION UNLAWFULLY DELEGATES LEGISLATIVE POWER.

A proposal to create an affiliation of school districts is initiated, as noted above, by a petition which must include, among other things, the number of board members to constitute the special board of education of the affiliation of school districts and the number of board members who shall come from the parent Class II, III, IV, or V school district and the number of board members who shall come from the Class I school districts who would affiliate with the parent school district pursuant to the proposal. See, section 6(2)(g) of LB 1225. It is to be noted that the minimum and maximum number of members of a special board of education of an affiliation of school districts is not stated in LB 1225, but is left to the absolute unregulated discretion of those who propose the creation of an affiliation of school districts. Likewise, the number of members of the special board of education who are to come from the parent Class II, III, IV or V school district is not stated in LB 1225, nor is the number of members of the special board of education who are to come from the affiliate Class I school districts stated. In each case, the number who are to come from each class of school districts is left to the absolute unregulated discretion of those who propose the creation of an affiliation of school districts. This

absolute and unregulated discretion is, in our opinion, an impermissible delegation of legislative power. See, Terry Carpenter, Inc. v. Nebraska Liquor Control Commission, 175 Neb. 26, 120 N.W.2d 374 (1963). Accordingly, we are of the opinion that section 6(2)(g) of LB 1225 violates Article II, section 1, of the Constitution of Nebraska.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH
AMENDMENT REQUIRES SUBSTANTIAL EQUALITY IN
POPULATION AMONG VOTING DISTRICTS OF A
POLITICAL SUBDIVISION.

As noted above, a petition which proposes the creation of an affiliation of school districts must include, among other things, the number of board members which constitutes the special board of education of the affiliation of school districts and the number of board members who shall come from the parent Class II, III, IV, or V school district and the number of board members who shall come from the Class I school district(s) who would affiliate with the parent school district pursuant to the proposal. The actual number of each is left to the absolute unregulated discretion of those who initiate the proposal.

It is well established law that the constitutionality of a statute is to be tested, not by what has been done or may be done under it, but what the law authorizes to be done under its provisions. City of Beatrice v. Wright, 72 Neb. 689, 101 N.W. 1039 (1904); Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961). Application of that legal principle to LB 1225 discloses that an individual(s) who initiates a petition to create an affiliation of school districts could designate in the petition a particular Class III school district with a population of 15,000 people shall have 15 members on the special board of education and the Class I school district(s) with a combined population of 3,000 people who would be given the opportunity to affiliate with the parent Class III school district is to have but 2 members on the special board of education.

To state the obvious, pursuant to LB 1225, the members of the special board of education represent different classes of school districts which are not of equal population. The problem here is compounded by the fact that members of the special board of education are chosen by elected local boards of education which represent school districts of unequal population. This is not a case where candidates must be residents of certain districts which may contain an unequal number of people but who are elected at large. Nor is this a case where elected local school boards send a delegate to a biennial meeting and those delegates elect a county board which performs essentially administrative functions. Rather, LB 1225 contemplates the exercise of governmental powers by a special board of education of an unknown number who are chosen by the elected governing bodies of school districts of unequal population which comprise the affiliation. Class I school districts have local elected

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boards of education of either three or six members. Neb.Rev.Stat. §§79-601 and 79-601.01 (Reissue 1986). LB 1225 grants the unknown total combined membership of all the elected boards of education of Class I school districts which are affiliated the power and duty to choose from their membership a statutory unknown unregulated number of members to serve on the special board of education which governs the affiliation. A Class II, III, IV or V school district has an elected local board of education of either six, seven, nine or twelve members, some of whom may be elected from districts within the parent school district. Neb.Rev.Stat. §§79-601, 79-601.01, 79-701, 79-803, 79-803.07, 79-902.01 and 79-1003 (Reissue 1986). Members of the elected board of education of a parent Class II, III, IV or V school district likewise have the power and duty to choose from their members a statutory unknown unregulated number of members to serve on the special board of education. Query, does LB 1225 violate the Fourteenth Amendment?

In our opinion, a qualified elector is no more nor less so because he or she lives in the city or on the farm. Indeed, that is an essential concept of a government of laws and not men. To the extent that a citizen's right to vote is debased or diluted, he or she is that much less a citizen. Thus the Fourteenth Amendment grants voters the right to have their votes given the same weight as other voters. Wesberry v. Sanders, 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526 (1964). Here, the total number of members elected to the local boards of the affiliate Class I school districts may, and in some situations will, exceed the number of board members elected to the board of a parent Class II, III, IV or V school district yet in some situations the total combined population of the affiliate Class I school districts will be less than the population of the parent school district. Moreover, the board members of the local Class I school districts which affiliate could, pursuant to LB 1225, choose a greater number of members to serve on the special board of education of the affiliated school district than the board members of the parent Class II, III, IV or V school board will be permitted to choose. That, in our opinion, violates the "one man-one vote" rule.

Respectfully submitted,

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20-21-2

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

APPROVED:


Attorney General