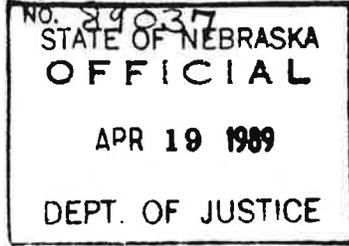


Linda Willard

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: April 18, 1989

SUBJECT: Constitutionality of the Financial Support Provisions 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 us to reexamine the conclusions reached in Attorney General Opinion No. 89-017, issued on March 20, 1989, in light of the recent Select File Amendment to LB 183 (AMO 861). Under this new amendment, financial support would be provided to school districts accepting students exercising the option to enroll in a district other than their district of residence by requiring the resident district to remit to the option district an amount equal to the state school aid provided for each option student based on the rates established pursuant to Neb.Rev.Stat. §§79-1334 and 79-1336 (Reissue 1987).

In our previous opinion, we expressed some concern as to whether the funding mechanism established to reimburse option districts for additional costs incurred in educating non-resident students could, in operation, result in a situation wherein taxpayers in option districts could be compelled to pay additional taxes to support such increased costs in the event the option district did not receive sufficient funds to cover added costs incurred by an option district accepting non-resident students. Our reference to this potential issue was based on a series of Nebraska cases in which the Nebraska Supreme Court has held that it is a violation of the constitutional requirement of uniformity of taxation (Neb. Const., Art. VIII, Section 1), as well as the constitutional prohibition against the commutation of taxes (Neb. Const., Art. VIII, Section 4), to compel taxpayers of one taxing district to pay taxes which are for the sole benefit of citizens of another taxing district. Peterson v. Hancock, 155 Neb. 80, 54 N.W.2d 85 (1952); Peterson v. Anderson, 100 Neb. 149, 158 N.W. 1055 (1916); Wilkinson v. Lord, 85 Neb. 136, 122 N.W. 699 (1909); High School District v. Lancaster County, 16 Neb. 147, 82 N.W. 380

L. Jay Bartel
Elaine A. Catlin
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Lynne R. Fritz

Denise E. Frost
Yvonne E. Gates
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
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(1900). As we pointed out, our concern in this regard was based on the possibility that the provisions of the bill could, in application, violate these constitutional provisions. We did not, however, conclude that the financial support provisions previously contained in LB 183 rendered the bill unconstitutional on its face.

In responding to your request to reexamine this issue in view of the recently adopted Select File Amendment to LB 183, we believe it is appropriate to analyze this matter in light of pertinent Nebraska Supreme Court decisions discussing the constitutionality of statutory provisions dealing with nonresident high school tuition. We believe these decisions will provide a framework for discussion of whether the provisions of LB 183, as currently amended, remove the potential constitutional defect noted in our prior opinion as to the operation of the financial support provisions of the bill.

In Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N.W.2d 729 (1971) ["Mann"], the court addressed a challenge to the constitutionality of a statute providing for the method of determining the tuition rate for nonresident high school students. The statute provided that the tuition rate was to be no less than the "average cost per pupil" of the receiving district for the previous year. "Cost per pupil", in turn, was required by statute to be determined by a formula which mandated consideration of specific elements of cost. Id. at 754-55, 186 N.W.2d at 732. Relying upon the principle that taxpayers of one taxing district cannot be required to pay taxes which are for the sole benefit of citizens in another taxing district, the plaintiffs contended the nonresident tuition payments required under these statutory provisions violated Article VIII, Sections 1 and 4, of the Nebraska Constitution, providing for uniformity of taxation and forbidding commutation of taxes, asserting that any nonresident tuition assessed at a rate above the actual per pupil cost of the receiving high school district constituted an unlawful exaction for the benefit of taxpayers of the receiving district. Id. at 756, 186 N.W.2d at 732-33.

Discussing the constitutional challenge raised by the plaintiffs in Mann, the court reiterated its long-standing position that "...a statute which provides for the raising of revenue for nonresident high school tuition which places a substantially unequal tax burden on either the district which receives the nonresident students or the district which sends them [is] discriminatory." Id. at 757, 186 N.W.2d at 733. (Citations omitted). Rejecting the contention that any difference between the nonresident tuition rate established under the statutory formula and the actual cost per pupil resulted in a violation of the constitutional principle of uniformity and the prohibition against the commutation of taxes, the court stated:

The appellants assert that any variation between the tuition rate and the actual per pupil cost creates a tax discrimination against either the receiving school district or the tuition paying district and is therefore unconstitutional as to one or the other. The logical result of this argument would be that any statute which might permit any variance at even one high school would be unconstitutional.... Tuition rates are always prospective and in a period of rapidly increasing costs, even a complete and accurate cost figure is outdated before it becomes effective. Many cost items can only be determined by using figures which are, in some degree, arbitrary. Exact equalization is impossible to achieve in any area of taxation, but particularly in this sensitive area of school operations. Section 79-4, 102, R. S. Supp., 1969, does not violate constitutional requirements of tax uniformity, nor constitute a commutation of taxes.

Id. at 757-58, 186 N.W.2d at 733-34.

Upholding the validity of the statutory formula for nonresident tuition at issue in Mann, the court concluded as follows:

A reasonable interpretation of section 79-4,102, R. S. Supp., 1969, is that it allows each individual high school district receiving nonresident students to determine, as accurately as is possible, the per pupil cost of high school education in its district and to certify a tuition rate for nonresident high school students based upon the average per pupil cost of high school education for the district, not less than the average per pupil cost for the preceding school year.

Id. at 759-60, 186 N.W.2d at 734.

Recently, in Ewing v. Scotts Bluff County Board of Equalization, 227 Neb. 798, 420 N.W.2d 685 (1988) ["Ewing"], the Nebraska Supreme Court addressed a similar constitutional challenge to a more recent version of the statutory formula contained in Neb.Rev.Stat. §79-4,102 for determining nonresident high school tuition rates. The plaintiffs in Ewing asserted, in part, that the nonresident high school tuition formula in §79-4,102 was unconstitutional on its face in that it allowed nonresident tuition charges to exceed the actual per pupil cost of educating students received by the high school district, resulting in a violation of the requirement of uniformity of taxation. Id. at 812, 420 N.W.2d at 693-94. Citing to the prior decision in Mann, the court rejected the plaintiffs facial challenge to §79-4,102, stating:

There can be no disagreement as to the underlying principle that Neb. Const. art. VIII, §1, requires that taxes shall be levied "uniformly and proportionately." In Mann v. Wayne County Board of Equalization, 186 Neb. 752, 757, 186 N.W.2d 729, 733 (1971), we stated: "[A] statute which provides for the raising of revenue for nonresident high school tuition which places a substantially unequal tax burden on either the district which receives the nonresident students or the district which sends them would be discriminatory". Plaintiffs contend that any tuition charges, other than the per pupil cost for each student educated in the school year in question, are invalid. In earlier years, as noted in the Mann case at 757, 186 N.W.2d at 733, "historically under a fixed tuition rate, it was cheaper for a taxpayer to live in a district which paid tuition than it was to live in the receiving district." The Legislature provided, in §79-4,102, for a way of calculating a nonresident tuition charge which is designed to compensate the receiving districts for maintaining a high school which the sending districts may utilize when they have children of high school age who claim their constitutional right to "free instruction in the common schools."

* * *

The Legislature is getting away from a flat, per-student charge and attempting to establish a basis for the sharing of the common goal of educating our children through high school. That effort is not per se unconstitutional because it departs from a calculation based on per-pupil cost alone.

* * *

...[T]he statute authorizes a tuition charge higher than the per-pupil cost as determined in years past. It is not necessarily unconstitutional for the Legislature to give weight to the fact that receiving districts have erected and maintained a school system, providing for physical buildings and staffing, available to furnish constitutionally required high school education over long periods of time, although some taxpayers from sending districts wish to pay only for the sporadic actual utilization of the facilities. The setting of rates beyond per-pupil costs is not per se unconstitutional. Mann v. Wayne County Board of Equalization, supra.

In addition, the court in Ewing also found the claim that §79-4,102 was unconstitutional as applied to be without merit, stating:

...[P]laintiffs premise their contention on the proposition that any amount, other than the precise per-pupil charge for each pupil actually educated in the receiving high school, is unconstitutional. As we have stated above, §79-4,102 is not unconstitutional, per se, merely because it set a rate higher than per-pupil cost as historically calculated. Plaintiffs have not shown the detailed formula set out in §79-4,102 to be discriminatory, in practice.

Id. at 814, 420 N.W.2d at 695. (Emphasis added).

Based on the decisions in Mann and Ewing, it is evident that, in the area of taxation resulting from the application of statutory formulas applied to determine rates for nonresident high school tuition, the court has adopted the view that "absolute preciseness" in accordance with the principle of uniformity is not required. Ewing, 227 Neb. at 813, 420 N.W.2d at 694. While rejecting the notion that rates for nonresident high school tuition may not differ from or exceed¹ the per-pupil cost of the attending high school district, it is nevertheless clear that the court continues to adhere to the position that a statutory formula providing for the raising of revenue for nonresident high school tuition which places a "substantially unequal" tax burden on either the receiving district or the sending district would be unconstitutionally discriminatory. Mann, 186 Neb. at 757, 186 N.W.2d at 733; Ewing, 227 Neb. at 812, 420 N.W.2d at 694. In essence, the court has adopted an approach requiring that the formula designed to determine the rate of nonresident high school tuition must not be structured in such a manner as to place a "substantially unequal" tax burden on residents of either the receiving or sending district.

Under LB 183, as currently amended, any cost to the option district incurred by virtue of acceptance of nonresident students exercising the open enrollment option is to be funded by requiring the sending district to remit to the option district the amount of per-pupil state school aid received by the sending district under the rates established pursuant to Neb.Rev.Stat. §§79-1334 and 79-1336 (Reissue 1987). Figures supplied by the State Department of

¹The decision in Ewing specifically approved the adoption of a formula which resulted in the imposition of a nonresident high school tuition charge on sending districts which was higher than the per pupil cost of the receiving district. 227 Neb. at 812-14, 420 N.W.2d at 694-95.

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Education indicate that the average per pupil cost for all school districts in the state for the 1987-88 school year was \$3,037.50 for elementary students (kindergarten to grade 6) and \$4,247.94 for secondary students (grades 7 to 12). It is contemplated that the maximum amounts which may be distributed per pupil to any school district from the School Foundation and Equalization Fund for 1989-90 will be as follows: \$1,372.00 per pupil for grades 1 to 6; \$1,646.40 per pupil for grades 7 and 8; and \$1,920.80 per pupil for grades 9 to 12. Given the disparities in these figures, it is questionable whether the payment of state aid funds received by sending districts will be sufficient to offset increased costs incurred by option districts receiving nonresident students. Obviously, the state aid component of supporting the cost of public education provided under §§79-1334 and 79-1336 represents only a part of the total cost of educating a student in any school district in the state. To the extent that the funding mechanism under LB 183 does not, in operation, adequately compensate the option district for the cost of educating additional students accepted under open enrollment, taxpayers in option districts receiving payments from sending districts based on the state aid formulas established under §§79-1334 and 79-1336 may be compelled to pay increased taxes if such funds do not cover the total added cost incurred in educating option students. The existence of such a situation would violate the principle of uniformity, and would operate to unconstitutionally 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.

In sum, our purpose in noting this potential constitutional defect is to point out that, in application, the financing provisions of LB 183 may operate in violation of certain constitutional provisions. The ultimate question which must be considered in adopting a funding mechanism under legislation of this nature is whether, in operation, the scheme chosen may result in the imposition of "substantially unequal" local tax burdens on property taxpayers in receiving districts in comparison with property taxpayers in option districts. The existence of any such unreasonable disparity which may arise under implementation of LB 183 could result in unconstitutional discrimination in the event the bill operates to create such a situation in relation to particular school districts. The Nebraska Supreme Court's decisions in Mann and Ewing, requiring tax burdens on receiving and sending districts to remain "substantially" equal in the area of raising revenue for nonresident high school tuition, indicate that, while absolute precision in accordance with the principle of uniformity is not required in this area, substantial disparities in tax burdens between districts will not be upheld. To the extent such potential disparities in taxation could arise by virtue of implementation of LB 183, the funding provisions of the bill could

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be subject to constitutional challenge by taxpayers of an affected school district on this basis.

Very truly yours,

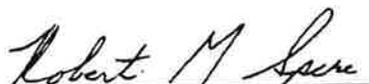
ROBERT M. SPIRE
Attorney General



L. Jay Bartel
Assistant Attorney General

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

APPROVED:


Robert M. Spire
Attorney General

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