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NO. 19-014

SUBJECT: Constitutionality of Legislation Distributing Future Tax Equity and Educational Opportunities Support Act State Aid Funding Adjustments Proportionately Across All School Districts

REQUESTED BY: Senator Mike Groene
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested an opinion from this office with respect to the constitutionality of proposed legislation which would amend the Tax Equity and Educational Opportunities Support Act, Neb. Rev. Stat. §§ 79-1001 to 79-1033 (2014, Cum. Supp. 2018, Supp. 2019) ("TEEOSA"). You indicate in your request letter that when the Legislature believes it necessary to annually adjust the TEEOSA formula, individual formula variables are "tweaked."[1] You indicate that this process adjusts the formula to generate the total amount of state aid the Legislature will fund.

PROPOSED LEGISLATION

As we understand it, your proposed legislation would amend the TEEOSA formula to provide for "distributions of any future TEEOSA state aid funding adjustments made by the Legislature proportionally across all school districts." The legislation "would alter the

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[1] In this regard, you reference 2019 Neb. Laws LB 675, § 1 (base limitation defined in Neb. Rev. Stat. § 77-3346 adjusted to two percent from two and one-half percent); and 2017 Neb. Laws LB 409 (adjustments made to both the base limitation and the local effort rate defined in Neb. Rev. Stat. § 79-1015.01).

TEEOSA formula to increase the amount of state aid to all school districts," resulting in "property tax relief through a lowered local property tax request." One key component of your proposed legislation is "provid[ing] equitable state funding to all school districts, with the greater of a per student foundation aid or 33.3% of a school district's formula needs."[2] You indicate that specific provisions may be added to TEEOSA to address how the formula works in the event of a legislative adjustment, i.e., the formula will be left intact, while the total amount of the adjustment is divided proportionally across the school districts. By way of example, you indicate that the preliminary calculation of state aid is $1.5 billion. However, the Legislature determines that $1.425 billion is "adequate to fund the free instruction in Nebraska's common schools . . . ." A new statute would be added to TEEOSA to divide the difference—$75 million [or 5 percent of $1.5 billion]—proportionally across all districts by reducing each district's preliminarily calculated state aid by 5 percent. In addition, to ensure that funding is adequate, a new section would be added to allow local school boards, by a supermajority vote, an annual budget exception to their statutory levy and revenue limits to recoup up to 75 percent of any reductions in their state aid due to legislative action.

You have asked for our opinion as to the following questions:

I. Do these proposed provisions added to Nebraska's public school funding formula . . . adhere to "[t]he Legislature shall provide for the free instruction in our common schools" provision of Neb. Const. art. VII, § 1?

II. Furthermore, do the proposed provisions comply with the equal protection clauses under Neb. Const. art. I, § 3 and U.S. Const. Amend. XIV, § 1?

Our response to each of your inquiries is set out below.

DISCUSSION

I. Free Instruction Clause

Restated, your proposal would reduce every school district's state aid funding by an amount equal to the percentage of any legislative adjustment to the preliminary calculated amount of state aid funding. A school district will be able to recover 75% of the reduction by a supermajority vote of its governing body. While you have not expressly articulated in what manner your proposed legislation might contravene the free instruction clause, it appears to us your concerns relate to the *adequacy* of the funding in those instances when the Legislature adjusts the preliminary calculated amount of state aid.

The free instruction clause provides, in pertinent part, that

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[2] We understand that "student foundation aid" is in reference to language found in AM1572 to Legislative Bill 289, currently pending on General File.

> [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.

Neb. Const. art. VII, § 1.

Beginning with *Affholder v. State*, 51 Neb. 91, 70 N.W. 544 (1897),[3] the Nebraska Supreme Court has on several occasions considered the subject of "free instruction" in Nebraska's common schools. In *Affholder*, the plaintiffs sued the local school board to require the school district to furnish textbooks to the children attending the school in accordance with an 1891 act. The school board argued that the act in question violated the "same subject" rule in Neb. Const. art. III, § 11 [now art. III, § 14], since the title of the act referenced "textbooks," but another section of the act required the provision of all "school supplies." *Id.* at 92, 70 N.W. at 545. The court considered whether school supplies were encompassed by the term "textbooks" in the context of the free instruction clause and concluded that

> [s]ection 6, art. 8, [now art. VII, § 1] of the constitution of Nebraska provides that "the legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of 5 and 21 years." 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. Prior to the passage of the act under consideration, instruction in all public schools was gratuitous, and by this act the legislature has seen fit to require the various school districts to purchase text–books necessary to be used in the schools. We do not think the term "text–books" should be given a technical meaning, but that it is comprehensive enough to and does include globes, maps, charts, pens, ink, paper, etc., and all other apparatus and appliances which are proper to be used in the schools in instructing the youth . . . .

Id. at 93, 70 N.W. at 545 (emphasis added).

In *State ex rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950), parents sued the local board of education to compel the board to establish a kindergarten for children who attained the age of five years of age, but not six years,

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[3] *See also State ex rel. Baldwin v. Dorsey*, 108 Neb. 134, 187 N.W. 879 (1922) (The court held that a school district receiving nonresident students could charge no more that the tuition fee set by the Legislature, even when the school district offered courses beyond those required by the state.); and *Farrell v. Sch. Dist. No. 54*, 164 Neb. 853, 858, 84 N.W.2d 126, 131 (1957) ("[The free instruction clause] leaves all matters pertaining to schools and school districts, their creation, dissolution, government, and control with the Legislature. In all such matters the State is supreme.").

before October 15. The parents argued that under the constitutional provision, their children were entitled to free public instruction. Because their children did not meet the statutory age limit for first grade, their children were prohibited from securing free instruction there. Accordingly, they contended the board of education was required to establish a kindergarten so that their five-year old children could receive the free instruction. *Id.* at 647, 42 N.W.2d at 170.

The trial court disagreed, however, and the Nebraska Supreme Court affirmed. The court reiterated the holding in *Affholder* "that the method and means to be adopted in order to furnish free instruction to the children of the state have been left by the Constitution to the Legislature." *Id.* at 648, 42 N.W.2d at 170. Notwithstanding explicit language in the clause requiring free instruction for persons ages five to twenty-one, the court found that "[c]learly legislation is necessary to carry into effect the constitutional provision. It is not a self-executing provision." *Id.* In the absence of a statute implementing the right, the matter of creating a kindergarten program was left to the discretion of the board of education. *Id.* at 649, 42 N.W.2d at 171.

In *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007) ["*Nebraska Coalition*"], the plaintiffs filed a declaratory judgment action claiming that Nebraska's education funding system failed to "provide sufficient funds for an 'adequate' and 'quality' education." *Id.* at 534, 731 N.W.2d at 169. The plaintiffs further alleged that the funding system violated the free instruction and the religious freedom clauses of the Nebraska Constitution. The plaintiffs sought three declarations from the court, including "that the religious freedom and free instruction clauses provide[d] a fundamental right 'to obtain free instruction which enables each student to become an active and productive citizen in our democracy, to find meaningful employment, and to qualify for higher education.'" *Id.* at 536-37, 731 N.W.2d at 170. The plaintiffs also asked the court to declare the school funding system unconstitutional for "fail[ing] to provide adequate resources to provide the free education guaranteed by these sections . . . ." *Id.* at 537, 731 N.W.2d at 170. The trial court dismissed the complaint, determining that the plaintiffs' allegations that the Legislature had not provided sufficient funds to provide for an adequate education posed a nonjusticiable political question. *Id.* at 538, 731 N.W.2d at 171.

The Nebraska Supreme Court framed the critical issue in *Nebraska Coalition* as whether it may determine that the Legislature has failed to provide adequate funding for public education without violating the separation of powers clause. *Id.* at 541, 731 N.W.2d at 173. The court acknowledged that it "does not sit as a superlegislature to review the wisdom of legislative acts[,]" *id.* at 545-46, 731 N.W.2d at 176, and "[t]hat restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature's plenary power." *Id.*

In its analysis, the court applied the criteria[4] set out in *Baker v. Carr*, 369 U.S. 186 (1962), to determine whether the issue presented a nonjusticiable political question. The court indicated that it had already determined that the free instruction clause was clearly directed to the Legislature, and "that the duty to adopt the method and means to furnish free instruction has been left by the state Constitution to the Legislature." *Id.* at 549, 731 N.W.2d at 178. The court found that "there are no qualitative, constitutional standards for public schools that this court could enforce, apart from the requirements that the education in public schools must be free and available to all children." *Id.* at 550, 731 N.W.2d at 179. In this regard, the court examined the state's constitutional history relating to the Legislature's duty to provide free public schools, and "interpret[ed] the paucity of standards in the free instruction clause as the framer's intent to commit the determination of adequate school funding solely to the Legislature's discretion, greater resources, and expertise." *Id.* at 552, 731 N.W.2d at 180. It held that "[a]ny judicial standard effectively imposing constitutional requirements for education would be subjective and unreviewable policymaking by this court." *Id.* at 553, 731 N.W.2d at 180-81. The court noted that under Neb. Const. art. III, § 25, fiscal policy decisions are left to the Legislature. "We could not hold that the Legislature's expenditures were inadequate without invading the legislative branch's exclusive realm of authority. In effect, we would be deciding what spending issues have priority." *Id.* at 554, 731 N.W.2d at 181. The court further observed that "a justiciable issue must be susceptible to immediate resolution and capable of present judicial enforcement." *Id.* at 555, 731 N.W.2d at 182. The court listed jurisdictions (i.e., Arkansas, Kansas, Texas, New Jersey), which had been mired in school funding litigation, and noted that "[t]he landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems." *Id.* at 557, 731 N.W.2d at 183. The court, however, assertively "refuse[d] to wade into that Stygian swamp." *Id.*

In concluding that the issue before it presented a nonjusticiable political question, the court stated:

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[4] The *Baker* criteria consisted of "six independent tests," as follows:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 547-48, 731 N.W.2d at 177.

> The Nebraska Constitution commits the issue of providing free instruction to the Legislature and fails to provide judicially discernible and manageable standards for determining what level of public education the Legislature must provide. This court could not make that determination without deciding matters of educational policy in disregard of the policy and fiscal choices that the Legislature has already made. . . .

Id. at 557, 731 N.W.2d at 183.

Affholder, *Shineman* and *Nebraska Coalition* all stand for the proposition that the Legislature is the sole judge of what amount of money should be spent on education. Consequently, your proposed legislation, which would reduce all school districts' state aid in an amount equal to a percentage of the legislative adjustment to the preliminary calculated state aid funding, does not contravene the constitutional provision discussed above. We would stress, however, that any future amendments to TEEOSA be consistent with other provisions in the act that require the Legislature to fund state aid as calculated under the formula.[5]

II. Equal Protection Clause

Your second question asks us to consider your proposed legislation in the context of the equal protection provisions of both the Nebraska and United States Constitutions. Neb. Const. art. I, § 3 states that "[n]o person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." The U.S. Const. Amend XIV, § 1, provides, as pertinent, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges." *Lingenfelter v. Lower Elkhorn Natural Resources Dis.*, 294 Neb. 46, 77, 881 N.W.2d 892, 914 (2016); *Citizens of Decatur for Equal Education v. Lyons-Decatur School Dist.*, 274 Neb. 278, 302, 739 N.W.2d 742, 762 (2007) ["*Citizens of Decatur*"]. *Accord Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006). The Equal Protection Clause requires the government to treat similarly situated people alike. It does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Lingenfelter*, 294 Neb. at 77, 881 N.W.2d at 914; *Citizens of Decatur*, 274 Neb. at 302-03, 739 N.W.2d at 762.

In *Citizens of Decatur*, a coalition of parents and taxpayers sued the surviving school district and members of the school board seeking an injunction to stop the district

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[5] *See, e.g.*, Neb. Rev. Stat. § 79-1008.01 (Supp. 2019) ("Each local system shall receive equalization aid in the amount that the total formula need, as determined pursuant to section 79-1007.11, exceeds its total formula resources, as determined pursuant to section 79-1017.01.").

from moving grades four to six to the surviving district. To support its claim that the school board's action violated the equal protection and substantive due process rights of its members, "the Coalition argued that Nebraska's free instruction clause provided a fundamental right to an education equally or proportionally funded compared with other schools in the same district." *Id.* at 285, 739 N.W.2d at 751. The trial court ultimately found for the school district on all claims.

"If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny. A suspect class is one that has been "'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process.'"" *Id.* at 303, 739 N.W.2d at 762. The coalition did not allege that the school district discriminated against a "suspect class" nor did it contest that the school board's actions were rationally related to a legitimate state interest. It relied instead on the argument that the Nebraska Constitution provides a fundamental right to equal and adequate educational funding. The court rejected this argument, noting its holding in *Nebraska Coalition.* "The free instruction clause does not mandate equal funding of schools." *Id.* at 301, 739 N.W.2d at 761. Funding decisions are left to the Legislature, which in turn entrusts local budget decisions to school boards.

Where a suspect class or fundamental right is not implicated, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.* at 303, 739 N.W.2d at 763. "[T]he burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* The court found that faced with increasing budget deficits, the school board's actions to reduce costs "were rationally related to its goal of providing an education for its students." *Id.* at 302, 739 N.W.2d at 762. It further found that the coalition failed to show that a heightened level of scrutiny applied or that the school board's actions were not rationally related to a legitimate state purpose.

You state that your proposed legislation "would alter the TEEOSA formula to increase the amount of state aid to all school districts and thereby provide property tax relief through a lowered local property tax request. One key component . . . would be to provide equitable state funding to all school districts . . . ." It appears to us that the classification at issue, i.e., an across the board reduction in state aid funding, may further a legitimate state interest in lowering property taxes. We fail to see how the proposed legislation would result in an increase in state aid to school districts or would provide equitable funding to all districts. However, since the challenging party has the burden "to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification," we believe that a court would likely find your legislation, if enacted, constitutional since it rationally relates to your goal of providing property tax relief.[6]

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6 We reach this conclusion solely on the basis of the proposed legislation set out in your request letter, and have not considered other TEEOSA legislation that may be pending in the Legislature.

Finally, as we recently pointed out in Op. Att'y Gen. No. 19-007 (May 6, 2019), to the extent the proposed legislation is constitutionally challenged by a county or school district, those entities have no due process or equal protection rights against the state. "U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from depriving any 'person' of life, liberty, or property without due process of law. A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person . . . . Accordingly, a county cannot invoke the protection of the 14th amendment against the State." *Rock County v. Spire*, 235 Neb. 434, 447-48, 455 N.W.2d 763, 771 (1990). "[T]he [school] district, as a creature and political subdivision of the state, is neither a natural nor an artificial 'person' and, therefore, cannot invoke due process protection against the state." *Loup City Public Schools v. Nebraska Dep't of Revenue*, 252 Neb. 387, 394, 562 N.W.2d 551, 556 (1997).

CONCLUSION

For more than a century, the Nebraska Supreme Court has held that the Nebraska Constitution leaves all decisions regarding the funding of public education to the Legislature. The Constitution provides no judicially discernible and manageable standards to determine what level of public education the Legislature must provide. Based on the foregoing authorities, we conclude that your proposed legislation would not contravene the free instruction clause or the equal protection provisions in the Nebraska and U.S. Constitutions.

Sincerely,

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Approved by:

Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature

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