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21-018

SUBJECT: Constitutionality of the Absence of a Voter Petition Process for Reorganization of School Districts That Are Members of a Learning Community

REQUESTED BY: Senator Robert Hilkemann
Nebraska Legislature

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

INTRODUCTION

You have requested an opinion of the Attorney General as to the constitutionality of certain school reorganization statutes which impact the Learning Community of Douglas and Sarpy Counties ("Learning Community"). You state in your request letter that voters in Nebraska "generally have the statutory right to petition to reorganize their school district," but voters who reside within a learning community "are expressly deprived of this petition right." You point to the difference between statutes which authorize legal voters to petition for school reorganization and the Learning Community Reorganization Act ("LCRA"), Neb. Rev. Stat. §§ 79-4,117 to 79-4,129 (2014, Cum. Supp. 2020), where plans for reorganization may only be proposed by the school boards of the affected districts. In this respect, you state that "in *any* public school district *anywhere in Nebraska other than Douglas and Sarpy Counties*,[1] the voters may petition for the reorganization of their district, notwithstanding the views of their school board members. But voters in my

[1] The member school districts in the Learning Community include Bellevue, Bennington, Douglas County West, Elkhorn, Gretna, Millard, Omaha, Papillion-La Vista, Ralston, Springfield Platteview, and Westside.

district—and indeed in the entire Learning Community of Douglas and Sarpy Counties—lack this petition right." (Your emphasis.)

You indicate that you "have concerns regarding the constitutionality of the differentiated treatment" of Nebraskans under the school district reorganization law. As you consider legislation to address this issue, you have sought our opinion on the following questions:

1. Would Nebraska's exclusion of learning community voters from the school district reorganization petition right otherwise afforded to every other voter in the state withstand equal protection scrutiny under the Nebraska and federal Constitutions?

   This question includes, but is not limited to, the following subissues:

   a. Would the petition right afforded under the Reorganization of School Districts Act sufficiently parallel the fundamental right to petition guaranteed by the First Amendment, such that Nebraska's exclusion of learning community voters from the reorganization petition right would be subject to a heightened—*i.e.*, greater than rational basis—level of judicial scrutiny?

   b. Even if Nebraska's exclusion of learning community voters from the reorganization petition right is subject only to rational basis scrutiny, what legitimate interest does the state have in restricting the reorganization initiation right to school boards in learning communities, but not everywhere else in the state?

2. Other than equal protection, would the exclusion of learning community voters from the reorganization petition right suffer from any other constitutional infirmity known to the Attorney General, including, but not limited to, violating the special legislation clause under Article III, Section 18 of the Nebraska Constitution?

BACKGROUND

In 2006, the Nebraska Legislature enacted LB 1024, creating "a new type of educational service unit . . . to be referred to as a learning community."[2] Neb. Rev. Stat. § 79-2101 (2014) defines learning community as "a political subdivision which shares the territory of member school districts and is governed by a learning community coordinating council." Pursuant to Neb. Rev. Stat. § 79-2102 (2014), "[a] learning community shall be established for each city of the metropolitan class and shall include all school districts for which the principal office of the school district is located in the county where the city of

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2 Committee Records on LB 1024, 99th Neb. Leg., 2nd Sess., Introducer's Statement of Intent (Jan. 30, 2006).

the metropolitan class is located and all school districts for which the principal office of the school district is located in a county that has a contiguous border of at least five miles in the aggregate with such city of the metropolitan class."

The petition process referenced in your opinion request is set out in Neb. Rev. Stat. §§ 79-413 to 79-422 (2014, Cum. Supp. 2020, Supp. 2021), not the Reorganization of School Districts Act ("RSDA"), Neb. Rev. Stat. §§ 79-432 to 79-451 (2014, Cum. Supp. 2020, Supp. 2021).[3] With respect to petitions from legal voters, § 79-413 provides, in pertinent part:

> (1) The State Committee for the Reorganization of School Districts ["State Committee"] created under section 79-435 may create a new school district from other districts or change the boundaries of any district that is not a member of a learning community upon receipt of petitions signed by sixty percent of the legal voters of each district affected. If the petitions contain signatures of at least sixty-five percent of the legal voters of each district affected, the state committee shall approve the petitions.
>
> (2) Petitions proposing to change the boundaries of existing school districts that are not members of a learning community through the transfer of a parcel of land, not to exceed six hundred forty acres, shall be approved by the state committee when the petitions involve the transfer of land between Class III or IV school districts or when there would be an exchange of parcels of land between Class III or IV school districts and the petitions have the approval of at least sixty-five percent of the school board of each affected district.
>
> (3)(a) Petitions proposing to create a new school district or to change the boundary lines of existing school districts that are not members of a learning community, any of which involves the transfer of more than six hundred forty acres, shall, when signed by at least sixty percent of the legal voters in each district affected, be submitted to the state committee. The state committee shall, within

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[3] Under the RSDA, school boards may file plans of reorganization with the State Committee. § 79-441. Prior to completion or approval, the State Committee is required to hold a public hearing or hearings regarding the proposed plan. § 79-442. Within thirty days of holding the hearing(s), the State Committee must notify the school district as to whether it approves or disapproves the proposed plan. § 79-444. An approved plan must contain the items listed in § 79-443, e.g., a map showing both established and proposed boundaries. A "final approved plan" is then returned to the school district to be submitted to the voters of the affected districts at a special election. § 79-446. Rules pertaining to the special election are set out in § 79-447. If the proposed plan is adopted, the county clerk shall implement the changes proposed in the plan. § 79-450.

> forty days after receipt of the petition, hold one or more public hearings and review and approve or disapprove such proposal.[4]

Neb. Rev. Stat. § 79-413 (Cum. Supp. 2020). Under this provision, petitions must contain the items listed in § 79-419 when a new district is created from other districts. In addition, § 79-415 provides that petitions "may be initiated and accepted by the school board or board of education of any district that is not a member of a learning community."

"Reorganization" under the LCRA "means the formation of new school districts that will become members of a learning community, the alteration of boundaries of established school districts that are members of a learning community, the dissolution or disorganization of established school districts that are members of a learning community through or by means of any one or combination of the methods set out in section 79-4,120, and any other alteration of school district boundaries involving a school district that is a member of a learning community . . . ." Neb. Rev. Stat. § 79-4,118(2) (2014). Reorganization is accomplished by one or more of the following methods:

> (1) The creation of new districts; (2) the uniting of one or more established districts; (3) the subdivision of one or more established districts; (4) the transfer and attachment to an established district of a part of the territory of one or more districts; and (5) the dissolution or disorganization of an established district for any of the reasons specified by law.

Neb. Rev. Stat. § 79-4,120 (2014). Pursuant to § 79-4,126(1), "[t]he school board of any school district in a learning community may propose a plan of reorganization." Such plan may be submitted to the State Committee when approved by "at least sixty percent of the members of the school board of each affected school district . . . ." *Id.* The contents of any plan must include the items set out in § 79-4,123, including

> [a] summary of the reasons for each proposed change, realignment, or adjustment of the boundaries which shall include, but not be limited to, an explanation of how the plan complies with any statutory requirements for learning community organization and an assurance that the plan does not increase the geographic size of any school district that has more than twenty-five thousand formula students for the most recent certification of state aid pursuant to section 79-1022[.]

The State Committee is required to hold one or more public hearings on any plan of reorganization prior to approval. § 79-4,122. In determining whether to approve a plan, the State Committee must consider the following criteria:

> (1) the educational needs of pupils in the learning community, (2) economies in administration costs, (3) the future use of existing satisfactory school buildings,

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[4] Section 79-413(3)(b) and (c) set out the procedures when a bond election is held in conjunction with the petition.

> sites, and play fields, (4) the convenience and welfare of pupils, (5) transportation requirements, (6) the equalization of the educational opportunity of pupils, (7) the amount of outstanding indebtedness of each district and proposed disposition thereof, (8) the equitable adjustment of all property, debts, and liabilities among the districts involved, (9) any additional statutory requirements for learning community organization, and (10) any other matters which, in its judgment, are of importance.

§ 79-4,121. Once the State Committee approves a plan or part of a plan, it shall be designated as the "final approved plan" and submitted to the county clerk pursuant to § 79-4,128 and to the boards of the affected school districts. § 79-4,126(2).

ANALYSIS

The Fourteenth Amendment of the U.S. Constitution prohibits the state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, § 1. Article I, § 3 of the Nebraska Constitution 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." When a statute is challenged under the Equal Protection Clause, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). "When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Citizens of Decatur for Equal Educ. v. Lyons-Decatur School Dist.*, 274 Neb. 278, 303, 739 N.W.2d 742, 763 (2007) ["*Citizens of Decatur*"].

I. The Equal Protection Clause Protects People, Not Geographic Areas.

In *Hawkins v. Johanns*, 88 F. Supp. 2d 1027 (D. Neb. 2000) ["*Hawkins*"], the court considered an equal protection challenge brought by residents of Class I (elementary only) school districts. At issue were statutes that required association between Class I districts and other districts (Class II-VI) and imposed restrictions on Class I districts pertaining to budgets, tax levies, special building funds, and merger, dissolution or reorganization. The plaintiffs claimed they were treated differently because their school districts lacked the same powers as the other districts in the state. Prior to determining the level of scrutiny to be applied, the court noted that "the Equal Protection Clause protects people and not places, such as political subdivisions of a state," citing *Missouri v. Lewis*, 101 U.S. 22 (1879) ["*Lewis*"]. *Id.* at 1042. In *Lewis*, the U.S. Supreme Court upheld a Missouri law that gave all citizens in the state, except those residing in four counties and the City of St. Louis, a right to appeal to the Missouri Supreme Court. The Court observed that

> [e]ach State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. . . . The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. . . . If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State.

Lewis, 101 U.S. at 30-31. The *Hawkins* court stated that "the *Lewis* rule applies where the statutory rights of citizens of a state are unequal because of the way in which that state has created and empowered political subdivisions." *Hawkins*, 88 F. Supp. 2d at 1042. The court further stated that

> [t]he *Lewis* doctrine stands for the proposition that such inequality of power does not (1) warrant an inference that the Equal Protection Clause is violated or (2) permit the court to ignore the separate identities and boundaries of the subdivisions when it conducts an equal protection analysis. Therefore, in deciding what level of scrutiny to apply, we start with the assumption that the State of Nebraska is free to create political subdivisions even though Nebraska's law lands unequally on the residents of those subdivisions. To put it simply, the court should not be suspicious of differences created by political subdivisions.

Id. at 1042-1043.[5]

Courts in other jurisdictions have applied the *Lewis* rule when the distinctions at issue are geographically based. In *Salsburg v. Maryland*, 346 U.S. 545 (1954), the U.S. Supreme Court considered the validity of a criminal statute that made illegally procured evidence inadmissible except in prosecutions in one particular county for violations of state gambling laws. The Court found that the statute did not violate equal protection of the law, stating: "We find little substance to appellant's claim that distinctions based on county areas are necessarily so unreasonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution. The Equal Protection Clause relates to equality between persons as such rather than between areas. . . . Territorial uniformity

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[5] Applying a rational basis level of scrutiny, the *Hawkins* court found that the Legislature had a legitimate government purpose in enacting the challenged statutes. "By using an ingenious strategy, Nebraska hoped to promote tax equity, educational effectiveness, and cost efficiency while still maintaining the separate identities of various political subdivisions." *Id.* at 1046. The court further found that "the relationship between the governmental purpose and the challenged statutes is neither arbitrary nor irrational." *Id.* The court concluded that "Nebraska's innovation in the reorganization of Class I school districts is rationally related to a legitimate governmental purpose and such an experiment is, therefore, not violative of the Constitutional guarantee of equal protection." *Id.* at 1047.

is not a constitutional requisite." *Id.* at 550-552. *See also McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing laws that discriminated between various counties held not to violate equal protection.); *Reeder v. Kansas City Board of Police Commissioners*, 796 F.2d 1050, 1053 (8th Cir. 1986) ("So long as all persons within the jurisdictional reach of the statute are equally affected by the law, it matters not that those outside the territorial reach of the law are free to behave differently."); *Sherwood School Dist. 88J v. Washington Cty. Education Service Dist.*, 167 Or. App. 372, 6 P.3d 518 (2000) ["*Sherwood*"] (Statute which denied voters within affected geographical area the right to bring remonstrance petition, where the statute was intended to resolve longstanding dispute between school districts and improve traffic flow in the affected areas, found not to violate equal protection.).

You assert in your request letter that legal voters in the Learning Community are expressly denied the petition right given to the voters in all other public school districts in the state. While the Learning Community may share the territory of member school districts, it is not a school district. It is a separate and distinct political subdivision, governed by a coordinating council. The Learning Community is a clear example of how the statutory rights of citizens are inequal based on how the Legislature "created and empowered political subdivisions." Based on *Lewis* and its progeny, no equal protection violation is implicated by the fact that legal voters outside the Learning Community have a right to petition for school boundary changes, while Learning Community voters do not.

II. The Legal Voters in the Learning Community Have No Right to Petition to Change School District Boundaries.

Neb. Const. art. VII, § 1 states, in part: "The 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." "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." *Affolder v. State*, 51 Neb. 91, 93, 70 N.W. 544, 545 (1897). "Nebraska's constitutional history shows that the people of Nebraska have repeatedly left school funding decisions to the Legislature's discretion." *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 273 Neb. 531, 550, 731 N.W.2d 164, 179 (2007). "This provision of the Constitution 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." *Farrell v. School Dist. No. 54, Lincoln Cty.*, 164 Neb. 853, 858, 84 N.W.2d 126, 131 (1957). In *Halstead v. Rozmiarek*, 167 Neb. 652, 660-661, 94 N.W.2d 37, 43-44 (1959), the Nebraska Supreme Court stated:

> A school district in this state has no territorial integrity. It is subject to the reserve power of the state exercised through administrative authority to change its territory according to current educational needs and good educational principles. The state may change or repeal all powers of a school district, take without compensation its property, expand or restrict its territorial area, unite the whole or a part of it with

> another subdivision or agency of the state, or destroy the district with or without the consent of the citizens.

See also Petition of DeJonge, 179 Neb. 539, 545, 139 N.W.2d 296, 300 (1966) ("The state is supreme in the creation and control of school districts and may as it thinks proper, modify or withdraw any of their powers, or destroy such school districts without consent of residents thereof, or even over their protests."); *Kaup v. Sweet*, 187 Neb. 226, 229, 188 N.W.2d 891, 894 (1971) ("[T]he Legislature has plenary power over the boundaries of school districts."); *Clark v. Sweet*, 187 Neb. 232, 234, 188 N.W.2d 889, 891 (1971) ("[T]he inhabitants of school districts have no vested rights in the territorial integrity of school districts."); *McDonald v. Rentfrow*, 176 Neb. 796, 800, 127 N.W.2d 480, 483 (1964) ("The fixing of boundaries of school districts is exclusively a legislative function, and it may be properly delegated to a subordinate agency, providing the Legislature prescribes the manner and the standards under which the power of the designated board may be exercised."); and 78 C.J.S., *Schools and School Districts*, § 15 ("The formation of school districts is a governmental function and, generally, a state legislative function. . . . [T]he legislature has power to create, abolish, divide, merge or alter school districts, or to prescribe or change the form of organization and functions of school districts, and its power is plenary, or unrestricted, but may be delegated.").

The Legislature has the sole power to determine school district boundaries. It has delegated some of this authority with the enactment of the petition process provisions in §§ 79-413–79-422, the RSDA and the LCRA, among others. Those statutes set out the procedures through which school reorganization may be achieved at the local level and represent the current official policy of school reorganization in Nebraska. Since the Legislature's power with respect to school district's boundaries is supreme, there is no right, either express or implied, to petition for school boundary changes.

III. The First Amendment Right to Petition the Government for Redress of Grievances Does Not "Sufficiently Parallel" the Petition Right Authorized in § 79-413 *et seq.*

The First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." U.S. Const. amend. XIV. The Nebraska Constitution also provides that "[t]he right of the people peaceably to assemble to consult for the common good, and to petition the government, or any department thereof, shall never be abridged." Neb. Const. art. I, § 19. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *U.S. v. Cruikshank*, 92 U.S. 542, 552 (1875). "The right to petition is cut from the same cloth as the other guarantees of [the First Amendment], and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). "[T]he rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other

First Amendment rights of free speech and free press." *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

The right to petition extends to all departments of government, and includes the right to access the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011). "But 'the text of the First Amendment [does not] speak in terms of successful petitioning—it speaks simply of "the right of the people . . . to petition the Government for a redress of grievances."'" *Santa Fe Alliance for Public Health and Safety v. City of Santa Fe*, 993 F.3d 802, 819 (10th Cir. 2021) ["*Santa Fe*"] (quoting *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 532 (2002) (omission in original)).

With these principles in mind, we have considered your question as to whether the right to petition for a boundary change sufficiently parallels the First Amendment right to petition such that the exclusion of the petition process for Learning Community voters would be subject to a heightened level of scrutiny, i.e., above rational basis. In this respect, we have identified no cases which would establish, infer or suggest that the constitutional right to petition the government is in any way analogous to petitioning the government to change a school district boundary which, as previously discussed, is strictly a legislative function. For example, in *Baptiste v. Kennealy*, 490 F. Supp. 3d 353 (D. Mass. 2020), a recent case involving a challenge to the legislative moratorium on residential evictions due to the COVID-19 emergency, the court stated:

> "In a nutshell, while there is a constitutional right to court access, there is no complementary constitutional right to receive or be eligible for a particular form of relief." *Inmates of Suffolk Cnty. Jail*, 129 F.3d at 660. This means that a legislature may, among other things, alter rights and remedies without violating the First Amendment right to petition if doing so does not violate another guarantee of the United States Constitution.

Id. at 393. *See also Santa Fe* (Alliance members' right to petition the government was not violated under telecommunications legislation because local officials could not adopt their desired outcome and because the members could not prevail on legal claims seeking compensation for injuries allegedly caused by radio-frequency emissions.); *Doherty v. Merck & Co., Inc.*, 892 F.3d 493 (1st Cir. 2018) (Maine statute prohibiting wrongful birth actions did not infringe on patient's First Amendment right to petition.); *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016) (Legislation which removed federal court jurisdiction over any claims relating to Indian land taken into trust on behalf of the tribe for casino use did not violate resident's First Amendment right to petition.); *Ruiz v. Hull*, 191 Ariz. 441, 457, 957 P.2d 984, 1000 (1998), *cert. denied*, 525 U.S. 1093 (1999) ("The right to petition bars state action interfering with access to the legislature, the executive branch and its various agencies, and the judicial branch."); *Highland Park Women's Club v. Dept. of Revenue*, 206 Ill. App. 3d 447, 459, 564 N.E.2d 890, 897 (1990) (The First Amendment

right to petition did not entitle plaintiff to a specific administrative remedy; the right only "entitles citizens to communicate and address their government in matters which they deem to be important and to lodge complaints with appropriate governmental agencies.").

Legal voters in the Learning Community have a First Amendment right to bring their district boundary concerns to their local school boards, the Learning Community Coordinating Council, county boards, the State Committee, the Nebraska Legislature, the governor, etc. Learning Community voters do not have a First Amendment right to a specific remedy or outcome, i.e., a boundary change. Since the First Amendment right is inapposite to the petition right set out in the reorganization statutes, there is no basis to apply a heightened level of scrutiny to the challenge presented.

IV. The Absence of a Petition Process for Learning Community Voters Does Not Violate the Equal Protection Clause.

We will now turn to your question as to whether the absence of a petition process for Learning Community voters violates the Equal Protection Clause or art. I, § 3. Since the classification does not implicate a fundamental right or suspect class,[6] any challenge would be subject to rational basis scrutiny. Moreover, "[u]nder the Fourteenth Amendment, differentiation on the basis of geographic location is subject to rational basis analysis only. *Sherwood*, 167 Or. App. at 393, 6 P.3d at 531. Under that standard, Nebraska would have to demonstrate that the absence of the petition process for Learning Community voters is based upon a legitimate public purpose and that the separate classification bears a reasonable relation to that purpose.

As originally enacted, the boundaries of all school districts required to be in the learning community would remain as they existed on March 1, 2006, until a learning community was formed. 2006 Neb. Laws LB 1024, § 109, codified at Neb. Rev. Stat. § 79-2107. Legislation enacted in 2007 Neb. Laws LB 647, § 41 "permanently froze school district boundaries." *Sarpy County Farm Bureau v. Learning Community of Douglas and Sarpy Counties*, 283 Neb. 212, 234, 808 N.W.2d 598, 615 (2012) ["*Sarpy Cty. Farm Bureau*"]. In 2016, the Legislature outright repealed § 79-2107. 2016 Neb. Laws LB 1067, § 70.

In *Sarpy Cty. Farm Bureau*, the Nebraska Supreme Court considered an action brought by three taxpayers seeking a declaration that the Learning Community's common general fund levy was unconstitutional. The court's summary of the "extensive" legislative history of the Learning Community indicates that during the committee hearing, the principal introducer of LB 1024 stated that the bill "was intended to address 'the metro

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[6] "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."'" *Citizens of Decatur*, 274 Neb. at 303, 739 N.W.2d at 762.

area school organization issue.'" *Id.* at 232, 808 N.W.2d at 614. This issue involved an attempt by Omaha Public Schools ("OPS") to "'expand its school district boundaries to the city limits of Omaha . . . .'" *Id.* at 233, 808 N.W.2d at 614. The plan, known as "One City, One School District," was predicated on two statutes: Section 79-409, which provided in part that "[e]ach incorporated city of the metropolitan class in the State of Nebraska shall constitute one Class V school district" (2003) and § 79-535 ("All schools erected or organized within the limits of cities of the metropolitan class shall be under the direction and control of the board of education . . . .") (2003). Under the plan, OPS would assume control of a number of schools currently in the Millard and Ralston school districts located within the boundaries of the City of Omaha. In addition, schools located within Elkhorn Public Schools would be subject to the same proposal in the event the City of Elkhorn was annexed into the City of Omaha.

At an open meeting on June 6, 2005, the OPS Board of Education unanimously adopted a resolution directing OPS administration and legal counsel "to take all necessary steps to assure that all schools organized or existing within the city of Omaha are under the direction of the [OPS] Board of Education, that all property and students within the city of Omaha are part of [OPS], that [OPS] has the means necessary to provide the necessary education to all such students, and to otherwise carry out the intent of the Legislature that as the city of Omaha grows, Omaha Public Schools also grow." Minutes of the OPS Board of Education, June 6, 2005 at 27, 28. The proposal came in the midst of pending litigation brought by OPS in 2003 seeking a declaration in the Douglas County District Court that the state's school funding system was unconstitutional. *See Douglas County School District 0001 a/k/a Omaha Public Schools, et al. v. Heineman*, Doc. 1028, No. 017, Douglas County District Court (JUSTICE Case No. CI 10 9348401).

During floor debate on LB 1024, Senator Raikes described the gains to be made by enacting LB 1024:

> We achieve an opportunity for cooperation between school districts that is locally directed. The benefit of individual school districts and the variety of choices they offer students and parents is retained. The financial underpinnings of districts are made more equitable. Student mobility and opportunity [are] enhanced, and the possibility of focus programs or campuses that serve the entire metro area is created.

Id. at 232, 808 N.W.2d at 614. The court noted that the legislative history

> also reflects concern about educational issues unique to a metropolitan area. One senator stated that L.B. 1024 encouraged "suburban districts" "to be involved with the urban district in making sure that all children have the best opportunities for educational success." The principal introducer of L.B. 1024 stated, "One of the main objectives of the learning community is to address . . . the issue of integration within the entire learning community . . . ." He stated that the legislation "basically involves a cooperative arrangement for funding, for addressing building needs, and

> for addressing whatever student mobility issues and educational opportunity issues that may be available, and the last may be the most important." Another senator described the learning community structure as one in which the member districts are "interrelated," explaining, "We're trying to find a way to bring better delivery of services, to bring the benefits of local control and shared responsibilities in the larger group all together in one bill . . . ."

Id. at 234, 808 N.W.2d at 615 (internal citations omitted).

The legislative history of LB 641 in 2007 included further discussion on the boundary issues that precipitated LB 1024:

> So you had a situation in June of 2005 where, all of a sudden, this policy was to be put in place and a huge amount of disruption resulted, amounting to taking over school buildings put there by other districts, operated by other districts, in addition to changing district allegiances and so on and so forth. We were left at that time with the proposition or the issue of, if you believe one city, one school district is a good policy—and I do, for the reasons I have mentioned—how do you adjust state policy given the situation that had arisen? The answer that was offered at that time, and I think has remained throughout the discussion which dates back more than two years now, involves five key components. In the metro area specifically, there should be a two-county area involved in public education that involves both the cooperation and competition among public school districts. There should be shared financial resource. There should be governance relating both to the individual school districts and to the cooperative involving all the school districts. And there should be a combined dedication to the expansion of educational opportunities for students, as well as diversity opportunities for students.

Floor Debate on LB 641, 100th Neb. Leg., 1st Sess. 55 (May 9, 2007) (Statement of Sen. Raikes).

"The Legislature has plenary legislative authority except as limited by the state and federal Constitutions." *Pony Lake School Dist. 30 v. State Comm. for Reorganization of School Districts*, 271 Neb. 173, 181, 710 N.W.2d 609, 618 (2006). "The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the constitution." *State ex rel. Peterson v. Shively*, 310 Neb. 1, 11, 963 N.W.2d 508, 516 (2021). As noted in *Hawkins*, "in order to meet changing conditions, '[v]iable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements . . . .'" *Hawkins*, 88 F. Supp. 2d at 1045 (quoting *Sailors v. Board of Education of Kent Cty.*, 387 U.S. 105, 110 (1967)). The legislative history reveals that the Legislature created a learning community to address the "metro area issue" created by OPS' One City, One School District proposal. A learning community was established

"'for the purpose of working to integrate our schools, for the purpose of creating a common levy, for the purpose of trying to address the problems in Omaha.'" *Sarpy Cty. Farm Bureau*, 283 Neb. at 233, 808 N.W.2d at 614. Based on the foregoing, the Legislature had a legitimate government purpose for enacting LB 1024, which included a unique reorganization scheme for school districts within the newly formed entity. And so long as the voters residing within the Learning Community are treated similarly under the LCRA, there is no equal protection violation.

V. The Absence of a Petition Process for Learning Community Voters Does Not Constitute Special Legislation in Violation of Neb. Const. art. III, § 18.

Your final question asks whether the absence of a petition process would violate any other portion of the Nebraska Constitution, including the prohibition against special legislation in Neb. Const. art. III, § 18. This provision states, in pertinent part:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

The Nebraska Supreme Court has determined that "[b]y definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary." *Haman v. Marsh*, 237 Neb. 699, 709, 467 N.W.2d 836, 844 (1991) ["*Haman*"]. "A legislative act that applies only to particular individuals or things of a class is special legislation." *Id.*

"A legislative act can violate Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class." *Id.* at 709, 467 N.W.2d at 845. "A special legislation analysis focuses on a legislative body's purpose in creating a challenged class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation." *J.M. v. Hobbs*, 288 Neb. 546, 557, 849 N.W.2d 480, 489 (2014). "The prohibition aims to prevent legislation that arbitrarily benefits a special class." *Id.* "[L]egislative classifications must be real and not illusive; they cannot be based on distinctions without a substantial difference." *Id.* at 558, 849 N.W.2d at 489. "A legislative body's distinctive treatment of a class is proper if the class has some reasonable distinction from other subjects of a like general character." *Big John's Billiards, Inc. v. State*, 288 Neb. 938, 945, 852 N.W.2d 727, 735 (2014) ["*Big John's*"]. "And that distinction must bear some reasonable relation to the legitimate objectives and purposes of the legislative act." *Id.* Since no closed class is implicated here, the question is whether the distinction created in the reorganization statutes for legal voters residing within the Learning Community establishes an arbitrary and unreasonable classification.

Applying these principles to the petition process statutes and the LCRA, we believe that the distinctions presented do not violate art. III, § 18. As discussed in Section IV. above, the Legislature created a new kind of political subdivision to address the "metro area issue." The decision was made to create a two-county system comprised of member school districts. The school districts retained their individual governance, but are subject to the collective governance of the coordinating council. Thus, a substantial difference of circumstances exists to warrant diverse legislation on the matter of reorganization. Consequently, for all the reasons that the LCRA is reasonable under the rational-basis test, it is also reasonable under a special legislation review.

Finally, "[a] statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality." *Sarpy Cty. Farm Bureau*, 283 Neb. at 239, 808 N.W.2d at 618. "[T]he unconstitutionality of a statute must be clearly established before it will be declared void." *State ex rel. Stenberg v. Omaha Racing and Exposition, Inc.*, 263 Neb. 991, 992, 644 N.W.2d 563, 565 (2002). "The burden of establishing the unconstitutionality of a statute is on the one attacking its validity." *Big John's*, 288 Neb. at 943-944, 852 N.W.2d at 734.

CONCLUSION

Neb. Const. art. VII, § 1 leaves all matters pertaining to schools and school districts to the Legislature, and its power is supreme. In this respect, the legal voters of the Learning Community have neither an express nor fundamental right to petition for school boundary changes. The First Amendment right to petition the government for redress of grievances is not analogous to petitioning the government for a boundary change. Thus, no greater judicial scrutiny than rational basis review is warranted. The fact that the statutory rights of citizens may be unequal in different areas of the state does not implicate an equal protection violation. The legislative history of 2006 Neb. Laws LB 1024 demonstrates that the Legislature had a legitimate public purpose for establishing a learning community to address the metro area organization issue, create cooperation and competition among school districts, share resources, and expand educational and diversity opportunities for students, among other things. Such legislation, including a specific reorganization scheme for member school districts, is neither arbitrary nor

irrational. Consequently, it is the opinion of this office that the absence of a voter petition process for school district reorganization for legal voters in the Learning Community does not violate the Equal Protection Clause, Neb. Const. art. I, § 3, or art. III, § 18.

Sincerely,

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