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February 3, 1989

ATTORNEY GENERAL OPINION NO. 89- 11

The Honorable Ben E. Vidricksen  
State Senator, Twenty-Fourth District  
State Capitol, Room 143-N  
Topeka, Kansas

Re: Constitution of the State of Kansas--  
Apportionment of the Legislature--  
Reapportionment of Senatorial and Representative  
Districts

Constitution of the State of Kansas--Education--  
Members of State Board of Education

Synopsis: Reapportionment of the Senate need not necessarily coincide with reapportionment of the House of Representatives. However, because current population figures reflect a 44.4% total deviation in State Board of Education member districts, it is our opinion that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that board member districts be reapportioned before the 1990 election of board members. Board member districts are based on senatorial districts. Thus, unless the senatorial districts can be regrouped to significantly lessen the current total deviation in population among board member districts, the Senate must be reapportioned in 1989. Reapportionment of the Senate in 1989 will not affect the terms of office of incumbent senators. Cited herein: K.S.A. 25-1911; 72-7513; Kan. Const., Art. 6, §§2, 3; Art. 10, §1; U.S. Const., Amend. XIV.

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Dear Senator Vidricksen:

You request our opinion regarding reapportionment of the Senate in 1989. You first ask whether the legislature is constitutionally required to reapportion the Senate in 1989.

Article 10, section 1 of the Kansas Constitution provides in part:

"(a) At its regular session in 1989, the legislature shall by law reapportion the state representative districts, the state senatorial districts or both the state representative and senatorial districts upon the basis of the latest census of the inhabitants of the state taken by authority of chapter 61 of the 1987 Session Laws of Kansas. At its regular session in 1992, and at its regular session every tenth year thereafter, the legislature shall by law reapportion the state senatorial districts and representative districts on the basis of the population of the state as established by the most recent census of population taken and published by the United States bureau of the census.

. . . .

"Bills reapportioning legislative districts shall be published in the Kansas register immediately upon final passage and shall be effective for the next following election of legislators and thereafter until again reapportioned. . . ."

Recognizing that this provision appears to afford the legislature an option to not reapportion the Senate in 1989, you inquire whether case law and other constitutional provisions would nevertheless mandate such reapportionment.

One argument would be that since the House of Representatives must be reapportioned in 1989, the Senate must also be reapportioned in order to achieve validity of the whole reapportionment scheme. The United States Supreme Court has indeed held that the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." Reynolds v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964). The court has stated further:

"[I]n determining whether a good faith effort to establish districts substantially equal in population has been made, a court must necessarily consider a State's legislative apportionment scheme as a whole. Only after an evaluation of an apportionment plan in its totality can a court determine whether there has been sufficient compliance with the requisites of the Equal Protection Clause. Deviations from a strict population basis, so long as rationally justifiable, may be utilized to balance a slight overrepresentation of a particular area in one house with a minor underrepresentation of that area in the other house. But, on the other hand, disparities from population-based representation, though minor, may be cumulative instead of offsetting where the same areas are disadvantaged in both houses of a state legislature, and may therefore render the apportionment scheme at least constitutionally suspect." Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S.Ct. 1472, 377 L.Ed.2d 632, 646, Note 27 (1964).

While the court makes a good argument for the desirability of reapportioning both houses simultaneously, we do not believe it has mandated simultaneous reapportionment. In Lucas the court was merely speaking to its scope of review in determining the validity of a reapportionment plan and went on to say that "the court below can properly take into consideration the present apportionment of seats in the House in determining what steps must be taken in order to achieve a plan of legislative apportionment . . . that sufficiently comports with federal constitutional requirements." Id. See also Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 84 S.Ct. 1442, 12 L.Ed.2d 595, 606 (1964). Further, the Kansas Supreme Court has held procedurally sound the presentment of two separate bills, each

reapportioning only one house. In re Senate Bill No. 220, 225 Kan. 628, 633 (1979). In the past the court has considered the bills separately and we find no indication that it will cease to do so. Thus, while it might be advantageous or desirable to reapportion the Senate simultaneously with the House of Representatives, we do not believe federal or state courts would mandate simultaneous reapportionment.

You next ask whether the Senate must be reapportioned in 1989 in view of the fact that five members of the State Board of Education are up for election in 1990, and article 6, section 3(a) of the Kansas Constitution requires State Board of Education member districts to be based on senatorial districts. The United States Supreme Court has held that the "one man-one vote" rule applies generally to the election of public officials who exercise "general governmental powers" over the entire district from which they are elected. Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). Specific responsibilities of the State Board of Education include: Accrediting elementary and secondary schools, area vocational-technical schools, and community colleges; administering and distributing state and federal funds to local education units; appointing numerous advisory councils and reviewing their recommendations; certifying teachers, administrators, and school nurses; developing, administering, and monitoring state and federal plans; developing standards for courses of study and curriculum; evaluating and approving teacher education programs; holding public hearings on state plans, rules and regulations, transfers of territory, certain bond elections, and due process appeals; licensing proprietary schools operating in the state; supervising and coordinating the state system of community colleges and area vocational-technical schools; and supervising the Kansas State School for the Visually Handicapped and the Kansas State School for the Deaf. See Kan. Const., Art. 6, §2; K.S.A. 72-7513; State, ex rel., v. Board of Education, 212 Kan. 482, 489, 490 (1973). We believe that the United States Supreme Court would conclude that the performance of these functions by popularly elected officials would trigger the application of the "one man-one vote" rule. This is evidenced by broad language used in Hadley v. The Junior College District of Metropolitan Kansas City, Missouri, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970):

"[W]hile the office of junior college trustee differs in certain respects from those offices considered in prior cases,

it is exactly the same in one crucial factor--these officials are elected by popular vote. [25 L.Ed.2d, at 50.]

. . . .

"If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. [25 L.Ed.2d, at 50.]

. . . .

"[This] case forebodes, if indeed it does not decide, that the rule is to be applied to every elective public body, no matter what its nature. [J. Harland dissent, 25 L.Ed.2d, at 53.]"

Thus, in our opinion, the "one man-one vote" rule [described in Reynolds v. Sims, *supra* as substantially equal representation and clarified by Mahan v. Howell, 410 U.S. 315, 325, 35 L.Ed.2d 320, 330 (1973) as requiring an equal protection analysis] applies to the election of State Board of Education members, and the board member districts must be apportioned according to population on an equal basis, as far as practical.

The 1988 census figures you have provided show a 44.4% total deviation in the State Board of Education member districts. This is beyond any deviation the courts have found acceptable, thus requiring that something be done. Unless the senatorial districts can be regrouped to significantly lessen the total deviation (by amending K.S.A. 25-1911), it appears the senatorial districts must be reapportioned in 1989 to assure the constitutionality of the 1990 State Board of Education board member elections.

Finally, you inquire whether reapportionment of the Senate in 1989 will have any effect on incumbent senators' terms of office. The Kansas Supreme Court has held that it does not:

"The apportionment of the state into legislative districts pertains to the future election of a senator and representative from the district created by law and does not affect the title to office or the tenure of the members making the apportionment." Harris v. Shanahan, 192 Kan. 183, syl. ¶17 (1963).

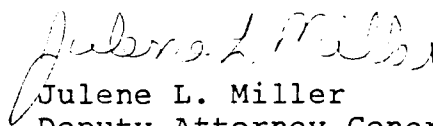
While this case preceded Reynolds v. Sims and Baker v. Carr, in our opinion the above-quoted conclusion would still prevail. Please note, however, that should a vacancy occur in the senate, it would be filled according to the new boundaries established by the reapportionment. Marston v. Kline, 301 A.2d 393 (Pa. 1973). (The Pa. Constitutional provision which provides that "districts shall be used thereafter in elections . . ." is substantially the same as the Kansas constitutional provision.)

In conclusion, reapportionment of the Senate need not necessarily coincide with reapportionment of the House of Representatives. However, unless the senatorial districts (upon which State Board of Education member districts are based) can be regrouped to lessen the current total deviation in population, the Senate must be reapportioned in 1989 to assure the constitutionality of the 1990 board member elections. Reapportionment of the Senate in 1989 will not affect the terms of office of incumbent senators.

Very truly yours,



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