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EL DORADO COUNTY
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MEMORANDUM

To: Dr. Vicki Barber, Superintendent
El Dorado County Office of Education

From: David Girard, Attorney at Law

Date: January 3, 2012

Subject: California Voting Rights Act

Issues:

What are the principal legal issues faced by school districts when apportioning voting areas for school board trustees?

Conclusions:

Districts in which school board trustees are elected in at-large elections may be subject to challenge under the California Voting Rights Act ("CVRA") (Elections Code section 14025 *et seq.*), which may require districts to change to trustee-area elections if there is evidence that the voting rights of protected minority groups have been impaired in the past.

Districts in which school board trustees are elected from trustee areas may be subject to challenge under the U.S. and California Constitutions' equal protection clauses if the comparative sizes of those trustee areas are not within acceptable limits. Although there is no fixed degree of variance that is allowable in all cases *per se*, the Supreme Court of California has allowed variances of up to 1% from the districts' "ideal population"[1] where certain competing considerations, such as geography or federal Voting Rights Act concerns, were present.

Furthermore, both at-large and trustee-area districts are subject to the requirements of the federal Voting Rights Act (42 U.S.C. 1971 *et seq.*), which prohibits voting practices that are discriminatory based upon racial grounds. The scope of potential violations of the federal Voting Rights Act is broad and are outside the scope of the memorandum.

Based on such considerations a preliminary anecdotal overview would suggest that the following El Dorado County School Districts would be most at risk of CVRA non-compliance: 1. Lake Tahoe Unified School District, 2. Black Oak Mine Unified School District, and 3. El Dorado Union High School District.

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[1] "Ideal population refers to the population that each district would have if the districts were absolutely equal.

Discussion:

1. The CVRA prohibits at-large elections where the voting rights of protected minority groups have been impaired in the past.

The CVRA is intended to eliminate mono-racial, mono-ethnic and mono-language group school boards, among others, whenever voting rights are impaired, diluted or abridged.

The CVRA is aimed at protecting a "Protected Class" which is a grouping based on race, color, or language by allowing a protected class to elect a candidate of choice or influence the outcome of an election. Elections Code §§ 14025 et seq.

In order to avoid being in violation of the CVRA school districts should determine whether racially polarized voting exists due to the selection of board members by at-large elections. Racially polarized voting exists where a protected class prefers candidates or measures different than the rest of the voters. Racially polarized voting is prohibited by the CVRA only if racial vote dilution occurs due to at-large elections. (Sanchez v. City of Modesto (2006)) 51 Cal.Rptr. 3d 821

A school district review generally should determine whether:

1. there has been a protected class candidate preferred by voters of the protected class (analyze voting behavior) who has not been successful,

2. there has been a ballot measure (e.g. bond measure) that has adversely affected the rights and privileges of a protected class,

3. there has been a situation where there were fewer candidates from a protected class than seats up for a particular election, where the candidate from the protected class got considerable support from the protected class,

4. members of a protected class are geographically compact or concentrated,

5. there is a history of discrimination,

6. there are voting practices or procedures that may have enhanced the dilutive effect, e.g. access to polling places,

7. protected class candidates have had diminished access to financial or other support,

8. there are negative effects of past discrimination in:

    - education
    - employment
    - health

    which hinder the ability of protected class candidates to effectively participate in the political process, and

9. there have been overt or subtle racial appeals in political campaigns?

2. The Equal Protection Clause requires voting districts to be population based.

The Equal Protection Clause of Amendment XIV of the U.S. Constitution provides that "[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., Amend. XIV.) The California Constitution similarly provides that no person may be denied equal protection of the laws. (CA Const., Art. I, Sect. 7.)

The U.S. Supreme Court has interpreted Article XIV to require that seats in state legislative bodies be apportioned on a population basis. (*Reynolds v. Sims* (1964) 377 U.S. 533, at 568.) Under the Supremacy Clause, the U.S. Constitution controls where adherence to a state constitutional or statutory scheme for apportioning representatives would unavoidably conflict with federal constitutional requirements. (*Id.*, at 584; U.S. Const., Art. VI, Sect. 2.)

3. There is no level of variance from the equal-representation standard that applies in all cases, in general maximum variances of under 10% are permissible.

The U.S. Supreme Court has rejected any set variance from the equal representation requirement that would apply in all cases. Rather, the Court requires that any variances be justified by specific competing considerations.

In *Swann v. Adams*, the Court rejected a reapportionment plan for the Florida legislature which called for senate districts ranging from approximately 15% over to 11% under the ideal population size and state house districts ranging from 18% over to 15% under the ideal population size. ((1967) 385 U.S. 440.) Citing *Reynolds v. Sims*, the Court struck down the plan, holding that only deviations from equal population that are "minor" and that are "based on legitimate considerations incident to the effectuation of rational state policy" are permissible. (*Id.*, at 444) Such justifications, the Court continued, may include integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts and the recognition of natural or historical boundary lines. (*Id.*)

The U.S. Supreme Court later established the general rule that legislative apportionment plans with maximum population deviation under 10% fall within the category of minor deviations, but plans with larger disparities in population create a *prima facie* case of discrimination and must therefore be justified by the state. (*Brown v. Thomson* (1983) 462 U.S. 835, 843.) The *Brown* court further suggested that there may be some upper limit to population deviation which cannot be justified on any grounds. (*Id.*, at 845, 849, 850 (citing *Mahan v. Howell* (1973) 410 U.S. 315, in which the Court stated that a 16.4% maximum deviation "may well approach tolerable limits").)

As discussed below, however, we believe that it is prudent to adhere to the more rigorous standard of equality used by the Supreme Court of California discussed below.

4. California case law suggests that a 1% variance from "ideal equality" may be acceptable where certain competing considerations are found to exist.

In *Wilson v. Eu*, the Supreme Court of California reviewed a statewide redistricting plan in accordance with the requirements described above. ((1992) 1 Cal.4th 707.) The *Wilson* court's analysis began by looking at the relative populations of the various voting districts, which the court found would vary by less than 1% from "ideal" equality.[2] (*Id.*, at 718.)

The court found this 1% deviation to be "minor" and amply justified by "legitimate state objectives," specifically the need to form reasonably compact districts, the use of census tracts rather than census blocks in forming districts and to comply with the federal Voting Rights Act. (*Id.*) The court also approved of the following additional criteria used to draw up the plan: contiguity and compactness of districts, respect for geographical integrity and community of interests. (*Id.*, at 719.)

These factors, viewed in light of the particular circumstances under consideration, were together found to justify an up to 1% of deviation from "ideal equality." Consequently, while this level of variance cannot be assumed to be acceptable in all cases, there is judicial support for the position that a 1% variance may be allowable where similar competing considerations are found to exist.

5. The analysis and conclusions of *Wilson v. Eu* would likely apply when determining voting districts for school district boards of education.

We believe that the holding in *Wilson v. Eu* would apply in the context of trustee areas for school district boards of education, despite the fact that this decision does not expressly apply in the present context.

The *Wilson* decision concerned a plan for the redrawing of voting districts for congressional, legislative, and State Board of Equalization districts. The *Wilson* court reviewed the plan against, among other things, Article XXI, Section 1 of the California Constitution[3] and criteria used by a statewide redistricting panel in the early 1970s and articulated in *Legislature v. Reinecke* ((1973) 10 Cal.3d 402).[4] (*Id.*, at 714.) Neither of these sets of standards applies directly to trustee areas of school district boards of education.

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[2] As discussed below, *Wilson v. Eu* may also be read to suggest that the slightly more permissive cut-off of 2% deviation may apply in the case of state legislative districts "in unusual circumstances." (*Wilson*, at 753.)

[3] The state constitutional standards for forming Senate, Assembly, Congress and State Board of Equalization districts include (1) consecutively numbered single-member districts, (2) "reasonably equal" populations among districts of the same type, (3) contiguous districts, and (4) "respect" for the "geographical integrity of any city, county, or city and county, or of any geographical region" to the extent possible without violating the other standards.

[4] The *Reinecke* criteria include (1) equality of population, (2) contiguity and compactness of districts, (3) respect for county and city boundaries, (4) preservation of the integrity of the state's geographical regions, (5) consideration of the "community of interests" of each area, (6) formation of state senatorial districts from adjacent assembly districts ("nesting"), and use of assembly district boundaries in drawing congressional district boundaries, and (7) reliance on the current census and on undivided census tracts.

One possible objection to the application of *Wilson v. Eu* in the present context is that it considered the drawing of both state legislative and congressional districts, and consequently reviewed the proposed voting districts against the stricter standard applicable to the latter. The U.S. Supreme Court has distinguished between the equal representation requirements for state legislative districts (under the Amendment XIV of the U.S. Constitution) and congressional districts (under Article II of the U.S. Constitution). (*Wilson*, at 753.)[5] Since it is the equal protection guarantees of Amendment XIV only that would apply to local voting districts (including trustee areas for school district boards of education), it could be objected that applying *Wilson* in the present context would set an inappropriately high standard of equality.

Despite this possible objection, we believe that it is appropriate to follow the *Wilson* standard in the present case for two reasons.

First, the Supreme Court of California has created more stringent equal representation requirements for state legislative voting districts than those used by the U.S. Supreme Court. In *Reinecke*, the Supreme Court of California held that Amendment XIV requires that the "population of senate and assembly districts should be within 1 percent of the ideal except in unusual circumstances, and in no event should a deviation greater than 2 percent be permitted." (*Id.*) This standard has in turn been applied more broadly when construing the meaning of other equal-representation guarantees, such as that contained in Article XXI of the California Constitution. (64 Ops.Cal.Atty.Gen. 597, 613-615 (1981).)

Second, because it is the most recent and thorough examination of this issue in this state, we believe that it is prudent to follow *Wilson v. Eu*. As noted above, the considerations at issue in *Wilson* (equality of population, geography, community of interest, etc.) are the same as those that apply to them more generally under Amendment XIV of the U.S. Constitution. We further note that there is no binding judicial guidance as to how the various competing equal representation standards would be applied in the case of local voting districts. In the absence of any such direct guidance, we believe that it is prudent to adopt the analysis and to follow the conclusions of the *Wilson* court in the present context, as well.

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[5] For example, the U.S. Supreme Court has permitted variations from ideal population of plus or minus approximately 4% in the case of state legislative districts (*Gaffney v. Cummings* (1973) 412 U.S. 735) but struck down variations of less than 1% for congressional voting districts (*Karcher v. Daggett* (1983) 462 U.S. 725).