A board of education has no discretion to provide a school year of less than 180 days of student instruction.

It is the statutory duty of the State Board of Education, in accordance with Section 252(c) and (e) of the school code of 1955, as amended, and Section 14 of Act 287, P.A. 1964, being M.C.L.A. § 388.1014; M.S.A. 1968 Rev. Vol. § 15.1023(14), to require each board of education to provide a minimum of 180 days of student instruction for its pupils.

Therefore, it is my opinion that boards of education of school districts are required by law to conduct 180 days of student instruction in a school year. Days lost because of a teacher strike must be made up through extension of the school district's calendar to comply with the requirement of 180 days of student instruction.

FRANK J. KELLEY,
Attorney General.

701208.1

LEGISLATURE: Apportionment of both houses.

EQUAL PROTECTION CLAUSE: Reapportionment of both houses of the legislature.

SENATE: Provision for four-year terms not in violation of equal protection clause.

The equal protection clause of the Fourteenth Amendment requires that members of both houses of a bicameral state legislature be elected from districts apportioned upon the basis of population according to census figures current at the time of establishment of senate districts.

No. 4710 December 8, 1970.

The Honorable Alex Pilch
State Representative
House of Representatives
The Capitol
Lansing, Michigan 48903

You have requested my opinion as to whether the provisions of the Michigan Constitution for the reapportionment of the legislature satisfy the requirements of the equal protection clause of the Fourteenth Amendment to the Federal Constitution that both houses of a bicameral state legislature be reapportioned periodically based upon population determined in accordance with reasonably current census figures. The issue raised is occasioned by the fact that the legislative reapportionment based upon the 1970 Federal decennial census will presumably be completed so that members of the house of representatives will be elected from those districts at the 1972 general November election for a term of two years commencing on January 1, 1973. Members of the senate are, however, elected for four-year terms[1] and having been elected at the 1970 general

[1] Article IV, Section 2, Michigan Constitution of 1963.

November election for a term of four years commencing on January 1, 1971 and ending on January 1, 1975, their successors will not be elected until 1974. Hence during the period from January 1, 1973 to January 1, 1975, the incumbent representatives will have been elected from districts apportioned in accordance with the 1970 Federal decennial census but the senators serving during that two-year period will have been elected from districts apportioned according to the 1960 Federal decennial census.

The landmark case holding that the equal protection clause requires that members of both houses of a bicameral state legislature must be elected from districts apportioned upon the basis of population determined in accordance with census figures was *Reynolds v. Sims* (1964) 377 U.S. 533, 12 L. ed. 2d 506. While that case was decided by a divided court, reference will only be made to the majority opinion written by Chief Justice Warren. The Chief Justice stated[2]:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state. . . ."

and further[3]

> "We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same —population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. *The length of terms of the legislators in the separate bodies could differ.* The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis.
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> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we

[2] 377 U.S. 568, 12 L. ed. 2d 531.
[3] 377 U.S. 576-578, 12 L. ed. 2d 536-537.

mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.[57]

"In *Wesberry v. Sanders, supra,* the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the court in *Wesberry*—equality of population among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. . . ." [Emphasis supplied]

Prior to 1952 the legislature convened in regular session biennially. As originally adopted, the 1908 Constitution provided for the reapportionment of both the house and senate at the 1913 session of the legislature and every ten years thereafter based upon the preceding Federal decennial census. By amendment to Article V, Section 3, ratified in 1952, the provision for the reapportionment of the house of representatives was continued. However, those members to which a given city was entitled were elected at large. Section 2 was amended to provide for the election of 34 members from districts designated therein. Both senators and representatives were elected for a term of two years.

The 1963 Constitution requires the election of members of the house of representatives from single-member districts at the general November election in the even-numbered years. It also provides for a senate of 38 elected for a term of four years. Provision was made for reapportionment by an apportionment commission of the districts of both the house and senate based upon each Federal decennial census. Following adoption of the 1963 Constitution, litigation ensued in the Federal courts regarding the validity of the apportionment provisions of the Constitution. This resulted in decision by a three-judge panel in the district court upholding the provisions thereof.[4] That decision was reversed by the United States Supreme Court upon authority of *Reynolds, supra,* and *Lucas v. Assembly*

[57] As stated by the Court in *Bain Peanut Co. v. Pinson,* 282 U.S. 499, 501 'We must remember that the machinery of government would not work if it were not allowed a little play in its joints.'

[4] *Marshall v. Hare, et al.* (1964) 227 F. Supp. 989.

of the State of Colorado, 377 U.S. 713, 12 L. ed. 2d 632.[5] That was followed by order of the Michigan Supreme Court directing the legislative apportionment commission to proceed to apportion both the house and senate "as nearly as practicable on equal population basis."[6] Later the Supreme Court issued its decision holding one of the plans submitted "most nearly complies with said constitutional requirements" and directed use thereof at the 1964 primary and general elections.[7] I, therefore, start with the premise that both the senate and house are presently apportioned as nearly as practicable upon the basis of population as determined by the 1960 Federal decennial census. Accordingly, when adopted, such plan was not subject to constitutional objection that the apportionment was not based primarily on population. Likewise, it must be assumed for the purposes of this opinion that the apportionment of both houses based upon the 1970 Federal decennial census will be free from constitutional infirmity upon that score. Rather the sole objection raised by your request is the fact that during the two-year period from January 1, 1973 to January 1, 1975, incumbent members of the senate will have been elected from districts apportioned according to population as determined by the 1960 instead of the 1970 Federal decennial census.

If legislators may only be elected at an election held biennially and members of the senate are to be elected for terms of four years, that situation is necessarily bound to exist for one period of two years during each twenty years. Does that fact render the apportionment scheme impermissible as violating the guarantee of the equal protection clause requiring apportionment of legislative seats of both houses according to population? No decision of either the State or Federal courts upon that precise issue is available for citation. However, as above quoted, the United State Supreme Court in *Reynolds* after holding that both houses of a bicameral state legislature were required to be apportioned primarily upon the basis of population noted that such requirement did not render the concept of bicameralism anachronistic and meaningless and stated in support thereof:

> ". . . The length of terms of the legislators in the separate bodies could differ. . . ."

However, as above pointed out, provision therefor necessarily results in there occurring once in every twenty years a period of two years during which members of the senate serve who were elected from districts established by the apportionment which occurred approximately ten years earlier. In *Reynolds,* Chief Justice Warren cited and quoted with approval from *Bain Peanut Co. v. Pinson.* In *Michigan Farm Bureau v. Secretary of State* (1967) 379 Mich. 387, 395, the Michigan Supreme Court likewise quoted therefrom as follows:

> " 'The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.' "

[5] *Marshall v. Hare, et al.,* 378 U.S. 561, 12 L. ed. 2d 1036.
[6] *In re Apportionment of State Legislature — 1964* (1964) 373 Mich. 247, 249.
[7] *In re Apportionment of State Legislature — 1964* (1964) 373 Mich. 250, 254.

Based upon the rationale of the court's decision as expressed in *Reynolds*, I am of the opinion that the legislative apportionment scheme, as adopted by the Michigan Constitution and implemented by the above-cited decisions of the Michigan Supreme Court, is not rendered impermissible by reason of the provision for the election of senators for a term of four years which necessarily results in this situation. It follows that the guarantee of the equal protection clause is not violated by reason of the fact that during such two-year period the incumbent members of the senate continue to serve the last two years of the term for which they were elected from districts apportioned upon the basis of population according to census figures current at the date of the establishment of such districts.

FRANK J. KELLEY,
Attorney General.