

Official Opinion No. 80-20, Authority of the Education and Cultural Affairs Planning Commission

March 13, 1980

Dr. Harris J. Wollman
Secretary
Department of Education and Cultural Affairs
Kneip Building
Pierre, South Dakota 57501

Official Opinion No. 80-20

Authority of the Education and Cultural Affairs Planning Commission

Dear Secretary Wollman:

You have requested an official opinion based upon the following factual situation.

FACTS:

The 1979 South Dakota Legislature in the general appropriations bill authorized the Education and Cultural Affairs Planning Commission to expend certain federal funds received by it pursuant to the provisions of certain federal legislation; however, spending authority for \$24,000 of the administration of Higher Education Act Title I programs and \$10,000 of contractual service funds, for the position of an executive assistant, were moved from the Education and Cultural Affairs Planning Commission budget to the budget of the Secretary of the Department of Education and Cultural Affairs.

Pursuant to a request by the Education and Cultural Affairs Planning Commission, you have asked the following questions:

QUESTIONS:

1. If the Education and Cultural Affairs Planning Commission is that agency of state government authorized to accept those funds provided by the federal government, may the Legislature, through its passage of the General Appropriations Act, transfer that portion of funding mentioned above to the Secretary of Education and Cultural Affairs?

2. Given the provisions of Executive Reorganization Order No. 3 of 1979 and the April 18, 1979, Letter of Intent, may the Education and Cultural Affairs Planning Commission seek to employ separate administrative personnel without the consent of the Secretary of Education and Cultural Affairs?

By way of background, in 1973, the Legislature created the Education and Cultural Affairs Planning Commission in SDCL 1-45-27 through 32. SDCL 1-45-29 provides:

Functions of the Planning Commission--The Education and Cultural Affairs Planning Commission's functions include but are not limited to:

- (1) Approval and adoption of comprehensive Education and Cultural Affairs plans;
- (2) assisting in coordinating programs in the Department;
- (3) advising on matters submitted to it by the Department's Secretary;
- (4) performing any functions assigned to it under federal law; and
- (5) performing the functions transferred from other agencies as specified by this chapter.

In addition to the functions identified in SDCL 1-45-29, SDCL 1-45-28 provides:

Planning to Qualify under Federal Act--Adjustment of Membership to Comply-- It is intended that the education and cultural affairs planning commission _shall qualify as a 'state post-secondary commission' as provided by Section 1202 of the Federal Act cited as the 'Education Amendments of 1972.' If the above membership does not qualify under Section 1202 of that Act, the Governor shall adjust the membership to comply with the federal requirements, provided that, as modified, the Commission shall act only with respect to the functions assigned it under the federal act and that, however adjusted, the membership shall always contain a majority of members appointed from the citizens of the state.

The federal legislation referred to in the above statute, 20 U.S.C.A. § 1142a (formerly Public Law 39-329, Title XII, Section 1202) provides:

State Postsecondary Education Commission

(a) Any State which desires to receive assistance under Section 1142b of this title or subchapter X of this chapter shall establish a State Commission or designate an existing State agency or State Commission (to be known as the State Commission) which is broadly and equitably representative of the general public and public and private nonprofit and proprietary institutions of post-secondary education in the State including community colleges (as defined in subchapter X of this chapter), junior colleges, post-secondary_vocational schools, area vocational schools, technical institutes, four-year institutions of higher education and branches thereof.

(b) Such State Commission may establish committees or task forces, not necessarily consisting of Commission members, and utilize existing agencies or organizations, to make studies, conduct surveys, submit recommendations, or otherwise contribute the best available expertise from the institutions, interest groups, and segments of the society most concerned with a particular aspect of the Commission's work.

In South Dakota the Legislature has obviously required the Commission to utilize an 'existing agency'--the Department of Education and Cultural Affairs--to provide administrative support personnel to the Commission. See SDCL 1-45-32, set out at length infra. The remainder of § 1142a provides:

State Commission for Administration of Subchapter I, VI, and VII State Plans

(c) (1) At any time after July 1, 1973, a State may designate the State Commission established under subsection (a) of this section as the State agency or institution required under Section 1005, 1123, or 1132a-3 of this title. In such a case, the State Commission established under this section shall be deemed to meet the requirements of such sections for State agencies _or institutions.

(2) If a State makes a designation referred to in paragraph (1)--

(A) the Commissioner shall pay the State Commission the amount necessary for the proper and efficient administration of the Commission of the functions transferred to it by reason of the designation; and (B) the State Commission shall be considered the successor agency to the State agency or institution with respect to which the designation is made, and action theretofore taken by the State agency or institution shall continue to be effective until changed by the State Commission.

In 1979, Executive Reorganization Order No. 3, now SDCL 1-45-34, transferred the functions of hiring, appointing and removing employees within the Department of Education and Cultural Affairs, except employees of the Board of Regents and Division of Higher Education, to the Secretary of Education and Cultural Affairs. The section provides:

Secretary to hire and fire within department--Higher education division excepted--
Notwithstanding the final paragraph of § 1-45-33 but subject to chapter 3-6A, the function of hiring, appointing and removing employees within the department of education and cultural affairs shall be vested in the secretary or his designee. This section shall not apply to employees of the board of regents and the division of higher education of the department of education and cultural affairs.

In view of the transfer of funds from the Planning Commission to the office of the Secretary of Education and Cultural Affairs accomplished by the 1979 Legislature in the General Appropriations Bill together with the provisions of SDCL 1-45-34, I have concluded that the Planning Commission is without authority to hire administrative personnel absent approval of the Secretary. See also 1-45-32, which provides:

The education and cultural affairs planning commission shall be attached for administrative support to the office of the secretary of education and cultural affairs.

This result is buttressed by the language of the April 18, 1979 Letter of Intent from the Joint Committee on Appropriations to you. The letter provides in pertinent part:

The Committee also added \$24,000 in Federal expenditure authority to the finance and management program for the administration of the Title I program. The same amount was reduced in the post-secondary education program. It is the intent of the Committee that the Secretary provide the administrative support to the Planning Commission in the performance of its prescribed duties established by South Dakota statutes and as specified in the contractual agreement between the Commission and the Federal government. The Joint Committee on Appropriations has requested that the Secretary review the contract between the Planning Commission and the North Central University Center and provide recommendations to either continue, change, or discontinue the agreement for FY 1980.

In addition to transferring the administration of the Title I program, the Committee also transferred the Federal contractual funds (\$10,000) designated for the Executive Director of the Planning Commission to the finance and management program. The Secretary should

analyze the need to continue the contract or return to the interim Appropriations Committee with a request for a part-time FTE.

The above action by the Committee are not intended to decrease or hinder the Planning Commission in the performance of its duties. It is expected that the shifts will provide better support to the Commission.

I find no provision in the federal statutes that would preclude this result. While various sections of the federal act require that the 'state plan' be administered by the Planning Commission, I can find no requirement that the Planning Commission be a completely autonomous body. It must, however, be solely responsible for preparing the state plan or plans and prioritizing requests made by eligible institutions for funds made available to the state pursuant to the state plan.

IN RE QUESTION NO. 1:

In answer to your first question, it appears that the Legislature had ample authority to transfer the spending authority of the federal administrative funds received by the Education and Cultural Affairs Planning Commission from the Commission to the office of the Secretary.

IN RE QUESTION NO. 2:

In answer to your second question, it is my opinion that the Education and Cultural Affairs Planning Commission is without authority to employ separate administrative personnel without the consent of the Secretary of Education and Cultural Affairs.

I trust that this explanation will be of assistance and will clarify the lines of authority within the Department.

Respectfully submitted,

Mark V. Meierhenry
Attorney General