OFFICIAL OPINION NO. 75-47, South Dakota High School Interscholastic Activities

March 7, 1975

Representative Loila Hunking
House of Representatives
Capitol Building
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 75-47

**South Dakota High School Interscholastic Activities Association**

Dear Representative Hunking:

You have requested an Attorney General's Opinion in regard to the following matters pertaining to the South Dakota High School Activities Association.

1. Does the South Dakota High School Activities Association have the proper authority to make rules and regulations governing local subdivisions of government i.e.-secondary schools of local school districts?

2. If it does, must the association come under Chapter 1-26?

3. If such powers are properly delegated, is the South Dakota High School Activities Association rule of one vote per school (regardless of number of students) constitutional?

4. Ultimately, can the rule making authority presently assumed by the South Dakota High School Activities Association be property delegated to a voluntary nonprofit organization, or does it properly belong to an agency of state government such as the State Board of Education?

The questions you raise pose some very difficult matters for consideration. I will attempt to first describe what the case law in South Dakota holds with respect to the propriety of South Dakota High School Interscholastic Activities Association rules and regulations.

SDCL 13-36-4 provides as follows:

All high schools approved and accredited by the superintendent of public instruction, pursuant to the provisions of this title as amended from time to time, shall be eligible for membership in South Dakota High School Interscholastic Activities Association or any successor thereto. Nothing herein contained shall prevent such Association, or its successor, from adopting uniform rules and regulations governing its affairs, including provisions for suspension of schools or their students for violations of such rules and regulations.

The only decision that the state Supreme Court has rendered on this statute is the case of *The South Dakota High School Interscholastic Activities Association* v. *St. Mary's Interparochial High School.* 82 S.D. 89, 141 N.W. 2d 477 (1966). In that decision the court upheld the constitutionality of SDCL 13-36-4 from the attack that the statute violated the constitutional prohibition against aid to sectarian schools. The court found that SDCL 13-36-4 was within the *power* of the Legislature to regulate and control its public schools. No question was presented in this case as to any unconstitutional delegation of legislative power.

In a more recent decision, Judge Robert Miller of the Sixth Circuit Court concluded in the case of *Michael Wright* v. the *South Dakota High School Interscholastic Activities Association* (1973) that:

I am of the opinion that the association rules do not violate the statutes of this state or the constitution of the state or nation. In so saying I am of the opinion that there was not an unlawful delegation of legislative powers by the enactment of SDCL 13-36-4. . . .

Judge Miller did not elaborate on the reasons for or the scope of his conclusion.

An appeal from the decision of Judge Miller was made to the state Supreme Court. The appeal was dismissed on November 6th, 1973, by stipulation of the parties.

The following constitute my personal views on the questions you raise.

Article VIII, Section 1 of the South Dakota Constitution provides:

The stability of a republican form of government depending on the morality and intelligence

of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.

The South Dakota Supreme Court has recognized that the legislative power over public schools is complete. *South Dakota High School Interscholastic Activities Association v. St. Mary's Interparochial High School,* 82 S.D. 84, 141 N.W. 2d 477, 480 (1966). Our court has also held that the Legislature may not abdicate its essential power to legislate, or to delegate that power to any other body or department, *Schryver* v. *Schirmer,* 84 S.D. 352, 171 N.W. 2d 634 (1969). Quasi legislative functions can be delegated, but only if the Legislature adopts adequate standards to guide the delegate in exercising the delegation. *Boe* v. *Foss,* 76 S.D. 295, 77 N.W. 2d 1 (1956). In determining what standards are adequate for delegation of legislative power, our court said in the case of *Affiliated Distillers Brands Corp.* v. *Gillis,* 81 S.D. 44, 130 N.W. 2d 597, 600 (1964):

A statute or ordinance which in effect reposes an absolute, unregulated and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers. The presumption that an officer will not act arbitrarily but will exercise sound judgment and good faith cannot sustain a delegation of unregulated discretion.

I personally cannot see where the standards and criteria are which define and regulate the discretion granted to the association in SDCL 13-36-4. This sort of unregulated and undefined discretion was declared unlawful by the *Gillis* case. In my opinion, the statutory standard here in SDCL 13-36-4 of regulations governing its "affairs" describes *nothing* without additional statutes which describe what such "affairs" are. "Affairs" could mean just about anything.

In addition to the problems relating to lack of adequate criteria, there appears to me to be a serious question about the propriety of delegation of legislative power to a private association. The principle seems to be quite well established that the Legislature cannot delegate legislative functions to private persons or private associations. 16 Am Jur 2d Constl. Law §249, *Penn School District No.* 7 v.*Board of Education,* 165 N.W. 2d 464 (Michigan, 1968). *Summerville* v. *North Platte Valley Weather Control District,* 101 N.W. 2d 748 (Nebraska, 1960). (See S.D. Constitution Article III, Section 23, Subdivision

9.) This question was not before the South Dakota Supreme Court when they decided the *St. Mary's* case. For that reason, the court's silence on this matter in that case should not be given determinative weight.

SDCL 13-36-4 is offensive to my sense of what the laws and Constitution of South Dakota require. Although I have long admired the dedication and effort of the South Dakota High School Interscholastic Activities Association, on behalf of students, it seems to me that purely private associations cannot properly hold delegated legislative rule making powers of the state. Certainly any group or body that is exercising rule making power under a grant of power from the Legislature, should do so pursuant to the requirements of SDCL 1-26. It is also my opinion that any grant of such rule making power must meet the constitutional tests which require criteria and definition in delegation of legislative powers. For all of these reasons I feel that the South Dakota High School Interscholastic Activities Association does not have proper authority to pass rules which have any legislative status or force.

Respectfully submitted,

WILLIAM J. JANKLOW
ATTORNEY GENERAL

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