

**OPINION
64-141**

January 27, 1964 (OPINION)

HIGHER EDUCATION

RE: State Commission - Federal Funds

This is in reply to your letter of January 22, 1964, relative to the Higher Education Facilities Act of 1963.

You state it is your intention to designate or establish a state commission in compliance with this act. You note it is necessary to notify the Commissioner of Education to this effect and that such notification must be accompanied by (1) certification that the members of such commission are, in accordance with Section 105 (a) of the Act, broadly representative of the public and institutions of higher education (including junior colleges and technical institutes) in the state and (2) certification including citation of state law, by the appropriate state legal officer, that such "State Commission" is authorized under state law to formulate, submit and administer a state plan under Title 1 of the Act.

You believe the Commission should be composed of the present seven members of the State Board of Higher Education, one person who represents the two junior colleges in North Dakota, an additional person to represent the two Catholic colleges, and an additional appointee to represent the Protestant College, all within North Dakota, making a total of ten members on this commission. You ask the following questions:

- 1) What are the steps that should be followed in establishing a 'State Commission?'
- 2) If a 'State Commission' is composed of the representatives as indicated above, would this meet the requirement under Title 1, which requires the state agency to be broadly representative of the public and of institutions of higher education within the state?
- 3) May the State of North Dakota or the agency to be established receive funds for the proper and efficient administration of the state plan, which may be subsequently submitted and approved under Title 1 of the Act, including expenses necessary for preparation of such plans?
- 4) Under the provisions of the Higher Education Facilities Act, do the funds that may be available go directly to the institutions of higher education and, if so, is this permissible under state law as it relates to State-supported educational institutions and the two junior colleges?"

In your letter you enclose certain documents and correspondence pertinent to the Act and the questions presented.

In reply to your first question, we have been unable to find any statutory authorization for the establishment of a "State Commission" such as the one contemplated. Apparently the Federal Government requires this office to provide a legal citation to the North Dakota statutes which citation must state the Commission is authorized under state law to formulate, submit and administer a state plan under the Act. We would be happy to submit such a citation if one existed. In this regard we are enclosing a copy of a letter written by this office under date of December 10, 1963, to Mr. Joe S. Rockwood, Regional Attorney, Department of Health, Education and Welfare, 569 Westport Road, Kansas City, Missouri, in response to a letter from Mr. Rockwood.

Not only are we unable to find a statute which authorized any existing agency to directly assume the duties and responsibilities under the Higher Education Facilities Act of 1963, we are also unable to find any existing law which would authorize the Governor, or for that matter any state officer, to appoint such a committee.

It would appear preferable to have this matter considered by the Legislature so that positive action might be taken to either establish a state agency endowed with the specific powers required by the Federal Act or to authorize the Governor to establish such agency. If, however, immediate action on this matter is necessary we have a suggestion to offer which might meet with acceptance by the Federal Government. The suggestion is as follows:

Under section 15-10-12 of the North Dakota Century Code, the State Board of Higher Education has the authority to accept gifts and bequests offered or tendered to or for the benefit of any institution of higher education under its control or subject to its administration. This section further provides that all such donations, gifts, and bequests are to be used for the specific purpose for which they are donated or given. This would appear to constitute authority for the Board of Higher Education to accept gifts or aid in the nature of gifts for the State institutions of higher learning.

Section 15-21-07.1 of the North Dakota Century Code, as amended, authorized the Superintendent of Public Instruction in order to carry out the purposes of any federal statutes pertaining to public education to enter into agreements with any agency of the federal government and with the school board of any district in the state. The statute further authorized the Superintendent of Public Instruction to make agreements for and in behalf of the public school districts of the state and to adopt the necessary rules of administration to insure the proper and efficient administration of the agreements and to comply with such conditions as may be necessary to obtain the full benefits of such federal statutes. The statute also provides that such contracts, agreements or arrangements shall in no way impair the rights, powers, duties or authority of local school districts and their governing boards in the management and control of the local schools.

Since the junior colleges and the one off-campus educational center in the State are operated by the local school districts they would be included within the provisions of the above statute. It would

therefore appear that the Superintendent of Public Instruction would have explicit authority to take advantage of the Federal Act insofar as the junior colleges and off-campus educational centers in this State are concerned. There is, of course, no state agency which controls, governs or has authority over the private institutions of higher learning of the State.

We therefore would suggest an agreement between each of the various private institutions and the State Board of Higher Education and between the Superintendent of Public Instruction and the State Board of Higher Education authorizing the State Board to act on their behalf. The agreement could, we believe, contain provisions for representation of the private institutions and the Superintendent of Public Instruction on the Board insofar as the provisions of the Federal Act are concerned. It would appear, however, that all agreements, etc., entered into in order to obtain the grants under the act would have to be in the name of the State Board of Higher Education.

While we do not know if this arrangement would meet the requirement of the Act it is the only possible solution of which we are aware at this time. It is, at best, only a poor substitute for specific legislation on the matter. As stated above, we believe specific legislation would be far preferable and we offer the above solution only in the event immediate action is necessary.

In this respect we would note section 103 (b) and (c) of the Conference Report which provides that allotments to states for public community colleges and public technical institutes for the fiscal year ending June 30, 1964, shall remain available for reservation as provided in section 109 until the close of the next fiscal year, in addition to the sums allotted to the State for such next fiscal year. The amounts allotted for the fiscal year ending June 30, 1965, and the succeeding fiscal year, which are not reserved as provided in the Act by the close of the fiscal year for which they were allotted, are to be reallocated by the Commissioner of Education among the States which are able to use without delay the amounts so reallocated for providing academic facilities for public community colleges or public technical institutes. A similar provision is found in section 104 with regard to allotments to states for institutions of higher education other than public community colleges and public technical institutes. It appears, therefore, that a session of the North Dakota Legislature would convene and could act on this matter prior to the time (June 30, 1965) the State would forfeit the opportunity to receive their allocation of the funds appropriated.

With respect to your second question, assuming there were legislation authorizing the appointment of such a committee we believe the committee contemplated in your letter would be broadly representative of the public and of institutions of higher education within the State.

Insofar as the third question is concerned, we believe the State Board would be authorized to receive funds for the proper and efficient administration of the State plan, which might be subsequently submitted and approved under Title 1 of the Act, including expenses necessary for preparation of the plans in the same

manner as they are authorized to accept gifts, bequests and donations under section 15-10-12 of the North Dakota Century Code.

The material presented does not completely clarify the question of whether the funds that are made available go directly to the institutions of higher education. See, e.g. Sec. 109 of the Higher Education Facilities Act of 1963 Conference Report. However, under section 105(a) of the Conference Report we note that the state plan must provide that the funds allotted for any year will be available only for use for the construction of academic facilities for public community colleges and public technical institutes or for construction of academic facilities for institutions of higher education other than public community colleges and public technical institutes, depending upon the purpose for which allotted. Under section 15-10-12 of the North Dakota Century Code funds must be used for the purpose for which they are given. There would appear to be no difficulty with this provision insofar as the state institutions and junior colleges are concerned, since even though the funds might be required to be paid directly to the institutions and expended for the purpose for which given, the expenditure would of necessity, be under the direction of the Board of Higher Education or the School Board, as the case might be. The Board and the local school boards could not, however, divert the funds from the purpose for which given.

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