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#92046

STATE OF NEBRASKA
OFFICIAL
MAR 19 1992
DEPT. OF JUSTICE

DATE: March 16, 1992

SUBJECT: LB 245; Do the provisions of that Bill which place members of the Legislature on the Nebraska School Accountability Commission violate Article II, Section 1 or other sections of the Nebraska Constitution?

REQUESTED BY: Senator Richard Peterson, Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

You have requested our opinion on the constitutionality of LB 245. Specifically, you wish to know, "...whether Section 2 [of LB 245] is constitutionally impermissible in combining in the School Accountability Commission members of the executive and legislative branches of government." In our view, the pertinent provisions of LB 245 do violate the Nebraska Constitution.

LB 245 would establish the Nebraska Schools Accountability Commission (Commission). Under the provisions of the bill, the Commission would be charged with the responsibility of developing broad curriculum frameworks and standards for learner outcomes in the Nebraska public schools. The Commission would also subsequently develop a system of assessing student progress towards achieving those standards for learner outcomes.

Section 2 of the Final Reading version of LB 245 provides that the Commission:

L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Laura H. Essay
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Paul N. Potadle
Marie C. Pawol
Kenneth W. Payne
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Wald
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

> ...shall consist of eleven members as follows: Two members of the Legislature appointed by the Executive Board of the Legislative Council; and one representative from the Governor's office, two public school classroom teachers, two administrators or administrative staff members, one parent, one school board member, one representative of business and industry, and one representative of agriculture,...

In our Opinion #91016 to Senator Crosby, issued March 13, 1991, we concluded that, "...members of the Legislature cannot serve on boards or commissions of state government which exercise primarily an executive or administrative function." Our conclusion was based upon the Separation of Powers provision of the Nebraska Constitution, along with Article III, Section 9 and Article IV, Section 10 of that same document. In Opinion #91016, we also cited a number of previous opinions of this office which consistently had taken a similar position.

It seems to us that the analysis which we provided to Senator Crosby in Opinion #91016 applies equally to the question which you presented. The Separation of Powers provision prevents members of the Legislature from serving on executive boards or commissions. It also would, presumably, prevent members of the Governor's staff from serving as officials on legislative bodies. As a result, any newly created governmental body which contains official members from two branches of government must necessarily be suspect. As was the case in Opinion #91016, we also believe that the governmental body contemplated by LB 245 may violate Article III, Section 9 and Article IV, Section 10 of the Nebraska Constitution.

We must also note that our analysis in Opinion #91016 is generally supported by the supreme court's decision in State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991). That decision, which held that Senator Gerald Conway could not serve in the Legislature and also serve on the faculty of Wayne State College, was issued subsequent to Opinion #91016.

Consequently, for the various reasons stated above, we believe that the membership of the Nebraska School Accountability Commission created by Section 2 of LB 245 would violate the pertinent provisions of the Nebraska Constitution. As was the case in Opinion #91016, we must state that our opinion herein is directed to the proposed legislation contained in LB 245. For the reasons stated in Opinion #91016, this opinion cannot be considered

as directed towards any statute currently in force.

cc. Pat O'Donnell
Clerk of the Legislature

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

Approved by:

Attorney General