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ATTORNEY GENERAL

*No. 23-002*

STATE OF NEBRASKA  
OFFICIAL

JAN 04 2023

**DEPT. OF JUSTICE**

**SUBJECT:** Authority of the Legislature to Limit the Criteria Utilized by the Coordinating Commission for Postsecondary Education to Approve Programs Involving "Institutes" or "Centers."

**REQUESTED BY:** Senator Steve Halloran  
Nebraska State Legislature

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
Lynn A. Melson, Assistant Attorney General

**INTRODUCTION**

You have requested an opinion of the Attorney General regarding the authority of the Legislature to limit the criteria utilized by the Coordinating Commission for Postsecondary Education ["Commission"] to review and approve or disapprove institutes or centers. You state that you are "researching and contemplating legislation to define limitations on the authority of the" Commission "regarding the scope of organizational units, often referred to as institutes or centers, that may be joined or formed by postsecondary institutions." You explain further that you may introduce legislation to "codify an interpretation of 'institutes' found in the Commission's own regulations and guidance." You also describe the potential legislation as codifying certain criteria that the Commission currently employs in approving or disapproving certain programs. You ask whether "such legislation [would] be in conflict with the Commission's authority under Article VII, Section 14 [of the Nebraska Constitution]."

You suggest that the Commission may have exceeded its authority to approve particular centers and you ask “did the Commission exceed its authority, or fail to exercise its statutory duty, by approving these centers?” This office provides opinions to state officers upon questions of law which arise “in the discharge of their duties.” Op. Att’y Gen. No. 157 (December 24, 1985). “[S]ince it is generally the duty of members of the Executive Branch of government to apply and enforce the existing statutes, we have made it our policy to issue opinions to Executive officers only with respect to their duties under existing statutes. . . .” Op. Att’y Gen. No. 97002 at 4 (Jan. 8, 1997). And, it has been our practice and policy to issue opinions to members of the Legislature only with respect to pending or proposed legislation and not with respect to the requirements of existing statutes. *Id.* For that reason, we will not address past decisions of the Commission or its application of existing statutes. We will, however, address your question whether legislation to codify a definition or the criteria used by the Commission to review, approve or disapprove programs, including “institutes,” may conflict with the Commission’s constitutionality authority.

### ANALYSIS

The State Constitution provides “there shall be established the Coordinating Commission for Postsecondary Education which shall, under the direction of the Legislature, be vested with the authority for the coordination of public postsecondary educational institutions.” Neb. Const. art. VII, § 14. The Constitution then defines the term “coordination” to include both “(1) [a]uthority to adopt, and revise as needed, a comprehensive statewide plan for postsecondary education” and “(2) [a]uthority to review, monitor, and approve or disapprove each public postsecondary educational institution’s programs and capital construction projects which utilize tax funds designated by the Legislature in order to provide compliance and consistency with the comprehensive plan and to prevent unnecessary duplication.” *Id.*

After the adoption of the constitutional provision in 1990, the Legislature enacted the Coordinating Commission for Postsecondary Education Act, Neb. Rev. Stat. §§ 85-1401 to 85-1420 (2014 and Cum. Supp. 2022) [the “Act”]. There are several statutory provisions relevant to your inquiry. Neb. Rev. Stat. § 85-1402(3)(a) (2014) uses the constitutional definition of the term coordination to include authority to adopt a comprehensive statewide plan for postsecondary education. Subsection (3)(b) uses the constitutional language above regarding the authority of the Commission “to review, monitor, and approve or disapprove each public postsecondary educational institution’s programs and capital construction projects. . . .” The term program is defined to include “the establishment of any new college, school, major division, education center, or institute but shall not include reasonable and moderate extensions of existing curricula which have a direct relationship to existing programs.” Neb. Rev. Stat. § 85-1402(6) (2014).

Neb. Rev. Stat. § 85-1414 pertains to the Commission’s authority to establish the process for approving or disapproving programs and, at subsections (7) and (8), provides

that it is generally the responsibility of the Commission to establish criteria for the review, monitoring, and approval or disapproval of programs.

You ask whether legislation to codify a specific interpretation of the term “institute” or to codify particular criteria utilized by the Commission would conflict with the Commission’s constitutional authority. You enclosed with your opinion request a copy of a document titled “Definition of Program(s),” which we understand to be an appendix to a guidance document issued by the Commission. A document titled “Guidelines for Submitting Proposals For New Instructional Programs and New Organizational Units” is found at the Commission’s website, prefaced by the statutory notice required by Neb. Rev. Stat. § 84-901.03(2) (Cum. Supp. 2022). That notice includes a statement that the “guidance document is advisory in nature but is binding on an agency until amended by such agency.” Footnote 1 in that guidance document states “[f]or definitions of programs, see Appendix A” and the document you enclosed is Appendix A.<sup>1</sup>

Your question is whether legislation to codify Appendix A’s definition of institute and the criteria appearing in that definition may conflict with the Commission’s constitutional authority. As previously discussed above, Neb. Const. art. VII, § 14 vests in the Commission the authority for the coordination of public postsecondary educational institutions and defines coordination to include the authority to review, monitor, and approve or disapprove programs and capital construction projects. Legislation to divest the Commission of its constitutional jurisdiction could be challenged on constitutional grounds.

This office has previously examined the scope of the Commission’s constitutional authority regarding a bill which would have mandated the establishment of a college of engineering at the University of Nebraska at Omaha. Op. Att’y Gen. No. 95020 (March 13, 1995). We considered several rules of statutory construction. “First, the Nebraska Supreme Court has determined that constitutional provisions are to be construed more liberally than statutory provisions. *Nebraska P.P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 299 N.W.2d 574 (1980). A second principle of statutory construction requires that before interpretation of the language of a constitutional provision may be engaged in, ‘it must be demonstrated that the questioned language is unclear or ambiguous and,

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<sup>1</sup> For your reference, a guidance document is defined at Neb. Rev. Stat. § 84-901(5) (Cum. Supp. 2022) to mean “any statement developed by an agency which lacks the force of law but provides information or direction of general application to the public to interpret or implement statutes or such agency’s rules or regulations.” And Neb. Rev. Stat. § 84-901.03(3) (Cum. Supp. 2022) provides that “[a] person may request in writing that an agency revise or repeal a guidance document or convert a guidance document into a rule or regulation.” The definition of institute [or center which the Commission uses interchangeably] which you bring to our attention is, thus, currently binding on the Commission. It could be amended by the Commission or incorporated into Commission rules or regulations. While binding, we note the definition is not inflexible, as it states “a working definition of centers will *normally be* interpreted to mean” an institution or sector’s academic entities with certain characteristics, and “[i]t is *intended* that centers will not include interdisciplinary units with” certain characteristics. Appendix A at 6.b., c. (emphasis added). This qualifying language reserves a degree of discretion to the Commission in applying the definition.

therefore, requires judicial construction. . . . *State ex rel. Spire v. Beermann*, 235 Neb. 384, 389, 455 N.W.2d 749, 752 (1990).” Op. Att’y Gen. No. 95020 at 4. In that opinion we found the language of Neb. Const. art. VII, § 14, which vests the Commission with the authority to review, monitor, and approve or disapprove programs, to be clear and unambiguous. *Id.* at 5.

Our 1995 opinion also discussed the history of the legislation implementing the 1990 constitutional amendment which changed the Commission from an advisory body to one vested with authority for the coordination of public postsecondary educational institutions. *Id.* at 6-7. We noted that, during floor debate on an amendment regarding education centers, one of the bill’s sponsors stated: “We have established the commission constitutionally with the authority to approve or disapprove programs. We, as the legislature, have in effect said this. . . the floor of the Legislature is not the appropriate place to make those decisions. The appropriate place to make these decisions is within the coordinating commission.” *Id.* at 7 (quoting Floor Debate on LB 663, 92<sup>nd</sup> Leg., 1<sup>st</sup> Sess. 2169 (March 25, 1991) (Statement of Sen. Withem)).

We further pointed out that “because the Nebraska Constitution ‘is not a grant but, rather, a restriction on legislative power, . . . the Legislature is free to act on any subject not inhibited by the Constitution.’ *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 905, \_\_\_ N.W.2d \_\_\_ (1994); [additional citation omitted]. In so acting, however, the court has established that ‘[t]he people of the state, by adopting a Constitution, have put it beyond the power of the [L]egislature to pass laws in violation thereof.’ *State ex rel. Randall v. Hall*, 125 Neb. 236, 243, 249 N.W. 756, 759 (1933). . . .” Op. Att’y Gen. No. 95020 at 4. As the bill in question at that time did not provide for a review or approval of the proposed establishment of a college of engineering by the Commission, we found the bill would violate art. VII, § 14 and that it would also conflict with provisions of the Act.

This office has also considered the scope of authority granted to the Commission to review capital construction projects. Op. Att’y Gen. No. 94015 (March 16, 1994). In that instance, the issue was whether a parking lot demolition and pedestrian plaza construction project fell within the statutory definition of “capital construction project” found at Neb. Rev. Stat. § 85-1402(1) (2014) and, specifically, whether the project fell within the term “capital structure” used in that statute. The Commission had defined the term “capital structure” in its regulations promulgated pursuant to the Act and we found its definition was consistent with the constitutional provision requiring that all capital construction projects which use tax funds designated by the Legislature be subject to Commission review. We concluded that “denying the Commission authority to review the project would be in direct contravention to the constitutional duty imposed upon the Commission. . . .” *Id.* at 3-4.

Neb. Const. art. VII, § 14 provides the Commission “shall, *under the direction of the Legislature*, be vested with the authority for the coordination of public postsecondary educational institutions.” (emphasis added). Similar language is found in Neb. Const.



art. VII, § 10, which provides in part: "The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in . . .the Board of Regents of the University of Nebraska....Their duties and powers shall be prescribed by law." "[T]he purpose of [this] constitutional provision was to remove the University from the plenary control of the Legislature and establish the Board of Regents as an independent body charged with the power and responsibility to manage and operate the University as free from political influence and control as possible." *Board of Regents v. Exon*, 199 Neb. 146, 148, 256 N.W.2d 330, 332 (1977) ["Exon"]. Thus, art. VII, § 10, means that "[t]he general government of the University must remain vested in the Board of Regents..." and, "[i]n prescribing the power and duties of the Regents a legislative act must not be so detailed and specific in nature as to eliminate all discretion and authority on the part of the Regents as to how a duty shall be performed." *Id.* at 149, 256 N.W.2d at 333.


Article VII, § 14 vests the Commission with authority for the "coordination" of public postsecondary institutions. Subsection (2) of Article VII, § 14 defines coordination to include the "[a]uthority to review, monitor, and approve or disapprove each public postsecondary educational institution's programs...in order to provide compliance and consistency with the comprehensive plan and to prevent unnecessary duplication...." While Article VII, § 14 vests this authority in the Commission "under the direction of the Legislature," the Legislature's power to direct cannot be exercised in a manner which improperly infringes the Commission's constitutional "coordination" authority to approve or disapprove programs. "Program" is currently defined to "include the establishment of any new college, school, major division, education center, or institute but shall not include reasonable and moderate extensions of existing curricula which have a direct relationship to existing programs..." Neb. Rev. Stat. § 85-1402(6). The Legislature has also provided that the Commission "shall establish criteria for the review, monitoring, and approval or disapproval of programs." Neb. Rev. Stat. § 85-1414(7). "The [C]ommission's criteria shall be designed to (a) meet educational needs and (b) assure efficiency and avoid unnecessary duplication," and "shall include: (i) Centrality to the role and mission of the public institution; (ii) Consistency with the comprehensive statewide plan; (iii) Evidence of need and demand; and (iv) Adequacy of resources to support proposed new programs." *Id.* Further, "[t]he criteria shall not infringe on the prerogative of the governing boards to make decisions on the quality of staff and the design of curriculum." *Id.*

The Legislature presently has directed the Commission to develop the criteria for approval of disapproval of programs. While § 85-1414(7) imposes some mandatory requirements for those criteria, it does so in general terms and in a manner which does not unduly restrict the Commission's exercise of its constitutional coordination authority. You have not provided a specific legislative bill for our review, but you appear to contemplate legislation which would put into statute specific criteria for the Commission to employ when engaging in its review of programs involving institutes or centers. Legislation "so detailed and specific in nature as to eliminate all discretion and authority on the part of the" Commission to exercise its coordination authority in this area may contravene art. VII, § 14. *Exon*, 199 Neb. at 149, 256 N.W.2d at 333. While the answer is not certain, a court could find that codifying specific and limiting criteria defining

“institutes” would impermissibly restrict the Commission’s constitutional “coordination” authority to approve or disapprove programs.

Sincerely,

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Approved by:

  
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pc. Brandon Metzler  
Clerk of the Nebraska Legislature

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