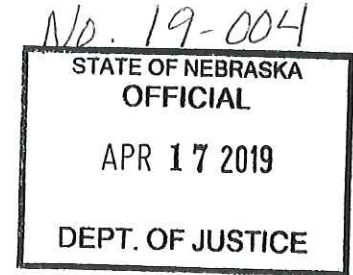




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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL



**SUBJECT:** Constitutionality of LB 644—the *Nebraska Workforce Diploma Act*

**REQUESTED BY:** Senator Mike McDonnell  
Nebraska State Legislature

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
Leslie S. Donley, Assistant Attorney General

You have requested an opinion from this office regarding the constitutionality of Legislative Bill 644, which would create the "Nebraska Workforce Diploma Act" (Act). You indicate in your opinion request letter that LB 644 "authorizes the Nebraska Department of Labor to institute a program providing a pathway for adults without a high school diploma to earn the missing credits necessary to receive a high school diploma." You state that "[u]nder the Act, an 'eligible workforce diploma program' is defined as an 'accredited or approved, public or private, high school provider.'" Program providers are directly reimbursed by the Department of Labor when students reach certain educational milestones described in the bill. You question whether LB 644 violates Neb. Const. art. VII, § 11, which prohibits the "appropriation of public funds . . . to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision . . . ." You have also inquired whether a distinction exists between state "funding for private providers of K-12 high school programs for ages five to twenty-one versus an adult high school program for ages twenty-two and older?" Our responses to your inquiries are set out below.

## LEGISLATIVE BILL 644

Sections two to six of LB 644 create the Act. Section 3 requires the Department of Labor (Labor), on or before August 15, 2019, and each year thereafter, to “request applications from eligible program providers to participate in the workforce diploma program.” Sec. 3(2). An “eligible workforce diploma program provider” is defined as

an accredited or approved, public or private, high school provider. An eligible program provider shall also have at least two years of experience providing adult dropout recovery services, including recruitment, learning plan development, and proactive coaching and mentoring culminating in qualification for a high school diploma.

Sec. 3(1). Participants in the workplace diploma program must be at least twenty-two years of age and have no high school diploma or high school equivalency diploma. *Id.* A “workplace diploma program” is not defined.

Providers applying to participate in the program must demonstrate “evidence” of several criteria, including “[a]ccreditation or approval by the State Department of Education or accreditation by a recognized regional accrediting body or consolidation thereof.”<sup>1</sup> Sec. 3(2)(a)-(k). A workplace diploma program may be offered “in a campus-based, blended or online modality.” Sec. 3(3). Labor is required to announce the approved providers on or before September 15, 2019. Providers are then required to establish a program and begin accepting students on or before October 15, 2019. Unless otherwise required in the Act, a provider is not required to reapply once approved. Sec. 3(4).

Section 4 requires Labor to reimburse each provider participating in the program an amount which correlates to a student’s completion of a specific “milestone.” The bill lists six milestones, beginning with a \$250 reimbursement for the completion of five credit hours,<sup>2</sup> and culminating in a \$1,000 reimbursement when a “high school diploma” is attained. Sec. 4(1)(a)-(f). Labor is required to reimburse providers based on the order of invoices received until all available funds are exhausted. Sec. 4(3). Section 5 sets out the reporting requirements and the minimum program performance standards for providers. Section 6 sets out the legislative intent to appropriate \$2,500,000 for fiscal years 2019-20 and 2020-21 to carry out the provisions of the Act. Finally, Section 8 includes an emergency clause.

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<sup>1</sup> The bill is silent as to what standards the State Department of Education or other accrediting body would employ to accredit or approve the entities seeking to become providers under the program.

<sup>2</sup> For purposes of section 4, “five credits equals one unit of instruction that correlates to one semester of one course in the traditional high school environment.” Sec. 4(2).

The Introducer's Statement of Intent for LB 644 indicates that

[i]n an effort to promote workforce development in Nebraska, LB 644 is intended to provide the framework for creation, administration, and implementation of an adult workforce diploma program that would provide adults, at least twenty-two years of age, the opportunity to complete their high school diploma and develop critical career and technical skills to prepare for employment.

Procedurally, the bill was scheduled for hearing by the Legislature's Business and Labor Committee on February 11, 2019. It remains in committee.

### **RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS**

#### Nebraska Constitution

Three provisions in the Nebraska Constitution are pertinent to your inquiries. First, Neb. Const. art. VII, § 1 provides, in pertinent part, that "[t]he Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Second, Neb. Const. art. VII, § 2 provides that "[t]he State Department of Education shall be comprised of a State Board of Education and a Commissioner of Education. The State Department of Education shall have general supervision and administration of the school system of the state and of such other activities as the Legislature may direct." Third, Neb. Const. art. VII, § 11 states, in pertinent part, that "[n]otwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . ."

#### Revised Statutes of Nebraska

Several provisions of law govern the qualifications for and issuance of high school diplomas and their equivalents. With respect to high school diplomas awarded to an individual attending high school, Neb. Rev. Stat. § 79-729 (2014) states:

The Legislature recognizes the importance of assuring that all persons who graduate from Nebraska high schools possess certain minimum levels of knowledge, skills, and understanding. Beginning in school year 1987-88, each high school student shall complete a minimum of two hundred high school credit hours prior to graduation. At least eighty percent of such credit hours shall be core curriculum courses prescribed by the State Board of Education. The State Board of Education may establish recommended statewide graduation guidelines. This section does not apply to high school students whose individualized education plans prescribe a different course of instruction. This section does not prohibit the governing board of any

high school from prescribing specific graduation guidelines as long as such guidelines do not conflict with this section. For purposes of this section, high school means grades nine through twelve and credit hour shall be defined by appropriate rules and regulations of the State Board of Education but shall not be less than the amount of credit given for successful completion of a course which meets at least one period per week for at least one semester.

Neb. Rev. Stat. §§ 79-730 to 79-733 (2014) pertain to diplomas of high school equivalency.<sup>3</sup> The Commissioner of Education may issue this diploma to any person when the conditions enumerated in Neb. Rev. Stat. § 79-730 are met. A diploma of high school equivalency “convey[s] all the significance and privilege of a regular high school diploma.” *Id.* Under Neb. Rev. Stat. § 79-733, the University of Nebraska, the state colleges, and the community colleges must accept diplomas of high school equivalency for enrollment purposes.<sup>4</sup>

#### Nebraska Administrative Code

In accordance with the authority in Neb. Rev. Stat. § 79-732 (2014) and § 79-2307 (2014), the State Board of Education has adopted and promulgated Title 92, *Nebraska Administrative Code*, Chapter 81, *Rules and Regulations for the High School Equivalency Program* (rev. April 27, 2016)<sup>5</sup> (Rule 81) and Title 92, *Nebraska Administrative Code*, Chapter 82, *Regulations Governing the Diploma of High School Equivalency Assistance Act* (rev. March 20, 2016) (Rule 82). Under Rule 81, § 002.01, the approved test for purposes of attaining a diploma of high school equivalency is “the General Educational Development Test as prepared and furnished by GED® Testing Service.” Applicants are required to register online with the GED® Testing Service (§ 004.01), and the minimum passing scores are determined by the GED® Testing Service in effect at the time the test is taken (§ 005.01A). “Official GED® Testing Centers” include Nebraska public secondary and postsecondary institutions authorized by the Commissioner of Education to administer the GED® test (§ 002.04).

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<sup>3</sup> Legislation giving the State Board of Education authority to issue “certificates” of high school equivalency was first enacted in 1959. See 1959 Neb. Laws LB 249 [Session Laws, 1959, ch. 399, page 1358].

<sup>4</sup> In 2013, the Nebraska Legislature adopted the Diploma of High School Equivalency Assistance Act, Neb. Rev. Stat. §§ 79-2301 to 79-2308 (2014, Cum. Supp. 2018). Under Neb. Rev. Stat. § 79-2302 (2014), “[t]he purpose of the . . . [a]ct is to provide assistance to institutions which offer high school equivalency programs in order to defray the costs associated with participation in such programs.”

<sup>5</sup> The earliest regulations pertaining to diplomas of high school equivalency date back to January 1978.

## ANALYSIS

You have asked whether LB 644 would violate Neb. Const. art. VII, § 11, which prohibits the “appropriation of public funds . . . to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . .” Obviously, the answer to your question depends on the type of provider selected to operate a workforce diploma program. The bill defines a provider as “an accredited or approved, public or private, high school provider.” A “high school provider” is not defined in the bill and, on its face, could encompass a variety of entities, like a school district or community college. However, it is our understanding that LB 644 is premised on private companies acting as high school providers, so we will respond to your questions on that basis. Also, based on your opinion request letter, a high school provider, which must be accredited or approved by the State Department of Education or other recognized accrediting body, is presumed to be a private school under the Act.

### Neb. Const. art. VII, § 11

Our analysis begins with the fundamental principle that the Nebraska Legislature has plenary legislative authority except as limited by the state and federal Constitutions. *Lenstrom v. Thone*, 209 Neb. 783, 789, 311 N.W.2d 884, 888 (1981) [*Lenstrom*]. “The Nebraska Constitution is not a grant but, rather, a restriction on legislative power, and the Legislature may legislate on any subject not inhibited by the Constitution.” *Id.*; *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 595, 544 N.W.2d 344, 349 (1996).

The question as to whether a high school provider can receive appropriations of public funds is controlled by a series of Nebraska Supreme Court cases construing art. VII, § 11. In *Lenstrom*, the Nebraska Supreme Court determined that a scholarship program providing financial assistance directly to students attending eligible postsecondary institutions did not violate art. VII, § 11. The court noted that “[t]he literal language of the [provision] prohibits ‘appropriation . . . to’ any school not owned by the state.” *Id.* at 787, 311 N.W.2d at 887. It further noted that the Legislature was free to enact laws and appropriate funds for any public purpose unless restricted by the state or federal Constitution. *Id.* at 789, 311 N.W.2d at 888. The court found that art. VII, § 11 did not prohibit appropriations to students attending nonpublic schools, and it was not for the court to determine, absent “some plain restriction in the Constitution” that the scholarship program did not serve a public purpose. *Id.* at 791, 311 N.W.2d at 889.

In *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982), a parent of a student attending private school sought a writ of mandamus to compel the local school district to provide bus transportation for the child. The request was based on a statute that requires a public school district, in the event it provides transportation facilities for its students, to extend those facilities to children in approved nonpublic private schools under certain circumstances. The trial court found the statute to be constitutional, and ordered the school district to provide the requested bus service. *Id.* at 732, 320 N.W.2d at 474. Drawing on its recent holding in *Lenstrom*, the court found

that “[t]he record . . . does not reflect that this is an instance involving a direct appropriation of public funds to a nonpublic institution” and that “any benefit that may inure to the nonprofit private institution is merely incidental and certainly cannot be deemed to be an ‘appropriation . . . to’ that institution.” *Id.* at 737, 320 N.W.2d at 476.

In *State ex rel. Creighton University v. Smith*, 217 Neb. 682, 353 N.W.2d 267 (1984), Creighton University sought a writ of mandamus requiring the state health director to consider its contract proposal for cancer research authorized under Neb. Rev. Stat. §§ 81-637 to 81-640 (Reissue 1981). Those statutes specified the considerations to be taken by the director in making grants and contracts for the research of cancer and smoking diseases. Regulations subsequently adopted under those statutes limited the contract awards to only the University of Nebraska or any other Nebraska public postsecondary institution having a college of medicine. *Id.* at 685-86, 353 N.W.2d at 270. The trial court issued a writ a mandamus finding, *inter alia*, that the regulations should be drafted to permit private institutions with a college of medicine in Nebraska to qualify for the contracts. On appeal, since the statutes at issue did not set aside money for Creighton’s use or “vest in Creighton any right to receive state funds,” the court concluded that “there [was] no appropriation of public funds to Creighton.” *Id.* at 690, 353 N.W.2d at 272.<sup>6</sup>

Legislative bill 644 would create a workplace diploma program where an approved provider is authorized to receive reimbursements directly from the governing state agency based on educational milestones achieved by the students enrolled in the program. A provider is required to “submit monthly invoices to [Labor] no later than the tenth day of each month for milestones met in the previous calendar month.” Sec. 4(3). In addition, “[t]he department shall reimburse approved program providers in the order in which invoices are received *until all funds appropriated for the workforce diploma program are exhausted.*” *Id.* (emphasis added).

Article VII, § 11 “prohibits appropriations by the Legislature *to* nonpublic schools.” *Cunningham v. Lutjeharms*, 231 Neb. 756, 759, 437 N.W.2d 806, 809 (1989) (emphasis in original). “Regarding appropriation of public funds, to appropriate means to set apart, or assign to a particular person or use in exclusion of others, to use or employ for a particular purpose, or in a particular case.” *State ex rel. Creighton* at 688, 353 N.W.2d at 271. In the cases set out above, the Nebraska Supreme Court found the various statutes at issue to be constitutional because there was no direct appropriation of funds to the nonpublic schools involved and any benefit that might inure to the schools was merely

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<sup>6</sup> See also *Father Flanagan’s Boys Home v. Dept. of Social Services*, 255 Neb. 303, 583 N.W.2d 774 (1998) (Finding constitutional a statute requiring the state to pay the educational costs of state wards in a nonpublic school.); and *Cunningham v. Lutjeharms*, 231 Neb. 756, 437 N.W.2d 806 (1989) (A statute requiring public school districts to purchase and lend textbooks to students in private schools determined to be constitutional where the court found that the statute permitted neither the distribution of public funds nor the loaning of publicly owned textbooks to private schools.)

incidental. Here, LB 644 requires, on its face, that public funds be set aside to directly reimburse the nonpublic school providers. The benefit to the provider is in no way incidental; it is a direct monetary payment to a provider. Consequently, we conclude that the direct reimbursements to a nonpublic school provider contemplated in the Nebraska Workplace Diploma Act contravene art. VII, § 11, and find LB 644 unconstitutional on this basis.<sup>7</sup>

Your second question asks us to consider whether a distinction exists “between the state providing funding for private providers of K-12 high school programs for ages five to twenty-one versus an adult high school program for ages twenty-two and older?” The constitutional provision implicated by your question, art. VII, § 1, requires the Legislature to “provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.” Your question suggests that art. VII, § 11 may not apply to LB 644 because the individuals participating in the program will be over twenty-one.

“In ascertaining the intent of a constitutional provision from its language, the court may not supply any supposed omission, or add words to or take words from the provision as framed. Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and therefore construction is necessary.” *Pony Lake School Dist. 30 v. State Comm. for the Reorg. of School Dists.*, 271 Neb. 173, 185, 710 N.W.2d 609, 620 (2006) (internal citations omitted). The prohibition under art. VII, § 11 is the appropriation of public funds to nonpublic schools. An exception in this provision allows the state to contract with nonpublic schools for nonsectarian services for the benefit of disabled children under the age of twenty-one. However, there are no other exceptions or distinctions in art. VII, § 11 that would obviate the prohibition.

In addition, a presumption that school districts are limited to providing “high school” instruction to individuals up to the age of twenty-one is misplaced. Under Neb. Rev. Stat. § 79-11,133 (2014), school districts may provide for the instruction of any person who is sixteen years old or older, who is not in high school and not required to be in high school, and “who lacks sufficient mastery of basic educational skills to enable him or her to function effectively in society . . . .”<sup>8</sup> There is no distinction to be drawn regarding the age of the individual receiving the instruction. As such, our conclusion that LB 644 violates art. VII, § 11 remains unchanged.

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<sup>7</sup> While not encompassed in your opinion request letter, we also believe there is a serious question whether LB 644 unconstitutionally divests the State Department of Education of its constitutional authority to supervise and administer the school system of the state. See *State ex rel. Ry. Com’n v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949).

<sup>8</sup> See also Neb. Rev. Stat. §§ 79-11,134 to 79-11,135 (2014), which govern the Adult Education Program established in the State Department of Education.

Neb. Const. art. III, § 25

Neb. Const. art. III, § 25 provides, in pertinent part, that

[n]o money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued as the Legislature may direct, and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever by resolution.

In 1979, the Legislature enacted laws to clarify what constitutes a “specific appropriation” under art. III, § 25. In that regard, Neb. Rev. Stat. § 49-804 (2010) provides:

An appropriation shall only exist when the following criteria have been met:

- (1) There shall be included the phrase there is hereby appropriated;
- (2) A specific fund type shall be identified and the fund shall be appropriated;
- (3) The amount to be appropriated from such fund shall be identified;
- (4) A specific budget program or a specific statement reflecting the purpose for expending such funds shall be identified; and
- (5) The time period during which such funds shall be expended shall be identified.

In addition, Neb. Rev. Stat. § 49-805 (2010) states that “[a]ny legislation not meeting the criteria established in section 49-804 shall not be considered a valid appropriation as defined in Article III, section 22, of the Nebraska Constitution.”

Section 6 of LB 644 indicates that “[i]t is the intent of the Legislature to appropriate two million five hundred thousand dollars each fiscal year for fiscal years 2019-20 and 2020-21 to the Department of Labor to carry out the Nebraska Workforce Diploma Act.” And as noted by the Legislative Fiscal Analyst’s Office in its Fiscal Note to LB 644, prepared February 6, 2019: “LB 644 is silent regarding the fund source for the appropriation intended in section 6. It is assumed that funding would come from the General Fund.” Obviously, Section 6 does not contain all of the criteria listed in § 49-804 and, as a result, does not constitute “a specific appropriation made by law” required under art. III, § 25; § 49-804; and the *Rules of the Nebraska Unicameral Legislature*, Rule 5, Sec. 2(d) (adopted January 23, 2019).

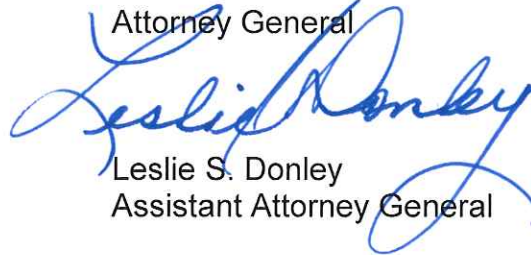


**CONCLUSION**

Based on the foregoing, we conclude that LB 644's authorization of direct reimbursement payments to a nonpublic school provider operating a workforce diploma program is an impermissible appropriation of public funds in violation of Neb. Const. art. VII, § 11. We further conclude that the intent language in Section 6 of the bill is insufficient to constitute a valid appropriation of public funds under applicable Nebraska law.

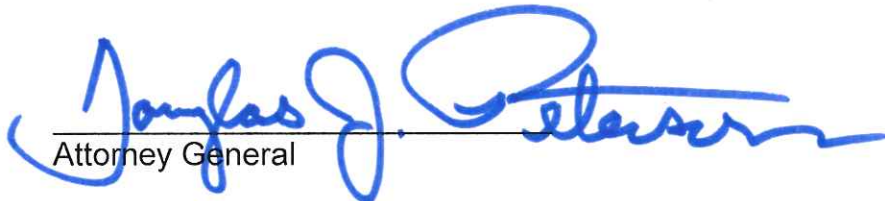
Sincerely,

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Approved by:



Attorney General

pc: Patrick J. O'Donnell  
Clerk of the Nebraska Legislature