



Office of the Attorney General
State of Arizona

Terry Goddard
Attorney General

Direct Line: 542-3333
Fax: 542-8308

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The Honorable James P. Weiers
Speaker of the House
House of Representatives
1700 West Washington, Suite H
Phoenix, Arizona 85007-2844

The Honorable Tom Horne
Superintendent of Public Instruction
Department of Education
1537 West Jefferson
Phoenix, Arizona 85007-2844

Re: Informal Opinion Regarding ISA for Scholarship Program (R08:032)

Dear Speaker Weiers and Superintendent Horne:

You asked for an informal opinion about whether the House of Representatives (the "House") may enter into an Interagency Service Agreement ("ISA") with the Department of Education (the "Department") for the purpose of funding two scholarship programs. The two scholarship programs are the Displaced Pupils Choice Grants (A.R.S. §§ 15-817 through -817.07) and the Arizona Scholarships for Pupils with Disabilities (A.R.S. §§ 15-891 through 891.06).

For the reasons described below, we conclude that the House does not have the constitutional or statutory authority needed to provide funding to the Department for the two scholarship programs through an ISA. If the House were to do so, it would infringe on the Legislature's appropriation authority (*McDonald v. Frohmiller*, 63 Ariz. 479, 489, 163 P.2d 671, 675 (1945)) and the executive branch's functions. *See generally, State ex. rel. Woods v. Block*, 189 Ariz. 269, 275, 942 P.2d 428, 434 (1997). Although this is not a formal opinion issued pursuant to A.R.S. § 41-193(A)(7), it is intended to provide you with guidance to assist you in performing your official duties.

Factual Background

As we understand the situation, the Legislature historically has given the House a lump sum appropriation that was to be used for the operation of the House. *See, e.g.,* Laws 2007, 48th Legislature, ch. 255, § 57 (appropriating lump sum of \$13,854,800 to the House for fiscal years 2007-2008 and 2008-2009). Over the years, the monies appropriated to the House have exceeded the costs of operation, and the House has retained those funds in a surplus operating account. We

understand that the House would like to use at least \$5,000,000 in its surplus operating account to fund the two scholarship programs. The House's surplus operating account was not mentioned in the legislation regarding appropriations for fiscal year 2008-2009.

In the past, the Legislature separately appropriated funds for the two scholarship programs. *See* Laws 2007, 48th Legislature, ch. 255, § 29 (appropriating \$2,500,000 for the Displaced Pupil Scholarship and \$2,500,000 for the Displaced Pupils Choice Grant Program). These appropriations were made to the Department by separate line items for each scholarship program. *See id.* No monies were appropriated for the scholarship programs for fiscal year 2008-2009. *Compare* Laws 2007, 48th Legislature, ch. 255 (no appropriation for the two scholarship programs) *with* 48th Legislature, 2d Reg. Session, SB1031, § 7 (unenacted legislation that contained a separate line item appropriation of \$2,500,000 for each scholarship program).

Analysis

The authority and powers of the Legislature and state departments and agencies are set forth in the Arizona Constitution and state statutes. We have found no constitutional or statutory authority for the House to operate or fund the two scholarship programs described in A.R.S. § 15-817 and A.R.S. § 15-891. Instead, those statutes authorize the Department to operate the scholarship programs with funds that the Legislature appropriates to the Department.

A. Constitutional and Statutory Appropriation Authority

Several longstanding legal principles guide our analysis. First, monies that have been appropriated can be used only for the authorized purpose. *McDougall v. Frohmiller*, 61 Ariz. 395, 403, 150 P.2d 89, 92 (1944). Second, public monies may not be spent, even for a public purpose, unless there has been an appropriation. *Proctor v. Hunt*, 43 Ariz. 198, 201, 29 P.2d 1058, 1059 (1934). Third, to modify an appropriation's purpose, the House, the Senate, and the Governor all must approve of the modification. *McDonald v. Frohmiller*, 63 Ariz. at 489, 163 P.2d at 675. Fourth, the House may not act unilaterally to appropriate funds without violating the principles of separation of powers, bicameralism, and presentment. *See id.*; *see also* Ariz. Att'y Gen. Ops. I89-097, I88-077 and I87-107 (all concluding that "approval by the JLBC approval over executive office expenditures violated fundamental principles embodied in our state constitution: separation of powers (Ariz. Const., art. III), bicameralism (*Id.* at art. IV, pt. 2, § 15) and the presentment requirement (*Id.* at art. V, § 7)).

Applying these well-established legal principles to your question, the House may not spend public monies for the two scholarship programs because there has been no appropriation to the House for that purpose. To conclude otherwise would allow the House to undermine the constitutional principles described above.

Statutory ISA Authority

The use of an ISA as a funding mechanism does not change this result. A.R.S. § 35-148 allows budget units to enter into an ISA so that one budget unit may reimburse a second budget unit for services performed by the second budget unit. Specifically, A.R.S. § 35-148 provides, in part:

Interagency Service Agreements entered into between budget units may provide for reimbursement for services or advancement of funds for services to be performed.

A.R.S. § 35-148, however, does not provide any budget unit with additional substantive authority. An ISA and the authorizing statutes simply allow one budget unit to provide a service (e.g., accounting functions) to a second budget unit and to receive reimbursement for providing that service. Here, by operating the two scholarship programs, the Department would not be providing a service to the House. Therefore, the House would need independent substantive authority to run the two scholarship programs on its own before the House could use an ISA to have another budget unit administer the two scholarship programs for the House.

Conclusion

Given the constitutional principles of separation of powers, bicameralism, and presentment, we can find no authority for the House to operate or to fund the two scholarship programs, even if the House enters into an ISA with the Department to do so.

Respectfully,


Mary O'Grady
Solicitor General

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