CITIES: Municipal home rule; Regulation of transient merchants; county fair. Iowa Code §§ 9C.2, 174.3, 174.4 (2005). Iowa Code chapter 174 vests exclusive control over the fairground with the officers of the fair. A city cannot enforce a local ordinance governing transient merchants on a fairground at any time. (Moline to Saur, Fayette County Attorney, 4-20-06) #06-4-1

April 20, 2006

W. Wayne Saur
Fayette County Attorney
120 East Charles Street
Oelwein, Iowa 50662

Dear Mr. Saur:

You have requested an opinion from this office addressing whether Chapter 122 of West Union City Code, governing transient merchants, can be enforced as to persons, organizations and events on the fairgrounds at times other than during the annual fair. Iowa Code chapter 174 vests exclusive control over the fairground with the officers of the fair. Therefore, we must conclude that a city cannot enforce a local ordinance governing transient merchants on a fairground at any time.

Analysis of this issue requires examination of the interrelationship between the home rule authority of Iowa cities, the statutes regulating transient merchants and the statutes governing county fairs. Cities are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government. Iowa Const. art. III, § 38A. Iowa Code chapter 364 sets forth the powers and duties of cities. The statute essentially mirrors the municipal home rule amendment, providing that "[a] city may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents...." Iowa Code § 364.1 (2005); see also Iowa Code § 364.2(2) (2005) ("[a] city may exercise its general powers subject only to limitations expressly imposed by a state or city law").

Iowa Code chapter 9C provides for the licensing of transient merchants by the secretary of state. This chapter explicitly recognizes the power of cities to regulate transient merchants by making it unlawful for a transient merchant to sell

goods of any kind within the state, "outside of the limits of any city . . . or within the limits of any city . . . that has not by ordinance provided for the licensing of transient merchants," unless merchant has obtained a license pursuant to chapter 9C. Iowa Code § 9C.2 (2005). If a city has an ordinance requiring licensing of transient merchants, a transient merchant must obtain a license from the city, rather than the secretary of state, before doing business in that city.

Under this authority, West Union City has enacted Chapter 122 of the West Union City Code. The ordinance requires any transient merchant conducting business within West Union City to first post a bond with the secretary of state, in accordance with chapter 9C, and obtain a license from the city. "Any person engaging in peddling, soliciting or in the business of a transient merchant in the City without first obtaining a license" from the city is in violation of the ordinance. West Union City Code, § 122.03.

Iowa Code chapter 174 authorizes the formation and operation of district and county fairs. County fairs are organized as corporations and management authority for each fair rests with the officers of the corporation, commonly referred to as the fair board. Iowa Code § 174.1(2), (4) (2005). Two sections of chapter 174 control the outcome of your inquiry.

> 174.3 Control of fair event and fairground.
> An Ordinance or resolution of a county or city shall not in any way impair the authority of a fair. The fair shall have sole and exclusive control over management *of a fair event and fairgrounds*.
>
> 174.4 Permits to sell articles.
> The management of a fair may grant a written permit to a person determined proper by the management, to sell fruit, provisions, and other articles not prohibited by law, under such regulation as the management may prescribe.

Iowa Code §§ 174.3, 174.4 (2005) (emphasis added).

Although a city has the general home rule authority to regulate transient merchants, this authority is subject to limitations imposed by state law. Iowa Code §§ 364.1, 364.2(2) (2005). Code section 174.3 explicitly places "sole and

exclusive control over . . . fairgrounds" with the fair board, and prohibits enforcement of a city ordinance impairing this authority. Further, section 174.4, explicitly empowers the fair board to regulate the sale of "fruit, provisions, and other articles not prohibited by law." The statutes authorizing the fair board to control the fairgrounds and grant permits to merchants do not explicitly limit this authority to the time the fair is being held. To the contrary, by indicating that the fair board has sole and exclusive control over management of both "the fair event and fairgrounds," section 174.3 implies that the fair board's authority over the fairgrounds extends to periods of time when a fair event is not occurring.

The ultimate goal of statutory interpretation is to "determine the legislature's intent when it enacted the statute." City of Cedar Rapids v. James Properties, Inc., 701 N.W.2d 673, 675 (Iowa 2005). "If the language used is clear and unambiguous, the court applies a plain and rational meaning in harmony with the subject matter of the statute." Id. The plain language of section 174.3 supports a conclusion that a city may not at any time enforce an ordinance governing transient merchants against persons, organizations, or events on the fairground. This conclusion is reinforced by a review of the legislative history of section 174.3.

Prior to 1999, this section provided:

> 174.3 Control of Grounds.
> *During the time a fair is being held*, no ordinance or resolution of any city shall in any way impair the authority of the society, but it shall have sole and exclusive control over and management *of such fair*.

Iowa Code § 274.3 (1997) (emphasis added). In 1996, a dispute arose in Madison County regarding the county fair association's construction of a figure-eight racetrack at the fairgrounds. Perkins v. Madison County Livestock & Fair Ass'n., 613 N.W.2d 264 (Iowa 2000). A number of neighboring property owners brought suit seeking to have the racetrack removed or to permanently enjoin figure-eight racing at the fairgrounds. "The district court held that the races were not a nuisance, but concluded that the Association had violated the Madison County Zoning Ordinance by not obtaining the necessary permit and variance for construction of the racetrack." Id. at 266-67. While appeal from this ruling was pending, the legislature amended section 174.3 by adding a reference to county ordinances and deleting the phrase which made the section applicable only

"[d]uring the time a fair is being held." 1998 Iowa Acts (78th G.A.), ch. 204, § 29. Section 174.3 was amended to its current form in 2004, when the legislature revised the final clause of the section to indicate that the authority of the fair extended to "management of a fair event and fairgrounds." 2004 Iowa Acts (80 G.A.), ch. 1019, § 10.

"[A]n amendment to a statute raises a presumption that the legislature intended to change the law." City of Cedar Rapids v. James Properties, Inc., 701 N.W.2d at 677. "This presumption of intent to change existing law is particularly strong when the amendment follows a contrary executive or judicial interpretation of an unambiguous statute." Midwest Automotive III, LLC v. Iowa Dep't. of Transportation, 646 N.W.2d 417, 425 (Iowa 2002). We must conclude that, by eliminating the time limitation from section 174.3 and expanding the scope of the fair authority to explicitly include both the fair event and the fairgrounds, the legislature intended to change the law and allow the authority of the fair board to control the fairgrounds to be superior at all times to a local ordinance which would impair that authority.

In summary, it is our conclusion that Iowa Code chapter 174 vests exclusive control over the fairground with the officers of the fair. Therefore, we must conclude that a city cannot enforce a local ordinance governing transient merchants on a fairground at any time.

Sincerely,

Stephen Moline
Assistant Attorney General

LAW ENFORCEMENT; PEACE OFFICER: Status of tribal "law enforcement officers" as "peace officers" under the Criminal Code. Iowa Code §§ 80B et seq., 801.4 (2006). Officers of a tribal government who are "responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state" are of the same class as other Iowa peace officers who serve and protect the public pursuant to the Criminal Code. Both share the same state hiring, training, and certification standards and law enforcement duties. Accordingly, these tribal law enforcement officers, though not enumerated as a category of "peace officer" under the Criminal Code, fall within the catchall definition of that term and gain all the powers, privileges, and immunities that accompany the title. (Sieverding to Gronstal, State Senator, 9-16-06) #06-9-1

September 19, 2006

The Honorable Mike Gronstal
State Senator, Fiftieth District
220 Bennett Avenue
Council Bluffs, IA 51503

Dear Senator Gronstal:

The question you have posed is whether a law enforcement officer of the Sac and Fox Tribe of the Mississippi in Iowa ("Tribe") is a "peace officer" as defined in the Iowa Code of Criminal Procedure ("Criminal Code"), chapter 801 *et seq*. This question, we understand, may be submitted to a court of law. Ordinarily, we do not issue opinions on matters where litigation is pending or imminent. 61 Iowa Admin.. Code 1.5(3)(a) (2006) ("The attorney general may decline to issue an opinion where . . . [t]he matter is pending in litigation or litigation is imminent, or other formal proceeding provided by law for resolution of the issue and issuance of the opinion could interfere with the authority of the other forum."). We are proceeding with an opinion, nevertheless, with due respect for the judicial process but with the hope that this opinion may help the parties resolve these issues short of litigation. We recognize that a court may accord our opinion only "respectful consideration" and may reach a contrary conclusion. *See Bradley v. Iowa Dept. of Personnel*, 596 N.W.2d 526, 530 (Iowa 1999).

Your query concerns the Tribe's authority to identify and respond to criminal activity on its reservation land. If tribal law enforcement officers meet this definition for "peace officer," then they can arrest offenders and otherwise keep the peace pursuant to the Criminal Code. Otherwise, their law enforcement authority is limited to that inherent in the Tribe's sovereignty. As is often the case, this question of statutory interpretation requires careful consideration of other Iowa Code provisions. The present inquiry also focuses on recent amendments to the Iowa Law Enforcement Academy And Council Act ("Act"), Iowa Code chapter 80B *et seq*., changes which expanded the purview of the Act to include tribal law enforcement officers. For reasons outlined below, we conclude that tribal officers who are subject to the Act's training and qualification standards are "peace officers" under the Criminal Code with the same authority as other "peace officers" in the Iowa law enforcement community.

To provide the relevant context, we turn initially to some background information before beginning the legal analysis.

Background

The Sac and Fox Tribe of Mississippi in Iowa is a federally recognized tribal entity with land located in Tama County, Iowa. *See State v. Lasley*, 705 N.W.2d 481, 484 (Iowa 2005) (citations omitted). Where tribal land is involved, Indian tribes exercise governmental powers "by reason of their original tribal sovereignty." *United States v. Wheeler*, 435 U.S. 313, 323–24 (1978). This sovereignty necessarily is limited by the plenary power of Congress to control Indian affairs. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). In the context of law enforcement, Congress has allowed tribes only to prosecute non-major offenses that an Indian committed on tribal land. *United States v. Lara*, 541 U.S. 193, 207–10 (2004); *Duro v. Reina*, 495 U.S. 676, 686–88 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206–09 (1978).

Tribal sovereignty appears less limited with respect to policing tribal land. Tribal officers may arrest and detain offenders in order to transport them to the proper authorities for prosecution, even if the tribe itself lacks criminal jurisdiction to prosecute. *Duro*, 495 U.S. at 697 (citations omitted). Tribal police also may be able to search persons and investigate illegal activities on tribal land. *See Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179–80 (9th Cir. 1975); *State v. Haskins*, 887 P.2d 1189, 1195–96 (Mont. 1994); *State v. Ryder*, 649 P.2d 756, 757–60 (N.M. 1982).

Many tribes have buttressed and increased their inherent policing authority through legislation. In Arizona, the legislature has granted "all law enforcement powers of peace officers in this state" to "any Indian police officer who is appointed by the ... governing body of an Indian tribe as a law enforcement officer and who meets the [state] qualifications and training standards." Ariz. Stat. § 13-3874 (2006). The New Mexico legislature similarly has authorized tribal officers, who are not otherwise permitted, to act as New Mexico peace officers pursuant to commission agreements. N.M. Stat. §§ 29-1-11(A), (B) (2006). Whether the Iowa legislature reached a similar result when it recently amended Iowa Code chapter 80B is the central issue here.

Iowa Code chapter 80B, as noted, is the Iowa Law Enforcement Academy And Council Act. Iowa Code § 80B.1 (2006). This Act, together with the accompanying provisions of the Iowa Administrative Code, sets the hiring, training, and certification standards for Iowa law enforcement. *See* Iowa Code § 80B.11 (2006); 501 Iowa Admin. Code 2.1–3.12 (2006). To be an officer with the power to enforce Iowa law, the candidate must satisfy these requirements and gain certification from an approved state academy or advisory council. *See* Iowa Code § 80B.11; Iowa Admin. Code 3.1(1), 3.8 (2006). Only persons who are already law enforcement officers

or who are sponsored by a law enforcement agency go through this process. Iowa Code §§ 80B.11D, 80B.11E (2006).

Until 2003, police officers of a tribal government did not appear bound by these requirements nor in need of this training and certification. By amending the Act in 2003, the legislature changed this state of affairs, to have tribal officers selected, trained, and certified in the same manner as other Iowa law enforcement officers. 2003 Iowa Acts, 80th G.A., ch. 87, §§ 1, 3–4. The legislature accomplished this end by amending the definition of "law enforcement officer" as used in chapter 80B to include tribal officers who "are responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state." That definition now reads,

> "Law enforcement officer" means an officer appointed by the director of the department of natural resources, a member of a police force or other agency or department of the state, county, city, *or tribal government* regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state and all individuals, as determined by the council, who by the nature of their duties may be required to perform the duties of a peace officer. Iowa Code § 80B.3(3) (2006) (emphasis added).

The legislature also amended the provision on training costs to require candidates from a tribal government "to pay the full costs of providing basic training requirements for a law enforcement officer." Iowa Code § 80B.11B(2) (2006).[1] Finally, the legislature enacted a new provision, entitled "Law enforcement officer — tribal government," which subjects a tribal officer to the Act's "certification and revocation of certification rules and procedures." Iowa Code § 80B.18 (2006).

Certification is important because a governmental entity in Iowa cannot employ a "law enforcement officer" to make arrests and otherwise keep the peace unless that officer is, or is to be, certified under the Act.[2] Indeed, certification is required for all Iowa law enforcement officers of any "agency or department of the state, county, city, or tribal government ... *who*

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[1] This requirement is in contrast to the state academy's limit on charging all other governmental agencies no more than half the cost of basic training for their candidates. Iowa Code § 80B.11B(2) (2006).

[2] Iowa law enforcement officers have a grace period during which to gain the proper certification, so they may be employed for a short duration of time without actual certification. *See* Iowa Code § 80B.17 (2006).

[are] responsible for ... the enforcement of the criminal laws of this state." *See* Iowa Code § 80B.3(3) (2006) (emphasis added). Based on these facts, one reasonably could say that certification (and a job) is what an officer needs to enforce state law. As a pure statutory matter, however, this is not the case. To obtain the authority to enforce the Criminal Code and to avail of its privileges and immunities, a credited law enforcement officer also must meet the definition of "peace officer" under Iowa Code section 801.4.

Section 801.4 is the general definition section of the Iowa Code of Criminal Procedure. It defines "peace officer" as used throughout the Criminal Code, in the provisions that authorize peace officers to arrest on probable cause, to conduct warrantless searches, to issue warrants, etc. *See, e.g.*, Iowa Code § 804.6 (2006) ("An arrest pursuant to a warrant shall be made only by a peace officer"). This definition of "peace officer" now includes nine enumerated categories of law enforcement officers.[3] It reads in part,

> *"Peace officers"*, sometimes designated "law enforcement officers", include:
>
> *a.* Sheriffs and their regular deputies who are subject to mandated law enforcement training.
> *b.* Marshals and police officers of cities.
> *c.* Peace officer members of the department of public safety as defined in chapter 80.
> *d.* Parole officers acting pursuant to section 906.2.
> *e.* Probation officers acting pursuant to section 602.7202, subsection 4, and section 907.2.
> *f.* Special security officers employed by board of regents institutions as set forth in section 262.13.
> *g.* Conservation officers as authorized by section 456A.13.
> *h.* Such employees of the department of transportation as are designated "peace officers" by resolution of the department under section 321.477.
> *i.* Employees of an aviation authority designated as "peace officers" by the authority under section 330A.8, subsection 16.

Iowa Code § 801.4(11) (2006) (emphasis in original)

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[3] The Criminal Code definition of "peace officer" has changed and grown over the years to accommodate new categories of peace officers. Early on, this definition included only "sheriffs and their deputies," "constables," and "marshals and policeman of cities and towns." Iowa Code, Title XXV, ch. 2, § 5099 (1897).

This list is in no manner exclusive. Not only did the legislature use the term "include" to preface this list, it expressly provided for a catchall category. The Criminal Code definition for "peace officer" also includes,

j. Such persons as may be otherwise so designated by law.

Since 2003, the legislature has not amended the definition to include "members of the police force of a tribal government who are subject to mandated law enforcement training" or the like. The legislature has made no substantive change to this section since adding subsection (i) in 1990. 1990 Iowa Acts, 73rd G.A., ch. 1233, § 43.

With this background in mind, we turn to analyzing the issue before us.

Analysis

Whether tribal law enforcement officers are "peace officers" under the Criminal Code is not to be answered by asking whether the officers fit within one of the nine enumerated categories of peace officer provided for in Iowa Code § 801.4(11). It is not immediately apparent that these tribal officers fit in those categories as they do not share the job titles nor the governmental employers reflected therein. If a tribal law enforcement officer is to meet the definition of "peace officer" under the Criminal Code, the only apparent course is through the catchall provision. The question thus is whether tribal law enforcement officers are "otherwise so designated by law" to be peace officers vested with the authority to enforce the Criminal Code.

Our task is one of statutory interpretation. When interpreting a statute, we must give effect to the intention of the legislature. *Albrecht v. General Motors Corp.*, 648 N.W.2d 87, 89 (Iowa 2002) (citations omitted). A legislature's intent is presumed reasonable. *Id.* It draws from several sources, including the language of the statutory provision at issue as well as consideration of other statutes of the same or a closely allied subject. *Bob Zimmerman Ford, Inc. v. Midwest Automotive I, L.L.C.*, 679 N.W.2d 606, 609 (Iowa 2004); *see also State v. Allen*, 708 N.W.2d 361, 366 (Iowa 2006) ("Legislative intent is derived not only from the language used but also from the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations.") (citations omitted). This holistic approach to statutory interpretation is favored because it produces a harmonious and consistent body of legislation. *See Albrecht*, 648 N.W.2d at 89.

Here, the need to look beyond the language of the statutory provision at issue, Iowa Code section 801.4(11)(j), is particularly great. By its own terms, the catchall provision references some other law or action that might designate a person a peace officer. Accordingly, in our analysis we pay particular attention and consideration to the only law through which a tribal law

enforcement officer might be so designated, to wit Iowa Code chapter 80B and its 2003 amendments.

Standing alone, the language of the catchall provision is inconclusive on the question before us. There is no established meaning for the language therein, and in no reported case has an Iowa court defined it. No dictionary can provide a decisive definition either. As is typical of catchall provisions, the language used here is broad. For instance, the legislature did not limit the definition of "peace officer" to employees of state agencies or by any job title; the catchall provision can apply to any person designated as a peace officer. We believe this language signals a legislative intent for a flexible application of the catchall provision. Finding no additional directives in its language, however, we must rely on other language and indicia of statutory interpretation to reach our conclusion.

We first look to Iowa Code section 801.4(11), the full definition of "peace officer" and the section in which the catchall provision lies. Where general phrases in a statutory provision follow more specific ones, as here, the doctrine of *ejusdem generis* helps define the more general phrasing. This doctrine provides that in such a situation "the general words are read to embrace only objects similar to those objects of the specific words," that is objects of the same class. *Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 715 (Iowa 2005). Like all interpretive aids, this doctrine must apply to accommodate the legislature's intent. *Id.* at 715–16 ("Classes can be defined in a vast number of ways, but the key to unlocking the true value of the doctrine is to ensure that the identified class has some objective relationship to the aim of the statute.") (citation omitted). We employ this doctrine here.

As a class, the nine enumerated categories of peace officer in Iowa Code section 801.4(11) are those Iowa law enforcement officers whose job duties require them generally to keep the peace and protect the public, by patrolling their districts, responding to calls for service, conducting investigations, pursuing and detaining suspects, making arrests, and the like. The officers in this class obtain their authority as peace officers through certification pursuant to Iowa Code chapter 80B, appointment by an agency head, or both. Although we do not pass upon whether all officers in this class must gain certification from an Iowa law enforcement academy or advisory council, we do note that many must do so, including "sheriffs and their regular deputies who are subject to mandated law enforcement training," "marshals and police officers of cities," and "peace officer members of the department of public safety." *See* Iowa Code § 80B.3(3) (2006) (defining law enforcement officer to include these titles).

We believe that tribal officers who are subject to the law enforcement training and oversight of the state fit within this class of officers. Tribal officers, like these other officers, must meet the same or similarly stringent physical, academic, psychological, and training requirements (among other criteria) before becoming a certified "law enforcement officer." We think this training, hiring criteria, and oversight of tribal law enforcement officers are significant here.

The legislature in its 2003 amendments to Iowa Code chapter 80B required training and certification for all tribal officers who "[are] responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state." Iowa Code § 80B.3(3) (2006). In our mind, the legislative intent behind those amendments is plain: the legislature intended to have tribal law enforcement officers provided the necessary tools to enforce Iowa law effectively, just as other Iowa law enforcement officers are. We see no other reasonable interpretation. We believe it unlikely that the legislature subjected tribal law enforcement officers to the state hiring, training, and certification standards while never intending for the tribal officers who meet these standards to enforce the Criminal Code.

Dovetailing with this intent behind the recent amendments to the Iowa Law Enforcement Academy And Training Act, are the legislative purposes behind the greater Act and the Criminal Code. In the legislature's words, the provisions of the Criminal Code shall provide for the "effective apprehension ... of persons suspected of criminal offenses without violation of fundamental human rights." Iowa Code § 801.3 (2006). A trustworthy, trained, and talented police force meets this end. The legislature seems to have recognized as much when it laid the groundwork for the state law enforcement academy and administering council. The express objective behind the enabling Act (Iowa Code chapter 80B *et seq.*) was to "coordinate training and set standards for the law enforcement service, ... which are imperative to upgrading law enforcement status to professional status." Iowa Code § 80B.2 (2006).

To place trained tribal law enforcement officers on a very different footing from other trained Iowa law enforcement officers, in our mind, undervalues this palpable link between training and enforcement authority. As noted, a governmental entity, including tribal governments, only can hire law enforcement officers to enforce the law if they are, or are to be, certified; and the state sets qualification and training standards for officers, including tribal officers, who are to enforce Iowa law. To deny the link therein, to carve an exception out for tribal officers so only tribal officers of all officer candidates cannot enforce Iowa law, is to read the Criminal Code definition of "peace officer" too restrictively. This narrow reading, we believe, creates unwelcome dissonance between two closely related sections of the Iowa Code, between the section that enables the state to train officers to enforce Iowa law (Iowa Code chapter 80B et seq.) and the section that authorizes those trained officers to enforce Iowa law (Iowa Code § 801.4).

In addition to sharing in training and certification, tribal law enforcement officers share the duties of other Iowa police officers. These tribal officers are retained by a governmental entity, just like the other enumerated peace officers, to detain suspects, investigate criminal activity, make arrests, and otherwise keep the peace. Iowa Code § 80B.3(3) (2006) (defining as tribal law enforcement officers those tribal officers who are "regularly employed as such and who [are] responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state"). This commonality ties into the discussion above. Thus, for the reasons above, we find it similarly significant: the legislature intended to have tribal officers,

like other officers, trained so they could serve and protect the public in a most effective and professional manner, and we see little reason to cross the legislature's intent and deny these tribal officers the opportunity to perform the duties that they were hired and trained to do.

We take note of, but fail to find an overriding significance in, the fact that tribal law enforcement officers are employed by a different sovereign. Tribal law enforcement officers, as other Iowa law enforcement officers, are trained by a Iowa law enforcement academy, steeped in Iowa law and methods of enforcement, and overseen by the Iowa law enforcement council. Their employment, at least in the sense of their authority to enforce Iowa law under the Criminal Code, is thus dependent and contingent on state action. If these tribal officers are not exercising their duties in the proper manner, the state can revoke their credentials as Iowa law enforcement officers.

For these reasons, we conclude that tribal law enforcement officers are of the same class as other Iowa peace officers. Accordingly, these tribal officers fall under the catchall definition to "peace officer" in Iowa Code section 801.4(11) and obtain the powers, privileges, and immunities of the Criminal Code.

When we look beyond of the Criminal Code definition of "peace officer" and seek to harmonize our above understandings with that of other Code provisions, we gain additional confidence in our conclusion. The legislature uses the terms "peace officer" and "law enforcement officer" interchangeably throughout the Code. *See, e.g.*, Iowa Code § 232.2(40) (2006) ("'Peace officer' means a law enforcement officer or a person designated as a peace officer by a provision of the Code."); Iowa Code § 321J.1(8) (2006) (a "peace officer" means "any other law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety.") Notably, in the statutory provision at issue, the legislature acknowledges that "peace officers" are "sometimes designated [as] 'law enforcement officers'." Iowa Code § 801.4(11) (2006).

As discussed, the legislature has designated certain tribal officers to be "law enforcement officers" when it amended the definition of that term in Iowa Code section 80B.3(3). Arguably, this designation meets the catchall provision's requirement that "persons ... be otherwise so designated by law" to be peace officers. We do not rest our analysis on this construction. But we do believe that given the interchangeable use of the terms "peace officer" and "law enforcement officer," we are more assured in saying that the legislature intended to have tribal law enforcement officers fit under the broad definition of "peace officer" in the Criminal Code when the legislature proclaimed the tribal officers to be Iowa "law enforcement officers."

Our conclusion also draws from the interpretive shortcomings of the alternate view that tribal law enforcement officers have no authority under the Criminal Code. If taken, this

alternate course appears to render the legislature's amendments to Iowa Code chapter 80B to be for little or for naught. Because we strive to interpret statutes to give all their terms meaning and effect, we are confident in eschewing this course. Iowa Code § 4.4(2) (2006) ("In enacting a statute, it is presumed that ... [t]he entire statute is intended to be effective"); *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 355 (Iowa 2005) (Iowa courts assume that an "amendment is adopted to accomplish a purpose and was not simply futile exercise of legislative power") (citation omitted). To illustrate, we raise two concerns.

If tribal law enforcement officers only were to enforce law on tribal land based on inherent tribal sovereignty, then the state rules and regulations on the hiring and certification of law enforcement officers (of Iowa Code chapter 80B *et seq.*) could not apply to them. In this scenario, the state would be seeking to regulate the wholly internal affairs of the tribe. Pursuant to longstanding law, this type of legislation is an impermissible infringement on tribal sovereignty. *See State v. Lasley*, 705 N.W.2d 481, 486–89 (Iowa 2005) (explaining that federal government retains plenary authority over tribes, whereas state governments, like Iowa, may only subject tribes to criminal or prohibitory laws). Thus, unless tribal law enforcement officers can act pursuant to the Criminal Code, the legislature's recent attempt to impose requirements on these officers is without apparent effect.

Similarly, because tribal officers retain some inherent authority to arrest and detain offenders on tribal land, Iowa Code chapter 80B must grant the officers some additional authority if the recent amendments to that chapter are to have a meaningful effect. Otherwise, with the amendments, the legislature has subjected tribal officers to the state certification process to be selected, tested, trained, and billed so that the tribal officers could go out into the field and enforce laws in the same manner that they could have without any affiliation with the state. We believe the legislature intended more to come from its recent changes to Iowa Code chapter 80B than this.

In a final point, we acknowledge that the legislature did not enact a provision, separate from the definition provision of Iowa Code § 801.4(11), in which it directly stated that tribal law enforcement officers are peace officers within the meaning of the Criminal Code. *Cf.* Iowa Code § 262.13 (2006) (the Board of Regents may commission employees to "have the powers, privileges, and immunities of regular police officers when acting in the interests of the institution"); Iowa Code § 330A.8(16) (2006) (the aviation authority may designate employees "whom are conferred all the powers of a peace officer as defined in section 801.4(11)"). This omission coupled with the legislature's failure to enumerate tribal law enforcement officers as a category of "peace officer" (in section 801.4(11)) lends some credence to the alternate view that the legislature never intended to have these tribal officers enforce the Criminal Code. This inference, admittedly, is more appreciable here where the legislature has taken these steps in the past to state unequivocally that a certain category of law enforcement officers could enforce the Criminal Code. We do not believe, however, that by its previous actions, the legislature has signaled that these steps are necessary to communicate its intent to authorize such powers.

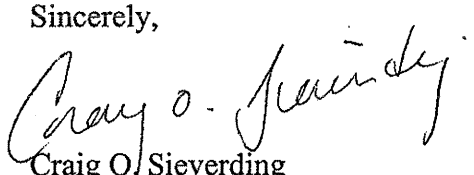
Legislative intent, as noted, draws from multiple sources; and based on the present circumstances and for the reasons offered above, we do not require the legislature to take all steps necessary to communicate its intent to have tribal law enforcement officers enforce the Criminal Code (even it if had done so in the past with other officers). We are confident, in answering the question before us, that the legislature has taken steps sufficient for us to identify this most reasonable understanding of legislative intent.

Conclusion

We conclude that law enforcement officers of the Tribe who are subject to the state certification process have the authority to enforce Iowa law pursuant to the Criminal Code. Although these tribal officers are not listed specifically under the definition of a "peace officer" in the Criminal Code, they fall within the express catchall provision of that definition.

We note the limited scope of our opinion. Our conclusion does not address whether tribal law enforcement officers are authorized to enforce laws under other Iowa Code provisions. *See, e.g.*, Iowa Code § 321.279(1) (2006) ("peace officer" means "those officers designated under section 801.4, subsection 11, paragraphs 'a', 'b', 'c', 'g', and 'h'."); Iowa Code § 717.1(1) (2006) ("[l]aw enforcement officer" means "a regularly employed member of a police force of a city or county, including a sheriff, who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state."). Many of these provisions supplement the law enforcement powers and privileges of the Criminal Code, and we have no occasion to say whether tribal law enforcement officers may exercise these supplementary powers.

Sincerely,



Craig O. Sieverding
Assistant Attorney General

CONSTITUTIONAL LAW; GOVERNOR: Item Veto. Iowa Const. art. III, sec. 16; amend. 27; H.F. 2792, § 27; 2006 Iowa Acts (81st G.A.) ch. 187, § 27. A court would likely rule that subsection 27(1)(b) of H.F. 2792 is not a distinct item within the bill and find the item veto of this subsection invalid. As a result, the statutory language remains in place. Executive Order No. 48 does not contravene House File 2792 and is within the Governor's constitutional authority. Nevertheless, a pay-for-performance study by both the Commission and the Institute is unworkable. Funding for a study by the Institute for Tomorrow's Workplace must come from a source other than the funds appropriated to the Pay-for-Performance Commission under House File 2792. (Miller and Pottorff to McKinley, State Senator, 10-20-06) #06-10-1

October 20, 2006

The Honorable Paul McKinley
State Senator
21884 483rd Lane
Chariton, Iowa 50049

Dear Senator McKinley:

Our office is in receipt of your request for an opinion of the Attorney General concerning the item veto of House File 2792 and the issuance of Executive Order No. 48. House File 2792 created a Pay-for-Performance Commission and charged the Commission with conducting a study for a pay-for-performance program, issuing periodic reports and implementing a program. You point out that Governor Vilsack item vetoed portions of section 27 of House File 2792 and, thereby, removed language in the bill establishing the Pay-for Performance Commission. Thereafter, the Governor issued Executive Order No. 48 which directed the Institute for Tomorrow's Workforce to propose and design a pay-for-performance program and conduct a study. In light of these related developments, you ask whether the combined effect of the item veto and the executive order constitutes an illegal exercise of executive power? For the reasons explained in this opinion we conclude that the item veto was invalid.

House File 2792 – Overview

At the outset it is helpful to delineate the language in section 27 of House File 2792 that was item vetoed. Because the section of House File 2792 affected by the item vetoes is quite lengthy, we summarize the item vetoes in the body of this opinion and set out an attached addendum of section 27 of House File 2792 in its entirety that shows the item-vetoed language with strike outs.

Section 27 is composed of six subsections. As enacted, subsection 1 establishes the Pay-for-Performance Commission and prescribes detailed criteria for appointment of members. Appointments are made by several different entities: a classroom teacher selected by the Iowa

State Education Association; a principal selected by the School Administrators of Iowa; a private sector representative selected by the Iowa Business Council; an industrial engineer selected by the American Society of Engineers; a small business employee selected by the Governor; and a professional economist selected by the voting members of the Commission after they convene.[1] In addition, House File 2792 provided for five nonvoting members: a representative from the Iowa Department of Education (Department) and two members from both the Iowa Senate and the Iowa House of Representatives. House File 2792, § 27, 2006 Iowa Acts (81st G.A.) ch. 187, § 27(1)(b).

Subsection 1 also addresses numerous organizational matters, including the assignment of technical and administrative support staff, selection of a chairperson, establishment of procedural rules, the number of members required for a quorum, the method for filling vacancies, the length of terms for members and an override of the gender and political balance requirements that would otherwise be imposed under Iowa Code chapter 69. H.F. 2792, § 27(1)(a)-(d).

Subsections 2 through 4 set out the statutory charge of the Commission. The Commission is directed to develop a "program" by gathering "sufficient information to identify a pay-for-performance program based upon student achievement gains and global content standards where student achievement gains cannot be easily measured." In gathering information the Commission is directed to "review pay-for-performance programs in both the public and private sector" and "design a program utilizing both individual and group incentive components." H.F. 2792, § 27(2). Further, the Commission is directed to initiate "demonstration projects" in order to "test the effectiveness of the pay-for-performance program." The demonstration projects, in turn, are "to identify the strengths and weaknesses of the pay-for-performance program design, evaluate cost effectiveness, analyze student achievement gains, test assessments, allow thorough review of data, and make necessary adjustments before implementing the pay-for-performance program statewide." The demonstration projects start

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[1] Whether delegation of appointment power to private organizations as provided in subsection 27(1)(b) intrudes unconstitutionally into the executive power of the Governor is beyond the scope of this opinion. We have observed that the Iowa Constitution does not expressly confer a power on the Governor to appoint positions in the executive branch of government. 1986 Iowa Op. Att'y Gen. 3, 4. Rather, the Governor is empowered to "take care the laws are faithfully executed" and to make appointments when "any office shall, from any cause become vacant, and no mode is provided by the Constitution and laws for filling such vacancy." Iowa Const. art. IV. §§ 9-10. Nevertheless, we have warned that the General Assembly may not strip the Governor of the power to appoint key policy makers in state government in a manner that unduly disrupts or interferes with the executive duty to "take care the laws are faithfully executed." 1986 Iowa Op. Att'y Gen. at 6.

with ten school districts and expand to twenty additional districts by 2008. H.F. 2792, § 27(2)(a)-(c).

The Commission is directed to provide periodic reports and a final study to the Iowa Department of Education (Department) and to the chairpersons and members of the Senate and House standing committees on education. Based on the demonstration projects, the Commission is required to prepare "an interim report by January 15, 2007, followed by interim progress reports annually, followed by a final study report analyzing the effectiveness of pay-for-performance in raising student achievement levels." The final study report is to be completed "no later than six months after the completion of the demonstration projects." H.F. 2792, § 27(3).

Implementation of a pay-for-performance program continues to involve the Commission, the Department and the General Assembly. The General Assembly is scheduled to consider implementation of a program statewide for the 2009-2010 school year. Once the program is implemented, the Commission, in consultation with the Department, "shall develop a system which will provide for valid, reliable tracking and measuring of enhanced student achievement." The Commission also "shall develop a pay-for-performance pay plan for teacher compensation." Under the plan, salary adjustments would vary directly with the enhancement of student achievement and include teacher performance standards which identify the following five levels of teacher performance with standards to measure each level: (1) superior performance; (2) exceeds expectations; (3) satisfactory; (4) emerging; and (5) in need of remediation. Finally, "individual salary adjustments" under an individual incentive component of a pay-for-performance program are not permitted for "teachers whose students do not demonstrate at least a satisfactory level of performance." H.F. 2792, § 27(4).

Subsections 5 and 6 address staffing and funding. Money is allocated from the appropriation to the Commission, discussed below, to provide staffing for technical and administrative assistance from the Legislative Services Agency. H.F. 2792, § 27(5). An "Iowa Excellence Fund" is created in the State Treasurer's office to be administered by the Commission who may provide grants for implementation of the program. H.F. 2792, § 27(6).

Funding for the Pay-for Performance Commission is appropriated in section 25 of the bill. "For purposes of the pay-for-performance program" established under House File 2792, $1 million is "allocated" to the Department of Management for the 2007 fiscal year. From this amount, $150,000 "shall be distributed to" the Institute for Tomorrow's Workforce "for the activities" of the Institute. H.F. 2792, § 25.

House File 2792 – Item Vetoes

Governor Vilsack item vetoed significant portions of section 27 in House File 2792. As set forth in the attached addendum, the item vetoes left the Pay-for-Performance Commission in

place, but stripped off all of the members. A Commission, therefore, remains, but the members statutorily assigned to carry out the statutory functions have been eliminated. Further, various organizational matters addressed in the bill were deleted, including assignment of technical and administrative support staff, selection of a chairperson, establishment of procedural rules, the number of members required for a quorum, the method for filling vacancies, the length of terms for members and the override of the gender and political balance requirements imposed under Iowa Code chapter 69.

Despite the item veto of the entire Commission membership, the statutory duties of the Commission remain substantially intact. The mission of the Commission remains "to design and implement a pay-for-performance program and provide a study relating to teacher and staff compensation." Further, the duties to develop a program using demonstration projects, to provide periodic reports and a final study and to implement a program continue.

Item vetoes have altered other statutory directives of House File 2792, but only in discrete ways. A specific directive to base student performance, where possible, "solely on student achievement, objectively measured by academic gains made by individual students using valid, reliable, and nonsubjective assessment tools" was item vetoed from section 27(4)(a). A prohibition against salary adjustments under the individual incentive component of a pay-for-performance program for teachers "whose students do not demonstrate at least a satisfactory level of performance" was item vetoed from section 27(4)(b). Finally, section 27(5), a provision for staffing by the Legislative Services Agency, was item vetoed in its entirety. Notably, the item vetoes left all funding for the Commission provided in section 25 of House File 2792 in place.

The veto message from Governor Vilsack explained his item vetoes of the Commission membership and the organizational matters set forth in subsections 27(1)(a)-(d). The Governor characterized this language as "not part of an agreed upon negotiation" and "too prescriptive." The Governor stated his intention to issue an executive order to have the Institute for Tomorrow's Workforce "take the lead on this study." The Institute is described by the Governor as a newly created body intended "to provide a long-term forum for bold, innovative recommendations to improve Iowa's education system." H.F. 2792, Governor's Veto Message (June 1, 2006). See Iowa Code ch. 7K (Supp. 2005). The veto message also sets out the Governor's policy-based objections to language in subsections 27(4)(a)-(b) and to subsection 27(4)(c) and section 27(5) in their entirety. Because your opinion request primarily concerns the item veto of the Commission members and the delegation of their statutory duties to the Institute, we focus our constitutional analysis on the item veto of the Commission members in subsection 27(1)(b) of House File 2792.

House File 2792 – Constitutional Principles

To assess the validity of the item veto of subsection 27(1)(b), we turn to constitutional principles. The Iowa Constitution vests the Governor with the power to sign or to veto "[e]very bill which shall have passed the general assembly. . . ." Iowa Const. art. III, §16. By constitutional amendment in 1968, the Governor's power expanded to "approve appropriation bills in whole or in part, and disapprove any item of an appropriation bill. . . ." Iowa Const. art. III, amend. § 27. There is no doubt that House File 2792 is an appropriation bill to which the Governor's item veto power applies. See Rants et al. v. Vilsack, 684 N.W. 2d 193, 208 (Iowa 2004) ("we must examine the face of the bill sought to be item vetoed to determine if it is subject to the item veto power"). House File 2792 appropriates hundreds of millions of dollars to the Department over three fiscal years. H.F. 2792, § 1.

Next, we must assess whether subsection 27(1)(b) is an "item" subject to item veto. Iowa has subscribed to the "scar tissue" test for the validity of item vetoes for more than thirty years. First adopted by the Iowa Supreme Court in 1971, the test defines an "item" as "something that may be taken out of a bill without affecting its other purposes and provisions. It is something which can be lifted bodily from it rather than cut out. No damage can be done to the surrounding legislative tissue, nor should any scar tissue result therefrom." State ex rel. Turner v. Iowa State Highway Commission, 186 N.W.2d 141, 151 (Iowa 1971), *rev'd on other gr'nds*, Rants v. Vilsack, 684 N.W.2d 193 (Iowa 2004) (*quoting from* Commonwealth v. Dodson, 176 Va. 281, 290, 11 S.E.2d 120, 124 (1940)). This principle has been repeated in item veto decisions in Iowa spanning the last three decades. Rants v. Vilsack, 684 N.W.2d at 206; Wengert v. Branstad, 474 N.W.2d 576, 578 (Iowa 1991); Welsh v. Branstad, 470 N.W.2d 644, 648 (Iowa 1991); Rush v. Ray, 362 N.W.2d 479, 481 (Iowa 1985).

Over the years the Iowa Supreme Court has identified items that can be "lifted bodily" from legislation without "damage" to the surrounding legislative tissue. See, e.g., Welsh v. Branstad, 470 N.W.2d at 649-50 (requirement that trade delegations led by the governor be represented by a bi-partisan delegation of the Executive Council constitutes an "item"); State ex rel. Turner v. Iowa State Highway Commission, 186 N.W.2d at 149 ("The permanent resident engineers' offices presently established by the State Highway Commission shall not be moved from their locations, however, the Commission may establish not more than two temporary resident engineers' offices within the State as needed" constitutes an "item"). Reviewing the "scar tissue" test and its application by the Iowa Supreme Court, we do not believe a court would sustain the item veto of subsection 27(1)(b) that establishes the members of the Commission. It is evident that an item veto which deletes the Commission members, but leaves the Commission and its statutory duties in place, does damage to "the surrounding legislative tissue." The Commission is delegated statutory duties, but left without any members to carry them out.

In this circumstance, the unconstitutional exercise of the item veto power is a nullity. That is, House File 2792 became law as if subsection 27(1)(b) had never been item vetoed. This

situation should be distinguished from the remedy imposed by the courts when the item veto is exercised unconstitutionally on a nonappropriation bill. In Rants et al. v. Vilsack, the Court analyzed the consequences of the item vetoes of House File 692 which was determined to be a nonappropriation bill. The Court emphasized that the language of the Iowa Constitution in article III, section 16, requires a governor to either approve or disapprove a bill within the time allowed by the Constitution. A bill submitted to the governor during the last three days of the legislative session does not become law unless it receives the affirmative approval of the governor. See Redmond v. Ray, 268 N.W.2d 849, 851 (Iowa 1978) ("The "pocket veto" provides that "bills which have been presented to the governor within the last three days of a session of the general assembly, and which he neither signs nor returns with objections before adjournment, become laws only in case he subsequently approves them."). When a governor attempts to exercise an item veto on a nonappropriation bill submitted during the last three days of the legislative session, therefore, the bill fails to receive affirmative approval in its entirety and so the bill fails to become law. Rants et al. v. Vilsack, 684 N.W.2d at 210-11.

Although Rants v. Vilsack did not discuss the appropriate remedy for an invalid item veto of an appropriation bill, we believe different constitutional remedies apply. The governor is not required to approve or disapprove an appropriation bill in its entirety, but "may approve appropriation bills in whole *or in part*, and *may disapprove any item of an appropriation bill*; and the part approved shall become a law." Iowa Const. art. III, § 16, amend. 27 (emphasis added). Accordingly, even if an appropriation bill is submitted to the governor during the last three days of a legislative session, the governor need not approve or disapprove the entire bill, but may exercise his item veto power. Should the item veto be determined to be invalid, the item veto is a nullity and statutory language remains in effect as if the item veto had not been exercised. Welden v. Ray, 229 N.W.2d at 715 ("The attempted vetoes by the Governor are beyond the scope of the item-veto amendment and are of no effect.").

Executive Order No. 48

Having analyzed the item vetoes of House File 2792, we turn to Executive Order No. 48. The Executive Order assigns a pay-for-performance study to the Institute by directing:

> the Institute for Tomorrow's Workforce to propose a design for a pay-for-performance program and conduct a study of the design as set forth in Section 27 of House File 2792 as enacted. The study shall measure the cost and effectiveness in raising student achievement of a compensation system that provides financial incentives based on student performance.

The study is to be performed by the Institute with input from and consultation with persons outside the Institute to include: at least one classroom teacher from each elementary, middle school and high school; at least one local school board official; and at least one K-6 principal

and at least one 7-12 principal. In addition, the Institute is directed to seek input from and consultation with representatives from the Iowa State Education Association, the Iowa Association of School Boards, the School Administrators of Iowa, the Professional Educators of Iowa and the Urban Education Network. Nothing in the Executive Order speaks to the funding for this study.

We have characterized the scope of an executive order in terms that require harmony with legislative enactments. Accordingly, we have said that a governor exercising executive powers "may not act in areas that are reserved for the legislature . . . may execute but not create laws; and in no case can a governor's executive order 'be contrary to any constitutional or statutory provision. Nor may it reverse, countermand, interfere with, or be contrary to a final decision or order of any court.'" 1992 Op. Att'y. Gen. at 67, *quoting from* Shapp v. Butera, 22 Pa. Commw. 229, 235, 348 A.2d 910, 913 (1975).

Examining Executive Order No. 48 with these principles in mind, we see no basis to opine that the Executive Order is contrary to any constitutional or statutory provisions. Nothing in the Executive Order contravenes the provisions of House File 2792. Because we conclude that the item veto of the members of the Commission is invalid and, as a consequence, these statutory provisions remain in place, Executive Order No. 48 duplicates the study mandated by the General Assembly in House File 2792. Although this duplication is not unconstitutional, the performance of studies by both the Commission and the Institute is unworkable.

House File 2792 does not fund two separate programs. Funding for the Commission provided in section 25 of House File 2792 is allocated to the Department of Management "for the pay-for-performance program established pursuant to section 284.14" which, in turn, creates the Commission and sets out its statutory duties. H.F. 2792, § 25. These funds must be directed to the Commission as provided in House File 2792. Iowa Code § 8.38 (2005) ("No state department, institution, or agency, or any board member, commissioner, director, manager, or other person connected with any such department, institution, or agency, shall expend funds or approve claims in excess of the appropriations made thereto, *nor expend funds for any purpose other than that for which the money was appropriated*, except as otherwise provided by law.) (emphasis added). See generally 1992 Iowa Op. Att'y Gen. 97, 103. House File 2792 appropriates the Institute only $150,000. H.F. 2792, § 25. Any funds in excess of this amount for a study performed by the Institute, therefore, must come from another source.

In summary, we conclude that a court would likely rule that the item veto of subsection 27(1)(b) is invalid and, as a result, the statutory language remains in place. Executive Order No. 48 does not contravene House File 2792 and is within the Governor's constitutional authority. Nevertheless, a study by both the Commission and the Institute is unworkable. Funding for a study by the Institute for Tomorrow's Workplace must come from a source other than the funds appropriated to the Pay-for-Performance Commission under House File 2792.

We recognize that our legal conclusions leave considerable uncertainty about the appropriate course of conduct going forward. Our office is happy to meet with the interested parties to discuss the legal options.

Sincerely,

THOMAS J. MILLER
Attorney General of Iowa

Julie F. Pottorff by JM

JULIE F. POTTORFF
Deputy Attorney General

ADDENDUM

House File 2797, § 27
(Item-Vetoed Language Shown by Strike Outs)

284.14. Pay-for-performance program

1. Commission.

a. A pay-for-performance commission is established to design and implement a pay-for-performance program and provide a study relating to teacher and staff compensation containing a pay-for-performance component. The study shall measure the cost and effectiveness in raising student achievement of a compensation system that provides financial incentives based on student performance. The commission is part of the executive branch of government. ~~The legislative services agency shall, upon request, provide technical and administrative support to the commission. The commission shall select its own chairperson and establish its own rules of procedure. A majority of the voting members of the commission shall constitute a quorum.~~

~~b. Any vacancy on the commission shall be filled by the appropriate appointing authority. Members shall receive a per diem. Membership of the commission shall be as follows:~~

~~(1) One classroom teacher selected jointly by the Iowa state educational association and the professional educators of Iowa.~~

~~(2) One principal selected by the school administrators of Iowa.~~

~~(3) One private sector representative selected by the Iowa business council. This representative should have all of the following qualifications:~~

~~(a) Possess a degree in education and have teaching experience.~~

~~(b) Be employed in a business employing at least two hundred persons that has an employee performance pay program.~~

~~(c) Have served as a school board member.~~

~~(4) One industrial engineer appointed by the American society of engineers. This individual should have technical knowledge and experience in the design and implementation of individual and group pay-for-performance incentive programs.~~

~~(5) One small business private sector employer, who employs at least fifty people in a targeted industry, selected by the governor, who has general management experience and top line and bottom line responsibilities.~~

~~(6) One professional economist with a doctoral degree with experience and knowledge in student achievement using test scores to measure student progress, selected by the voting members of the commission, after they convene.~~

~~(7) One representative from the department of education who shall serve as a nonvoting member.~~

~~(8) Two members of the senate and two members of the house of representatives who shall serve as nonvoting members for two-year terms coinciding with the legislative biennium.~~

~~c. Voting members shall serve three-year terms except for the terms of the initial members, which shall be staggered so that two members' terms expire each calendar year. A vacancy in the membership of the board shall be filled by appointment by the initial appointing authority.~~

~~d. The pay-for-performance commission is not subject to the provisions of section 69.16 or 69.16A.~~

2. Development of program. Beginning July 1, 2006, the commission shall gather sufficient information to identify a pay-for-performance program based upon student achievement gains and global content standards where student achievement gains cannot be easily measured. The commission shall review pay-for-performance programs in both the public and private sector. Based on this information, the commission shall design a program utilizing both individual and group incentive components. At least half of any available funding identified by the commission shall be designated for individual incentives.

a. Commencing with the school year beginning July 1, 2007, the commission shall initiate demonstration projects, in selected kindergarten through grade twelve schools, to test the effectiveness of the pay-for-performance program. The purpose of the demonstration projects is to identify the strengths and weaknesses of the pay-for-performance program design, evaluate cost effectiveness, analyze student achievement gains, test assessments, allow thorough review of data, and make necessary adjustments before implementing the pay-for-performance program statewide.

b. The commission shall select ten school districts as demonstration projects. To the extent practicable, participants shall represent geographically distinct rural, urban, and suburban areas of the state. Participants shall provide reports or other information as required by the commission.

c. Commencing with the school year beginning July 1, 2008, the commission shall select twenty additional school districts as demonstration projects.

3. Reports and final study. Based on the information generated by the demonstration projects, the commission shall prepare an interim report by January 15, 2007, followed by interim progress reports annually, followed by a final study report analyzing the effectiveness of pay-for-performance in raising student achievement levels. The final study report shall be completed no later than six months after the completion of the demonstration projects. The commission shall provide copies of the final study report to the department of education and to the chairpersons and ranking members of the senate and house standing committees on education.

4. Statewide implementation --remediation. The general assembly shall consider implementing the pay-for-performance program statewide for the 2009- 2010 school year, notwithstanding the provisions of chapters 20 and 279 to the contrary.

a. The commission, in consultation with the department of education, shall develop a system which will provide for valid, reliable tracking and measuring of enhanced student achievement under the pay-for-performance program. ~~Where possible, student performance shall be based solely on student achievement, objectively measured by academic gains made by individual students using valid, reliable, and nonsubjective assessment tools such as the dynamic indicators of basic early literacy skills (DIBELS), the Iowa test of basic skills, or the Iowa test of educational development.~~

b. The commission shall develop a pay-for-performance pay plan for teacher compensation. The plan shall establish salary adjustments which vary directly with the enhancement of student achievement. The plan shall include teacher performance standards which identify the following five levels of teacher performance with standards to measure each level:

(1) Superior performance.
(2) Exceeds expectations.
(3) Satisfactory.
(4) Emerging.
(5) In need of remediation.

~~No individual salary adjustments under an individual incentive component of a pay-for-performance program shall be provided to teachers whose students do not demonstrate at least a satisfactory level of performance.~~

~~c. The department of education, in conjunction with the commission, shall create a teacher remediation program to provide counseling and assistance for teachers whose students do not demonstrate adequate increases in achievement.~~

~~5. Staffing. The legislative services agency may annually use up to fifty thousand dollars of the moneys appropriated for the pay-for-performance program to provide technical and administrative assistance to the commission and monitoring of the program. The commission may annually use up to two hundred thousand dollars of the moneys appropriated for consultation services in coordination with the legislative services agency.~~

6. Iowa excellence fund. An Iowa excellence fund is created within the office of the treasurer of state, to be administered by the commission. Notwithstanding section 8.33, moneys in the fund that remain unencumbered or unobligated at the close of the fiscal year shall not revert but shall remain in the fund.

The commission may provide grants from this fund, according to criteria developed by the commission, for implementation of the pay-for-performance program.