

MEMORANDUM

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To: Howard Willens, Esquire
From: Howard N. Mantel
Subject: Review of Briefing Paper #11: Education (Draft August 17, 1976)
Date: August 27, 1976

I had asked Professor Frederick S. Lane* to review the paper for me. His comments are incorporated in this memorandum. The memorandum will proceed by page and section and I will add on any overall thoughts at the end, if there are any.

Page 1, I. Introduction, paragraph 1, sentence 3

When you say "assured of formal training" should you also add the concept of compulsory education? You are correct throughout the introductory statement in stressing that education is more than "reading and writing." But I wonder whether you ought to make that fundamental point, which can be termed basic intellectual and skills training. Broadly, education might be defined as literacy education, citizen education, technical education, and higher education. One point which Professor Lane stresses is non-formal educational strategies, encompassing industrial training programs, agricultural extension, work-oriented functional literacy, nutritional rehabilitation programs, etc.

Page 4, III.A. Background

Throughout, these comments may reflect an inadequate comprehen-

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sion of particular educational issues in the Marianas. We assume that there is an existing primary and secondary school system, that there is universal education, and that most higher education occurs off the islands (Guam, etc.). I am unfamiliar with the extent of private school facilities, literacy rates, etc.

Page 3, paragraph 1

If one introduces a standard or goal of education in the Constitution, does this provide a basis for law suits against the Commonwealth or individual school districts to the effect that the standard or goal has not been met and in effect forcing higher allocations for public education?

Page 6, top paragraph

In your last sentence one can add too the question whether primacy over education throughout the Commonwealth ought to be vested specifically by Constitution in the Commonwealth as a preeminent state function.

Page 6, paragraph 2

You have backed in, in the first sentence, to another issue which is really more applicable to the paper on executive branch. That is, whether the Constitution should describe functions of government, health, transportation, education, etc. This usually comes up in structural terms, as in creating specific departments, rather than functions, but there is an interrelationship. If departments are named (rather than saying, e.g. that there shall be no more than 20 departments in the Commonwealth government) then the issue is posed of how do you handle new functions or changes in proportion. Thus, it is one thing to mention education in the Constitution; it is another thing to create a Department of Education. Thus later on,

for example, it may be desirable to have a separate Department of Higher Education.

Page 7, paragraph 1

Again, I would suggest that in addition to the guarantee of primary education to all citizens is the question of a basic grant of exclusive ultimate control over education to the Commonwealth. I will deal again with this subject infra. Finally, again the question whether "guarantee of primary education" should be related to compulsory education.

Page 9, top paragraph, sentence 1

Your reference to delegation of responsibility for "its operation to the Government": in the Northern Mariana context I gather you would mean the Commonwealth Government. Query? That is implied by the following sentence.

Page 10, B. Centralization vs. Decentralization

You have already identified one principal constitutional issue: whether the Constitution guarantees free compulsory public education (and whether any broader guarantee of primary, secondary, or higher education or standards of such education should be constitutionally stated). In this paragraph you go to the question of where the authority for education should be vested. But I wonder whether you would want to differentiate in a slightly changed way. First, one could pose the issue whether the Commonwealth under the Constitution should be the ultimate determining authority for the scope and quality of all public and private education delivered in the Northern Marianas. Second is the question whether the Commonwealth itself delivers all public education or delegates delivery ser-

vices or the authority to deliver services to local governments or school districts. As I understand the education system in New York State, which is not explicitly stated in the Constitution, the University of the State of New York, which is not actually a college, is the ultimate authority and control over all education in the State. That authority vests in the Regents of the University of the State of New York. The University is a corporation and the Constitution (Article XI, Section 2) continues the University and says, "It shall be governed and its corporate powers, which may be increased, modified or diminished by the Legislature, shall be exercised by not less than nine Regents." In effect, and I have not looked at the statutes or case law on this, all educational institutions in the State are part of that corporate system, and approval of the State Education Department, acting for the Regents, is required for the creation of any private or public educational corporation, and the ultimate control of such corporations on educational matters vests in the University of the State of New York. I may be overdoing the point, but I am simply asking whether the ultimate control for the scope and quality of education should vest in the Commonwealth unless delegated by it under statute.

Page 11, paragraph 1

Here you again deal with this issue, recognizing some of the ambiguity in state constitutions.

In a practical context and given the size of population of the Marianas, it may be feasible, not in the Constitution to be sure, to create a centralized educational administration but with strong local input, say in the method of selection of the central school authority, the board members.

Page 11, 1(a)

The statement from the Book of the States suggests a practical way of dividing authority: the state finances all, or a good part, of public education but leaves service delivery to local entities. In the practical sense, the division between local and Commonwealth matters, other than fundamental divisions, probably is best left for statute. In your last sentence continuing to page 12, you probably suggest still another practical consideration: economies of scale in having specialized services provided throughout the Commonwealth and, implicitly, by a single service delivery agent. This probably would be true of higher education programs.

Page 11, fn.

If you want some data to support the first statement in the quote from the Book of the States, for your information, the total number of school districts (basic administrative units), for 1951-1952 was 71,021. For 1974-75 the figure was 16,178, down 77.2%. The source for this is U.S. Department of Health, Education, and Welfare, Office of Education, Statistics of State School Systems: Organization, Staff, Pupils, and Finances, 1951-52, Table 4; National Education Association, Estimates of School Statistics, 1974-75, Research Report, Table 1, quoted in Table 8, Book of the States, 1976-77, page 325. The reason for this trend is clearly economies of scale and is paralleled in some other instances of special district arrangements, such as fire districts, although that number would be offset by creation of new fire districts for areas that were previously unorganized. It should be noted at some point that while there has been a merger of school

districts in suburban and rural areas in the past two decades, there has been a strong movement for decentralizing school systems in large urban communities, of which New York City is the principal example, although not necessarily a good one.

Page 12, (b)

The point is well made but the two sentences are a bit obtuse. Is it worth explaining what you mean by "vested interest" and "favoritism?" Does the sentence imply that separate school districts might have the consequence of unequal provision of quality education because of different administrative capacities and unequal tax bases? Of course the latter point introduces the whole world of *Serrano v. Priest, et. al.*

Pages 12-13, 2(a)

The traditional argument for decentralization, which also would be argued for the retention of local school districts where they now exist, is that the creative processes work better away from large educational bureaucracies. It is true that the larger urban public school systems have generated enormous bureaucracies which have tended to stifle creativity. If there are substantial differences among the islands or within Saipan Island, owing to ethnic, economic, literacy, or occupational factors, then these arguments are strengthened.

Page 13, (b)

Is the first sentence true? If so, what is your authority? I gather what you are saying is that this is the argument rather than that this is an assertion. Further, the second sentence bothered me a bit by the reference to "a new theory with no historical base" I suggest that it could be countered rather easily (I can't!) and you might want to reword the sentence slightly.

Page 13, (c)

Again, to be argumentative one can maintain that you could never remove any part of education from any type of politics, Commonwealth or otherwise. There is a tradition in the accepted wisdom on education to "keep it out of politics." What that usually means is to keep it out of party politics. I wonder if it would be appropriate at some point in the paper to say rather explicitly and candidly that education is so vital to the interest of citizens and so large a factor in financing government and involves so many areas of potential policy conflict that it never can be treated outside of politics. The question is how to structure education so that the greatest quality can be delivered in the most efficient ways, etcetera, etcetera.

Page 14, (e)

This states well a point I was making earlier about retaining residual and ultimate authority for education in the Commonwealth but delegating operational matters locally. You might indicate that "policy-making" functions can be divided with basic control over standards of quality of education and perhaps basic curricula matters remaining in the Commonwealth while particularized policy-making on a variety of things would be retained at the local or school district level.

Page 14, 3

I believe this third option comes closest to what I have in mind, including the methodology for insuring strong local participation in the basic decision-making and allocation functions of the Commonwealth. Perhaps one could add here something to the effect that given the size and scale of the Mariana Islands, say compared to the larger states, it is

easier, prima facie, to achieve the local participation and input without fractionalization of the administrative arrangements for education.

Page 15, paragraph 1

Are you contemplating a central school authority that would encompass both primary, secondary, and higher education. This may make a lot of sense for a variety of reasons, and there is precedent, I believe in New Jersey at least, for a single state authority dealing with both aspects of education.

Page 16, top

Hopefully, the Constitution will leave as much flexibility on the details of the organizational infrastructure to statute.

Should you raise here the question of organizing the Commonwealth structure for education (regardless of what powers are vested in it) to a department arrangement versus a corporate or special structure? You deal with this in the material that follows (pages 16-17) but I wonder whether it could be made a bit more explicit. Aside from aspects of school financing and the feasibility of using a corporate device for school construction, one method of insulation of governmental-type functions from the normal political processes (whatever that is supposed to imply) is to create a public corporation.

Page 17, (1)(d)(e)

You might want to add a bit of detail here to the effect that the legislature might create a multi-membered body as the basic policy instrument for the Commonwealth's responsibilities in education and that that body then would appoint the operating head, possibly subject to review by

the governor or the legislature or other arrangements. The more insulated the actual operating head of the state educational function is from control by the public or publicly elected officials, the more likely you are to have a sense of distance between the educational functions delivered by the Northern Marianas Government and other governmental functions, such as recreation, economic development, and planning of public works. Most of this clearly is not constitutional in nature, but it is a fact that probably ought to be highlighted in some way.*

Page 17, 2

There is in the public administration and political science literature considerable attention to the arguments pro and con on multi-membered boards to oversee governmental functions and to fix terms, usually going to the question of accountability and control. I think the critical issue in fixing terms is the degree of independence or autonomy, more than the concept of "certainty." Your last sentence goes more to the question of tenure issues in the Constitution versus the legislative authority rather than the question of tenure at all.

Pages 18-19, E. Equal Education Opportunity

You refer in the discussion to (page 19, last sentence) a bill of rights. I wonder if there is any constitutional issue with respect to student rights. While I do not offhand know of any constitutional provisions on the subject, there is at least a discussion on some Supreme Court rulings

* I may be particularly sensitive on this point since the fiscal crisis in New York City has given enormous critical attention to the role and responsibilities of 3 governmental agencies that are not directly under the Mayor or legislative bodies: the Board of Education, the Board of Higher Education, and the Health and Hospitals Corporation.

in the Book of the States, 1976-1977, page 313. Question: would it be appropriate, at least as an issue for consideration by the Constitutional Convention, to include either in the education article or the bill of rights some kind of statement on the rights of students. The Book of the States article states, "A sharply divided Supreme Court ruled that students have a due process right to at least minimal procedural safeguards in cases of temporary suspension... The Court ruled that once a state extends a right to an education, it may not withdraw that right on the grounds of misconduct in the absence of fundamentally fair procedures, which, at a minimum, must afford the student some kind of notice and the right to a hearing at which he may present his side (Goss v. Lopez). However, the Court also held in Wood v. Strickland that students whose rights were thus denied were not necessarily entitled to damages..."

Page 23, 1

Are not there some lottery arrangements, the proceeds of which are earmarked for education? Having said this, I suspect that none of those are constitutional.

Should you raise the question on the broader governmental issue of earmarked school funds? That is, the impact on flexibility for the Commonwealth Government as a whole in allocating funds among competing priority needs. Once any type of fund is established, regardless of the income source, this has the effect of precluding the use of such funds for any other purpose. There is a counter-argument to this to the effect that earmarking can be viewed as the allocation for schooling and that any question of allocations among general revenue sources, whether for education

or other purposes, is measured by additions to the earmarked school funding.

Page 27, paragraph 2

Your sentence implies that the two funding sources, taxes and school bonds, are mutually exclusive. That really is not the case, since school bonds are a device obviously to obtain cash and amortization is through tax revenues in all likelihood. Also in most instances, the tax base (or tuition in rare instances) providing the operating expenses to run the school system and borrowing is typically the method for public works.

How about the broad issue of equal opportunity in school financing? Again, it is the whole range of decisions which have come up in Texas, New Jersey, New York, etc, following Serrano and Rodriguez v. San Antonio Independent School District. Should you pose the issue whether all financing of public education, primary, secondary, and higher, should be controlled at the Commonwealth level in order to insure equity?*

Page 30, H. Higher Education

higher/
I think you have covered the issues of education with respect to writing of a constitution. I have perceived that the main point in any mention of higher education (other than with respect to who controls and structural arrangements) is from the point of view of setting some lofty goals. I would also assume that questions of the Commonwealth contracting for higher education services from universities or colleges not located on the Mariana Islands does not involve a provision of the Constitution. If one

* I assume, incidentally, that the issue of free tuition for higher education is not a matter that need be raised.

wanted to play it to the hilt, however, one could conceivably have a constitutional provision authorizing the creation of the University of the Northern Marianas or some such and leaving to the legislature or the educational authority how that might be implemented. There is, of course, the problem of raising expectations that cannot be fulfilled. Perhaps all that needs to be done is to add to the last sentence on page 30 the issue of whether the educational institution or organization that might be mentioned in the Constitution includes higher education or whether some separate institutional arrangement is mentioned or authorized.