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# State Legislative Oversight: **South Dakota**



## Capacity and Usage Assessment

Oversight through Analytic Bureaucracies:	Minimal
Oversight through the Appropriations Process:	Moderate
Oversight through Committees:	Limited
Oversight through Administrative Rule Review:	Limited
Oversight through Advice and Consent:	Minimal
Oversight through Monitoring Contracts:	Minimal
Judgment of Overall Institutional Capacity for Oversight:	Limited
Judgment of Overall Use of Institutional Capacity for Oversight:	Limited

To read the full 50 state study or to discuss the South Dakota state report, please contact [Benjamin.Eikey@wayne.edu](mailto:Benjamin.Eikey@wayne.edu).



This report is sponsored by the Levin Center at Wayne Law

# Legislative Oversight in South Dakota

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## Summary Assessment

After reviewing legislative oversight in South Dakota, two things became clear: the legislature has only some tools and prerogatives needed to exercise strong oversight of the state's executive branch, and the use of some of these oversight mechanisms appears limited. The Department of Legislative Audit and the Interim Rules Review Committee both provide opportunities for oversight. Moreover, South Dakota is adding to its capacity to perform legislative oversight. These additions, in particular performance auditing and program evaluation, could increase oversight, as long as the legislature makes effective use of them.

## Major Strengths

This is a state infused with a political culture that has historically abhorred corruption. Therefore, the legislature emphasizes advice and consent on gubernatorial appointments to ensure that there are "good people" in powerful places. The legislature can challenge gubernatorial executive orders that reorganize government. The state seems aware of the need to increase its oversight capacity-- a recent law establishes a division in the Legislative Research Council to conduct performance audits.

## Challenges

South Dakota does not currently possess adequate capacity to produce performance audits. The legislature is institutionally weaker than the governor. Long-term, single-party domination of state politics tends to reduce oversight. Additionally, the legislative session is very short and might simply provide too little time for effective oversight.

## Relevant Institutional Characteristics

South Dakota ranks among the lowest in the nation with regard to legislative professionalism at 48<sup>th</sup> (Squire, 2017). The National Conference of State Legislatures (NCSL, 2017) classifies South Dakota's legislature as "[p]art-time, [with] low pay [and a] small staff." The regular session of the legislature begins each year on the second Tuesday of January (Art III, Section 7) and each and every regular session shall not exceed forty days (Art. III, Section 6).<sup>2175</sup> The 2018 Regular Session consisted of 38 days in which legislative activity was conducted (South Dakota Legislative Calendar, 2018).

The South Dakota legislature may also hold a special session (also known as an extraordinary session), which may be called by the governor or the legislature. The governor has always had this power, but the legislature relatively recently gained it through a 1990<sup>2176</sup> change to the constitution<sup>2177</sup> initiated in the legislature and ratified by a majority vote on a statewide ballot.<sup>2178</sup> In order for the legislature to call a special session, the presiding officers of both houses must obtain a written request of two-thirds of the members of each house (Art. III, Section 31). Furthermore, the petition requesting a special session must state the purposes of the session; only business encompassed by those purposes may be transacted (NCSL, 2009). Since 2010, the South Dakota legislature has convened for two special sessions, which occurred during 2011 and 2017 (LegiScan, 2018). The former was initiated by the governor for the purpose of drawing redistricting<sup>2179</sup> maps,<sup>2180</sup> and the session consisted of a single day in October.<sup>2181</sup> The latter was also initiated by the governor to address a specific issue--property rights to meandered/non-meandered water.<sup>2182</sup>

Legislators are paid \$6,000 annually, plus a \$142 per diem, and an additional \$142 per day for those legislators who sit on interim committees during the period in which the legislature is not in regular session. During 2015, the legislature had 114 staff members, 58 of whom were permanent. Legislators are limited to eight consecutive years of service in each house (NCSL, 2017). Since these are not lifetime limits, it is possible for legislators to accumulate experience by cycling between chambers.

South Dakota's governor has fairly extensive powers, including full budget-making powers, as well as the right to reorganize state agencies by executive order. Furthermore, the governor may use a line-item veto on appropriations bills, with a 2/3 majority vote of legislators required to override such veto (Beyle, 2008). According to information provided in Ferguson (2015), the South Dakota's governor is tied for the 6<sup>th</sup> most powerful among the 50 states.

The size of South Dakota's state and local bureaucracy is smaller than the size of most other state bureaucracies. Approximately 10.5% of those employed in South Dakota work in

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<sup>2175</sup> [https://ballotpedia.org/Article\\_III,\\_South\\_Dakota\\_Constitution](https://ballotpedia.org/Article_III,_South_Dakota_Constitution) accessed 7/12/18

<sup>2176</sup> <https://sdsos.gov/general-information/about-state-south-dakota/summary-south-dakota-state-government/legislative-branch.aspx> accessed 7/12/18

<sup>2177</sup> <https://sdsos.gov/elections-voting/election-resources/election-history/1990/1990-ballot-question-text.aspx> accessed 7/12/18

<sup>2178</sup> [https://cdn.ballotpedia.org/images/4/45/Referenda\\_Elections\\_for\\_South\\_Dakota\\_1968-1990.pdf](https://cdn.ballotpedia.org/images/4/45/Referenda_Elections_for_South_Dakota_1968-1990.pdf) accessed 7/12/18

<sup>2179</sup> [https://ballotpedia.org/Redistricting\\_in\\_South\\_Dakota\\_after\\_the\\_2010\\_census#cite\\_note-10](https://ballotpedia.org/Redistricting_in_South_Dakota_after_the_2010_census#cite_note-10) accessed 7/12/18

<sup>2180</sup> <https://sodakgovs.wordpress.com/2017/06/08/special-legislative-sessions-in-south-dakota/> accessed 7/12/18

<sup>2181</sup> <http://sdlegislature.gov/docs/legsession/2011s/calendar.pdf> accessed 7/12/18

<sup>2182</sup> <http://ktwb.com/news/articles/2017/jun/08/daugaard-calls-for-meandered-waters-special-session/> accessed 7/12/18

state and local government. Of these state and local government workers, 6.2% work in education, while roughly 1% work in safety, 1% in welfare, 1% in services, and 1% in other areas (Edwards, 2006).

## Political Context

A Republican trifecta has become the norm in South Dakota over the last two decades. Both chambers have had Republican majorities since 1995 (NCSL, 2017). A Republican has held the governorship since 1979. In 2018 both chambers of South Dakota's legislature, as well as its governorship, were controlled by the Republican Party. Currently, the House of Representatives is comprised of 58 Republicans and 12 Democrats, while the Senate has 27 Republicans and 8 Democrats.

Ideology appears more salient the political party. Shor and McCarty's (2015) find that South Dakota's legislature is less politically polarized than most states. In 2014 South Dakota's House was the 41<sup>st</sup> most polarized—or the 9<sup>th</sup> least polarized, while its Senate was the 38<sup>th</sup> most polarized—or 12<sup>th</sup> least polarized. According to Haider-Markel (2008), politicians must account for two key features in the political environment: populism—a suspicion of big government and big business—and agrarian conservatism—limited government that only acts on moral issues like abortion or gay marriage.

## Dimensions of Oversight

### Oversight Through Analytic Bureaucracies

Although South Dakota elects a state auditor, that position is responsible for the state's payroll and various fund balances and performs accounting duties. This is not a position that is involved in auditing the performance of state agencies, and so we do not discuss it further.

The Department of Legislative Audit (DLA) is the primary analytic bureaucracy of the South Dakota Legislature. Established by statute in 1943, it performs audits of state, county, and local government entities. The statutory authority for the DLA can be found in 4-2 of the South Dakota Codified Laws.<sup>2183</sup> Although the DLA is designed to work independently, it is administratively assigned to the Executive Board of the Legislative Research Council (LRC). The LRC is another analytic bureaucracy, and its work is supervised by this Executive Board, an oversight committee. This “fifteen member board consist[s] of nine legislators from the majority party and four legislators from the minority party plus the President Pro Tempore of the Senate and the Speaker of the House. The thirteen legislators are chosen by their respective parties and can serve on this board for only three consecutive terms.” (Department of Legislative Audit-About) The Executive Board appears to function as a kind of legislative management council, which performs standard legislative functions outside of the regular session. As the administrative agent for the DLA, the Executive Board of the LRC hears their budget requests,

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<sup>2183</sup> [http://sdlegislature.gov/Statutes/Codified\\_Laws/DisplayStatute.aspx?Type=StatuteChapter&Statute=4-2](http://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=StatuteChapter&Statute=4-2)

sets basic policy including details of operations and compensation, oversight, and accountability, but practitioners tell us the LRC does not direct the work of the DLA.

According to sources, DLA does not produce performance audits or program evaluations, instead they do financial audits, special reviews like fraud investigations or internal reviews, and attestation engagements on very small local governments. Sources told us that occasionally audits or reviews that DLA produced led legislature to direct DLA to investigate further. This, they say, is not typical. We were also told that audits have many sources: citizens can report fraud through the DLA website, a board member could come to them with information worth investigating, individual legislators or legislative committees or the governor have the authority to request audits, and some audits are mandated by statutes. DLA staff screen these audit requests to filter out ones that are baseless. This preserves the DLA's independence and conserves its resources (interview 2018). The department is led by the Auditor General, who is appointed by the legislature<sup>2184</sup> and may be removed, without cause, by a joint resolution of the legislature.<sup>2185</sup>

During 2018, the Auditor General managed a staff of 35 individuals, most of whom were accounting professionals (Department of Legislative Audit-About). The primary mission of the DLA appears to be to monitor the accuracy and transparency of the self-reported financial statements of state-level entities, counties, municipalities, schools, special districts [e.g. irrigation districts and redevelopment commissions, regional railroad authorities, and statewide school board funds (e.g. the school benefits fund)] (Department of Legislative Audit-Reports). None of these reports were described as performance audits.

In 2017, the Department of Legislative Audit (DLA) produced 15 reports on state-level entities, in addition to an extensive single audit of state government. In 2018 DLA produced 13 reports on state-level entities, such as the Soybean Research Promotion Council, the Lottery, the Housing Development Authority, the Drinking Water State Revolving Fund. The focus appears to be on authorities, funds and other entities rather than state agencies per se. Moreover, examining the report on the Lottery reveals that the first nine pages of the report consist of the annual report from the executive director of the Lottery submitted to the governor, legislature, and the people of South Dakota. This is followed by a financial audit of the Lottery conducted by the DLA transmitted by the auditor general (pages 10-27 of the report). While the GOAC does not have statutory authority to direct DLA, we were told that in practice the DLA works closely with the GOAC (interview 2018).

The GOAC is a joint standing committee that meets during the regular session and during the interim. It reviews the audits conducted by the DLA. Evidence of this can be found on the South Dakota Legislature's website in the detailed meeting minutes and audio files from past meetings held by the Committee (SD Legislature Government Operations and Audit). A sampling of the minutes and practitioner feedback indicates that legislators do engage with issues revealed by DLA audits. GOAC membership is dominated by the majority party in each chamber. "The committee is composed of five members of the Senate and five members from the House of Representatives. The majority party has three members from the House of Representatives and four members from the Senate. The minority party has two members from the House of Representatives and one member from the Senate" (Department of Legislative Audit-About).

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<sup>2184</sup> [http://sdlegislature.gov/Statutes/Codified\\_Laws/DisplayStatute.aspx?Type=Statute&Statute=4-2-2](http://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=4-2-2)

<sup>2185</sup> [http://sdlegislature.gov/Statutes/Codified\\_Laws/DisplayStatute.aspx?Type=Statute&Statute=4-2-5](http://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=4-2-5)

Although the DLA works year-round with the Government Operations and Accountability Committee (GOAC), it has some flexibility to work with other committees; we were told that sometimes it works with an appropriations committee or subcommittee (interview notes). There are times when the DLA will discuss an audit request with the LRC before proceeding. This occurs when the audit will require extensive resources or when the audit request is particularly urgent (interview 2018). GOAC provides feedback to audited entities, the primary legislative enforcement mechanism for compliance recommendations to agencies. The DLA provides staff support for the GOAC, producing minutes, managing logistics, agenda preparation, clerical services, preparation for meetings, coordination, etc. (interview 2018). In addition to the work products that it provides, primarily to the GOAC but occasionally to other committees, the DLA: (1) provides assistance to the legislature by answering requests for information, (2) monitors bills during the legislative session, and (3) provides testimony or commentary when it is appropriate or requested by the legislature (Department of Legislative Audit-About).

As mentioned above, the LRC is another important analytic bureaucracy that provides three kinds of services to the legislature through its corresponding divisions: maintenance of the statutes and administrative rules including finalizing bill drafts with respect to state laws and the constitution (Code Counsel Division); fiscal research, analysis, and producing fiscal impact statements (Fiscal Analysis Division); maintenance of the legislative library, studies, and research (Research Analysis Division).<sup>2186</sup> There are 22 professional staff listed on the LRC website.<sup>2187</sup>

An important development to watch in South Dakota is the creation of performance audit capacity. We are told by practitioners that the Legislative Research Council was recently tasked by the legislature with developing a performance audit capacity, and the legislature appropriated money for this purpose. Talks of developing this capacity have gone on for years, according to sources close to the issue, but the recent challenges uncovered in the states EB-5 Visa program and the Gear Up program were a catalyst, precipitating a dedicated appropriation for independent program evaluation and performance audit services. These two scandals were focusing events that played out in news headlines from 2013 through 2018, sparking<sup>2188</sup> ballot<sup>2189</sup> measures,<sup>2190</sup> executive actions, and legislative hearings.

### *Vignette: Belated Oversight of EB-5 and Green Cards for Sale*

*EB-5 is a federal visa program administered by the states. Basically, the program grants an immigrant a green card in exchange for making a \$500,000 investment in a business that will create jobs in the U.S. South Dakota's former Secretary of Tourism and State Development, Richard Benda, charged with implementing EB-5, privatized the program.<sup>2191</sup> In 2010, after Secretary Benda left office, he went to work for the now privatized EB-5 program.<sup>2192</sup> In 2013,*

<sup>2186</sup> [https://ballotpedia.org/South\\_Dakota\\_Legislative\\_Research\\_Council](https://ballotpedia.org/South_Dakota_Legislative_Research_Council)

<sup>2187</sup> <http://sdlegislature.gov/LRCStaff/StaffListing.aspx#divAll>

<sup>2188</sup> <https://www.argusleader.com/story/news/politics/2016/11/09/amid-voters-call-change-sd-chooses-massive-campaign-finance-reform/93539374/> accessed 1/8/19

<sup>2189</sup> [https://rapidcityjournal.com/opinion/editorial/ours-amendment-w-adds-needed-transparency/article\\_217c178c-2957-572e-a99a-2b5777bdc06c.html](https://rapidcityjournal.com/opinion/editorial/ours-amendment-w-adds-needed-transparency/article_217c178c-2957-572e-a99a-2b5777bdc06c.html) accessed 1/8/19

<sup>2190</sup> <https://www.apnews.com/6ff638a5120e400a8b2ae671e6e94187> accessed 1/8/19

<sup>2191</sup> <https://www.argusleader.com/story/davidmontgomery/2014/10/08/eb-5-primer/16890965/> accessed 1/8/19

<sup>2192</sup> <https://www.argusleader.com/story/davidmontgomery/2014/10/08/eb-5-primer/16890965/> accessed 1/8/19

while under investigation for diverting \$550,000 to pay for his own monitoring fees, Mr. Benda committed suicide. One of the projects he worked on, Northern Beef Packers, received \$100 million in investments on a total cost of \$115 million, but went bankrupt within a year of its opening. Subsequently the Chinese investors who had been recruited to fund the project, but lost their money, tried to sue the State of South Dakota. An investigation in 2013 by the executive branch resulted in the cancellation of the EB-5 implementation contract with the private entity.<sup>2193</sup> The governor ordered the Department of Legislative Audit (DLA) and independent accounting firms to conduct audits of the Governor's Office of Economic Development (GOED), in which the South Dakota Tourism and State Development Department are located.<sup>2194</sup>

In 2014, citing an attorney general's report, the legislature passed House Concurrent Resolution 1010, requesting GOAC to conduct hearings on GOED.<sup>2195</sup> GOAC held hearings on March 7<sup>th</sup>,<sup>2196</sup> July 29<sup>th</sup>,<sup>2197</sup> September 24<sup>th</sup>,<sup>2198</sup> and November 13<sup>th</sup><sup>2199</sup> of 2014. There was no archival recording of a June 18<sup>th</sup> hearing available, but minutes of this hearing confirm that subpoenas were amended to include certain documents and required an official appear before the committee.<sup>2200</sup> DLA staff assisted, answering committee questions and discussing the audit reports, recommendations, and providing their opinion on whether GOED was in compliance.<sup>2201</sup> These hearings frequently included testimony from officials including the attorney general, current Commissioner of GOED, and written answers to legislative questions by former Governor Rounds and another executive official, Joop Bollen, who was eventually charged with a felony in federal court. Issues of audit compliance were connected to the department's internal controls—noting failure to check the background of all new hires and also documenting reimbursement procedures that allowed an employee to double bill for travel costs. The agreed-upon procedures of engagement were found to lack documentation of an audit of governmental funds in GOED. The GOAC report and audio of the meetings indicates that legislators questioned officials, legislative audit staff advised GOAC, and officials were held accountable for compliance with audit recommendations. The hearings determined that the former secretary, Mr. Benda, took “inappropriate actions.” the risk of such occurrences in the future. The scandal included the prosecution of Joop Bollen,<sup>2202</sup> whose legal trial took place in 2017-18.<sup>2203</sup> The legislature conducted a total of approximately 22 hours of hearings on this issue. DLA's audit recommendations focused on ways to improve internal oversight to avoid future problems at GOED.

<sup>2193</sup> <http://politicalsmokeout.tumblr.com/post/65819551933/state-quietly-ends-contract-with-company-related> accessed 1/8/19

<sup>2194</sup> <http://sdlegislature.gov/docs/interim/2014/documents/GOA11-13-14HCR1010GOACReport.pdf> accessed 1/8/19

<sup>2195</sup> <http://sdlegislature.gov/docs/interim/2014/documents/GOA11-13-14HCR1010GOACReport.pdf> accessed 1/8/19

<sup>2196</sup> <https://sdlegislature.gov/docs/Interim/2014/minutes/MGOA03072014.pdf> accessed 1/8/19

<sup>2197</sup> <http://sdpb.sd.gov/SDPBPodcast/2014/Interim/Goa07292014.mp3> accessed 1/8/19

<sup>2198</sup> <http://sdpb.sd.gov/SDPBPodcast/2014/Interim/GOA09242014.mp3> accessed 1/8/19

<sup>2199</sup> <http://sdpb.sd.gov/SDPBPodcast/2014/Interim/goa11132014.mp3> accessed 1/8/19

<sup>2200</sup> <https://sdlegislature.gov/docs/Interim/2014/minutes/MGOA06182014.pdf> accessed 1/8/19

<sup>2201</sup> <http://sdlegislature.gov/docs/interim/2014/documents/GOA11-13-14HCR1010GOACReport.pdf> accessed 1/8/19

<sup>2202</sup> <https://www.usnews.com/news/best-states/south-dakota/articles/2018-10-20/deposition-uncovers-details-about-south-dakota-visa-scandal> accessed 1/8/19

<sup>2203</sup> <http://sdlegislature.gov/docs/budget/BoardPapers/2017/2%20-%20AG%20Presentation%20FY18.pdf> accessed 1/8/19

*Vignette: Oversight of an Education Cooperative using federal funds--Gear Up*

*A similar scandal involved a non-profit, Mid-Central Education Cooperative, and its administration of a \$4.3 million federal Gear Up<sup>2204</sup> grant, designed to help prepare low-income students for a postsecondary education. In 2015, The Secretary of Education Melody Schopp notified the cooperative that they were cancelling their contract citing “conflicts of interest and other red flags.”<sup>2205</sup> Soon after the cancellation, the coop’s business manager, Scott Westerhuis, killed his wife and four children, then committed suicide. An investigation by the South Dakota Division of Criminal Investigation revealed he had used the coop to funnel money from Gear Up to other nonprofits to pay himself and others.<sup>2206</sup> Charges in connection to the scandal were brought against three officials, resulting in two acquittals and one plea bargain. In 2017, DLA released their audit of Mid-Central Education Cooperative for 2015. The audit noted*

*A plethora of witnesses told law enforcement authorities and the DLA that not only did MCEC and its Board not know about the fraudulent and illegal activities of Scott and Nicole Westerhuis, but also that MCEC and the Board could not have known about them. These illicit activities were deliberately kept secret and out of view by Scott and Nicole Westerhuis, that it was the inappropriate action of the business manager and his wife, who was also an employee of the cooperative.<sup>2207</sup>*

*GOAC discussed the audit with the Auditor General at their August 25<sup>th</sup>, 2017 meeting. The meeting focused on details of the audit, and legislators pledged to allocate enough time to review all relevant materials.<sup>2208</sup> A June 6<sup>th</sup>, 2017 GOAC meeting included further discussion of Gear Up details and one legislator expressing an interest in having a public hearing “where people testify under oath.”<sup>2209</sup> Secretary of Education Schopp provided testimony regarding the scandal and the program generally at the July 24<sup>th</sup> GOAC hearing, which included this particular exchange about the programs outcomes*

*Senator Nelson asked since receiving the grant, how many Native American students went to college because of GEAR UP. Dr. Schopp referred to Tab C in the report, showing 285 students were reported for 2016-2017. Data in the annual performance reports submitted to the USDOE detail results achieved by the GEAR UP grant. Senator Nelson asked what metrics DOE was using to report the grant was a success. Dr. Schopp referred to the annual performance reports where evaluations were performed. High school graduation rates were an important metric.<sup>2210</sup>*

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<sup>2204</sup> Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP)

<sup>2205</sup> <https://www.argusleader.com/story/news/politics/2018/06/22/gear-up-investigation-trial-jury-decision-midcentral-marty-jackley-platte-westerhuis-sioux-falls/696070002/> accessed 1/8/19

<sup>2206</sup> <https://www.argusleader.com/story/news/politics/2018/10/12/south-dakota-gear-up-trials-school-district-funds-scandal-analysis/1601877002/> accessed 1/8/19

<sup>2207</sup> <https://sdlegislature.gov/docs/interim/2017/documents/goa7-24-17mcecsingleaudit15.pdf> accessed 1/8/19

<sup>2208</sup> <http://sdlegislature.gov/docs/Interim/2017/minutes/MGOA04252017.pdf> accessed 1/8/19

<sup>2209</sup> <http://sdlegislature.gov/docs/Interim/2017/minutes/MGOA06062017.pdf> accessed 1/8/19

<sup>2210</sup> <http://sdlegislature.gov/docs/Interim/2017/minutes/MGOA07242017.pdf> accessed 1/8/19



*At the next GOAC meeting on August 29<sup>th</sup>, 2017, discussions between legislators and auditors revealed that the Gear Up Grant had not been audited within the last 7 years.<sup>2211</sup> Legislators proceeded to ask audit staff and other legislators about the program's history. These were answered by some auditor staff and some representatives, who were on the committee who helped write the first Gear Up grant. At the next meeting on October 5<sup>th</sup>, legislators discussed how to monitor Gear Up more effectively. Again, the discussions occurred between legislators and audit staff. According to the meeting minutes, one legislator criticized the oversight conducted by the GOAC.*

*Senator Tapio commented on what has been learned. He advised that he would be an opponent of any legislation that comes out of this because he feels they have not done a proper analysis of what the problems are. Senator Tapio identified the following problems:*

- 1. There was fraud, and fraud possibly by State employees*
- 2. There were warnings of fraud to State employees that were not acted upon*
- 3. There were matching funds that were allocated and valued that were later determined never used*
- 4. We don't know who in State government knew about fraudulent activity and the valuation of the match to federal funds*
- 5. All of the players are interconnected*

*Senator Tapio stated he is ashamed of the Committee because there are unanswered questions and the Committee didn't subpoena people who know the answers. Representative Anderson made a point of order objecting to Senator Tapio's comment.<sup>2212</sup>*

*Gear Up was discussed again during the October 30<sup>th</sup>, 2017 GOAC meeting in the context of the Annual Report. One legislator made a motion to highlight in the Annual Report that fact that the committee had heard evidence brought by the Directors of Indian Education saying that the Department of Education had ignored their concerns about Gear Up. The motion to include this in the Annual Report failed, 3 Ayes, 5 Nays, and 2 excused.<sup>2213</sup> This provided an opportunity to execute oversight of a state agency, the Department of Education, for poor performance. Those voting against this amendment were all Republicans, so their motivation might have been partisan - to protect a department head appointed by a governor from their own party. On the other hand, one Republican did cross over to vote, along with the only two Democrats on the committee, for the amendment. This hints at some potential for bipartisan oversight, but this is only a small indication of that potential.*

The legislature took action to improve grant monitoring in the aftermath of the Gear Up hearings. SB 100 was signed into law on March 22<sup>nd</sup>, 2018.<sup>2214</sup> The bill was promulgated<sup>2215</sup> in

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<sup>2211</sup> <http://sdlegislature.gov/docs/Interim/2017/minutes/MGOA08292017.pdf> accessed 1/8/19

<sup>2212</sup> <http://sdlegislature.gov/docs/Interim/2017/minutes/MGOA10052017.pdf> accessed 1/8/19

<sup>2213</sup> <http://sdlegislature.gov/docs/Interim/2017/minutes/MGOA10302017.pdf> accessed 1/8/19

<sup>2214</sup> [https://sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?Bill=100&Session=2018](https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=100&Session=2018) accessed 1/8/19

<sup>2215</sup> [https://www.capjournal.com/news/in-response-to-gear-up-scandal-house-tightens-financial-standards/article\\_20e3b6bc-21a0-11e8-b461-d3bf910385f7.html](https://www.capjournal.com/news/in-response-to-gear-up-scandal-house-tightens-financial-standards/article_20e3b6bc-21a0-11e8-b461-d3bf910385f7.html) accessed 1/8/19

the wake<sup>2216</sup> of the Gear Up scandal and includes some of the items discussed in GOAC hearings noted in this section. It establishes provisions to improve grant monitoring and review. It also requires certain record retention policies. The legislature did not take decisive action on the EB-5 problems; they conducted hearings—many hours of them; and the hearings may have revealed information used by the DLA to make its recommendations. But the legislature deferred to its analytic bureaucracy to recommend improved internal procedures and to the federal government to take punitive action.

## Oversight Through the Appropriations Process

According to Article XII, Section 2 of South Dakota’s Constitution, a general appropriations bill may only include “ordinary expenses” of state institutions, including debt payments. Any spending outside of these parameters must be included in a separate, single-item bill, which “require[s] a two-thirds vote of all the members of each branch of the Legislature.” (p. 42)

Per the legislature’s joint rules, The Joint Committee on Appropriations “is deemed to be a standing committee of the Senate and House of Representatives for the limited purposes of hearing agency or other budget presentations, and introducing, hearing, or acting on appropriation bills.” (South Dakota Legislature-Joint Rules (2018), Rule 7-12). Most appropriations-related activities are conducted by the Joint Committee on Appropriations.

Undetailed meeting minutes and audio files from past meetings held by the Joint Committee on Appropriations are available on the South Dakota Legislature’s website. This material reveals that the joint committee held extensive hearings that were attended by agency heads. A typical meeting includes an executive branch official making a presentation, followed by legislators asking questions of the officials, and policy discussion among legislators. An example from the minutes of an exchange regarding school districts meeting certain standards demonstrates the sort of questioning that takes place. (Failure to meet the standards means that the district will incur a penalty unless the district is granted a conditional waiver.)

Representative David Anderson asked Ms. Darnall to explain the process for monitoring these conditional waivers. Ms. Darnall said the Department of Education has ten days after this meeting to notify each school district of the conditions of each waiver. Each district will be required to provide documentation on how these conditions are met. If the school district does not meet the condition, the Department of Education will withhold the amount of the penalty.<sup>2217</sup>

The Department of Legislative Audit sometimes will report findings to appropriations committees in an effort to ensure agency compliance (interview 2018). Reporting could take the form of attending a hearing to provide testimony, staffing in preparation for a hearing, informal communication about an audit finding, a dialogue about an agency that is struggling to get into compliance, or suggesting that the Government Operations and Accountability Committee route a report to an appropriations committee. The implication is that audits are occasionally

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<sup>2216</sup> [https://rapidcityjournal.com/news/local/senate-oks-tougher-standards-in-wake-of-gear-up-scandal/article\\_d5e15476-24f8-59d2-8a98-f0b123b6cb41.html](https://rapidcityjournal.com/news/local/senate-oks-tougher-standards-in-wake-of-gear-up-scandal/article_d5e15476-24f8-59d2-8a98-f0b123b6cb41.html) accessed 1/8/19

<sup>2217</sup> <https://sdlegislature.gov/docs/Interim/2017/minutes/MAPP12052017.pdf>, accessed 1/8/19

considered in the budgeting process, although examples of this activity were not apparent from a sampling of meeting minutes. Furthermore, the available committee materials indicate that most appropriations-related legislative activities occur within the joint committee, not the separate House and Senate Appropriations Committees. The South Dakota Legislature's website also provides various reports concerning budgetary information about specific state agencies.

No recent examples of serious budget battles between the executive and legislature could be found, rather there were some minor disagreements about narrow bill details. The Governor consistently expressed that his budget priority was to have a structurally balanced budget. Legislators broadly support the principles that underlie the governor's approach.<sup>2218</sup> There have been substantial surpluses in each and every one of the last 7 years, and from all appearances, the governor and the majority of his party are in broad agreement on the budgeting priorities. The 2018 legislative session ended with gubernatorial vetoes<sup>2219</sup> on a very narrow set of items: lower standards for home schooled students to receive a state college scholarship compared to public school students and a bill that would have allowed the legislature to file up to 10 bills before the start of the legislative session.<sup>2220</sup> Despite using up all the days available to them in the 2018 session to debate these vetoes and even though some of the bills initially passed with veto-proof majorities, the legislature did muster a 2/3s majority to override any veto.<sup>2221</sup>

## Oversight Through Committees

We have not identified anything in the constitution, chamber rules, or statutes that specifically delineate the oversight responsibilities of any standing committees, aside from GOAC. Practitioners confirm this claim and state that GOAC is the primary oversight committee. As discussed above, the Department of Legislative Audit (South Dakota's legislative analytical bureaucracy) reports to the Joint Government Operations and Audit Committee (GOAC). GOAC serves as the legislature's main oversight committee (interview 2018), reviewing agency performance reports and audits. The GOAC holds extensive hearings in which officials from various government agencies are questioned, for details see the section *Oversight through Analytic Bureaucracies*, in particular the discussion of EB-5 and Gear Up. Detailed descriptions of committee proceedings are provided through the committee website (SD Legislature-Government Operations and Audit). We are told that GOAC will occasionally routes key audits to specific committees, but for the most part the main form of dissemination is informal communication amongst legislators and legislative staff.

We were told that recently state agencies have been tasked with developing indicators and performance measure reports that they share with the legislature. The effort is a relatively new practice that has only recently completed its first full cycle. GOAC reviewed these operations. We were told that legislators were facilitating this new process—in the absence of

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<sup>2218</sup> [https://rapidcityjournal.com/opinion/columnists/tsitrian-lawmakers-put-politics-over-people/article\\_37c8c3a2-b841-5bd2-9b59-145b01229b6a.html](https://rapidcityjournal.com/opinion/columnists/tsitrian-lawmakers-put-politics-over-people/article_37c8c3a2-b841-5bd2-9b59-145b01229b6a.html) , accessed 1/8/19

<sup>2219</sup> <https://www.usnews.com/news/best-states/south-dakota/articles/2018-03-23/daugaard-vetoes-3-bills-lawmakers-could-override-next-week> , accessed 1/8/19

<sup>2220</sup> <https://www.argusleader.com/story/news/politics/2018/03/23/daugaard-vetoes-home-school-scholarship-requirements-earlier-bill-filing/450976002/> , accessed 1/8/19

<sup>2221</sup> <https://www.argusleader.com/get-access/?return=https%3A%2F%2Fwww.argusleader.com%2Fstory%2Fnews%2Fpolitics%2F2018%2F03%2F26%2FHome-school-scholarship-requirements-fall-short-veto-override-pierre%2F458008002%2F> , accessed 1/8/19

independent external auditing—by questioning agency indicators and occasionally pressing for more useful measures. Practitioners are hopeful that the capacity, which is being developed by the LRC to conduct program evaluation and performance audits, will improve the validity of these agency reports.

In addition to GOAC, the legislature occasionally creates a study committee to consider a specific issue. For example, the Legislative Committee on Non Meandered Waters met and discussed solely the meandered waters issue that was eventually the subject of a special session called by the governor. The special session lasted a single day and was dedicated to this one issue. This targeted oversight is conducive to a legislative body that has limited resources at its disposable and little slack legislative staff capacity.

## Oversight Through the Administrative Rules Process

According to the Council of State Governments (2016), the South Dakota Legislature’s Joint “...Interim Rules Review Committee may, by statute, suspend rules that have not become effective yet by an affirmative vote of the majority of the committee.” (p. 126) Administrative rules that are not acted upon by the committee go into effect automatically.

South Dakota Codified Law, Chapter 1-26 directs the administrative rules process.<sup>2222</sup> Statute 1-26.1 creates the six-member Interim Rules Review Committee, including three house members and three senators, appointed by the Speaker of the House of Representatives and President Pro Tempore of the Senate, respectively. It further requires that no more than four committee members be from the same political party (a maximum of two from each house). One distinct tool the IRRC possesses is the ability to have promulgated rules suspended until they have had additional public hearings. This tool could be abused and used to delay a rule’s adoption perpetually, or it could be used adjust a rule for better fit with the regulatory environment and problems experienced by citizens, or it provides an opening for special interests to exercise outsized influence through public hearings.

During 2017, the Interim Rules Review Committee appears to have reviewed between 50-100 items; either new rules or amendments to existing rules.<sup>2223</sup> Of these items, most were fully approved. However, there were some instances where rules were reverted, rejected, returned to a prior phase in the approval process due to some procedural defect. Sometimes rules were partially accepted. Votes were most commonly either unanimous or along party lines. Representatives from the proposing agency testified during each review, and public testimony was heard during a handful of reviews (SD Legislature-Interim Rules Review).

Overall, Schwartz (2010) grades South Dakota poorly, giving them “D” for the overall quality of the review process. The state is lauded for its rules transparency and processing, which

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<sup>2222</sup> Section 30

Text of Section 30:

Power of Committee of Legislature to Suspend Administrative Rules and Regulations

The Legislature may by law empower a committee comprised of members of both houses of the Legislature, acting during recesses or between sessions, to suspend rules and regulations promulgated by any administrative department or agency from going into effect until July 1 after the Legislature reconvenes.

History: Section proposed by SL 1980, ch 4, approved Nov. 4, 1980.[30]

<sup>2223</sup> <http://sdlegislature.gov/Rules/RegisterArchive.aspx?Year=2017>, accessed 1/8/19

ensures that public notice is given. But he is critical of the weak requirements for impact statements and the lack of a true cost-benefit analysis of rules.

### Oversight Through Advice and Consent

The appointment powers of the governor are somewhat limited in South Dakota, as the most influential executive branch offices are elected by popular vote (including secretary of state, attorney general, auditor general, and others) (SD Constitution, Article IV-7). Agency heads who are not directly elected are appointed by the governor, “by and with the advice and consent of the senate” (SD Constitution, Article IV-9, p. 21-22). Of 50 agency heads, only 18 are gubernatorial appointments that require the advice and consent of the Senate (Book of the States). Despite the opportunities for the senate to exercise advice and consent, we have not identified any recent instance in which the senate has rejected a gubernatorial appointment or even an instance where the appointment was in question. This is true despite the current governor and the past governor being publicly criticized for cronyism and nepotism in some of the appointments, including the 2010 appointment of the governor’s son to an executive level position.<sup>2224</sup>

The South Dakota Constitution also gives the governor the power to reorganize state agencies, excepting those of “elected constitutional officers”. “If such changes affect existing law, they shall be set forth in executive orders,” and can be overturned by majorities of either chamber of the legislature (Article IV-8, p. 21). In 2017, two separate Reorganization Orders and one Administrative Closure were issued by the Governor.<sup>2225</sup> No evidence was found to suggest the legislature attempted to overturn these executive orders.

The executive appears to use order fairly regularly, issuing 11 in 2017, 10 in 2016, and 11 in 2015. Most orders deal with weather or drought emergencies. Each and every year in the sample there was an executive order to declare Good Friday a closure for all offices of state government under the director control of the governor. The legislature has no power to oversee these orders except through the legislative process. It is not clear, given the nature of these orders in South Dakota, that the legislature would want to object even if it had additional prerogative to do so.

### Oversight Through Monitoring of State Contracts

The Bureau of Administration’s Office of Procurement Management provides a list of state contracts on its website. It is unclear what, if any, oversight is conducted of the contract-granting process. State contracts over \$25,000 must be competitively bid, with some exceptions. The bidding process is explained in the South Dakota Local Government Guide for Acquisitions, Disposals and Exchanges, published by the Department of Legislative Audit (2012).

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<sup>2224</sup> [https://rapidcityjournal.com/news/daugaard-appointments-family-jobs-inspire-debate-over-hiring-connections/article\\_7c8eba6a-faad-11df-bbb2-001cc4c03286.html](https://rapidcityjournal.com/news/daugaard-appointments-family-jobs-inspire-debate-over-hiring-connections/article_7c8eba6a-faad-11df-bbb2-001cc4c03286.html), accessed 1/8/19

<sup>2225</sup> <https://sdsos.gov/general-information/executive-actions/executive-orders/search/>, accessed 1/8/19

## Oversight Through Automatic Mechanisms

South Dakota is one of three states with an irregular or ad hoc sunset process (Baugus & Bose, 2015). According to the Council of State Governments (2016, p. 133), “South Dakota suspended sunset legislation in 1979. A later law directing the Executive Board of the Legislative Research Council to establish one or more interim committees each year to review state agencies was repealed in 2012.” In contradiction to that assertion, we found a few instances of sunset clauses being attached to legislation in 2017 (Heidelberger, 2017; SD Department of Revenue, 2017). This appears consistent with the Baugus and Bose (2015) assessment that the sunset process is irregular and ad hoc.

## Methods and Limitations

We contacted three people about oversight in South Dakota and interviewed two of them. Agendas, minutes, and audio recordings are available for most committee meetings, although it typically takes a year for the official minutes to be posted. This did not prove a major impediment for our investigation of oversight in South Dakota, but its citizens might not want to wait for many months in order to hear how thoroughly their elected officials are pursuing problems with state programs. We suspect that limited staff resources impair the ability of the legislature to provide this information promptly.

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