

**FORMAL OPINION
2001-F-02**

DATE ISSUED: February 22, 2001

REQUESTED BY: Jeff Rotering, Adams County State's Attorney

QUESTION PRESENTED

Whether parents in a bordering state may privately pay tuition to a North Dakota public school district so their children may attend school in the North Dakota school district.

ATTORNEY GENERAL'S OPINION

It is my opinion that a North Dakota school district may not accept a student from a bordering state unless there is in place either a reciprocal master agreement between the Superintendent of Public Instruction and the appropriate officer or board in the bordering state or there is an agreement between the North Dakota school district and the school district in which the student resides. It is my further opinion that North Dakota law does not require that the tuition payments made on behalf of a nonresident student must be paid by any particular individual or from any particular source of funds.

ANALYSIS

The North Dakota Supreme Court "has often said that school boards have only such powers expressly or impliedly granted by statute." Fargo Educ. Ass'n v. Fargo Pub. Sch. Dist., 291 N.W.2d 267, 271 (N.D. 1980). North Dakota public schools are under legislative control and the rule of strict construction applies to defining the powers of school officials. Any doubt as to the existence or extent of such powers must be resolved against the school board. Myhre v. School Bd. of N. Cent. Pub. Sch. Dist., 122 N.W.2d 816, 819-20 (N.D. 1963). "In the absence of a statute authorizing the admission of nonresident students, it is generally held that children have no right to be admitted to a school outside of their own district on any terms, and that a school district has no authority to open its schools on any terms for the instruction of children living outside of the district in which such schools are located." Id. at 819.

Statutory authority permitting a student residing in another state to attend school in a North Dakota public school district is found at N.D.C.C. § 15-40.2-10, which provides:

1. The superintendent of public instruction shall enter into reciprocal master agreements with the appropriate state educational agencies or officers of bordering states in regard to the cost of educating elementary and high school students in the public schools or institutions in such bordering states. A school district may either comply with the terms of the reciprocal master agreement or, upon notification to the superintendent of public instruction, may enter into an agreement with a school district in a bordering state for the education of elementary and high school students. The agreement, which replaces the provisions of the master reciprocal agreement, must provide for the payment of tuition at an amount agreed upon by the school district of residence and the school district of the bordering state. However, the tuition may not exceed the amount established under the reciprocal master agreement, nor may it be less than the per student foundation aid plus tuition apportionment in the student's school district of residence. For purposes of foundation aid, a student attending school in a bordering state under such an agreement is deemed to be in attendance in the student's school district of residence. The student's school district of residence is liable to the school district in the bordering state for payments as provided in the agreement.
2. If the state educational agency or officer of the bordering state is not authorized to or declines to enter into a reciprocal master agreement with the superintendent of public instruction, a school district may negotiate with a school district of that bordering state an amount of tuition it is willing to pay to that other state's school district for the education of pupils in that state. The school district of residence is liable to the school district in the bordering state for the payments it agrees to make under this subsection. However, if the school district accepts students from that bordering state, it may not agree to accept those nonresident students for an amount of tuition less than the foundation aid plus tuition apportionment it would have received from this state for one of its students in the same grade if its student had been attending in that bordering state.

The only permission granted to a North Dakota school district allowing it to accept students from other states is either through the terms of a reciprocal master agreement negotiated

by the Superintendent of Public Instruction or through an agreement that the North Dakota school district has reached with a school district in a bordering state. In neither instance is a North Dakota school district allowed to accept a student from another state without either complying with the terms of a reciprocal master agreement or without having first obtained the agreement of the school district in which the child resides.

The issue of who is liable to pay the tuition, however, is an open topic. Subsection 2 plainly requires that, for a North Dakota student attending a public school of a bordering state, the school district of residence must pay any tuition that had been agreed upon to the school district in the bordering state. However, the source of funds for any payments that a North Dakota school district would receive to educate students from the bordering state is not specified. The only restriction in this instance is that the North Dakota school district may not agree to accept a nonresident student for less than the foundation aid plus tuition apportionment it would have received for one of its own students in the same grade if that student were attending in the bordering state.

The North Dakota Supreme Court has stated that, generally, the law is what the Legislature says, not what is unsaid. Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993). The court said, in pertinent part:

It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent.

Id. (quoting City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940)). It therefore appears that the Legislature was concerned that when a North Dakota student is to receive public school education in another state, the school district of that child's residence is responsible for paying the tuition owed to the school district of the other state on behalf of that child. However, the Legislature's silence as to the source of payment for students attending school in North Dakota from out of state may simply recognize that other states may choose any number of ways to fund the tuition charge, including requiring a parent to pay tuition. Whether the bordering state's school district, the bordering state government, or the student's parents are responsible for payment of the North Dakota tuition is a matter North Dakota law leaves to the bordering state's laws and constitution.

Therefore, it is my opinion that a North Dakota school district may not accept a student from a bordering state unless there is in place either a reciprocal master agreement between the Superintendent of Public Instruction and the appropriate officer or board in the bordering state or there is an agreement between the North Dakota school district and the school district in which the student resides. It is my further opinion that North Dakota law

does not require that the tuition payments made on behalf of a nonresident student be paid by any particular individual or from any particular source of funds.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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