LETTER OPINION
2003-L-21

March 26, 2003

Honorable Wayne G. Sanstead
Superintendent of Public Instruction
600 East Boulevard Avenue, Dept. 201
Bismarck, ND 58505-0440

Dear Dr. Sanstead:

Thank you for your letter asking if 2003 Senate Bills 2065 and 2418 are constitutionally infirm because they affect your administration of education matters related to federal law compliance and testing by requiring oversight and approval by a legislative investigating committee.

It is presumed when construing a statute that the Legislature intended to comply with the constitutions of North Dakota and of the United States and any doubt must be resolved in favor of a statute's validity. Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195, 197 (N.D. 1994); Snortland v. Crawford, 306 N.W.2d 614, 626 (N.D. 1981); State ex rel. Johnson v. Baker, 21 N.W.2d 355, 359 (N.D. 1945); N.D.C.C. § 1-02-38(1). This presumption is conclusive unless the statute clearly contravenes the state or federal constitutions. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987); State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 694 (N.D. 1984). Also, a statute will only be found unconstitutional upon concurrence of four of the five justices of the North Dakota Supreme Court. N.D. Const. art. VI, § 4. "One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." S. Valley Grain Dealers Ass'n v. Bd. of County Comm'rs of Richland County, 257 N.W.2d 425, 434 (N.D. 1977). Because it is the Attorney General's role to defend statutory enactments from constitutional attacks, this office has been reluctant to issue an opinion questioning the constitutionality of a statutory enactment. Accordingly, absent controlling case law to the contrary, this office will not declare that a bill, if enacted, would be unconstitutional. In this case, the bills have been amended since you requested my opinion to remove the language that you questioned.

Senate Bill 2418, as introduced, created a legislative investigating committee to review the No Child Left Behind Act of 2001 (NCLBA), 20 U.S.C. § 6301 et seq., and its implementation, and would have allowed the committee to approve or disapprove rules

implementing NCLBA. This provision was removed. Subsection 5 of the bill now states that no rule or guideline to implement the NCLBA applies to any North Dakota school district until the investigating committee holds a public hearing on it. Engrossed S.B. 2418, 2003 N.D. Leg. As originally introduced, Senate Bill 2065 did not contain any restrictions on rulemaking. Senate Bill 2065 originally addressed statewide testing, but it was amended to require a public hearing before the investigating committee created by Senate Bill 2418 before a test required by that section could be administered. Amendments in the House have removed this provision. 2nd Engrossed S.B. 2065, 2003 N.D. Leg.

Senate Bills 2065 and 2418, as amended, no longer provide for a legislative committee to approve or void your rules or actions on the subjects at issue. Senate Bill 2418 still allows for a hearing before a rule or guideline becomes effective, while Senate Bill 2065 does not. It is my opinion that the bills, in their present form, do not constitute an impermissible legislative intrusion into executive functions and are, therefore, facially constitutional.[1]

Sincerely,

Wayne Stenehjem
Attorney General

pg

[1] A statute may be constitutional on its face, but yet be unconstitutional when applied to specific circumstances. See Traynor v. Leclerc, 561 N.W.2d 644, 646 (N.D. 1997); Glaspie v. Little, 564 N.W.2d 651, 654 (N.D. 1997); Quist v. Best Western Intern., Inc., 354 N.W.2d 656, 665 (N.D. 1984). Even though Senate Bill 2418 is not facially unconstitutional, it appears its application could cause unconstitutional results. Traynor, 561 N.W.2d at 646. Because Senate Bill 2418 does not provide a specific time within which the investigative committee created must meet and act upon your activities by holding its public hearing and because your activities are not effective until the committee holds the public hearing, application of the bills could produce an unconstitutional effect if committee inaction allowed the rules or tests to be "vetoed" by allowing them to languish. State ex rel. Meadows v. Hechler, 462 S.E.2d 586, 589 (W. Va. 1995).