LETTER OPINION
2005-L-06

February 4, 2005

The Honorable Wayne G. Sanstead
Superintendent of Public Instruction
600 E Boulevard Ave.
Bismarck, ND 58505

Dear Superintendent Sanstead:

Thank you for asking whether payments made by a school district receiving impact aid to a school district that admits its students may be classified as a "tuition payment" as that term is used in N.D.C.C. § 15.1-27-11(1)(b). In addition, you ask whether an admitting school district must charge tuition based upon the formula outlined in N.D.C.C. § 15.1-29-12, or whether the school districts are free to negotiate a different tuition rate. For the reasons stated below, it is my opinion that payments made by school districts receiving impact aid to a school district that admits its students must be classified as a "tuition payment." Further, military installation school districts may negotiate a tuition rate, but all other districts must calculate the tuition rate pursuant to the formula set out in N.D.C.C. § 15.1-29-12.

ANALYSIS

Impact aid is a federal program that provides funding for a portion of the educational costs of federally-connected students. See 20 U.S.C. 7701 *et seq.*, 34 C.F.R. 222.1 *et seq*. Funding is sent from the federal government directly to local educational agencies (LEA), i.e., school districts, that qualify for this program. Some LEA's forward a portion or all of their impact aid funds to neighboring school districts for the education of the LEA's students.

You question whether the payments made by the LEA's to the admitting districts should be viewed as impact aid or tuition payments. If the amounts are impact aid, they could not be considered by the state when calculating state aid. See 20 U.S.C. § 7709 and N.D.A.G. 2004-L-63. If the amounts are tuition, however, the amounts are considered when calculating state aid. See N.D.C.C. § 15.1-27-11(1)(b).

I was unable to find any federal law or regulation that governs the use of impact aid funds once those funds have been paid out by an LEA. In addition, a member of my staff spoke with an attorney at the United States Department of Education who

confirmed that he knew of no law, regulation or policy on point.[1] Because there appears to be no federal directive relating to these funds once the funds are paid out by an LEA, state law is applicable.

There are three statutes that relate to providing education for nonresident students. The first is N.D.C.C. § 15.1-29-09 which states:

> An admitting district may accept payments under title 1 of Public Law No. 81-874 [64 Stat. 1100; 20 U.S.C. 236 *et seq.*] as tuition for a nonresident student if:
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> 1. The student's parent is employed on an installation owned by the federal government;
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> 2. The student's parent resides on an installation owned by the federal government; and
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> 3. The boards of the student's school district of residence and the admitting district agree to accept the payments in lieu of other tuition for the nonresident student.

N.D.C.C. § 15.1-29-09 (emphasis added).

"[T]itle 1 of Public Law No. 81-874 [64 Stat. 1100; 20 U.S.C. 236 *et seq.*]," as referenced in this statute, was the law that first established impact aid. This law has since been repealed and impact aid legislation is now found at 20 U.S.C. 7701 *et seq*., and 34 C.F.R. 222.1 *et seq*. The money accepted by the admitting district is accepted "as tuition." N.D.C.C. § 15.1-29-09.

The second section is N.D.C.C. § 15.1-29-13(1)(a), which states, in part, " . . . the board of a school district that admits a nonresident student shall charge and collect tuition for the student" (emphasis added). Section 15.1-29-12, N.D.C.C., requires the sending school district to pay as tuition "the full cost of education incurred by the admitting district" and sets out a formula for calculating that tuition.

The third section is N.D.C.C. § 15.1-08-04(3), which directs a military installation school district to "[c]ontract for the provision of education to the students residing in the district." It is reasonable to conclude that any consideration paid under this contract represents "the cost of education incurred by the admitting district" or "tuition." See N.D.C.C. § 15.1-29-12.

[1] Telephone call with Mark Smith, Attorney, U.S. Dept. of Ed., (Jan. 6, 2005).

While N.D.C.C. § 15.1-27-11(1)(b) does not define the phrase "tuition payments" it is reasonable to conclude that it is referencing tuition payments as calculated under N.D.C.C. §§ 15.1-29-12, 15.1-29-09 or 15.1-08-04(3) because no other type of tuition is statutorily authorized to be charged by a school district admitting nonresident students. See generally, N.D.C.C. title 15.1. Therefore, regardless of whether the tuition is paid pursuant to N.D.C.C. §§ 15.1-29-12, 15.1-29-09 or 15.1-08-04(3), the amount paid by an LEA to an admitting district is a "tuition payment" as that phrase is used in N.D.C.C. § 15.1-27-11(1)(b).

It is interesting to note that the department of public instruction (DPI) traditionally has not viewed the amount paid by a military installation school district to an admitting district as regular tuition. In 1989, Al Koppang, former Director of School Finance at DPI, testified on the bill authorizing military installation school districts. In explaining the relationship between the Air Force Bases and the Grand Forks and Minot Public School Districts, he stated:

> You are not talking about regular tuition payments on these Air Bases. The Grand Forks district and the Minot district do not get tuition; they receive the state foundation aid payment and the impact aid payment, and they agree to educate for whatever that is. That is what the contract calls for.

Hearing on H.B. 1304 Before the House Comm. on Education, 1989 N.D. Leg. (Feb. 7) (Statement of A. Koppang) (emphasis added). If this money is suddenly viewed as tuition, it will likely have a significant impact on the amount of state aid received by the school districts admitting students from the military installation school districts. This may or may not have been the intent of the Legislature, and the Legislature may wish to consider this issue prior to its adjournment.

You also ask whether school districts that receive impact aid may negotiate a tuition rate with an admitting school district. Again, three statutes address this issue.

The first section is N.D.C.C. § 15.1-29-09, which was discussed above. The plain language of the statute indicates that the student's school district of residence and the admitting district could agree to accept the impact aid payments "in lieu of" other tuition for the nonresident student. In this case, the districts would not be free to negotiate a tuition rate, but would be limited to the amount received as impact aid. As noted above, the federal law cited in N.D.C.C. § 15.1-29-09 has been repealed.

The second section is N.D.C.C. § 15.1-29-12. When payments are calculated pursuant to this section, there is no ability to negotiate a tuition rate. The formula for nonresident tuition is set out clearly, in mandatory language, stating that the admitting district "shall determine the cost of education per student" and what it "shall add" and what it "shall

subtract" to arrive at the correct tuition amount. See N.D.C.C. § 15.1-29-12(2). Clearly, this statute does not allow room for negotiation of a tuition rate for a nonresident student.

The third section is N.D.C.C. § 15.1-08-04. This section is strictly limited to military installation school districts and would not apply to LEA's that are not military installation school districts. When military installation school districts are involved, state law provides that they "shall . . . [c]ontract for the provision of education to the students residing in the district." N.D.C.C. § 15.1-08-04. In this case, the Legislature specifically gave the military installation school districts the ability to negotiate a contract to provide education, rather than simply directing the military installation school districts to follow N.D.C.C. ch. 15.1-29.

North Dakota has required schools to collect tuition for nonresident students pursuant to a statutory formula since at least 1921. See 1921 N.D. Sess. Laws ch. 107, § 1. The creation of military installation school districts is relatively new, and was enacted in 1989. See 1989 N.D. Sess. Laws ch. 204. Had the Legislature wanted the military installation school districts to calculate nonresident tuition pursuant to the current statutory formula, what is now N.D.C.C. ch. 15.1-29, it would not have directed it to "[c]ontract for the provision of education." N.D.C.C. § 15.1-08-04(3). To require a party to enter into a contract where the terms of the contract would do nothing more than restate current law appears to be an idle or unnecessary act. "A statute must be construed to avoid . . . idle or unnecessary acts." Larson v. Wells County Water Resource Bd., 385 N.W.2d 480, 482 (N.D. 1986). Therefore, when a military installation school district contracts with an admitting school district it is free to negotiate a tuition rate outside of the rate set in N.D.C.C. § 15.1-29-12.

Sincerely,

Wayne Stenehjem
Attorney General

njl/vkk

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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).