

LETTER OPINION
96-L-60

April 8, 1996

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

Dear Dr. Sanstead:

Thank you for your letter asking about the authority of North Dakota school districts located along the border between North and South Dakota to pay tuition to South Dakota school districts for the education of North Dakota students where the state of South Dakota declined to finalize under its law a reciprocal agreement with the state of North Dakota concerning tuition rates for the education of students in each state.

The information you provide indicates that the acting Secretary of the South Dakota Department of Education and Cultural Affairs on July 7, 1995, and you, on July 12, 1995, signed a document entitled "South Dakota-North Dakota Reciprocal Tuition Agreement." This document was entered into under the authority provided by the respective state education statutes, namely, North Dakota Century Code § 15-40.2-10 and South Dakota Codified Laws § 13-15-8.

Following the execution of that document, the Secretary of the South Dakota Department of Education and Cultural Affairs notified your office by a memorandum dated October 30, 1995, that the state of South Dakota did not finalize the agreement pursuant to South Dakota law because it did not file that agreement with its Secretary of State pursuant to the above-noted section of South Dakota law. The memorandum also stated that the agency would recommend to its state's 1996 Legislature that its school districts be authorized to contract with bordering states for school tuition without any state oversight or intervention. You provided a copy of South Dakota 1996 House Bill No. 1047, which apparently was enacted by the Legislature and approved by the South Dakota Governor as an emergency measure. This bill repealed South Dakota Codified Laws § 13-15-8 and amended other South Dakota statutes providing South Dakota school districts with authority to contract with bordering state school districts for the education of school children and a decision on the rate of tuition. N.D.C.C. § 15-40.2-09(1) provides:

1. Students may attend a school in a bordering state under the following circumstances:

- a. A student who lives within forty miles [64.37 kilometers] of another state or in a county bordering on another state may, with the approval of the school board, attend a public school or institution in a bordering state, and the school board of the school district within which the student resides may contract with the bordering state for the education of the student.
- b. A student who resides within a school district that is annexed to or reorganized with another district or districts, and who attended a school district in a bordering state during the 1990-91 school year, must be permitted to attend or continue attending school in the district in the bordering state.
- c. A student who resides within a school district that is annexed to or reorganized with another district or districts, and whose sibling attended an out-of-state school during the 1990-91 school year, must be permitted to attend school in the district the sibling attends in the bordering state.

N.D.C.C. § 15-40.2-10 provides:

15-40.2-10. Reciprocal master agreements for student attendance in other states -- School district agreements. 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, upon notification to the superintendent of public instruction, 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, may 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.

N.D.C.C. § 15-40.2-09(1) provides the circumstances under which students living on the borders of North Dakota may attend school in bordering states. Subdivisions b and c of subsection 1 of that section grant presumed eligibility to certain students who attended bordering states' schools during the 1990-91 school year or whose siblings attended bordering states' schools. All other students would be covered by subdivision a which requires the approval of their school board if they reside in appropriate locations, before being authorized to attend the bordering state and gives that school board the discretion to enter into a contract with the bordering state for the education of the student. It is expressed in terms that the North Dakota school district board "may contract with the bordering state for the education of the student." This authority is in addition to the school board's discretion to authorize the student to attend school in the other state.

N.D.C.C. § 15-40.2-10 authorizes a school district, upon notification to the Superintendent of Public Instruction, to enter into an agreement with a school district in a bordering state for the education of North Dakota students. The next sentence in that section states, "[t]he agreement, which replaces the provisions of the master reciprocal agreement, may 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." This language indicates that it is discretionary with the North Dakota school district whether it will pay tuition to the South Dakota school district for the education of students authorized to attend school in another state. If the agreement with the bordering state for the education of North Dakota students does include the payment of tuition, then that tuition amount may not be less than the per student foundation aid plus tuition apportionment in the student's school district of residence and may not exceed the amount established under the reciprocal master agreement.

Because of the actions of the South Dakota Department of Education and Cultural Affairs in October of 1995 and the South Dakota Legislature in February of 1996, North Dakota students have begun

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attendance in South Dakota school districts under the belief that the reciprocal tuition agreement you and the South Dakota Education Secretary executed would be effective. For purposes of the South Dakota districts, that agreement is apparently ineffective and those districts are not bound by it. Obviously, these events have occurred between North Dakota legislative sessions drawing into question the applicability of the reciprocal tuition agreement you have executed with South Dakota as well as the absence of any authority on the part of the South Dakota Department of Education and Cultural Affairs to enter into such an agreement in the future.

South Dakota Codified Laws § 13-15-8, at the time the South Dakota Education Secretary executed the above-noted reciprocal tuition agreement, provided that it shall, "after filing with the secretary of state, be binding upon all school districts." This language, of course, applied to its being binding on all South Dakota school districts.

On the other hand, the North Dakota statute, N.D.C.C. § 15-40.2-10, provides that the Superintendent of Public Instruction "shall enter into reciprocal master agreements with the appropriate state educational agencies or officers of bordering states. . . ." In the instant case, the North Dakota Superintendent of Public Instruction did enter into the reciprocal master agreement with South Dakota by signing the same document that the South Dakota Education Secretary signed. Therefore, even though the document did not become binding on South Dakota school districts because it was not filed with the South Dakota Secretary of State, it does form a basis pursuant to N.D.C.C. § 15-40.2-10 for North Dakota school districts to use in paying tuition to South Dakota school districts for the 1995-1996 school year. The agreement in question only applied to the 1995-1996 school year.

Therefore, for school year 1995-96, ending June 30, 1996, a North Dakota student who has been authorized by the local school board to attend a South Dakota school district and where that North Dakota school district has agreed to pay tuition to the South Dakota school district, the North Dakota school district has authority to pay tuition within the range of the North Dakota foundation aid plus tuition apportionment amount and the amount provided in the agreement signed by the North Dakota Superintendent of Public Instruction and the South Dakota Education Secretary in July of 1995.

The remaining part of this opinion addresses the payment of tuition for the 1996-1997 school year.

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If the language of a statute is of doubtful meaning, or if adherence to the strict letter of the statute would lead to injustice, absurdity, or contradictory provisions, a duty descends upon the courts to ascertain the true meaning. [Citations omitted.] Thus, in pursuance of the general objective of giving effect to legislative intent, we are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter. [Citations omitted.]

In Interest of B.L., 301 N.W.2d 387, 390 (N.D. 1981), citing Barnes County Education Association v. Barnes County Special Education Board, 276 N.W.2d 247, 249 (N.D. 1979).

N.D.C.C. §§ 15-40.2-09 and 15-40.2-10, taken together, disclose a legislative intent that North Dakota school districts bordering on neighboring states have the discretion to allow their resident students to attend school in the bordering states, to enter into agreements for that education, including the payment of tuition, and to establish tuition payments within the range of state foundation aid and tuition apportionment, and the amount provided by agreement between state educational agencies.

For reasons beyond the control of the state of North Dakota and its school districts, the state of South Dakota first refused to finalize a reciprocal agreement as its law then provided and, thereafter, amended its law to delete the authority for entering into interstate reciprocal tuition agreements. However, North Dakota's statute still deals with the exercise of discretion by North Dakota school districts in the payment of tuition to neighboring states to be exercised within a monetary range of tuition amounts. Recognizing that the literal meaning of the language of N.D.C.C. § 15-40.2-10 cannot be followed and that attempted adherence to it by prohibiting tuition payments in excess of North Dakota state foundation aid and tuition apportionment distributions would produce unjust and unreasonable impacts on North Dakota students desiring to attend school in South Dakota, it appears another result feasible of execution must be employed to give effect to the statute.

Therefore, despite the fact that the Superintendent of Public Instruction apparently will not be able to enter into a new reciprocal master agreement with the state of South Dakota for the 1996-1997 school year, the agreement previously executed between North Dakota and South Dakota state educational agencies does provide tuition figures that express the intent of the North Dakota Superintendent of Public Instruction with respect to realistic

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tuition amounts for the education of students between the two states. Therefore, despite the fact the agreement's expressed duration is for the 1995-1996 school year, North Dakota school districts need a range within which they may negotiate tuition payments with South Dakota school districts in order to be in compliance with the intended range available to them under N.D.C.C. § 15-40.2-10. Therefore, if North Dakota school districts along the border of South Dakota authorize any of their students to attend school in the state of South Dakota for the 1996-1997 school year and if the North Dakota school district contracts for the education of that student with the South Dakota school district, and if that contract includes an agreement to pay tuition, then the agreed tuition payable by the North Dakota school district must also be paid within the range of the North Dakota foundation aid plus tuition apportionment, and the amount provided in the agreement executed by the North Dakota Superintendent of Public Instruction and the South Dakota Secretary of Education and Cultural Affairs in July of 1995.

The North Dakota school districts bordering neighboring states may wish to seek legislation during the next legislative session to provide a method for dealing with circumstances involving other states' laws and other states' education administrators that may affect the authority of those school districts to contract with school districts in neighboring states for the education of children.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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