

LETTER OPINION
96-L-82

April 26, 1996

Mr. Gordy L. Smith
Audit Manager
Office of State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Smith:

Thank you for your March 20, 1996, letter asking several questions concerning your performance audit of the Department of Public Instruction (DPI). Your letter cites five issues and asks several questions with respect to those issues.

Your first issue discusses "approval" standards of public and nonpublic schools and asks whether the DPI is required to approve both public and nonpublic schools.

Computerized research indicates the North Dakota Century Code contains approximately 200 sections that use the word "school" and some variation of the word "approve" in the same sentence. Not surprisingly, a number of those sections are contained in title 15. You state in your letter that DPI staff believe approval of schools under North Dakota law for public schools has a different intent than when it is used in relation to nonpublic schools. I agree with the DPI contention because public schools have concerns about being an approved school that are different from the concerns that a nonpublic school has in being approved.

Nonpublic schools, in addition to any academic stature obtained thereby, are interested in being approved schools under N.D.C.C. § 15-34.1-03(1), because without that approval the nonpublic school does not qualify as an alternative educational institution for purposes of compulsory attendance. Without that approval, parents of students attending nonpublic schools could be subject to charges of educational deprivation of their children pursuant to N.D.C.C. § 15-34.1-04.

Public schools are no doubt also interested in the academic stature achieved by the DPI determination that they qualify with the relevant statutes in title 15 for appropriate curriculum, certified teachers, and safe structures. However, unlike nonpublic schools, public school approval, that is, the DPI determination that statutory

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compliance is achieved, means that the public school qualifies for per student foundation aid under N.D.C.C. ch. 15-40.1.

Therefore, the DPI must effectively "approve" both nonpublic and public schools, but for varying purposes. Whether or not the process results in "approval" or a determination of statutory compliance is not critical.

Your second issue is whether specific statutes exist authorizing the DPI to adopt approval standards for public schools. There is no need for the DPI to adopt approval standards, and no statutory section authorizes the adoption of such standards, because the relevant statutes are specific enough for the DPI to determine "statutory compliance" for the purposes for which compliance is important. For purposes of "approval" of public schools it is the statutory standards that are significant.

Your third issue concerns penalizing public schools for noncompliance with statutes. You ask first whether DPI has the authority to reduce state funding for elementary schools that do not comply with N.D.C.C. § 15-47-46. N.D.C.C. § 15-40.1-08 provides that payments must be made to each school district operating an elementary school "employing teachers holding valid certificates or permits in accordance with section 15-47-46 and chapter 15-36." Consequently, if a district's elementary school teachers do not comply with those cited sections, then foundation aid payments may not be made to that district for those elementary schools.

You next ask under this issue whether N.D.C.C. § 15-40.1-06(2)(b) allows DPI to reduce state funding to elementary schools. That section provides:

School districts operating high schools not meeting the minimum curriculum as provided in section 15-41-24 or the teacher qualifications in section 15-41-25 must be supported in the amount of two hundred twenty dollars, which is the basis for calculating grants-in-aid on a per student basis as provided in section 15-40.1-07.

The subdivision relates specifically to school districts operating high schools not meeting minimum curriculum or teacher qualification requirements and per student foundation aid payments made under N.D.C.C. § 15-40.1-07. Therefore, N.D.C.C. § 15-40.1-06(2)(b) relates only to payments for high school students under N.D.C.C. § 15-40.1-07 and not to elementary schools.

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Your fourth issue deals with accreditation standards adopted by DPI and penalties for not being an accredited school. Under this issue you ask whether DPI may establish accreditation policies which directly conflict with state law and whether DPI's accreditation policy circumvents legislative intent with respect to elementary schools. You did not attach with your opinion request a copy of the accreditation standards about which you are concerned, but it appears the accreditation standards at issue are those adopted pursuant to N.D.C.C. § 15-21-04.1. That section provides that the Superintendent of Public Instruction has the authority to adopt standards for the accreditation of the public and private schools of the state and that schools which comply with the standards must be deemed to be an accredited school. This section provides the Superintendent of Public Instruction with discretionary authority to adopt accreditation standards. Once adopted, it is those standards which control application of subdivisions c and d of N.D.C.C. § 15-40.1-06(2). Both subdivisions c and d state that school districts operating schools "not accredited pursuant to the accreditation standards adopted by the superintendent of public instruction" are to receive certain amounts of state foundation aid. It is, therefore, the Superintendent's accreditation standards that control application of subdivisions c and d of N.D.C.C. § 15-40.1-06(2). The Superintendent of Public Instruction may not adopt an accreditation standard that is directly in conflict with state law but, once the accreditation standard is adopted and if a school district, pursuant to those standards, is declared to be "accredited" even if the designation given is "accredited warned," then the school in question is still accredited and would not fall under the penalty provisions of subdivisions c or d. The Legislature left the responsibility for determining accreditation standards to the Superintendent of Public Instruction; therefore, it is those standards, as adopted, that the Superintendent of Public Instruction may use in determining compliance and whether any penalties under subdivisions c and d of N.D.C.C. § 15-40.1-06(2) are to be imposed. Since the Legislature has provided that the penalty provisions of subdivisions c and d are to be effective only if accreditation standards adopted by the Superintendent of Public Instruction are not met, there is no circumvention of legislative intent when an elementary school is determined to be "accredited warned" pursuant to the accreditation standards and no penalty is imposed.

Your fifth issue concerns statutory language and its applicability to public and nonpublic schools. You ask if statutes must state

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specifically that they apply to nonpublic schools in order for them to be applicable to those schools.

In a case upholding the compulsory school attendance law and its requirement that private and parochial school teachers be certified by the state, the North Dakota Supreme Court interpreted North Dakota Constitution article VIII, sections 1 through 4 by stating:

Sections 1 and 2 authorize the Legislature to establish "public schools." However, those sections must be read and harmonized with Section 4 which authorizes the Legislature to take necessary steps to prevent illiteracy and ensure uniform instruction. Moreover, Section 3 requires that all schools instruct in areas of knowledge that impress upon the mind the importance of "truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind." When each of those constitutional provisions are given effect and harmonized, the Legislature's plenary power is not limited to regulating only "public schools." Rather, those constitutional provisions authorize the Legislature to regulate all schools subject, of course, to limitations that may be imposed by other constitutional provisions and congressional acts. . . .

. . . .

We therefore conclude that Article VIII of the North Dakota Constitution authorizes the Legislature to regulate public and private schools.

State v. Anderson, 427 N.W.2d 316, 318 (N.D. 1988), cert. denied, 488 U.S. 965 (1988).

The Legislature has exercised its regulatory authority over private schools with varying styles of enactment. Most common is indirect regulation by requiring compliance by nonpublic schools with certain statutes that are directed at public schools in order to be deemed "approved" and qualify for compliance with the compulsory school attendance law. N.D.C.C. § 15-34.1-03(1). Some statutes may deal specifically and exclusively with nonpublic schools such as N.D.C.C. § 15-41-27 which sets forth approval criteria which the Superintendent of Public Instruction must employ for certain nonpublic high schools. Other statutes may relate specifically to both public and private schools such as N.D.C.C. § 15-41-24 which

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lists minimum curricula for "each public and private high school in this state."

The statutes that may have direct or indirect application to nonpublic as well as public schools are too numerous to list. Generally speaking, the Legislature has specified those statutes which it intends to apply to nonpublic schools. However, in the area of school approval for compulsory attendance purposes, statutes that don't specifically mention nonpublic schools are made applicable to those schools through the requirement for approval. Therefore, the determination on whether any individual section of the law regulates nonpublic as well as public schools must be left to a case-by-case determination.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg
cc: Dr. Wayne G. Sanstead, Superintendent of Public Instruction