

## **N.D.A.G. Letter to Sanstead (Aug. 29, 1986)**

August 29, 1986

Dr. Wayne G. Sanstead  
Superintendent  
Department of Public Instruction  
State Capitol  
Bismarck, ND 58505

Dear Superintendent Sanstead:

Thank you for your letter of August 14, 1986, posing three questions concerning school districts and liability insurance.

Your first question is whether a school district which has purchased liability insurance containing those maximum coverage amounts provided for in N.D.C.C. § 32-12.1-03(2) has accomplished maximum liability protection. We are unable to unequivocally state that possession of liability insurance to the maximum amounts provided for in this particular statute provides maximum protection against the risks from lawsuits. There are three reasons why maximum insurance protection may not present total and complete protection.

First of all, the limitations provided for in N.D.C.C. § 32-12.1-03(2) do not concern liability for punitive damages caused by willful or malicious behavior or conduct. Second, these particular limitations would not be applicable to causes of action brought by an injured party where such actions are based upon federal statutes (such as 42 U.S.C. §1983). Third, there are a few courts throughout the United States (including the Montana Supreme Court) which have declared statutes limiting potential liability of political subdivisions as being unconstitutional.

For these reasons, one cannot state with certainty that an insurance policy protecting a political subdivision to the limitations contained within N.D.C.C. § 32-12.1-03(2) provides complete and absolute protection to this political subdivision from potential lawsuits and judgments which may be rendered as a result thereof.

Your second question is whether a school district may obtain insurance to protect them from liability for punitive damages caused by willful or malicious behavior or conduct. Liability for punitive damages resulting from injuries caused by willful or malicious behavior or conduct are not subject to the statutory liability limitations of political subdivisions. N.D.C.C. § 32-12.103(2). Furthermore, insurance policies or contracts purchased by a political subdivision pursuant to N.D.C.C. Ch. 32-12.1 cannot provide coverage for punitive damages for which the political subdivision may be held liable. N.D.C.C. § 32-12.1-05. Although the insurance coverage authorized by N.D.C.C. Ch. 32-12.1 may be in addition to other insurance coverages purchased by the political subdivision pursuant to

any other provision of law, we are unable to locate a provision of law providing for the purchase of insurance by a political subdivision covering punitive damages for which a political subdivision may be held liable.

In enacting N.D.C.C. Ch. 32-12.1, the Legislature has adopted clear statutory language clearly prohibiting limitations on punitive damages for political subdivisions and further prohibiting such entities from obtaining insurance to cover the potential risks posed by punitive damages. As such, we are unable to draw any other conclusion but that political subdivisions are not authorized under the current status of the law to purchase insurance protecting the entity from punitive damages awarded as a result of actions taken by the employees of the political subdivision.

Although there is a strong conflict amongst the jurisdictions on this point, it should be noted that a number of courts have held that insurance against liability for punitive damages is invalid as being against public policy. 44 Am. Jur.2d Insurance § 1557 (1982); Annot., 20 A.L.R.3d 320, 331 (1968); Annot., 20 A.L.R.3d 343 347-50 (1968).

Your final question asks for the maximum amount of insurance to be obtained by school districts. As you can see from the answers to your first two questions, such maximum amounts are not available at this time. While an insurance policy which contains the maximum amounts provided for in N.D.C.C. § 32-12.1-03(2) may be deemed sufficient for most purposes, the same policy would possibly be insufficient to provide coverage for a Section 1983 civil rights action brought against the school district. However, by purchasing additional insurance protection, the increased amounts of coverage may backfire. I am aware of several cases across the state where political entities now find themselves facing potential liability because they obtained insurance which exceeded the amounts of limitations provided for by N.D.C.C. § 32-12.1-03(2). The argument is that the purchase of insurance protection beyond the statutory maximum amounts waives the limitations altogether or at least to the extent of the insurance purchased. This issue has not been resolved by our state supreme court and I anticipate that they may be facing the issue within the relatively near future. However, the school districts should be aware of these arguments being made in particular lawsuits across the state at this time.

N.D.C.C. §32-12.1-05 states that a political subdivision (including a school district) may provide coverage for liabilities established by this particular statute and may provide such additional coverage as the governing body of the political subdivision believes is appropriate. Obviously, the question of the amounts of insurance which should be purchased is one of discretion based upon various facts and circumstances. I cannot instruct the school districts' governing boards as to how they should make their determination of what is an appropriate insurance coverage amount. However, I do hope that these additional facts will be of some help for the school boards in making their determinations for their respective school districts.

Sincerely,

Nicholas J. Spaeth

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