

**OPINION
63-110**

January 31, 1963 (OPINION)

DEPARTMENT OF PUBLIC INSTRUCTION

RE: Foundations Program Payments - Necessity of Bond

This is in response to your request for an opinion on the following questions:

1. Would it be lawful for the North Dakota Department of Public Instruction to make Foundation Program payments to the Grandin School District if a bond is filed in the Department of Public Instruction or in court, conditioned on the payment of the Wiger tuition on the final determination in court of liability?
2. Must this bond, if permitted, be ancillary to a legal action then filed in court, or is it possible for the bond to be conditioned on a lawsuit started on or before March 1, 1963?"

The questions are prompted by the difficulty experienced with the Grandin School District. There appears to be a serious question as to which arbitration board has jurisdiction where the school districts involved are in two different counties. It also appears from the attached correspondence that in one instance the arbitration board, consisting of the county judge, state's attorney and county superintendent of Cass County, participated in a question and in the other instance only the arbitration board of Traill County, and again in another instance the arbitration board of both counties participated but ended in a tie.

It is now the considered opinion of the Grandin School District that the statute as it exists now where school districts of more than one county are involved are, at the least, unworkable if not unconstitutional. The Grandin School District is eager to have this question either resolved by the courts or by the present legislature. However, it does not wish to be in a position where it will lose any payments to which it would be entitled under existing law. The sections of law involved are 15-29-08(14) and 15-40-17 of the North Dakota Century Code and related sections.

It is common accepted procedure where private rights are involved to permit the posting of a bond or cash bond conditioned on full compliance or payment of any liability that might be adjudged against the person posting the bond. This procedure is permissible so that the litigants may have their day in court without having to sacrifice or forego any rights to which they may be entitled. We are not aware of any law which would prohibit or be inconsistent with the proposal made by the Grandin School District.

It is, therefore, our opinion that the North Dakota Department of Public Instruction may make Foundation Program payments if a bond is filed by the Grandin School District, conditioned on the payment of any tuition as finally determined by a court of competent jurisdiction. Such bond, however, would have to cover any and all liability that might be imposed upon the Grandin School District.

As to the second question, we believe it would also be appropriate that the bond be further conditioned that the lawsuit to determine liability, if any, be initiated on or before March 1, 1963, and that it will be faithfully prosecuted. The amount of the bond should be sufficient to cover any liability that might be imposed upon the Grandin School District.

It is our opinion that the foregoing comes within the realm of due process of law guaranteed under both the Federal and State Constitutions.

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Attorney General