

**OPINION
68-191**

February 9, 1968 (OPINION)

Mr. Clyde Duffy

Attorney

Devils Lake, North Dakota

RE: Schools - Indian Reservations - Eligibility

This is in reply to your letter of January 24, 1968, in which you ask for a definition of the term "Indian" as used in sections 15-40-14 and 15-40-24 of the North Dakota Century Code, as amended. Your request is made in behalf of the Couture and Ingebretson Public School Districts in view of a letter written by this office to Mr. Howard Snortland, Department of Public Instruction, on December 22, 1967.

Section 15-40-14- of the North Dakota Century Code, as amended, governs state aid payments to school districts contracting to educate high school pupils in a federal Indian School, among others, and provides in part:

"However no payment shall be made for Indian pupils in districts in which the school facilities are being provided, maintained and staffed wholly or in part by the federal government for the education of the Indian pupils."

Section 15-40-24 of the North Dakota Century Code, as amended, governs state aid payments to school districts contracting to educate elementary pupils in a federal Indian school, among others, and provides in part as follows:

"Payment shall not be made for Indian pupils in districts in which the school facilities are being provided, maintained and staffed wholly or in part by the federal government for the education of Indian children."

We do not find in the North Dakota law a statutory definition of the term "Indian pupils" or "Indian children" nor have we found any cases from other jurisdictions which would be pertinent to this matter or of assistance in determining this question. While North Dakota cases have defined the term "Indian" in one or more cases, those cases involve laws and situations entirely unrelated to the matter at hand, and do not provide any precedent for this question. See, e.g., State v. Kuntz, 66 N.W.2d. 531 (1954).

We might assume the Legislature, in using the terms "Indian pupils" and "Indian children" in the above quoted statutes, was primarily concerned with ensuring that the school districts would not receive foundation payments, for those students whose education was being provided by the federal Indian schools. In other words the purpose would appear to be that the school districts would not receive foundation payments for students for whom the district was not

required to provide education. In fact, there would appear to be little other reason for the enactment of such a statute.

We might further assume the Legislature in using the terms was under the impression that where federal Indian schools were available, all Indians would be admitted to such schools free of tuition without further distinction or that federal government would pay for the corresponding costs. Had the Legislature not been under such impression it would appear they might have been more definitive in the use of the terms with which we are here concerned. Had the Legislature been aware that the federal government through its proper agencies had or would abrogate their responsibilities with regard to the education of Indian students because of the employment of their parents by the Bureau of Indian Affairs or similar reasons, it would also appear to be the legislative intent to provide education for such students on a state or local basis.

In construing the terms "Indian pupils" and "Indian children" we must consider the context in which such terms are used and the assumed purpose of statute. We believe, therefore, these terms may be construed to include only those students for whom the federal government has not, by statute or legal regulation, abrogated its responsibility of education for Indian children. In positive terms, therefore, we conclude that the state may make payments for such Indian pupils or Indian children for whom the federal government, by statute or legal administrative regulation adopted pursuant to statute, has abrogated its responsibility of education. Conversely, the state may not make payments for those Indian pupils or Indian students for whom the federal government is providing an education at a federal Indian school maintained wholly or in part by the federal government for the education of such pupils or students.

We would note that the adoption of a federal definition of an Indian for state purposes is not without precedent in North Dakota. See, e.g., sections 5-0210 and 5-0318 of the North Dakota Revised Code of 1943 prior to the amendment thereof.

In reaching this conclusion we are aware we have made assumptions which are open to question both factually and legally. For this reason, if this matter is not clarified by the proper federal agencies, we recommend this matter be presented to the forthcoming Legislative Assembly for their further consideration.

HELGI JOHANNESON

Attorney General