

**OPINION
70-295**

September 2, 1970 (OPINION)

The Honorable Earl H. Redlin

State Senator

Twenty-eighth District

Ellendale, ND

RE: School Districts - Fees - Validity

This is in reply to your letter of August 25, 1970, relative to the following facts and questions:

Enclosed find fee schedule for the 1970-71 Ellendale Public School year.

The local school has tried unsuccessfully twice, to pass a mill levy increase. It is the opinion by some that this fee schedule is to circumvent the inability of the school to pass the levy.

I have been requested by interested patrons whether all or part of this schedule is in violation of the State Constitution. If it is legal, then I would like the reference as to statute.

What brought this to light is the fact that a family with five children would have to pay about \$100 to \$120 to get his children admitted to school.

I question very much personally the textbook and typewriter rental fees."

We assume the constitutional provision to which you have reference is section 148 of the North Dakota constitution, as amended, which provides:

The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education."

Insofar as textbooks are concerned, we refer you to chapter 15-43 of the North Dakota Century Code, as amended. We call your particular attention to sections 15-43-07, 15-43-09, and 15-43-10 thereof, copies of which are enclosed herewith.

You will note that under these provisions a school district is not required to provide free textbooks except when petitioned so to do by two-thirds of the voters of the district. If the district has not adopted a system of free textbooks the parents or guardian of any

child in school must, according to the statute, provide him with the textbooks adopted by the school board. We have no knowledge of whether a free textbook system has been adopted in the Ellendale School District.

We have no decisions of the Supreme Court of this state relative to the constitutionality of fees in public schools. However, two recent decisions in other states have ruled the payment of fees unconstitutional under a constitutional provision requiring a free system of public schools. In *Paulson v. Minidoka County School District*, 463 P. 2d. 935 (Idaho 1970), the Idaho Supreme Court held a fee was unconstitutional under their constitutional provision requiring a free system of public schools. In that the case fee was a collective fee each student was required to pay but included extracurricular activities as well as textbooks, cap and gown fee, etc. The court noted that a levy for extracurricular purposes imposed generally on all students whether they participate in extracurricular activities or not, becomes a charge on attendance at the school. The court states such charge contravenes the constitutional mandate that the school should be free. The court also noted, however, that because social and extracurricular activities are not necessary elements of a school career, the constitution of the state did not prohibit the school district from setting fees to cover costs of such activities to be paid by students who wish to exercise an option to participate in them. The court noted that unlike pencils and paper, the student has no choice in quality or quantity of textbooks he will use if he is to earn his education. He must use the books prescribed by the school. The court stated:

"School books are, thus, indistinguishable from other fixed educational expense items such as school building maintenance and teachers' salaries. The appellants may not charge students for such items because the common schools are to be 'free' as our constitution requires." See pages 938-939 of reported case.

In a case decided on July 17, 1970, the Michigan Supreme Court in *Bond v. Public Schools of Ann Arbor School District*, 178 N.W.2d. 484 (Michigan 1970) reached much the same conclusion as the Idaho Court (an in fact cited part of the Idaho decision therein) and held that books and school supplies are an essential part of a system of free public elementary and secondary schools and a fee therefore was declared invalid.

Presumably should the matter be raised in North Dakota, these cases would be cited to our court and be considered by it. As such we believe they have substantial significance. However, to our knowledge, neither Michigan nor Idaho had statutes such as the ones cited herein governing textbooks. Thus, at least in North Dakota, the school districts which have not adopted a free system of textbooks as provided by the legislature are acting under color of legislative authority in requiring payment of textbook fees. This does not mean the action of the legislature can make constitutional what would otherwise be unconstitutional. However, it would appear the school districts are entitled to rely upon these statutes until they have been repealed or declared unconstitutional by our courts.

As you are perhaps aware this office has no authority to declare enactments of the legislature unconstitutional. In fact, we believe it is one of the functions of this office to support the constitutionality of legislative enactments.

We note, however, that the statutes above cited only apply textbooks. They do not encompass other charges and, in view of the recent decisions of the Idaho and Michigan Courts and the similarity between their constitutional provisions and section 148 of the North Dakota Constitution, there would appear to be little doubt as to their invalidity.

We note that the Idaho decision indicates charges for curricular activities may be made on a voluntary basis and that any student who desires to attend such activities may be required to pay for same. However, the decision indicates that the fee cannot be required of each student as a condition precedent to his attendance at schools.

We trust this will adequately set forth our position on the matter presented.

HELGI JOHANNESON

Attorney General