OPINION
73-377

December 11, 1973 (OPINION)

Mr. Richard B. Thomas
State's Attorney
Ward County
Minot, ND 59701

Dear Mr. Thomas:

This is in reply to your letter of December 4, 1973, in which you enclosed a copy of a letter addressed to your office on November 29, 1973, by Dr. Marlowe Johnson, Superintendent of Minot Public Schools. You ask this office to render an opinion as to whether or not the State of North Dakota can deduct from payments that would otherwise be made to the City of Minot School Board District because of the fact they are receiving PL 973 impact funds. Dr. Johnson, in his letter to your office, notes the Minot School Board has been advised that courts in Nebraska, Kansas, and perhaps other states have ruled that legislation similar to North Dakota Senate Bill 2026 is not constitutional and that the State cannot make such deductions.

Senate Bill 2026 has been included in the Session Laws as Chapter 127 of the 1973 Session laws of North Dakota. Section three of that Chapter amends Section 15-40.1-06 of the North Dakota Century Code. This Section contains the method of computing the grants in aid from the State to the school districts or, as it is more commonly known, the "foundation aid program". The Section as amended by Section three of Chapter 127 of the 1973 Session Laws, provides in part:

> "In determining the amount of payment due school districts for per pupil aid under this Section, the following shall be subtracted from the amount of such aid:
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> * * *
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> 2. That amount in dollars of the state group rate for Title 1 of Public Law 81-874, 81st Congress, represented by the twenty-one mill county equalization levy in the determination of the state group rate multiplied times the number of students for whom the district received Public Law 81-874 payments."

Thus, from the payments made by the State through the foundation aid program there would be deducted that amount of dollars reflecting the twenty-one mill levy (which is considered part of the foundation program) which are received by the school districts as federal impact aid.

The problem arises in that 20 USC 240 (d)(2) (Public Law 81-874) provides:

> "No payments may be made during any fiscal year to any local educational agency in any State which has taken into consideration payments under this subchapter in determining the

> eligibility of any local education agency in that State for State aid (as defined by regulation), or the amount of that aid, with respect to free public education during that year or the preceding fiscal year, or which makes such aid available to local educational agencies in such a manner as to result in less State aid to any local educational agency which is eligible for payments under this Chapter than such local educational agency could receive it it were eligible."

It appears these two Sections are in conflict, i.e., the State law requiring a deduction from the foundation program payment because of the federal impact payments and the federal law providing that if such deductions are made from the State payments, no federal impact aid will be made to the school district. The question thus becomes whether the Department of Public Instruction, in computing the foundation aid payment must make the deduction as provided by state statute.

In arriving at a conclusion on this matter, there are several questions which should be considered.

In the first instance we note that Section 15-40.1-06 was amended by Section 1 of Chapter 153 of the 1973 Session laws as well as by Section 3 of Chapter 127 of the 1973 Session Laws. The amendment in Chapter 153 does not contain the language which required reduction in foundation aid program payments. However, that Section also does not contain the increase in State foundation program payments and were we to hold that Section governed, the new education finance program would become a nullity. The amendment to this Section by Chapter 153 was for an entirely different reason than the foundation aid program. In codifying these various amendments, the Legislative Council noted that the two amendments are reconcilable in accordance with Section 1-02-09.1 of the North Dakota Century Code. See footnote to Section 15-40.1-06 in the 1973 Supplement to the North Dakota Century Code. Section 1-02-09.1 North Dakota Century Code, as amended, provides that if amendments to the same statute are enacted at the same or different sessions of the Legislature, one amendment without reference to another, the amendments are to harmonized if possible, so that effect may be given to each. If the amendments are irreconcilable. the latest in date of enactment prevails.

In this instance the Legislative Council has indicated the two amendments to Section 15-40.1-06 are in harmony. Thus, the language contained in that Section by virtue of Chapter 127 of the 1973 Session Laws must be given effect. We note that Chapter 127 (Senate Bill 2026) was enacted by the Legislature on March 14, 1973, and approved by the Governor on March 23, 1973. Chapter 153 (House Bill 1460) was finally enacted by the Legislature on February 27, 1973, and approved by the Governor on March 21, 1973.

Therefore, even if the two amendments cannot be harmonized, Section 15-40.1-06 as amended by Chapter 127 of the Session Laws (Senate Bill 2026) would govern since it was latest in date of enactment.

Another question which has presented itself is whether the language of Section 15-40.1-06, quoted above, is consistent with legislative intent, i.e., whether, in fact, the Legislature intended a reduction

in state aid payments at the loss to the school districts of the federal impact payments. Senate Bill 2026 was the product of an interim study by the Legislative Council. In their report to the Legislature, we find the following statement at page 31:

> "The Committee recommends that the payment due any school district also be reduced by that amount in dollars of the state group rate for Title 1 of Public Law 81-874, represented by the 21-mill county equalization levy in the determination of the state group rate, multiplied times the number of students for whom the district received Public Law 81-874 payments. The intent of the Committee is to eliminate the duplication of payments caused by the fact that the 21-mill levy is used both in determining the state group rate for the payment from the Federal Government and in determining benefits due under the Foundation Program. * * * It should be emphasized that there is some question as to whether the Federal Government will permit this reduction for amounts received pursuant to this program, and the Department of Public Instruction has requested a formal opinion from the United States Department of Education on this question. A decision is expected by the end of this year."

The requested opinion was not forthcoming until after the Legislature had adjourned. We must therefore assume the Legislature was aware of this problem. In addition, and even more important as a legal basis, the Supreme Court of the State of North Dakota has consistently held that resort to legislative intent to construe a statute is applicable only in the instance in which the statute is ambiguous on its face and in those instances in which there is no ambiguity resort to legislative intent is not permissible to alter the plain language of the statute. Thus, in Rausch v. Nelson, 134 N.W.2d. 519 (N.D. 1965), the North Dakota Court quoted with approval the following statement from 82 C.J.S. Statutes, Section 322:

> "Where the language of a statute is plain and unambiguous, there is no occasion for construction, and this is true even though other meanings of the language employed could be found. The Court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, or assume a legislative intent in plain contradiction to words used by the legislature, and need not search for reasons which promoted the legislature to enact the statute."

We can find no ambiguity in Section 15-40.1-06 of the North Dakota Century Code, as amended by Section three of Chapter 127 of the 1973 Session Laws North Dakota Century Code provides that words used in any statute are to be understood in their ordinary sense unless a contrary intention plainly appears.

We are, however, faced with a constitutional question. Clause two of Article VI of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuant thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every

> State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

Several states have, on previous occasions, enacted statutes similar to Section Three of Chapter 127 of the 1973 Session Laws. In five instances these statutes have been considered by federal district courts and held to violate the above quoted "federal supremacy" clause of the United States Constitution. No courts have held to the contrary.

The first case to consider the matter was Shepherd v. Godwin, 280 F. Supp. 869 (E. D. Virginia 1968). In that case a three judge federal district court noted that in applying a state formula for state assistance to local school districts Virginia deducted from the share otherwise allocable to the district a sum equal to a substantial percentage of any federal impact funds received by the district under Public Law 81-874. The Court, after a review of the history of Public Law 81-874, found that the federal funds were to supplement local revenues, not substitute therefore and held that the state law violated the federal supremacy clause.

The second case involved the State of Kansas and the three judge federal district court held that the State could not substitute its judgment for that of the federal government in this matter and that the Kansas statute violated the federal supremacy clause. See Hergenreter v. Hayden, 205 F. Supp. 251 (Kansas 1968).

The third case involved a similar statute in the State of South Dakota and in that instance, as in the previous cases, actions were brought to restrain state officials from using the law reducing payments by the State to local school districts because of federal impact payments. The three judge federal district court followed the reasoning in the previous decisions and restrained the state officials from using the South Dakota statute in reducing payments to local school districts because of federal impact payments. See Douglas Independent School District v. Jorgenson, 293 F. Supp. 849 (South Dakota 1968).

The same result occurred in Nebraska and California although in those instances the three judge federal district court was convened and determined certain issues but the issue of federal supremacy was determined by one judge, the three judge court being of the opinion such question should be determined in that manner. See Triplett v. Tiemann, 302 F. Supp. 1244 (D. Nebraska 1969); Carlsbad Union School District v. Rafferty, 300 F. Supp. 434 (S. D. Calif. 1969).

While these cases are impressive, they were determined prior to the enactment of Public Law 93-150, approved November 7, 1973, which includes the following provision:

> "Payments to local educational agencies under Public law 874, Eighty-first Congress.)
>
> "Section II. Section 5(d)(2) of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), shall not operate to deprive any local educational agency of payments under such Act during the fiscal year ending June 30, 1974, if such local

> educational agency is in a State which after June 30, 1973, has adopted a program of State aid for free public education which is designed to to equal expenditures for education among local educational agencies in that State. This Section shall be effective on and after July 1, 1973, and shall be deemed to have been enacted on June 30, 1973."

We believe North Dakota is a state which, after June 30, 1973, adopted a program of state aid for free public education which is designed to equalize expenditures for education among local educational agencies in the state. This was the avowed purpose of Senate Bill 2026 enacted by the 1973 legislature.

It further appears to us that the enactment of this Section by the Congress of the United States is an indication that Section 5(d)(2) of Public law 874 (20 USC 240(d)(2) quoted above) and the remainder of the Act is not, under this new provision, a violation of the federal supremacy clause as set forth in the decisions hereinbefore cited. It is difficult for us to accept a conclusion that the North Dakota enactment providing for a reduction of State aid is in violation of the federal supremacy clause when the federal act which is supposed to be supreme recognizes the reduction of state aid payments and permits federal payments to be made in the state contrary to the generally expressed intent of the Congress.

We are aware of the presumption of constitutionality that accompanies every act of the legislature. We are also aware that the ultimate authority to declare a law unconstitutional rests with the judicial, not the executive branch of government. If, however, an instance should arise in which we were asked by one of the state agencies which we are required by law to advise as to the constitutionality of a certain statute and if we held no doubts that the statute was unconstitutional we would so advise. In this instance we are not advising a state agency and we are not in the attorney-client relationship which would entitle us to advise as to the constitutionality of the legislation. In addition, even if we were to adopt the rationale of the cases from other jurisdictions, which have ruled on this matter, we believe that rationale is no longer valid in view of the enactment of Public Law 93-150.

We are also aware that the pertinent provisions of Public law 93-150 is valid until July 1, 1974, whereas the provisions of Senate Bill 2026 are effective until July 1, 1975. However, we do not believe we should answer a question of constitutionality on the basis of what might happen in the future since it is not impossible that either the state or federal statutes may be further amended prior to that time.

We, therefore, conclude the State must at the present time deduct from payments made to the Minot School District in accordance with the Provisions of Section Three of Chapter 127 (Senate Bill 2026) of the 1973 Legislative Assembly.

Sincerely yours,

Allen I. Olson

Attorney General