

**OPINION
75-151**

May 27, 1975 (OPINION)

Mr. L. J. Schirado
State's Attorney
Morton County
Mandan, ND 58554

RE: Special Education of Exceptional Children

Dear Mr. Schirado:

This is in reply to your letter of May 14, 1975, relative to section 15-59-07 of the N.D.C.C. You quote certain portions of the statute and state the matter you would like to have clarified is whether the maximum amount that a school district is required to pay is three times the state average cost per pupil or is such school district's obligation the actual cost of educating an exceptional child pursuant to section 15-59-07 of the N.D.C.C.

Section 15-59-07 of the N.D.C.C., as amended, provides in part:

"If any school district in this state has any educable elementary or high school student who in the opinion of a qualified psychologist, a medical doctor, and the district superintendent is unable to attend the public schools in the district because of a physical or mental handicap or because of a learning disability, such school district shall contract with any accredited private nonsectarian nonprofit corporation within or without the state which has proper facilities for the education of such student, if there are no public schools in the state with the necessary facilities which will accept such student. * * * The contract shall provide that such school district agrees to pay the private nonsectarian nonprofit corporation as part of the cost of educating such student an amount for the school year equal to three times the state average per-pupil elementary or high school cost, depending on whether the enrollment would be in a grade or high school department, provided that such payment shall not exceed the actual per-pupil cost incurred by such private, nonsectarian nonprofit corporation. * * *"

We note the language used in the above statute is mandatory, i.e., if the prescribed conditions exist the school district is obligated as a matter of law to contract with a private nonsectarian nonprofit corporation to educate the student. The specific corporation with which the contract is to be executed is, however, within the discretion of the school district provided the corporation has the proper facilities for the education of such student. Thus the selection of the school is to be determined by the board within these statutory requirements and not by the parents or guardian of the child.

The above-quoted statute was enacted in 1961. The statute as originally enacted provided for payments equal to the county average

per pupil elementary or high school cost, depending upon whether enrollment would be in a grade or high school department, in the county in which the contracting district was located. The minutes of the education committees of the Senate and House which considered the bill indicate that it was the intent of the bill to give the physically handicapped the same benefits as are given regular pupils, i.e., per pupil payments are made for each child in the public schools of the state. In 1967 the law was altered to the current "three times the state average per-pupil elementary or high school cost, depending upon whether the enrollment would be in a grade or high school department." The minutes of the education committees of the Legislature which considered the bill in 1967 indicate the rationale of the amendment increasing the amount paid by the school district was the fact school districts should assume a greater portion of the obligation for those students who could not be educated in the public schools of the district.

As we noted above, the language is mandatory, i.e., the district must enter into a contract for the amount specified by the statute. Prior to 1973 we would have considered this as a limitation upon the authority of a school district to pay any greater amount. However in 1973 the Legislature amended section 15-59-04 of the N.D.C.C. changing the entire concept of special education from permissive on the part of the school board to mandatory. Thus, whereas prior to 1973 the only mandatory provision was section 15-59-07, special education is now generally mandatory on the part of the school district. Thus we do not believe section 15-59-07 should be considered as a limitation upon the authority of the school board to provide special education to these particular children but rather as a minimum mandatory requirement under the conditions therein set forth. Thus if the school district determines that a greater amount should be paid it may do so but is not required by statute to do so. In no case, however, may the school district pay more than the actual cost per-pupil cost incurred by the private, nonsectarian nonprofit corporation.

Should the per pupil cost be greater than three times the state average per-pupil cost, and should the school district determine to pay more than three times the state average per-pupil cost, the district would not be entitled to any additional reimbursement from the state than is presently provided by statute, i.e., sixty percent of the payment made to such private, nonsectarian nonprofit corporation, not to exceed sixty percent of three times the state average per pupil payment.

In direct reply to your question, we do not believe the school district is obligated to pay more than three times the state average cost per pupil but may pay more if the actual per pupil cost is greater.

Sincerely,

ALLEN I. OLSON

Attorney General