

**OPINION  
78-11**

November 24, 1978           (OPINION)

Mr. Reuben T. Guenthner  
Assistant State Director  
State Board for Vocational Education  
State Office Building  
900 East Boulevard  
Bismarck, North Dakota 58505

Dear Mr. Guenthner:

This is in response to your letter of October 27, 1978. in which you requested an opinion relative to the payment, by the State Board of Public School Education, of state aid to junior colleges pursuant to North Dakota Century Code Section 15-18-07.

In your letter you set forth the following facts and questions:

The State Board of Public School Education has directed my office to request an official opinion on the eligibility of students enrolled in junior colleges and educational centers pursuant to Section 15-18-07 of the North Dakota Century Code.

Specifically, the questions relate to legislative intent regarding "For the purpose of this section, a 'full-time student' shall mean a person enrolled and in attendance, exclusive of temporary absences, in a junior college or educational center operated by a state-supported institution of higher education . . ."

Comment: The State Board of Public School Education policy states "Eligibility for state aid shall be limited to full-time and part-time students enrolled in those courses or programs offered within the district (or leased off-campus facilities or leased facilities outside the district on a temporary basis if no facility on the primary campus is available) and meeting academic standards prescribed by the Board of Higher Education or vocational standards prescribed by the State Board of Vocational Education. Other course offerings not offered on a primary campus requested by an institution may be approved for unusual circumstances such as lack of adequate facilities subject to prior approval by the State Board of Public School Education upon written justification of need and certification of staff to be used and curriculum approved by either the State Board of Higher Education or State Board of Vocational Education." (sic)

Question: Does the legislation limit eligibility for state aid to only students enrolled in a junior college as further described in State Board policy? Or, is it legislative intent that state aid payments be made also to those eligible institutions under Chapter 15-18 which conduct programs outside the school district? Example: Lake Region Junior College

offers, through Little Hoop Community College, academic instruction for residents of Ft. Totten. Lake Region uses regular instructors from Lake Region Junior College at Ft. Totten and subsidizes the costs with a federal grant. Other junior colleges could offer "extension courses" for credit in communities outside of their school district.

Comment: The State Board of Public School Education policy states "Each Board (Board of Higher Education, State Board of Vocational Education) shall certify to the State Board of Public School Education that an inspection was made of each junior college or educational center along with a listing of new courses meeting the prescribed academic standards set forth by the State Board of Higher Education and vocational standards prescribed by the State Board of Vocational Education. Programs or courses supported 100 percent (including administration) with external funds shall not be termed eligible for state aid even though meeting prescribed program standards set forth by either board and subject to any other regulations or policy established by the State Board of Public School Education. The final state aid claim to the State Board of Public School Education shall be in accordance with all statutory laws and in compliance with such policies approved by the State Board of Public School Education." (sic)

Question: Does legislative intent allow eligibility for students enrolled in an approved program funded externally with 100 percent federal support? Or, is it legislative intent that payments be limited to students enrolled in "regular" program offerings as described in the State Board of Public School Education policy? Example: A junior college receives a federal grant to operate a specialized program for adults or other targeted population. Students are enrolled and are in attendance along with other students on campus.

The State Board of Public School Education has attempted to interpret the law by adopting policies relating to areas which have posed concerns by the junior colleges as well as our office which reviews the state aid claims.

There is attached to your letter a letter addressed to the Attorney General from Dr. Merrill Berg, President of Lake Region Junior College, dated November 7, 1978, which letter sets forth some of the history and background of the involvement of the Lake Region Junior College in providing academic instruction on the Fort Totten Indian Reservation.

While no such filing is required by law, we note that we have previously received a copy of the policies of the State Board of Public School Education, to which your letter refers in paragraphs 3 and 5. By a copy of your letter of February 24, 1978, addressed to Mr. Garvin Stevens, Dean, UND-Williston Center, we have previously received the document entitled "Policies Relating to State Aid to Junior Colleges, State Board of Public School Education, as adopted September 20, 1977". This document sets forth the policies of the Board, as quoted in paragraphs 3 and 5 of your letter.

With respect to your first question concerning state aid to be paid on the basis of enrolled students, the eligibility of the district for such aid is governed by North Dakota Century Code Section 15-18-07 which provides as follows:

15-18-07. STATE AID TO JUNIOR COLLEGES OR EDUCATIONAL CENTERS. There shall be paid to each school district maintaining a junior college or educational center operated by a state-supported institution of higher education meeting the standards and eligibility requirements prescribed in section 15-18-08, out of funds appropriated for this purpose, the sum of eighteen dollars and fifty-nine cents per calendar week, which shall be paid for every full-time student in attendance, provided the school district, city, or county shall levy taxes of not less than four mills for the support of such junior college or education center in accordance with the provisions of sections 15-18-03, 15-18-04.2 or 15-18-05. For the purpose of this section, a "full-time student" shall mean a person enrolled and in attendance, exclusive of temporary absences, in a junior college or educational center operated by a state-supported institution of higher education carrying a course of study of not less than twelve class hours during each calendar week in academic courses meeting standards prescribed by the state board of higher education, or in vocational courses meeting standards prescribed by the state board of vocational education. In addition, an amount equal to the weekly payment made for each full-time student shall be made for each full-time equivalent student enrolled for each calendar week of attendance in an approved academic or vocational program meeting the standards prescribed by the respective boards. The number of full-time equivalent students enrolled in each junior college or educational center for each calendar week shall be computed as follows: The total class hours of all students in attendance, exclusive of temporary absences, who are enrolled in less than twelve class hours, shall be divided by twelve. A class hour shall mean not less than fifty minutes of instruction or supervised laboratory training. Payments shall be made on a fiscal year basis, which shall mean the period from July first of one calendar year through June thirtieth of the following calendar year.

If the funds appropriated for the purpose of carrying out the provisions of this section should prove to be insufficient based on the number of students in attendance at a junior college or educational center as provided in this section, the amounts to be paid to such junior colleges or educational centers shall be reduced in such a manner so that the payments for each student in attendance at a junior college or educational center will be made on a prorata basis.

This section provides for mandatory payments, of a given amount, upon the fulfillment of conditions by the junior college or educational center. The funds provided for by this section are conditioned, among other things, upon: (1) the junior college's ability to meet standards and eligibility requirements provided under Century Code Section 15-18-08, and; (2) the number of "full-time students" enrolled, as defined in Section 15-18-07. It is obvious that the

"standards and eligibility requirements" referred to in Section 15-18-07 are not those "policies" of the State Board of Public School Education to which you refer in your letter, as these have been adopted by the State Board of Public School Education and not be the State Board of Higher Education or the State Board of Vocational Education, as required under Section 15-18-08.

Because the State Board is a creature of statute it has only those powers expressly granted or necessarily implied in the law. Thus, in order that the Board be justified in adopting the policy that it has, such a policy must be found or implied in the relevant statutes. Upon a review of Section 15-18-07, we believe "policies" which you quote in your letter and which you have previously provided to us have had the effect of changing the verbatim language of Section 15-18-07, as no where in such section do we find the literal requirement, now made by the policy of the State Board, that a student must be enrolled in a course or program "offered within the district". Thus, if the policy adopted by the State Board of Public School Education is to be sustained, the legislative authority for such policy must be found to be implied in Section 15-18-07 or other statutes concerning the powers of the State Board.

This office has on a previous occasion addressed a problem at least somewhat similar to the one you raise in your letter, in connection with North Dakota Century Code Section 15-41-24, which at the time of our letter provided in part as follows:

No later than July 1, 1961, the following units of study shall be made available to all students in each high school in this state at least once during each four-year period if such high school is to receive any accreditation by the department of public instruction:

\* \* \*

Six units of any combination of the following subjects:  
Business Education, Foreign Language, Homemaking, Vocational Agriculture, and Industrial Arts.

We are enclosing for your information a copy of our letter dated July 18, 1973, addressed to the Honorable M. F. Peterson, Superintendent of Public Instruction. In that letter, we addressed the issue of whether the Oberon School District could contract with the Sheyenne School District to send students and a teacher to the Sheyenne School District for the purposes of utilizing the Sheyenne physical facilities for classes in Home Economics and Industrial Arts. The question arose whether, because of Oberon classes would actually be held in the Sheyenne School, the classes were being offered ". . . in each high school in this state . . ." in accordance with Section 15-41-24 as that section applied to the Oberon School. We responded that we did not believe that "the phrase 'in each high school in this state' means that the course must actually be offered in the school building of the particular high school."

While we are of course dealing with different statutes in the case of your inquiry, we still find that a similar conclusion is logically reached in the case of Section 15-18-07, which only requires that the

student be " . . . enrolled and in attendance . . . at a junior college . . .". There is nothing in this language that directly or impliedly compels the conclusion that a person is not "enrolled and in attendance" simply because classes are being held in a facility located outside the school district, if other applicable college requirements of registration, payment of tuition or credit-hour fees, full-time student status determination, etc., have otherwise been complied with.

Given the conclusion reached above, that there is no requirement direct or implied in Section 15-18-07 that the classes attended actually be classes taught within the district, the final inquiry must be whether the policy of the State Board of Public School Education in this regard may yet be considered to apply. We note here that the question you have presented to us does not concern the authority of the junior college to establish or offer for credit classes in facilities located outside the district, but whether, once established, the State Board may declare a policy that students attending such classes may not be counted for purposes of state aid. We believe that such a policy may not be applied, for the reason that it purports to alter a matter of legal substance upon which the Legislative Assembly has already declared its intentions. Upon this question we believe the law to be well settled, that a board may not, by regulation or policy, make a requirement on a substantive matter not included in the statute pursuant to which the board is acting. Any such new matter would constitute legislation, unauthorized by the Legislative Assembly. *Lanterman v. Dorgan*, 255 N.W.2d. 891 (N.D. 1977); *Medical Properties Inc. v. North Dakota Board of Pharmacy*, 80 N.W.2d. 87 (N.D. 1956); *Cavanagh v. Coleman*, 72 S.D. 274, 33 N.W.2d. 282 (1948).

In regard to your second question concerning courses supported 100 percent with "external funds", we believe that a similar situation exists. We see that the policy adopted by the State Board of Public School Education provides that "programs or courses supported 100 percent (including administration) with external funds shall not be termed eligible for state aid even though meeting prescribed program standards (emphasis supplied) . . .". As in the case of our response to your first question, the authority of the State Board of Public School Education to interpret the statutes in such a manner as to allow the adoption of this policy is dependent on the intent of the Legislative Assembly, as expressed in the applicable law. Whether or not a particular course is "termed eligible" depends upon the standards prescribed in the law for such eligibility, or the authority granted by law for the State Board of Public School Education to determine eligibility itself. In this case, the eligibility of programs for payment of state aid to junior colleges is established by North Dakota Century Code Section 15-18-07, set forth above, and Section 15-18-08, which provides as follows:

15-18-08. STANDARDS FOR STATE AID - REVIEW OF BUDGETS - AUDIT OF EXPENDITURES. No school district maintaining a junior college or educational center operated by a state-supported institution of higher education shall be eligible to receive payments as provided in section 15-18-07 or as otherwise specifically provided by law unless it was established and eligible to receive such payments on July 1, 1969, and meets

either such academic standards as shall be prescribed by the state board of higher education, or the vocational standards as shall be prescribed by the state board of vocational education. The state board of higher education shall provide for an annual inspection of each junior college or educational center operated by a state-supported institution of higher education to determine compliance with prescribed academic standards, and the state board for vocational education shall provide for an annual inspection of each junior college or educational center operated by a state-supported institution of higher education to determine compliance with prescribed vocational standards. Each school district maintaining a junior college or educational center shall annually submit a proposed institutional budget to the state board of public school education. The state board of public school education shall review such budgets, and the staff of the state board of vocational education shall provide such professional and clerical assistance as is required for such review. Two copies of each proposed biennial institutional budget, in the same format as prescribed by the office of the budget for the colleges and universities under the state board of higher education, shall also be submitted to the office of the legislative council for the information of the appropriations committees of the legislature. In addition, each school district maintaining a junior college or education center shall at least biennially provide the legislative audit and fiscal review committee with an official audit of their expenditures and activities (emphasis added).

Neither of the above quoted sections makes reference either to any dollar amount of "external funding" which would disqualify the school from eligibility for state aid, or to any authority of the State Board of Public School Education to establish the same terms of disqualification by rule, regulation or policy of the board.

We recognize that the Legislative Assembly may nevertheless have intended that state aid payments generally be made to junior colleges and educational centers on the basis of need, and that some schools may have made private commitments to such a general intent. On page 2 of Dr. Merrill Berg's letter, we note that he states:

Drawing State aid for instruction provided to students when the entire costs of such programs are fully covered by federal grants in (sic) quite a different story. ... We agreed with legislative committees that we would not claim State aid when FULL PROGRAM COSTS WERE INVOLVED.

Commitments such as the one referred to above may have been made in some instances to the Legislative Assembly, which commitments the Legislative Assembly may have a right to expect will be honored. Whether or not such commitment may be binding in a given case, or even apply to a particular case given the extent and type of funding involved, is a matter upon which we decline to express an opinion, the facts of any such commitment and funding not being directly before us in your inquiry. We do note that notwithstanding any such commitments, however, no standard of financial need in terms of a percentage of "external funding" or some other standard, has been set

forth in the above sections, nor does it appear that the State Board of Public School Education has been given the authority by statute to set such a standard at 100 percent, 99 percent, 50 percent, or at any other level of "external funding" by rule or policy of the Board. We must therefore conclude that however desirable it may be as a matter of sound fiscal administration to withhold state funds from those programs funded at least to some degree by other means, the eligibility requirements for state aid to junior colleges or educational centers under Section 15-18-07 and 15-18-08 have been provided directly in those sections of law, and no authority exists for the State Board of Public School Education to adopt any policy in contravention of the standards contained therein.

We trust that the foregoing adequately sets forth our position on these matters.

Sincerely,

Allen I. Olson

Attorney General