

**OPINION
78-157**

March 15, 1978 (OPINION)

The Honorable Gary J. Nelson
State Senator, 22nd District
Box 337
Casselton, ND 58012

Dear Senator Nelson:

This is in reply to your letter of March 9, 1978, wherein you set forth the following facts and questions:

The question I have, concerns section 154 of the Constitution.

The current method used to establish the number of children of school age is the school census. My question is, would it in your opinion be in conflict with the constitution to use ADM (average daily membership) or some other method to determine the number of children? There can be considerable difference in the number of children in a school district and those who attend the Public School and I feel that the fair way to establish the number of children is to go by the number of those children actually in attendance.

Section 154 of the North Dakota Constitution governs the distribution of the interest and income of the fund established by the Constitution for the support of the common schools of this state. It provides:

The interest and income of this fund together with the net proceeds of all fines for violation of state laws and all other sums which may be added thereto by law, shall be faithfully used and applied each year for the benefit of the common schools of the state, and shall be for this purpose apportioned among and between all the several common school corporations of the state in proportion to the number of children in each of school age, as may be fixed by law, and no part of the fund shall ever be diverted, even temporarily, from this purpose or used for any other purpose whatever than the maintenance of common schools for the equal benefit of all the people of the state; provided however, that if any portion of the interest or income aforesaid be not expended during any year, said portion shall be added to and become a part of the school fund.
(emphasis supplied)

We assume the question arises over the clause "as may be fixed by law." However, it is our impression that such clause modifies the term "of school age," i.e., the age of school children may be established by law. We do not believe it modifies the provision that the interest and income may be apportioned since that clause very specifically states it shall be apportioned among and between all the school districts of the state "in proportion to the number of children in each of school age." Were the phrase "as may be fixed by law" to be construed to modify that provision, it would cause a

conflict since the provision requiring it to be distributed in proportion to the number of children in each district of school age is specific. Any other construction of the provision would cause a conflict, i.e., if the Legislature did provide another method of distribution other than by the proportion of school age children in each district it would be contrary to the specific provisions of the section. Thus the only discretion left by the section is to permit the Legislature to specify the age of the children to be used in determining the distribution. Once that age is established the distribution is automatic.

We note that Section 147 and 148 of the North Dakota Constitution which provide for the establishment of a system of free public schools beginning with the primary and extending through all grades up to and including schools of higher education do not specify the school age. Rather that is established by the Legislature in Section 15-47-01 of the N.D.C.C., as amended. Thus we believe the term "as may be fixed by law" modifies the term "number of children in each of school age" and does not modify any other provision of the section.

While not necessarily decisive of the question, this construction has been adopted by the Legislature (see Section 15-44-03 of the N.D.C.C.) consistently since statehood. See Section 91, Chapter 62, 1890 Session Laws.

It is therefore our opinion that the only method upon which the distribution of the fund may be made pursuant to Section 154 of the North Dakota Constitution is in proportion to the number of children of school age in each school district.

I trust this will adequately set forth our position on the question presented.

Sincerely,

ALLEN I. OLSON

Attorney General