

LETTER OPINION
80-112

November 24, 1980 (OPINION)

Mr. Darrell R. Ohlhauser, CPA
Executive Budget Analyst
Office of the Budget
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Ohlhauser:

This is in response to your request for an opinion concerning Section 14 of Chapter 243 of the 1979 Session Laws. In your inquiry, you state the following:

Section 14 of Chapter 243 appropriates, from the state tuition fund, "the sum of \$16,500,000.00 or so much thereof as is or may become available, to the public schools of this state as provided in Section 154 of the Constitution of the State of North Dakota and chapter 15-44, for the biennium beginning July 1, 1979 and ending June 30, 1981."

Section 154 of the Constitution and chapter 15-44 of the N.D.C.C. provide for the apportionment of interest and income from the permanent school fund to the common schools of the state. (The interest and income constitute the "state tuition fund" per section 15-44-01). The Constitution provides 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." section 15-44-03 provides that the superintendent of public instruction "shall apportion such fund immediately among the several counties of the state" and the department of accounts and purchases is to "prepare and issue a warrant" to the state treasurer for distribution to the county treasurers.

Prior to the Forty-sixth Legislative Assembly, there was no appropriation of the interest and income from the state tuition fund and distributions were made solely pursuant to section 15-44-03. However, the Legislature now made a specific appropriation of \$16,500,000 or "so much thereof" as is (or may become) available.

It appears that there is a conflict between Section 14 of Senate Bill 2439 and the previous distributions of the state tuition fund under section 15-44-03. My question is, "Does Section 14 (S.B. 2439), which was passed subsequent to section 15-44-03, make a specific maximum appropriation of \$16,500,000 or may all interest and income in the state tuition fund be distributed as in prior years under section 15-44-03?"

Section 153 of the Constitution of North Dakota, as amended, provides:

SECTION 153. All proceeds of the public lands that have heretofore been, or may hereafter be granted by the United States for the support of the common schools in this state; all such per centum as may be granted by the United States on the sale of public lands; the proceeds of property that shall fall to the state by escheat; all gifts, donations, or the proceeds thereof that come to the state for support of the common schools, or not otherwise appropriated by the terms of the gift, and all other property otherwise acquired for common schools, shall be and remain a perpetual trust fund for the maintenance of the common schools of the state. Only the interest and income of the fund may be expended and the principal shall be retained and devoted to the trust purpose. All property, real or personal, received by the state from whatever source, for any specific educational or charitable institution, unless otherwise designated by the donor, shall be and remain a perpetual trust fund for the creation and maintenance of such institution, and may be commingled only with similar funds for the same institution. Should a gift be made to an institution for a specific purpose, without designating a trustee, such gift may be placed in the institution's fund; provided that such a donation may be expended as the terms of the gift provide.

The interest and income of each institutional trust fund held by the state shall, unless otherwise specified by the donor, be appropriated by the legislative assembly to the exclusive use of the institution for which the funds were given.

(Emphasis added).

Section 154 of the Constitution provides:

SECTION 154. 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 added).

The interest and income of the perpetual trust fund created by Section 153, together with the proceeds of all fines for violation of state laws as provided for by Section 154, are paid into the State Treasury and constitute the "state tuition fund". Section 15-44-01 of the North Dakota Century Code provides:

15-44-01. STATE TUITION FUND - SOURCE. The net proceeds arising from all fines for violation of state laws, from leasing the school lands, and the interest and income from the state permanent school fund shall be paid into the state treasury and shall constitute the state tuition fund.

The proceeds of the state tuition fund are to be paid out of the Treasury and apportioned among the counties of the state by authority of the Superintendent of Public Instruction as provided in section 15-44-03:

15-44-03. CERTIFICATE BY DEPARTMENT OF ACCOUNTS AND PURCHASES - APPORTIONMENT BY SUPERINTENDENT OF PUBLIC INSTRUCTION - WARRANT - NOTICE TO COUNTY TREASURERS. The department of accounts and purchases on or before the third Monday in February, May, August, and November in each year, shall certify to the superintendent of public instruction the amount of the state tuition fund. The superintendent shall apportion such fund immediately among the several counties of the state in proportion to the number of children of school age residing in each as shown by the last enumeration provided for by law, and shall certify to the department of accounts and purchases, state treasurer, and to the county treasurer and county superintendent of schools of each county, the amount apportioned to the respective counties. Immediately upon receipt of the apportionment from the superintendent of public instruction, the department of accounts and purchases shall prepare and issue a warrant, signed by the state auditor, upon the state treasurer for the full amount of the state tuition fund apportioned to the several counties and shall deliver the same to the state treasurer, taking his receipt therefor. The department of accounts and purchases shall notify the several county treasurers of the amount due their respective counties and that the warrant has been issued therefor. The state treasurer, upon such warrant, shall pay the amount due the several counties to the respective county treasurers.

(Emphasis added).

Pursuant to section 15-44-04, the county superintendent of schools, upon receipt of the certificate of apportionment from the Superintendent of Public Instruction, ". . .shall apportion the state tuition fund to the several school districts. . . ."

As stated in your inquiry, the 1979 Legislative Assembly, for the first time, made a specific appropriation from the state tuition fund. Section 14 of Chapter 243, Session Laws 1979, provides:

SECTION 14. APPROPRIATION.) There is hereby appropriated out of any moneys in the state tuition fund in the state treasury, not otherwise appropriated, the sum of \$16,500,000.00, or so much thereof as is or may become available, to the public schools of this state as provided in Section 154 of the Constitution of the state of North Dakota and chapter 15-44, for the biennium beginning July 1, 1979, and ending June 30, 1981.

Based on the nature of your specific question, we assume that it is anticipated that the amount of the state tuition fund during the present biennium will exceed, sometime before the end of the biennium, the amount of the appropriation contained in Section 14 of Chapter 243. With that assumption, the potential exists for possible conflict between the requirements of Section 154 and the implementing provisions of chapter 15-44, and the limitations of the appropriation contained in Section 14 of Chapter 243.

It is our opinion that Section 154 of the Constitution is a special provision making an appropriation each year of the full amount of the state tuition fund for the benefit of the common schools of the state; that this constitutional appropriation is mandatory and self-executing; and that it is beyond the power of the Legislature to place limitations or restrictions on the amount of the appropriation first made by the Constitution. Our reasoning for this conclusion is based upon the authorities discussed below.

The Supreme Court has held that appropriations may be made by the Constitution, and may be self-executing. *State, ex rel. Walker v. Link*, 232 N.W.2d. 823 (N.D. 1975); *Ford Motor v. Baker*, 300 N.W. 435 (N.D. 1941); *Langer v. State*, 284 N.W. 238 (N.D. 1939); and *State v. Hall*, 171 N.W. 213 (N.D. 1919).

In *McCarney v. Meier*, 286 N.W.2d. 780 (N.D. 1979), the Supreme Court, in giving interpretation to the provisions of Article 105 of the Amendments to the Constitution, stated that a constitutional provision should be construed to make it operative and effective and not so as to defeat its purpose. In the case of *State v. Baker*, 262 N.W. 183 (N.D. 1934), the Court concluded that the failure by the Legislature to provide funds by appropriation would not defeat the performance of a constitutionally mandated function. In that case, the Court recognized the constitutional duty of the Secretary of State, pursuant to Section 25 of the Constitution as it then provided, to publish publicity pamphlets regarding Initiative and Referendum measures, as constituting an appropriation to accomplish the constitutional mandate, even though no legislative appropriation had been made.

We believe the provisions of Section 154 meet the test adopted by our Supreme Court to determine whether they constitute an appropriation of funds to the common schools of this state. In *Menz v. Coyle*, 117 N.W.2d. 290 (N.D. 1962), the Court defined "appropriation" as (1) the setting apart of a definite sum, (2) for a specific purpose, (3) in such a way that public officials can use the amount appropriated, and no more than the amount appropriated.

In *State v. Hanson*, 256 N.W. 201 (N.D. 1934), the Court had occasion to give interpretation to Section 154. It stated, at page 203:

. . .The Constitution (Section 154) makes specific provision that the interest and income of this fund shall be apportioned "between all the several common school corporations of the state" and "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."

. . .This interest belongs to the school fund, is payable annually, and when collected, if unexpended during that year, becomes a part of the school fund and cannot be used except for investment.

In *State v. Amerada Petroleum Corporation*, 49 N.W.2d. 14 (N.D. 1951), the Supreme Court restated the rule that the Constitution of the State is not a grant of, but a restriction on legislative power, and that the Legislature may enact any law not expressly nor inferentially forbidden by the Constitution. In an earlier case, our Supreme Court held to the rule that every reasonable presumption is in favor of the constitutionality of a legislative act and that the only test of the validity of an act passed by the Legislature is whether it violates any of the express or implied restrictions of the state or federal constitutions. *State, ex rel. Sathre v. Board of University and School Lands*, 262 N.W. 60 (N.D. 1935).

In the construction of constitutional provisions, the Supreme Court has long recognized that it should ascribe to the words used in the meaning which the people understand them to have when the constitutional provision is adopted and to rely on contemporaneous and practical constitutional constructions that have been acquiesced in for a considerable period of time. *State, ex rel. Sanstead v. Freed*, 251 N.W.2d. 898 at 905 (N.D. 1977). See, also, *Cooley's Constitutional Limitations* (7th Ed.), c. 4, pp. 70-123. We have discovered no comments recorded in the Debates of the First Constitutional Convention which would aid in the interpretation of the provisions of Section 154 to be in the nature of providing a continuing annual appropriation of the state tuition fund to the schools. In the absence of such, it is appropriate to next consider the history of administrative and legislative application of Section 154. We are impressed by the history of no legislative appropriation having been made from the state tuition fund to the schools from statehood through the Forty-sixth Session of the Legislative Assembly. From the provisions of Section 154, and the early statutes implementing its provisions found in chapter 15-44 of the North Dakota Century Code, state and local officials charged with the duty of making apportionment of the state tuition fund, by their practice, have long considered Section 154 to constitute a constitutional appropriation. This long standing practice has gone unchallenged and did not meet with statutory conflict until the enactment by the Forty-sixth Legislative Assembly of the appropriation in Section 14 of Chapter 243, Session Laws 1979.

Since it is our opinion that Section 154 provides for an annual appropriation of the amount contained in the state tuition fund and that this appropriation does not require any legislative appropriation to render it operative, only such legislation that is in furtherance of the purpose, or as will facilitate the operation of Section 154, is permissible, and any legislation which will impair or limit the rights granted by its provisions is not permissible. *State v. Hall*, 171 N.W. 213 (N.D. 1918), 16 C.J.S., Const. Law, Section 48, p. 145.

We believe that the people have clearly expressed their intention through the provision of Section 154 that all moneys accumulated in the state tuition fund are to be paid to the schools. Accordingly,

in the event the amount in the state tuition fund during the present biennium shall exceed the amount appropriated by the Legislature, the mandate of the Constitution will prevail and any limitation placed on the constitutional appropriation must yield.

We are mindful of the presumption that is given to the constitutionality of all legislative acts. We are also aware that only the courts may determine them to be otherwise. It may, therefore, be appropriate, under the present circumstances, that the next Legislative Assembly reconsider its action regarding Section 14 of Chapter 243 with a view toward removing the limiting nature of the appropriation in light of the constitutional appropriation. Such action would avoid a conflict between the provisions of the Constitution and legislative action.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General