

Date Issued: June 1, 1981 (AGO 81-51)

Requested by: Dr. Joe Crawford, Superintendent
Department of Public Instruction

- QUESTIONS PRESENTED -

I.

Whether kindergarten students can be tuitioned between North Dakota school districts pursuant to chapter 15-40.2 of the North Dakota Century Code.

II.

Whether a North Dakota school district is eligible to receive foundation aid payments pursuant to section 15-40.1-08(7), N.D.C.C., for a nonresident kindergarten pupil.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that there is no authority in chapter 15-40.2, N.D.C.C., for North Dakota school districts to either send or receive kindergarten pupils under tuition agreements with other North Dakota school districts.

II.

It is my further opinion that a North Dakota school district is not eligible to receive foundation aid payments pursuant to section 15-40.1-08(7), N.D.C.C., for a nonresident kindergarten pupil.

- ANALYSIS -

I.

Kindergarten programs are established in the public school districts in North Dakota pursuant to section 15-45-01, N.D.C.C. They are to be established "in connection with the public schools of the district." The kindergartens are established by either board action or by popular vote.

Sections 15-29-08(3) and (14), N.D.C.C., authorize school districts to send and receive pupils from other districts "as provided by law." School pupils are transferred or tuitioned between school districts pursuant to chapter 15-40.2, N.D.C.C. Section 15-40.2-01, N.D.C.C., provides as follows:

15-40.2-01. TRANSFER OF PUPILS TO OTHER DISTRICTS OR INSTITUTIONS - TUITION AGREEMENTS. The school board of any district may send elementary or high school pupils into another school district or to

an accredited institution of another state when, because of shorter distances and other conveniences, it is to the best interests of the school district to do so, and in such instances the board may pay the tuition of such pupils to the district or institution to which they are sent. The school board may arrange, and when petitioned to do so by a majority of electors of the district, shall arrange with the school boards of other districts or with the institutions, to send pupils to such other districts or institutions who can be taught conveniently therein, and for the payment of their tuition and for furnishing and paying for their transportation to and from such other schools or institutions. (Emphasis supplied).

Section 15-40.2-02, N.D.C.C., authorizes admission of elementary and high school pupils, and provides as follows:

15-40.2-02. RECEIVING OF PUPILS BY ADMITTING DISTRICTS. Any school district shall admit elementary and high school pupils from other districts to its schools when it can be done without injuring or overcrowding such schools and after the board of the sending district and the board of the admitting district have entered into an agreement governing the attendance of such pupils as may be enrolled or when tuition will be paid by a parent or guardian in the manner provided for in this chapter. (Emphasis supplied).

The question then is whether "elementary" means kindergarten pupil for purposes of sections 15-40.2-01 and 15-40.2-02, N.D.C.C.

The term "elementary" is not specifically defined in sections 15-40.2-01 and 15-40.2-02, N.D.C.C. "Elementary" pupil is defined, however, in section 15-40.2-05, N.D.C.C. That section deals with the application of a parent or guardian for the payment of tuition by a school district. It also provides a procedure for a parent or guardian to apply to a school district for approval of the payment of tuition charges. An "elementary" pupil, for purposes of section 15-40.2-05, N.D.C.C., is defined "to mean grades one through eight" and does not include kindergarten pupils. While section 15-40.2-05, N.D.C.C., states that the definition is "for purposes of this section," it certainly indicates that the one through eight definition is probably what was intended to apply for sections 15-40.2-01 and 15-40.2-02, N.D.C.C., as well. It is doubtful that in 1971 when chapter 15-40.2, N.D.C.C., was passed that kindergarten was intended to be included within the definition of "elementary." Therefore, allowing such transfer of kindergarten students would be inconsistent with this definition and a school board has no authority to tuition kindergarten students between in-state school districts pursuant to chapter 15-40.2, N.D.C.C.

II.

Section 15-40.1-08(7), N.D.C.C., as amended by the 1981 Legislative Assembly, provides as follows:

7. For elementary schools providing kindergartens which are established according to provisions of section 15-45-01, and for out-of-state kindergarten programs, approved by the state

superintendent and utilized by North Dakota school districts bordering other states, there shall be paid that amount of money resulting from multiplying the factor .50 times the educational support per pupil payment for that elementary school as determined under this section for each of the first twenty-five pupils in average daily membership in each classroom or for each teacher, except that no payment shall be made for more than twenty-five pupils in average daily membership in each classroom or for each teacher. The full per-pupil payments shall be made only to those kindergarten programs providing the equivalent of ninety full days of classroom instruction during any twelve-month period. Programs providing shorter periods of instruction during the same time period shall receive a proportionately smaller per-pupil payment. (Emphasis supplied).

Section 15-45-01, N.D.C.C., provides that a school board can establish free public kindergartens "for the instruction of resident children below school age during the regular school term." (Emphasis supplied). A child from another school district is not a "resident" child. Therefore, foundation aid payments cannot be made to North Dakota school districts for the kindergarten education of a nonresident child. This is not to say that two school districts which both establish kindergarten programs might not enter into cooperative arrangements for kindergarten instruction.

It should be noted that section 15-40.1-08(7), N.D.C.C., specifically allows for foundation aid payments to out-of-state kindergarten programs. School districts have entered into tuition agreements with out-of-state districts. Authority for tuitioning for this purpose is derived from section 15-40.2-09, N.D.C.C., which does not limit tuitioning to "elementary" pupils. section 15-40.1-08(7), N.D.C.C., can thus be construed to be consistent with section 15-40.2-09, N.D.C.C. Tuitioning of kindergarten students between in-state districts would have to be specifically authorized by legislation.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

ROBERT O. WEFALD
Attorney General

Prepared by: Rick D. Johnson
Assistant Attorney General