

Office of the Attorney General  
State of North Dakota

Opinion No. 83-46

Date Issued: December 21, 1983

Requested by: Ronald C. Stastney  
Assistant Superintendent  
Department of Public Instruction

--QUESTIONS PRESENTED--

I.

Whether a local school board or the state superintendent of public instruction has the authority to establish courses of study required for graduation in excess of those required by Section 15-41-06 of the North Dakota Century Code.

II.

Whether a local school board or the superintendent of public instruction has the authority to establish a minimum attendance for the purposes of promotion.

III.

Whether the superintendent of public instruction may require each secondary student to be enrolled in at least 5 periods of the school day in order for the school to receive the full foundation payment.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that a local school board, and not the state superintendent of public instruction, has the authority to establish courses of study required for graduation in excess of those required by Section 15-41-06, N.D.C.C.

II.

It is my further opinion that a local school board, and not the superintendent of public instruction, has the authority to establish a minimum attendance for the purposes of promotion.

### III.

It is my further opinion that the superintendent of public instruction may not require each secondary student to be enrolled in at least 5 periods of the school day in order for the school to receive the full foundation payment.

#### --ANALYSIS--

##### I.

Article V, Section 13 of the North Dakota Constitution provides, in pertinent part, that 'the powers and duties of the . . . superintendent of public instruction . . . shall be prescribed by law.' Article III, Sections 1 and 2 of the North Dakota Constitution give the legislative assembly the power to establish and maintain a system of public schools which shall be open to all children in the state and the duty to provide for a uniform system of free public schools throughout the state. The Supreme Court in *State, ex. rel., Langer v. Totten*, 175 N.W. 563 (N.D. 1919), stated that the constitutional power to prescribe and prepare courses of study is in the legislature and not in the superintendent of public instruction. However, the legislature may, by statute, give the superintendent such power.

Sections 15-21-04 and 15-41-02, N.D.C.C., given the superintendent of public instruction 'general supervision' over secondary education in the state. Further, Section 15-21-09, N.D.C.C., provides:

15-21-09. CERTIFICATION OF TEACHERS --STANDARDIZATION OF SCHOOLS--TEXTBOOKS--EXAMINATIONS--COURSES OF STUDY. The superintendent of public instruction shall have charge and supervision of the certification of teachers, standardization of schools, uniformity of textbooks, examinations for eighth grade and high school pupils, and preparation of courses of study for the several classes of public schools. [Emphasis supplied]

Section 15-41-07, N.D.C.C., provides:

15-41-07. COURSES OF INSTRUCTION TO FOLLOW STATE PLAN--COURSES IN COOPERATIVE MARKETING AND CONSUMERS' COOPERATIVES--CREDITS. The content of all courses and the grade in which they severally are taught in all types of high schools and in the high school department of all schools doing high school work shall conform to the state course of study for high schools as outlined by the superintendent of public instruction. In the course of study for high schools, the superintendent of public instruction shall provide for an elective course of instruction in cooperative marketing and consumers' cooperatives which shall be a one-half year course. No school which does not conform to the provisions of

this section shall be accredited by the superintendent of public instruction through state high school examinations or otherwise. [Emphasis supplied]

The above quoted statutes give the superintendent of public instruction the authority to prepare courses of study, but do not give the superintendent of public instruction the authority to establish graduation requirements.

The legislature established minimum graduation requirements in Section 15-41-06, N.D.C.C. This section provides:

15-41-06. HIGH SCHOOL COURSES -- REQUIREMENTS -- CREDITS -- ALTERNATIVE CURRICULUM PLANS. Four units of high school work shall be considered the minimum number of any year from the ninth grade through the twelfth grade. However, students in their fourth year of standard high school coursework may be enrolled in fewer than four units if the students require fewer than four units for graduation and if the school board of their school district of attendance has adopted an alternative high school senior curriculum plan. An alternative high school senior curriculum plan may be adopted by board action, and must contain specifically described criteria under which high school seniors may be enrolled in fewer than four units. An alternative high school curriculum plan of coursework shall become effective only following formal approval by the superintendent of public instruction, and no student shall be eligible to be enrolled in fewer than four units of coursework in his or her twelfth-grade year unless that student can graduate during that same school year while carrying fewer than four units. A school board is not obligated to adopt an alternative high school senior curriculum plan, but once having adopted such a plan, a district must permit high school seniors satisfying criteria set forth in the plan to be enrolled in fewer than four units in accordance with this section. All unit courses shall be taught a minimum of forty minutes a day for at least one hundred eighty days, subject to the provisions of section 15-47-33, except that all natural science courses shall exceed forty minutes to such an extent as may be determined by the superintendent of public instruction. In all high schools and in all schools maintaining any of the grades from the ninth to the twelfth and doing high school work, it shall be made possible for each grade to complete four units of work each year. The work which is done by pupils in any school which does not conform to the requirements contained in this section shall not be accredited by the superintendent of public instruction through state high school examination or otherwise. [Emphasis supplied]

Therefore, the minimum graduation requirements as set forth in Section 15-41-06, N.D.C.C., are 16 total units of completed high school work for grades nine through twelve. The legislature did not specifically grant the superintendent of public instruction the authority to increase those graduation requirements. To the extent the legislature has not identified the courses of study which must be taken, the superintendent does have the

authority to determine the courses of study which must be taken for graduation within the statutory minimum graduation requirements of 16 units. Sections 15-21-09 and 15-41-07, N.D.C.C.

Section 15-29-08, N.D.C.C., itemizes the powers and duties of a school board of a public school district, including, in subsection 4, the power and duty:

[T]o determine and establish courses of study which shall be followed, in addition to those courses prescribed or approved by the superintendent of public instruction or by law.' [Emphasis supplied]

In 1921, the legislature amended Section 15-21-09, N.D.C.C., and removed the power of the superintendent of public instruction to prescribe courses. That section currently gives the superintendent the power to prepare courses of study. Section 15-29-08, N.D.C.C., which itemizes the powers and duties of the school board was not amended to conform to this change. Section 15-29-08(4), N.D.C.C., refers to a power which no longer exists and hasn't existed since 1921. Therefore, it is my opinion that a local school board and not the superintendent of public instruction has the authority to require additional courses of study to be taken in excess of the 16 units required by law.

## II.

Section 15-29-08(13), N.D.C.C., provides that a school board has the authority:

13. To adopt, alter, and repeal, when it deems it expedient, rules and regulations for the reception, organization, grading, government, and instruction of pupils, and for their suspension, expulsion, or transfer from one school to another. No pupil shall be suspended or expelled except for insubordination, habitual indolence, or disorderly conduct, and a suspension shall not be for a longer period than ten days, nor shall an expulsion be in effect beyond the end of the current term of school. [Emphasis supplied]

Section 15-29-08(13), N.D.C.C., gives a school board the authority to adopt rules regarding the grading, government and instruction of pupils. There is no statute which gives the superintendent of public instruction similar authority. Therefore, a school board and not the superintendent of public instruction has the authority to establish a minimum attendance for the purposes of promotion.

## III.

Sections 15-40.1-07 and 15-40.1-07.2, N.D.C.C., set forth the requirements which must be met by a school district to receive foundation payments. Section 15-40.1-07, N.D.C.C., provides, in pertinent part:

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Such payments shall not be made unless four or more units of standard high school work approved by the superintendent of public instruction (are offered) during the current year, only certificated teachers have been employed, and the other standards prescribed by this chapter have been met. Payments shall be made to the high school district in which the student is enrolled for graduation and units of approved vocational education in accordance with the provisions of chapter 15-20.1, and other courses approved by the superintendent of public instruction, earned in another high school district shall be included to meet the minimum four required units. In the case of students enrolled in non-public schools for graduation or [students enrolled in less than four units of standard high school work who are in their fourth year of high school coursework and who are enrolled in (approved alternative high school curriculum programs,)] proportionate payments shall be made to the public school district in which such student is enrolled for specific courses. School districts offering high school summer school programs shall be eligible for proportionate payments provided each course offered in such programs satisfies requirements for graduation and comprises at least as many clock hours as courses offered during the regular school term.

Districts that did not maintain high schools during the year of 1964-1965 shall not be eligible for payments unless they have a minimum enrollment of twenty-five pupils if four years of high school work are offered, a minimum enrollment of twenty pupils if three years of high school work are offered, a minimum enrollment of fifteen pupils if two years of high school work are offered, and a minimum enrollment of ten pupils if one year of high school work is offered. Payments pursuant to this chapter to school districts in bordering states shall be made after subtracting the amount realized from a twenty-mill levy in the sending school district divided by the total number of resident pupils enrolled in the school district plus the number of resident pupils from the district attending school in another state. [Emphasis supplied]

Section 15-40.1-07.2, provides:

15-40.1-07.2. PAYMENTS FOR ALTERNATIVE PROGRAMS. Payments made pursuant to section 15-40.1-07 must be made to high school district which provide alternative programs for students from the ages of sixteen through eighteen who have dropped out of school. Upon determination by the local school district of nonmembership in the regular program of a high school, a district may apply to the superintendent of public instruction for continuation of the foundation aid funding for high school students enrolled in an approved alternative education program. A subtraction will be made from the district average daily membership when a

student is dropped from membership and added back for the days of membership in an approved alternative program. Proportionate payments must be made for students enrolled in less than four units and must be based on the number of units carried and the high school weighting factor.

The above quoted provisions do not condition eligibility for foundation payments to a requirement that a student be enrolled in 5 periods of the school day. The legislature has specifically set forth the requirements a school district must meet to be eligible for foundation payments and the superintendent of public instruction may not increase those requirements.

--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.

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