

LETTER OPINION
95-L-71

March 21, 1995

Dr. Wayne G. Sanstead
Superintendent of Public Instruction
600 East Boulevard Avenue
Bismarck, ND 58505-0440

Dear Dr. Sanstead:

Thank you for your February 16, 1995, letter asking whether a North Dakota public school district board may enter into an agreement with a nonpublic school entity to collect state foundation aid for the combined student enrollment of the public and nonpublic school, and whether a North Dakota public school district board may enter into an agreement to allow a nonpublic entity to exercise a vote in or otherwise control the public school district board's decision-making processes.

The North Dakota Constitution provides, in part:

A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. . . .

N.D. Const. art. VIII, ? 1.

The Legislature has carried out that function in various chapters and provisions of the North Dakota Century Code (N.D.C.C.), including provisions found in titles 15 and 57. The Legislature has provided for the election of school board members, their various powers, duties, and responsibilities, their receipt of state foundation aid, the attendance of students, the authority to levy property taxes, and numerous other matters. (See, e.g., N.D.C.C. chs. 15-28, 15-29, 15-40.1, 15-34.1, and 57-15.)

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The North Dakota Supreme Court has held that North Dakota public school districts have only those powers specifically provided by law and those powers which must be implied in order to carry out the specific powers. The rule of strict construction applies when determining the powers of North Dakota public school districts. E.g., Fargo Educ. Ass'n v. Fargo Pub. Sch. Dist. No. 1, 291 N.W.2d 267, 271 (N.D. 1980), Myhre v. Sch. Bd. of N. Cent. Pub. Sch. Dist. No. 10, 122 N.W.2d 816, 819-20 (N.D. 1963), and Peterson v. McKenzie County Pub. Sch. Dist. No. 1, 467 N.W.2d 456, 458 (N.D. 1991).

After North Dakota school board members are elected under N.D.C.C. ch. 15-28, they organize and exercise powers provided in N.D.C.C. ch. 15-29 and elsewhere in North Dakota law. A school district is authorized to collect state foundation aid based on the school district's average daily membership of students in its public schools. N.D.C.C. ? 15-40.1-09.

No express or implied authority is contained in North Dakota law that would authorize a North Dakota public school district board to agree with a nonpublic school entity to create a third cooperative school board for the purpose of collecting state foundation aid for students attending a nonpublic school. Authority of a school board to contract with a federal school under N.D.C.C. ? 15-40.2-11 does not apply to the issue at hand.

The draft agreement you attached to your letter provides for continued independence of the North Dakota school district and the tribal school. It creates a combined cooperative school board for certain financial purposes, and states:

The Cooperative School Board is legally empowered to act on all policy and financial matters consistent with the authority granted to each governing body under the laws, regulations, and statutes applicable to each as separate and independent bodies, and to the unique authority of the Cooperative School Board as identified in this Cooperative School Agreement.

Four Winds Community School Cooperative School Agreement, section 1, paragraph 2.

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No North Dakota law allows a North Dakota public school district to grant or delegate its statutory authority to a nonpublic entity. When North Dakota school board members are elected, they possess the authority provided by law. They may grant administrative authority to a school superintendent, N.D.C.C. ? 15-29-07, but there is no statutory authority to delegate control over its basic decision-making authority, including creation of a third entity in the effort to claim state foundation aid for a combined public and nonpublic student enrollment. It is, therefore, my opinion that a North Dakota public school district board may not enter into an agreement with a nonpublic school entity to collect state foundation aid for the combined student enrollment of the public and nonpublic school.

In response to your second question, various North Dakota statutes address a school board's authority to contract for certain purposes. See, e.g., N.D.C.C. ? 15-34.2-07.1 (regarding school transportation contracts). Other statutes allow school districts to enter into joint powers agreements with other North Dakota governmental entities. See, e.g., N.D.C.C. ? 54-40-01(1) (agreements to acquire, construct, and maintain buildings), N.D.C.C. ? 54-40-08 (agreements for the use of state buildings and facilities), and N.D.C.C. ch. 54-40.3 (agreements for the joint administration of any power or function that is authorized by law or assigned to one or more of the parties). But joint powers agreements do not allow the identity of the participating governmental entities to be lost, and those participating entities must still carry out their required statutory duties. See N.D.C.C. ? 54-40.3-01(3), 1994 N.D. Op. Att'y Gen. 34. N.D.C.C. ch. 54-40.2 allows North Dakota governmental entities to enter into agreements with North Dakota Indian tribal governments. That chapter, however, only allows agreements for administrative services, activities, or undertakings that the public agencies or the tribal governments are authorized by law to perform. N.D.C.C. ? 54-40.2-02.

In conclusion, it is my opinion that no North Dakota law grants or implies authority for a North Dakota public school district board to enter into an agreement to allow a nonpublic entity to exercise a vote in or otherwise control the public school district board's decision-making processes.

Sincerely,

Heidi Heitkamp

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ATTORNEY GENERAL

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