

LETTER OPINION
98-L-54

April 24, 1998

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

Dear Dr. Sanstead:

Thank you for your letter asking whether your department may employ the Minnesota Guide For Planning New And Improved School Facilities as a criterion for your administration of N.D. Admin. Code ch. 67-09-01 involving school district construction and remodeling approval and, specifically, building sizes.

N.D.C.C. § 15-35-01.1(1) provides:

1. Notwithstanding the powers and duties of school boards of public school districts otherwise provided by law, all construction, purchase, repair, improvement, renovation, or modernization of any school building or facility within a school district estimated by the school boards to cost in excess of twenty-five thousand dollars may not be commenced unless approved by the superintendent of public instruction. No such construction, purchase, repair, improvement, renovation, or modernization of any school building or facility may be approved unless the school district proposing the project demonstrates the need, the educational utility of the project, fiscal need, and the capacity to pay for the project under rules adopted by the superintendent of public instruction pursuant to chapter 28-32 after receiving input from the state board of public school education. In the event of disagreement between the superintendent of public instruction and the school board applying for approval of a construction project under this section, the school board may appeal the application to the state board of public school education and the decision of the state board approving or disapproving the application is final.

Thus, notwithstanding the powers and duties of public school districts, no such district may commence construction, repair,

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improvement, renovation, or modernization of any school building unless the project is approved by the Superintendent of Public Instruction and no such project may be approved unless the district demonstrates the need, educational utility, fiscal need, and capacity of the district to pay for the project under rules adopted by the Superintendent.

The rules adopted by the Superintendent under N.D. Admin. Code ch. 67-09-01 provide for construction approval, consultation with DPI, applications, facility plans, application submission, and the demonstration of need and educational utility. N.D. Admin. Code § 67-09-01-07 sets forth criteria for school district construction projects less than \$150,000 as well as for projects that exceed that dollar amount. The introductory paragraph of N.D. Admin. Code § 67-09-01-07 states:

The superintendent may not approve the application unless the district demonstrates to the superintendent's satisfaction the need and educational utility of the project based on criteria that include the following:

The list of criteria under subsection 2 of N.D. Admin. Code § 67-09-01-07, for projects involving \$150,000 or more, requires, at subdivision g, that the building or facility meet or exceed the size standards recommended by the Department. Administrative rules in North Dakota have the force and effect of law when adopted, approved by the Attorney General, and published in the North Dakota Administrative Code. N.D.C.C. § 28-32-03(3).

N.D. Admin. Code § 67-09-01-07(2)(g) does not set forth size standards specifically for each type of school building. The subdivision and the section in general require that the school district meet or exceed the size standards recommended and that the application in general meet the satisfaction of the Superintendent.

As a state official, the Superintendent has the authority specifically provided by law, including administrative rules, and such other authority impliedly necessary to carry out the specific authority stated. American Federation of State, County, and Municipal Employees v. Olson, 338 N.W.2d 97, 100 (N.D. 1983). "Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an

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administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity." Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 133 (N.D. 1987) (quoting Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 202-203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947)).

It is therefore my opinion that the statute and rules cited above concerning school district construction approval authorize the Superintendent of Public Instruction, acting through the Department of Public Instruction (N.D.C.C. § 15-21-01.1) (DPI), to set reasonable building standards for construction of North Dakota school district buildings and facilities and to refuse to approve the construction of such buildings and facilities which does not adhere to DPI recommendations.

It is my further opinion that DPI may employ guidelines and policies from other professional sources and governments to develop its building size recommendations and to condition its approval of school district building construction applications on compliance with those recommendations. When DPI administers its authority under the statute and rules noted above, it may use sources such as the Minnesota Guide For Planning New And Improved School Facilities in the development of its size recommendations, but when those recommendations are made and imposed on an applying school district, DPI is administering North Dakota statutes and rules and merely using the Minnesota guide as a source for the development of its own recommendations for any specific project application. The statute (N.D.C.C. § 15-35-01.1) provides due process to any school district that disagrees with DPI requirements for school building construction, repair, or renovation by granting the right of appeal to the State Board of Public School Education, a separate agency (N.D.C.C. § 15-21-17).

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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