

**LETTER OPINION  
2007-L-14**

September 6, 2007

Dr. Wayne G. Sanstead  
Superintendent of Public Instruction  
Department of Public Instruction  
State Capitol  
Bismarck, ND 58505

Dear Dr. Sanstead:

Thank you for your letter raising several questions regarding regional education associations.<sup>1</sup> For the reasons stated below, it is my opinion that regional education associations may employ and compensate staff, but it is up to the Legislature to determine whether those employees may be treated as political subdivision employees for purposes of bonding, workers compensation, unemployment coverage, and retirement benefits. It is my further opinion that the creation of a regional education association by a joint powers agreement among political subdivisions does not automatically result in the regional education association itself being a political subdivision.

**ANALYSIS**

A regional education association is “a group of school districts that have entered a joint powers agreement that has been reviewed by the superintendent of public instruction and verified as meeting the requirements of section 15.1-09.1-02.”<sup>2</sup> A regional education association is governed by a board, and the joint powers agreement must require that all voting members of the board or their designees be individuals currently serving on the boards of the participating school districts.<sup>3</sup> The joint powers agreement of a regional

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<sup>1</sup> The 2007 Legislature repealed the laws referring to “educational associations,” i.e., N.D.C.C. §§ 15.1-07-28, 15.1-07-30, and 15.1-27-40, and enacted similar laws that refer to “regional education associations,” i.e., N.D.C.C. ch. 15.1-09.1. See S.B. 2030, 2007 N.D. Leg.

<sup>2</sup> N.D.C.C. § 15.1-09.1-01.

<sup>3</sup> N.D.C.C. § 15.1-09.1-02(7).

education association must also provide for “the employment and compensation of staff.”<sup>4</sup> The Attorney General’s office has long held that “implicit in the power to . . . hire is the power to fire.”<sup>5</sup> Thus, the governing board of a regional education association may hire and fire employees, but whether those employees may be bonded, and provided workers compensation, unemployment coverage, and retirement benefits like political subdivision employees is not addressed in state law.

A joint powers agreement may provide for “[t]he precise organization, composition, and nature of any separate administrative or legal entity, including . . . a joint board . . . responsible for administering the cooperative or joint undertaking.”<sup>6</sup> There are no North Dakota court cases that address whether this separate administrative or legal entity formed by political subdivisions through a joint powers agreement is itself a political subdivision. Previous North Dakota Attorney General opinions have discouraged such entities from employing staff because it would be questionable whether such employees are eligible for bonding under the state bonding fund, entitled to a defense and indemnification as an employee of a political subdivision, entitled to pension and group insurance benefits, or entitled to workers or unemployment compensation.<sup>7</sup>

Other states have laws similar to N.D.C.C. ch. 54-40.3, regarding joint powers agreements. State laws interpreted in court cases in Utah and Iowa provided that the specific entity created under the joint powers agreement was a political subdivision. Thus, the Utah Supreme Court determined that the entity and its employees were protected by the state’s immunity act,<sup>8</sup> and the Iowa Supreme Court determined that because the entity was a political subdivision separate from the political subdivisions that formed it, the forming political subdivisions were not liable on the entity’s contract with a third party.<sup>9</sup>

Other states have determined that the entity created under the joint powers agreement was not a political subdivision. In a Wyoming case,<sup>10</sup> the Weston County Hospital Joint Powers Board was determined to be a governmental entity, but not a political subdivision, even though the Board was created by two towns and a county. The Board made the

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<sup>4</sup> N.D.C.C. § 15.1-09.1-02(6).

<sup>5</sup> N.D.A.G. 93-L-261.

<sup>6</sup> N.D.C.C. § 54-40.3-01(1)(c).

<sup>7</sup> See N.D.A.G. Letter to Kautzmann (July 13, 1992) and N.D.A.G. 2002-L-22.

<sup>8</sup> Davis v. Central Utah Counseling Center, 147 P.3d 390 (Utah 2006).

<sup>9</sup> Allis-Chalmers Corporation v. Emmet County Council of Governments, 355 N.W.2d 586 (Iowa 1984).

<sup>10</sup> Weston County Hospital Joint Powers Board v. Westates Construction Company, 841 P.2d 841 (Wyo. 1992).

argument that because political subdivisions joined together to form the Board, the Board inherently must be recognized as a political subdivision.<sup>11</sup> The Wyoming court stated:

The fallacy in this contention is the assumption that, by the creation of a joint powers board, the participating entities in some manner merge so as to form a body that is essentially the equivalent of their individual entities. This is not the case. The participating entities, whatever they may be, do not merge. Instead, they simply agree to create and support a different and independently managed organization that exists and functions for their mutual benefit.<sup>12</sup>

Also, in a Nebraska case,<sup>13</sup> an entity created by cooperating counties under a joint powers agreement was determined to be a state agency rather than a political subdivision, and in a Texas case,<sup>14</sup> an entity created by a city and other political subdivisions under a joint powers agreement was not a political subdivision; it was an “interlocal agency.” These court cases from Wyoming, Nebraska, and Texas indicate that it is far from clear that the entity created by political subdivisions under a joint powers agreement is itself a political subdivision.

The North Dakota Legislature has specified occasionally that an entity created by a group of political subdivisions is itself a political subdivision. A joint water resource board created by two or more water resource districts is a political subdivision.<sup>15</sup> One or more political subdivisions may form a commerce authority which the Legislature has specified is a political subdivision.<sup>16</sup> These examples indicate that the Legislature will specify that an entity created by a group of political subdivisions is a political subdivision if the Legislature wants it to be treated as a political subdivision.

The 2007 Legislature, in the bill it passed relating to regional education associations, stated:

**LEGISLATIVE COUNCIL STUDY - REGIONAL EDUCATION ASSOCIATIONS.** The legislative council shall consider studying, during the 2007-08 interim, the short-term and long-term evolvement of regional

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<sup>11</sup> Id. at 846.

<sup>12</sup> Id. at 846-47.

<sup>13</sup> Roggasch v. Region IV Office of Developmental Disabilities, 423 N.W.2d 771 (Neb. 1988).

<sup>14</sup> Texas Municipal League Intergovernmental Risk Pool v. Burns, 209 S.W.3d 806 (Tex. App. 2006).

<sup>15</sup> See N.D.C.C. § 61-16.1-11(1).

<sup>16</sup> See N.D.C.C. §§ 11-37-03, 11-37-04.

education associations and shall include the feasibility and desirability of regional education associations becoming political subdivisions; whether teachers should be employed directly by regional education associations, and whether that employment should include bargaining rights, contract renewal and nonrenewal provisions, participation in the teachers' fund for retirement, and participation in the state's uniform group insurance program; the impact that allowing regional education associations to hire teachers directly would have on the recruitment and retention of teachers currently employed by school districts and on teacher salary levels; whether teacher employment contracts, if offered by regional education associations, would have to parallel those of participating school districts with respect to common school calendars, annual or personal leave provisions, and other contractual benefits; the conduct of evaluations, if teachers are employed directly by regional education associations, including who will conduct the evaluations, their frequency, and the criteria upon which the evaluations are based; the organizational structure of regional education associations, including the qualifications of administrative or supervisory personnel; the governance structure of regional education associations; and state level oversight. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-first legislative assembly.<sup>17</sup>

Thus, the Legislature is aware of the importance of determining whether regional education associations are political subdivisions. As the proposed Legislative Council study indicates, it is up to the Legislature to decide whether employees of regional education associations should be treated as political subdivision employees for purposes of bonding, workers compensation, unemployment coverage, and retirement benefits.

During the 2007 Legislative Session, the Legislature amended the definition of "political subdivision," in N.D.C.C. ch. 32-12.1 dealing with governmental liability to include "administrative or legal entities responsible for administration of joint powers agreements."<sup>18</sup> Thus, since state law now provides that an entity created under a joint powers agreement is a political subdivision for purposes of N.D.C.C. ch. 32-12.1, employees of such an entity will be provided a defense if sued.<sup>19</sup>

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<sup>17</sup> S.B. 2030, 2007 N.D. Leg., § 16 (emphasis added).

<sup>18</sup> S.B. 2244, 2007 N.D. Leg.

<sup>19</sup> See N.D.C.C. §§ 32-12.1-02(3), (6), and 32-12.1-04.

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In conclusion, it is my opinion that regional education associations may employ and compensate staff, but whether those employees may be treated as political subdivision employees for purposes of bonding, workers compensation, unemployment coverage, and retirement benefits must be determined by the Legislature. It is my further opinion that the creation of a regional education association by a joint powers agreement among political subdivisions does not automatically result in the regional education association itself being a political subdivision.

Sincerely,

Wayne Stenehjem  
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>20</sup>

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<sup>20</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).