

**LETTER OPINION  
2009-L-15**

October 12, 2009

Dr. Wayne G. Sanstead  
Superintendent  
Department of Public Instruction  
600 E Boulevard Ave Dept 201  
Bismarck, ND 58505-0440

Dear Dr. Sanstead:

Thank you for your letter asking several questions related to the Earl Public School District (hereafter, "Earl School District"). For the reasons stated below, it is my opinion that a joint powers agreement between the Earl School District and the Sidney Public School District (hereafter, "Sidney School District") in Montana does not satisfy the requirement in N.D.C.C. § 15.1-31-01(5) that the Earl School District must "offer the grade level in which the student requires enrollment" in order for its students to qualify to participate in open enrollment. It is my further opinion that if the Earl School District has not entered into a cooperative plan for the joint provision of educational services approved by the North Dakota Superintendent of Public Instruction, the law requires the Earl School District to pay tuition to the Alexander School District for the Earl School District's high school students who attended school in the Alexander School District during the 2008-09 school year. It is my further opinion that you should consult with this office to determine how to compel the dissolution of the Earl School District, but there are no penalties in state law that would apply to a school district which does not comply with the requirement to dissolve.

**ANALYSIS**

In 2006, the McKenzie County Committee<sup>1</sup> held a hearing to determine whether the Earl School District should be dissolved because the District had not operated a school during the 2004-05 school year.<sup>2</sup> The information provided by you indicated that the Earl School District believed it was complying with the law because it was offering some educational services, even though it was not operating a school as required by N.D.C.C. § 15.1-12-26.<sup>3</sup> The hearing did not result in dissolution of the Earl School District. You subsequently requested an Attorney General's opinion regarding the legal requirements for dissolving a school district, and I concluded that state law required the

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<sup>1</sup> See N.D.C.C. ch. 15.1-10.

<sup>2</sup> See N.D.C.C. §§ 15.1-12-26, 15.1-12-27.

<sup>3</sup> See N.D.C.C. § 15.1-12-24.

Earl School District to be dissolved because it had not provided educational services, i.e., operated a school, within its district during the 2004-05 school year.<sup>4</sup>

On January 11, 2007, the McKenzie County Committee<sup>5</sup> held a second hearing regarding the dissolution of the Earl School District. Information provided by you indicates that the county state's attorney advised the committee members of the law and the application of N.D.A.G. 2006-L-35. A hearing was held, but the McKenzie County Committee did not dissolve the Earl School District based upon the committee's finding, contrary to the Attorney General's opinion, that the district had provided educational services during the 2004-05 school year, even though it had not operated a school. The matter of the dissolution of the Earl School District did not proceed to the State Board of Public School Education because state law indicates the State Board of Public School Education would become involved only to give final approval to a dissolution approved by a county committee.<sup>6</sup>

Even though state law requires a school district to be dissolved if it ceases to operate a school within its district,<sup>7</sup> the Earl School District has not been dissolved. Its students are reportedly attending school in Montana and surrounding North Dakota school districts, including the Alexander School District.

You indicate the current dispute concerns a request by the Alexander School District that the Earl School District pay tuition for the Earl School District's high school students who attended school in the Alexander School District during the 2008-09 school year.

State law provides:

A student whose school district of residence does not offer the grade level in which the student requires enrollment may not participate in open enrollment. For purposes of determining whether the grade level in which the student requires enrollment is offered, the several school districts cooperating with each other for the joint provision of education services under a plan approved by the superintendent of public instruction must be considered to be a single district.<sup>8</sup>

The Earl School District declined to pay the tuition to the Alexander School District, indicating that it was offering the grade levels in which the students required enrollment

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<sup>4</sup> See N.D.A.G. 2006-L-35.

<sup>5</sup> See N.D.C.C. ch. 15.1-10.

<sup>6</sup> See N.D.C.C. § 15.1-12-27(4), (6).

<sup>7</sup> See N.D.C.C. §§ 15.1-12-24, 15.1-12-26(1)(b), and N.D.A.G. 2006-L-35.

<sup>8</sup> N.D.C.C. § 15.1-31-01(5) (emphasis added). The second sentence quoted is not relevant because, according to the Department of Public Instruction, the Earl School District's joint powers agreement with the Sidney School District is not a plan for the joint provision of education services approved by the Superintendent of Public Instruction. Conversation with Bob Marthaller, Assistant Superintendent, Department of Public Instruction, Sept. 23, 2009.

through a joint powers agreement entered into under N.D.C.C. ch. 54-40.3<sup>9</sup> with the Sidney School District in Montana. Therefore, the Earl School District contended its high school students could attend school in the Alexander School District through open enrollment and the Earl School District would not be required to pay tuition to the Alexander School District.<sup>10</sup>

The Earl School District made a similar argument in relation to N.D.A.G. 2006-L-35, arguing that because of a joint powers agreement entered into under N.D.C.C. ch. 54-40.3, it was operating a school, since the involved school districts “became one district and regardless where the students were housed on any given day, that facility became a part of each and every school district involved.”<sup>11</sup>

In N.D.A.G. 2006-L-35, I explained “[t]here are various provisions in state law indicating when school districts are to be considered a single district.”<sup>12</sup> After identifying those state laws, I concluded: “[i]n contrast . . . there is no law stating that, for purposes of determining whether a district is operating a school, school districts cooperating with each other under a joint powers agreement under N.D.C.C. ch. 54-40.3 must be considered to be a single district.”<sup>13</sup>

In this case, the Earl School District claims that, because it has a joint powers agreement with the Sidney School District, it offers the high school grade levels since the Sidney School District offers the high school grade levels. Similar to the situation in N.D.A.G. 2006-L-35, there is no law stating that a joint powers agreement entered into under N.D.C.C. ch. 54-40.3 can be used to expand a school district’s grade levels offered to enable its students to participate in open enrollment. Thus, it is my opinion that educating some of its high school students under the joint powers agreement in the Sidney School District in Montana does not satisfy the requirement in N.D.C.C. § 15.1-31-01(5) that the Earl School District offer the high school grade levels in its own district to participate in open enrollment. Since the Earl School District itself does not offer the grade levels in which the students attending school in the Alexander School District require enrollment, the law prevents the Earl School District’s high school students attending school in the Alexander School District from participating in open enrollment.

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<sup>9</sup> N.D.C.C. § 54-40.3-01(1) provides:

Any political subdivision of this state may enter into a joint powers agreement with a political subdivision of another state . . . if the power or function to be jointly administered is a power or function authorized by the laws of this state for a political subdivision of this state and is authorized by the laws of the other state . . . .

<sup>10</sup> See Letter from Steve Paul to Murray Kline (not dated). See also N.D.C.C. § 15.1-31-03(2) (“Except as specifically provided in this chapter [on open enrollment], chapter 15.1-29 [on payment of tuition] does not apply to students involved in open enrollment.”)

<sup>11</sup> Written testimony of Steve Paul submitted at the January 11, 2007, McKenzie County Committee hearing. (The minutes of this meeting were incorrectly dated January 11, 2006.)

<sup>12</sup> N.D.A.G. 2006-L-35.

<sup>13</sup> Id.

You also ask whether, in the event a joint powers agreement under N.D.C.C. ch. 54-40.3 does not satisfy the requirements of N.D.C.C. § 15.1-31-01(5), and if the Earl School District has not entered into a cooperative plan for the joint provision of educational services, the district is required to pay tuition to Alexander for the 2008-09 school year for the Earl high school students who attended Alexander's high school. Regarding the payment of tuition, state law provides:

If a district does not provide educational services to an entire grade level, the students in that grade level may attend a public school of their choice outside their district of residence . . . The board of the students' school district of residence shall pay for the students' tuition and transportation. For purposes of determining whether educational services are provided to an entire grade level, districts cooperating with each other in the joint provision of educational services under a plan approved by the superintendent of public instruction are considered to be a single district.<sup>14</sup>

The Earl School District cannot evade this state law requiring payment of tuition to the Alexander School District by arguing it is offering the educational services to its high school students by entering into the joint powers agreement with the Sidney School District in Montana. There is no law stating that a joint powers agreement entered into under N.D.C.C. ch. 54-40.3 can be used to expand a school district's grade levels offered to avoid paying tuition to other school districts educating its students. To the contrary, the law relating to joint powers agreements states a joint powers agreement "does not relieve any political subdivision . . . of any obligation or responsibility imposed by law. . . ."<sup>15</sup> It is worthy to note that at the same time the Earl School District is contending that the grade levels offered in the Sidney School District are its grade

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<sup>14</sup> N.D.C.C. § 15.1-29-03(2) (emphasis added). The last sentence quoted is not relevant because, according to the Department of Public Instruction, the Earl School District's joint powers agreement with the Sidney School District is not a plan for the joint provision of educational services approved by the Superintendent of Public Instruction. Conversation with Bob Marthaller, Assistant Superintendent, Department of Public Instruction, Sept. 23, 2009.

Before state law authorized districts cooperating under a plan approved by the Superintendent of Public Instruction to be considered a single district for purposes of determining payment of tuition, a previous opinion from this office stated:

[I]f a district does not provide a grade level within its district, and a resident student in that grade level attends school outside the district, then the school district of residence must pay tuition to the admitting district. This is so whether the student attends school in a district that is part of the same cooperative plan or one that is not.

N.D.A.G. 97-L-10 (emphasis added). See also N.D.A.G. 2001-L-18 ("The cooperative agreement . . . results in one of the two districts educating only elementary grades. Thus, based on the grades it actually teaches, it does not have a high school enrollment . . .").

<sup>15</sup> N.D.C.C. § 54-40.3-01(3).

levels, the Earl School District, under the joint powers agreement, is paying tuition to the Sidney School District for its high school students to attend school there.<sup>16</sup>

In conclusion, a joint powers agreement may not be used by the Earl School District to avoid its obligation under N.D.C.C. § 15.1-29-03(2) to pay tuition to the Alexander School District for its high school students who attend school there.<sup>17</sup> Thus, it is my opinion that the law requires the Earl School District to pay tuition to the Alexander School District for the Earl School District's high school students who attended school in the Alexander School District during the 2008-09 school year.<sup>18</sup>

You also ask what legal mechanisms might be available for enforcing N.D.A.G. 2006-L-35 and other applicable laws. You may have a number of different options available to you, but I suggest you consult with this office to determine how to proceed.

Finally, there are no penalties in state law that would apply to a school district which does not comply with the requirement to be dissolved, but a court could determine that the committee members are derelict in their duties under the law for ignoring N.D.A.G. 2006-L-35 and any advice from their state's attorney, and hold them personally liable for claims made against the committee.<sup>19</sup>

Sincerely,

Wayne Stenehjem  
Attorney General

las/vkk

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>16</sup> See Joint Powers Agreement between the Earl School District and the Sidney School District, ¶ 5.a. (This agreement does not have a signature date, but states it "is effective commencing with the 2007-2008 school year . . . and shall remain in effect continuously until terminated." ¶ 15.)

<sup>17</sup> See N.D.A.G. 2006-L-35 (A joint powers agreement does not relieve the Earl School District of the obligation under N.D.C.C. § 15.1-12-24 to dissolve after it has ceased to operate a school for a one year period).

<sup>18</sup> Because the Earl School District has a high unobligated general fund balance, the Department of Public Instruction has indicated that the Earl School District will likely get little or no state aid based on the requirements of N.D.C.C. § 15.1-27-35.3, thus, there is little state aid, if any, that the Department of Public Instruction could withhold because of non-payment of tuition. See N.D.C.C. §§ 15.1-29-13(1), 15.1-29-06(3).

<sup>19</sup> N.D.A.G. 98-L-146.

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