

**LETTER OPINION**  
**99-L-107**

November 17, 1999

Honorable Audrey Cleary  
State Representative  
104 Seminole Avenue  
Bismarck, ND 58501-3544

Dear Representative Cleary:

Thank you for your question on whether a specific school psychologist is required to participate in the Teachers' Fund for Retirement (TFFR). Since a person's membership in any specific state retirement plan is confidential, I will refrain from using the name of the specific employee in my opinion, but will refer to that person as the "school psychologist." See N.D.C.C. §§ 15-39.1-30 (TFFR), 54-52-26 (Public Employees Retirement System (PERS)); 1997 N.D. Op. Att'y Gen. 26.

You ask whether the school psychologist is a "teacher" and thus eligible for TFFR. Your corollary question is whether the school psychologist can be a member of the Public Employees Retirement System (PERS).

Your letter indicates the school psychologist has a degree in school psychology, and is employed by a school district as a school psychologist. The school psychologist holds an educator's professional certificate from the Education Standards and Practices Board (ESPB). The certificate is restricted to the area of school psychology.

N.D.C.C. § 15-39.1-09(1) states that all "teachers" are members of TFFR. N.D.C.C. § 15-39.1-04(11)(a) defines "teacher" as a "person[] licensed to teach in this state by the education standards and practices board who [is] contractually employed in teaching, supervisory, administrative, or extracurricular services in any state institution or by any school board or other governing body of any school district of this state, including . . . special teachers . . ." Thus, school psychologists are eligible for TFFR coverage if they are licensed to teach by ESPB and are appropriately employed.

ESPB's administrative rules state that "[r]estricted [educator's professional] certificates are issued to applicants with masters degrees in school psychology or speech therapy." N.D. Admin. Code § 67.1-02-05-04. "Teachers with restricted certificates may teach or substitute teach only in the specified area." Id. Thus, a school psychologist with an educator's professional certificate is certified to teach.

While N.D.C.C. § 15-39.1-04(11)(a) requires a person to be "licensed" rather than "certified" to teach, that distinction is not meaningful to the resolution of this issue. The Legislature amended N.D.C.C. § 15-39.1-04(11)(a) to change "certified" to "licensed" during its 1999 session. 1999 N.D. Sess. Laws ch. 162, § 32. Testimony before both the House and Senate Education Committees indicated the change was made to reflect changing national opinions on this terminology. Hearing on H. 1188 Before the House Comm. on Education 56<sup>th</sup> N.D. Leg. (Jan. 13, 1999) (Testimony of Janet Placek, Executive Director of the Education Standards and Practices Board); Hearing on H. 1188 Before the Senate Comm. on Education 56<sup>th</sup> N.D. Leg. (March 1, 1999) (Testimony of Janet Placek, Executive Director of the Education Standards and Practices Board). That testimony also indicated the term "certified" referred to the recognition of a teacher's qualifications that are more substantial than one who is merely "licensed." Hearing on H. 1188 Before the House Comm. on Education 56<sup>th</sup> N.D. Leg. (Jan. 13, 1999) (Testimony of Janet Placek, Executive Director of the Education Standards and Practices Board); Hearing on H. 1188 Before the Senate Comm. on Education 56<sup>th</sup> N.D. Leg. (March 1, 1999) (Testimony of Janet Placek, Executive Director of the Education Standards and Practices Board).

Further, the 1999 Legislature also amended N.D.C.C. § 15-36-01 to change the term "certificate" to "license" and provided that "[c]ertificates in effect remain in effect until their expiration date." 1999 N.D. Sess. Laws ch. 162, § 16. Accordingly, it is my opinion that one who is certified to teach, rather than licensed to teach, by ESPB qualifies as a "teacher" under the definition in N.D.C.C. § 15-39.1-04(11)(a). Since the school psychologist is certified to teach, the school psychologist is a "teacher" and is a member of TFFR if the school psychologist is appropriately employed.

In order to be appropriately employed for TFFR coverage, a teacher must be (1) contractually employed, (2) employed in "teaching, supervisory, administrative, or extracurricular services", and (3) employed by a "state institution or by any school board or other governing body of any school district of this state". N.D.C.C. § 15-

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39.1-04(11)(a). The school psychologist is employed by a school district, which satisfies the third requirement. The school psychologist has a written agreement with the school district for the school psychologist's services, which satisfies the definition of "contract" in N.D.C.C. § 15-39.1-04(4).

Your main issue appears to be whether the school psychologist is "employed in teaching, supervisory, administrative, or extracurricular services." N.D.C.C. § 15-39.1-04(11)(a) specifically states that "special teachers" are deemed to be "employed in teaching, supervisory, administrative, or extracurricular services." While state statutes do not define "special teachers," TFFR's administrative rules define "special teachers" to include psychologists. N.D. Admin. Code § 82-02-01-01(8).

The propriety of TFFR's definition of "special teachers" to include psychologists "is a question of fact subject to TFFR's reasonable interpretation of the statutes it is charged to administer." 1997 N.D. Op. Att'y Gen. L-28 (March 20 letter to Henry Wessman)(opining that TFFR's inclusion of "Head Start Program" teachers and home visitors within the definition of "teacher" was reasonable). Accordingly, it is my opinion that because the school psychologist falls within N.D.C.C. § 15-39.1-04(11)(a)'s definition of "teacher," the school psychologist is required to be a member of TFFR.

You ask the related question of whether the school psychologist could be a member of the North Dakota Public Employees Retirement System. N.D.C.C. § 15-39.1-09(1) states that "every teacher is a member of [TFFR] . . . ." (Emphasis added). The statute does not provide any pertinent alternative for a person who satisfies the definition of teacher. Accordingly, it is my opinion that since the school psychologist meets the definition of "teacher" for TFFR purposes, the school psychologist must be a member of TFFR, and may not be a member of PERS. Cf. 1995 N.D. Op. Att'y Gen. L-233 (Oct. 11 letter to Rohrich)("[S]tate employees are members of the Teachers' Fund for Retirement or the Public Employees Retirement System as their current employment status requires and do not have a right to elect to participate in the retirement plan of their choice.").

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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