

STATE OF NORTH DAKOTA

ATTORNEY GENERAL' S OPINION 90- 11

Date issued: April 23, 1990

Requested by: Ronald Stastney, Assistant Superintendent for
Instruction, Department of Public Instruction

- QUESTIONS PRESENTED -

I.

Whether public school districts may charge a fee for students to attend a public kindergarten.

II.

Whether public school districts may charge a credit fee for a course taken over because of failure to pass the course in a previous year.

III.

Whether public school districts may charge a fee for credits taken beyond the 17 credits required by state law for high school graduation.

- ATTORNEY GENERAL' S OPINION -

I.

It is my opinion that public school districts may not charge a fee for students to attend a public kindergarten.

II.

It is my further opinion that public school districts may not charge a credit fee for a course taken over because of failure to pass the course in a previous year.

III.

It is my further opinion that public school districts may not charge a fee for credits taken beyond the 17 credits required by state law for high school graduation.

- ANALYSES -

I.

The first question is whether public school districts may charge a fee for students to attend a public kindergarten. Art. VIII, ' 2 of the North Dakota State Constitution states:

The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.

N. D. Const. art. VIII, ' 2. The Legislative Assembly has passed a statute which provides for a uniform system of free public schools:

The public schools of the state shall be equally free, open, and accessible at all times to all children between the ages of six and twenty-one, except that children who do not arrive at the age of six years by midnight August thirty-first shall not start the first grade in an elementary school until the beginning of the following year, except children who by reason of special talents or abilities as determined by a series of developmental and readiness screening instruments approved by the state department of public instruction and administered by the school district, or who have completed kindergarten in an approved kindergarten, may start school at a younger age. However, under no circumstances shall a child start first grade that school year if he is not six years of age by January first. . . .

N. D. C. C. ' 15-47-01.

These general provisions do not require the state to provide for a free public kindergarten, nor do they authorize public school districts to charge a fee for students attending public kindergarten.

The Legislature has passed another law, however, which deals directly with the establishment of kindergartens:

The school board of any school district may, upon its own motion, establish free public kindergartens in connection with the public schools of the district for the instruction of resident children below school age during the regular school term. A school board which establishes free kindergartens may levy a tax pursuant to subdivision p of subsection 1 of section 57-15-14.2. On a petition signed by qualified electors of the school district comprising at least five percent of the number of persons enumerated in the school census for that district for the most recent year such census was taken, but in no case less than twenty-five qualified electors, the school board must submit the question of establishing a kindergarten program at the next annual

or special school election. The question must be approved by the qualified electors of the district by the respective margins of electorate approval as provided for in section 57-15-14.

N. D. C. C. ' 15-45-01. Whether a school district establishes a kindergarten upon motion of the school board or by election, it is my opinion that the kindergarten provided must be a free public kindergarten.

The legislative history of N. D. C. C. ' 15-45-01 also supports this conclusion.

The Legislature first established free public kindergartens in 1909. This section has undergone numerous revisions. Every revision has required that any public kindergarten program established must be free. See 1909 N. D. Sess. Laws ch. 103, ' 1; 1911 N. D. Sess. Laws ch. 266, ' 289; 1915 N. D. Sess. Laws ch. 129, ' 1; 1931 N. D. Sess. Laws ch. 245, ' 1; 1961 N. D. Sess. Laws ch. 158, ' 47; 1975 N. D. Sess. Laws ch. 163, ' 1; 1979 N. D. Sess. Laws ch. 220, ' 15; 1983 N. D. Sess. Laws ch. 608, ' 6; 1985 N. D. Sess. Laws ch. 235, ' 32; 1987 N. D. Sess. Laws ch. 232, ' 1.

Additional support for the conclusion that kindergartens are intended to be free can be found in N. D. C. C. ' 57-15-14.2 which authorizes a school board to levy an amount sufficient to cover the expense of "[e]stablishing free public kindergartens in connection with the public schools of the district. . . ." N. D. C. C. ' 57-15-14.2(1)(p). The word "free" means without charge or cost. See Cardiff v. Bismarck Pub. School Dist., 263 N.W.2d 105, 113 (N.D. 1978) (phrase "free public school" in state constitution requires school districts to provide elementary students textbooks without charge or cost). Therefore, it is my opinion that a public school district may not charge a fee for students to attend a public kindergarten.

II.

N. D. C. C. ' 15-47-01 states, in part, that "the public schools of the state shall be equally free, open, and accessible at all times to all children between the ages of six and twenty-one." Thus, as a general rule, public school districts may not charge fees for students to attend school.

The Legislature has passed several statutes which directly address the charging of fees by public school districts in several different circumstances. N. D. C. C. " 15-43-11.1, 15-43-11.2, 15-43-11.3, 15-43-11.4.

N. D. C. C. ' 15-43-11.2 authorizes a school board to require payment of certain fees. That section does not specifically allow a school board to charge a credit fee for a course taken over because of failure to pass the course in a previous year.

N. D. C. C. ' 15-43-11.3 authorizes a school board to adopt additional fees not inconsistent with the provisions of sections 15-43-11.1 through 15-43-11.4. Charging a credit fee for a course taken over because of failure in a previous year, however, appears to be inconsistent with subsection 1 of N. D. C. C. ' 15-43-11.1, which states that "[i]t is the policy of this state that public education shall be free." Because the charging of a fee for retaking a course is inconsistent with N. D. C. C. ' 15-43.1-11.1, N. D. C. C. ' 15-43.1-11.3 does not authorize public school districts to charge such a fee.

The fact that a student was given the opportunity to pass a course the first time around without paying a fee does not defeat the statutory requirement that "[t]he public schools of the state shall be equally free, open and accessible at all times to all children between the ages of six and twenty-one. . . ." Therefore, it is my opinion that a public school district may not establish a credit fee for a course taken over because of failure to pass the course in a previous year.

III.

Your final question is: "Assuming that state funding covers the 17 credits required for high school graduation, can a district establish a fee for credits taken beyond the 17?" The underlying assumption is incorrect; state law does not provide that state funding may be used to support only the number of credits required by state law for high school graduation. State funding provided to high schools is intended to support the education of students from the ninth grade through the completion of the twelfth grade regardless of the number of credits taken. See N. D. C. C. ' 15-40.1-01, 15-40.1-07.

Whether a public school district may establish a fee for credits taken beyond those 17 credits required to be taken by state law is determined by applying the same statutes used to analyze the question in part II of this opinion.

The Legislature has not specifically authorized a school board to require payment of a fee for credits taken beyond the 17 credits required by state law. See N. D. C. C. ' 15-43-11.2. A school board may, however, adopt additional fees not inconsistent with the provision of sections 15-43-11.1 through 15-43-11.4. N. D. C. C. ' 15-43-11.3. Charging a fee for credits taken beyond the 17 credits required by state law is inconsistent with N. D. C. C. ' 15-43-11.1, which states that "[i]t is the policy of this state that public education shall be free." Charging a fee is also inconsistent with the state statute that requires that "[t]he public schools of the state shall be equally free, open, and accessible at all times to all children between the ages of six and twenty-one." N. D. C. C. ' 15-47-01. Therefore, it is my opinion that a public school district may not charge a fee for credits taken beyond the 17 credits required by state law.

- EFFECT -

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 questions presented are decided by the courts.

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