

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

## EDUCATION FUNDING AND TAXATION COMMITTEE

Thursday, October 18, 2012

Harvest Room

Bismarck, North Dakota

Representative RaeAnn G. Kelsch, Chairman, called the meeting to order at 10:00 a.m.

**Members present:** Representatives RaeAnn G. Kelsch, Bette Grande, Craig Headland, Bob Hunskor; Senators Dwight Cook, Tim Flakoll, Joan Heckaman, Gary A. Lee

**Others present:** See [Appendix A](#)

**It was moved by Senator Flakoll, seconded by Representative Grande, and carried on a voice vote that the minutes of the June 19, 2012, meeting be approved as distributed.**

### CONCUSSION MANAGEMENT PROGRAMS

At the request of Chairman Kelsch, Committee Counsel presented a bill draft [\[13.0146.01000\]](#) pertaining to concussion management program requirements. Committee Counsel said at the last meeting, the committee requested the Legislative Council work with interested groups in order to draft a bill that addresses concerns raised both by those who previously testified and by committee members. She said this bill draft, just like current law, provides that if a school district or a nonpublic school sponsors or sanctions any athletic activity and requires a participating student to regularly practice or train, and compete, that entity is subject to a concussion management program. She said the bill draft would require that a student be removed from practice, training, or competition if the student reports any sign or symptom of a concussion, if the student exhibits any sign or symptom of a concussion, or if a licensed, registered, or certified health care provider, whose scope of practice includes the recognition of concussion signs and symptoms determines, after observing the student, that the student may have a concussion. She said the duty to remove a student who meets the criteria is placed on each official, coach, and individual having direct responsibility for the student during practice, training, or competition.

Committee Counsel said once a student is removed, the draft requires that the student be evaluated as soon as practicable by a physician, a neuropsychologist, a nurse practitioner, a physician assistant, an athletic trainer, or a physical therapist. She said there may be other health care providers who can make their case to add themselves to the list. She said these providers were, at least among the interested parties, the ones deemed able to perform

this function. She said there was some interest in referencing individuals who have "training in concussion management." She said the intent was to require that the student be evaluated by a physician with training in concussion management or a nurse practitioner with training in concussion management. She said that requirement was not placed in the draft because there was no definition with respect to what constitutes "training" in concussion management? She said, is it reading material? Videos? Classroom instruction? Clinical experiences? She said, is the training comparable for all health care providers? Would the training have to be repeated periodically? How would a person find out whether a particular health care provider had received training in concussion management? Would there be a registry to keep track? Who would be responsible for its maintenance and its accessibility? She said when a school district receives a return-to-play authorization, would it have to determine whether the health care provider who signed the form had received training or was current with respect to training requirements? She said these are just a few of the practical issues that, from a drafter's perspective, would need to be addressed if the phrase requiring training and concussion management were to be inserted into the bill. She said there are a number of policy issues that are generated as well.

Committee Counsel said once the individual who conducts the evaluation determines that the student may have suffered a concussion, that individual is to consult with the student's parent to determine an appropriate course of treatment. She said, as in current law, once a student is removed from practice, training, or competition, the student is required to obtain written authorization before being allowed back to the activity. She said, under current law, that authorization may be given by a health care provider whose scope of practice includes the diagnosis and treatment of concussion. She said the bill draft was crafted in a way that avoided such terminology, because of the inherent difficulty in even determining who met that criteria. She said, as proposed, the bill draft would allow a student's return to play to be authorized by a physician, a neuropsychologist, a nurse practitioner, a physician assistant, an athletic trainer after consultation with a physician, or a physical therapist after consultation with a physician.

Committee Counsel said the language permitting athletic trainers and physical therapists to authorize

returns to play after consultation with a physician was suggested by one of the interested parties. She said it does not require that an athletic trainer or a physical therapist obtain the permission of a physician, but merely consult with the physician prior to authorizing a student's return. She said, at the June 19, 2012, meeting, Dr. Meeker testified that in order to make a diagnosis of a concussion, an individual also needed to determine that the patient does not have a subdural hematoma, an epidural hematoma, a skull fracture, or a number of other injuries. She said he indicated that there was a huge amount of liability that will be shouldered by someone in the event that a serious injury is missed. She said the consultation language was inserted to minimize the possibility of an underlying injury being missed.

Committee Counsel said this bill draft also requires that the return-to-play authorization be given to the individual designated by the school district or nonpublic school for receipt of such documents. She said the authorization should be viewed as an important record, and not merely tossed in the bottom drawer. In addition, she said, the bill draft would require the record to be retained for a period of 10 years after conclusion of the student's enrollment.

Committee Counsel said the bill draft was shared with interest groups at the time it was forwarded to the committee, which was August 22, 2012. She said they were asked to share thoughts, concerns, and suggestions. She said, that same day, she received a brief e-mail from Dr. Mattern and a note of support from Mr. Vastag. In addition, she said, three days ago, she received an e-mail from Mr. McDonald.

Dr. Dawn Mattern, Trinity Health, Minot, presented testimony regarding the proposed bill draft. She said she is a family physician and also works in sports medicine. She said she is a passionate advocate for concussion education. She said the committee members have received enough education about concussion management so that she feels comfortable allowing them to deal with her athletes. She said, in her practice, she sees three or four concussion cases every day. She said the word is getting out to parents and athletes and coaches. She said, however, there are still incredible hurdles. She said it is very important to reference training in the management of concussions. She said 25 other states reference training in the evaluation and management of concussions. She said one state requires continuing medical education within the last three years. She said the others do not address the type or scope of training. She said all that "training" requires is getting on the Centers for Disease Control and Prevention website and watching the concussion training video. She said it is not that hard. She said medical journals include a huge amount of information on concussions. She said we owe it to our student athletes to be seen by providers who are trained in the evaluation and management of concussion, regardless of whether those providers are physicians, athletic trainers, physical therapists, or anyone else.

Mr. Lorell Jungling, Activities Director, Mandan School District, presented testimony regarding the proposed bill draft. He said the sports medicine provider for Mandan School District is a physical therapist. He said there has been extensive discussion regarding who can make return-to-play decisions. He said when 2011 Senate Bill No. 2281 was first being considered, there was no disagreement about who could remove a student from practice, training, or competition. However, he said, there was conversation about who could authorize the student's return. He said it is up to the board of each provider group to determine whether or not its members have the training and experience to provide such a service. He said the physical therapists have decided that it is within their scope of practice to authorize a student's return to play. He said not all physical therapists want to make a return-to-play decision. He said if a physical therapist signs a return-to-play authorization, that physical therapist is liable for the decision. Therefore, he said, the assumption is that if the physical therapist does not feel comfortable making that decision, the physical therapist will not make that decision. He said if a physical therapist is not comfortable making that decision, the physical therapist should seek a consultation. He said it is inappropriate to require the consultation by law. He said he requests that the consultation requirement be removed from the bill draft. He said doing so will help more students than it hurts.

Ms. Robyn Gust presented testimony regarding the proposed bill draft. She said she is representing the North Dakota Athletic Trainers Association. She said, every year, she has seen a student who has been released by a physician, a chiropractor, a nurse practitioner, or a physician assistant or told that they do not have a concussion and when the student is evaluated by an athletic trainer, the athletic trainer finds that the student did have a concussion. She said if the very first person that sees an athlete is not trained in the evaluation and management of concussion, the point of this bill is being missed. She said we do a good job of getting a student off the field if a concussion is suspected. She said it is important that the next person that the student sees be definitively able to say yes, you have a concussion, or no, you do not have a concussion. She said referring to the "evaluation and management" of concussion as the bill draft does, instead of the "diagnosis and treatment" of concussion, is appropriate because not everybody's practice act uses the word diagnosis.

Senator Flakoll said there is a concern with the current statutory wording that requires a coach to remove a student that meets certain symptomatic thresholds. He said, in effect, the coach of an opposing team could require the removal of a star player for purposes not related to concussion symptoms.

In response to a question from Senator Flakoll, Ms. Gust said if an official or a coach, even a coach of

an opposing team removes a student, that student needs to be evaluated. She said if the student is evaluated and determined not to have the signs or symptoms of a concussion, that student cannot be held out. She said that student can return to practice, training, or competition.

Senator Flakoll said if a game is down to the final two minutes and an official or a coach determines that a player may have a concussion, by the time the player is evaluated on the sideline, the game can be over.

Ms. Gust said it would be unethical for a coach or an official to remove a player for purposes not related to a concussion.

Representative Grande said because each high school does not necessarily have its own medical staff, especially when traveling, an athletic trainer will generally work both sides of the field. She said inappropriately removing a student would be considered totally unethical and probably cause for dismissal.

Ms. Gust said the original intent was to remove the student when certain thresholds were met. She said it was not the intent of the bill originally to allow an opposing coach to remove a student.

Representative Kelsch said it would be appropriate to have that clarified in a subsequent draft.

In response to a question from Senator Flakoll, Ms. Gust said it takes approximately 30 seconds to determine that a student has a concussion. She said it would take her approximately two minutes to five minutes to determine that a student does not have a concussion. She said only one time in the past three years has a student been pulled and upon evaluation by her found not to have had a concussion.

Representative Hunsakor said if an individual is qualified to evaluate a student and determine that the student has a concussion, that individual should also be considered qualified to determine that a student is fit to return to practice, training, or competition.

Ms. Gust said she agrees that the individual who evaluates the student and determines that the student may have a concussion should also be qualified to determine that a student can return to practice, training, or competition. She said it boils down to education. She said this threshold can be met by the 20-minute Centers for Disease Control and Prevention video. She said, without the reference to training in the evaluation and management of concussion, an oncologist could clear a student after a concussion. She said she learned about cancer in college but she is not qualified to cure it.

Representative Hunsakor said he wondered if after watching a 20-minute video one would be highly qualified to evaluate and manage concussions.

Ms. Gust said she would not suggest that one would be highly qualified. However, she said, she would suggest that one would be able to recognize and manage concussions. She said she believes that the Centers for Disease Control and Prevention video

is in fact the bare minimum required training in concussion evaluation and management.

In response to a question from Senator Cook, Ms. Gust said when the coach or an official pulls a player, the coach or official is suggesting that the student may have a concussion, not that the student does have a concussion. She said, after the student is evaluated, a determination is made with respect to whether or not the student has a concussion. She said, as the bill is written, the parent gets involved after a determination of a concussion. She said she would love to keep parents off of the sidelines. She said 99 times out of 100 what happens is that the parent shows up and the student athlete becomes angry that the parent is there. She said the parent's presence is detrimental to the evaluation process.

Mr. Bob Schulte, Professor of Physical Therapy, University of Mary, Bismarck, presented testimony regarding concussions in youth athletics. He said he is also a sports medicine provider for the Mandan School District. He said he recommends that a decision about who can return a student to practice, training, or competition should be left to the individual licensing boards. He said the Board of Physical Therapy determined that physical therapists can diagnose and make return-to-play decisions. He said the standard of care with respect to concussions is going to change. He said it should be the responsibility of the individual provider and the licensing board to determine who should and should not make return-to-play decisions. He said each professional should be current with respect to the best practices. He said everybody should be held to the standard of care which requires decisions to be made in the best interests of the student.

Mr. Jack McDonald presented testimony regarding concussions in youth athletics. He said he is representing the North Dakota Board of Physical Therapists. He said he recommends that the requirement for consultation with a physician that the bill draft places on physical therapists and athletic trainers be removed. He said it does not matter to him whether the list of health care providers is left in the bill draft or removed. However, he said, he would recommend that there be some reference to providers who are trained in the evaluation and management of concussion. He said if you do not reference training in the evaluation and management of concussion, one could have consultations with a pediatrician. He said that is clearly not the intent of the bill draft.

In response to a question from Representative Kelsch, Mr. McDonald said the use of the word diagnosis is problematic. He said that is a medical and a legal term of art. He said from the perspective of that which is included in scopes of practice, it would be far preferable to reference evaluation and management of concussion rather than the diagnosis of concussion. He said while there is an understandable concern about designating the level of training, he does not believe that is done in other laws. He said the professional licensing boards can

determine whether individuals have an appropriate level of training to be able to meet the statutory requirements. He said the Legislative Assembly cannot start designating training requirements for every provider group. He said they can determine that if a person is licensed, the person can provide the service.

Representative Kelsch said we do not state in the North Dakota Century Code that a family physician cannot place tubes in the ears of a two-year-old unless the family physician is appropriately trained.

Mr. McDonald said if a physician does that and the physician is not appropriately trained, he puts himself at risk of liability.

Representative Kelsch said that is the case with all of the professionals.

Representative Kelsch said it is important that the interest groups get together and agree on proposed language for the bill draft.

Representative Grande said she would not go on the field and diagnose a concussion.

Ms. Courtney Koebele, Executive Director, North Dakota Medical Association, presented testimony regarding the proposed bill draft. She said she believes that the authorization returning a student to practice, training, or competition, should be forwarded by the parent to the school.

Committee Counsel said if the parent is statutorily required to present the authorization, the physician is precluded from faxing or e-mailing the authorization directly to the student's school district or school.

Mr. John Vastag, Director, Legislative Affairs, Sanford Health, said the interim committee was also charged with determining whether or not the provisions of 2011 Senate Bill No. 2281 should be extended beyond school districts and nonpublic schools. He said other public and private organizations such as USA Hockey, the National Football Association, and the National Soccer Association have all done a great job of developing concussion management protocols on their own. He said he sees no reason to extend the bill draft to those organizations.

## STATUTORY REPORTS

Ms. Lisa Feldner, Chief Information Officer, Information Technology Department, presented a report ([Appendix B](#)) from the Statewide Longitudinal Data System Committee.

Mr. Robert Marthaller, Assistant Superintendent, Department of Public Instruction, presented a report ([Appendix C](#)) relating to school district employee compensation; a report ([Appendix D](#)) regarding waivers of accreditation rules; a report ([Appendix E](#)) regarding requests for statutory waivers; a report ([Appendix F](#)) regarding scores of the tests aligned to the state content standards in reading and mathematics; a report ([Appendix G](#)) regarding Indian education issues and criteria for grants to low-performing schools; a report ([Appendix H](#)) regarding notices from boards that are unable to

comply with the statutory directive requiring that at least 70 percent of all new money received by the district for per student payments be used to increase the compensation of teachers; and a report ([Appendix I](#)) relating to the provision of services to students in grades 6 through 8 who are enrolled in an alternative education program.

## EDUCATION FUNDING FORMULA - PROPOSED CHANGES

At the request of Chairman Kelsch, Mr. Jerry Coleman, Director of School Finance, Department of Public Instruction, presented testimony ([Appendix J](#)) regarding kindergarten through grade 12 funding formula options. He distributed a document that shows five possible funding scenarios. He said each of these scenarios assumes that the state aid dollars and the mill levy reduction grant dollars would be incorporated for purposes of distribution. He said, because anytime a formula is changed, there will be school districts that do better than they did before and school districts that do less well than they did before. He said significant attention was paid to mitigating any negative financial impacts for districts.

Mr. Coleman said the first scenario assumes an adequate amount of funding, as defined by the Picus study, and utilizes both state and local contributions while eliminating the mill levy reduction grant program. He said the Picus rate for adequacy was determined to be approximately \$8,000 per student and when applied through the weighted student unit calculation, would net \$8,000 to \$10,000 per student. He said, whereas most school districts are at approximately 110 mills now, this scenario will allow for a local contribution of 95 mills which, in turn, translates to some discretionary spending at the local level.

Mr. Coleman said the second scenario would make the state responsible for funding the full cost of education, as defined by the Picus study. He said this scenario assumes the utilization of all federal unrestricted revenues and would preclude any county or other local dollars going to the school districts, because the state would be paying the full cost of education. He said this version would also eliminate the mill levy reduction grant program and would require a revision of school district taxing authority. He said this version would put the state in full control of funding educational services.

Mr. Coleman said the third scenario would roll the mill levy reduction grant dollars into the state aid formula. He said this scenario assumes a hold harmless factor that is based on a distribution level as of a date certain.

Mr. Coleman said the fourth scenario would freeze the mill levy reduction grant payments at their current level and then over a period of 10 years phase out the grants.

Mr. Coleman said the fifth scenario is essentially the current scenario. He said approximately 50 percent of funding for educational purposes comes

from the state level and the remainder comes from the local property taxes. He said this would continue the state aid formula and the mill levy reduction grant program as two separate streams for dollar distribution.

Mr. Coleman said he used the current year data set to establish a cost estimate for each scenario. He said the annual costs range from \$632 million to \$918 million.

Mr. Coleman said an ad hoc working group helped to develop the scenarios and put in place various premises that they believe should be considered in future formula pursuits. He said this version assumes additional property tax reductions of up to 60 mills. He said, currently, the state is providing property tax buydowns at the rate of 75 mills. He said this would be an additional 60 mills for a total of 135 mills. He said the scenario assumes a combination of state and local dollars with a concurrent reduction in reliance on property tax dollars. He said there would also have to be some transitional period to minimize the financial impact on school districts. He said the mill levy reduction grant program would be frozen at its last level, and thereafter the dollars would go into the state formula. He said a factor would be devised to, in essence, replace the mill levy reduction grant dollars. Going forward, he said, any additional funding that goes into state aid would be distributed through the funding formula. He said all but about nine school districts would have general fund mill levies of less than 50 mills. He said the maximum levy would be 60 mills.

Mr. Coleman said, under this version, the school district taxing authority would also have to be rewritten. He said school districts would be reduced to 50 mills, with the option for an additional 10 mills, with voter approval.

Mr. Coleman said the current reference to 185 mills would in fact be replaced by a statutory maximum of 60 mills. He said the cost to pay for the additional 60-mill buydown would be \$150 million annually or \$300 million per biennium.

In response to a question from Representative Grande, Mr. Coleman said the ultimate cost of any scenario is going to be dependent on the definition that governs the cost of education. He said the current definition under state law provides that the Superintendent of Public Instruction may not use capital outlay for buildings and sights, capital outlay for debt service, and expenditures for school activities, school lunch programs, transportation, and early childhood education in determining the cost of education. He said the federal definition includes things such as extracurricular activities and transportation. On the other hand, he said, the federal definition does not include equipment or other capital purchases. He said the Picus definition looked at the provision of courses that could enable students to meet the state standards.

Representative Grande said the inconsistency comes in the comparison of small and large school

districts. She said a district such as Fargo would have to pay for considerably more electives and services than a small rural district. She said large school districts would hope to have all of their costs covered as well.

Representative Kelsch said the challenge with each of the scenarios begins with a definition of the cost of education. She said there is no agreement with respect to whose definition or whose situation is used. She said there is no consensus with respect to what would even constitute an average cost. She said the North Dakota Constitution requires the state to provide a uniform system of education. She said she has always believed that in order to meet the constitutional obligation, the state needs to pay for education. However, she said, it would then be incumbent upon the state to pay teacher salaries. She said if teacher compensation is viewed as an average, the next question is whose average.

Representative Kelsch said if the next legislative session wishes to fully consider the funding of education at the 100 percent level, there needs to be an indepth study involving individuals who thoroughly understand the funding of education.

Representative Kelsch said if the state is going to assume an increased responsibility for funding the cost of education, the presumption is that reduces local control. She said the unanswered question is whether an increase in local control or a decrease in local control was being recommended by the people through their vote on initiated measure No. 2 in June 2012.

Representative Kelsch said if the Legislative Assembly would take the mill levy reduction grant dollars and simply insert them into the current formula, some significant variations in funding would result.

## **CONCUSSION MANAGEMENT PROGRAMS - CONTINUED**

At the request of Chairman Kelsch, Committee Counsel presented a bill draft [[13.0146.03000](#)] relating to concussion management programs. She said the bill draft reflects the suggested changes that the interest groups agreed to over the noon hour with respect to concussion management program requirements. She said the bill draft does not change the circumstances under which a student must be removed from practice, training, or competition. However, she said, the duty to remove a student under the conditions set forth in subsection 3 extend to each official, each individual having direct responsibility for the student during practice training or competition, and in accordance with the committee's wishes, to the coach of a student.

Committee Counsel said, thereafter, any student who is removed must be evaluated as soon as practicable by a licensed health care provider who is acting within the provider's scope of practice and who is trained in the evaluation and management of concussion. She said a student who is evaluated and

determined to have suffered a concussion may not return to practice, training, or competition until the student's return is authorized by a licensed health care provider who meets the criteria set forth in subsection 4.

Representative Grande said she wondered how long schools retained records pertaining to students.

Representative Kelsch said a member of the audience indicated that student transcripts are retained forever and other educational records are retained for seven years. She said the advantage of the 10-year requirement would be that it spans most precollegiate and collegiate playing years.

In response to a question from Representative Grande, Committee Counsel said the bill draft requires that the return-to-play authorization be presented or forwarded to the individual designated by the student's school district or nonpublic school for receipt of such authorizations. She said that language allows school districts and schools the flexibility to designate an appropriate individual or an appropriate location depending on their own circumstances.

Senator Flakoll said a period of 10 years after the individual leaves the district appears to be an inordinately long time, and he would be more inclined to limit the recordkeeping requirements to 7 years.

**It was moved by Senator Flakoll, seconded by (inaudible), and carried on a voice vote that the record retention requirement be amended from 10 years to 7 years.**

**It was moved by Representative Grande and seconded by Representative Hunskor that the bill draft relating to concussion management program requirements be approved as amended and recommended to the Legislative Management.**

Senator Flakoll said he will vote to advance the bill draft. However, he said, he is not satisfied with the bill draft in its current form and will work during the legislative session to improve the provisions. Representative Grande said she too will vote for the bill but, for the record, also has concerns about various provisions.

The motion **carried on a roll call vote.** Representatives Kelsch, Grande, Headland, and Hunskor and Senators Cook, Flakoll, Heckaman, and Lee voted "aye." No negative votes were cast.

### COMMENTS BY OTHERS

Mr. Brandt Dick, Superintendent, Hazelton/Moffit/Braddock School District and Underwood School District, presented testimony ([Appendix K](#)) regarding that portion of the education funding formula which penalizes districts having a high taxable valuation per student.

### ADJOURNMENT

Chairman Kelsch said the interim Education Funding and Taxation Committee will not be recommending a bill draft with respect to either the education funding formula or the property tax reduction grants. She said the Legislative Assembly should never have gotten involved in the business of reducing property taxes. She said that has only created confusion between that which is part of the education funding formula and that which is a property tax reduction effort. She said they are not the same.

**It was moved by Representative Grande, seconded by Senator Cook, and carried on a voice vote that the Chairman and staff of the Legislative Council be requested to prepare a report and the bill draft recommended by the committee and to present the report and the recommended bill draft to the Legislative Management.**

**It was moved by Representative Grande, seconded by Senator Cook, and carried on a voice vote that the committee be adjourned sine die.**

No further business appearing, Chairman Kelsch adjourned the committee sine die.

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L. Anita Thomas  
Committee Counsel

ATTACH:11