

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1032

2005 HOUSE EDUCATION

HB 1032

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1032

House Education Committee

☐ Conference Committee

Hearing Date 5 January 2005

Tape Number	Side A	Side B	Meter #
1	X	.	1,640 - 2956

Committee Clerk Signature



Minutes:

**Chairman Kelsch** opened the meeting. All members present. HB 1032 was read.

**Testimony in favor:**

**Jerry Coleman, Assistant Director of School Finance and Organization for the Department of Public Instruction,** appeared in support of this measure and provided written testimony. See attachment.

**Rep. Mueller:** When we talk about unrestricted federal aid, I understand that's impact monies for Grand Forks and Minot in particular. Are there any federal funds that come in that would not necessarily fall under the category of "unrestricted federal" that maybe should be included in this fund?

**Mr. Coleman:** There are a couple: Federal impact aid is the reporting number under 4110. We also included in that unrestricted definition, 4200 and that's "other federal unrestricted revenue"

received direct to the district and then there's a 4790, for the most part that's ICEP (Indian Child Equalization Program) monies.

**Rep. Mueller:** How was it determined which was left in?

**Mr. Coleman:** This was considered a cleaner way to do it in light of the Attorney General's advice.

**Paul Johnson, Superintendent of the Bismarck School District,** appeared in opposition to HB 1032 and provided the attached written testimony. Mr. Johnson suggested an accommodation provision to correct the flaw in the formula for the Grand Forks School District and a hold harmless provision for the rest of the state's school districts.

There being no further questions or discussion, Chairman Kelcsh closed the hearing on HB 1032.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HB 1032**

House Education Committee

☐ Conference Committee

Hearing Date **11 Jan 05**

Tape Number

3

Side A

X

Side B

Meter #

370 - 1380

Committee Clerk Signature



Minutes:

**Chairman Kelsch opened the meeting on HB 1032.** She explained that the bill came out of the Interim Education Committee and relates to formula for calculating supplemental formulas for high school districts. During the last session when they were looking at making supplemental payments more fair to the school districts, one of the issues that came up was that we should be using all revenue to a school district when we are looking at the equity issues. When we did that we asked if unrestricted federal dollars could be used. We were told yes they could be used and be incorporated into the formula when we were figuring out the formula for supplemental payments. People questioned if federal law superseded ND law and that we could not actually use these unrestricted funds. Where this effects mostly is the Grand Forks and Minot Air Force Base. During the interim Representative Delmore asked for an Attorney General Opinion. The AG found that we could not incorporate unrestricted dollars as part of all the monies we wanted to use for calculating supplemental payments. We have a bill before us to

correct that and to correct it immediately it has an emergency clause on it because it needs to pass rather quickly so that it can be implemented the way it should be implemented. As a consequence some school districts that were hoping that they would receive the money by the recalculation would not be receiving the money. It's not money they had and is being taken away from them, however it is money they thought they would be receiving and will not be receiving. It's one of those issues that periodically we did partially incorrect or under incorrect advice when we were drafting legislation and this was one of those on an amendment on the funding bill from the conference committee. This is something we need to do to correct the situation. We had a few options before us in the interim, one was to do nothing and let it run its course. We thought that was inappropriate. This was the one the Education Committee thought was best and moved this one forward.

**Rep Sitte:** I move adding an amendment to hold the schools harmless. It would cost \$460,000, but in the case of Bismarck we would be losing \$209,000 that we thought we had anticipated receiving and I ask for your favorable consideration for this amendment to hold these school districts harmless.

**Chairman Kelsch:** Is there a second?

**Rep. Meier:** I second.

**Rep. Hawken:** Just for curiosity, where are we going to \$460,000?

**Rep. Herbel:** Would this have to go to appropriations.

**Chairman Kelsch:** It would have to go to appropriations. It's in DPI budget but it's appropriated differently. This would be the mechanism to spend the appropriation.

**Rep. Herbel:** Do you have a list of the schools that lose.

Page 3

House Education Committee

Bill/Resolution Number **HB 1032**

Hearing Date **11 Jan 05**

**Chairman Kelsch:** If you look at the Dr. Johnson's paper it tells which schools lose money.

**Rep. Herbel:** There are three schools that gain? What kind of funds would they be using that they wouldn't also be losing?

**Chairman Kelsch:** They're close enough to the air bases that they receive federal impact funds. Some have missile silos. Some have AF kids.

**Rep Hawken:** They are not losing money because they don't have the money, but they planned for it.

**Rep. Haas:** This did come before the committee before the budget was finalized so I think most of those districts are well aware of it.

**Rep Mueller:** If that's true and I suspect it is, it's also true for Grand Forks.

**Rep. Hanson:** Why is Bismarck so high.

**Chairman Kelsch:** They are a property poor school district they have state government and hospital exemptions.

**Chairman Kelsch called for the vote on the amendment** to hold harmless the school districts that were losing money under the original distribution of supplemental payments. The hold harmless section is on the Fourth Page of Dr. Johnson's testimony lines 18-20 as **Moved by Rep. Sitte and Seconded by Rep Meier.**

Yes:   7   No:   7   Absent:   0   **Motion Failed on the tie.**

**Chairman Kelsch closed the discussion on HB 1032 to a future schedule and adjourned the meeting.**

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HB 1032**

House Education Committee

☐ Conference Committee

Hearing Date **31 January 05**

Tape Number

2

Side A

x

Side B

Meter #

0 - 500

Committee Clerk Signature



Minutes:

**Chairman Kelsch opened the discussion of HB 1032.**

**Rep. Sitte:** I move an amendment dated October 2004. It says that on page 2 that "the superintendent of Public Instruction shall use the first \$700,000 or so much as the amount that is necessary for the purpose of providing supplemental aid hold harmless payments to school districts."

**Rep. Meier:** I second

**Rep. Hawken:** How much are we adding to this appropriation?

**Chairman Kelsch:** \$460,622

**Rep. Mueller:** I recall the discussion, but the amount?

**Chairman Kelsch:** It could go up to the \$700,000

**A roll call vote was taken on the motion to amend:**

Page 2  
House Education Committee  
Bill/Resolution Number **HB 1032**  
Hearing Date **31 Jan 05**

Yes:   7   No:   7   Absent:   0   The motion failed for lack of  
majority.

**Rep. Haas:** I move a Do Pass.

**Rep. Herbel:** I second.

**Rep. Mueller:** I like the amendment, but I don't think we have a choice in this matter, we've  
got to pass this bill.

**Chairman Kelsch:** We do have to pass the bill, the federal government said so.

This corrects an error we made during the legislative session.

**Rep. Haas:** Whether we pass this not, the unrestricted revenue will not be considered because  
essentially there's a savings clause in every single bill that says you cannot enact something that  
conflicts with federal legislation. So it's really a no brainer.

**A roll call vote was called:**

Yes:   10   No:   4   Absent:   0   The motion passed.

**Rep. Johnson** will carry the bill.

**FISCAL NOTE**  
**Requested by Legislative Council**  
12/17/2004

Bill/Resolution No.: HB 1032

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	<b>2003-2005 Biennium</b>		<b>2005-2007 Biennium</b>		<b>2007-2009 Biennium</b>	
	<b>General Fund</b>	<b>Other Funds</b>	<b>General Fund</b>	<b>Other Funds</b>	<b>General Fund</b>	<b>Other Funds</b>
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$5,000,000	\$0	\$7,500,000	\$0	\$7,500,000	\$0
<b>Appropriations</b>	\$0	\$0	\$0	\$0	\$0	\$0

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

<b>2003-2005 Biennium</b>			<b>2005-2007 Biennium</b>			<b>2007-2009 Biennium</b>		
<b>Counties</b>	<b>Cities</b>	<b>School Districts</b>	<b>Counties</b>	<b>Cities</b>	<b>School Districts</b>	<b>Counties</b>	<b>Cities</b>	<b>School Districts</b>
\$0	\$0	\$5,000,000	\$0	\$0	\$7,500,000	\$0	\$0	\$7,500,000

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

This corrects a conflict between North Dakota Century Code and the Federal Impact Aid Law. It impacts the formulas for allocating funds to school districts, but does not change the total amount distributed.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

No change in expenditures from the executive budget.

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

No change in appropriations from the executive budget.

**Name:** Jerry Coleman  
**Phone Number:** 328-4051

**Agency:** Public Instruction  
**Date:** 12/22/2004  
**Prepared:**

Date: *11 Jan 05*  
Roll Call Vote #: *2*

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. *1032*

House Education Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *Amend and presentation of dr Johnson DPI*  
*on 10 Jan 05*  
Motion Made By *Sitte* Seconded By *Johnson*

Representatives	Yes	No	Representatives	Yes	No
Chairman Kelsch		X	Rep. Hanson	X	
Vice Chairman Johnson		X	Rep. Hunsakor	X	
Rep. Haas		X	Rep. Mueller	X	
Rep. Hawken		X	Rep. Solberg	X	
Rep. Herbel		X			
Rep. Horter		X			
Rep. Meier	X				
Rep. Norland		X			
Rep. Sitte	X				
Rep. Wall	X				

Total (Yes) *7* No *7*

Absent *0*

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

*Failed*  
*To hold harmless school districts losing funds from new distribution of impact funds in supplemental formula funding.*

Date:  
Roll Call Vote #:

31 Jan

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1032

House Education Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Amend - per Sitte's submission

Action Taken

Motion Made By

Sitte

Seconded By

Reese

Representatives  
Chairman Kelsch  
Vice Chairman Johnson  
Rep. Haas  
Rep. Hawken  
Rep. Herbel  
Rep. Horter  
Rep. Meier  
Rep. Norland  
Rep. Sitte  
Rep. Wall

Yes No

✓  
✓  
✓  
✓  
✓  
✓  
✓  
✓  
✓  
✓  
✓

Representatives

Rep. Hanson  
Rep. Hunskor  
Rep. Mueller  
Rep. Solberg

Yes No

✓  
✓  
✓  
✓

Total (Yes)

7

No

7

Absent

0

Yails  
lack of  
majority

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: *3 Jan 05*  
Roll Call Vote #:

**2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. *1034***

House Education Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

*as Pass*

Motion Made By

*Haas*

Seconded By

*Herbel*

**Representatives**  
**Chairman Kelsch**  
**Vice Chairman Johnson**  
**Rep. Haas**  
**Rep. Hawken**  
**Rep. Herbel**  
**Rep. Horter**  
**Rep. Meier**  
**Rep. Norland**  
**Rep. Sitte**  
**Rep. Wall**

**Yes No**

*✓*  
*✓*  
*✓*  
*✓*  
*✓*  
*✓*  
*✓*  
*✓*  
*✓*  
*✓*  
*✓*

**Representatives**  
**Rep. Hanson**  
**Rep. Hunsakor**  
**Rep. Mueller**  
**Rep. Solberg**

**Yes No**

*✓*  
*✓*  
*✓*  
*✓*

Total (Yes)

*10*

No

*4*

*Passes*

Absent

*0*

Floor Assignment

*Johnson*

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
**January 31, 2005 12:01 p.m.**

**Module No: HR-20-1415**  
**Carrier: D. Johnson**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1032: Education Committee (Rep. R. Kelsch, Chairman) recommends DO PASS**  
**(10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1032 was placed on the**  
**Eleventh order on the calendar.**

2005 HOUSE APPROPRIATIONS

HB 1032

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1032

House Appropriations Committee  
Education and Environment Division

☐ Check here for Conference Committee

Hearing Date February 4, 2005

Tape Number

1

Side A

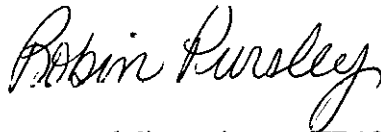
X

Side B

Meter #

0 - 1.8

Committee Clerk Signature



**Minutes:** Chairman Martinson opened discussion on HB1032.

**Rep. RaeAnn Kelsch, chairman of House Education Committee** During last legislative session in the conference committee, we decided that if you are going to look at supplemental payments you should consider all levels of income and all moneys that come into a school district in order to figure out how much money a school district should receive in supplemental payments. In doing this we used the Impact Aid money. We found out during the interim that we were not allowed to use the Impact Aid moneys from Grand Forks Air Force Base and Minot Air Force Base. In doing that, we had to pass a bill that would go back to our old laws and take out the unrestricted funds. The bill you have before you is to correct that.. The moneys shown on the fiscal note are not new expenditures, we have to go back to the old way of distributing those supplemental payments. No additional cost, still being done within the budget passed in last biennium.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1032

House Appropriations Committee  
Education and Environment Division

☐ Check here for Conference Committee

Hearing Date February 7, 2005

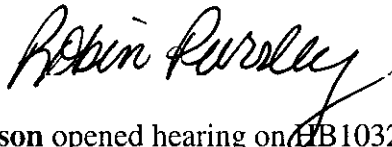
Tape Number  
1

Side A  
X

Side B

Meter #  
0-3.2

Committee Clerk Signature



**Minutes:** Chairman Martinson opened hearing on HB1032.

**Vice Chairman Brusegaard** For purpose of discussion I move for a Do Pass on HB1032.

**Rep. Rennerfeldt** Second.

**Chairman Martinson** Any discussion? We have a recommended Do Pass on HB1032.

**Vice Chairman Brusegaard** All it does is try to include payments from unrestricted federal revenue payments received by school districts into our supplemental payment plan and we can't do that. So we'll go back to the way it was two years ago. Essentially deals with revenue from Grand Forks and Minot Airforce Base that we tried to attached to school districts to determine supplemental revenue and the Feds say we can't do that..

**Rep. Aarsvold** Do we have a subsequent obligation from previous years based on this?

**Vice Chairman Brusegaard** I'm not sure but I imagine that if that was the case Grand Forks school district would be yelling in my ear and they are not.

Page 2

Education and Environment Division

Bill/Resolution Number HB1032

Hearing Date February 7, 2005

**VOTE 6 YES and 0 NO with 0 absent. DO PASS. Rep. Brusegaard will carry bill to full committee.**

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1032  
Supplemental Payments to High School Districts

House Appropriations Full Committee

☐ Conference Committee

Hearing Date February 8, 2005

Tape Number  
2

Side A  
X

Side B

Meter #  
#17.4 - #21.4

Committee Clerk Signature

*Chris Alexander*

Minutes:

**Rep. Ken Svedjan, Chairman** opened the discussion on HB1032.

**Rep. Tom Brusegaard** explained that this bill corrects something we tried to do 2 years ago in the education committee. We tried to capture federal dollars from communities around the air force bases in Grand Forks and Minot and tried to assign those dollars as supplemental payments to these high school districts who needed funding. Unfortunately this is in conflict with the federal impact aid law. This bill changes the code back to where it was before this. The fiscal note impacts the formula for allocating funds but does not change the total amount distributed.

**Rep. Tom Brusegaard** moved a Do Pass motion on HB1032.

**Rep. Bob Martinson** seconded.

**Rep. Ken Svedjan, Chairman** asked if the funds were already in the budget for the Department of Public Instruction.

**Rep. Tom Brusegaard** answered yes.

Page 2

House Appropriations Committee

Bill/Resolution Number HB1032

Hearing Date February 8, 2005

**Rep. Ken Svedjan, Chairman** called for a roll call vote to the Do Pass motion on HB1032.

Motion carried with a vote of 22 yeas, 0 neas, and 1 absence. Rep Dennis Johnson will carry the bill to the house floor.

**Rep. Ken Svedjan, Chairman** closed the discussion on HB1032.

Date: 2.7.05  
Roll Call Vote #:

**2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. HB1032**

House Appropriations Education and Environment

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

DO PASS

Motion Made By

Rep. Brusegaard

Seconded By

Rep. Rennerfeldt

**Representatives**  
Chairman Martinson  
Vice Chairman Brusegaard  
Rep. Rennerfeldt  
Rep. Wald

Yes No  
✓  
✓  
✓  
✓

**Representatives**  
Rep. Aarsvold  
Rep. Gulleson

Yes No  
✓  
✓

Total

6

(Yes)

6

No

0

Absent

Floor Assignment

Rep Brusegaard

If the vote is on an amendment, briefly indicate intent:

Date: **February 8, 2005**  
Roll Call Vote #: **1**

**2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. HB1032**

House Appropriations - Full Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken **DO PASS**

Motion Made By **Rep Brusegaard** Seconded By **Rep Martinson**

<b>Representatives</b>	<b>Yes</b>	<b>No</b>	<b>Representatives</b>	<b>Yes</b>	<b>No</b>
Rep. Ken Svedjan, Chairman	X		Rep. Bob Skarphol	X	
Rep. Mike Timm, Vice Chairman	X		Rep. David Monson	X	
Rep. Bob Martinson	X		Rep. Eliot Glassheim	X	
Rep. Tom Brusegaard	X		Rep. Jeff Delzer	X	
Rep. Earl Rennerfeldt	X		Rep. Chet Pollert	X	
Rep. Francis J. Wald	X		Rep. Larry Bellew	X	
Rep. Ole Aarsvold	X		Rep. Alon C. Wieland	X	
Rep. Pam Gulleeson	X		Rep. James Kerzman	X	
Rep. Ron Carlisle	X		Rep. Ralph Metcalf	X	
Rep. Keith Kempenich	X				
Rep. Blair Thoreson	X				
Rep. Joe Kroeber	X				
Rep. Clark Williams	X				
Rep. Al Carlson	AB				

Total Yes **22** No **0**

Absent **1**

Floor Assignment **Rep Dennis Johnson (Human Services)**

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
February 8, 2005 2:27 p.m.

**Module No: HR-25-2153**  
**Carrier: D. Johnson**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1032: Appropriations Committee (Rep. Svedjan, Chairman) recommends DO PASS**  
(22 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1032 was placed on the  
Eleventh order on the calendar.

2005 SENATE EDUCATION

HB 1032

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HB 1032**

Senate Education Committee

☐ Conference Committee

Hearing Date March 2, 2005

Tape Number	Side A	Side B	Meter #
1	x		1642-2388
1	x		3433-4290

Committee Clerk Signature

*Patty Wilkins*

**Chairman Freborg** opens the hearing on HB 1032.

**Relating to the formula for calculating supplemental payments to high school districts and to declare an emergency.**

(Meter #1642, side B)

**Jerry Coleman** - Assistant Director of School Finance and Organization For DPI - In favor of this bill. See written testimony.

**Senator Seymour** - Asked what would happen if this bill wasn't passed.

**Coleman** - It is his understanding they would have to follow the Attorney General's opinion. He said they would have to remove the impact aid because when Federal law and State law are in conflict the Federal law takes precedence.

Page 2

Senate Education

Bill/Resolution Number **HB 1032**

Hearing Date March 2, 2005

**Senator Flakoll** - Asked if he discussed the money that is already out there that maybe in excess payment that has to be rectified.

**Coleman** - Replied yes and said if Grand Forks had not been included in the distribution the differences would have been minor. Grand Forks was over \$500,000. That changes the formula.  
(meter #2237)

**Paul Johnson** - Superintendent of Schools in Bismarck - Said he is unsure if he is in support or not. He said the information he just heard from Coleman was new to him. He planned on testifying in opposition because a change in the formula would change the amount of aid from the Supplemental Equity Plan by \$200,000 for the Bismarck School District and reduce the aid to other districts. The equivalent of the \$460,000 that Grand Forks would have received from this, its sounds like now Grand Forks won't be eligible for that payment. Now with what he has heard here he is withdrawing his opposition and is in favor of the bill.

(meter #2388)

Close the hearing on HB 1032

(meter #3433)

Discussion on HB 1032

**Senator Erbele** - Motioned for a do pass

**Senator Flakoll** - seconded

**Senator Lee** - Asked about the phrase calling it tuition payment.

**Senator Freborg** - Said there is other Federal impact aid that is not tuition that could not be used in the formula and would not qualify for tuition payments.

**Senator Lee** - Asked if this would leave the one school district that was getting a significant portion of the money under what was thought to be a reason to strike this out. It takes them out of the picture completely.

**Senator Freborg** - Replied yes it does because their money is tuition.

**Senator Taylor** - Asked if schools will be affected in any way that receive traditional amounts of supplemental payments.

**Senator Freborg** - Said other districts will divide more money. Another \$450,000.

**Senator Flakoll** - Said that in some respect some schools could lose some money but because of the Grand Forks situation they could gain back more than they lost possibly.

**Senator Freborg** - Replied, very likely. The only school that would lose on the first formula would be Grand Forks. That was not the intent, Grand Forks did not get paid and they requested an opinion and the opinion was that they did have to be included because they could not use Federal revenue as part of the formula. They did get a payment. The second opinion said because their money was tuition that it could be figured in the formula and they will qualify.

**Senator Lee** - Asked if they did get payment are they going to be required to pay that back.

**Senator Freborg** - Replied, yes they are and that is by law.

(meter #4234)

Roll taken, 6 yes, 0 no.

**Senator Erbele** will carry

(meter #4290)

Date: 3/2/05  
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1032

Senate SENATE EDUCATION

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Erbele

Seconded By Flakoll

Senators  
CH- SENATOR FREBORG  
V-CH- SENATOR G. LEE  
SENATOR ERBELE  
SENATOR FLAKOLL

Yes No  
✓  
✓  
✓  
✓

Senators  
SENATOR SEYMOUR  
SENATOR TAYLOR

Yes No  
✓  
✓

Total (Yes) 6 No 0

Absent

Floor Assignment Erbele

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
March 2, 2005 1:04 p.m.

**Module No: SR-38-3965**  
**Carrier: Erbele**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1032: Education Committee (Sen. Freborg, Chairman) recommends DO PASS**  
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1032 was placed on the  
Fourteenth order on the calendar.

2005 TESTIMONY

HB 1032

HB 1032  
5 Jan 05

**TESTIMONY ON HB 1032**  
**HOUSE EDUCATION COMMITTEE**  
**January 5, 2005**  
**Department of Public Instruction**

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Mr. Chairman and members of the committee:

My name is Jerry Coleman and I am the Assistant Director of School Finance and Organization for the Department of Public Instruction. I am here to speak in favor of HB 1032.

House Bill 1032 corrects a conflict between federal law and N.D.C.C. §15.1-27-11 regarding the formula for calculating supplemental payments. This section requires the Department of Public Instruction to consider the amount of "unrestricted federal revenue received by the district" as part of the formula to determine the payment for which each district is eligible. Impact aid is included in the definition of "unrestricted federal revenue".

The federal law regarding impact aid found at 20 U.S.C. §7709 prohibits the consideration of impact aid payments in any manner that results in less State aid than would be the case if the district were not so eligible. Supplemental payments fall under the definition of State aid.

Attached to this testimony is an AG's opinion dated October 6, 2004 regarding this matter. The Department followed the AG's advice and removed impact aid from the formula for the supplemental payment for 2004-05. We have not made further payment adjustments pending legislative action.

That concludes my testimony. I would be happy to answer any questions the committee may have.

**LETTER OPINION  
2004-L-63**

October 6, 2004

The Honorable Lois Delmore  
House of Representatives  
714 S 22nd St  
Grand Forks, ND 58201-4138

Dear Representative Delmore:

Thank you for your letter regarding the formula for calculating supplemental payments under N.D.C.C. § 15.1-27-11. In part, the formula requires the Department of Public Instruction to consider the amount of federal impact aid received by a school district. For the reasons outlined below, it is my opinion that the portion of the formula that is in conflict with federal law is invalid and should not be taken into consideration when calculating the supplemental payments.

**ANALYSIS**

The 2003 Special Legislative Session amended N.D.C.C. § 15.1-27-11 as part of S.B. 2421. 2003 N.D. Sess. Laws ch. 667, § 14. The new language added "unrestricted federal revenue received by the district" as part of the formula to determine the amount of supplemental payment for which each school district is eligible.

The Department of Public Instruction ("DPI") initially included the amount received under impact aid as part of "unrestricted federal revenue." Upon further analysis, by DPI, the Legislative Council, and this office, it was agreed that impact aid should not be included in the formula for calculating supplemental payments. The decision to remove the amounts received under impact aid from the formula for supplemental payments was based upon the federal law regarding impact aid found at 20 U.S.C. § 7709. This section states, in part:

§ 7709. - State consideration of payments in providing State aid

(a) General prohibition

Except as provided in subsection (b) of this section, a State may not -

(1) consider payments under this subchapter in determining for any  
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- (A) the eligibility of a local educational agency for State aid for free public education; or
- (B) the amount of such aid; or
- (2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

"State aid" is defined in 34 C.F.R. § 222.2 as "any contribution, no repayment of which is expected, made by a State to or on behalf of an LEA [Local Education Agency i.e. School District] within the State for the support of free public education." Since supplemental payments fall within this definition, federal impact aid cannot be considered in determining the amount of the supplemental payment. While there are exceptions to this general prohibition, North Dakota does not fall within any of the exceptions. See 20 U.S.C. § 7709; 34 C.F.R. § 222.161 and 34 C.F.R. § 222.162.

The question is whether impact aid may be considered in calculating state aid or whether federal law preempts this act. Under the Supremacy Clause<sup>1</sup> of the United States Constitution, state law that actually conflicts with federal law is preempted. Billey v. North Dakota Stockmen's Ass'n., 579 N.W. 2d 171, 179 (N.D. 1998). "[A] state statute is void to the extent that it actually conflicts with a valid federal statute." Edgar v. MITE Corp., 457 U.S. 624, 631 (1982). "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' Hines v. Davidowitz, 312 U.S. 52, 67 (1941)." Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 204 (1983).

In 1973 this office addressed a similar issue. See N.D.A.G. Letter to Thomas (Dec. 11, 1973). That opinion addressed whether the state could deduct a specific amount from payments that would otherwise be made to a school district because the school district was receiving federal impact aid. In that case, this office concluded that the state must deduct the impact aid from payments made to the school district in accordance with state statute. That opinion, however, was based upon state and federal law that has since been amended or repealed. Specifically, this opinion looked at N.D.C.C.

<sup>1</sup> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

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§ 15-40.1-06 which related to general educational support (also known as "foundation aid" or "state aid"). In 1997, the Legislature enacted H.B. 1393 which separated high school supplemental payments from general educational support. See 1997 N.D. Sess. Laws ch. 178. At issue here is the supplemental payments rather than general educational support.

In addition, the previous opinion addressed Pub. L. 93-150 which suspended, for fiscal year 1974, the law forbidding states from considering impact aid when determining state aid unless the state had adopted a plan to equalize expenditures for education after June 30, 1972. The opinion stated that North Dakota had adopted such an equalization program and, therefore, there was no federal preemption issue<sup>2</sup>.

Traditionally, this office has been very reluctant to question the constitutionality of a statutory enactment. E.g., 1980 N.D. Op. Att'y Gen. 1. This is due, in part, to the fact that in North Dakota the usual role of the Attorney General is to defend statutory enactments from constitutional attack and because "[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution." *Traynor v. Leclerc*, 561 N.W.2d 644, 647 (N.D. 1997) (quoting *State v. Ertelt*, 548 N.W.2d 775, 776 (N.D. 1996)). Further, Article VI, Section 4 of the North Dakota Constitution provides that "the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.

N.D.A.G. 98-L-197. Because of this, I am reluctant to issue opinions questioning the constitutionality of a current statutory enactment unless it is manifestly contrary to the federal constitution and it is beyond a reasonable doubt that the state statute will be declared void by a court of competent jurisdiction. N.D.A.G. 2004-L-61.

In this case there is a conflict between the state and federal law such that compliance with both laws is impossible. Federal law prevents states from considering the amount a school district receives in state aid based in any way on the amount the district receives in federal impact aid. See 20 U.S.C. § 7709(a). State law requires the

<sup>2</sup> Pub. L. 93-150 did not define what was meant by "equalized expenditures." While this law was only in effect for one fiscal year, similar legislation was enacted thereafter. See 20 U.S.C. § 7709(b). The legislation in effect now strictly defines what is meant by a "state equalization plan." North Dakota does not meet this test. In addition, even if it did meet the equalization test North Dakota would have to obtain a certification from the secretary of education that it met the test. North Dakota holds no such certification.

Superintendent of Public Instruction to take "unrestricted federal funds"<sup>3</sup> into account when calculating the amount of a school district's supplemental payment. See N.D.C.C. § 15.1-27-11. As a result, under the Supremacy Clause of the United States Constitution, state law is preempted.

I have also found significant judicial precedent supporting this position which I cannot ignore. In *San Miguel Joint Union School Dist. v. Ross*, 173 Cal. Rptr. 292 (Cal. App. 3rd 1981) the California Legislature attempted to reduce state education aid to those local school districts that received impact aid in an effort to reduce the effect of loss of revenue following passage of Proposition 13<sup>4</sup>. The court found that the state aid formula "violates federal mandate and requires modification of the state grant of school aid." *Id.* at 294. The state was required to restore funds "[t]o the extent that federal fund amounts were not removed from consideration prior to making the reductions." *Id.* at 294. See also *Carlsbad Union School Dist. of San Diego County v. Rafferty*, 300 F.Supp. 434 (S.D.Cal.1969) (state law deducting federal impact funds from state aid was invalid under the federal Supremacy Clause); *Shepherd v. Godwin*, 280 F.Supp. 869 (E.D. Va. 1968) (formula whereby state deducted from school district's share a sum equal to a percentage of any federal impact aid funds received by district was unconstitutional as violating the supremacy clause of the Constitution); *Douglas Independent School District No. 3 v. Jorgenson*, 293 F.Supp. 849 (D. S.D. 1968) (South Dakota statutes specifying formula for deducting certain percentages of federal impact funds received by eligible districts from amount of state aid to those impacted areas are unconstitutional as being in violation of Supremacy Clause); and *Hergerreter v. Hayden*, 295 F.Supp. 251 (D. Kan. 1968) (a deduction from the state-aid fund to federally-impacted areas is prohibited by the federal impacted area legislation and the Supremacy Clause of the United States Constitution).

"[T]he attorney general is ... the legal adviser of both the legislative assembly and the state officers ... and, when requested, [shall] give opinions not only on all legal questions but also on all constitutional questions. . ." *State ex rel. Johnson v. Baker*, 21 N.W.2d 355, 364 (N.D. 1946). See also N.D.C.C. § 54-12-01(6), (8). "[W]hen any constitutional or other legal question arises regarding the performance of an official act [the officer's] duty is to consult with the attorney general and be guided by the opinion. . ." *Johnson*. "The Supreme Court of North Dakota has held that an Attorney

<sup>3</sup> "The federal aid granted [impact aid] is unrestricted and may be used by the District for any educationally related purpose." *San Miguel Joint Union School District v. Ross, et al.*, 173 Cal. Rptr. 292 (CA 1981).

<sup>4</sup> Proposition 13 was a ballot initiative enacted by the voters of the State of California on June 6, 1978. Its passage resulted in a cap on property tax rates in the state, reducing them by an average of 57%. See [http://www.fact-index.com/c/ca/california/proposition 13 1978 .html](http://www.fact-index.com/c/ca/california/proposition%2013%201978.html)

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General's opinion has the force and effect of law until a contrary ruling by a court." North Dakota Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 557-558 (N.D. 2001) (citations omitted); Roe v. Doe, 649 N.W.2d 566, 571 (N.D. 2002). Further, the Supreme Court stated in Johnson, that if officers fail to follow the advice of the Attorney General, "they will be derelict to their duty and act at their peril." State ex rel. Johnson v. Baker, 21 N.W.2d at 364. On the other hand, if the officer follows the opinion, the opinion protects a government official until such time as a court decides the question. See Johnson v. Baker, 21 N.W.2d 355, 364 (N.D. 1946).

In conclusion, the state cannot simultaneously follow the federal law, which forbids taking federal impact aid into account when calculating state aid, and at the same time follow the state law which requires taking federal impact aid into account when calculating state aid. Therefore, it is my opinion federal law preempts state law in this instance and the portion of the supplemental formula that is in conflict with federal law is invalid. As such, the Department of Public Instruction should calculate supplemental payments under N.D.C.C. § 15.1-27-11 without taking federal impact aid into account.

Sincerely,

Wayne Stenehjem  
Attorney General

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

HB 1032  
5 Jan 05

**HB 1032 – Supplemental Payments Formula  
Testimony by Paul K. Johnson, Superintendent  
Bismarck School District  
January 5, 2005**

Madame Chairman and Members of the Committee:

My name is Paul K. Johnson, Superintendent of the Bismarck School District. The Supplemental Equity Program is important to the Bismarck School District. Even though we are the second largest school district in North Dakota and serve a thriving city, we are considered property poor because our taxable valuation per pupil is lower than the state average. Our local tax effort is second only to Fargo and yet our per pupil expenditure is below the state average.

As a result of the change in the formula that is being contemplated by this committee, Bismarck stands to have its state revenue for 2004-05 reduced by \$209,000. This reduction is because Grand Forks becomes eligible with the change in the formula. We understand the reason for the change in the formula and do not begrudge Grand Forks their \$460,000.00. What we don't understand is why our state revenue must be reduced by a late discovery of this flaw in the formula.

A worksheet attached to this testimony shows how each school district in the Supplemental Equity Program must have their revenue reduced in order to accommodate Grand Forks. In our opinion, the fairer way to approach this would be to acknowledge the mistake, include Grand Forks, and hold the rest of the districts in the program harmless.

In fact, a bill draft to that effect was reviewed by the Interim Education Committee and I attach it for your review.

Thank you.

Paul K. Johnson  
701-355-3054  
paul\_johnson@educ8.org

## SUPPLEMENTAL EQUITY PAYMENTS

	ORIGINAL CALCULATION	REVISED PAYMENT	DIFFERENCE
Bismarck	\$714,073	\$504,746	(\$209,327)
West Fargo	35,914	0	(35,914)
Jamestown	176,620	152,414	(24,206)
Dickinson	169,376	145,809	(23,567)
Mandan	135,763	112,819	(22,944)
Wahpeton	91,395	76,881	(14,514)
Valley City	92,896	82,048	(10,848)
Beulah	10,661	0	(10,661)
Cavalier	20,161	11,375	(8,786)
Lisbon	22,958	15,104	(7,854)
Hazen	36,987	29,243	(7,744)
Kindred	13,328	5,791	(7,537)
Oakes	15,121	7,630	(7,491)
Grafton	92,048	85,179	(6,869)
Central Cass	16,637	10,966	(5,671)
Park River	17,234	11,717	(5,517)
New Rockford	15,621	10,816	(4,805)
Williston	423,359	419,182	(4,177)
LaMoure	4,046	0	(4,046)
Larimore	35,035	31,001	(4,034)
Lidgerwood	4,700	1,106	(3,594)
Linton	10,896	7,526	(3,370)
North Sargent	5,582	2,457	(3,125)
Stanley	2,957	0	(2,957)
Northwood	2,858	0	(2,858)
Hatton	6,567	4,036	(2,531)
Flasher	11,717	9,193	(2,524)
Bottineau	2,380	0	(2,380)
Wishek	3,101	809	(2,292)
Napoleon	1,900	0	(1,900)
Southern 8	5,045	3,171	(1,874)
Carrington	1,845	0	(1,845)
Richland	1,591	0	(1,591)
Milnor	14,996	13,411	(1,585)
Harvey	1,584	0	(1,584)
Hankinson	1,549	0	(1,549)
New Salem	6,817	5,384	(1,433)
Edinburg	6,956	5,611	(1,345)
Thompson	18,176	17,038	(1,138)
South Heart	3,735	2,940	(795)
Mt Pleasant	17,535	16,825	(710)
Steele-Dawson	554	0	(554)
Ellendale	470	0	(470)
United	7,995	7,624	(371)
Belfield	1,683	1,451	(232)
Maddock	129	0	(129)
Surrey	40,867	41,123	256
Griggs County	1,883	3,036	1,153
Devils Lake	<u>174,699</u>	<u>183,916</u>	<u>9,217</u>
	2,500,000	2,039,378	(460,622)
Grand Forks		<u>460,622</u>	
		2,500,000	

Introduced by

1 A BILL for an Act to provide for the distribution of hold harmless payments to certain high  
2 school districts eligible to receive supplemental payments; to amend and reenact subsection 1  
3 of section 15.1-27-11 of the North Dakota Century Code and section 37 of chapter 667 of the  
4 2003 Session Laws, relating to the formula for calculating supplemental payments to high  
5 school districts and the provision of contingent payments; and to declare an emergency.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1. AMENDMENT.** Subsection 1 of section 15.1-27-11 of the North Dakota  
8 Century Code is amended and reenacted as follows:

- 9 1. The superintendent of public instruction shall calculate the average valuation of  
10 property per student by dividing the number of students in average daily  
11 membership in grades one through twelve in a high school district into the sum of:
- 12 a. The district's latest available net assessed and equalized taxable valuation of  
13 property; plus
- 14 b. All tuition payments and county and unrestricted federal revenue received by  
15 the district, divided by the total of the district's general fund levy, high school  
16 transportation levy, and high school tuition levy.

17 **SECTION 2. DISTRIBUTION OF DIFFERENCE IN SUPPLEMENTAL PAYMENTS -**  
18 **HOLD HARMLESS.**

- 19 1. The superintendent of public instruction shall calculate the payment to which a  
20 school district was entitled under section 14 of chapter 667 of the 2003 Session  
21 Laws, from July 1, 2003, through the effective date of this Act.
- 22 2. The superintendent of public instruction shall calculate the payment to which a  
23 school district would have been entitled under section 1 of this Act if that section  
24 had been in effect from July 1, 2003, through the effective date of this Act.

3. If a school district received less money under section 14 of chapter 667 of the 2003 Session Laws than it would have received under section 1 of this Act had section 1 been in effect from July 1, 2003, through the effective date of this Act, the superintendent of public instruction shall forward the difference to the school district.

4. If a school district received more money under section 14 of chapter 667 of the 2003 Session Laws than it would have received under section 1 of this Act had section 1 been in effect from July 1, 2003, through the effective date of this Act, the superintendent of public instruction may not recoup the difference.

**SECTION 3. AMENDMENT.** Section 37 of chapter 667 of the 2003 Session Laws is amended and reenacted as follows:

**SECTION 37. CONTINGENT PAYMENTS - DISTRIBUTION.** If any moneys appropriated for per student payments and transportation payments in the grants - state school aid line item in Senate Bill No. 2013 remain after payment of all statutory obligations for per student and transportation payments during the biennium beginning July 1, 2003, and ending June 30, 2005, the superintendent of public instruction shall distribute the remaining moneys as follows:

1. The superintendent of public instruction shall use the first \$700,000, or so much of the amount as is necessary, for the purpose of providing supplemental aid - hold harmless payments to school districts pursuant to section 2 of this Act.

2. The superintendent of public instruction shall use the ~~first~~ next \$250,000, or so much of that amount as is necessary, for the purpose of providing reimbursements to the chief administrators of joint powers agreements pursuant to section 19 of this Act.

~~2-~~ 3. The superintendent of public instruction shall use the next \$1,000,000, or so much of that amount as is necessary, for the purpose of providing reorganization bonuses, pursuant to section 15.1-12-11.1, to school districts having reorganizations effective after July 1, 2003, and before July 1, 2005. If insufficient moneys exist to fully meet the requirements of this subsection, the superintendent of public instruction shall prorate the payments according to that percentage of the amount available to which a school district is entitled.

1        ~~3.~~ 4.    The superintendent of public instruction shall use the remainder of the moneys to  
2                    provide additional per student payments on a prorated basis, according to the  
3                    average daily membership of each school district during the 2004-05 school year.

4                    **SECTION 4. EMERGENCY.** This Act is declared to be an emergency measure.

**TESTIMONY ON HB 1032**  
**SENATE EDUCATION COMMITTEE**  
**March 3, 2005**  
**Department of Public Instruction**

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Mr. Chairman and members of the committee:

My name is Jerry Coleman and I am the Assistant Director of School Finance and Organization for the Department of Public Instruction. I am here to speak in favor of HB 1032.

House Bill 1032 corrects a conflict between federal law and N.D.C.C. §15.1-27-11 regarding the formula for calculating supplemental payments. This section requires the Department of Public Instruction to consider the amount of "unrestricted federal revenue received by the district" as part of the formula to determine the payment for which each district is eligible. Impact aid is included in the definition of "unrestricted federal revenue".

The federal law regarding impact aid found at 20 U.S.C. §7709 prohibits the consideration of impact aid payments in any manner that results in less State aid than would be the case if the district were not so eligible. Supplemental payments fall under the definition of State aid.

Since the interim education committee recommended this bill there have been two legal opinions issued relate to this matter. Those opinions are attached to this testimony.

- 2004-L-63 states that federal law preempts state law in this instance and that the portion of the supplemental formula that is in conflict with federal law is invalid.
- 2005-L-06 states that payments made to school districts receiving impact aid to a school district that admits its students must be classified as a "tuition payment".

Based on these two legal opinions the Department will restate the supplemental equity entitlement calculations for the 2003-2005 biennium and make the corrections on the last regular state aid distribution on April 1.

I would like to make two more points related the bill. First, the prohibition relates only to impact aid. The bill removes all unrestricted federal revenue from the formula. Second, the bill has an emergency clause that becomes effective when it is signed into law. The last payment for the supplemental payments will be in April.

That concludes my testimony. I would be happy to answer any questions the committee may have.

**LETTER OPINION  
2004-L-63**

October 6, 2004

The Honorable Lois Delmore  
House of Representatives  
714 S 22nd St  
Grand Forks, ND 58201-4138

Dear Representative Delmore:

Thank you for your letter regarding the formula for calculating supplemental payments under N.D.C.C. § 15.1-27-11. In part, the formula requires the Department of Public Instruction to consider the amount of federal impact aid received by a school district. For the reasons outlined below, it is my opinion that the portion of the formula that is in conflict with federal law is invalid and should not be taken into consideration when calculating the supplemental payments.

**ANALYSIS**

The 2003 Special Legislative Session amended N.D.C.C. § 15.1-27-11 as part of S.B. 2421. 2003 N.D. Sess. Laws ch. 667, § 14. The new language added "unrestricted federal revenue received by the district" as part of the formula to determine the amount of supplemental payment for which each school district is eligible.

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Superintendent of Public Instruction to take "unrestricted federal funds"<sup>3</sup> into account when calculating the amount of a school district's supplemental payment. See N.D.C.C. § 15.1-27-11. As a result, under the Supremacy Clause of the United States Constitution, state law is preempted.

I have also found significant judicial precedent supporting this position which I cannot ignore. In *San Miguel Joint Union School Dist. v. Ross*, 173 Cal. Rptr. 292 (Cal. App. 3rd 1981) the California Legislature attempted to reduce state education aid to those local school districts that received impact aid in an effort to reduce the effect of loss of revenue following passage of Proposition 13<sup>4</sup>. The court found that the state aid formula "violates federal mandate and requires modification of the state grant of school aid." Id. at 294. The state was required to restore funds "[t]o the extent that federal fund amounts were not removed from consideration prior to making the reductions." Id. at 294. See also *Carlsbad Union School Dist. of San Diego County v. Rafferty*, 300 F.Supp. 434 (S.D.Cal.1969) (state law deducting federal impact funds from state aid was invalid under the federal Supremacy Clause); *Shepherd v. Godwin*, 280 F.Supp. 869 (E.D. Va. 1968) (formula whereby state deducted from school district's share a sum equal to a percentage of any federal impact aid funds received by district was unconstitutional as violating the supremacy clause of the Constitution); *Douglas Independent School District No. 3 v. Jorgenson*, 293 F.Supp. 849 (D. S.D. 1968) (South Dakota statutes specifying formula for deducting certain percentages of federal impact funds received by eligible districts from amount of state aid to those impacted areas are unconstitutional as being in violation of Supremacy Clause); and *Herqenreter v. Hayden*, 295 F.Supp. 251 (D. Kan. 1968) (a deduction from the state-aid fund to federally-impacted areas is prohibited by the federal impacted area legislation and the Supremacy Clause of the United States Constitution).

"[T]he attorney general is ... the legal adviser of both the legislative assembly and the state officers ... and, when requested, [shall] give opinions not only on all legal questions but also on all constitutional questions. . ." *State ex rel. Johnson v. Baker*, 21 N.W.2d 355, 364 (N.D. 1946). See also N.D.C.C. § 54-12-01(6), (8). "[W]hen any constitutional or other legal question arises regarding the performance of an official act [the officer's] duty is to consult with the attorney general and be guided by the opinion. . ." Johnson. "The Supreme Court of North Dakota has held that an Attorney

<sup>3</sup> "The federal aid granted [impact aid] is unrestricted and may be used by the District for any educationally related purpose." *San Miguel Joint Union School District v. Ross, et al.*, 173 Cal. Rptr. 292 (CA 1981).

<sup>4</sup> Proposition 13 was a ballot initiative enacted by the voters of the State of California on June 6, 1978. Its passage resulted in a cap on property tax rates in the state, reducing them by an average of 57%. See [http://www.fact-index.com/c/ca/california/proposition 13 1978 .html](http://www.fact-index.com/c/ca/california/proposition%2013%201978.html)

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General's opinion has the force and effect of law until a contrary ruling by a court." North Dakota Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 557-558 (N.D. 2001) (citations omitted); Roe v. Doe, 649 N.W.2d 566, 571 (N.D. 2002). Further, the Supreme Court stated in Johnson, that if officers fail to follow the advice of the Attorney General, "they will be derelict to their duty and act at their peril." State ex rel. Johnson v. Baker, 21 N.W.2d at 364. On the other hand, if the officer follows the opinion, the opinion protects a government official until such time as a court decides the question. See Johnson v. Baker, 21 N.W.2d 355, 364 (N.D. 1946).

In conclusion, the state cannot simultaneously follow the federal law, which forbids taking federal impact aid into account when calculating state aid, and at the same time follow the state law which requires taking federal impact aid into account when calculating state aid. Therefore, it is my opinion federal law preempts state law in this instance and the portion of the supplemental formula that is in conflict with federal law is invalid. As such, the Department of Public Instruction should calculate supplemental payments under N.D.C.C. § 15.1-27-11 without taking federal impact aid into account.

Sincerely,

Wayne Stenehjem  
Attorney General

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

**LETTER OPINION  
2005-L-06**

February 4, 2005

The Honorable Wayne G. Sanstead  
Superintendent of Public Instruction  
600 E Boulevard Ave.  
Bismarck, ND 58505

Dear Superintendent Sanstead:

Thank you for asking whether payments made by a school district receiving impact aid to a school district that admits its students may be classified as a "tuition payment" as that term is used in N.D.C.C. § 15.1-27-11(1)(b). In addition, you ask whether an admitting school district must charge tuition based upon the formula outlined in N.D.C.C. § 15.1-29-12, or whether the school districts are free to negotiate a different tuition rate. For the reasons stated below, it is my opinion that payments made by school districts receiving impact aid to a school district that admits its students must be classified as a "tuition payment." Further, military installation school districts may negotiate a tuition rate, but all other districts must calculate the tuition rate pursuant to the formula set out in N.D.C.C. § 15.1-29-12.

**ANALYSIS**

Impact aid is a federal program that provides funding for a portion of the educational costs of federally-connected students. See 20 U.S.C. 7701 *et seq.*, 34 C.F.R. 222.1 *et seq.* Funding is sent from the federal government directly to local educational agencies (LEA), i.e., school districts, that qualify for this program. Some LEA's forward a portion or all of their impact aid funds to neighboring school districts for the education of the LEA's students.

You question whether the payments made by the LEA's to the admitting districts should be viewed as impact aid or tuition payments. If the amounts are impact aid, they could not be considered by the state when calculating state aid. See 20 U.S.C. § 7709 and N.D.A.G. 2004-L-63. If the amounts are tuition, however, the amounts are considered when calculating state aid. See N.D.C.C. § 15.1-27-11(1)(b).

I was unable to find any federal law or regulation that governs the use of impact aid funds once those funds have been paid out by an LEA. In addition, a member of my staff spoke with an attorney at the United States Department of Education who

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confirmed that he knew of no law, regulation or policy on point.<sup>1</sup> Because there appears to be no federal directive relating to these funds once the funds are paid out by an LEA, state law is applicable.

There are three statutes that relate to providing education for nonresident students. The first is N.D.C.C. § 15.1-29-09 which states:

An admitting district may accept payments under title 1 of Public Law No. 81-874 [64 Stat. 1100; 20 U.S.C. 236 *et seq.*] as tuition for a nonresident student if:

1. The student's parent is employed on an installation owned by the federal government;
2. The student's parent resides on an installation owned by the federal government; and
3. The boards of the student's school district of residence and the admitting district agree to accept the payments in lieu of other tuition for the nonresident student.

N.D.C.C. § 15.1-29-09 (emphasis added).

"[T]itle 1 of Public Law No. 81-874 [64 Stat. 1100; 20 U.S.C. 236 *et seq.*]," as referenced in this statute, was the law that first established impact aid. This law has since been repealed and impact aid legislation is now found at 20 U.S.C. 7701 *et seq.*, and 34 C.F.R. 222.1 *et seq.* The money accepted by the admitting district is accepted "as tuition." N.D.C.C. § 15.1-29-09.

The second section is N.D.C.C. § 15.1-29-13(1)(a), which states, in part, "... the board of a school district that admits a nonresident student shall charge and collect tuition for the student" (emphasis added). Section 15.1-29-12, N.D.C.C., requires the sending school district to pay as tuition "the full cost of education incurred by the admitting district" and sets out a formula for calculating that tuition.

The third section is N.D.C.C. § 15.1-08-04(3), which directs a military installation school district to "[c]ontract for the provision of education to the students residing in the district." It is reasonable to conclude that any consideration paid under this contract represents "the cost of education incurred by the admitting district" or "tuition." See N.D.C.C. § 15.1-29-12.

<sup>1</sup> Telephone call with Mark Smith, Attorney, U.S. Dept. of Ed., (Jan. 6, 2005).

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While N.D.C.C. § 15.1-27-11(1)(b) does not define the phrase "tuition payments" it is reasonable to conclude that it is referencing tuition payments as calculated under N.D.C.C. §§ 15.1-29-12, 15.1-29-09 or 15.1-08-04(3) because no other type of tuition is statutorily authorized to be charged by a school district admitting nonresident students. See generally, N.D.C.C. title 15.1. Therefore, regardless of whether the tuition is paid pursuant to N.D.C.C. §§ 15.1-29-12, 15.1-29-09 or 15.1-08-04(3), the amount paid by an LEA to an admitting district is a "tuition payment" as that phrase is used in N.D.C.C. § 15.1-27-11(1)(b).

It is interesting to note that the department of public instruction (DPI) traditionally has not viewed the amount paid by a military installation school district to an admitting district as regular tuition. In 1989, Al Koppang, former Director of School Finance at DPI, testified on the bill authorizing military installation school districts. In explaining the relationship between the Air Force Bases and the Grand Forks and Minot Public School Districts, he stated:

You are not talking about regular tuition payments on these Air Bases. The Grand Forks district and the Minot district do not get tuition; they receive the state foundation aid payment and the impact aid payment, and they agree to educate for whatever that is. That is what the contract calls for.

Hearing on H.B. 1304 Before the House Comm. on Education, 1989 N.D. Leg. (Feb. 7) (Statement of A. Koppang) (emphasis added). If this money is suddenly viewed as tuition, it will likely have a significant impact on the amount of state aid received by the school districts admitting students from the military installation school districts. This may or may not have been the intent of the Legislature, and the Legislature may wish to consider this issue prior to its adjournment.

You also ask whether school districts that receive impact aid may negotiate a tuition rate with an admitting school district. Again, three statutes address this issue.

The first section is N.D.C.C. § 15.1-29-09, which was discussed above. The plain language of the statute indicates that the student's school district of residence and the admitting district could agree to accept the impact aid payments "in lieu of" other tuition for the nonresident student. In this case, the districts would not be free to negotiate a tuition rate, but would be limited to the amount received as impact aid. As noted above, the federal law cited in N.D.C.C. § 15.1-29-09 has been repealed.

The second section is N.D.C.C. § 15.1-29-12. When payments are calculated pursuant to this section, there is no ability to negotiate a tuition rate. The formula for nonresident tuition is set out clearly, in mandatory language, stating that the admitting district "shall determine the cost of education per student" and what it "shall add" and what it "shall

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subtract" to arrive at the correct tuition amount. See N.D.C.C. § 15.1-29-12(2). Clearly, this statute does not allow room for negotiation of a tuition rate for a nonresident student.

The third section is N.D.C.C. § 15.1-08-04. This section is strictly limited to military installation school districts and would not apply to LEA's that are not military installation school districts. When military installation school districts are involved, state law provides that they "shall . . . [c]ontract for the provision of education to the students residing in the district." N.D.C.C. § 15.1-08-04. In this case, the Legislature specifically gave the military installation school districts the ability to negotiate a contract to provide education, rather than simply directing the military installation school districts to follow N.D.C.C. ch. 15.1-29.

North Dakota has required schools to collect tuition for nonresident students pursuant to a statutory formula since at least 1921. See 1921 N.D. Sess. Laws ch. 107, § 1. The creation of military installation school districts is relatively new, and was enacted in 1989. See 1989 N.D. Sess. Laws ch. 204. Had the Legislature wanted the military installation school districts to calculate nonresident tuition pursuant to the current statutory formula, what is now N.D.C.C. ch. 15.1-29, it would not have directed it to "[c]ontract for the provision of education." N.D.C.C. § 15.1-08-04(3). To require a party to enter into a contract where the terms of the contract would do nothing more than restate current law appears to be an idle or unnecessary act. "A statute must be construed to avoid . . . idle or unnecessary acts." *Larson v. Wells County Water Resource Bd.*, 385 N.W.2d 480, 482 (N.D. 1986). Therefore, when a military installation school district contracts with an admitting school district it is free to negotiate a tuition rate outside of the rate set in N.D.C.C. § 15.1-29-12.

Sincerely,

Wayne Stenehjem  
Attorney General

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