

N.D.A.G. Letter to Johnson (Aug. 18, 1992)

August 18, 1992

Mr. Dennis E. Johnson
McKenzie County State's Attorney
PO Box 1288
Watford City, ND 58854

Dear Mr. Johnson:

Thank you for your April 15, 1992, letter concerning expulsion from school of a child of an indigent family. You inquire whether the failure of the expelling school district to pay the tuition for attendance of the expelled student at another school district when the child's family is unable to pay the tuition violates North Dakota's constitutional right to an education. I am sorry for the delay in finalizing the response.

The North Dakota Constitution provides:

. . . [T]he legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control.

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

N.D. Const. art. VIII, §§ 1 and 2.

In a case entitled In the Interest of G.H., 218 N.W.2d 441 (N.D. 1974), the North Dakota Supreme Court held that these provisions of the North Dakota Constitution provide a constitutional right to education. The court has also determined that by the establishment of operating schooldistricts, the Legislature has carried out its constitutional responsibility for the establishment of a free and uniform system of public schools. Dickinson Public School Dist. v. Sanstead, 425 N.W.2d 906 (N.D. 1988).

Part of the system of free public schools includes the establishment of the powers and duties of a school board. One of the powers of a school board is:

To adopt, alter, and repeal, when it deems it expedient, rules and regulations for the reception, organization, grading, government, and instruction of pupils, and for the suspension, expulsion, or transfer from one school to

another. No pupil shall be suspended or expelled except for insubordination, habitual indolence, or disorderly conduct, and a suspension shall not be for a longer period than ten days except as provided in section 15-38-13.1, nor shall an expulsion be in effect beyond the end of the current term of school.

N.D.C.C. § 15-29-08(13).

In a previous opinion, I determined that if a student was expelled from a North Dakota public school in accord with due process requirements, the school district did not have the responsibility to arrange for the education of that student at an alternate location, regardless of whether the student was within the ages of compulsory school attendance. See Letter from Atty. Gen. Nicholas J. Spaeth to Dr. Wayne G. Sanstead, Supt. of Public Instruction (November 19, 1990).

The question you ask relates to whether the child's family's economic circumstances would affect my prior opinion concerning whether a school district has the responsibility for paying tuition for the child at a different school district. The answer to this query turns upon whether an expelled child is merely removed from class or whether the expulsion is from the education system of the school district.

In Stromberg v. French, 236 N.W. 477, 479 (N.D. 1931), the North Dakota Supreme Court stated:

The Constitution of North Dakota, . . . , imposes upon the Legislature the duty of making provision for the establishment and maintenance of a system of public schools. While imposing this duty, the Constitution places no restrictions upon the Legislature as to its performance. "The Legislature, therefore, has the power to enact any legislation in regard to the conduct, control, and regulation of the public free schools, which does not deny to the citizen the constitutional right to enjoy life and liberty, to pursue happiness and to acquire property".

After citing the predecessor to N.D.C.C. § 15-29-08(13), the court stated:

Thus the Legislature reposed a very broad discretion in boards of education with respect to the conduct and regulations of schools conducted by them.

In Stromberg v. French, the student was suspended for wearing metal heel plates contrary to school rule until he removed those heel plates. The court determined that the student's refusal to remove the heel plates, even though his parents told him to keep them on, constituted insubordination contrary to properly adopted school rule and that the student could be suspended until he complied with that rule.

Other states have dealt with the relationship between a state constitutional right to an education and school board authority to suspend or expel a student for conduct violations. In Keith D. v. Ball, 350 S.E.2d 720 (W.Va. 1986), the West Virginia Supreme Court dealt

with expulsion of students for making false bomb threats. The court cited the West Virginia Constitution, Art XII, § 1, which provided that "the legislature shall provide by general law, for a thorough and efficient system of free schools." The court also cited a previous holding that in West Virginia education is "a fundamental constitutional right." Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979).

The court in Keith D. held that conduct by a student which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not constitutionally immunized. The court further determined that an exercise of rights in such a fashion that it deprives others of their lawful rights may result in a forfeiture of those rights. The court indicated that if an individual chooses to exercise his rights to education in such a fashion as to disrupt schools and deny that right to others, then the student may forfeit the right to attend school. The students in Keith D. were expelled for one year for the making of the false bomb threats. The West Virginia Supreme Court indicated that the students had therefore temporarily forfeited their right to an education and that the board's action in expelling them was not unconstitutional. 350 S.E.2d at 722, 723.

The Constitution of North Carolina, Art. IX, § 2, provides:

- (1) General and uniform system: term. The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

In the Matter of Jackson, 352 S.E.2d 449 (N.C. App. 1987), the Court of Appeals of North Carolina dealt with the above section of the North Carolina Constitution in a juvenile proceeding wherein a district court had ordered a school board to place Jackson in an appropriate school program after he had been suspended by that board for the remainder of the school year for physical assault on a student and a teacher, and for verbally and profanely threatening another teacher. The board of education appealed the order which required it to provide for the education of Jackson elsewhere.

The Court of Appeals of North Carolina determined in Jackson that the district court was in error in ordering the school district which had expelled Jackson to make arrangements for his education elsewhere. The court noted that the North Carolina Court of Appeals had previously ruled that "the right to attend school and claim the benefits of the public school system is subject to lawful rules prescribed for the government thereof." The court noted that a student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system. The court stated that as a general rule, a student may be constitutionally suspended or expelled for misconduct whenever the conduct is of a type the school may legitimately prohibit, and procedural due process is provided.

The North Carolina court stated that reasonable regulations punishable by suspension do

not deny the right to an education but rather deny the right to engage in the prohibited behavior. The court noted that public schools have no affirmative duty to provide an alternative educational program for suspended students in the absence of a legislative mandate. The court stated that the grant of authority to suspend or expel under North Carolina law is not expressly limited to suspensions from the regular classroom but contemplates suspension from the entire system. 352 S.E.2d at 455.

North Dakota's Constitutional provisions concerning a free public school education are similar to both those in West Virginia and North Carolina. The Legislature has provided the requirement for the establishment of a uniform system of public schools, and the North Dakota Supreme court has held that the constitution does not place restrictions on the Legislature as to the performance of that duty. In pursuance of that duty, the Legislature has provided for a system of school districts, and has authorized those school districts to establish rules for the conduct of students, and for their suspension and expulsion within the limits provided by N.D.C.C. § 15-29-08(13). North Dakota's system of free public schools and the suspension or expulsion therefrom should be interpreted in a manner similar to that shown in the rulings above noted from West Virginia and North Carolina.

It is therefore my opinion that when a student is suspended or expelled by a public school board, the suspension or expulsion is not merely from the regular classroom but is a suspension or expulsion from the school system of that district. It is my further opinion that when a student engages in proscribed conduct authorizing his removal from school pursuant to statute, and when due process has been extended in the process of the suspension or expulsion, the public school district has no affirmative duty to provide for an alternative education program absent a specific legislative mandate to do so. It is my further opinion that because an expelled student is expelled from the education system of the district, the financial wherewithal of the student's parents does not alter the situation. The student, regardless of the student's parents' financial circumstances, has forfeited the constitutional right to an education in that district on the temporary basis provided by law, and the school district is not required to provide or pay for an alternative educational program elsewhere.

Because of the special requirements for the education of disabled children needing special education, this opinion does not apply to children with disabilities receiving special education under N.D.C.C. ch. 15-59 and related provisions of federal law in 20 U.S.C.A. § 1400, et seq. (1992). Federal law on the education of children with disabilities requires states desiring to receive federal aid to have, among many other things, established procedural safeguards concerning changing or denying special education and related services. 20 U.S.C.A. § 1412(5) (1992). The procedural safeguards required include a prohibition on changing the placement of a child with disabilities contrary to the child's individualized education program until after the conclusion of administrative due process proceedings and judicial review. 20 U.S.C.A. § 1415(e)(3) (1990). North Dakota's plan includes these procedural safeguards.

Sincerely,

Nicholas J. Spaeth

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