

**OPINION
79-126**

January 18, 1979 (OPINION)

Honorable Wayne G. Sanstead
Lieutenant Governor
Office of the Lieutenant Governor
State Capitol
Bismarck, North Dakota 58505

Dear Lieutenant Governor Sanstead:

This is in response to your letter of January 4, 1979, regarding the provisions in House Bill 1057 concerning charges made for behind-the-wheel driver education. In your letter you set forth the following facts and question:

House Bill 1057, introduced by the Legislative Council from the Interim Committee on Education, provides in Section Two entitled, "Authorized Fees" for school board authority to require (pupil) payment of certain fees.

Among the delineated fee areas is item number six which reads "fees for behind-the-wheel drivers education instruction." The question that Senator Redlin has raised, and on which we request an opinion from your office, is whether the concept of charging fees to public school students for instruction in driver training education courses is contrary to constitutional and statutory principles regarding free public education. I enclose two sources which indicate the Attorney Generals of Maryland and Missouri have both dealt with this question when it was raised in their respective states.

You enclose with your letter copies of short articles concerning the opinions of the Attorneys General of Maryland and Missouri which you mention in your letter.

We would first note that we are not familiar with the opinions you have mentioned and, while they may be relevant and helpful to our answer to your inquiry, we must in the final analysis be guided by the provisions of North Dakota law, which we are sure you understand.

We note that Section 15-47-01 of the North Dakota Century Code provides as follows:

15-47-01. SCHOOLS FREE AND ACCESSIBLE - SCHOOL AGES. - The public schools of the state shall be equally free, open, and accessible at all times to all children between the ages of six and twenty-one, except that children who do not arrive at the age of six years by midnight August 31 shall not start school until the beginning of the following year, except children who by reason of special talents or abilities as determined by a series of developmental and readiness screening instruments approved by the state department of public instruction and administered by the school district, may start school at a younger age. However, under no circumstances shall a child

start school that school year if he is not six years of age by January first.

More importantly, we also note that Section 148 of the North Dakota State Constitution provides:

SECTION 148. The legislative assembly shall provide at their first session after the adoption of this constitution, for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including the normal and collegiate course.

The meaning of this section of the North Dakota State Constitution, as it applies to the ability of school districts to charge for elementary school textbooks under the authority of North Dakota Century Code Chapter 15-43, was recently interpreted in the case of *Cardiff v. Bismarck Public School District*, 263 N.W. 2d 105 (N.D. 1978). In *Cardiff*, after reviewing court decisions from other jurisdictions construing constitutional provisions similar to those in North Dakota, the North Dakota Supreme Court said:

We must assume that the framers of the Constitution made a deliberate choice of words which reflected or expressed their thoughts. The term "free public schools" without any other modification must necessarily mean and include those items which are essential to education.

It is difficult to envision a meaningful education system without textbooks. No education of any value is possible without schoolbooks. See *Crowley v. Bressler*, 181 Misc. 59, 41 N.Y. Supp. 2d 441 (1941).

* * *

The word "free" takes on its true and full meaning from the context in which it is used. There can be no doubt that the term means "without charge or cost." In the absence of any other showing we must conclude that the term was commonly understood by the people to mean "without charge or cost." Books and school supplies are a part of the education system. This is true whether we apply the necessary elements of the schools activities test or the integral part of the educational system test.

* * *

However, our conclusion must necessarily only apply to the elementary schools, as they are the only ones covered in this action. The action in district court was not a class action and factually involved only students enrolled in the elementary schools. The briefs, arguments, and whatever practices were involved related only to elementary schools. This opinion therefore is limited to textbooks used in the elementary schools and in the required subjects, as set out in Section 15-38-07, North Dakota Century Code.

By the use of this language, the court has established the "test" by

which we must determine whether a fee charge for a particular class, or equipment used in a class is a charge that may be made under our constitution. Before attempting to apply this language to the question you have asked in relation to House Bill 1057, we make two notable observations: First, the fact that the Cardiff case was limited only to elementary schools does not thereby prevent the extension of the reasoning and principles stated therein to courses offered in junior high schools or high schools. In fact, we believe that such an extension would logically occur, given the language of Section 148 and the language of the Cardiff opinion itself. Secondly, we believe that by limiting the opinion to apply only to schoolbooks and supplies used in required subjects, that the court in Cardiff was persuaded by the reasoning of opinions from other jurisdictions which limited the application of the concept of a free education only to that education mandated by law. While a court of competent jurisdiction must in the final analysis make a determination of what charges are constitutional and what charges are not, we see no reason to extend the principles applied in the Cardiff case beyond those which appear to have been adopted by the Supreme Court.

It is therefore considered that while the principles announced in the Cardiff case may easily be extended to junior high schools and high schools, that no reason appears to exist to extend those principles beyond the limitations of those courses or subject areas required to be taken as a matter of law. It is there classes and subject areas to which we believe the court referred to as "education" when it said that "the term 'free public schools' without any other modification must necessarily mean and include those items which are essential to education."

A review of the provisions of the North Dakota Century Code applicable to the minimum curriculums that must be offered in high schools of the state, principally North Dakota Century Code Section 15-41-24, shows that there is nowhere provided in the Code any requirement that high schools must offer behind-the-wheel driver education as a matter of law. We must therefore conclude on the basis of Section 148 of the State Constitution, as interpreted by those principles in the Cardiff case outlined above, that charges for behind-the-wheel driver education courses authorized by House Bill 1057 may lawfully be levied in this state.

Sincerely,

ALLEN I. OLSON

Attorney General