

**LETTER OPINION
2002-L-30**

May 10, 2002

Honorable Merle Boucher
State Representative
PO Box 7
Rolette, ND 58366-0007

Dear Representative Boucher:

Thank you for your letter concerning the ramifications to a school district for not being in compliance with the fire code. I share your concern about the safety of our children, and I am particularly concerned about the high number of repeat deficiencies the Fire Marshal has discovered.

Your letter included a copy of a letter dated January 24, 2002, from the Department of Public Instruction to some school districts concerning repeat fire code deficiencies and prohibiting the operation of a school if deficiencies were not corrected by August 15, 2002. The Department of Public Instruction letter cites N.D.C.C. §§ 15.1-06-06 and 15.1-06-09 concerning school approval and fire safety inspections.

Section 15.1-06-09(2), N.D.C.C., provides criteria and procedures to be followed by the State Fire Marshal, the Superintendent of Public Instruction, school district superintendents, and school district boards concerning periodic fire inspections and the discovery of either deficiencies or imminent fire hazards. If a deficiency is noted in the fire inspection report, the school district has until the next succeeding budget period to correct it. In the event of an imminent fire hazard, the State Fire Marshal, or a designee, is to immediately notify the school board, school district superintendent, and Superintendent of Public Instruction. If the Superintendent of Public Instruction recommends immediate closure of some or all of the school because of the imminent fire hazard, "the school board and the school district superintendent may immediately close some or all of the school until the fire hazard is eliminated." (Emphasis supplied.) The issue is what sanctions befall a school district for not correcting fire code violations found in an inspection.¹ Due to

¹ Chapter 67-22-01 of the North Dakota Administrative Code is entitled "Corrective Actions and Sanctions." However, the chapter gives no indication by either definition or

the absence of specifics in N.D.C.C. § 15.1-06-09, the statute is ambiguous on what, if any, sanction is applicable, and whether a noncomplying school district can lose per-student state aid for a violation. Legislative history may therefore be consulted. N.D.C.C. § 1-02-39(3).

Section 15.1-06-09, N.D.C.C., is virtually the same statute as enacted in 1997 as former N.D.C.C. § 15-35-01.2. The changes made in current law include only the removal of private school inspections from the section and minor language changes. The 1997 enactment was the product of an interim study by the Legislative Council's Education Finance Committee. The bill was introduced as Senate Bill 2032 and its intent concerning financial penalties was stated as follows:

Unlike House Bill No. 1038 (1995) [which was defeated by the 1995 Legislative Assembly] this bill draft contained no provision for the withholding of financial aid or the imposition of any financial penalty. The committee determined that a financially strapped school district will be in no better position to make needed repairs or corrections if additional funds are withheld.

Report of the North Dakota Legislative Council, p. 130 (1997).

While it is clear that the Legislature expected deficiency violations of the fire code to be remedied within the current or the budget cycle following the issuance of the report, the Legislature did not include closure of the school or a reduction of per-student state aid as a penalty for failure to follow the corrective action plan. It therefore appears that the Department of Public Instruction letter you attach overstated the consequences of fire code violations.

Your letter also deals with technical definition matters on fire inspections, and the impact of changes in building codes and their relationship to fire safety. These are technical matters for experts in the fire inspection process to deal with in consultation with school officials, and do not involve legal questions that I may resolve in an opinion.

It is therefore my opinion that neither N.D.C.C. § 15.1-06-09 nor other law provides for ordering school closure or reduction in per-student state aid for schools because of noncompliance with relevant fire codes as determined by fire safety inspections. It is my

description of what constitutes a sanction for the purpose of that chapter. Consequently, even though section 15.1-06-09 is listed as a school approval standard the failure with which to comply could be subject to the Administrative Code chapter, it does not appear the procedures of the chapter have been undertaken in this instance and, as noted above, the kind of sanctions intended are not stated. No statute authorizes the Department of Public Instruction to order the closure of schools.

further opinion that fire safety inspections and follow-up therefrom are to be conducted pursuant to N.D.C.C. §15.1-06-09, unless the Fire Marshal, or a deputy, determines conditions to be severe enough to begin abatement procedures under N.D.C.C. § 18-01-15, et seq.

These conclusions should not be construed to indicate that there are no other enforcement mechanisms available to deal with fire code violations.

In addition to the responsibility of the Fire Marshal and school officials provided in N.D.C.C. § 15.1-06-09, the Fire Marshal has general responsibilities to abate conditions that are dangerous to persons. The Fire Marshal's responsibility is stated as:

If the state fire marshal or a deputy fire marshal finds in any building or upon any premises any condition which is a danger or a menace to the safety of life and limb of the occupants of that building or of any adjacent building, such officer shall issue an order for the immediate removal or correction of the dangerous condition. Any owner, agent, or occupant upon whom an order of abatement issued under this section is served, who fails to comply with the order within the time specified therein, is guilty of a class B misdemeanor, and is guilty of a class A misdemeanor upon a second or subsequent offense.

N.D.C.C. § 18-01-15.

With respect to school fire safety inspections, N.D.C.C. § 15.1-06-09 provides a procedure specifically related to schools that includes the involvement of state and local school officials. This process is designed to discover deficiencies and imminent fire hazards and provides processes to follow in the event either is discovered. However, the State Fire Marshal has responsibilities for determining the fire safety for any building and to abate conditions determined to be "a danger or a menace to the safety of life and limb of the occupants of that building or of any adjacent building." N.D.C.C. § 18-01-15.

Our law provides for circumstances where a general provision such as N.D.C.C. § 18-01-15 conflicts with a special provision such as N.D.C.C. § 15.1-06-09. In that regard, the law provides that whenever "a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions." N.D.C.C. § 1-02-07.

Sections 15.1-06-09 and 18-01-15, N.D.C.C., may be construed together to give meaning to both by recognizing the State Fire Marshal, and deputy fire marshals, may exercise independent judgment during any fire inspection. That is, even when inspecting a school, if the Fire Marshal, or deputy, believes that a condition discovered therein constitutes a danger or a menace pursuant to N.D.C.C. §18-01-15, the Fire Marshal may make the

LETTER OPINION 2002-L-30

May 10, 2002

Page 4

determinations and report required by N.D.C.C. § 15.1-06-09 and also commence the abatement process by the service of an order pursuant to N.D.C.C. § 18-01-15 on the school principal or superintendent.

The letter from the Department of Public Instruction noted above dealt with repeat fire code violations, and statements on documents submitted to the Department of Public Instruction claiming compliance with the fire code when later fire inspections showed the same violations to exist. I express no opinion on whether a prosecutable offense actually occurred, but it is a class A misdemeanor for any person to make a false statement in a governmental matter. N.D.C.C. § 12.1-11-02(2)(a).

Also, to compel performance of an act that the law specifically requires as a duty of office, a party interested in school safety might be able to pursue an action requesting a writ of mandamus compelling correction of fire code violations when they continue for periods of time beyond that provided by law. The plaintiff in a mandamus proceeding, however, must show a clear legal right to performance of the particular act sought to be compelled and that no other plain, speedy, or adequate remedy exists in the ordinary course of law. Christianson v. City of Bismarck, 476 N.W.2d 688 (N.D. 1991). This opinion deals only with the availability of fiscal sanctions for fire code violations where the Legislature has clearly indicated its intent.

I have not been requested to, and this opinion does not, opine on whether noncompliance by a public school district with other portions of the school approval process in N.D.C.C. § 15.1-06-06 could result in financial sanctions. It would seem evident that the requirement for school approval contained in that section was intended by the Legislature to have real meaning. The school approval process (as distinguished from accreditation) is in obvious need of legislation to clarify it and the authority of the Superintendent of Public Instruction to enforce it. The next Legislative Assembly needs to deal with the issue directly.

Sincerely,

Wayne Stenehjem
Attorney General

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cc: Dr. Wayne G. Sanstead, Superintendent of Public Instruction