MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1365

2005 HOUSE EDUCATION

HB 1365

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HB 1365**

House Education Committee

☐ Conference Committee

Hearing Date **25 January 05**

Tape Number	Side A	Side B	Meter #
2	X		620 - 4580

Committee Clerk Signature Jan Prindle

Minutes:

Chairman Kelsch opened the hearing on HB 1365.

Rep. Sitte, District 35, introduced the bill relating to voluntary participation in the NCLB (No Child Left Behind) Act of 2001. **(Testimony attached.)**

Rep Hawken: Of the 12% we get from the federal government for our state budget, what percent of that goes into administration.

Rep. Sitte: I have no idea, but the fiscal note does provide fascinating information.

Rep. Hawken: If we were to do this what would that do to our special ed money and other programs.

Rep. Sitte: Looking at past history, in the year 2000 only four states were in compliance with Goals 2000 and the federal government never did invoke the penalties on the other 46 states that were out of compliance. I really don't believe any state will be able to be in complete compliance with NCLB and I do think we would be leading the charge. I honestly question if

they would revoke all of our funding in special ed or any other particular area. The hue and cry would be so enormous that it would stop

Rep. Solberg: The fiscal note states ($130.2 million) is that the total amount of money coming to ND from NCLB?

Rep. Sitte: I believe that to be all of the federal funds we receive.

Chairman Kelsch: What is your plan to make up that $130.2 million loss to the school districts in the state. Some of these programs need to be in place. How would you recommend we make up that $130.2 difference?

Rep. Sitte: I am not a proponent of raising taxes. I firmly believe if we gave schools the flexibility and released them from the bureaucratic burden that they have been put under by all of these programs, they would be able to rearrange and reallocate and be able to provide a worthwhile education that is far more cost efficient than what we are doing now.

Rep. Herbel: How many states have opted out of NCLB?

Rep. Sitte: Mr. Gallagher said he was going to provide some information from Utah because that is the one state that opted out. After that letter they decided not to. I am curious to see the letter.

Rep. Mueller: You know if this bill passes, does an opt out school have an impact on those who choose to stay involved? Do they have to all be in or do we all have to be out of it?

Rep. Sitte: I have a different take on it than Mr. Gallagher. He says it's all or none. It comes down to that fundamental question of are we, as legislators, bound to follow the ND constitution and the irrevocable part of that constitution that says we are responsible for education in this

state, or will surrender that right to federal government and allow them to come in and say you're not meeting progress and therefore you need to replace your staff or need to close, whatever?

Chairman Kelsch: If school districts don't take the money, do they still have to test and they are still in the NCLB act because it is a federal act and is not necessarily tied to the dollars?

Rep. Sitte: It is my understanding that they will still have to test, but what I'm saying in this bill is that we want the protection that they will not have to face those sanctions.

Chairman Kelsch: Don't they still face those sanctions because this does not take you out of the NCLB Act, all you do is refuse the federal dollars, but you still have to comply with all the provisions of the Act?

Rep. Sitte: Isn't it still a state decision as to whether or not . . . How did we get into this, did the governor sign his name. If that is what has been done is the governor has signed us up for this program, to me it is an enormous abrogation of legislation responsibility to allow that to happen to say that we are going to let that 12% funding to come in and drive our standards, our curriculum, our testing, everything under the sun is being twisted by that little measly 12%. I think we could do far better in our own educational system. Forty years of federal funding has shown that throwing money at an issue does not solve the problem and that we have actually created more problems. Because we are in these lawsuits is because of the nebulous standards that they put out there. That is why MN has rejected its Profiles in Learning and going with more cognitive standards because they realize they opened themselves to lawsuits with what they had.

Chairman Kelsch: I'm sure Greg will answer the questions we have. It is my understanding it was not something we signed up for, it was not an opt in. It was a federal mandate that all states participate.

Sophia Pressler, Bismarck, testified in support of the bill. I know this bill has constitutional basis and I know that our country cannot survive under the present system. We are over $7 trillion in debt and how can the federal government bail us out when it itself is $7. trillion in debt. Let's look at the whole picture.

Greg Gallagher, director of Standards and Achievement, DPI, on behalf of DPI testified in opposition to HB 1365. **(Testimony attached.)** He also provided a compact disc containing the DPI presentation to the NCLBA Committee. **(The one copy of this CD is provided to the library to become part of the permanent record.)**

Rep. Mueller: As an individual school district we can get out of NCLB but the district must still participate in the sate assessment and accountability system, the administration of the NAEP assessment and the highly qualified teachers' provision of the act? Why opt out? What have you gained as a school district?

Gallagher: Your interpretation is correct. It is by the state's participation in the act there is a requirement for these things. What you gain, depending on the value you place on it, is at the local level you would not be under the regulations that attached to the individual titles themselves: Title 1, Title 2, etc.

Rep. Sitte: You say there is not need for this bill but on line 13 it says the Superintendent of Public Instruction may not impose financial penalty or other sanctions on a school or school district if they choose to terminate participation in this program. Some of the regulations we codified are relatively easy to strike as this overarching federal program has become too burdensome.

Gallagher: HB 1365 is problematic in what it doesn't say. If you were involved and opt out at a certain time there's an implication here that any obligation to the requirements of the law would cease and you could move on. You can't move on. There are laws that must be adhered to. If you are engaged for a half year you are still held by obligation to the actives during the six month period. That obligation still holds. The phrases in lines 13 - 15 is not appropriate. It may have matched Goals 2000, but it is not a good match for NCLB.

Chairman Kelsch: A specific question I asked Pat Glover, regional director of USDPE based out of Denver, is exactly what you said. Lines 13 - 15 can't apply to NCLB because federal law supersedes state law and federal law would still be able to tell the superintendent he has to impose those sanctions.

Gallagher: I would agree with that. Sometimes state law allows assurance at the state level a principlel the state holds true. It's a value statement to be honored.

Chairman Kelsch: You will remember when we crafted that bill what the intent was. The intent of this and the intent of what Rep. Sitte wants to do are not the same. It would probably have been better if you came in with a new law than try to change this one.

Rep. Sitte: I do remember the debate, I was writing about it. We debated it. I know the intricacy of Goals 2000 quite well. Mr. Gallagher repeatedly told school districts that participation in the program was completely voluntarily. We built the web and now we're dropping the net. We will allow federal law to supersede state responsibility. It is a loss of local control and some small districts, especially on the reservations, are unable to meet adequate yearly progress. We should not continue this course of action.

Gallagher: We just got through 18 months of testimony with the NCLB Committee. A couple of concepts must be understood. Under the issue of local control you have the ultimate control to engage or not engage in any element of the program. States cannot enter into participation. Under the ND approach, if a school was to identified as not making adequate yearly progress, it does not lead to the possibility of firing or for reconfiguration or take over of a school, there is no authority for that to occur. I stated the impact of the bill was ($130.2 million) for the biennium. That would not be inclusive of all elements of the NCLB funding in particular, Title 8 Impact Aid. That is a federal obligation to pay to local districts for any impacts because of federal installations. I did introduce the "fudge" word. The estimate is conservative. We did not want to overestimate but we need to make you make aware of that. It covers only the core ones that we believe to be germane to this particular bill.

Rep. Sitte: Could you provide us with a list of the sanctions that will be imposed on local districts.

Gallagher: You will find it on the compact disc I provided today.

Chairman Kelsch closed the hearing on HB 1365.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. **HB 1365**

House Education Committee

☐ Conference Committee

Hearing Date **31 January 05**

Tape Number	Side A	Side B	Meter #
2	X		800 - 1496
Committee Clerk Signature			

Minutes:

Chairman Kelsch opened discussion of HB 1365, participation in the No Child Left Behind Committee.

Rep. Haas: I move **do not pass.**

Rep. Norland: I **second.**

Rep. Hanson: Is it possible for a board to opt out?

Chairman Kelsch: As I was told by Patricia Clover from the Regional DoE office in Denver, you could opt out. The penalty is per the testimony of Greg Gallagher, you would lose all those federal funds. They would still have to comply with the testing and the annual yearly progress.

Rep. Solberg: I would not only be the funding that goes with the NCLB it would be other federal funding.

Chairman Kelsch: If you look at the fiscal note. On the second page it lists the money they would not receive.

Rep. Mueller: A school could opt out. How does that affect the Department and the rest of the state in terms of lost revenue?

Chairman Kelsch: The only ones are those who decide to opt out. Only those school districts would be affected. They would still have to participate in the NEAP assessment and the Highly Qualified Teacher provisions of the act, and AYP.

Rep. Hawken: If there were a certain percentage of schools not meeting AYP doesn't it affect the state.

Chairman Kelsch: Eventually, yes.

Rep. Hanson: Could they opt out without this bill.

Chairman Kelsch: Pat Glover told me that the law allows districts to opt out if they would so choose to.

Rep. Hanson: So this takes out the penalties that the Supt. of Public Instruction could put in.

Chairman Kelsch: Right.

Rep. Sitte: I do think we have to ask ourselves what's going to be happening in the next two years. Are we going to really implement those sanctions that allow for complete replacement of school boards and that whole list of sanctions that Mr. Gallagher mentioned. If we look at this 4 or 5 years down the road are we looking at total loss of local autonomy.

Chairman Kelsch: The local control is there because if they choose to opt out, they can do that but there are still things they have to comply with. That's the federal law and federal law will supersede the state law. We can't say those sanctions can't be opposed. They can opt out right now but still must comply with the rest of the federal law.

The question was called.

A roll vote was called.

Yes: 13 **No:** 1 **Absent:** 0 **The Do Not Pass motion carried.**

Rep. Norland will carry the bill.

FISCAL NOTE

Requested by Legislative Council
01/14/2005

Bill/Resolution No.: HB 1365

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.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$130,908,566	$0	($130,188,150)	$0	($130,200,000)
Expenditures	$0	$0	$0	$0	$0	$0
Appropriations	$0	$0	$0	$0	$0	$0

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

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$130,908,566	$0	$0	($130,188,150)	$0	$0	($130,200,000)

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

HB 1365 amends NDCC 15.1-21-06 to allow for the voluntary participation of local school districts in programs administered within the No Child Left Behind Act (NCLBA), PL 107-110. HB 1365 places full discretion on the part of local school districts regarding the manner in which NCLBA funds may be expended and allows for the termination of participation in NCLBA programs without regard to financial penalty or other sanctions.

The language of HB 1365 requires no expenditure of state funds to administer its provisions.

The Department of Public Instruction interprets the language of HB 1365 to be in conflict with the general administration provisions of NCLBA, thereby placing the State's assurance of continued NCLBA funding in jeopardy. The office of the Attorney General has advised the Department of Public Instruction that once the state has elected to accept federal funds the state is subject to all federal laws and regulations that regulate those funds. To the extent that HB 1365 conflicts with the federal law and regulations, the federal law controls. Therefore, if a school district were to comply with HB 1365 and disregard the federal law, it potentially could place the state's assurance of continued NCLBA funding in jeopardy. In the course of submitting its annual NCLBA program application to the U.S. Department of Education, the State Superintendent is required to sign legal assurances that the state is administering the provisions of NCLBA according to federal law and regulations. Local school officials must similarly sign these legal assurances. Additionally, in the course of required annual reporting or scheduled program monitoring conducted by the U.S. Department of Education, the Department of Public Instruction must provide evidence that the provisions of NCLBA are being administered according to federal law and regulations. The U.S. Department of Education independently audits all evidence and issues monitoring findings accordingly.

HB 1365 places state law at odds with federal law. The violation of federal law results in the application of sanctions defined under federal regulation. Pursuant to Part 81 of the Education Department General Administrative Regulations (EDGAR) regarding the enforcement of the General Education Provisions Act (GEPA), a series of possible financial penalties or program sanctions may accompany any monitoring finding from the U.S. Department of Education. It is reasonable to anticipate that if the Department of Public Instruction were to administer the provisions of HB 1365 then a monitoring finding would inevitably ensue. If the Department of Public Instruction were to persist in its violations, then the U.S. Department of Education would be permitted to withhold the affected state's program allocation or to demand repayment of the affected state's program allocation. Any penalties are dependent on the

extent of the state's violation.

In the absence of any delimiting factors, the Department of Public Instruction must assume that the state's full NCLBA may be in jeopardy as a result of an extensive violation. The Department of Public Instruction estimates that this loss of NCLBA funding may conservatively amount to $65,094,075 per year based on 2005-06 allocation estimates. This would equal approximately $130,188,150 for the 2005-07 biennium. Comparable amounts would be at risk during the 2007-09 biennium. This premise forms the foundation of this fiscal note; any lesser violations may result in lower funding exposure.

As support for this fiscal note, the Department of Public Instruction will submit within its formal testimony a February 2004 letter from the Dr. Eugene Hickok, Acting Deputy Secretary for Elementary and Secondary Education within the U.S. Department of Education, to Dr. Steven Laing, Utah Superintendent of Public Instruction, regarding the possible funding implications of the state's nonparticipation in NCLBA programming. This letter presents the U.S Department of Education's foundational principles that articulate the interconnection between NCLBA funding and the concomitant impact on a state's allocation, default, or repayment.

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.*

The effect of HB 1365 would constitute a 2005-07 biennial loss of approximately $130 million in federal funding for state and local educational programming. This impact would remain in effect into the 2007-09 biennium.

The programs that would incur a loss of funding include the following:

Title I Grants to Local Educational Agencies $63,104,906
Reading First State Grants $4,981,870
Even Start $2,028,362
Migrant $441,798
Comprehensive School Reform $928,330
Improving Teacher Quality Grants $27,790,418
Math and Science Partnerships $1,776,672
Educational Technology $4,780,040
21st Century Community Learning $9,712,558
Innovative Programs $1,970,112
State Assessments $6,975,338
Rural, Low Income Schools $115,206
Safe, Drug Free Schools $4,270,060
Language Acquisition $1,000,000
Education for Homeless $312,480

Total $130,188,150

   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.*

There are no anticipated expenditures in the administration of HB 1365.

   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.*

There are no anticipated state appropriations required within HB 1365.

The Department is available to answer any questions regarding this fiscal note.

Name:	Greg Gallagher	**Agency:**	Public Instruction
Phone Number:	328-1838	**Date Prepared:**	01/19/2005

Date: 31 Jan 05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1365

House **Education Committee**

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do not pass

Motion Made By Haas Seconded By Norland

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

Total (Yes) 13 No 1

Absent 0

Floor Assignment Norland

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

REPORT OF STANDING COMMITTEE

HB 1365: Education Committee (Rep. R. Kelsch, Chairman) recommends **DO NOT PASS** (13 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1365 was placed on the Eleventh order on the calendar.

2005 TESTIMONY

HB 1365

HB 1365
25 Jan 05

House Bill 1365—Voluntary participation in No Child Left Behind.
January 25, 2005

Madame Chairperson and Members of the Committee, I am Representative Margaret Sitte from District 35 in central Bismarck. House Bill 1365 is a housekeeping bill that updates language in the North Dakota Century Code. All this bill does is change "Goals 2000" to "No Child Left Behind." The bill simply reassures local districts that they are still in charge and that they cannot be closed by force of the federal government if they fail to meet Adequate Yearly Progress.

We know that Article VIII, Section 1 of the Constitution of North Dakota provides "A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the 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. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota." Each one of us took a solemn oath to uphold those words on the day we took office.

Federal funding of education began in 1965 with the Elementary and Secondary Education Act established for the purpose of closing the achievement gap that existed between advantaged and disadvantaged children. Since that time, every six to seven years, this country has witnessed an ever-growing federal bureaucracy that was going to transform education. These programs, America 2000 and

Goals 2000 promised that "By the year 2000 all children in America will start school ready to learn." "By the year 2000, all children in America will..." "By the year 2000, all children in America will..." Guess what? The year 2000 came and went and the achievement gap still exists.

So after 40 years of increased federal funding of education, what do we have to show for our money? A policy analysis by the Cato Institute released last summer titled, "A lesson in waste: Where does all the federal education money go?" explains that federal funding has increased from $25 billion in 1965 dollars adjusted for inflation to $108 billion in 2002. The report says, "Despite the huge infusion of federal cash and the near tripling of overall per pupil funding since 1965, national academic performance has not improved. Math and reading scores have stagnated, graduation rates have flatlined, and researchers have shown numerous billion-dollar federal programs to be failures."

This nation, which had been the tops in the world for turning out literate people, has succumbed to fads, performance-based standards and college remediation courses. More than 36 federal departments and organizations run major education programs that place heavy bureaucratic burdens on state officials, local school districts and teachers. As *A Nation at Risk* warned 22 years ago, "If an unfriendly power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war."

If we had seen the achievement gap close in these past 40 years, if we could see educational excellence stemming from No

Child Left Behind, if we really had 3,800 elementary teachers who needed to be requalified to teach, if we had the freedom to use these funds as local schools best need them, I would concur to take the money.

Instead, federal funding of education is a failure by every measurement. We have already lost our rigorous course of study that defined what children should know by the time they graduate from high school, and we have replaced it with nebulous performance-based standards modeled on the outcast national standards that were rejected by Congress. As a result, we see 27 percent of our students arriving at college needing remediation, even though their grade point averages are higher than ever.

If we continue down this No Child Left Behind course, within five years most of the schools in North Dakota will have failed to meet Adequate Yearly Progress, and they will face sanctions ranging from firing the staff to being subsumed by the state.

The truth is, when this statute was put into state law just four years ago, the state was promised that there were no strings attached to the federal funds. Now the strings have appeared, and the cost to the state is enormous.

Last session we learned that almost all of the No Child Left Behind funds were going to four areas: teacher training, tutoring, technology, and transportation to flee "failing" schools. If we returned to cognitive standards instead of performance-based standards—if we tested what children know instead of assessing what busywork they can do—we could improve our students' education immensely,

we would be free from the adequacy lawsuit, and we could deliver a much more cost-efficient, less bureaucratic system of education.

The ultimate question you will decide today is who is in charge? Is the North Dakota State Constitution worth defending, or is the federal agenda driven by federal dollars going to control North Dakota's future? Will 12 percent of our funding undermine our freedom? Let me remind you that this legislative assembly never voted to join No Child Left Behind.

Read this bill carefully. Realize that in four short years we have moved from a voluntary program to a mandate that has promised to close many of our local schools and supersede state authority for education. For just 12 percent of the state's education budget, North Dakota stands to lose all state autonomy. Make no mistake. No Child Left Behind isn't about closing the achievement gap; after forty years, it's obvious that mission has failed. No Child Left Behind is about federal control of an irrevocable state Constitutional responsibility and a local function. The threatened loss of $130 million is cheap compared to the most expensive cost to our freedom we will ever see.

HB 1365
25 Jan 05

TESTIMONY on HB 1365
By Greg Gallagher
Department of Public Instruction
January 25, 2005

Madam Chair and Members of the House Education Committee,

I am Greg Gallagher, Director of Standards and Achievement within the Department of Public Instruction. I am here on behalf of the Department to provide testimony in opposition to HB 1365.

HB 1365 amends NDCC 15.1-21-06 to allow for the voluntary participation of local school districts in programs administered within the *No Child Left Behind Act* (NCLBA), PL 107-110. HB 1365 places full discretion on the part of local school districts regarding the manner in which NCLBA funds may be expended and allows school districts to terminate their participation in NCLBA programs without regard to financial penalty or other sanctions.

The NCLBA is Not Equivalent to Goals 2000

HB 1365 substitutes the NCLBA in place of the now-expired *Goals 2000 Educate America Act* within NDCC 15.1-21-06 and, thereby, associates, effectively equates, the highly-flexible participation of Goals 2000 with that of the NCLBA.

It is, however, a mischaracterization to equate the flexibility inherent within Goals 2000 with the more-regulated, administrative provisions within the NCLBA.

The Goals 2000 Act, enacted as companion legislation to the 1994 reauthorization of the *Elementary and Secondary Education Act (ESEA)*, provided significant resources to the States to develop and implement the academic standards and support measures needed to meet the accountability requirements of ESEA. By legislative design, the Goals 2000 Act provided flexible financial resources to States and districts to meet the demands of ESEA, *outside* of the prescriptive, regulatory structure of ESEA.

Since its inception and with each successive reauthorization, the ESEA has provided resources to States and districts, but within clearly prescribed, approved, and regulated activities. The NCLBA, the most recent reauthorization of the ESEA, is no different.

The NCLBA (hereafter, the Act) authorizes funding for specific program activities within broadly defined Titles. These activities include services to disadvantaged

students, professional development, technology, school safety, innovation, accountability, and more. States and districts participate in these authorized Titles through prescribed application, reporting, payment, monitoring, and sanctioning rules. The Act provides various expressions of flexibility, including the transferability and consolidation of funds, where applicable, based on a district's approved program application. Compliance regulations ensure the proper administration of the Act's provisions.

In July 2003, the Department of Public Instruction submitted extensive testimony and support materials before the No Child Left Behind Committee detailing the programs and regulations inherent within the Act. I am providing to the House Education Committee a single compact disc that contains the contents of the July 2003 testimony and supporting evidence.

The Act provides to States and districts the opportunity to voluntarily enter into or opt out of participation in its programming and funding. Local school districts are completely free not to participate; indeed, several school districts have elected to exercise this option. The various administration sections within the Act identify requirements of participation and the regulatory compliance measures that accompany this participation. If a local school were to elect not to participate in program funding provided by the Act, that school district must, nevertheless, participate in the state assessment and accountability system, the administration of the NAEP assessment and the highly qualified teachers' provisions of the Act.

It must be understood that participation in the Act is voluntary for States and districts. In effect, the voluntary nature of the Act negates the need for HB 1365. HB 1365 is superfluous.

HB 1365 Establishes a Conflict Between State and Federal Law

HB 1365 states that a school district may expend the Act's funds in a manner the district determines best meet the goals of its educational enhancement. HB 1365 states that the State Superintendent may not sanction a school district if the school district chooses, at any time, to terminate its participation. Such blanket statements misrepresents the regulatory restrictions within the Act.

Within the Act, school districts may apply for and expend funds within a limited period of time as identified in the State's application process; otherwise, these funds are reallocated to other participating school districts. Within the Act, school districts may exit

participation; however, districts are responsible for any expenditures and compliance measures conducted during the time of their participation. Exiting participation does not remove a district's accountability during the time of its participation. Any blanket removal of accountability to a district is not permissible under the Act or its accompanying regulations.

The Department of Public Instruction interprets the language of HB 1365 to be in conflict with the general administration provisions of the Act, thereby placing the State's assurance of continued NCLBA funding in jeopardy. The office of the Attorney General has advised the Department of Public Instruction that once the state has elected to accept federal funds the state is subject to all federal laws and regulations that control those funds. To the extent that HB 1365 conflicts with the federal law and regulations, the federal law controls. I respectfully attach to this testimony an Attorney General's Opinion, dated October 6, 2004, regarding conflicts in federal and state law on impact aid payments. This opinion presents clear principles regarding the resolution of conflicts between federal and state law and the obligation of state agencies and state officials to comply with and fully enforce federal law.

In the course of submitting its NCLBA program application to the U.S. Department of Education, the State Superintendent was required to sign legal assurances that the state would administer the provisions of the Act according to federal law and regulations. Local school officials must similarly sign these annual legal assurances. Additionally, in the course of required annual reporting or scheduled program monitoring conducted by the U.S. Department of Education, the Department of Public Instruction must provide evidence that the provisions of the Act are being administered according to federal law and regulations. The U.S. Department of Education independently audits all evidence and it issues monitoring findings accordingly.

HB 1365 places state law at odds with federal law. The violation of federal law results in the application of sanctions defined under federal regulation. Pursuant to Part 81 of the Education Department General Administrative Regulations (EDGAR) regarding the enforcement of the General Education Provisions Act (GEPA), a series of possible financial penalties or program sanctions may accompany any monitoring finding from the U.S. Department of Education. It is reasonable to anticipate that if the Department of Public Instruction were to administer the provisions of HB 1365 then a monitoring finding would inevitably follow. If the Department of Public Instruction were to persist in its

violations, then the U.S. Department of Education would be permitted to withhold any affected program allocation or to demand repayment of the affected state's program allocation. Any penalties are dependent on the extent of the state's violation.

If state law were to allow school districts to comply with the provisions of HB 1365 and thereby disregard federal law, the state's assurance of continued NCLBA funding potentially could be placed in jeopardy.

In the absence of any delimiting factors, the Department of Public Instruction must assume that the state's full NCLBA allocation may be in jeopardy as a result of an extensive violation. The Department of Public Instruction estimates that this loss of NCLBA funding may conservatively amount to $65,094,075 per year based on 2005-06 allocation estimates. This would equal approximately $130,188,150 for the 2005-07 biennium. Comparable amounts would be at risk during the 2007-09 biennium. This premise forms the foundation of the fiscal note for HB 1365; any lesser violations may result in lower funding exposure.

As support for the accompanying fiscal note, the Department of Public Instruction attaches to this testimony a February 2004 letter from the Dr. Eugene Hickok, Acting Deputy Secretary for Elementary and Secondary Education within the U.S. Department of Education, to Dr. Steven Laing, Utah Superintendent of Public Instruction, regarding the possible funding implications of the state's nonparticipation in NCLBA programming. This letter presents the U.S Department of Education's position regarding the conditional nature of NCLBA funding and its impact on a state's allocation, default, or repayment of related program funding.

Madam Chair and members of the House Education Committee, the voluntary participation of States and districts is assured within the provisions of the Act. This assurance alone removes any need for HB 1365. Additionally, the language of HB 1365 raises a conflict with federal law and places the State's good standing and assured funding in jeopardy. This conflict between federal and state law requires that federal law supersede state law. HB 1365 constitutes an inappropriate amendment of state law to make voluntary that which is already voluntary in a manner that creates an unnecessary conflict with federal law and places the state at risk of losing potentially hundreds of millions of dollars. This is not good policy. The Department of Public Instruction recommends that the Committee defeat HB 1365.

Madam Chair, this completes my testimony. I am available to address any questions from the Committee. Thank you.

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 fiscal year -

> (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[1] 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.

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[1] "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.

§ 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[2].

> 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

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[2] 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"[3] 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[4]. 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); Shepheard 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 Hergenreter 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

[3] "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).

[4] 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

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).

February 6, 2004

Dr. Steven O. Laing
Superintendent of Public Instruction
Utah State Office of Education
P. O. Box 144200
Salt Lake City, Utah 84114-4200

Dear Dr. Laing:

I am writing in response to your recent letter of January 12, 2004 to Secretary Paige regarding the consequences of potential nonparticipation by the State of Utah in the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB).

The ESEA provides very significant financial assistance and programs to help educate students in every State, including Utah. As you know, in 2003 Utah received about $107 million in state-administered formula grants under the ESEA. These funds supplement the ongoing efforts of parents, teachers, and principals to help Utah's students meet the academic achievement standards Utah has established for its students. Federal funds under these programs focus especially on students with special needs, including students from low-income families, limited English proficient students, Native American students, and migrant students. While it is clear that it is strictly up to Utah to decide to utilize or forfeit these resources, we urge leaders to weigh these issues with great care before opting for a course that we believe is not in the best interest of Utah's children. This is especially true now, when the need to raise standards and hold schools and districts accountable for meeting these standards is more critical than ever.

As you know, the nation's federal investment in education historically has been targeted to provide resources to our children greatest in need. As noted above, for the 2002-03 school year, the total amount of ESEA funds available for Utah was approximately $107 million. If Utah, as a State, declined to accept future federal support offered through ESEA, districts would also not receive formula funds offered through ESEA. The achievement gap, which persists among Utah's students, would certainly continue if the State rejects resources devoted to help struggling students.

If Utah elected to forfeit only its Title I funds (approximately $46 million in 2003), the state administrative set-aside (1% of the total Title I allocation) that is used to support staff and statewide activities would be forfeited. Even so, State action to reject ESEA formula funds would not jeopardize Utah's or its districts' ability to apply for discretionary funding (such as the

Teaching of Traditional American History, Magnet Schools, or the Voluntary Public School Choice program). The rejection of State Title I funds would result in serious consequences to other programs. The formulas for programs like Educational Technology State Grants, Safe and Drug Free Schools, and 21st Century Community Learning Centers are driven, in part, by Title I. Thus, if Title I funds are declined, these programs would be severely affected at the State level and, as a result, at the district level. A similar situation unfolds if districts wish to decline only Title I funds.

Additionally, districts that reject ESEA formula funds (when the State of Utah accepts these funds) would still need to implement several key aspects of NCLB. These include assessing whether students can read and do math on grade level in grades 3-8 and high school, reviewing whether each school has made adequate yearly progress, and ensuring that teachers of core academic subjects are highly qualified.

Following are responses to your specific questions. For purposes of this letter, where your questions refer to NCLB, I have assumed your intent was to refer to the ESEA as amended by NCLB.

1. *If Utah does not participate in [ESEA], is the state still eligible to receive other federal funds for education, such as Carl Perkins, adult education, IDEA, and USDA Child Nutrition?*

Nonparticipation by Utah in programs under the ESEA does not disqualify it from receiving funds under the Carl D. Perkins Vocational and Technical Education Act, the Adult Education and Family Literacy Act, and the Individuals with Disabilities Education Act (IDEA). Although we do not administer the Richard B. Russell National School Lunch Act, it is our understanding that Utah's eligibility would not be affected by nonparticipation in ESEA programs.

2. *Would Utah's nonparticipation in [ESEA] impact any formula allocations of federal funds authorized outside of [ESEA]?*

Generally no, at least with respect to programs administered by our Department. If Utah does not participate in Title I, Part A, however, its funds under Title VII, Subtitle B of the McKinney-Vento Homeless Assistance Act would be affected because Utah's allocation under McKinney-Vento is dependent upon its relative share of Title I, Part A funds (see question 4 below).

3. *If the state did not participate in [ESEA] formula funds, would it be eligible to apply for discretionary funds, and what would be the federal requirements upon the state if such were possible?*

If Utah does not participate in the ESEA state-administered formula grant programs, it may still apply for discretionary grant funds, assuming it otherwise meets the requirements of an eligible applicant for the particular discretionary grant program. The federal requirements would be whatever requirements are included in the respective program's statute, regulations and applicable notices. In addition, the requirements of equal access to Boy Scouts and other similar groups for meetings (20 U.S.C. § 7905) would apply to the Utah State educational agency, or any local educational agency or public school in Utah if it accepts *any* funds provided through the Department and the requirements regarding unsafe school choice (20 U.S.C. § 7912) would apply if Utah accepts *any* ESEA funds, including discretionary grant funds.

4. *Could the state opt out of one or more titles of [ESEA] without opting out of the entire act, and what would be the federal requirements upon the state with regard to any titles in which it could continue participation?*

Utah may choose not to participate in one or more titles of the ESEA. Utah's nonparticipation under Title I, Part A, however, would have serious consequences for funding under other ESEA programs. For example, a number of the formulas for allocating federal funds are linked to the State's funding under the Title I, Part A program. As a result, if Utah chooses not to participate under Title I, Part A, Utah's formula funds under the following programs would be negatively affected:

- Even Start (Title I, Part B, Subpart 3)
- Comprehensive School Reform (Title I, Part F)
- State and Local Technology Grants (Title II, Part D, Subpart 1)
- Safe and Drug Free Schools and Communities (Title IV, Part A)
- 21st Century Community Learning Centers (Title IV, Part B)
- Education for Homeless Children and Youth (Title VII, Subtitle B of the McKinney-Vento Homeless Assistance Act)

Of course, if Utah does not receive funds under these programs, its local educational agencies (LEAs) would also not be able to participate.

As noted above, if Utah participates in *any* ESEA program, it must implement the unsafe school choice provisions (20 U.S.C. § 7912). Moreover, if the Utah State educational agency or any local educational agency or public school in Utah accepts *any* funds provided through the Department, it would be subject to the requirements of equal access to Boy Scouts and other similar groups for meetings (20 U.S.C. § 7905).

5. *May an individual school district or charter school opt out of participating in [ESEA] and the related funding?*

As was the case for ESEA programs prior to NCLB, an individual school district may choose not to accept funds under one or more titles of the ESEA. If Utah participates under Title I,

Part A, however, and a school district nevertheless chooses not to accept Title I, Part A funds, Utah is required – as a result of Utah's receipt of Title I, Part A funds – to ensure that such school district complies with certain ESEA provisions. These provisions include: (1) assessing all students in reading/language arts and mathematics in grades 3-8 and grade span 10-12 (20 U.S.C. § 6311(b)(3)); (2) making adequate yearly progress determinations for all schools (20 U.S.C. § 6311(b)(2)); and (3) ensuring that all teachers teaching core academic subjects are highly qualified by the end of the 2005-2006 school year (20 U.S.C. § 6319).

If a school district accepts *any* ESEA funds, the school district must comply with the military recruitment provisions (20 U.S.C. § 7908); certify that it has no policies interfering with constitutionally protected prayer (20 U.S.C. § 7904); and implement the unsafe school choice provisions (20 U.S.C. § 7912).

In addition, if a school district or public school receives *any* funds through our Department, the school district or school must provide equal access to Boy Scouts or other similar groups for meetings (20 U.S.C. § 7905).

If Utah state law considers a charter school to be an LEA, then the above analysis with respect to school districts would apply. If Utah state law considers a charter school to be a school within a traditional school district, then the decision of whether or not to participate in one or more titles of the ESEA is a decision of the school district, not of the charter school.

6. *If an individual school district or charter school does opt out of [ESEA], are other federal funds still available to that district or charter school?*

If an individual school district chooses not to participate in programs under the ESEA, such nonparticipation does not disqualify the district from receiving funds under the Carl D. Perkins Vocational and Technical Education Act, the Adult Education and Family Literacy Act, the IDEA, and the McKinney-Vento Homeless Assistance Act. As stated above, although we do not administer the Richard B. Russell National School Lunch Act, it is our understanding that a district's eligibility would not be affected by nonparticipation in ESEA programs.

7. *May an individual school district or charter school opt out of individual titles within [ESEA] and still participate in others? If so, are there any unique conditions the school district or charter school must follow other than those directly related to the titles in which participation continues?*

As was the case for ESEA programs prior to NCLB, an individual school district may choose not to participate in one or more titles of the ESEA. A district's nonparticipation under Title I, Part A, however, would have serious consequences for funding under other ESEA programs. As noted above, a number of the formulas for allocating federal funds are based,

in part, on funding for the district under the Title I, Part A program. Therefore, if a district does not participate in Title I, Part A, its funding under other programs would be affected. For example, 60 percent of an LEA's allocation under the Safe and Drug Free Schools and Communities Act (SDFSCA) is based on how much Title I, Part A funds the LEA received. If an LEA received no Title I, Part A funds, its allocation under SDFSCA would be significantly reduced. Allocations under the following programs are based, in part, on Title I, Part A:

- Reading First (Title I, Part B, Subpart 1)
- Education Technology Grants (Title II, Part D, Subpart 1)
- Safe and Drug Free Schools and Communities (Title IV, Part A)
- 21st Century Community Learning Centers (Title IV, Part B) (competitive priority)

Please refer to the answer to question 5 for a summary of other provisions that would apply, depending on the particular programs in which a school district participates.

These answers are provided as technical assistance to you and not as a formal legal opinion. Each program, both within and outside our Department, must be reviewed to determine whether any of the respective program's requirements are linked to or otherwise reference requirements of the ESEA. I would encourage you or counsel to the Utah Department of Education to review thoroughly relevant program statutes in the ESEA and other acts prior to making any decisions.

Under NCLB, funding for students in our nation's elementary and secondary schools is at an all-time high. Despite all the priorities competing for our tax dollars – strengthening our economy, defending our nation, and expanding opportunities for all Americans – the President's budget boosts education funding to $57.3 billion. In 2003, Utah received approximately $215 million dollars in federal funding for kindergarten through twelfth grade programs. As an example, Utah received $4.8 million for Reading First, $18.5 million to attract and retain highly-qualified teachers, and $5 million for annual assessments.

As we've done in the past, the Department stands ready to grant as much flexibility as possible for Utah in implementing this law. We are also happy to provide technical assistance to Utah. If you have questions about these responses or if I may be of additional assistance, please do not hesitate to contact me.

Sincerely,

Eugene W. Hickok
Acting Deputy Secretary