

OFFICIAL OPINION NO. 78-54, Joint power special education services agreements

November 6, 1978

Mr. Thomas C. Todd  
State Superintendent  
Elementary and Secondary Education  
Kneip Building  
Pierre, South Dakota 57501

Official Opinion No. 78-54

**Joint power special education services agreements**

Dear Mr. Todd:

You have requested an official opinion from this office based on the following factual situation:

**FACTS:**

Official Opinion 75-184 held that the second sentence of SDCL 13-39-53 authorized the center board of a multidistrict secondary occupational- vocational education center to enter into agreements with individual school districts to provide special education and adult education services. This type of multidistrict is authorized under the provisions of SDCL 13-39-40, et seq., and is created under procedures set forth in said statutes. Several school districts have indicated an interest in creating a multidistrict for special education services only under the provisions of SDCL 1-24 and 13-15-1. What is proposed is to create a multidistrict entity with a center board that would have the same authority as the multidistrict center board authorized by SDCL 13-39-40, et. seq.

Based on the above factual situation you ask the following question:

**QUESTION:**

Is there authority in SDCL 13-15-1 and SDCL 1-24 to create a multidistrict entity with a center board for the purpose of providing special education services?

SDCL 13-51-1 provides:

A school district is hereby authorized to enter into contracts and agreements with the state, its agencies and institutions and any political subdivisions for educational purposes and services.

As I understand the thrust of your question, the point of interest is whether there is the ability to create a "legal entity" pursuant to either SDCL 13- 51-1 or the South Dakota Joint Powers Act (SDCL 1-24).

The statutory provisions of SDCL 1-24 do not specifically answer this question and that lack of clarity is no doubt the point of your concern in asking for an opinion on this matter. Certainly, an argument can be made that the language of SDCL 1-24-5 would tend to imply the ability under a Joint Powers Agreement to create a legal entity. That statute in relevant provisions provides:

In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall, in addition to the items enumerated in Section 1-24-4 contain the following: . . .

SDCL 1-24-4(2) further confuses the area since it provides that a Joint Powers Agreement must specify:

The precise organization, composition, and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, *provided such entity may be legally created*. [Emphasis added.]

In 1975 and 1976, the Legislature amended the Joint Powers Act to provide that copies of any agreements which state agencies enter into shall be filed with the Attorney General and the Interim Rules Review Committee. This amendment, found at [SDCL 1-24-6.1](#), grew out of a concern on the part of the legislators involved that the Joint Powers Act could be used as a means to affect governmental reorganization by contract through creation of new legal entities which would in essence replace existing state government structure. Although the

amendment specifically relates to state agencies, it would also appear that a similar concern would also be in order insofar as other entities included within the definition of "agency" in 1-24 might also be concerned. See Chapter 9-41A for an example of legislative authorization to create a "legal entity." Consequently, it is my view that unless and until the Legislature specifically grants authority for the creation of such "legal entities" under a Joint Powers Agreement structure, there is no automatic authority in SDCL 1-24 or in [SDCL 13-15-1](#) to create such separate legal entities by agreement.

I do understand and appreciate the concern that is present in this matter of providing special education on a multidistrict basis. It is understandable why there is a desire and need for a separate legal entity to effect this type of structure. Based on the above statutes, however, and the concern of the Legislature for reorganization of government by contract through establishment of separate legal entities, as discussed in reference to SDCL 1-24-6.1 and 9-41A, I can only conclude that the SDCL 1-24 and 13- 15 should be narrowly construed as far as granting any authority for the creation by contract of such separate legal entities.

This does present an issue which the Legislature should be given an opportunity to consider, not only in reference to the special needs of the multidistrict occupational-vocational educational centers as noted in your request, but also with the broader range of issues under the Joint Powers Act.

Respectfully submitted,

William J. Janklow  
Attorney General

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