

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

July 21, 1966

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OFFICIAL OPINION NO. 67-68 pg. 6

Education. Establishment of public school system in Hutterite Colonies, apportionment of operating costs and teacher's salary. Area furnished and maintained by Hutterites. Validity of contract.

You have requested an official opinion based upon the following factual situation:

"The Doland School District has discussed the possibility of setting up a public school system in two Hutterite Colonies within their school district. The contract between the district and the Colonies would provide, generally, that the Colonies furnish the suitable areas, maintain the area, and undertake all of the costs of the operation of the proposed school and would possibly pay a portion of the teacher's salary. The school district, on the other hand, would employ the teacher, which teacher would be required to comply with the curriculum of the Doland School System. The teacher, of course, would have to have the same qualifications of any other teacher for the district, and the teacher would be subject to the entire control of the school district.

"It is felt by the school board that it may be more economical to have this arrangement than to bus these students into the city school system."

You have asked two specific questions:

"1. Is the Doland School District authorized to set up a school under such conditions?

"2. Would a contract between the school district and the Hutterites for sharing the operating costs of the school and teacher be valid?"

On March 10, 1966, the Attorney General in an opinion to Mr. M. F. Coddington discussed areas which would materially affect the relationship which could possibly exist between the Doland School District and the Hutterite Colonies. This opinion cites Sec. 1, Art. VIII of the South Dakota Constitution which establishes the duty of the legislature to maintain a public school system. The opinion then sets forth Sec. 16 of Art. VIII which expressly and emphatically prohibits aid by the state for any sectarian purpose and also prohibits any sectarian instruction in a public school.

The leading case in South Dakota interpreting these constitutional provisions is the case of *Synod of Dakota v. State*, 2 SD 366, 50 NW 632 (1891). The Court states in its opinion:

"It matters not how much consideration has been given by services rendered, the language is emphatic and unqualified that no money shall be given or appropriated for the benefit of or to aid any sectarian school, society, or institution."

SDC 1960 supp. 15.3103 reads as follows:

"No sectarian doctrine may be taught or inculcated in any of the public schools of the State."

Therefore, when considering the above cited Constitutional provisions and statutes, it would appear that the proposed contract would be void and unconstitutional if the school or if any religious instruction whatsoever was offered during the regularly scheduled school periods.

In 1929 the South Dakota Supreme Court in the case of *State ex rel Finger v. Weedman et al*, 55 SD 343, 266 NW 350, held that the reading of the King James version of the Bible in a public school amounted to an unconstitutional infringement of the religious liberties of Catholic children who were being forced to attend the readings. The Court stated that "the state as an educator must keep out of this field, and especially is this true in the common schools, where the child is immature, without fixed religious convictions." The Supreme Court of the United States has affirmed this position in the leading cases of *Engel v. Vitale*, 370 US 421, 8 L ed 2d 601, 82 S ct 1261, 86 ALR 2d 1285 (1963), and *Arlington School District v. Schempp*, 374 US 302, 10 L ed 2d 844, 83 S Ct 1560 (1963). Also on October 11, 1945, the Attorney General in an opinion addressed to Mr. J. T. Hines stated that an interpretation of SDC 15.3202 would prohibit the use of any public school building for any religious purpose whatsoever during school session.

"The statute clearly contemplates that the religious instruction shall be given outside the school building; that there may be no interference with the school and that the school district shall incur no expense therefor."

Although the statute has been amended, SDC 1960 Supp. 15.3202, the amendment in no way affects the section of the statute upon which the opinion was based. It should be noted that this opinion refers only to "religious instruction" and in no way denies the schools the right to teach classes in religion just as they teach classes in history, math or political science. In other words, the distinctions between different religious beliefs can be studied from an academic point of view in the same manner as the distinctions between communism and capitalism are studied.

Therefore, it would appear to be well settled that the school, if established, must, in fact, be a public school open to all children of school age. There must be absolutely no possibility of any control being exerted by the Hutterite Colonies over the use of the building, the curriculum and the teacher.

SDC 1960 Supp. 15.2301 states in part as follows:

"The school board. . has been created. . for the purpose of organizing, maintaining, and conveniently locating schools for the education of all children of school age within the school district."

This statute indicates broad powers existing in the board for the establishment of schools as long as all children are granted admission. Section 1, Chapter 74 of the 1963 Session Laws amending SDC 1960 Supp. 15.2105 reads in part as follows:

"Any school board shall have power to erect, purchase, lease; rent, sell, equip, and move schoolhouses. . . as the board shall deem necessary subject to the limitations as provided by law." SDC 1960 Supp. 15.2233 reads as follows:

"Every school district in this state is hereby empowered to accept, own, manage, and dispose of any grant, gift, devise, or bequest of money, or real or personal property; and the school board of such school district shall have the power to enter into such agreement for the receipt thereof upon such terms as shall be to the best interests of all parties and to make such rules and regulations as it may deem best for the ownership, management, and control of such property."

This statute appears to give the school district broad powers to contract with others on terms which would be to the "best interests of all parties;" certainly the proposed contract would serve the interests of the school district as well as the Hutterites.

However, concerning the contract itself, Chapter 30 of the 1963 Session Laws amending SDC 1960 Supp. 10.0708 reads in part as follows:

"It shall be unlawful for an officer of a... school district. to be interested, either by himself or agent, in any contract entered into by said. . . school district. Such contract shall be null and void from the beginning. Provided, however, that the foregoing provisions shall not be applicable when the contract is made pursuant to any one of the following subdivisions hereof, without fraud or deceit; but, such contract shall be voidable if the provisions of the applicable subdivision were not fully satisfied or contract present with at the time such contract was entered into: (3) Any contract with any...association... for which competitive bidding is not required and the consideration is reasonable and just, unless a majority of the governing body members. . . or any one of them is an officer or manager of such... association, then such contract shall be null and void."

SDC 13.1308 reads as follows:

"Every public officer, being authorized to sell or lease any property, or make any contract in his official capacity, who voluntarily becomes interested individually in such sale, lease, or contract, directly or indirectly, is guilty of a misdemeanor."

SDC 1960 Supp. 15.9909 reads as follows:

"Any contract of a school district in which a member of the school board or board of education shall be directly or indirectly interested shall be void, and any member of such board having an interest in such contract or the result thereof, who participates on behalf of his district in the making of such contract, shall be guilty of a misdemeanor."

These statutes consider the possibility of a conflict of interest issue and it is my opinion that the statutes must be applied to the school board at the time of the making of the contract.

In concluding, it is my opinion that a contract-between the Doland Independent School District and the Hutterite Colonies would be valid if executed subject to the constitutional and statutory limitations and requirements discussed in this opinion.

It is also my opinion that the Doland Independent School District is authorized to establish a school under such conditions.