



## NEBRASKA AUDITOR OF PUBLIC ACCOUNTS

Charlie Janssen  
State Auditor

Charlie.Janssen@nebraska.gov

PO Box 98917  
State Capitol, Suite 2303  
Lincoln, Nebraska 68509  
402-471-2111, FAX 402-471-3301  
[www.auditors.nebraska.gov](http://www.auditors.nebraska.gov)

March 21, 2016

Bryce Jorgenson, Superintendent  
Shickley Public School  
104 East Murray  
Shickely, NE 68436

Dear Superintendent Jorgensen:

As you may recall, during the course of recent pre-audit examination work at Shickley Public School (SPS), the Auditor of Public Accounts (APA) questioned the legality of the school's ownership and operation of a community swimming pool.

This issue came about as a result of the APA's obligation under governmental auditing standards to test for the auditee's compliance with, among other things, relevant laws and rules and regulations. Due to the legal complexities involved in making a proper determination for auditing purposes, we decided to seek the guidance of the Nebraska Attorney General (AG) in this matter. In early November of last year, therefore, we sent the AG a written request for a legal opinion. This month, we received a response to that inquiry, Op. Atty' Gen. No. I-16001 (March 1, 2016), a copy of which is enclosed.

Because a somewhat similar situation was found to exist in another school district, we requested the AG to address both situations simultaneously. For purposes of the present communication, however, suffice it to say that we asked, "[D]oes SPS have the authority to own and operate its public swimming pool?" In posing that question, we emphasized that our concern was not with the school's ownership of the swimming pool per se; rather, we had doubts as to the underlying authority, statutory or otherwise, for SPS to operate the swimming pool as a for-profit business enterprise with little apparent relationship to the school's educational mission or purpose. Our opinion request contained the following:

*The APA does not seek a statute specifically authorizing SPS to own a swimming pool. Many schools throughout Nebraska have swimming pools for athletic competitions and other educational purposes, and they are clearly entitled to do so. Rather, the APA seeks statutory support for SPS to own and operate a public swimming pool – or, for that matter, any other communal facility or commercial enterprise – as a for-profit business that, instead of serving as an educational resource "for use in instructing students in the practical application of skills taught in classes offered by such school district," as required under § 79-10,104, operates merely as a seasonal recreational facility for the community at large.*

The opinion received from the AG declined to answer outright the question posed. Instead, the AG observed, "While the concerns you express regarding the involvement of . . . SPS are understandable, it cannot be said that, as a matter of law, these school districts have exceeded their authority." Thus, the AG concluded as follows:

*[W]e believe the issue is whether a school district has the authority to operate a swimming pool . . . as a for-profit enterprise. We agree with your legal analysis that a school district may not own and/or operate a for-profit enterprise, which is not primarily for the education of its students. However, with the broad authority that school districts possess with respect to purchase and ownership of real estate and other equipment for educational purposes, the answer to your question is not entirely clear. The final determination as to whether or not a school district holds property for educational purposes, or for profit, is a question of fact that is best determined in a Court rather than by the Auditor of Public Accounts or the Attorney General's Office.*

According to the AG, the answer to the question raised by our opinion request "requires the school districts to be given a full opportunity to present and argue their case before a neutral finder of fact." Such an answer would be best obtained, the AG continued, through "a proper action brought by a taxpayer or taxpayers."

As noted at the outset of this letter, the APA's compulsory duty under governmental auditing standards is to question any suspected violation of relevant laws or rules and regulations by the auditee. In pursuing this matter with you and bringing it to the attention of the AG, we have fulfilled that obligation. Whether the taxpayers will act upon the AG's recommendation by initiating a civil action to obtain a judicial ruling regarding the legality of SPS's public swimming pool operation remains to be seen.

Regardless, in addition to discharging in full our auditing responsibilities, pursuing this issue has elicited from the AG not only acknowledgment of the legitimacy of our concern but also support for our legal analysis of this situation. Consequently, for your benefit, we wish to reiterate here the fundamental legal precept put forth by the AG:

*We agree with your legal analysis that a school district may not own and/or operate a for-profit enterprise, which is not primarily for the education of its students.*

Whether operating the community swimming pool at issue or undertaking any other endeavor, especially of a commercial nature, we encourage you to be mindful of this important guidance from the AG.

Sincerely,



Lance Lambdin  
Legal Counsel

Enclosure



STATE OF NEBRASKA  
**Office of the Attorney General**

2115 STATE CAPITOL BUILDING  
LINCOLN, NE 68509-8920  
(402) 471-2682  
TDD (402) 471-2682  
FAX (402) 471-3297 or (402) 471-4725

I# 16001

**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

**JOHN L. JELKIN**  
ASSISTANT ATTORNEY GENERAL

March 1, 2016

Charlie Janssen  
Auditor of Public Accounts  
P.O. Box 98917  
State Capitol, Suite 2303  
Lincoln, Nebraska 68509



Dear Auditor Janssen:

This opinion is written in response to your letter dated November 9, 2015, relating to your pending audit of two separate Nebraska School Districts, Auburn Public Schools (APS) and Shickley Public Schools (SPS). In your opinion request letter, you state that, "Both school districts are operating for-profit businesses that appear to exceed not only their express statutory authority but also their basic educational functions."

Your question to this office is this: "Does APS have the authority to own and operate its public movie theater, and does SPS have the authority to own and operate its public swimming pool?"

### ANALYSIS

As you correctly pointed out, "[s]chool boards are creatures of statute and their powers are limited. Any action taken by a school board must be through either express or an implied power conferred by legislative grant." *Busch ex rel. Knave v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W. 2d 672 (2001).

The Nebraska Legislature has declared that the mission of the State of Nebraska, through its public school system is to:

1. Offer each individual the opportunity to develop competence in the basic skills of communications, computations, and knowledge of basic facts concerning the environment, history, and society;

2. **Offer each individual the opportunity to develop higher order thinking and problem solving skills by means of adequate preparation in mathematics, science, the social sciences, and foreign languages and by means of appropriate and progressive use of technology;**
3. **Instill in each individual the ability and desire to continue learning throughout his or her life;**
4. Encourage knowledge and understanding of political society and democracy in order to foster active participation;
5. **Encourage the creative potential of each individual through exposure to the fine arts and humanities;**
6. Encourage a basic understanding of and aid the development of good health habits; and,
7. **Offer each individual the opportunity for career exploration and awareness.**

Neb. Rev. Stat. § 79-701 (2014) (Emphasis Added).

The legislature goes on to state: "It is the intent of the Legislature to encourage and support all public schools in this state in order to carry out the state's mission to promote quality education as described in section 79-701." Neb. Rev. Stat. § 79-702(2) (2014). The mission statement is broad and sweeping and appears to give school districts some latitude in their actions to provide a quality education. Thus, school districts appear to have broad authority to purchase a large number of things that are reasonably related to their educational mission. A school district is a body corporate and has both the express powers granted to it in law and implied powers necessary to enable them to perform their duties. See Neb. Rev. Stat. § 79-405 (2014) and *Cowles v. School District No. 6*, 23 Neb. 655, 37 N.W. 493 (1888).

Your letter concedes that, "Many schools throughout Nebraska have swimming pools for athletic competitions and other educational purposes, and they are clearly entitled to do so." See also, *Perkins v. Trask*, 95 Mont. 1, 23 P.2d 892 (1933), which specifically held that the Trustees of the school district were authorized to construct and maintain a swimming pool and therefore could assert performance of a governmental function as a defense to an action based on negligent operation of the pool, stating: "Under the broad rules announced in *McNair v. School District*, 87 Mont. 423, 288 P. 188, 69 A.L.R. 866, the trustees have authority to construct and maintain a swimming pool for the use of the pupils."

Auditor Charlie Janssen  
March 1, 2016  
Page 3

The concern then, is not whether a school district owns a swimming pool or a theater, but rather if the primary use of the pool or theater is for educational purposes or for a business enterprise.

It is also problematic that in this day and age, it is not unusual for the public to be charged to attend a high school sporting event, or for students to pay for their band instruments or school supplies. In Neb. Op. Atty. Gen. No. 02004 (2002), we stated:

[I]t is our opinion that under current law, a school district must provide free instruction for all courses which are required by state law or regulation and must provide all things necessary for that instruction, such as lab equipment, textbooks and so forth, without charge or fee to the student. For other activities which are not required by law or regulation, such as athletics, cheerleading, and chess club, the school district may require students to provide their own equipment and may charge fees, but the district is not required to do so.

Neb. Op. Atty. Gen. No. 02004, at 10.

Thus, the school district may charge students and the public for equipment and activities that are not required as part of the state's obligation to provide free instruction in the common schools. The mere fact that the school charges for the use of a swimming pool or a theater is not determinative if that pool or theater is primarily used for educational purposes or as part of a for-profit business enterprise.

As you correctly stated in your letter, in *Hemme v. School Dist.*, 30 Kan. 377, 1 P.104 (1883), the Kansas Supreme Court, in determining whether a water well constituted a necessity for a school house, held that was a question of fact best left for a jury. In the *Hemme* case, the district court judge had ruled, as a matter of law, that a water well was not a necessity for a schoolhouse. The Kansas Supreme Court ruled that the matter must be decided by a jury and not solely by the judge.

Accordingly, whether a theater or a swimming pool is held by the school district primarily for educational purposes, or for profit, is a question of fact, one whose answer is best determined through a proper suit rather than action of the Auditor of Public Accounts. While the concerns you express regarding the involvement of APS and SPS are understandable, it cannot be said that, as a matter of law, these school districts have exceeded their authority. Due process requires that the school districts be given a full opportunity to present and argue their case before a neutral finder of fact. It is our opinion that this can best be accomplished by a proper action brought by a taxpayer or taxpayers. *Fulk v. School Dist. No. 8 of Lancaster County*, 155 Neb. 630, 53 N.W.2d 56 (1952).

### CONCLUSION

School districts appear to have the authority to own a wide variety of equipment and facilities in order to meet the state's obligation to provide a free education in the common schools. Ownership of a theater or a swimming pool by a school district is not, in and of itself, an ultra vires act. Additionally, school districts may charge for the use of school facilities and school activities to defray the cost to taxpayers.

Rather, we believe the issue is whether a school district has the authority to operate a swimming pool or a theater as a for-profit enterprise. We agree with your legal analysis that a school district may not own and/or operate a for-profit enterprise, which is not primarily for the education of its students. However, with the broad authority that school districts possess with respect to purchase and ownership of real estate and other equipment for educational purposes, the answer to your question is not entirely clear. The final determination as to whether or not a school district holds property for educational purposes, or for profit, is a question of fact that is best determined in a Court rather than by the Auditor of Public Accounts or the Attorney General's Office.

Sincerely yours,

DOUGLAS J. PETERSON  
Attorney General

  
John L. Jelkin  
Assistant Attorney General