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Robert R. Corbin

LAW LIBRARY ARIZONA ATTORNEY GENERAL

January 23, 1985

Ms. Martha Blue
601 North Humphreys
Post Office Box 789
Flagstaff, AZ 86002

Re: I85-010 (R84-185)

Dear Ms. Blue:

We have reviewed the opinions expressed in your letter to Dr. Paul Rosier, Superintendent of the Page Unified School District #8, regarding the proposed intergovernmental agreement between the Page District Governing Board (District), the Bureau of Indian Affairs (BIA) and the Kaibeto Boarding School Board (KBSB) to operate a cooperative school (Kaibeto).

We concur with your opinion that the District would be entitled to state aid monies if it complies with state laws relevant to the operation of public schools set out in Title 15, Arizona Revised Statutes. We also concur in your opinion that the KBSB may not act in more than an ordinary advisory capacity with regard to the operation of the academic program at Kaibeto and that the KBSB may take independent legal action as to matters which are solely their responsibility pursuant to the cooperative agreement. We revise the remainder of your opinion as follows.

Dr. Rosier has asked whether District funds could be used for improvements of buildings and grounds at Kaibeto and

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whether an agreement to do so may be written on a year-to-year, five-year or longer than five-year basis. Several statutory provisions authorize a district governing board to either repair, make improvements or construct school buildings. See e.g., A.R.S. §§ 15-341.A.8, 15-341.A.12, 15-341.A.13. See also A.R.S. § 15-341.A.6. Such expenditures must be made consistent with the requirements of applicable State Board of Education (Board) rules.

The District may expend district funds for improvements and repairs so long as such expenditures are made in conformity with relevant rules and do not constitute an unconstitutional gift of public monies proscribed by Ariz.Const., art. IX, § 7. The District should, therefore, receive some form of consideration for an agreement to make improvements at Kaibeto. See e.g., Ariz. Atty. Gen. Op. I78-093. The District's agreement with the BIA or KBSB to make such improvements should have a term no longer than the term of the cooperative agreement. Absent a lease of buildings at Kaibeto by the District, the duration requirements of A.R.S. §§ 15-341 and 342 are inapplicable.

Dr. Rosier has also asked whether federal program funds become a part of the BIA budget or the public school budget. "All funds appropriated by the Congress for the support and administration of Bureau operated or contracted elementary and secondary educational purposes and programs shall be allocated in accordance with, and be distributed through, the Indian School Equalization Program (ISEP). . . ." 25 C.F.R. § 39.3(a) (1984). Federal regulations indicate that federal funds available through ISEP remain a part of the BIA budget and cannot be transferred to the public school budget. See e.g. 25 C.F.R. § 39.53(a), § 39.55, and § 39.60 et seq. (1984).

However, with the exception of ISEP funding, federal assistance would be available to the District through numerous programs administered by the United States Department of Education (DOE) and BIA including, but not necessarily limited to the following programs:

1. Aid to public school districts encompassing reservation lands. Johnson-O'Malley Act, 25 U.S.C. §§ 452-457.
2. Impact aid which flows directly to the school districts. 20 U.S.C. §§ 236-241-1, 631-647.

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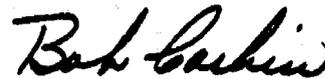
3. Elementary and Secondary Education Act monies funnelled to school districts by the Board. 20 U.S.C. § 3801 et seq.

4. Indian Education Act funds funnelled to school districts by the Board. 20 U.S.C. §§ 241aa-241ff, 1211a, 1221f-1221h, 3385-3385b.

Monies received from these programs would become part of the district's budget.

A potential problem which is not addressed by federal or state statutes and regulations is one of double funding. If the BIA and the District both include students who attend Kaibeto as part of their average daily membership (ADM) for purposes of calculating state equalization assistance and ISEP funding, the computations will not reflect the fact that the BIA and the District are sharing responsibility for the operation of Kaibeto. While double funding will not impact upon the availability of state equalization assistance initially, the calculation of the amount of state aid or ISEP funds to be awarded in succeeding years may need to be adjusted to reflect any double funding.

Sincerely,



BOB CORBIN
Attorney General

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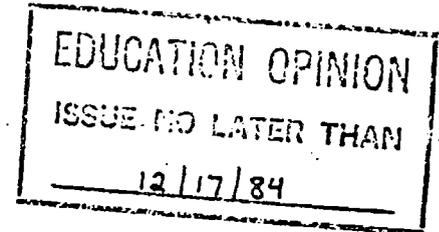
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October 2, 1984



Dr. Paul Rosier
Superintendent
Page Unified School District No. 8
P. O. Box 1927
Page, Arizona 86040

Re: Operation of Kaibeto School

Dear Dr. Rosier:

This letter is in response to your request for an opinion from us as to the four questions raised in your letter of August 29, 1984, regarding the Page School District's plans to operate a public school at a Bureau of Indian Affairs school compound.

The Kaibeto Community has approached the governing body of the Page School District to operate a state-run public school in Kaibeto and the governing board of the Page District is committed to do so. At the prompting of the Kaibeto Community and the District's concern with the admission levels of those students transferring from boarding school to public school, Page School District has begun negotiation with the Bureau of Indian Affairs Education Department and the Kaibeto Boarding School Board.

Kaibeto Boarding School is located within the boundaries of the Page Unified School District and within the exterior boundaries of the Navajo Indian Reservation. Simply stated, the Kaibeto Boarding School is representative of federal boarding schools on reservations across the country in that in addition to school buildings, dormitories, cafeterias, plant management buildings and staff housing, as of this date, the federal government provides not only the custodial, maintenance, cafeteria and dormitory personnel, but also the academic staff. All the Bureau boarding school teaching staff will be certified by commencement of the 1985-86

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school year. At present, most of the Bureau teachers are certificated. There were 432 students in Spring 1984 attending Kaibeto Boarding School grades K-8 and approximately 239 Kaibeto students (parents reside in or near Kaibeto) who attended K-12 at Page Public School.

At the present, the nexus of the parties' proposed agreement is one of a cooperative agreement through which the Page Unified School District would provide the basic educational program while the Bureau of Indian Affairs would provide supplementary educational, dormitory and other support services. The Page District follows a formula of at least devoting seventy percent of the instructional minimum per grade level to the State Board of Educations' prescribed courses of study in its schools and would do the same at the Kaibeto School.

Further, Page would hire those certificated Bureau teachers who desired to become public school employees subject to the usual hiring, screening and employment policies of the District. Further, all academic personnel including teachers and aides would be supervised and directed in their delivery of educational services and programs by the principal employed by Page School District.

The subjects taught in Kaibeto boarding School in the 1983-1984 school year included Reading, Health, Mathematics, Writing (Penmanship), Science, Social Studies, Music, Spelling and Language Arts. Academic electives in the past included Home Economics, Wood Shop and Art for 7-8 grades and it has been suggested that Physical Education, Music, Counseling grades 6-8 and Remedial Reading-Math become supplementary academic services.

QUESTION NO. 1. Will the Page School District be entitled to state aid monies if they fund and provide a basic educational program and the BIA funds and provides all peripheral, or special, or supplemental programs?

ANSWER: Yes.

DISCUSSION:

The question presented for our opinion is not how much state aid would be available to the Page School District if the district operated the educational program at Kaibeto Boarding

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School, since this calculation itself is complex and subject to many variables under the statutory scheme and U.S.F.R., but rather whether Page School District is entitled to state aid, i.e., equalization for the students attending Kaibeto Boarding School if the District operates a public school at the Kaibeto Boarding School plant. Several questions must be answered to reach the conclusion.

It should be noted that the computation of state aid and its statutory scheme were recently altered and then challenged judicially at least as far as it affects districts with heavy Indian enrollment.

State aid monies in Arizona, A.R.S. §15-971, et seq., are from appropriations made for such purpose to the several counties on the basis of state aid entitlement for the school districts in each county. In order to compute state aid, i.e. equalization assistance, the District must prepare exhibits to attach to school year budgets. These exhibits have student counts, teacher experience indexes, approved daily route miles for students eligible for transportation support, and so on. A pivotal factor for determining state aid is the average daily membership which is the total enrollment of fractional students and full-time students, minus withdrawals, of each school day for the current year, A.R.S. §15-901, as amended.

The school enrollment of a pupil is deemed, for the purposes of determining student count and/or apportionment of state aid, to be enrollment in the district of actual attendance (except for circumstances warranting Certificates of Educational Convenience and where there is no high school), A.R.S. §15-824. Further, enrollment or enrolled means when a student is currently registered in the school district, A.R.S. §15-901(10).

One step towards entitlement then would be for the Page Public School to make sure that in its operational program at Kaibeto the students are registered in conformance with the state board of education regulations. See A.R.S. §15-902(C). "The school enrollment of a pupil is deemed, for the purpose of determining student count and for apportionment of state aid to be enrollment in the school district of actual attendance . . ." By doing this, Page would avoid the problem addressed in Attorney General Opinion I84-085 of a district providing special educational services to a non-enrolled child and its conclusion that the child may not be counted in the districts' average daily membership for the

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purposes of state funding and would avoid the dual enrollment problem. While every child in Arizona is entitled to attend the public schools on a full-time basis and a public school is only required to voluntarily accept pupils from other schools for a portion of the day, students accepted by the public school in grades 1 through 8 under dual enrollment do not qualify as fractional students and a district would have no authority to receive state aid for those children. Attorney General Opinion No. 79-103.

But what happens in a split instructional program where some courses are taught by teachers from one institution for X period of time and other courses are taught by teachers from the other institution for Y period of time during the day?

The Governing Board of a public school must, by specific statutory direction, employ only certificated teachers. A.R.S. §15-502, as amended. "A teacher shall not be employed if the teacher has not received a certificate for teaching granted by the authorities." While this statute requires only those teachers employed by Page School District to be certificated, we are of the opinion that all instructional activities at the Kaibeto public-run school must be supervised by certificated personnel regardless of whether the staff member is paid by the Page School District or by the Bureau of Indian Affairs.

Whether a course or instructional activity is one of prescribed or optional study, it still needs to be taught by certificated personnel regardless of whether Page School District or the Bureau pays the employee. See A.R.S. §15-341(A)(18) which requires that the Governing Board:

"Provide for supervision over pupils in instructional activities of certificated personnel and in noninstructional activities by certificated or noncertificated personnel. Supervision in noninstructional activities does not require the physical presence of certificated personnel. For the purposes of this paragraph noncertificated personnel have the same powers and duties as certificated personnel."

Several Attorney General opinions have discussed which activities are instructional and which noninstructional. All have concluded that if credit is given for participation in an activity, it is instructional and must be supervised by certificated personnel. Attorney General Opinion Nos.

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I81-062 and 81-130. Thus, the second step is to assure that all teachers, regardless of which party employs them, are certificated.

The next step is for the Page School District to require that the properly enrolled students are full-time students in a course of study required by the state board of education based on minimum enrollment minutes per day depending on the students' grade levels. A.R.S. §15-902(E) adopts a formula for student count for extended school year programs based on equivalency of instructional time.

Chapter 7 of Title 15, Instruction Curriculum, Courses of Study, Textbooks addresses course study. Basically, the state board is allowed to prescribe the courses of study and the competency requirements for the grades, A.R.S. §15-701, et seq., but the Governing Board may prescribe a course of study and competency for promotion from the eighth grade which are additional or higher than the state board's, A.R.S. §15-701(B). Without belaboring the numerous statutory directions and state board prescriptions, suffice it to say that at the conclusion of Chapter 7, A.R.S. §15-798, emphasis is again placed on the governing boards to retain educational responsibility for their pupils.

The Basic Instructional Program or subject areas to be taught in the common schools, R7-2-301, is as indicated in the attachment marked "A." As is apparent, the prescribed course of study centers about the three R's and is a core program which parallels Page School's proposed academic instruction as well as Page's present course structure.

Thus, according to the state board's own regulations, the prescribed course of subjects are all subjects to be taught by Page Public School at Kaibeto and the courses of study which may be handled by the Bureau at Kaibeto are listed as optional courses.

A strict reading of A.R.S. § 15-901(2)(b)(i), as amended, defines a full-time student (for common schools) as regularly enrolled in a course of study required by the state board of education based on minimum enrollment minutes per day depending on grades. Therefore, "enrollment", "course of study", and instructional "minutes per day" are key words. The proposed cooperative agreement will provide that the students attending the Kaibeto School would be enrolled in the Page School, that the prescribed state course of study will be followed,

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that certificated teachers, the majority of whom would be employed by the Page Unified School District, would teach instructional courses, and over seventy percent of the instructional minutes per day would be instruction in prescribed courses. Thus, Page should be entitled to state aid.

QUESTION NO. 2: Are there any decisions concerning the Kaibeto School's operation that can be more than advisory by the present Kaibeto School Board?

ANSWER: No and yes.

DISCUSSION:

The question presented is actually a dual question, that is, in the area of the public school operations of the Kaibeto School, can the Kaibeto Bureau of Indian Affairs Board act in more than an advisory capacity and secondly, under any part of the proposed cooperative arrangement, can the Kaibeto Bureau of Indian Affairs Board act in other than an advisory capacity?

The answer to the first part of the question is no. The governing board of a school district is the governing authority, see A.R.S. §15-421 and §15-341, even though the Board has authority to enter into an agreement between the Page Unified School District and the BIA Kaibeto School by virtue of A.R.S. §15-824, as opined in the Arizona Attorney General Opinion No. 79-128.

The first question was primarily addressed in Arizona Attorney General Opinion No. 80-159, which involved the Tuba City Unified School District and Tuba City BIA Board's desire to operate the Tuba City High School jointly, which is a conglomerate of Page School and Bureau buildings and staff. In that opinion the Attorney General stated:

" . . . there are no statutory provisions authorizing a district governing board to share its governing powers with another entity. Such a sharing would constitute an improper delegation of power."

In the opinion the Attorney General recognized

"that the District Board may receive recommendations from the Bureau of Indian Affairs Board as it may accept recommendations from any other organization or individual. The District Board must exercise its own discretion in acting upon such recommendations."

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The answer to the second part of the question is yes, the Kaibeto Boarding School Board may take independent legal action on matters for which they are solely responsible, that is, at this point the dormitory program, food service, and transportation by Bureau buses.

QUESTION NO. 3: May Page District funds be used for improvements of buildings and grounds if an agreement is written on a year to year basis? on a five year basis? longer than five years?

ANSWER: Year to year--yes. Five years or more--yes, with voter approval.

DISCUSSION:

The first analysis that is necessary is whether the referenced agreement, regardless of its actual term, is a license or lease. If the agreement is a lease, then there are specific statutory requirements with respect to its length or term.

A.R.S. §15-342(10) provides as follows:

(The governing board may)

"10. Enter into any long-term leases or lease-purchase agreements for school buildings and grounds, as lessor or as lessee, for periods exceeding one year but not to exceed five years, except as provided in paragraph 11 of this section."

Subparagraph (11) provides as follows:

"11. Enter into long-term leases or lease-purchase agreements for school buildings and grounds, as lessor or as lessee, for a period of five years or more, but not to exceed ninety-nine years, if authorized by vote of the school district electors as provided in §15-491."

Clearly, the board has authority to enter into a year to year lease agreement without voter approval. It appears just as clear that the board can only enter into a long-term lease agreement with voter approval. A.R.S. §15-491(4) states that the governing board of a school district may call an election for the purpose of leasing, as lessor or as lessee, school buildings or grounds for a period of five years or more, but not to exceed ninety-nine years. This vote by the school district electors authorizes the governing board to negotiate for and enter into a long-term lease.

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Subsection E of A.R.S. §15-491 states that the governing board shall order the election to be held not less than sixty nor more than ninety days from the date of the order and the next possible date for the election to be held would be the second Tuesday in February; after that, the third Tuesday in May or the first Tuesday following the first Monday in November. At this point, it would probably be too late for a November 1984 election, considering the minimum of sixty days which has to pass from the date the order for election is given.

While A.R.S. §15-342(10) and (11) seem to have covered all lease terms from one year up to five years and from five years up to ninety-nine years, it is not clear which of the subsections would apply to exactly five years, i.e., whether a vote of the school district electors is required or not.

Fortunately, the Attorney General interpreted the law in this respect in Attorney General Opinion I83-079 to the Maricopa County Attorney concluding:

" . . . that if any district real property lease, by its terms, provides for a period of five years or greater, the Board must first obtain district voter approval. Conversely, voter approval is not required for those real property leases that, by their terms, provide for any period less than 5 years."

The obvious solution in the latter case would be to extend the lease term to a term almost but not quite 5 years, such as one day less, for example.

On the other hand, a longterm lease might make better economic sense, depending on the cost and the nature of any improvements the district is planning to make any leased property. For example, in Attorney General Opinion I83-123, the Attorney General found it well within reason and "sound business practices" that a right to demolish certain buildings should be granted to the governing board in view of the long-term lease arrangement and the finite useful life of real estate improvements.

A somewhat similar question to the one at hand was presented for review to the Attorney General when the Chinle School District, which played all of its junior high and high school baseball games on fields not owned by them, wanted to use their funds to install lights, build dugouts and install fences.

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The Attorney General in Opinion 78-93, however, revised the County Attorney's Opinion and said instead that the Chinle School District could expend its own money to make any improvements to improve the playing fields even though they neither owned nor leased the fields, as long as the improvements would not be a constitutionally prohibited gift. To make certain that the improvements could not be considered a gift, it was suggested that the district agree with the owner of the facility that, in consideration for the improvements, the owner would guarantee the district the use of the facilities during the life of the improvements, or, in the alternative, during such period of time as the parties agree represents the equivalency between the fair market value of the property and the cost of the improvements.

Further, the Attorney General confirmed the conclusion that the school district may enter into a lease agreement and improve the leased property.

In our opinion there may be circumstances where an option to renew could take a lease arrangement out of the statutory time constraints as was discussed in Attorney General Opinion No. 76-6. However, the option to renew would have to be a real option. In Opinion 76-6 the first lease purchase was not a real option because it required the District, if it did not renew, to pay the balance due in the option purchase schedule. In reviewing in the same opinion another lease purchase, the Attorney General said that that particular agreement offered the District the annual option of renewing the lease or cancelling sixty days prior to the end of the year term without any liability for the remaining purchase price. "The important fact is that the District is under no obligation to renew nor to pay the total price." An option then must in fact be an option in operation and not merely in label.

With respect to the first part of your question and assuming the agreement is a lease, yes, then Page District funds may be used to provide improvements of buildings and grounds year to year.

While there is no Arizona case directly on point, several cases have distinguished leases from licenses. Rendall et ux. v. Pioneer Hotel Inc., 222 P.2d 986, 71 Ariz. 10 (1950) involved an action to recover damages for injuries allegedly sustained as a result of a fall while dancing upon a ballroom floor located in the Pioneer Hotel during an annual benefit rodeo dance held by Junior Chamber of Commerce in the Pioneer ballroom which was donated without any charge to the Junior Chamber of Commerce. The facts emphasized the

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exclusive control that evening of the J.C.'s over the ballroom (including their employment of police and vigilantes) and the Pioneer Hotel's control over the adjacent bars which were staffed with hotel employees. The relationship of the parties create one of landlord and tenant due to the fact that the Pioneer Hotel surrendered exclusive control of the ballroom for that evening to the J.C.'s. The Court stated also that if the right to use the property is not exclusive the occupant is a mere licensee.

See also, Wenner v. Dayton-Hudson Corporation, 598 P.2d 1022, 123 Az. 203 (1979) which reiterates the case law principle for a license and which held that agreements between the operators of a department store and its merchant retailers were licenses, not leases, and thus the ordinance assessing the privilege tax was not applicable. The Court looked beyond the parties' declaration in the agreement that it was a license, but noted the characteristic terminology of a lease was absent from the agreement and that the agreement failed to give any exclusive possession of any particular portion of the building to the retailers. And Ulan v. Vend-A-Coin Inc., 558 p.2d 741, 27 Ariz.App. 713 (1976) when the court stated that a license is merely a permit or privilege to do what would otherwise be unlawful to do and noted that Vend-A-Coin received no right of possession to the premises but the mere right to enter the premises for certain limited purposes. In the Page-Kaibeto matter, the purpose of the Agreement "is to provide for sharing of facilities and provision of educational services by the Bureau of Indian Affairs, Kaibeto Boarding School and the Page Unified School District No. 8 in order to increase efficiency, prevent duplication of services, and provide a superior education program for eligible students of the Page Unified School District."

While Arizona Courts¹ have not examined agreements such as that proposed for Page-Kaibeto, it seems clear that they will look to the substance of the agreement to determine if it involves a license or lease.

¹Another jurisdiction, North Dakota, in Lee v. North Dakota Park Service, 262 N.W.2d 467 (1977), discussed an analagous factual situation. In Lee, the Court reviewed the grant by the United States for a public park and recreation place with a park district which agreement the Court categorized as a license and not a lease. The case listed a multitude of definitions of licenses and leases and applied these to the facts to determine that the license was a license and not a lease.

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Likewise, the authority for this Page-Kaibeto agreement are federal statutes, 25 U.S.C. §§ 13 and 452-457, allowing contracts with states for educational purposes for Indians as well as use of government property. These statutes parallel the authority of the Secretary of the Army to enter into agreements for recreational facilities in Lee.

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Again, the essence of the Agreement is that Page School District will operate a state-run public school program at the Kaibeto Boarding School physical plant alongside of the Bureau's dormitory program, food service, maintenance, transportation and certain optional academic programs (which includes funding and staffing). Thus, the proper characterization of the proposed agreement is one of a license and the statutory prohibitions regarding long-term leases would be inapplicable.

Attorney General Opinion No. 78-93 involving improvements on a playing field non-owned and non-leased by the school were okayed by the Attorney General so long as the property use paralleled the life of the improvements or an equivalent value. While the opinion does not designate the use as a "license", (which we think it was), the Attorney General's Office indicated the Chinle District could enter into a lease, but generally did not require them to do so. This opinion is authority for allowing the Page District to improve the Kaibeto buildings and grounds under a license, and not be subject to the special constraints of A.R.S. §15-342(10).

QUESTION NO. 4: Do Federal program funds become a part of the BIA budget or the public school budget?

DISCUSSION:

It is our understanding that this question concerns the issue of double funding, which matter is presently under scrutiny. The Acting Director, Office of Indian Education in Washington D.C. indicated in recent correspondence that federal Indian education regulations are "currently being revised to reflect the academic and dormitory standards and this issue of cooperative schools is under consideration."

Therefore, since we are forwarding this opinion to the Attorney General for his review pursuant to law, we are concerned that any discussion of this question under the present applicable federal regulations will be moot by the time the opinion is received and/or the effective dates of any agreement negotiated by Page School and the Bureau regarding the Kaibeto School.

Consistent with your request, we are forwarding a copy of this letter to the Office of the Attorney General for review, concurrence, or revision.

Sincerely,

[Handwritten Signature]
[Illegible Printed Name]