CITIES; COUNTY CONSERVATION BOARDS: Home Rule; sex offender residency restrictions. Iowa Const. art. III, § 38A; Iowa Code §§ 305.5, 364.1; 692A.2A (2007). Iowa Code section 692A.2A does not preempt cities from imposing residency restrictions upon convicted sex offenders through exercise of their home rule power and a county conservation board could exercise the authority granted by section 305.5 to prohibit sex offenders from camping in the parks. However, the reasonableness and constitutionality of locally enacted restrictions on the residency of sex offenders must be determined on a case-by-case basis. (Scase to Hansen, Emmet County Attorney, 9-19-08) #08-9-2

Douglas R. Hansen
Emmet County Attorney
Emmet County Courthouse
609 – 1st Avenue North
Estherville, Iowa 51334

Dear Mr. Hansen:

You have requested an opinion from this office concerning the authority of a county conservation board to prohibit registered sex offenders from camping in county controlled campgrounds. Through subsequent correspondence you also ask us to address whether a city may restrict the residency of sex offenders. We conclude that a conservation board is explicitly authorized to regulate use of parks under its control and that state law does not preempt local restriction of the residency of sex offenders. Similarly, a city in Iowa may use home rule authority to exercise police powers and regulate the residency of sex offenders.

As you note, Iowa Code section 692A.2A imposes a residency restriction upon convicted sex offenders, prohibiting a person who has committed a listed offense from residing "within two thousand [2000] feet of the real property comprising a public or nonpublic elementary or secondary school or a child care center." Iowa Code § 692A.2A(2) (2007). Both the Iowa Supreme Court and the federal Eighth Circuit Court of Appeals have examined the statute, found a rational connection between the government interest of preventing sex offenders from reoffending and the residency restriction, and concluded that the statute represents a reasonable exercise of the police power of the state. Doe v. Miller, 405 F.3d 700 (8th Cir.), cert. denied __ U.S. ___, 126 S. Ct. 757, 163 L. Ed. 2d 574 (2005); State v. Groves, 742 N.W.2d 90 (Iowa 2007); State v. Seering, 701 N.W.2d 655 (Iowa 2005).

As background to your inquiries, you note that a sex offender covered by the state law residency restriction has taken up residence at a campground operated by the Emmet County Conservation Board and that public use of the campground declined dramatically when the community learned he was living there. You ask whether the board may prohibit registered set offenders from camping overnight in the campground. Further, you note that the 2000-foot residency restriction encompasses a majority of the available housing in many cities and smaller towns which have a school or day care center. As a result, some offenders are looking to small towns which do not have a school or day care center to find unrestricted housing. In response,

two small towns in Emmet County, which do not have a school or day care center, have passed ordinances restricting the residency of sex offenders.

Each of your questions requires examination of the legal authority to act and the doctrine of preemption. As to Iowa cities, the Municipal Home Rule Amendment provides the authority to act and the basis for our preemption analysis:

> Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the General Assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the General Assembly.
>
> The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

IOWA CONST. ART. III, § 38A.

Iowa Code chapter 364 sets forth the powers and duties of cities and essentially mirrors the municipal home rule amendment.

> A city may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents . . ..

Iowa Code § 364.1 (2007); see also § 364.2(2) (2007) ("[a] city may exercise its general powers subject only to limitations expressly imposed by a state or city law"). "An action taken pursuant to this provision is an exercise of a city's police power." Home Builders Ass'n. Of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339, 345 (Iowa 2002). Police power refers to a municipality's "broad, inherent power to pass laws that promote the public health, safety, and welfare." Gravert v. Nebergall, 539 N.W.2d 184, 186 (Iowa 1995). In order to constitute a legitimate exercise of police power, an ordinance "must have a definite, rational relationship to the ends sought to be served by the ordinance." Goodenow v. City Council of Maquoketa, 574 N.W.2d 18, 23 (Iowa 1998). Limitations on the exercise of police power were detailed by the United States Supreme Court more than a century ago.

> [T]he state may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority in

> behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U.S. 133, 136-7, 14 S. Ct. 499, 501, 38 L. Ed. 385, 388 (1894). Reasonableness is the benchmark for assessing the scope of police power.

Both the Iowa Supreme Court and the Eighth Circuit Court of Appeals have rejected constitutional challenges to the sex offender residency restrictions contained in Iowa Code section 692A.2A. State v. Groves, 742 N.W.2d 90 (Iowa 2007); State v. Seering, 701 N.W.2d 655, 662-69 (Iowa 2005); Doe v. Miller, 405 F.3d 700, 709-16 (8th Cir. 2005), cert. denied, 546 U.S. 1034, 126 S. Ct. 757, 163 L. Ed. 2d 574 (2005). The courts recognized that "there can be no doubt in a legislature's rationality in believing that sex offenders are a serious threat in this Nation, and that when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." Doe v. Miller, 405 F.3d at 714-15 (internal quotations and citations omitted); State v. Seering, 701 N.W.2d at 665 ("the risks of recidivism posed by sex offenders is 'frightening and high.'"), citing Smith v. Doe, 538 U.S. 84, 103, 123 S.Ct. 1140, 1153, 155 L.Ed.2d 164, 184 (2003). In upholding the reasonableness of section 692A.2A, both courts found "a reasonable fit between the government interest of preventing sex offenders from reoffending and the residency restriction statute, the means utilized to advance that interest." State v. Seering, 701 N.W.2d at 665; Doe v. Miller, 405 F.3d at 715-16 (holding the chosen residency restriction rationally advances the State's interest in protecting children). These decisions clearly establish that, as a general proposition, restrictions upon where a convicted sex offender may reside constitutes a legitimate exercise of police power.

Having concluded that a city's home rule authority to exercise police power encompasses the imposition of residency restrictions upon convicted sex offenders, we must examine whether statewide regulation of this area preempts the proposed ordinance. See Goodenow v. City Council of Maquoketa, 574 N.W.2d at 25. While the concept of home rule clearly envisions the possibility that both the state and a city may regulate in the same area, a city's power to govern its local affairs may be preempted by state law. The concept of "preemption" finds its source in the constitutional prohibition against the exercise of a home rule power that is "inconsistent with the laws of the general assembly." IOWA CONST. ART. III, § 38A. "A local ordinance, however, is *not* inconsistent with a state law unless it is *irreconcilable* with the state law." BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes, 646 N.W.2d 857, 859 (Iowa 2002) (emphasis original), citing Goodell v. Humboldt County, 575 N.W.2d 486, 500 (Iowa 1998) and Iowa Code § 364.2(2). "A city may not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." Iowa Code § 364.3(3) (2007).

Preemption may be express or implied. "Express preemption occurs when the general assembly has specifically prohibited local action in an area. Obviously, any local law that regulates

in an area the legislature has specifically stated cannot be the subject of local action is irreconcilable with state law." Goodell v. Humboldt County, 575 N.W.2d at 492. Iowa Code chapter 692A, creating a state sex offender registry, was enacted in 1995. 1995 Iowa Acts (76 G.A.), ch. 146. Section 692A.2A was added to the chapter in 2002. 2002 Iowa Acts (79 G.A.), ch. 1157, § 3.

> **692A.2A Residency restrictions – child care facilities and schools.**
>
> 1. For purposes of this section, *"person"* means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.
>
> 2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.
>
> 3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.
>
> 4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply:
>
> *a.* The person is required to serve a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.
>
> *b.* The person is subject to an order of commitment under chapter 229A.
>
> *c.* The person has established a residence prior to July 1, 2002, or a school or child care facility is newly located on or after July 1, 2002.
>
> *d.* The person is a minor or a ward under a guardianship.

Iowa Code § 692A.2A (2007). Although a part of chapter 692A, the residency restriction within section 692A.2A is essentially a stand alone provision and applies to any person who has committed one of the listed criminal offenses against a minor, not merely to offenders who are required to be "registered" under the remaining provisions of chapter 692A. Wright v. Iowa Dept. of Corrections, 747 N.W.2d 213, 215-16 (Iowa 2008).

Because section 692A.2A does not explicitly limit the ability of political subdivisions to impose additional residency restrictions upon sex offenders, it does not expressly preempt local legislation on this subject. The question then becomes whether statute implicitly restricts local regulation.

> Implied preemption occurs in two ways. When an ordinance prohibits an act permitted by a statute, or permits an act prohibited

> by statute, the ordinance is considered inconsistent with state law and preempted. Implied preemption may also occur when the legislature has covered a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.

Goodell v. Humboldt County, 575 N.W.2d at 492 (internal citations and quotations omitted). Section 692A.2A does not appear to address sex offender residency restrictions in an all-encompassing or comprehensive manner that would indicate an intent to preempt or otherwise restrict local regulation on the topic. The statute applies only to delineated offenders and precludes residency only "within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility."

You point out in your request letter that cities may consider other locations, such as public parks, libraries, or campgrounds to present an alternative venue for offenders to prey on children. In light of the high recidivism threat posed by sex offenders and the desire to protect children from this risk, some small towns have enacted residency restrictions triggered by these additional locations. The fact that an offender may be subject to both state and local restrictions does not necessarily creates an inconsistency between the city ordinance and the statute. While a city ordinance may not prohibit an act allowed by state law, "[a] city . . . may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." Iowa Code § 364.3(3).

It may be argued that because the state statute allows an offender to reside anywhere which is not "within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility," a local ordinance which extends the residency restriction to new areas precludes an offender from residing in a location where the state law would allow residence and is inconsistent with state law. We believe this is a close issue, but conclude that an Iowa court would likely reject a preemption challenge to a local residency restrictions. See BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes, 646 N.W.2d at 860-61 (upholding a city ordinance which imposed additional restrictions for tire recycling upon a corporation which was operating in the city under a DNR permit; noting that the ordinance merely enhanced already enforceable restrictions, did not attempt to bypass, contradict or override the state permitting process, and promoted the underlying policy of the state statutory scheme); Sioux City Police Officers' Ass'n v. City of Sioux City, 495 N.W.2d 687, 694 (Iowa 1993) (when determining whether a particular ordinance violates the home rule provisions of the Constitution, the Supreme Court attempts to interpret state law to render it harmonious with the ordinance); 5 E. McQuillin, *The Law of Municipal Corporations*, § 15.20, at p. 197 (2004) ("according to many authorities, an ordinance making additional regulations which are reasonable and consistent with a regulatory act is not void as conflicting"). As the Court of Appeals noted in BeeRite, the Supreme Court has found local ordinances to be irreconcilable with state law when the ordinances "contradicted a clear policy of the statutory scheme regulating the same subject matter rather than merely increasing the details of the regulation." BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes, 646 N.W.2d at 860, citing Goodell v. Humboldt County and City of Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771, 772 (Iowa

1978); Cedar Rapids Human Rights Comm'n v. Cedar Rapids Cmty. Sch. Dist., 222 N.W.2d 391, 402-03 (Iowa 1974). "The contradictory ordinances in those cases bypassed statutorily-mandated routes to relief, authorized rights of action or created violations which were disallowed (not just merely unmentioned by statute), and/or they regulated action in areas where regulation had been expressly delegated to another entity." Id.

However, in this particular context, an additional concern arises. Even though we believe that section 692A.2A does not preempt an Iowa city from adopting an ordinance imposing additional residence restriction upon convicted sex offenders, such an ordinance may give rise to additional constitutional challenges. 5 E. McQuillin, *The Law of Municipal Corporations*, § 15.18, at p. 156 ("although an ordinance may be a clear and valid exercise of a municipality's police powers, the ordinance is not exempt from constitutional requirements"). Cases upholding section 692A.2A have considered and rejected claims that the state-wide residency restriction, standing alone, constitutes punitive banishment. Doe v. Miller, 405 F.3d at 719-20; State v. Seering, 701 N.W.2d at 667-68. Recently, an offender challenging the state-wide restriction "added another dimension" to the argument by contending that because local communities in the area where he resided had municipal ordinances imposing additional residency restrictions, "the cumulative effect of these ordinances [was] to banish him." Wright v. Iowa Dept. of Corrections, 747 N.W.2d 213, 218 (Iowa 2008). The court again rejected the banishment argument, finding that the offender was "still free to engage in most community activities and free to live in areas not covered by the residency restrictions." Id. Despite this outcome, a municipality considering imposition of a local residency restriction should be aware of the potential for a similar claim. As additional communities move to impose local restrictions and the area in which offenders are free to reside narrows, offenders may well argue that the impact has changed sufficiently to render a given restriction unconstitutional. See State v. Groves, 742 N.W.2d 90, 93 (Iowa 2007) (when applying "a rational basis test under the Iowa Constitution, changes in the underlying circumstances can allow [the court] to find a statute no longer rationally relates to a legitimate government purpose"). If the cumulative effect of the state restriction and a local ordinance were found to be unreasonable or to constitute an unconstitutional punishment or banishment, it is the local ordinance, not the state law, which would give way. Ollinger v. Bennett, 562 N.W.2d 167, 172 (Iowa 1997) ("It is well established that state law prevails over local ordinances.").

Turning to the conservation board question, we note that although not granted broad "home rule" powers, county conservation boards are statutorily authorized to control and manage park land owned by the county. County conservation boards derive their authority from Iowa Code chapter 350, which directs that each board is empowered to have the custody, control, and management of all property acquired by the county for public parks, preserves, playgrounds, recreation centers, forests, wildlife areas, and other conservation and recreation purposes. Iowa Code § 305.4 (2007). The conservation board is empowered to "make, alter, amend or repeal regulations for the protection, regulation, and control" of all parks and other property under its control. Iowa Code § 305.5 (2007). Code sections 461A.35 through 461A.57 contain specific regulations applicable to state parks, preserves, and other public lands, including a registration requirement for campers and a provision allowing the state natural resources commission to establish a time limit for camping at each state park or preserve, which shall not exceed a period of two weeks. Iowa Code §§ 461A.49, 461A.50 (2007). Pursuant to code section 305.10,

sections 461A.35 through 461A.57 "apply to all lands and waters under the control of a county conservation board, in the same manner as if the lands and waters were state parks, lands, or waters," but "may be modified or superceded by rules adopted as provided in section 305.5." Based upon these statutes, we have previously held that the statutes regulating state park activities "apply to all lands and waters under the control of a county conservation board in the same manner as if they were state park lands or waters unless and until other requirements are adopted by board rule." 1980 Iowa Op. Att'yGen. 901 (#80-12-20(L)) [1980 WL 26116] (interpreting 1979 Iowa Code chapters 111 and 111A, the prior versions of current chapters 305 and 461A).

Clearly, a county conservation board may enact regulations to control the use of county owned parks and property under their control. The legislature, by cross referencing the section 305.5 authority within section 461A.57, acknowledges that a conservation board may impose a time limit for camping within county parks. We also believe that a county conservation board could reasonably exercise its authority to regulate use of county parks by prohibiting sex offenders from camping in the parks.

We cannot, however, through our opinion process, address the reasonableness of the specific restrictions which have been or may be imposed by cities in your county or the county conservation board. Whether a particular ordinance placing restrictions upon the location of residences of convicted sex offenders is reasonable or would withstand constitutional challenge is dependent upon nature of the restriction, the specific challenge raised, and the impact of the restriction upon the individual or individuals who challenge the ordinance. See State v. Groves, 742 N.W.2d at 93 (recognizing that changes in the underlying circumstances can allow the court to find a statute no longer rationally relates to a legitimate government purpose); State v. Seering, 701 N.W.2d at 663-65 (assessing impact of residency restriction upon individual offender in upholding section 692A.2A); see also *Validity of Statutes Imposing Residency Restrictions on Registered Sex Offenders*, 25 A.L.R.6th 227 (2007). These are fact-based inquiries which are not appropriately resolved through an opinion from this office. 61 Iowa Admin. Code 1.5(3)(c).

In summary, we conclude that Iowa Code section 692A.2A does not preempt cities from imposing residency restrictions upon convicted sex offenders through exercise of their home rule power and a county conservation board could exercise the authority granted by section 305.5 to prohibit sex offenders from camping in the parks. However, the reasonableness and constitutionality of locally enacted restrictions on the residency of sex offenders must be determined on a case-by-case basis.

Sincerely,

Christie J. Scase
Assistant Attorney General

SCHOOLS; Attendance and tuition; Application of the junior-senior rule. Iowa Code §§ 257.6, 282.1, 282.6 (2007). Iowa Code subsection 257.6(1)(d) provides that "[e]leventh and twelfth grade nonresident pupils who were residents of the district during the preceding school year" are entitled to continue to attend the district from which they moved without complying with open enrollment procedures or paying tuition. Because our system of public schools is designed to fulfill the constitutional obligation to provide a free education to children residing in the state, we do not believe that the junior-senior rule is intended to allow students residing outside of the state to attend Iowa public schools without paying tuition. Therefore we conclude that Iowa Code subsection 257.6(1)(a)(4) should be applied only to students who reside within Iowa. (Scase to Jeffrey, Director of the Iowa Department of Education, 9-12-08) #08-9-1

September 12, 2008

The Honorable Judy A. Jeffrey, Director
Iowa Department of Education
Grimes State Office Building – 2nd Floor
L-O-C-A-L

Dear Director Jeffrey:

You have requested guidance from this office regarding application of Iowa Code subsection 257.6(1)(a)(4). Specifically, you ask whether the "junior-senior rule" established by this subsection applies to a pupil who has moved outside of the state of Iowa. Because our system of public schools is designed to fulfill the constitutional obligation to provide a free education to children residing in Iowa, we conclude that the statute should be applied only to students who reside within Iowa.

The statute at issue appears in chapter 257 of the Code, which establishes our system of financing public school programs. The Iowa school financing formula is largely pupil-driven. The amount of state foundation aid received by a school district equals "an amount per pupil equal to the difference between the amount per pupil of foundation property tax in the district, and the combined foundation base per pupil or the combined district cost per pupil, whichever is less." Iowa Code § 257.1(2) (2007). Code section 257.6(1) provides for the calculation of the "actual enrollment" for each school district for use in the finance formula. Subsection (1)(a)(4) allows a school district to include in the enrollment count

> [e]leventh and twelfth grade nonresident pupils who were residents of the district during the preceding school year and are enrolled in the district until the pupils graduate. Tuition for those pupils shall not be charged by the district in which the pupils are enrolled and the requirements of section 282.18 [procedures for open enrollment] do not apply.

Iowa Code § 257.6(1)(a)(4) (Supp. 2007).[1]

This provision is commonly known among Iowa school districts as the "junior-senior rule." As you observe in your request letter, the rule appears to be intended to "allow juniors and seniors to complete their secondary education at the district in which they were enrolled the previous year even if they no longer are residents of the district." Clearly, if a pupil and his family move from one Iowa school district into another Iowa district immediately prior to or during the pupil's junior or senior year of high school, the pupil may continue to enroll and complete his education at the first school district without paying tuition or going through the open enrollment process and the district which the student attends may continue to include the pupil within its actual enrollment count and receive state foundation aid toward the cost of educating the pupil. You ask whether the statute also applies to permit a pupil who has moved to another state to continue to attend the Iowa district of prior enrollment.

Our interpretation of the statute is guided by familiar principles of statutory construction, with the ultimate goal of determining legislative intent. City of Cedar Rapids v. James Properties, Inc., 701 N.W.2d 673, 675 (Iowa 2005). The "first step in ascertaining the true intention of the legislature is to look to the statute's language." Gardin v. Long Beach Mortg. Co., 661 N.W.2d 193, 197 (Iowa 2003). As the Iowa Supreme Court has frequently articulated, "we do not speculate as to the probable legislative intent from the words used in the statute." City of Cedar Rapids, 701 N.W.2d at 675 (quoting City of Fairfield v. Harper Drilling Co., 692 N.W.2d 681, 684 (Iowa 2005)). "When the language of a statute is plain and its meaning is clear, the rules of statutory construction do not permit us to search for a meaning beyond the statute's express terms. A statute is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute." City of Waterloo v. Bainbridge, 749 N.W.2d 245, 248 (Iowa 2008).

Subsection 257.6(1)(a)(4) provides that "[e]leventh and twelfth grade *nonresident pupils* who were residents of the district during the preceding school year" are entitled to continue to attend the district from which they moved without complying with open enrollment procedures or paying tuition. The district is allowed to include these students within the district's actual enrollment count for calculating and receiving state aid. The key to resolving your inquiry is whether the term "nonresident pupil" includes only pupils who remain in Iowa or also includes those who have moved outside of the state. The term "nonresident pupil" is not defined within chapter 257, or elsewhere within the Iowa Code. "Therefore, 'we may refer to prior [judicial decisions], similar statutes, dictionary definitions, and common usage' to determine its meaning." Cubit v. Mahaska County, 677 N.W.2d 777, 783 (Iowa 2004) (quoting State v. Kellogg, 542 N.W.2d 514, 516 (Iowa 1996)).

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[1] Code section 257.6 was amended by 2007 Iowa Acts (81st G.A.), ch. 22, § 59. The 2007 amendment separated and numbered the rest of the former unnumbered paragraphs within subsection 257.6(1). The subsection at issue here, previously designated as 257.6(1)(d), was not amended.

Because chapter 257, which establishes Iowa's school finance system, is closely related to provisions within chapter 282 regarding school attendance and tuition, we believe that otherwise undefined terminology should be read as having the same meaning in both statutes. "Statutes relating to the same subject matter, or to closely allied subjects, may properly be construed, considered and examined in light of their common purposes and intent." State v. Peterson, 347 N.W.2d 398, 402 (Iowa 1984). In Iowa, as in most states, the obligation to provide public education extends only to school-age children residing within the state. See IOWA CONST. ORIGINAL, ART. IX, 1ST DIV, §§ 1, 8, 12 and 15 (requiring the general assembly to "provide for the education of all the youths of the State"); Fennelly v. A-1 Machine & Tool Co., 728 N.W.2d 163, 173-74 (Iowa 2007) ("a comprehensive statutory scheme exists that defines the role of the state and the state department of education to provide a public education to Iowa's young people").

Public schools in Iowa are "free of tuition to all actual residents between the ages of five and twenty-one . . ." Iowa Code § 282.6 (unnumbered ¶ 1) (2007). For the purposes of section 282.6, "'resident' means a person who is physically present in a district" and meets other statutory criteria. Iowa Code § 282.6 (unnumbered ¶ 3) (2007). Absent an applicable statutory exception, "[n]onresident children shall be charged the maximum tuition rate as determined under section 282.24, subsection 1." Iowa Code § 282.1 (unnumbered ¶ 1) (2007) (the maximum tuition fee "is the district cost per pupil of the receiving district as computed in section 257.10"). Chapter 282 contains no provision for the payment of tuition by the parents of nonresident students. Rather, the tuition payments for nonresident children, prescribed by section 282.24, are paid by the "school corporation in which the student resides." Iowa Code § 282.20 (2007) (unnumbered ¶ 1). The Iowa legislature is empowered to require Iowa public school districts to make tuition payments, but lacks the authority to mandate tuition payments by out-of-state school districts. Given the statutory context, we believe that the legislature intended the term nonresident, as used in section 257.6 and throughout chapter 282, to mean residents of Iowa, but who reside outside of the school district which they attend.

In examining judicial decisions, we find that disputes regarding application of the term "nonresident children," as used in chapter 282, have typically arisen in the context of tuition charges to in-state nonresident students. C.f. Lakota Consol. Indep. Sch. v. Buffalo Center/Rake Comm. Schs., 334 N.W.2d 704 (Iowa 1983) (holding that an Iowa school district stated a viable claim for injunctive, declaratory, and monetary relief based upon allegations that a neighboring Iowa school district allowed residents of the plaintiff district to attend school without charging tuition to the "nonresident students" as required by statute); Independent Sch. Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N.W.2d 263 (1951) (mandamus action against county auditor to compel transfer of tuition funds by county from Iowa district in which students resided to Iowa district educating students). We find no judicial decision addressing whether the term "nonresident" includes students living outside of Iowa.

When construing a statute, our Supreme Court "look[s] at the object sought to be accomplished and the evils and mischief sought to be remedied to arrive at an interpretation that will accomplish the intended purpose rather than one which will defeat it." State v. Moore, 569 N.W.2d 130, 132 (Iowa 1997). Although section 257.6 does not explicitly distinguish between in-state and out-of-state nonresident pupils, we believe it is unlikely that the legislature intended

the junior-senior rule to allow students residing outside of the state to attend Iowa public schools at taxpayer expense without paying tuition. The function of our public school system is to provide an education to Iowa's young people, as mandated by our state Constitution. IOWA CONST. ORIGINAL, ART. IX, 1ST DIV. Public schools are funded through a combination of local property taxes, state aid, and federal funds – which are generally targeted to specific programs. See e.g. Fennelly, 728 N.W.2d at 173-74; Iowa Code § 256.9(7) (authorizing the director of the department of education to accept federal funds appropriated for education and rehabilitation purposes).

Our system of public schools is designed to fulfill the constitutional obligation to provide a free education to the children of this state and we do not believe that the junior-senior rule is intended to allow students residing outside of Iowa to attend Iowa public schools without paying tuition. Therefore we conclude that Iowa Code subsection 257.6(1)(a)(4) should be applied only to students who reside within Iowa.

Sincerely,

Christie J. Scase
Assistant Attorney General

ASSESSORS; COUNTY OFFICES: Sharing of county assessors. Iowa Code §§ 28E.1, 331.301(1), 331.323, 441.1, 441.17(1) (2007). The section 441.17(1) requirement that assessors devote full time to the duties of the assessor's office effectively precludes any sharing of those duties or combining of two assessor offices through a 28E agreement or through a local ordinance under home rule authority. Any sharing or combining of assessors or assessor offices would require a legislative amendment to chapter 441 spelling out the duties of the assessor and the affected boards of each respective assessing jurisdiction. (Miller to Schuling, Director, Iowa Department of Revenue, 2-15-08) #08-2-1

February 15, 2008

Mark R. Schuling, Director
Iowa Department of Revenue
Hoover State Office Building
Fourth Floor
L O C A L

Dear Mr. Schuling:

You have asked for an opinion from the Attorney General as to whether it is permissible for two counties to share an assessor through a chapter 28E agreement. As set forth below, we conclude that an agreement between two counties to share the services of a single assessor would be inconsistent with the chapter 441 requirement that each county assessor must devote full time to the duties of the office.

Chapter 28E agreements are intended to allow state and local governments to efficiently cooperate and share services and facilities with each other for the mutual advantage of each. See Iowa Code § 28E.1 (2007); Barnes v. Dept. of Housing and Urban Development, 341 N.W.2d 766 (Iowa 1984). Section 28E.3 authorizes political subdivisions "to exercise their powers jointly" and section 28E.4 authorizes public agencies of the state to enter into agreements for "joint or cooperative action." See Allis-Chalmers Corp. v. Emmet County Council of Governments, 355 N.W.2d 586, 588 (Iowa 1984). However, chapter 28E "does not confer any additional powers on the cooperating agencies, it merely provides for their joint exercise." Barnes, 341 N.W.2d at 767. Similarly, a 28E agreement shall not "relieve any public agency of any obligation or responsibility imposed upon it by law . . .." Iowa Code § 28E.7 (2007). If a political subdivision cannot do an activity directly under its statutory authority, then it cannot do that activity indirectly through a chapter 28E agreement. 1984 Iowa Op. Att'yGen. 167, 170 [1984 WL 60030]. If other provisions of the Iowa Code preclude counties from sharing an assessor, then a chapter 28E agreement cannot be used to achieve that goal.

Section 441.1 requires the creation of an office of assessor in every county in Iowa. In addition, cities of 10,000 or more in population may by ordinance provide for the selection of a city assessor and for the assessment of city property, but such an office is not required. The duties of all assessors, whether city or county, as set out in section 441.17, include a requirement that the assessor shall "[d]evote full time to the duties of the assessor's office and shall not

engage in any occupation or business interfering or inconsistent with such duties." Iowa Code § 441.17(1) (2007) (emphasis added).

Several opinions issued by this office have dealt with the issue of what is meant by devoting "full time to the duties of the assessor's office." We have consistently concluded that, although the provision does not mean that the assessor must devote 24 hours a day, seven days a week, to the assessor's job, the assessor is expected to devote normal or standard working hours to the assessor's office. See Iowa Op. Att'yGen. #97-2-2(L) [1997 WL 988714]; 1968 Iowa Op. Att'yGen. 370; 1947 Iowa Op. Att'yGen. 73. The most recent opinion on this point concluded that a county could combine the duties of the county assessor with those of the county zoning administrator, as long as the county considered "the requirement that a county assessor devote 'normal' or 'standard' working hours to the duties of the assessor's office and the possibility that a single person cannot physically perform the duties of both positions." Iowa Op. Att'yGen. #97-2-2(L).

The 1997 opinion relied, in part, upon a 1968 opinion where we determined that a county assessor was not precluded from serving as a county civil defense director as that position was not per se incompatible or in conflict with the assessor's duties set forth in section 441.17(1). 1968 Iowa Op. Att'yGen. 370. That opinion included the following observations about the requirement for the assessor to devote full time to that office.

> However, if the duties of civil defense director and county assessor are so extensive and demanding that one person would be physically unable to be engaged in both at the same time we are of the opinion that a situation of incompatibility would exist and that the holding of the office of civil defense director would be an occupation which would interfere or be in conflict with the office of assessor prohibited by §441.17(1). Furthermore, unless the duties of civil defense director could be performed at night and on weekends the requirement of §441.17(1) that the assessor "devote his entire time to the duties of his office" would be violated.

Id. at p. 372 (emphasis added).

In a 1947 opinion, we dealt directly with the issue of whether a city assessor could also act as the deputy county assessor. 1948 Iowa Op. Att'yGen. 73. At that time, every city over 125,000 population was required to establish an office of city assessor which was considered in that opinion to be a full time position. The opinion reasoned that if a city assessor was expected to devote his full time to the city as city assessor,

> then he does not have time to serve as a deputy county assessor and if such city assessor were appointed deputy county assessor, he would not be in a position to comply with the provisions of

> section 11, paragraph one, chapter 240,[1] which provides, "[The county assessor] shall devote his entire time to the duties of his office and shall not engage in any operation or business interfering or inconsistent with such duties." It is our judgment that no man can serve two masters and devote his entire time to each at the same time.

Id. at 75 (emphasis added).[2]

A 1971 opinion addressed use of a chapter 28E agreement to combine the offices of county assessor and optional city assessor for a city with a population of 125,000 or less. 1972 Iowa Op. Att'yGen. 252. The opinion reiterated and appeared to agree with the reasoning and conclusion of the 1947 opinion, that one person could not devote full time to the office of city assessor in a city with a population of greater than 125,000 and also serve as a deputy county assessor. Id. at 252. Without otherwise discussing the statutory requirement for a county assessor to devote full time to that office, the 1971 opinion concluded that a 28E agreement could be used to combine the office of county assessor with the office of city assessor in a city with a population of 125,000 or less in the same county. Id. at 253. The holding was expressly limited to cities with a population not exceeding 125,000.

No explicit rationale was given in that opinion as to why a 28E agreement would be applicable only to assessors in cities with a population not exceeding 125,000. At the time of the opinion the office of city assessor was optional in a city of that size. Iowa Code § 441.51 (1971). Cities with a population exceeding 125,000 were required to maintain a city assessor devoting full time to that office.[3] The opinion did not analyze whether the full time duty requirement set forth in section 441.17(1) applied to optional city assessors under section 441.51. Clearly,

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[1] The internal reference is to 1947 Iowa Acts, 52nd G.A., chapter 240, section 11, paragraph one, codified as section 441.17(1). The 1947 Act created the office of county assessor and provided for an optional assessor's office for cities between 10,000 and 125,000 in population.

[2] As discussed in our 1997 opinion, in the mid-1980s the Code Editor changed the section 441.17(1) wording from "his entire time" to "full time" for gender neutrality purposes. Iowa Op. Att'yGen. #97-2-2(L). "This editorial decision . . . did not amount to a substantive change to section 441.17(1)." Id.

[3] Section 441.51 authorizing the optional city assessor offices was repealed in 1974 and all assessors were then included under section 441.1. See 1974 Iowa Acts, 65 G.A., ch. 1230. Section 441.1 was further amended in 1997 making all city assessor offices optional and specifically provided for procedures to abolish the city assessor's office by ordinance, including abolishing the conference board, examining board and the board of review within the city assessing jurisdiction. See 1997 Iowa Acts, 73 G.A., ch. 22, § 1.

however, at the time of that opinion all county assessors and assessors in cities having a population of 125,000 or more were subject to the full-time-duty requirement. See 1968 Op. Att'yGen. 370. Therefore, it appears that the 1971 opinion was predicated upon the assumption that the full-time-duty requirement of section 441.17(1) was not applicable to city assessors for cities of 125,000 or less in population. Whether that assumption was correct or not is now irrelevant as no city is required to maintain an assessor and all assessors, city or county, are now required by section 441.17(1) to devote full time to their assessor's office. Because the question presented here involves the sharing of an assessor by two counties and each county is required to employee an assessor who is directed to "devote full time to the duties of the assessors office," the 1971 opinion does not control the outcome here.

The reasoning in our opinions has consistently supported the view that one person can not functionally hold two offices if the law requires full time service to be devoted to each office.[4] Current statutes clearly require both county and city assessors to devote full time to the duties of the assessor's office to which they were appointed. Any combining of two assessor positions or sharing of an assessor between two assessing jurisdictions would defeat this mandate and be contrary to the duties required of an assessor under section 441.17(1). Because we find that the full time duty requirement of section 441.17(1) effectively prohibits the sharing of an assessor between two or more counties, we must conclude that a chapter 28E agreement cannot be utilized to accomplish this purpose.

In addition, we have previously held that the county conference board may not "impose any duties upon an assessor beyond those required by statute." Iowa Op. Att'yGen. # 97-7-3(L) [1997 WL 988720]. "As the Supreme Court of Iowa has observed about a city assessor: '[H]is duties are fixed by statute, and when these are performed, he is not required to do more.'" Id., quoting Polk County v. Parker, 178 Iowa 936, 160 N.W. 320, 321 (1916); see 1994 Iowa Op. Att'yGen. 21 (#93-6-4(L) [1993 WL 264140] (a county attorney "is not required to perform any duty unless the duty is specifically mandated by statute").

We are aware that the office of county assessor may be combined with certain other county offices upon petition and election, pursuant to Iowa Code section 331.323 (2007). Several prior opinions have recognized the authority of the electorate to combine the assessor's function

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[4] Conversely, we have consistently found that an individual who serves in an office or position of employment to which a statute requires the individual to devote full time, may engage in private activity or agree to accept additional duties, as long as the added functions do not conflict with or interfere with the individual's ability to devote regular full time work hours to the original position. See Iowa Op. Att'yGen # 97-2-2(L) (finding that section 441.17(1) does not, per se, preclude combination of the position of county assessor with the position of county zoning administrator); 1990 Iowa Op. Att'yGen. 65 (assessor may take on additional part-time employment if the work is done during non-business hours of the assessor.); 1982 Iowa Op. Att'yGen. 119; 1968 Iowa Op. Att'y Gen. 370.

with that of another officer. See Iowa Op. Att'yGen. # 97-7-3(L); Iowa Op. Att'yGen # 97-2-2(L) [1997 WL 988714]; and 1990 Iowa Op. Att'yGen. 65 (#90-2-7(L)) [1990 WL 484874]. In these opinions we considered section 331.323 and concluded that the power of the electorate to combine offices does not extend the authority of the conference board or negate the full-time-duty requirement found in section 441.17(1). Neither section 331.323 nor chapter 441 authorizes the conference board or the electorate to approve the combination of the offices of two county assessors or the sharing of an assessor between two counties.

Similarly, home rule authority provided to the counties pursuant to Article III, section 39A of the Iowa Constitution does not provide authority for two counties to share an assessor. This section of the Iowa Constitution provides that "counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly. . . ." See also Iowa Code § 331.301(1) (2007). This caveat "places an important qualification on counties' powers. They may only exercise powers 'if not inconsistent with the laws of the general assembly.'" Worth County Friends of Agriculture v. Worth County, 688 N.W.2d 257, 261 – 262 (Iowa 2004). For reasons discussed above, we believe that any county action to share an assessor with a city or another county would be in direct conflict with the statutory requirement that each assessor shall devote full time to the duties of the assessor's office and would be preempted specifically by section 441.17(1) and generally by chapter 441. See also Iowa Code § 441.55 (2007) ("[i]f any of the provisions of this chapter should be in conflict with any of the laws of this state, then the provisions of this chapter shall prevail").

In summary, the statutory requirement that an assessor devote full time to the duties of the assessor's office effectively precludes the sharing of an assessor between two or more counties or the combination of county assessor offices through use of a 28E agreement or local ordinance enacted under home rule authority. Any sharing or combining of assessors or assessor offices would require a legislative amendment to chapter 441 spelling out the duties of the assessor and the affected boards of each respective assessing jurisdiction.

Sincerely,

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JDM:cml