

Opinion No. 49-5216

May 17, 1949

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Charles L. Rose Superintendent of Public Instruction Department of Education
Santa Fe, New Mexico

{*40} I am writing in reply to your inquiry of May 4, 1949, in which you inquire as to the effect of the Findings of Fact and Conclusions of Law rendered in the case of Lydia C. Zellers et al v. Raymond Ruff et al, otherwise known as the Dixon Suit.

This office is reluctant to express an opinion on any of the questions submitted for the reason that the position of the Board of Education and of the State of New Mexico is a passive one. The litigation basically is between private litigants and there is no knowledge of how far either party intends to carry this case. In discussing the Findings of Fact and Conclusions of Law with the counsel for the respective parties, we find that each gives a diametrically conflicting interpretation of the various findings of fact and conclusions of law and each has considerable merit on his side. It is understood that both parties intend requesting the trial judge to clarify various Findings of Fact and Conclusions of Law so that the exact meaning and intent of the trial judge may be determined. The results of these maneuverings is to put the Board of Education in a position like a ship at sea without a rudder.

The Findings of Fact and Conclusions of Law are conditional determinations and may be changed prior to the entry of a judgment. When the judgment is entered, it will be binding unless one of the real parties in interest should take an appeal and secure a stay of execution of the judgment until the Supreme Court of the State shall pass upon the various questions.

The first question which you present is whether the Board of Education can distribute free textbooks to students attending non-public elementary and secondary schools in New Mexico. In Conclusion of Law 11, the trial judge stated that "furnishing of free text books to schools other than tax supported schools" violates certain constitutional provisions of the New Mexico and United States Constitutions. In Conclusion of Law 13, Judge Hensley stated that the furnishing by the state of "sectarian and indoctrinated text books, or textbooks for Catholic schools only, to private parochial schools" is in violation of certain constitutional provisions. The basic question is what is meant by Judge Hensley's ruling. Clearly the Board of Education has no right to furnish sectarian textbooks to either a school or to children. Whether the trial judge in these particular Findings meant only that textbooks could not be given to non-public schools or whether his Finding was intended to mean that they could not be given to pupils is not clear. It should be pointed out that in the case of Cochran vs. Board of Education, 281 U.S. 370 and in the Everson case, 330 U.S. 7, the United States Supreme Court upheld a statute of Louisiana authorizing free textbooks for children attending non-public schools. It is,

therefore, the opinion of this office that you may continue the distribution of textbooks to children on an individual basis, but not to schools.

Your second inquiry is whether public school busses can furnish transportation to non-public school students. In Conclusion of Law 18, Judge Hensley ruled that {*41} the Board of Education could not authorize free school bus transportation for pupils attending parochial or sectarian schools. The prohibition of the transportation of parochial students would seem to be in conflict with the Everson case, supra. In the Everson case, however, there was a specific statute authorizing transportation. We have no such statute in New Mexico. It is believed, therefore, that ultimately this Finding of Fact by Judge Hensley may be found to be correct. We have made no inquiry as to whether you might have the inherent power to issue such a regulation or order authorizing the transportation of older children. It is suggested, however, that you continue the transportation of non-public school children until such time as a judgment is entered in this case, after which it will be necessary that you abide by the determination.

The third proposition submitted is whether Boards of education can employ or re-employ teachers involved in the pending litigation under the same terms as other persons are employed in the schools. It is our understanding that this is your most pressing problem since many of these teachers must be re-employed before the expiration of the present school term. Section 55-1102 of the 1941 Compilation provides as follows:

"No teacher shall use any sectarian or denominational books in the schools or teach sectarian doctrine in the schools, and any teacher violating the provisions of this section shall be immediately discharged, his certificate to teach school revoked, and be forever barred from receiving any school moneys and employment in the public schools in the state. Provided, that this section shall not be construed to interfere with the use of school buildings for other purposes authorized by the county board after school hours."

Judge Hensley, in making the basic determination that these people were employed and were teaching sectarian doctrine in the schools, is undoubtedly correct in following the law. It is suggested, therefore, that you do not re-employ any of these teachers, or if you should enter into a contract out of necessity, effective next fall, that you make the contract subject to the final judgment and ultimate adjudication of this cause.

It should be pointed out that the trial court did not prohibit in any way the employment of members of religious orders from teaching in tax supported schools. If such members are employed, they should be employed on an individual basis and the application of each processed as that of any lay teacher. The employment of such persons is, of course, subject to the further restriction that they shall not teach any sectarian doctrine while so employed.

The fourth and final question which you present is whether boards of education can rent non-public school buildings for public school uses when the buildings and rooms do not

carry religious signs of any denomination whatsoever. In Conclusion of Law 17 the trial judge prohibited the board of education "from renting, leasing, or acquiring for use in any way buildings or space in buildings for use as a public school or public school room when said building does not remain under the absolute control of the state." A blanket answer to your inquiry is difficult because of the difference in the situation in each locality. The test will have to be an individual one. This office is unable to issue a blanket statement as to when a building is in the "absolute control of the state" within the meaning of Judge Hensley's ruling. It is suggested that as each of these problems is {*42} presented, that you submit the individual facts, after which this office will give you an opinion in each case.