

Opinion No. 49-5240

August 15, 1949

BY: JOE L. MARTINEZ, Attorney General

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

{*76} I am writing in reply to your inquiry of July 20, 1949, regarding the distribution of free text books to children attending non-public schools. It is my opinion that the letter of this office dated May 17, 1949, properly disposes of the question. However, in order to avoid any ambiguity, I am rendering {*77} the following supplementary opinion:

Judge Hensley, in his Conclusions of Law, prohibited the furnishing of free text books to schools other than tax supported schools for the reason that such distribution of text books was in violation of Section 14, Article 9 and Section 3, Article 12 of the Constitution of the State of New Mexico. The difficulty as I see it is that Judge Hensley failed to take into consideration the provisions of the free text book law of the State of New Mexico set forth in Sections 55-1701 through 55-1720 of the New Mexico 1941 Compilation. If Judge Hensley is right in determining the question solely on the basis of the New Mexico Constitution, he must inferentially have held the free text book law of the State of New Mexico unconstitutional. It is believed, however, that the question of the authority of the school board to issue free text books to non-public schools can be determined independently of Judge Hensley's decision.

It should first be especially noted that Judge Hensley's opinion does not prohibit the distribution of text books to children, but to schools. The United States Supreme Court and numerous state supreme courts have consistently held that the distribution of free text books to the children attending private schools serves a public function. The best exposition of this proposition is contained in the language of the case of Cochran v. Louisiana State Board of Education, 281 U.S. 370, at page 374, which states as follows:

"The contention of the appellant under the 14th Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. Citizens' Sav. & L. Assoc. v. Topeka, 20 Wall. 655, 22 L.ed. 455. The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the state by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the supreme court of the state as follows (168 La.p. 1020, 67 A.L.R. 1183, 123 So. 655):

"One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state cost to them. It was for their benefit

and the resulting benefit to the state that the appropriations were made. True, these children attend some schools, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical {78} way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected adapted to religious instruction."

"The court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of the books that is granted to the children, or, in other words, the books are lent to them.'

"Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

This proposition has been reaffirmed again by the United States Supreme Court in the case of *Everson v. Board of Education*, 330 U.S., page 7, where, in passing on an analogous situation involving free bus transportation for children attending parochial schools, the court stated:

"It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran v. Louisiana State Bd. of Edu.* 281 U.S. 370, 74 L ed 913, 50 S. Ct. 335; *Holmes, J., in Interstate Consol. Street R. Co. v. Massachusetts*, 207 U.S. 79, 87, 52 L ed 111, 115, 28 S. Ct. 26, 12 Ann Cas 555. See *Opinion of Cooley, J., in Stuart v. School Dist.* 30 Mich. 69 (1874). The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking.' See *Barbier v. Connolly*, supra (113 U.S. at 31, 28 L ed 924, 5 S. Ct. 357). See also cases collected 63 ALR 413; 118 ALR 806. Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael v. Southern Coal & Coke Co.* 301 U.S. 495, 518, 81 L.ed 1245, 1258, 57 S. Ct. 868, 109 ALR 1327. Subsidies and loans to

individuals such as farmers and home owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history."

See also cases collected in 67 A.L.R. 1196 and 17 A.L.R. 299.

Approaching the problem, then, independently of Judge Hensley's decision, and having determined by the decisions of the U.S. Supreme Court that the assistance given to children attending private schools by means of free text books is in the furtherance of the public policy, the question reduces itself solely to an interpretation of the free text book act in § 55-1701 et seq of the New Mexico 1941 Compilation.

§ 55-105 (e), of the 1941 Compilation, Chapter 119, Laws of 1931, in defining the powers of the State Board of Education, provides:

"To furnish approved books to private or parochial schools, or to pupils or parents at cost, plus the cost of handling, such cost to be determined by {^{*79}} the State Board of Education."

It will be noted particularly that this law was enacted in 1931.

§ 55-1703 of the 1941 Compilation, being Chapter 76 of the Laws of 1941, set up a free text book division within the State Department of Education. In Section 1 of Chapter 76 of the Laws of 1941 the pertinent part provides:

"The State Board of Education shall require said Director to maintain a fidelity bond in an amount approved by the State Board of Education, and shall promulgate such rules and regulations not inconsistent with the provisions of this Act for the handling and distribution of free textbooks **to the school children of the State;**"

§ 5 pf Chapter 76 of the Laws of 1941 in pertinent part provides:

"At the end of the school year every county school superintendent, the administrative head of each municipal and independent school district and of **every other educational institution, private or public**, shall make an inventory of all free textbooks on hand, and a detailed estimate of the textbooks needed for the succeeding year, together with such other information, and on such forms, as the State Department of Education may by rule require."

§ 6 of Chapter 76 of the Laws of 1941 in pertinent part provides:

"From such information the State Superintendent of Public Instruction shall make a detailed budget for each county, municipal or independent school district, and for all other educational institutions, public or private, the pupils of which are entitled to receive free textbooks, which shall include cost and freight of books, and no requisition for books shall be made by such school units in excess of such budget."

Section 9 of Chapter 76 of the Laws of 1941 in pertinent part provides:

"Free textbooks shall hereafter be distributed to the county, municipal and independent school boards of education in this State and to the superintendents or other officials in charge of other institutions, the students of which are entitled to receive free textbooks by the publishers of such textbooks with which the State Board of Education has made or shall hereafter make contracts covering the furnishing of such textbooks, through such agencies as said publishers may select."

§ 12 of Chapter 76 of the Laws of 1941 provides:

"That Chapter 112 of the New Mexico Session Laws of 1933, except Sections 5 and 6 thereof, and Chapter 83 of the New Mexico Session Laws of 1935, and all acts and parts of acts in conflict herewith are hereby repealed."

Section 5 of Chapter 12 of the Laws of 1933, which was reincorporated by reference in Chapter 76 of the Laws of 1941, provides in part as follows:

"Said free text books shall be distributed **to the children of this state attending schools in this state**, and the parents or guardians of such children shall be responsible for the loss, damage or destruction of books issued to their children or wards, and no books shall be issued to the child or ward of any parent or guardian who refuses to pay for such book damaged, lost or destroyed * * *."

{*80} It is believed that the legislative continuity above outlined is self-explanatory. Chapter 76 of the Laws of 1941 specifically repeals all acts and parts of acts in conflict therewith. The language contained in Chapter 112 of the Laws of 1933 and reincorporated in Chapter 76 of the Laws of 1941 specifically makes free text books available "to the children of this state attending schools in this state."

That there is no ambiguity in this legislation and that it was clearly the plan in the enactment of Chapter 76 of the Laws of 1941 to make text books available to all children attending schools in the state, regardless of the denominational or private interests of the operating schools under the supervision of the State Board of Education, is particularly made clear from the fact that the number of children in the private or parochial schools were to be accounted for in determining budgets for the text book funds for the ensuing year.

This office is in a position to render the legal advice heretofore given, but is in no position to advise as to the mechanics of distribution. § 55-1703 of the 1941 Compilation confers on the director of the State Text Book Division the authority to issue the necessary rules and regulations for the handling and distribution of the text books to the school children. The rules and regulations which may be necessary to effectuate the distribution of these books is an administration and mechanical problem.

Trusting the foregoing sufficiently answers your inquiry, I remain