

Opinion No. 51-5339

March 5, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Honorable Edwin L. Mechem Governor, State of New Mexico Santa Fe, New Mexico

{*15} I am writing in reply to your oral request regarding the constitutionality of Senate Bill 117.

This is an act broadening the scope of school bus transportation by extending it to allow transportation of all pupils attending school in compliance with the compulsory school attendance laws of the State of New Mexico under certain conditions. The act permits counties to furnish this transportation from general funds only for the transportation of pupils attending other than state public schools in instances where they can be carried upon the same terms, in the same manner, and over the same routes of travel as is provided for pupils attending the public schools.

The present law authorizes the transportation of pupils to public schools only. In the case of Zellers, et al, v. Huff, et al, No. 22178 on the Civil docket of the District Court of Santa Fe County, the {*16} State Board of Education was enjoined from providing school bus transportation to children other than public schools. Prior to the issuance of the injunction, these children were being transported under the present law, which provides funds for such transportation from the Public School Equalization Fund. This case is now being appealed and will be submitted to the Supreme Court of New Mexico for determination at the May, 1951 session. It is rather difficult to adequately appraise the effect of the Dixon case since the correctness of the rulings of the trial court are being questioned by all parties concerned.

The injunction issued by the court was based upon the alleged violation of the 1st amendment to the United States Constitution and of Section 3, Article 12 and of Section 9, Article 14 of the Constitution of the State of New Mexico. There is considerable merit to the contention that the law construed by the District Court would not permit this transportation under Section 3, Article 12 of our Constitution. This section states that none of the proceeds from the sale of state lands, or any other funds appropriated, levied, or collected for educational purposes shall be used for the support of any sectarian, denominational or private school. As the funds being used for transportation came from the Public School Equalization Fund it might be said that school funds were being used for the support of a sectarian or denominational school. There is also considerable merit to an argument stating that they were not being used for the support of a school at all. In either event, it would seem that this objection is overcome by Senate Bill No. 117, which specifically prohibits the use of "any funds or taxes raised or levied for educational purposes or appropriated in aid of the state public schools." Thus this act vitiates the objections to Section 3, Article 12 of the New Mexico Constitution.

After a reading of the majority opinion in *Everson v. Board of Education*, 220 U.S. 1, it is difficult to understand the holding of the District Court in the Dixon case to the effect that school transportation violates the federal constitution. The *Everson* case, which was decided in February, 1947, upheld the validity of a New Jersey statute which provided that when a school district provided transportation for public school children to and from school, transportation on any such established school route to any other point on the route should be supplied to school children residing in such school district in going to and from schools other than public schools. It further provided that although the district might not provide transportation if there were children living at great distances from any school house, either parochial, public or private, the district could make arrangements for reimbursing the parents of these children for their cost of transporting the children to and from school.

The majority of the Supreme Court of the United States held that this statute was constitutional as against a claim that it violated the 1st amendment of the Federal Constitution as made applicable to the states by the 14th amendment to the Federal Constitution. The majority opinion 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."

Cited was the case of *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, where the Supreme Court of the United States, in an unenumerated opinion, held a statute giving free text books to all children attending school under compulsory attendance laws was not unconstitutional. The majority opinion closed with this thought. Under other decisions of the United States Supreme Court, parents may discharge their duty under state compulsory education {*17} laws by sending their children to religious schools, if those schools meet the educational requirements of the state. The parochial schools involved in the *Everson* case, supra, meet those requirements. The state was not contributing money to the schools and was not supporting them.

"Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." It does not appear that Senate Bill No. 117 does any more than just that.

The amendment contained in Senate Bill No. 117 was patterned from Chapter 156 of the 1944 Act of the General Assembly of Kentucky. This act was upheld by the Court of Appeals of Kentucky in the case of *William E. Nichols, County Judge, et al, v. Susan B. Henry*.

The statutes providing for school bus transportation for all pupils have been upheld in some states and stricken in others, both before and after the *Everson* case, supra. The decisions have been based primarily upon violation of provisions of state constitutions.

It is the belief of the writer that Senate Bill No. 117 does not violate the Constitution of the State of New Mexico and that the Everson case, supra, has precluded the raising of any question regarding violation of the United States Constitution by acts of this nature.