

Opinion No. 51-5453

November 5, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Hon. Tom Wiley Superintendent of Public Instruction State of New Mexico Santa Fe, New Mexico

{*162} Recently you requested an opinion from this office inquiring as to the effect of the judgment in the Dixon case, as modified and affirmed by the Supreme Court of New Mexico, with respect to the policy to be pursued by the State {*163} Board of Education in the matter of furnishing free text books to pupils of non-public schools.

Your attention is invited to an opinion written by the Attorney General on August 15, 1949, addressed to the Superintendent of Public Instruction, which reviewed the effect of the judgment in the Dixon case upon the policy of the State Board of Education in furnishing text books to such pupils.

In that opinion this office ruled that the State Board of Education was under a duty to furnish text books to such pupils as provided in § 55-1703 et seq., N.M.S.A. Your attention is respectfully called to the provision of the original decree with reference to Count 1 thereof. In the judgment, the furnishing of free text books to schools, other than tax supported schools, was declared to be violative of the Constitution of the State of New Mexico. The declaratory judgment also provided that members of the Board of Education were prohibited from furnishing free text books to private, parochial or sectarian schools and the furnishing thereof was declared to be unlawful.

The judgment entered with respect to Count 2 of the complaint enjoined the members of the State Board of Education from furnishing free text books to schools other than tax supported schools of the State of New Mexico.

Let it be noted that the judgment of the Supreme Court reversed the case so far as applied to the members of the State Board of Education and declared that the action was a suit against the State of New Mexico requiring that the State Board of Education be dismissed as a party defendant. Therefore, while the decree, as modified, removed the restraint against the members of the State Board of Education from furnishing free text books to non-public schools, nevertheless the Court made it very evident that the spirit of the decree controlled.

However, it must likewise be noted that neither in the original decree, nor in the review thereof by the Supreme Court, was the question of furnishing of free text books to pupils attending school in New Mexico touched upon. The sole question decided, either by judicial pronouncement, or by implication, was the propriety of furnishing free text books to non-public schools and therefore it cannot be said that the decree in any wise invalidates the provisions of § 55-1703, et seq., hereinbefore referred to.

Consequently, there is no reason to overrule the opinion issued in August of 1949 and this office again rules that the State Board of Education, by virtue of the statute, is under a duty to furnish free text books to pupils attending schools in New Mexico as provided by § 55-1703 et seq.

For your information, we note that the former opinion of this office stated that we were not in a position to advise as to the mechanics of text book distribution. For your guidance, however, may we point out that § 55-1718 provides that the publishers of text books shall distribute them to the officials in charge of institutions, whose students are entitled to receive free text books. In accepting such books, such officials would merely be the agent of the State Board of Education. We therefore suggest that it would be proper for the Board of Education to designate the principal of any such school as its agent for the purpose of affecting the actual distribution of the books to the pupils, and the Board of Education likewise is empowered to make such agent responsible for the ultimate return thereof. This is entirely in conformity with § 55-1711, making the head of such educational institution responsible for the inventory of text books on hand and the estimate as to books needed for the ensuing year.

Trusting that this fully answers your inquiry, I remain