

## Opinion No. 55-6255

August 16, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Richard F. Rowley, District Attorney, Ninth Judicial District, Clovis, New Mexico

You have asked the opinion of this office upon several questions regarding § 203, Chapter 179, Laws of 1955. Your questions are:

1. Is it discretionary or mandatory for the Division of Motor Vehicles to issue an operator's permit to a fifteen year old person who has satisfactorily completed an accredited driver's education program?
2. If discretionary, who makes the determination whether or not such person shall be granted an operator's permit?
3. Is it discretionary or mandatory for the Division to issue to a thirteen year old person a license for the operation of a motorcycle, motor scooter or bicycle with motor attached, which motor does not produce in excess of five horsepower?
4. What is the proper standard for determining horsepower ratings on a motorcycle, motor scooter or motor-driven bicycle under § 203, paragraph 1 (b), of Chapter 179?
5. Where an engine has been altered to increase horsepower on a motorcycle, motor scooter or motor-driven bicycle, does the law require tests to be made to determine horsepower?

The applicable portion of Chapter 179 are as follows:

"Section 203. -- What persons shall not be licensed.

The division shall not issue any license hereunder:

1. To any person, as an operator, who is under the age of sixteen (16) years, except as hereinafter specifically provided. The division may, however, in its discretion issue a restricted instruction permit or a restricted license to students fourteen (14) years of age or over enrolled in a high school driver-education program approved by the State Board of Education;
  - (a) The division may issue an operator's permit to any person fifteen (15) years of age or older who has satisfactorily completed an accredited driver education program.
  - (b) The division may issue to any person thirteen (13) years of age or older, who passes an examination prescribed by the division, a license restricted to the operation of a

motor-driven cycle, motor scooter or a bicycle with motor attached provided the motor does not produce in excess of five (5) horsepower."

Your questions are answered as follows:

Questions No. 1 and 3: It is noted that § 203, subsections (a) and (b), use the language "may issue" the license or permit to the two groups mentioned therein. These two subsections create exceptions to the general group of persons under sixteen years old which otherwise may not be licensed. It should be noted further that as concerns the group of persons sixteen years old or over, no language is present in Chapter 179, such as above, which would indicate that issuing a license or permit is discretionary. On the contrary, § 211 (a) contains language which indicates that except for cause the Division must issue the license upon qualification of the applicant. In view of the latter and in view of the language "may issue", it is the opinion of this office that issuing a permit or license to the groups and for the purposes covered by § 203, subsections (a) and (b), is a discretionary and not a mandatory matter with the Division.

Question No. 2: Although not free of all doubt, it is our opinion that the discretion to be exercised in issuing or refusing to issue a license or permit to the groups covered in § 203, subsections (a) and (b), may be exercised by the local representative of the Division. Your attention is called to § 106 (a) of Chapter 179, which provides that "Division" shall mean the Division of Motor Vehicles acting directly or through its duly authorized officers, agents and employees. Further, it is the local representative who conducts the examination and is in the most favorable position to determine whether or not a particular applicant is qualified to receive the license or permit.

Question No. 4: It is my understanding that there are several ways in which horsepower is rated. For example, you indicate that one standard is "brake horsepower", while there is also another called "N.A.C.C. horsepower". I have inquired of motor scooter manufacturers as to the ordinary manner in which they rate horsepower on motor scooters. I am informed by them that motor scooters are rated under the "brake horsepower" method, and that most scooter manufacturing companies use that method.

It is, therefore, the opinion of this office that when the Legislature was dealing with motor scooters and the horsepower which the motors thereon would generate, it had in mind the most commonly used method for rating horsepower, which would be the above, i.e. brake horsepower.

Question No. 5: Concerning this question, it should be noted that § 203, paragraph 1 (b), provides that any thirteen year old person may secure the license to operate a motor-driven cycle, motor scooter or bicycle with motor attached provided the motor does not produce in excess of five horsepower. It would seem, therefore, that if a licensee under this subsection were using that license for operating a motor scooter or bicycle generating in excess of five horsepower that he would be in violation of the law and tests could properly be undertaken to determine horsepower.

I trust the above answers your inquiries satisfactorily.

By Santiago E. Campos

Assistant Attorney General