

Opinion No. 55-6272

September 6, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mrs. Georgia L. Lusk, Superintendent of Public Instruction, Department of Education, Santa Fe, New Mexico

With your letter of August 26, you enclose a clipping from a Belen newspaper and ask our opinion as to the validity of the practice described therein.

According to the clipping, the Belen Public High School is requiring all students to purchase activity cards at a cost of \$ 5.00 per semester. These activity cards cover athletic events, schools plays, school newspaper and the annual. The clipping states: "Each student must have the \$ 5 for payment on the activity ticket before he receives a registration card." It thus appears that the Belen High School is requiring the payment of this fee as a condition to permitting otherwise qualified children to attend the Belen Public High School.

Article XII, Section 1 of the Constitution of New Mexico provides as follows:

"A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained."

Article XII, Section 5 of the Constitution of New Mexico provides as follows:

"Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such period and for such time as may be prescribed by law."

The question is, therefore, whether the requirement of the payment of this fee from a child subject to the provisions of Article XII, Section 5, is in violation of Article XII, Section 1 of the Constitution establishing a free public school system.

In 47 Am. Jur., Schools, § 148, it is said:

"There is a decided conflict of authority as to the right of a public school to exact an incidental fee from students. Some cases squarely hold that such a fee cannot be charged, while others hold that with legislative authority, such a fee is proper. These latter cases hold that the term 'free' as applied to schools means free so far as tuition is concerned, and does not preclude an assessment of a reasonable sum for incidental expenses.

In those jurisdictions where an incidental fee cannot be charged, such a result cannot be accomplished by indirection. Thus, an act of the legislature permitting the renting of books to pupils cannot be made the cloak for a fee by making the renting compulsory."

The only New Mexico case touching on the problem is *Strawn v. Russell*, 54 N.M. 221, 219 P. 2d 292, where, in speaking of consolidation of school districts, the court stated:

"If the districts are made so large that school children are unable to make the trip to school and back home each day, then they would be denied a free school just as effectively as if no school existed."

It appears from the quotation from American Jurisprudence that such fees may only be charged by express legislative authority, even if not prohibited by the Constitution. We find no such authority in our statutes and hold, therefore, that the charging of these fees, if required as a condition to attendance at a public school, is prohibited.

By Walter R. Kegel

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