

Opinion No. 61-137

December 27, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A. Donnelly, Assistant Attorney General

TO: Mr. Richard H. Folmar, Assistant Director, New Mexico Legislative Council, State Capitol, Santa Fe, New Mexico

QUESTION

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1. Are the attendance and grade records of students in a tax-supported elementary or secondary public school in the category of public records?
2. If they constitute public records, can access to these records be denied to taxpayers or newspapers?

CONCLUSIONS

1. See analysis.
2. See analysis.

OPINION

ANALYSIS

The authority of a citizen of the State of New Mexico to inspect public records is set forth in Sec. 71-5-1, N.M.S.A., 1953 Comp., which reads as follows:

"Every citizen of this state has a right to inspect any public records of this state except records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions and except as otherwise provided by law."

Section 71-5-2, N.M.S.A., 1953 Comp., provides:

"All officers having the custody of any state, county, school, city, or town records in this state shall furnish proper and reasonable opportunities for the inspection and examination of all the records requested of their respective offices and reasonable facilities for making memoranda abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose." (Emphasis supplied)

In addition, Sec. 71-5-3, N.M.S.A., 1953 Comp., specifies that the failure of a school officer having the custody of any school public records and who refuses any citizen the right to inspect such public records shall be guilty of a misdemeanor. This section sets out in full as follows:

"Penalties for violation of act. -- If any officer having the custody of any state, county, school, city or town records in this state shall refuse to any citizen of this state the right to inspect any public records of this state, as provided in this act [71-5-1 to 71-5-3], such officer shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than two hundred and fifty dollars (\$ 250.00) nor more than five hundred dollars (\$ 500.00), or be sentenced to not less than sixty (60) days nor more than six (6) months in jail, or both such fine and imprisonment for each separate violation."

The determinative factor governing the answers to your questions stated above is whether or not attendance and grade records of students enrolled in public elementary or secondary schools are "public records" within the meaning and application of the sections cited herein above.

As stated in 76 C.J.S., "Records", Section 1, the term "public record" is defined as follows:

"A 'public record' has been defined as one required by law to be kept, or necessarily to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. The elements essential to constitute a public record are, namely, that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it. . ."

Not every document, memorandum or record which is kept by public officers are "public records". Under the definition of the term "public record" specified above, papers or memoranda in the possession of public officers and which are not required by law to be kept by them as official records, are not public records. Section 71-6-2, N.M.S.A., 1953 Comp., defines the term "public records" kept by governmental agencies on the State level in even broader language. It is clear that those records which are necessary and incidental to carrying out the duties imposed upon an individual by operation of law are generally deemed public records. In 76 C.J.S., "Records", Sec. 1, it is similarly stated that:

"All records which the law requires public officers to keep, as such officers, are public records; and whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of the office, and is kept by him as such, it is a public record."

Applying the above authority to the records maintained as central records under the supervision of the superintendent of each school district, it is evident that business

records, expenditures, daily attendance records, and permanent records of an individual student's grades kept by the public schools are public records.

Section 73-7-40, N.M.S.A., 1953 Comp. (P.S.), further provides in part:

"The superintendent of each school district shall, from and after the passage of this act under the provisions of sections 73-7-33, 73-7-34, 73-7-36 through 73-7-41 and 73-19-2 New Mexico Statutes Annotated, 1953 Compilation, cause an accurate account and record to be kept in each school of the daily attendance of all pupils enrolled, and shall, between the first and the tenth of each month, report the total average daily attendance in the school district for the preceding month, compiled as herein provided, to the state board of education, upon forms prescribed and furnished by the board, and shall also keep copies of all such reports as part of the permanent records of the school district. . .

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* * *

All accounts, records and reports required to be kept and made hereunder shall be a part of the permanent records of the several governing boards of education and the same shall be subject to inspection and audit at all times by the state board of education; the state superintendent of public instruction; chief, public school finance division; department of finance and administration, or any of their duly authorized agents or representatives, and the state superintendent of public instruction shall cause all such records to be checked or audited each year."

Under the above statutes, attendance records of all students are required by law to be kept as permanent records of each school district. Similarly, the grade or achievement records of students are customarily kept as permanent records of each school district. These records, when made a part of the permanent files of a school district, become public records of such school system and as such, are open to public inspection by virtue of the express language of the statutes quoted above.

However, such records or memoranda as may be kept by a teacher, or other school official, for informational purposes on individual students, and which may contain data of a personal nature for use in assisting teachers or school personnel in educating pupils, in our opinion does not fall within the classification of public records entitled to be scrutinized by the public. Nor, are temporary or partial grades or records kept by individual teachers public records in nature.

In 76 C.J.S. "Records", Sec. 1, at page 113, the distinction between public records and other papers or memoranda kept by public officials is stated. This sets out in part:

". . . Likewise, every memorandum made by a public officer is not a public record; papers or memoranda in the possession of public officers which are not required by law to be kept by them as official records, are not public records; and reports of private individuals to government officials, even pursuant to statute, correspondence of officials

relating to private affairs, although in connection with public business, and memoranda of public officers made for their own convenience, even if made at the public expense, are not public records unless made so by statute. Whether or not records are strictly public records is often declared by statute, but, in the absence of statute, the nature and purpose of the record, and possibly, custom and usage, must be the guides in determining whether a record is a public record."

As we interpret the provisions of Sec. 71-5-1 through 71-5-3, N.M.S.A., 1953 Comp., any citizen of this State has a right to examine the public records of a school district when such records have been made a part of central records of such school district. This right to inspection is spelled out by statute, and the Legislature has specified that the denial of such right of access is punishable as a misdemeanor.

This right of access and inspection is not unqualified or unrestricted, however, and is subject to such reasonable regulation and policy as the local board of education may prescribe governing the place of examination and the time and manner of inspection. The local board of education may properly regulate inspection and access to such records so as to not unduly interrupt or interfere with the board and the administration of such school system in the discharge of their official duties.

A careful distinction should be drawn also between the right of the public to inspect any public records of this State by virtue of Sec. 71-5-1, N.M.S.A., 1953 Comp., et seq., and dissemination of such material. The Courts have held in some instances that an improper or unwarranted invasion of an individual's right to privacy against the dissemination of personal information may give rise to a cause of action for damages against the wrongdoer. In 77 C.J.S., "Right of Privacy", Sec. 2, at page 399, it is stated that the law will afford relief "to protect all persons from having matters which they may properly prefer to keep private made public against their will. The right includes protection against mortifying notoriety unless some legal justification for its infliction exists."

It is our conclusion, based upon a careful reading of Sec. 71-5-1, 71-5-2, and 71-5-3, N.M.S.A., 1953 Comp., and the above authorities, that attendance and grade records of students in public elementary and secondary schools of this State when kept as the permanent records of such school district are public records within the scope and meaning of such statutes and any citizen of this state is entitled to examine such public records subject to reasonable regulations imposed by the local school board. This conclusion is further supported by the general rule as stated in **Sosa v. Lincoln Hospital of the City of New York**, 74 N.Y.S. 2d 184, 190 Misc. 448; and **Birenbaum v. Carey**, 22 N.Y.S. 2d 722, 175 Misc. 351, that statutes in derogation of the Common law right of inspection should be strictly construed, and will not be unduly extended, and statutes conferring the right to inspect or use public records should be liberally construed in favor of inspection.

Under the provisions of Sec. 71-5-1 through 71-5-3, N.M.S.A. 1953 Comp., the statutes expressly direct that any "officer" having the custody of any school records in this State

shall furnish reasonable opportunities for the inspection and examination of all records requested of their respective offices. The term "officer" as employed therein although having application to superintendents or administrative officials of school systems does not apply to school teachers, school nurses, or other school employees. See **People ex rel Patterson v. Board of Education of City of Syracuse**, 54 N.Y.S. 2d 80, 269 App. Div. 39; **Gelson v. Berry**, 250 N.Y.S. 577, 233 App. Div. 20; **Regents of University System of Georgia v. Blanton**, 176 S.E. 673, 49 Ga. App. 602; **Kosek v. Wilkes-Barre Township School Dist.**, 168 A. 518, 110 Pa. Super. 295.

In **Regents of University System of Georgia v. Blanton**, supra, the Court held that: "The position of a teacher or instructor in a state or public educational institution is not that of a public officer or official but he is merely an employee thereof (Board of Education v. Bacon, 22 Ga. App. 72, 95 S.E. 753)." Similarly, in **Kosek v. Wilkes - Barre Township School Dist.**, supra, the Court stated, quoting with approval from **Foyle v. Commonwealth**, 101 Pa. Super. Ct. 412, that "There is a well recognized and definite distinction between an office and an employment."

This right to public inspection extending to any citizen of this State to inspect school records held by a public officer, includes the right of any publisher or reporter to inspect such records for the purposes of his business. However, such right to examination and access does not extend to data or memoranda prepared or gathered by school officials or teachers regarding students or a student's background, for use in teaching such student, and which may be of a confidential or delicate nature, or of a type which is not permanent in character.