

## **Opinion No. 64-149**

December 16, 1964

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

**TO:** Mr. Joseph B. McGee, Superintendent, Independent School District No. 2, Catron County, Pie Town, New Mexico

### **QUESTION**

#### **QUESTIONS**

1. Does the Chief of the Public School Finance Division have the authority to close schools within a school district without the consent of the local board of education involved?
2. Does the Chief of the Public School Finance Division have the authority to demand that the local board authorize the closing of the schools?
3. Does such state officer have the power to combine the enrollment of two or more schools for weighting purposes, even though at a later date he authorized the reopening of these schools for the coming school year?
4. Is an appeal authorized from the action of the Chief of the Public School Finance Division closing schools within a school district?

#### **CONCLUSION**

1. Yes, in certain instances; see Analysis.
2. Yes, if the schools do not meet standard legal requirements; see Analysis.
3. Yes, under certain conditions.
4. Yes; see Analysis.

### **OPINION**

#### **ANALYSIS**

A number of complex and divergent statutory provisions bear upon the questions presented by you. Necessarily, some brief review of these statutes is required in order to fully answer your inquiries.

By statute, the Public School Finance Division is declared to be a division of the State Department of Finance and Administration (Sec. 11-1-28, N.M.S.A., 1953 Compilation). Section 11-1-31, N.M.S.A., 1953 Compilation authorizes the appointment of the Chief of the Public School Finance Division of the Department of Finance and Administration.

The powers and functions of the Public School Finance Division are in part set forth in Sections 73-3-3, N.M.S.A., 1953 Compilation through 73-3-9, N.M.S.A., 1953 Compilation. The Chief of the Public School Finance Division pursuant to Section 73-3-4, N.M.S.A., 1953 Compilation is charged with the duty of supervising and controlling the preparation of all budgets of all public grade and high schools, and under Section 73-3-8, such officer is entrusted with the duty of fixing the "final budget allowances for the schools" and certifying such budget to the boards of county commissioners, and to county, municipal, union high school and independent boards of education.

After final budgets are approved and certified by the Chief of the Public School Finance Division, upon application the Chief or the Director of the Department of Finance may permit either budget transfers or budget increases in certain amounts.

Additionally, the Public School Finance Act (Laws 1962 (S.S.), Chapter 21) compiled as Sections 73-7-55 through 73-7-94, N.M.S.A., 1953 Compilation detail school finance provisions and duties of the Chief of the Public School Finance Division. In the Public School Finance Act (Section 73-7-58) the Chief of the Public School Finance Division is invested with the duty of distributing the public school equalization funds to each of the several counties of this state with allocations to districts in three parts: "A. The basic-state support distribution; B. The minimum support distribution; and C. The transportation distribution." Under Section 73-7-59, the Chief is directed to "certify to the State Treasurer the allocation from the equalization fund for each district, for each of the distributions of the equalization fund." Section 73-7-60.1 of the Public School Finance Act also sets out that:

"In order that there be no unnecessary proliferation of schools, and therefore an unnecessary rise in the cost of public school education under the weighting formulas set out in Section 4 of this act:

A. The governing board of each school district shall secure the approval of the chief prior to the construction, or letting of contracts for construction, of any school building or related structure, or before re-opening an existing structure which formerly was used as a school but which has not been used for that purpose during the previous year. . ."

The Public School Finance Act also provides under Section 73-7-79 that "**no public school shall be maintained or budget allowance be made, for any school in any administrative unit, unless the average membership of the school is at least eight without the approval of the chief.**" (Emphasis supplied.)

Additionally, Section 73-7-81 specifies that certain statutory requisites must be met by each school administrative unit in the state in order to be eligible to receive state financial support. This section states in part:

"A. A school year shall consist of at least one hundred eighty teaching days; and

B. Each administrative unit in the state shall provide not less than one full-time equivalent, certified, classroom teacher for each thirty pupils or major fraction thereof in the membership of that unit.

No budget shall be approved which does not provide for the basic minimum requirements."

Specifically, in addition to the above cited statute, there are three separate legislative provisions relating to the power of state authorities to reorganize or consolidate school districts or school units within local districts. Section 73-7-83, N.M.S.A., 1953 Compilation, sets out in applicable part that "Any local board of education **may request** that a survey be made to determine if any reorganization or consolidation is needed by the district under its jurisdiction. Upon request of a local board, the state board of education shall conduct a survey. . . Such law also provides that after the survey is made the report and proposal shall be presented to the local board or boards involved. If all of the local boards involved approved the proposal, then it shall be submitted to the state board of education, and if the "State board of education approves the proposal it shall make necessary orders effecting the reorganization or consolidation."

Section 73-20-1, N.M.S.A., 1953 Compilation, specifies that:

"Whenever deemed necessary the state board of education shall cause to be made a survey in the several counties of the state in cooperation with the state transportation director for the purpose of determining the feasibility of making consolidations to effect the greater possible economies and so that proper education facilities may be furnished to all school children of the state, said survey shall be acted upon within one year from the date of submission to the state board of education, otherwise said proposed consolidation cannot be effected until another survey be made. Whenever any elementary school, being the 1st to the 8th grades, inclusive, shall have less than eight in average daily attendance for the preceding school year, and whenever any high school, being the 9th to the 12th grades, inclusive, shall have less than fifteen pupils in average daily attendance for the preceding school year, the pupils of such schools shall be transported to the nearest schools having facilities to properly care for such pupils. Provided, however, whenever the state board of education shall determine that in any isolated case it is not economically feasible to transport such pupils and that no material saving can be made thereby or that proper educational facilities are not available to properly care for such pupils, and shall so certify to the governing boards of education affected, such schools having less than the required number above provided shall be permitted to continue until such time as conditions may justify the transportation of said pupils to other schools as hereinabove provided."

The legislature in implementing the above act created also a state school reorganization committee to conduct surveys concerning possible school reorganization and consolidation programs.

Local school districts which have not conducted schools on account of the transportation of pupils to other schools as provided in Section 73-20-1, supra, are by law required to be consolidated with contiguous school districts under the provisions of Section 73-20-2, N.M.S.A., 1953 Compilation.

Section 73-20-3, N.M.S.A., 1953 Compilation provides that whenever a board of education shall determine by resolution that two or more school districts within the county should be consolidated, then the state board of education may order the consolidation of all classes of such school district upon receipt of the resolution of each of the governing bodies affected by such consolidation.

From the review of the statutory authorities set out hereinabove it is evident that the Chief of the Public School Finance Division does have the authority to close schools without the consent of the local board of education, under the provisions of Sections 73-7-79, 73-7-81, or 73-20-1, supra, under instances mentioned in such statutes and where the schools do not meet standard legal requirements; in all other situations, approval is required from the local board concerned. Action taken under Section 73-20-1, supra, requires also the approval of the state board of education.

Secondly, we think the answer to your second question is controlled by our answer to the first question. In other words, the Chief of the Public School Finance Division may properly request and take appropriate steps to implement the closing of public schools under the provisions of Sections 73-7-79, 73-7-81 and 73-20-1, supra, in proper circumstances; in all other cases such action is permissible only with local board approval. As noted above, action taken under Section 73-20-1, supra, requires state board of education approval.

Thirdly, the question is posited as to whether the Chief of the Public School Finance Division has the authority to combine the enrollment of two or more schools for weighting purposes, even though at a later date the two schools are authorized to be reopened. We think such power does exist in such state officer in proper instances.

In addition to the statutes above cited, the 1964 General Appropriation Act, Laws 1964, Chapter 2, Section 11, invests the Chief of the Public School Finance Division with the power, subject to certain controls, to make distributions of public school support funds. This act sets out in part that the Chief of the Public School Finance Division shall "examine, in detail, all proposed expenditures and the justification therefor of a district requesting funds and shall require of the district, as a prerequisite to receiving funds, such modification of its policies, procedures and expenditures as shall be indicated by his examination. Such law also declares in part:

"Provided, that no district may budget for expenditure any cash balance forward in the operational funds unless such action shall have the express approval in writing, with a copy sent to the legislative finance committee, or the chief of the public school finance."

Under the above acts we feel that the power resides in the Chief of the Public School Finance Division to take the action questioned, in appropriate instances.

Fourth, inquiry is made as to whether any appeal is permitted to be taken from the action of the Chief of the Public School Finance Division closing schools within a particular local school district. We think the answer is clearly "yes." The New Mexico Supreme Court has held numerous times that a school district may resort to court action to test the action of state or other public officers who are believed to have acted in excess of their authority in ordering the consolidation of local public schools. See **Board of Education of San Miguel County, et al. v. State Board of Education**, (1964) N.M. , decided August 24; 1964, and **Harriett v. Lusk**, (1958), 63 N.M. 383, 320 P2d 738. If the officer has acted in consonance with law, no valid attack on his action effecting consolidation may be made; if the law has been exceeded, then a proper legal proceeding may be instituted to prohibit or appeal or test the validity of such action. Thus, dependent upon the particular statute under which the action to consolidate certain schools may be premised, an appeal may be taken either directly to the district court, or by administrative review of the state board of education if the action is founded upon the provisions of Section 73-20-1, supra, and then to the district court.

It should be noted that under the statutes and authorities above cited, action to consolidate schools must be taken strictly in accordance with statute and access to the courts is available in the possible event consolidation or closing of schools is effected other than under such lawful authority. In instances, however, where the Chief of the Public School Finance Division orders a consolidation or closing of certain local schools and takes such action under applicable state law cited above, such action may not be set aside except upon a clear and strong showing of an abuse of such officer's discretion.