

Opinion No. 65-74

May 4, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Thomas A. Donnelly, Assistant Attorney General

TO: Mr. Leonard J. De Layo, Superintendent of Public Instruction, Department of Education, Capitol Building, Santa Fe, New Mexico

QUESTION

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May school children who are not citizens of and who do not live in the United States attend a New Mexico public school and be counted in average daily membership for weighting purposes to receive reimbursement from state funds?

CONCLUSION

Such children may attend a public school in New Mexico if such attendance is carried out pursuant to an agreement acceptable to the local public school system and the State Board of Education, and if financial reimbursement is received from some source other than the public funds. Such children may not be counted in average daily membership for weighting purposes to receive reimbursement from state funds.

OPINION

{*126} ANALYSIS

As indicated by the facts supplied this office it appears that for several years a few local public school systems have followed the practice of enrolling children from towns or ranches in Mexico to be transported into the United States and to attend both public grade schools and high schools within the State of New Mexico. Such children, we are informed participate in all school activities with children in such school district and also receive meals under the school lunch program. Some of the children hold dual citizenship, having parents that are both American and Mexican. Other children are solely of Mexican parents.

In considering the question presented we turn first to a review of applicable provisions of the New Mexico State Constitution, Article XII, Section 1, of the Constitution specifies.

"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."
(Emphasis supplied.)

This provision of the State Constitution contemplates that "free public schools" will be open without monetary charge only to "the children of school age in the state."

Similarly, Article XII, Section 4 of the State Constitution sets out that "provision shall be made for the establishment and maintenance of a system of public **schools which shall be open to all the children of the state** and free from sectarian control, and said school shall always be conducted in English."

The State Constitution, additionally, prohibits any public school district from expending funds in aid of any private person. Article IX, Section 14, of the State Constitution states in part:

"Neither the state, nor any county, school district, or municipality, {**127*} except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to in aid of any person, association, or public or private corporation. . . ."

Article XII, Section 4, of the State Constitution declares that the state "current school fund shall be distributed among the school districts of the state in proportion that the number of children of school age in each district bears to the total number of such children in the state."

The enabling act for New Mexico (Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310) reads in part:

"Fourth. That provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to **all the children of said State** and free from sectarian control, and that said schools shall always be conducted in English . . ." (Emphasis added).

Reviewing the statutory provisions relative to public schools in New Mexico, we note that Section 73-13-2, N.M.S.A. 1953 Compilation declares:

"Nonresident pupils -- Admission -- Tuition -- Basis -- Deduction for school tax payment. -- **Governing authorities of schools may admit nonresident pupils to the schools under their charge. Provided school accommodations are sufficient to provide for them, and resident of the state and collect same**, which tuition shall not be greater than the average cost per capita for education based on the average daily attendance of the district for the previous school term. When nonresident pupils, their parents or guardians, pay a school tax in this state the amount of such tax shall be credited on their tuition in a sum not to exceed the amount of such tuition, and they shall be required to pay tuition only for the difference therein." (Emphasis supplied).

This statute contemplates that non-resident students may be admitted to New Mexico schools if a tuition is paid based on the average cost per capita of students in such school district for the previous school term. Whether or not such children are admitted,

however, is subject to the discretion of the local school board and the state board of education. See prior Attorney General Opinion No. 1937-38, p. 75, and 1943-44, No. 4439.

We deem the above statute (Section 73-13-2, N.M.S.A., 1953 Compilation), particularly controlling under the facts of your inquiry.

Additionally, we note that Section 73-13-3, N.M.S.A., 1953 Compilation declares that school attendance in New Mexico is compulsory for children who have passed their sixth birthday until they have reached their seventeenth birthday, and such children must attend "schools **in the district in which such children reside** shall be in session, except that children actually attending private or denominational schools maintaining courses of instruction approved by the state board of education."

Section 73-13-1 New Mexico Statutes Annotated, 1953 Compilation, specifies as follows regarding admittance to public schools:

Pupils who are **residents of a district** shall be permitted to attend school in the same regardless of the time when they acquired such residence, whether before or after the enumeration." (Emphasis supplied).

Further reviewing of the statutory provisions relative to school financing it is to be noted that {^{*128}} Section 73-7-57, N.M.S.A., 1953 Compilation of the Public School Finance Act defines the following terms:

"Definition. -- For the purpose of the Public School Finance Act:

A. "Membership" means average daily membership, and is the total enrollment of qualified pupils for each school day used, minus withdrawals, in addition to pupils absent from school for as many as ten consecutive days;

B. "Qualified pupil" means a regularly enrolled state public school pupil who will be at least six years of age on or before January 1, after the beginning of the school year, who has not graduated from high school and who is regularly enrolled for one-half or more of the minimum student requirements of schools approved by the state board of education;

C. "Weighted membership" means the figure used for distribution of certain public school funds, arrived at by applying the statutory formula to membership; . . ."

Analyzing the above constitutional and statutory provisions we find that the New Mexico public school system is based upon the proposition that school age children residing within State and the specific school district involved are guaranteed attendance at "free public schools". Necessarily, we think that children who are non-resident of New Mexico and the particular school district, are not legally qualified to receive **free public schooling** in this State since the expense of educating, providing free public text books,

programs and bonding for school buildings is borne principally by citizens residing in this state and the school district concerned.

Further supportive of this conclusion, we believe is the fact that the legislature has found it necessary to provide specific statutory authority to empower the governor of this state to negotiate compacts with adjoining states of the United States to permit school districts adjoining the New Mexico state line to combine with school districts in this state to promote educational facilities and cooperative educative measures to be adopted between New Mexico and other states. Section 73-21-1, N.M.S.A., 1953 Compilation provides:

"Authority of governor in negotiation -- State line school consolidations -- Joint financing and operation. -- The governor of the state of New Mexico is hereby authorized to negotiate compacts with adjoining states to permit school districts, incorporated towns or union school districts located in New Mexico adjoining the state line to combine with school districts, incorporated towns and other educational subdivisions in other states likewise adjacent to said state line, to promote educational facilities for such communities, to permit co-operative measures to be adopted by them for the financing of school buildings and teaching staffs for the same, and for other purposes incident thereto or in aid thereof."

After the adoption of such statutory provisions authorizing the governor to enter into school compacts with other states, New Mexico entered into the Texas-New Mexico state line school district compact in 1933, and which was ratified by the state legislature by Laws 1933, Chapter 110. Under such compact, provision is made for sharing the costs of educating the children within such school district created pursuant to the compact.

We think that clearly both the state constitution and the implementing state statutes cited herein {*129} prohibit counting children residing in a foreign county from being counted in average daily membership for weighting purposes to receive reimbursement from state public funds for the cost of educating such children. It should be observed that the State Constitution, Article IX, Section 11, sets out that "No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to a vote of such qualified electors of the district as are owners of real estate within such school district, and a majority of those voting on the question shall have voted in favor of erecting such debt. . ." This provision places the expense of building schools principally upon taxpaying property owners within such school district. If additional facilities or buildings or land is necessary to educate children in the public schools, the property owners subject to tax in such school district must bear such cost.

Section 73-7-60, N.M.S.A., 1953 Compilation, provides that for the purpose of making allocations and distributions of the equalization fund, the chief of the public school finance division of the Department of Finance and Administration "shall weight the

membership of each school. In weighting membership the chief shall take as the membership to be weighted the estimated membership, exclusive of the estimated membership of approved programs of education for educable handicapped children, of the first eight school days of the current year. . . ."

As pointed out by the New Mexico Supreme Court in **Zellers v. Huff**, (1951) 55 N.M. 501, 326 P. 2d 949, "Money for the support of our public school system comes from taxation and the income from lands granted the state by the Congress of the United States."

Since the statutory and constitutional provisions discussed to make it the duty of the citizens of this state to provide for children of school age a "uniform system of free public schools" in this state, we are of the opinion that state public funds may be properly expended only for providing free education for children who reside within New Mexico or who are educated pursuant to a state compact.

As a caveat it should be specifically observed that the legislature has not by law precluded foreign school age children from being educated in the public schools of New Mexico. To the contrary, as pointed out in Section 73-13-2, N.M.S.A., 1953 Compilation, supra, the legislature has provided that such non-resident children may be properly admitted to the schools within this state and indeed their enrollment may be beneficial to New Mexico school children in learning the customs, language, and culture of foreign students. However, their presence in the United States must be permitted by the Federal government, and the local public school district and the state department of public education must concur in such school training. If such children are admitted to public schools however, we are of the opinion that the expense of providing such education for nonresident children must be reimbursed to the school district in an amount commensurate to the actual cost of providing such public education and such reimbursement must come from some source other than state or local public monies. As provided by the Statute credit may be given for school tax actually paid. Such monies may be properly paid by the parents of such children for reimbursement or by a third party, private grants or foundations or from the Federal Government, or from the Republic of Mexico.