

Opinion No. 71-125

December 22, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Herbert J. Taylor New Mexico State Senator 1602 Linda Drive
Gallup, N.M. 87305

QUESTIONS

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1. Are children who qualify for special education entitled to free public school education, according to existing laws and the Constitution of New Mexico?
2. If children who qualify for special education are entitled to free public school education, are they also entitled to free transportation and textbooks?
3. What alternatives exist for free public school education for children who qualify for special education but are not served because they live in school districts where no special education program is available?
4. Does "state financial support" as used in Chapter 109, Laws of 1971, mean all financial support for public education from the state or only state financial support directly for special education?
5. What state official is responsible for making the determination required by Section 77-10-2(3), N.M.S.A., 1953 Comp. and is confinement to a wheelchair sufficient cause to deny a child of compulsory school age a public education opportunity?

CONCLUSIONS

1. Yes.
2. Yes.
3. See analysis.
4. See analysis.
5. See analysis.

OPINION

{*193} **ANALYSIS**

1. Article XII, Section 1 of the New Mexico State Constitution states 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."

This provision, however, has been interpreted in light of the compulsory school attendance section of the Constitution, Article XII, Section 5, which specifically requires children of school age and of "sufficient physical and mental ability" to attend school. The positive constitutional requirement of "sufficient physical and mental ability" has traditionally resulted in a system in which those not possessing "sufficient" ability are deprived of the opportunity to attend free public schools.

New Mexico is not alone in its treatment of those without "sufficient mental and physical ability" -- the mentally and physically retarded. See **Watson v. City of Cambridge**, 157 Mass. 561, 32 N.E. 864 (1893); **State ex rel. Beattie v. Board of Education**, 169 Wis. 231, 172 N.W. 153 (1919). However, in this state as in most, special education programs are available. Section 77-11-3, N.M.S.A., 1953 Comp. (1971 P.S.), sets forth a detailed system whereby any school district may receive distribution from the equalization fund for special education by conforming to the requirements of the section. In order to receive the funds the school district must first, request such a program, and second, meet state requirements. Because of these criteria, normally only large districts offer special education programs.

Section 77-11-3.2, N.M.S.A., 1953 Comp. (1971 P.S.), provides for a "mandatory" special education program "provided local facilities and state financial support are available." This program is dependent upon petition from local adult citizenry. It is obvious, though, that with the same funding problems mentioned above, only larger districts will have sufficient financial ability to offer such programs.

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity {**194*} of an education. **Such an opportunity**, where the state has undertaken to provide it, **is a right which must be made available to all on equal terms.**" (Emphasis added.) **Brown v. Board of Education**, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180 (1954).

In light of such principles we come to the question presented: Are children who qualify for special education entitled to free public school education?

Mental retardation is one of the most serious problems facing our society. If mental retardation is defined as the inability to obtain gainful employment due to mental sub-normality (one accepted definition) there is no form of disability which causes as much economic uselessness and human misery. Each year 126,000 children in the United States are born, or will become, mentally retarded. According to the President's Panel on Mental Retardation (A National Plan for a National Problem, 1963) it is estimated that the retarded and their families comprise about ten percent (10%) of the population.

While the percentage of mentally retarded persons in the United States is not rising, the increasing complexity of our society is creating new difficulties for the moderately and mildly retarded person. This means that the basic causes of mental subnormality are not increasing, but that mentally retarded persons in our society are less able to cope with their environment and need more special care than in the past. Because of changes in our society such as urbanization, automation and compulsory education, many individuals who might have been able to adjust to life on a farm or in a factory are now included within the category of subnormals merely because they cannot compete in a more complicated society. Often the categorization of "retarded" is tagged to individuals whose only deficiency is a lack of English competence based on having a different cultural background. Obviously, we cannot rid society of urbanization or automation, but we can allow the retarded a right to equal education so they can compete on a more equal ground in the complex society. It is vital to the family, community, state and nation and the retardate himself that he be regarded as an individual possessing dignity, inherent civil rights and privileges equal to that accorded other members of society.

The right to an equal educational opportunity was clearly recognized in **Brown v. Board of Education, supra**. While racial discrimination is not an issue in the instant situation, recent interpretations of the right to an equal educational opportunity suggest that the right protects individuals not only from discrimination on the basis of race, but also on the basis of poverty. **Hobson v. Hensen**, 269 F. Supp. 401 (D.D.C. 1967). So, too, should the right protect individuals on the basis of physical and mental retardation. **Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania**, (E.D. Penn. 1971, Unreported).

"In urging that the equal protection clause requires the state to provide additional assistance to those with objectively measurable learning impediments, we find support in prior case law and, indeed, in the underlying rationale of the great equality guarantee. True, most equal protection decisions have involved laws vesting **unequal burdens on persons similarly situated**, rather than laws vesting **equal burdens on those who are differently situated**. But it seems clear that equality can be denied as much by refusal to take cognizance of the status of persons differently situated from the generality as by the vesting of special burdens on those who are equally situated." Intrastate Inequalities in Public Education, 1970 Wis. L. Rev. 1 (Emphasis theirs).

In providing equal learning opportunities for all children, the state, in our opinion, is required to offer equal educational opportunities to all children in the state. Thus, children who qualify for special education are entitled to a free public school education.

2. Obviously, if these children are entitled to the same free education as all other children, they are also entitled to free textbooks and transportation, as long as free textbooks and transportation {**195*} are offered to all other children. The state's obligation is to provide equal educational opportunities to all children in the state, regardless of their physical or mental capabilities.

3. Section 77-11-3, **supra**, sets forth a procedure whereby special educational facilities or training "may be made available within a school district. This section also permits consolidation of such programs between districts for the education and training of handicapped children.

As outlined in the first portion of this Opinion, under the federal Constitution, the state must provide equal educational opportunities for all children. However, even under the state Constitution the result must be the same. The mandate of Article XII, Section 1, **supra**, requires the state to provide a free public school education "open to" all children in the state. Article XII, Section 5, in no way affects this mandate. The compulsory school attendance section merely exempts from its requirement those without sufficient ability. Thus, the state is required to provide free public education for the physically and mentally retarded child, as well as every other child of school age; however, the physically and mentally retarded are not required to attend school.

With such constitutional requirements, laws enacted pursuant to these provisions become mandatory. Therefore, it is our opinion that the provisions in Section 77-11-3, **supra**, are mandatory.

4. Section 77-11-3.2, **supra**, [Chapter 109, Laws of 1971] refers to the availability of state financial support as a condition of offering special education programs. Because the state has the obligation of offering equal opportunities to all children regardless of learning ability this condition cannot be presumed valid. In the past this phrase has been interpreted as meaning only state financial support directly earmarked for special education, but under the reasoning of this Opinion, the condition can be tied only to the total availability of state funds for free public school education under Section 77-11-3.2, **supra**.

5. Pursuant to the authority granted in Article XII, Section 5, **supra**, the compulsory school attendance law [Sections 77-10-1 through 77-10-7, N.M.S.A., 1953 Comp.] has been enacted.

That law, at Section 77-10-2, specifically exempts a person "physically incapable of attending or mentally incompetent to attend public school" from its provisions. The terms "physically incapable" and "mentally incompetent" are general and obviously require more detailed definitions. The authority and duty to define such terms is granted to the

State Board of Education at Sections 77-2-1 and 77-2-2(A), N.M.S.A., 1953 Comp. Such definitions are necessary even in a system in which retardates are offered equal educational opportunities. Where the state is required to make education available for physically and mentally handicapped children, it is unlikely that confinement to a wheelchair is sufficient cause to deprive the individual of a free public school education. However, this determination is subject to the standards promulgated by the State Board of Education. as mentioned above.

Such a result finds support in a number of cases which suggest that beyond an obligation to provide equal access to its institutions, the State also has an obligation to make possible their actual utilization by all citizens. Intrastate inequalities in Public Education, **supra**.

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