

Opinion No. 72-19

April 27, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Oliver E. Payne, Deputy Attorney General

TO: The Honorable Robert A. Mondragon, Lieutenant Governor, State of New Mexico, Legislative-Executive Building, Santa Fe, New Mexico 87501

QUESTIONS

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1. Is it constitutional for a school to charge a public school student a mandatory fee on courses required for graduation?
2. Is it constitutional for a public school to charge a student a mandatory fee as a prerequisite to taking an elective course?

CONCLUSIONS

1. No.
2. Usually not, but some incidental fees are upheld.

OPINION

{*34} ANALYSIS

Article XII, Section 1, New Mexico Constitution, directs the Legislature to establish:

"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 added.)

Under state constitutional provisions like the one quoted above from our Constitution, matriculation, registration, textbook and transcript fees have been invalidated in a number of cases. Understand that throughout we are speaking of public schools, i.e., elementary and secondary. **Dowell v. School Dist.**, Ark. 250 S.W.2d 127 (1950); **Brewer v. Ray**, Ga., 105 S.E. 667 (1919); **Bond v. Public Schools of Ann Arbor School Dist.**, Mich. 178 N. W. 2d 484 (1970); **Paulson v. Minidoka County School Dist.**, Idaho, 463 P.2d 935 (1970).

Some cases have held that textbook damage deposits are constitutional. **Segar v. Board of Education**, Ill., 148 N.E. 289. Occasionally even a textbook rental charge has

been upheld. **Hammer v. Board of Education**, Ill., 265 N.E.2d 616 (1970). However, the weight of authority is the other way. **Mathis v. Gordy**, Ga., 47 S.E. 171; **Paulson v. Minidoka County School Dist.**, *supra*.

The thrust of the cases holding the type of fees mentioned in your first question invalid is that the item or items for which the fee was charged was a **necessary element** of the school's activity, **Paulson v. Minidoka County School Dist.**, *supra*, or was an essential part of a system of free public elementary and secondary schools, **Bond v. Public Schools of Ann Arbor School Dist.**, *supra*. In other words, "free" means just that -- "free," "without charge." We have little reluctance in answering your first question in the negative.

Your second question is a more difficult one to answer in a "yes or no" fashion. Many courts have upheld such fees if they are only for optional, nonessential materials, activities or privileges so long as the fees are reasonable in terms of actual costs and by exempting persons financially unable to pay. See Annotation in 41 A.L.R. 3rd 755. But a tuition fee for manual training was held not to be legally chargeable by a school, except for non-residents, as long ago as 1910. **Maxey v. Oshkosh**, Wis., 128 N.E. 899. The fact that manual training was **not** a compulsory course did not alter the conclusion. The court noted that a pupil in a school district was just as much entitled to have manual training taught him without exaction of a fee, as he was {^{*35}} to have mathematics taught without being obliged to pay therefor. It has also been held that a school district exceeded its authority in requiring, **as a condition of attendance**, the payment of \$ 13, which consisted of \$ 5 for athletic privileges, \$ 3 for library fees, and \$ 5 for literary fees, **Morris v. Vandiver**, Miss., 145 So. 228 (1933) even though the fees were used to subsidize specific events, facilities, and activities rather than salaries for teachers. The court, however, did not question the power of the trustees to impose "incidental" fees as a condition to using the specific facilities.

In the 1970 **Paulson** case, *supra*, the court said:

"But it should be noted that, because social and extra-curricular activities are not necessary elements of a high school career, the constitution does not prohibit [the school board] from setting fees to cover costs of such activities to be paid by students who wish to exercise an option to participate in them."

We see, then, that some "incidental" fees have been held to be valid; but because of the delicacy and difficulty in resolving the questions on the basis of the Constitution, the courts have shown a decided preference for ruling on these questions on a factual case-by-case method. We, too, find it desirable to use such an approach.

The 1970 Michigan case, **Bond v. Public Schools of Ann Arbor**, *supra*, contains a facet which is of considerable interest. Some of the Michigan parents were seeking a refund of fees paid, and the court said:

"As bearing on the question of good faith, on October 16, 1964, the Attorney General rendered an opinion . . . in which he ruled that . . . a board of education may not lawfully charge fees for participation in courses such as band or for participation in athletic programs."

Since the board of education had apparently chosen not to follow the legal advice given it by the Attorney General, the court ordered a refund by the board.