

Opinion No. 76-06

February 9, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Jill Z. Cooper, Assistant Attorney General

TO: Honorable Vernon N. Kerr, State Representative, House of Representatives, Capitol Building, Santa Fe, New Mexico 87503

QUESTIONS

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Does the concept of a special education voucher system as proposed in House Bill 60 violate the state constitution?

CONCLUSION

See analysis.

OPINION

{*52} ANALYSIS

House Bill 60 proposes a voucher system for those exceptional children whose needs are not being met by the programs available in {*53} the school districts. Under a voucher system, parents could use the funds the school district would spend on the child to purchase special education at private nonsectarian institutions. The concept of a voucher system has not been tested in this state and the question has been raised as to the validity of such a system under the New Mexico Constitution.

It is our position that the New Mexico Constitution does not necessarily prohibit the enactment of a special education voucher system within that limits suggested by House Bill 60. It would, of course, be left to the courts to finally determine the constitutionality of House Bill 60 or, indeed, any similar bill, if it were enacted and subsequently challenged on that ground. In the meantime, however, sufficiently persuasive argument can be offered to rebut the possible constitutional obstacles to the concept of a voucher system and the legislature need not be dissuaded from enacting such legislation on constitutional grounds alone.

First, whatever restrictions may be found in that constitution must be considered in the context of the constitutional provisions which require that the state provide a uniform free education to all children of school age (Article XII, Section 1) and that all children of school age must attend school (Article XII, Section 5). It is well established that when a state undertakes to provide an education for all school age children, the opportunity

must be made available to all, including exceptional children, on equal terms. See **In the Interest of G. H.**, 218 N.W.2d 441 (N.D. 1974) and the cases cited therein. In order to meet this obligation, exceptional children must be provided with programs within the public schools or by other publicly supported programs. See **Mills v. Board of Education of District of Columbia**, 348 F. Supp. 866(1972). A voucher system is an alternative publicly supported program.

Second, the constitutional obstacles to a voucher system can be fairly easily dismissed in the context of the intent expressed in House Bill 60.

A. **Article IV, Section 31.** Article IV, Section 31 would prohibit appropriations for educational purposes to any person or institution not under the absolute control of the state. To the extent that the voucher system would make use of funds which have, in fact, been appropriated to the public schools, there appears to be no violation of this provision. Under a voucher system as described in House Bill 60, the local school board would issue a voucher on its own funds for the purpose of educational services in much the same manner as it would purchase other services or materials.

B. **Article IX, Section 14.** Article IX, Section 14 would prohibit a school district from making "any donation to or in aid of any person." The term "donation" as used in this provision is taken in its ordinary sense and meaning, as a "gift," an allocation or appropriation of something of value, without consideration. **Village of Deming v. Hosdreg Co.**, 62 N.M. 18, 303 P.2d 920 (1956). As there is a legal obligation to provide an education for school age children, public money spent for education is not a gift. A legal obligation is consideration. See 17 Am.Jur.2d Contracts § 126. From that perspective, it does not matter whether those funds are spent within the public school system or for the purchase of educational services under a voucher system. Thus a voucher system does not appear to ^{*54} violate Article IX, Section 14 any more than any money spent on education would.

C. **Article XII, Section 3.** Article XII, Section 3 would prohibit the use of state funds for the support of nonpublic schools. If the voucher system were limited to nonsectarian schools, the problem of separation of church and state would be avoided. See **Sloan v. Lemon**, 413 U.S. 825, 37 L. Ed. 2d 939, 93 S. Ct. 2982 (1973). The question then becomes simply whether or not a voucher system would constitute "support" of a private school.

Under the system described in House Bill 60, parents would apply for the money already allocated to their children and would use that money to purchase educational services at a private school. The money, therefore, is used for children and not for schools. The "support," if any, of private schools is only an indirect consequence. While there is no case law on the point, it would seem that the prohibition in Article XII, Section 3, is limited to direct support of private schools and thus the voucher system would not be in violation of that provision.

In general, the question of the constitutionality of a concept like the voucher system tends to involve a balancing of constitutional principles. We would conclude, on balance, that the constitutional obstacles are not sufficiently compelling to prohibit legislative enactment of a voucher system as a means of providing equal educational opportunity for exceptional children.