

Opinion No. 87-70

November 10, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Honorable Caleb Chandler, State Senator, 1919 Miller, Clovis, NM 88101

QUESTIONS

1. Who are "certified school instructors" within the meaning of 1986 N.M. Laws, ch. 33, § 34, granting a \$2,200.00 salary increase to those instructors?
2. Are speech -- language pathologists included within the meaning of "certified school instructor" contained in 1986 N.M. Laws, ch. 33, § 34, granting a \$2,200.00 salary increase?
3. Since some school districts have included speech-language pathologists within the meaning of "certified school instructor" contained in 1986 N.M. Laws, ch. 33, § 34 for purposes of granting a \$2,200.00 salary increase, are these districts in violation of law?
4. Since some school districts have excluded speech-language pathologists from the meaning of "certified school instructor" contained in 1986 N.M. Laws, ch. 33, § 34 for purposes of granting a \$2,200.00 salary increase, are these districts in violation of law?

CONCLUSIONS

1. See analysis.
2. No.
3. No, provided all requirements of the Public School Finance Act have been met.
4. No.

ANALYSIS

Section 34 of the 1986 N.M. Laws, ch. 33, increases the compensation level of certified school instructors by \$2,200 and appropriates for this purpose \$33,700,000 to be expended during the seventy-fifth fiscal year, i.e., the 1986-87 school year.¹ Subsection E of section 34 provides: "As used in this section, certified school instructor means a certified school instructor who spends more than fifty percent of his contract time providing direct instruction to students, and includes guidance counselors and certified school librarians." The Public School Code defines "certified school instructor" as "any

person holding a valid certificate authorizing the person to teach, supervise an instructional program, counsel or provide special instructional services in the public schools of the state." Section 22-1-2(D) NMSA (1987 Cum. Supp.). Thus, Section 34 of the 1986 N.M. Laws, ch. 33, restricts this statutory definition to those instructors who spend more than half their time providing "direct instruction" to students, guidance counselors and librarians.

The term "direct instruction" appears in Manual of Procedure for Uniform Financial Accounting and Budgeting for New Mexico School Districts at IV-6 (rev. ed. Nov. 1984), prepared by the Office of Education of the Department of Finance and Administration. The legislative finance committee must approve this manual, and school districts must adhere to it. Section 22-8-5 NMSA 1978. This manual defines direct instruction as "those activities dealing directly with, or aiding in, the instruction of students." These are the activities of the teachers, teacher aides, and substitute teachers.

"Direct instructional" personnel are classified within a "1.000" classification series. "Teachers" are included within this classification as:

1.141 Teachers-Grades 1-12

[T]eaching services rendered to students enrolled during the regular school term in grades 1-12.

1.141 [sic]² Teachers-Special Education

[T]eaching personnel assigned to Special Education programs during the regular school term.

1.149 Teachers-Early Childhood Education

[T]eaching personnel assigned to Early Childhood Education (Pre-school, Kindergarten) programs during the regular school term.

Other than substitute teachers and teacher aides, these three classifications of teachers are the only personnel who are described as providing "direct instruction".

This manual also classifies "Instructional-Support" personnel in a "2.000" series and generally describes the activities of such personnel as "those activities in support of teaching or improving the quality of teaching or related services to meet student instructional needs. Instructional Support includes health services." Id., at IV -9. Included within this series are librarian/media specialists (2.130), guidance (2.140), and special education support personnel (2.150). Included within the 2.150 classification are "certified special support personnel such as audiologists, diagnosticians, psychometrists, speech therapists, occupational therapists, and physical therapists."

To assist the legislature in arriving at the appropriated amount of \$33,700,000 made by 1986 N.M. Laws, ch. 33, § 34, the Office of Education prepared cost estimates. In doing so, it classified school personnel by groups. "Teachers," identified by the previously mentioned classifications of 1.141, 1.145, and 1.149, were assigned 14,544.48 full-time equivalent positions (FTE's);³ librarians (2.130) were assigned 268.47 FTE's; and guidance counselors (2.140) were assigned 493.92 FTE's. Assuming an increase of \$2,200 per individual, these three groups account for approximately \$33,779,000 and therefore exhaust the appropriation.

The Office of Education prepared cost estimates for other groups as well. Subject matter specialists (2.120) were assigned 135.02 FTE's; special education support personnel (2.150) were assigned 564.58 FTE's; and nurses (2.160) were assigned 210.82 FTE's. To grant the \$2,200 salary increase to special education support personnel, which classification likely would include speech-language pathologists, i.e., speech therapists, would have required an additional appropriation of \$1,243,000.

The state's classifications of school personnel, the Office of Education's cost estimates, and the legislature's appropriation at chapter 33, section 34, counsel that the "certified school instructors" described in chapter 33, section 34(E), who provide "direct instruction to students" include only the classroom teachers classified as 1.141, 1.145 and 1.149. The legislature excluded, save guidance counselors and librarians, other school personnel, including speech-language pathologists.⁴ Consequently, school districts who did not use the appropriation made in 1986 N.M. Laws, ch. 33, § 34 to increase by \$2,200 the salary of excluded personnel, including speech-language pathologists, have complied with the law.

In response to your third question, according to documentary material dated November 5, 1986, which the Legislative Education Study Committee has provided to us, twenty-six school districts granted the \$2,200 salary increase to certified school personnel excluded from 1986 N.M. Laws, ch. 33, § 34. The state's equalization distribution for public school support made in 1986 N.M. Laws, ch. 19 "include[d] a five percent compensation adjustment for all certified and non-certified school personnel except for certified school instructors, librarians and guidance counselors, who receive a compensation adjustment in a separate appropriations measure." The legislature, however, did not expressly limit a compensation increase to no more than five percent. The legislature expressed a limitation at 1986 N.M. Laws, ch. 33, § 34 in providing that "in distributing this appropriation the director [of the office of education] shall insure that each certified instructor receives no more than two thousand two hundred dollars (\$2,200) additional compensation for the 1986-87 school year." As the legislature was aware of the language to employ to prohibit salary increases above the five percent increase specifically contemplated by chapter 19's public school funding and did not use such language, we do not attribute to the legislature an intent to prohibit a district from granting more than a five-percent salary increase to certified school instructors excluded from chapter 33, section 34. Furthermore, "[f]unds generated under the Public School Finance Act are discretionary to local school boards, provided that the special program needs as enumerated in this section are met," Section 22-8-18(B) NMSA 1978, and

provided that local school boards must incorporate into their districts' salary schedules "any salary increases or compensation measures specifically mandated by the legislature," Section 22-5-11(A) NMSA 1978. See, e.g., Sections 22-8-37 and 22-8-42 NMSA 1978 (imposing certain limits on local school board spending discretion). The state's equalization guarantee distribution is provided for in the Public School Finance Act, specifically, Section 22-8-25 NMSA 1978, and such funds are, therefore, discretionary within certain limits. Accordingly, we conclude that school districts which have included speech-language pathologists within the meaning of "certified school instructor" contained in 1986 N.M. Laws, ch. 33, § 34 for purposes of granting a \$2,200 salary increase to those instructors are not in violation of law, provided all requirements of the Public School Finance Act were met.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) Section 34(G) of the 1986 N.M. Laws, ch. 33, mandates that the salary increase of \$2,200.00 shall "become a part of the base salary for certified school instructors and be incorporated into the public school equalization distribution in subsequent years." To implement this provision, the legislature enacted Section 22-5-11 NMSA (1987 Repl.), which provides, in part:

A. Prior to the beginning of the 1986-87 school year, each school board shall file its 1985-86 salary schedule and its 1986-87 salary schedule with the office of education. Prior to the beginning of each subsequent school year, each local school board shall file with the office of education a district salary schedule, which salary schedule shall incorporate any salary increases or compensation measures specifically mandated by the legislature.

[n2](#) Special education teachers are classified as 1.145. The manual incorrectly depicts 1.141 as the classification number.

[n3](#) The source that the Office of Education used in projecting FTE's was the Office's "A First look at New Mexico School Budgets 1985-86." Thus, FTE's were projected on 1985-86 positions.

[n4](#) School personnel excluded from receiving the \$2,200 increase provided in 1986 N.M. Laws, ch. 33, § 34 include (1) administrators/supervisors (such as superintendents, principals, administrative aides, supervisors); (2) instructional support (such as teacher aides, special education support personnel, instructional support aides); (3) other support (such as nurses, technicians, secretaries, clerical personnel, custodians, food service personnel); and (4) extracurricular activities (such as athletic, recreation, summer school personnel). See Legislative Education Study Committee budget document prepared for use by the 1987 legislature.