

Opinion No. 89-02

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OPINION OF: HAL STRATTON, Attorney General

BY: Lyn Hebert, Assistant Attorney General

TO: Robert A. Aragon, District Attorney, Eleventh Judicial District, McKinley County Courthouse, Gallup, New Mexico 87301

QUESTIONS

Can McKinley County contract with the Gallup -- McKinley County School District for the transportation of students of private, religious schools under the authority of Section 22-16-7 NMSA 1978?

CONCLUSIONS

Yes, but only if the county is reimbursed for the costs of such transportation pursuant to a contract.

ANALYSIS

Section 22-16-7 NMSA 1978 states:

A. A board of county commissioners may contract with a school bus service operator for the transportation of students attending schools, other than public schools, within the county in compliance with the Compulsory School Attendance Law [22-12-1 to 22-12-7 NMSA 1978]. The contract shall provide for the school bus service operator to use the same school bus routes as established for students attending public schools in the county.

B. A board of county commissioners may provide for payment under any contract made pursuant to the provisions of this section only out of general funds of the county and not out of any funds, taxes raised or taxes levied for educational purposes or out of any money appropriated for public schools.

It is clear that school districts may not provide transportation of students to private schools because of Article XII, Section 3 of the New Mexico Constitution that states:

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes,

shall be used for the support of any sectarian, denominational or private school, college or university.

The question remains whether the county can provide for such transportation with general county funds. In *Zellers v. Huff*, 55 N.M. 501, 514, 236 P.2d 949, 958 (1951), the New Mexico Supreme Court affirmed an injunction against the State Board of Education and several local school boards from "providing, permitting or authorizing free school bus transportation for pupils attending a parochial or sectarian school." The district court had declared that:

...the furnishing by the State of New Mexico of free school bus transportation to pupils of parochial schools is in violation of Section 3, Article 12 and Section 14, Article 9 of the Constitution of the State of New Mexico and the First Amendment to the Constitution of the United States of America¹ as made applicable to the states by the Fourteenth Amendment of the Constitution of the United States.

Id. at 512. As discussed, Article XII, Section 3 of the N.M. Constitution would prohibit use of educational funds only. However, Article IX, Section 14 of the N.M. Constitution, the "anti-donation clause," states, in part: "Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation...." The Supreme Court of New Mexico has rejected the argument that the receipt of some "public benefit" will remove a donation of state funds from the prohibition contained in this section. *Hutcheson v. Atherton*, 44 N.M. 144, 99 P.2d 462 (1940). If the private schools or students were to reimburse the county pursuant to an enforceable contract for funds expended in contracting with a school district for the transportation of students to the private schools, there would be no violation of Article IX, Section 14. Without such reimbursement, the county's expenditure of funds would be a violation of the state constitution.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

ⁿ¹ In a 5-4 decision the United States Supreme Court in *Everson v. Bd. of Education*, 330 U.S. 1, 67 S. Ct. 962 (1947) held that a New Jersey state statute that authorized school districts to provide for transportation of pupils to and from schools, including parochial schools, did not violate the "establishment of religion" clause of the First Amendment of the United States Constitution.