

## **Opinion No. 90-06**

March 16, 1990

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Andrea R. Buzzard, Assistant Attorney General

**TO:** Honorable Linn J. Tytler, State Representative, 6031 McKinney Drive, N.E., Albuquerque, New Mexico 87109. Alan D. Morgan, State Superintendent of Public Instruction, Department of Education, Education Building, Santa Fe, New Mexico 87501-2786

### **QUESTIONS**

Is NMSA 1978, § 22-2-8.6(C) (Repl. Pamp. 1989), which requires non-indigent parents of children in grades nine through twelve to pay the cost of optional summer and after-school remediation programs, constitutional?

### **CONCLUSIONS**

Yes. That section does not offend the "free school guaranty" of N.M. Const. art. XII, § 1, as that provision is construed by the New Mexico Supreme Court.

### **ANALYSIS**

Beginning with the 1989-90 school year, school districts must provide free remediation programs, i.e., special instructional assistance, for children in grades one through eight who fail to master essential competencies, including tutoring and summer school.<sup>1</sup> Beyond the eighth grade, non-indigent parents of students in those class levels who participate in summer and after-school remediation programs must pay the cost of that instruction. § 22-2-8.6(C) provides: "The cost of summer and after-school remediation programs offered in grades nine through twelve shall be borne by the parent or guardian; however, where parents are determined to be indigent according to guidelines established by the state board of education, the local school board shall bear those costs."

"Remediation" is a broad concept and includes that which occurs as part of the daily instructional process.<sup>2</sup> It also includes, for example, work/study programs, learning labs, parent workshops, peer or community volunteer tutoring, small group instruction, guided homework, and self-esteem enhancement. See the state department of education's remediation plan form to be used by schools as a guide in drafting remediation plans. The legislature does not direct school districts to offer remediation programs in grades nine through twelve and, more specifically, does not direct school districts to offer summer and after-school remediation programs.

It also includes, for example, work/study programs, learning labs, parent workshops, peer or community volunteer tutoring, small group instruction, guided homework, and self-esteem enhancement. See the state department of education's remediation plan form to be used by schools as a guide in drafting remediation plans. The legislature does not direct school districts to offer remediation programs in grades nine through twelve and, more specifically, does not direct school districts to offer summer and after-school remediation programs.

N.M. Const. art. XII, § 1 provides: "A uniform system of free public schools sufficient for the education of, and open to, all children of school age in the state shall be established and maintained." In *Norton v. Board of Educ. of School Dist. No. 16*, 89 N.M. 470, 553 P.2d 1277 (1976), the New Mexico Supreme Court prohibited school districts from charging fees for science workbooks, physical education towels and identification cards, based on New Mexico's "free school" guaranty. Citing *Paulson v. Minidoka County School Dist. No. 331*, 93 Idaho 469, 463 P.2d 935 (1970), the New Mexico Supreme Court stated:

In our opinion, the words in our Constitution, "free public schools sufficient for the education," do not mean that all courses offered should be free. Only those courses "sufficient for the education" should be "free" in the sense of this constitutional provision.

*Id.* at 471, 553 P.2d at 1278. (Emphasis in original.) To distinguish "free" courses from those for which schools might constitutionally exact fees, the court held that fees could not be charged for "required" courses but could be charged for "elective" courses. *Id.* at 471-72, 553 P.2d at 1278-79. The court directed the state department of education to define those courses that are "required" and those that are "elective" in New Mexico's educational system. *Id.* at 472, 553 P.2d at 1279.

Norton must guide our analysis of the free-school guaranty in the context of remediation programs, and, based on Norton, we conclude that the legislature has not violated New Mexico's constitution in requiring non-indigent parents of children in grades nine through twelve to pay for their children's attendance at optional summer and after-school remediation programs. Neither the legislature nor the state department of education "requires" children to attend those programs. Necessarily, therefore, those programs fall within Norton's "elective" category.

We are not permitted to question the legislature's wisdom in exacting fees of parents whose children attend summer school and after-school remediation programs. See, e.g., *Kaiser Steel Corp. v. Revenue Div., Taxation and Revenue Dept.*, 96 N.M. 117, 124, 628 P.2d 687, 694 (App.), cert. denied, 96 N.M. 116, 628 P.2d 686 (1981) (court is under no duty to inquire into the wisdom of a legislative act, and must resolve all doubts as to constitutionality in favor of validity of the act). Furthermore, because Norton controls, we are not permitted to rely on the reasoning of other courts reaching an opposite conclusion.<sup>3</sup>

Accordingly, we conclude that § 22-2-8.6(C) does not violate N.M. Const. art. XII, § 1.

## ATTORNEY GENERAL

HAL STRATTON Attorney General

### GENERAL FOOTNOTES

[n1](#) NMSA 1978, § 22-2-8.6(B) (Repl. Pamp. 1989) provides: "Local school boards shall develop remediation programs to provide special instructional assistance to students in grades one through eight who fail to master the essential competencies as established by the state board. Remediation programs may include but not be limited to tutoring or summer programs. The cost of school district-approved remediation programs shall be borne by the school district. Remediation plans shall be filed with the state board."

[n2](#) See September, 1988, state department of education memorandum to school districts: "Research indicates that the most effective remediation occurs within the classroom as part of daily instruction."

[n3](#) See *Hartzell v. Connell*, 201 Cal. Rptr. 601, 679 P.2d 35 (1984), in which the California Supreme Court stated:

The free school guarantee reflects the people's judgment that a child's public education is too important to be left to budgetary circumstances and decisions of individual families.

Once the community has decided that a particular educational program is important enough to be offered by its public schools, a student's participation in that program cannot be made to depend upon his or her family's decision whether to pay a fee or buy a toaster.

*Id.*, at 609-10, 679 P.2d at 43-44.