Opinion No. 37-1790

October 21, 1937

BY: FRANK H. PATTON, Attorney General,

TO: Mr. H. R. Rodgers Superintendent of Public Instruction Santa Fe, New Mexico

*{*171}* You inquire whether a school board has the right to exclude from public school married persons (a) under 21 years of age, and (b) over 21 years of age.

In my opinion the Boards of Education have the right to exclude married persons over the age of 21 years, but do not have the right to exclude any persons under 21 years of age solely on the ground that they are married.

The Enabling Act required a system of public schools "open to **all children** of the state"; and the Constitution provides in Article XII, Section 1:

"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."

With relation to age, the word "children" is ordinarily synonymous with "minor", and since neither the Enabling Act nor the Constitution otherwise defined the word "children", it is clear that the schools are open to all persons under the age of 21 years, and in my opinion the word "unmarried" cannot be read into the Constitutional provision. In legal contemplation, the marriage of an infant does not make him an adult. Montoya v. Miller, 7 N.M. 289, decided before the Constitution was adopted.

If the Constitutional Convention had intended to limit the privilege to unmarried children it would have so specified, particularly in view of the fact that the Constitutional Convention had before it a statute which had been in existence since at least 1891 (Ch. 25, Sec. 22, L. 1891) providing: "All resident unmarried persons between said ages (5 and 21) shall be entitled to attend the schools of their districts." This provision was a part of the statute providing for the enumeration of "all unmarried persons within the district under the age of 21 years, and over the age of 5 years".

*{*172}* Further it is significant that though this statute was reenacted in 1923, the first provision quoted above was dropped, Sec. 120-816, 1929 Compilation. The Legislature no doubt considered that the language of the constitution is broad and cannot be narrowed by such statutory provision. Nevertheless it permitted the census to continue being taken of "unmarried persons", since there is never much likelihood of but few, if any, married children availing themselves of the opportunity.

Constitutional and statutory provisions governing the eligibility of pupils are to be liberally construed in favor of the educational privilege, and in the absence of a contrary judicial determination our constitutional provision should be taken at its face value, in

my opinion, as meaning all persons of school age (that is, old enough to understand instruction), and who have not attained their majority, whether married or single.

It is only fair to state, however, that a contrary conclusion had been reached by this office in the past. (See Opinion No. 111, dated February 19, 1936, addressed to you, which is based on an opinion by a former attorney general in 1931). Since there is conflict of opinion, if there should be a great rush of married infants seeking free education, and the facilities should prove inadequate to provide for both the married and unmarried children, no doubt the board would be justified in resolving all doubt in favor of the latter by giving them the preference.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.