

## Opinion No. 39-3309

October 19, 1939

**BY:** FILO M. SEDILLO, Attorney General

**TO:** Mr. R. H. Grissom, Educational Budget Auditor, Office of State Comptroller, Santa Fe, New Mexico.

{\*116} In your letter of October 16 you state and inquire as follows:

"Section 12, Chapter 119, Session Laws of 1931, among other things, provides the number of teachers which may be employed, and states 'the above number shall be computed upon average daily attendance.'

Does this mean on the average daily attendance for the previous year, or can the number of teachers for a school be increased or decreased whenever the school authorities are satisfied that the decrease or increase in the number of pupils is permanent, and is not caused by sickness or other temporary conditions?"

The statute involved is not at all specific as to the time when the average daily attendance should be computed.

For the purpose of ascertaining the number of school teachers required at the commencement of a school term, no doubt reference to the average daily attendance for the previous year is proper, if not absolutely necessary, in order to at least anticipate or estimate what the average daily attendance for the ensuing year will be.

After a school term has begun and the school enrollment as reflected by the average daily attendance, warrants additional teachers, I see no legal objection to any action that the employing board may take in increasing the number of teachers within the limits allowed by the statute.

A more difficult question may arise in the case where during the school year it develops that a sharp decrease in enrollment and attendance leaves the school with more teachers than the ratio of students would warrant, because in such cases the employing board may have a binding contract with the teacher for the full year and in the absence of some express stipulation in the contract the board could not very well drop a teacher without perhaps incurring a civil liability on the contract.

At any rate, the law is very indefinite in this request and whatever the State Board {\*117} of Education will recommend in any given instance will be of much weight.

It is suggested that if the enrollment or daily attendance during any school year in any school increases to a point where additional teachers are permissible under the law and necessary under the circumstances, the employing board should not hesitate to

increase the number of teachers. It is only where a decrease in the number of teachers is contemplated during any school year that the employing board should be hesitant because of a possible lawsuit for breach of the teachers' contract, in the absence of an express stipulation in the contract giving power to the employing board to terminate the contract in case of decrease in average attendance.

By: FRED J. FEDERICI,

Asst. Atty. Gen.