Opinion No. 54-5917

March 10, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Jess T. Holmes Director of Safety Education Department of Education Santa Fe, New Mexico

*{*358}* You have asked this office for an opinion of what the liability of a school district or board, or the individual officers of the district or board, may be by reason of Laws 1953, Chapter 139, § 89.1 (c), (§ 68-2435 (c) of N.M.S.A., 1941 Comp., as amended), which reads as follows:

"(c) At all school crossings the school authorities shall place in the center of the roadway at the *{*359}* appropriate times portable signs inscribed 'School Crossing 15 **MPH,**' one such sign to be placed not to exceed 300 feet from each side of the school crossing. In addition, portable signs reading 'Stop When Children in Cross Walk' shall also be placed in the center of the roadway. One on each side of the marked school crossing. School authorities shall be held strictly responsible for the removal of these signs immediately after each session is concluded."

There is no other statute creating such liability for negligence against the school district as a governmental agency or its officers individually, and there are no decisions in our Supreme Court directly in point on this question.

At common law and under the weight of authority throughout the United States, school districts or boards being creatures of the sovereign, are not subject to financial responsibility for injuries incurred by reason of the negligence for the school district or board in the performance of its governmental functions unless such liability is created by statute. **47 Am. Jur. § 56 and 58, 160 A.L.R. 37, 53 and 55.** As to the liability of county hospitals, our Court recently, in **Elliott v. Lea County,** opinion filed February 17, 1954, upheld the general principle of common law immunity from suit.

It is the opinion of this office that the wording in the statute is not sufficient to either impliedly or directly create "tort liability" upon school districts. It is the generally accepted rule that statutes that abrogate this common law immunity are to be strictly construed and that the mere creation of corporate duties and powers in a school district does not create ab initio, liability for negligence. **Sullivan v. School District,** 179 Wis. 502, 191 NW 1020, **Lawver v. Joint District,** 232 Wis. 608, 288 NW 192, 160 A.L.R. 87. It has been held that failure of the governing body to provide funds to satisfy such obligations would nullify an interpretation of the creation of tort liability. **Weedle v. School,** 94 Md. 334, 51 A. 289, but see **Scofield v. Lordsburg Municipal School Dist.,** 53 N.M. 249, wherein our Court upheld judgment against School District under our Workmen's Compensation statute.

None of the cases reviewed involve the same set of facts under consideration here, but in similar facts patterns where legislatures have required school board officials to do or not to do certain acts and persons have been injured by reason of their failure to perform these acts, it has been uniformly held that no civil liability was created in the school district by such statute. **Conrad v. The Board,** 290 Ill. App. 317, 163 NE 567, **Krutile v. The Board,** 99 W. Va. 466, 129 SE 486, and **Lawver v. The Joint School District,** supra.

As to the individual liability of school officials, the general rule is that members of a school board or officials of a school district are not liable in tort as individuals for acts done by them as a board or in the discharge of their corporate duties in absence of a statute creating such liability nor do such school officials incur personal liability for the negligence of their agents or employees in the discharge of their duties. The exception to this rule is where such officials fail to perform ministerial duties delegated to them by statute. Employees and agents of high school boards or districts under the general rule do not enjoy this common law immunity for their negligent acts in the performance of their ministerial duties in the absence of a statute *{*360}* providing otherwise. **47 Am. Jur. p. 339, § 60, 160 A.L.R. p. 35.** Our 1953 law, cited above, in using the terminology "school authority" did not clearly establish whether they intended to mean school officials, members of the boards of school districts, or their agents, and in view of this lack of clarity, the commonly acceptable definition of school authorities would mean school officials "sui generis" and not individually. In like manner, this would infer that the Legislature conferred upon school districts or school boards a ministerial duty to be performed by the responsible officials.

It is, therefore, the opinion of this office that the Laws of 1953, Chapter 139, § 89.1 (c), probably did not abrogate common law immunity of school districts or boards from tort liability nor does the enactment appreciably affect the present liability of school officials for negligent acts performed within the scope of their employment.

By: Hilario Rubio

Assist. Attorney General