

Opinion No. 57-180

July 24, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Santiago E. Campos,
Assistant Attorney General

TO: Honorable Ken Roberts, State Representative, 801 Loma Vista Drive, NE,
Albuquerque, New Mexico

QUESTIONS

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1. Does the Department of Education have power over ". . . Non - public elementary schools insofar as plant facilities, teacher qualifications, student achievement, etc. are concerned"?
2. Under present laws, may operators of non-public elementary schools be enjoined from maintaining schools which do not offer substantially equal education to that offered in the public schools and may they be penalized?

CONCLUSIONS

1. See opinion.
2. No.

OPINION

ANALYSIS

Question 1. Pertinent constitutional and statutory provisions are the following:

Article 12, § 5 of the New Mexico Constitution provides:

"Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such period and for such time as may be prescribed by law."

Article 12, § 6 of the New Mexico Constitution, in part, provides:

"A state board of education is hereby created, to consist of seven members. **It shall have the control, management and direction of all public schools**, under such regulations as may be provided by law . . ." (Emphasis Supplied).

In conformity with the last provision of the Constitution quoted above, the Legislature of the State of New Mexico passed Chapter 148, Laws 1923. This enactment codified the existing school laws at the time and enacted other sections. Without too much change, Chapter 148, Laws of 1923, exists today as our basic school code. Pertinent sections are the following:

Section 101, as amended, (§ 73-1-1, N.M.S.A., 1953), which in part provides:

"The state board of education, pursuant to section 6, article XII, state Constitution, **shall be the governing authority of all public elementary and high schools of the state** and shall cause the provisions of this chapter to be carried into effect to the end that the school laws of the state shall be properly and uniformly enforced . . ." (Emphasis Supplied).

Section 105 (§ 73-1-7, N.M.S.A., 1953), which in part provides:

"The state board of education shall have the following powers:

(d) To hold or cause to be held, examinations for teachers for all the elementary and high schools of the state, under such regulations as it may prescribe; to fix the fees for all examinations and certifications, and pay the cost thereof from such funds as may be provided therefor.

(e) **To determine qualifications of persons teaching or desiring to teach school in any of the public elementary and high schools of the state** and to that end promulgate, from time to time, a system of classification of teachers. (Emphasis Supplied).

(f) To certificate teachers according to law and the prescribed classification of said board, and at its discretion to issue temporary teaching certificates in the interim of examinations, but in no case shall a person under the age of 18 years be certificated."

Section 1203 (§ 73-13-3, N.M.S.A., 1953), which in part provides:

"Children who have passed their sixth birthday shall until they have reached their seventeenth birthday, unless a child has previously graduated from high school, attend public schools of the state for as many weeks as the public schools in the district in which such children reside shall be in session, except that children actually attending private or denominational schools maintaining courses of instruction approved by the state board of education, those physically or mentally unfit or incompetent, and those residing more than three (3) miles from public schoolhouses and to whom no free public means of conveyance to and from school are furnished shall be exempt from the provisions of this act . . ."

Chapter 228, § 1, Laws 1939 (§ 73-1-9, N.M.S.A., 1953), which in part provides:

"The state board of education, in addition to the powers already given it by law, shall have the following powers:

(a) To examine and approve all plans and specifications for the repair or construction of school buildings of five (5) rooms or less; and no contract shall be written or any money expended by any board of education or governing authority of any school district in this state for the repair or construction of any school building in the state until such plans and specifications have been approved by the state board of education or the state superintendent of public instruction . . ."

With the above in mind, we take up first "plant facilities." It is assumed that you desire to know whether the State Board of Education may prescribe the type, size and general character of buildings used for school purposes. The only specific power which we can find in this regard is that contained in § 1, Chapter 228, Laws of 1939, above. And this section patently applies only to public schools, for it refers specifically to "any board of education or governing authority of any school district in this state." The laws providing for the creation and regulation of school districts concern themselves solely with the public schools. Private schools are not considered "school districts" within the meaning and intent of these laws.

In connection with this, it may be pointed out that not only has the Legislature not empowered the State Board of Education to prescribe or regulate the type and nature of "plant facilities" in private schools, it also has not seen fit to delegate such a power to it where the school building, public though it may be, is larger in size than five rooms. The obvious intent of the Legislature, it seems to us, was to permit the local authorities to determine for themselves what "plant facilities" best suited their needs in view of peculiar local circumstances.

Now there is no doubt but what private or public school buildings, or "plant facilities" as you choose to call them, must meet the requirements of municipal and state codes on buildings and health and safety. But as stated, only in the situation covered by § 1, Chapter 228 of the Laws of 1939, does the State Board of Education possess the power to approve or disapprove the type or character of "plant facilities".

The second part of your first question concerns "teacher qualifications" in non-public elementary schools. It is assumed that you desire to know whether the State Board of Education may prescribe the qualifications necessary for teaching in such schools and absent the meeting of such qualifications determine that such schools are not offering or maintaining courses of instruction such as would excuse children from attending the public schools under the compulsory attendance law.

We do not believe the State Board of Education possesses such power. We note that subsection (e) of § 103, Chapter 148, Laws of 1923, specifically empowers the State Board of Education to determine the qualifications of persons teaching in the "public elementary and high schools of the state". Nothing is said about determining the

qualifications of those teaching in non-public schools. And the power, we believe, cannot be inferred.

Further, we remember that the basic purpose of Chapter 148, Laws of 1923, in creating the State Board of Education, as set out in § 101 of that chapter, was to provide a governing authority for all the "public elementary and high schools of the state". It would seem that it was not intended that the State Board of Education should, at least as concerns the qualifications of teachers, regulate the affairs of these in non-public schools.

Private schools are mentioned in three places in § 105, as amended. This in subsection (a) 2. E., subsection (b) and subsection (n). But the mention of private schools in these subsections does not in any manner point to the power of the State Board of Education to prescribe the qualification of teachers in private schools. On the other hand, the mention of private schools in these subsections, which do not deal with teacher qualifications, and the absence therefrom in the subsections dealing with teacher qualifications, to us is a clear indication that the Legislature did not intend that the State Board of Education should have any power over teacher qualifications in private schools.

The third part of your first question relates to "student achievement". Frankly, we are unable to determine exactly what is desired by you in connection with this. In relating the powers of the State Board of Education to "student achievement," it is essential that we know what is contemplated by this term. Not having that knowledge, we hesitate to examine the host of concepts suggested by the term and relate them to the powers of the State Board of Education. However, if you will tell us what matters are encompassed by the term, we will be happy to examine it further and attempt to answer your questions for you.

Regarding your second question, we fail to find any legislation which specifically sanctions enjoining the operation of a non-public elementary school not offering education substantially equivalent to that offered in the public schools. Nor do we find a statute providing for the imposition of penalties on the operator of such a school. However, in this connection, it may be pointed out that a parent who does not send his children either to a public school or a "private or denominational school maintaining courses of instruction approved by the State Board of Education", as provided for in § 1203, Chapter 148, Laws of 1923, as amended, *supra*, are subject to fine and imprisonment provided for by § 1210, Chapter 148, Laws of 1923, (§ 73-13-10, N.M.S.A., 1953).