

Opinion No. 59-150

September 25, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. Tom Wiley Superintendent of Public Instruction Department of Education Santa Fe, New Mexico

{*227} This is in reply to your recent inquiry in which you asked for our opinion regarding the following questions:

1. What schools in New Mexico are "Public Schools" for the purposes of the National Defense Education Act of 1958 and what schools in New Mexico are "Secondary Schools" for the purposes of the National Defense Education Act of 1958?
2. Specifically, are the New Mexico Military Institute and the Northern New Mexico State School "Secondary Schools" for the purpose of the Act?
3. In the event the New Mexico Military Institute is considered a "Secondary School" for the purposes of the Act are the 13th and 14th years offered by the Institute considered as part of a "Secondary School System"?

The answers to your questions will be given in the discussion that follows:

The National Defense Education Act approved September 2, 1958 (P.L. 85-864; 72 Stat. 1580; 20 U.S.C.A., Secs. 15aaa, et seq.) was enacted by the Congress of the United States" . . . to provide substantial assistance in various forms to individuals, and to the States and their subdivisions, in order to insure trained manpower of sufficient quality and quantity to meet the national defense needs of the United States. {*228} See Section 101 of the Act. Title III of the Act, being Sections 301 through 305 provide for appropriations from the Federal Government to the States in accordance with a formula spelled out in Section 302. These appropriations must be used for financial assistance for the acquisition of equipment and minor remodeling in connection with science, mathematics and modern foreign language instruction in accordance with State plans approved by the Federal Commissioner of Education. Under Section 303 this assistance may be used only for expansion or improvement of supervisory or related activities in public elementary and secondary schools in the fields of science, mathematics and modern foreign languages and the administration of the State plan.

Title V, being sections 501 through 504, provides for appropriations from the Federal Government for the purpose of grants to State agencies to assist them in establishing and maintaining programs of testing, guidance and counseling. The appropriations are to be used pursuant to a formula spelled out in Section 502. Funds allotted to any one State are to be spent in accordance with a State plan approved by the Commissioner as spelled out in Section 503, allowing expenditures for testing and guidance and

counseling in public secondary schools. For the purpose of the Act, the terms "elementary school" and "secondary school" are defined in Section 103(g) and (h) as schools that provide elementary and secondary education as determined by State law, except that a secondary school does not include ". . . any education beyond grade 12." However, for the purposes of sections 301 through 304 [relating to acquisition of equipment and minor remodeling for science, mathematics and foreign language instruction] the term "secondary school" may include a public junior college as determined by State law. Section 103 (h). Nowhere in the Act is the term "public school" expressly defined except that section 103(i) states that the term "public" as applied to any school or institution does not include a school or institution of any agency of the United States.

The Act, therefore, leaves the definitions of elementary and secondary schools up to determination of state law. Further, the term "public school" is, in our opinion, to be given as broad a definition as possible in view of the above-cited statutory language that merely excludes schools or institutions of agencies of the United States. This does not mean, of course, that schools obviously private in nature, not supported in any way by public funds and/or managed by a public body, can be considered as public schools under the Act, but in our opinion such language does show an intent by the Congress to extend the coverage of the Act to as many public institutions as possible.

The authority to accept educational aid from the Federal Government is found in Section 73-1-9 (c) N.M.S.A., 1953 Comp., being Chapter 228, Section 1, Laws of 1939. This section granting to the State Board of Education the power to accept Federal aid, reads as follows:

"(c) To accept and receive all grants of money from the United States of America or any other agency, made for public school purposes or in any way touching or pertaining to the public school system of the state, and to disburse the same in the manner and for the purposes specified in the grant. . . . (Emphasis Supplied) . . ."

Therefore, the State Board of Education is authorized to receive such grants not only for public school purposes, but also for purposes in any way touching or pertaining to the public school system of the state. See also Section 73-1-1, supra, for like authority vested in the [Illegible Word] Board {*229} of Education. This shows an intent on the part of the legislature to authorize acceptance of grants for broad public education purposes. Further, Section 73-6-31, supra, states an acceptance by the State of the provisions of each and every part of each and every title of any Act of the Congress of the United States which will afford or grant to accepting states Federal aid to educational institutions and educational activities within the State, and Section 73-6-34 authorizes the State Superintendent of Public Instruction to enter into agreements and otherwise administer such Federal aid.

With these statutory provisions and our conception of the policy considerations behind the Act in mind, we turn now to your specific questions.

In answer to your first question it is our opinion that any school giving instruction up to and including the 12th grade, supported in whole or in part by public funds of the State of New Mexico and managed by an elective or appointive body authorized by the statutes of the State of New Mexico is a public school for the purpose of the Federal National Defense Act of 1958. We are aware that no precise definition of "public schools" exists by statute or Constitution in New Mexico. We are further aware that certain schools coming under our definition are not free public schools, the establishment and maintenance of which is mandatory under Article XII, Section 1 of the New Mexico Constitution. Nevertheless, in our opinion, the purpose of the Federal Act is to distribute grants on as wide a base as possible and any limitation of the receipt of such Federal funds to schools which are denominated as free public schools would, in our opinion, subvert the purposes of the Act. The purpose of establishing a free public school system is to allow a public education for all children whose parents cannot afford and/or do not choose to educate such children at private or public institutions of learning requiring fees or other monetary consideration as a prerequisite for admission. The fact that a publicly managed, and partially public supported school is not a free public school should not eliminate such school from the receipt of grants, directly or indirectly, from the Federal Government unless the Federal Act authorizing such grants specifically so states, and as pointed out above, such was not the apparent intent of the Congress in this case.

The definition of secondary schools for the purpose of the Act is a more difficult problem. As stated before, Section 103 (h) leaves this definition up to the determination of the individual states. Again, there is no precise definition of secondary schools by Constitution or statute in New Mexico. Section 73-1-1, supra, does name the State Board of Education, pursuant to Article XII, Section 1, supra, as governing authority for "all public elementary and high schools" of the State. Thus, a delineation is made which would appear to indirectly define a secondary school as a high school. However, as you have informed us, many school systems throughout the State are set up with elementary school through the 6th grade, a junior high school from the 7th through 9th grades and a high school from the 10th grade to 12th grade inclusive, instead of the traditional delineation of grades 1 through 8 as elementary and 9 through 12 as high school. Further, you state that for purposes of teacher certification, a teacher in a junior high must be certified for teaching secondary education. In view of this information, we are of the opinion that the term "secondary school" must be viewed as applied to each school system or particular school. Thus, if a system is based on the traditional basis of grades 1 through 8 as elementary and 9 through 12 as high school, the term "secondary school" would be coextensive with the high school, so that secondary education would begin with the 9th {230} grade, whereas if the system included a junior high, the term "secondary school" would include the junior high and a secondary education would begin with the 7th grade.

We turn now to your second question, to wit, whether the New Mexico Military Institute and the Northern New Mexico State School are "secondary schools" for the purpose of the Act. Under the above discussed definition of public schools, which of necessity includes secondary schools under the Act, both of these institutions qualify at least as to

education through the 12th grade. The New Mexico Military Institute at Roswell is designated as an educational institution of the State. Article XII, Section II, New Mexico Constitution. It is governed by a Board of Regents established by statute and appointed by the Governor by and with the advice of the Senate. Section 73-28-1, supra. The Institute is financed partly by appropriation by the legislature as evidenced by appropriations for the 48th and 49th Fiscal Years in Chapter 288, Sections 5 and 22 and Chapter 314, Sections 1 through 6, Laws of 1959. Therefore, at least for education through the 12th grade, the Institute is a secondary school under the Act. The Northern New Mexico State School at El Rito, also known as the Spanish-American School at El Rito is also designated as a State Educational Institution by Article XII, Section 11, supra. It is run by a Board of Regents as provided by Article XII, Section 13, New Mexico Constitution, being a five man Board appointed by the Governor with consent of the Senate. The school is financed partially by appropriations by the Legislature as evidenced by appropriations for the 48th and 49th Fiscal Year in Chapter 288, Sections 5 and 22, and Chapter 314, Sections 1 through 6, Laws of 1959. Although the school was intended as a normal school for the training of Spanish-American teachers for instruction in communities where the Spanish language is prevalent, you have informed me that for several years the school has conducted a high school program. Insofar as the school conducts such a program, in our opinion, it is a secondary school for the purpose of the Act.

Lastly, you have asked whether the 13th and 14th years at New Mexico Military Institute are considered as part of a secondary school for the purpose of the Act. The answer to your question is found in the above cited language of Section 103 (h). Under this language, the 13th and 14th years at the Institute cannot be considered as part of a secondary school except for the purposes spelled out in Sections 301 through 304 (pertaining to financial assistance for strengthening science, mathematics and modern foreign language instruction). In our opinion, the Institute would qualify as a "public junior college" for said purposes.

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