

## Opinion No. 63-106

August 20, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Mr. Charles S. Solomon Assistant District Attorney P. O. Box 2041 Santa Fe, New Mexico

### QUESTION

#### QUESTION

May the Board of Education of Rio Arriba County authorize a religious denomination to use public school facilities for religious services?

#### CONCLUSION

Yes, subject to certain restrictions specified herein.

### OPINION

#### {\*230} ANALYSIS

As pointed out in your letter requesting an opinion, the Board of Education of Rio Arriba County, New Mexico, has in the past, authorized a private religious denomination to use a public school classroom for religious services at times when the building was not utilized in connection with the regular school program.

Three New Mexico State Constitutional provisions apply in part to the question under consideration. Article IX, Section 14 recites in part:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit or make any donation to or aid of any person, association or public or private corporation. . ."

Article XII, Section 3 of the state Constitution sets out:

"The schools, colleges, universities and other educational institutions provided for by this Constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, **or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.**" (Emphasis supplied).

Section 8 of the Enabling Act for New Mexico (36 U.S. Statutes at Large 557, Ch. 310) provides in part:

"The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said state, . . ."

In addition to the above cited constitutional provisions, Section 73-12-2, N.M.S.A., 1953 Compilation, provides:

"No teacher shall use any sectarian or denominational books in the schools or teach sectarian doctrine in the schools, and any teacher violating the provisions of this section shall be immediately discharged, his certificate to teach school revoked, and be forever barred from receiving any school moneys and employment {231} in the public schools of this state. **Provided, that this section shall not be construed to interfere with the use of school buildings for other purposes authorized by the county board after school hours.**" (Emphasis supplied)

Section 73-9-7, N.M.S.A., 1953 Compilation, as amended, specifies in part that "Except with respect to independent and union high school districts, the county board of education shall have supervision and control of all rural schools and districts and sites, buildings, equipment and funds of the district. . ."

As pointed out in 78 C.J.S. "Schools and School Districts", Section 259, at page 1239:

"Meetings for religious purposes. In the absence of express or implied statutory authorization, a school building may not be used for religious meetings, and under some statutes the school authorities may prohibit the use of a school building for such purpose. . ."

Several recent decisions of the United States Supreme Court prohibiting certain aspects of the teaching of religion in public schools bear in part also upon the question posed above. In **Engle, et al. v. Vitale, et al.** (1962) 370 U.S. 421, 82 S. Ct. 1261, the United States Supreme Court held that a board of education of a public school system could not under the establishment clause or the Fourteenth Amendment to the United States Constitution employ the power, prestige or financial support of the State behind a particular religious belief, nor prescribe a particular prayer for use in the public schools.

In the case of **School Dist. of Abington Township, Penn., et al. v. Schempp, et al.**, (1963) 83 S. Ct. 1560; U.S. , the Supreme Court held that the Establishment clause of the First Amendment to the Federal Constitution which is incorporated in the Fourteenth Amendment of the Constitution of the United States prohibits a state or school district from assisting any religious organization. The court stated in this case that the state and school district must follow a strict policy of "neutrality" respecting the teaching of religion.

The leading New Mexico Supreme Court decision bearing upon the question of the relationship between the State and particular religious denominations is the case of **Zellers v. Huff** (1951) 55 N.M. 501, 236 P.2d 949. In that case the court clearly indicated that neither the state nor a local school board could lawfully give or provide from public funds assistance to private or sectarian groups.

From a careful consideration of the above Constitutional, statutory and case law authorities, it is our opinion that a county board of education may, in its discretion, pursuant to Sections 73-9-7 and 73-12-2, N.M.S.A., 1953 Compilation, permit a particular religious denomination or private group to use public school buildings or facilities after school hours where such use, in the opinion of the school board, will not interfere with normal school activities. However, as pointed out in the above cited authorities, the school board may not in any respect sanction or give endorsement to such religious denominational programs. See Attorney General's Opinion No. 822-1934, dated October 27, 1934, and No. 57-144, dated June 20, 1957, pertaining to the authority of municipal and consolidated boards of education {232} to authorize private use of school buildings. In our judgment the local school board must in exercising its discretion either make the use of school facilities available to all religious groups on an equal basis and without preference as to any particular group, or not permit such use at all.

Although it is our opinion that a county board of education may in its discretion permit a religious denomination to utilize public school buildings after normal school hours, we wish to emphasize that since a school district may not in any manner lend its financial or other support to any private religious denominations, it is, therefore, **incumbent upon the school authorities to obtain reimbursement for any actual expenses occasioned from such private use.**

In instances where the local school board desires to enter into a lease of real property to any private party or religious group and proposes to give **exclusive** right of possession and occupancy to school lands or buildings, the State Board of Finance must give its approval pursuant to Section 6-1-8, N.M.S.A., 1953 Compilation. Where, however, the use permitted is temporary or brief, and limited to hours when the property is not needed for school purposes, the approval of the State Board of Finance is not necessary, and the local board of education may or may not authorize such usage according to its discretion. See Attorney General's Opinion No 63-26, dated March 29, 1963.

By: Thomas A. Donnelly

Assistant Attorney General