

## Opinion No. 69-16

February 27, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Assistant Attorney General

**TO:** Honorable Benito Chavez, State Representative, House of Representatives, Legislative Executive Building, Santa Fe, New Mexico 87501

### QUESTIONS

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1. May public school students be released from a study hall period to attend religious instructions?
2. May a public school building be used for religious instructions after school hours or on Saturdays?
3. May an elected school board member serve on that school board if he lives outside the school district?

#### CONCLUSIONS

1. See analysis
2. See analysis
3. No.

### OPINION

#### {\*22} ANALYSIS

Article XII, Section 5 of the Constitution of New Mexico 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.** (Emphasis added).

Section 77-10-2, New Mexico Statutes Annotated, 1953 Compilation, requires that all persons age six (6) prior to January 1, of a school year through 16 attend a public school, an approved private school, or a school offered by a state institution "for at least the length of time of the school year that is established in the school district in which the person is a resident", unless specifically exempted by law. It is apparent that a person

subject to the compulsory school attendance law who attends a public school must be present for the full school year as established by the school district where he resides. As far as this law is concerned the minimum and maximum time for attendance at a public school is the {23} same.

Section 77-10-2, New Mexico Statutes Annotated, 1953 Compilation, provides that certain persons may be exempted from compulsory school attendance if they are "**specifically exempted by law.**" While there are certain exemptions provided for in the law, none of them include the right to be excused to attend religious exercises.

A number of states have enacted legislation which allows pupils to be excused from school for a certain period of time to attend religious exercises away from school property and legislation of this nature has been upheld by the United States Supreme Court (**Zorach v. Claiborn**, 343 U.S. 306). It is our opinion that similar legislation will be necessary in New Mexico to excuse children from the compulsory school attendance law.

In reference to your second question, an examination of the applicable statutes and case law would indicate that it is now unlawful to allow religious instruction in a public school building. Section 77-11-10 of the New Mexico Statutes Annotated, 1953 Compilation provides:

"Public School instruction -- Prohibition -- Penalty. -- A. No person shall teach sectarian doctrine in a public school.

B. Any person violating the provisions of the section by teaching sectarian doctrine in a public school shall be immediately discharged from further employment with a school district. The provisions of sections 77-8-14 through 77-11-17, New Mexico Statutes Annotated, 1953 Compilation relating to the discharge of certified school personnel apply to this section."

Section 77-1-2, N.M.S.A. 1953 Compilation was enacted to replace Section 73-12-2, N.M.S.A., 1953 Compilation. (Repealed Laws 1967, Chapter 16, § 301) which provided:

"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 in the public schools in the 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 added.)

You will observe that the provisions of the repealed act granted to the school board discretionary powers to permit after hours use of the school for sectarian religious instruction. See Attorney General Opinion 57-144, issued June 20, 1957. The

legislature chose not to include a similar provision in the present act. This is strong evidence of the legislative intent to withhold any such authority from school boards.

We believe that free use of public use of public school buildings after school hours would also violate Article 12, Section 3 of the Constitution of New Mexico which provides:

"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 added.)

{\*24} In view of the constructional statutory and judicial prohibitions we conclude that, in the absence of payment for such use, public school buildings may not be used for religious instruction. See **Zellers v. Huff**, 55 N.M. 501, 236 P.2d 949 (1951).

As to whether a person who lives outside the boundaries of a school district may serve on the school board; Article V, Section 13 of the Constitution of New Mexico provides in part as follows:

"All district, county, precinct and municipal officers, shall be residents of the political subdivisions for which they are elected or appointed."

A school district is a political subdivision of the state. **McWhorten v. Board of Education**, 63 N.M. 421, 320 P.2d 1025 (1958). See Attorney General Opinion 64-6, issued January 21, 1964. Section 77-5-5 N.M.S.A. 1953 Compilation of the Public School Code requires that a candidate for membership on a local school board be a resident of the school district in which he resides. We therefore must conclude that a person who lives outside a school district may not serve on that district's school board.