

Opinion No. 73-59

August 13, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Richard H. Folmar Assistant Director New Mexico Legislative Council 334 State Capitol Santa Fe, New Mexico 87501

QUESTIONS

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Can a school district compel students residing in the district to attend the appropriate schools of that district, instead of attending schools in an adjacent district?

CONCLUSION

No, **but** see analysis.

OPINION

{*117} ANALYSIS

New Mexico Constitution, Article XII, § 5, which requires school age children to attend school, states:

"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."

Pursuant to the Constitution's mandate, our legislature enacted the Compulsory School Attendance Law, Sections 77-10-1 through 77-10-7, N.M.S.A., 1953 Comp. There is nothing in the Compulsory School Attendance Law which allows a child to be compelled to attend the schools of the school district within which he lives, as a review of the following sections demonstrates.

Section 77-10-1(A), **supra**, which specifies the ages between which compulsory attendance is mandated, only states that children between ages six and seventeen must "attend a public school, a private school maintaining courses of instruction approved by the state board, or a program of instruction offered by a state institution." This passage implies that there is a freedom of choice for the student (or his parent or guardian) as to how he is to fulfill the requirement. The section allows a student to choose to attend a private school and certainly there is no restriction on where such attendance must take place. Furthermore, in indicating that the student may attend a "public school" in order to meet the requirement, there are no limiting nor modifying

words connected therewith. It is assumed that if the legislature had intended to restrict or allow the restriction to attendance within the district, it would have said so.

In Section 77-10-2(B), **supra**, it is required that a student attend school "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." Again, this passage does not require attendance within the district, but rather only provides the standard against which the period of attendance required of him is to be measured.

Section 77-10-3, **supra**, states that any student subject to the Compulsory School Attendance Law "shall be permitted to attend public school within the school district in which he is a resident . . ." This section creates a right in the student to attend the schools of his district if he or his parent or guardian choose for him to do so, but does not create any obligation for him to do so.

Section 77-10-4(A), **supra**, deals with the situations in which a school district may admit students who are not residents of the school district. Such students may be admitted "when there are sufficient school accommodations to provide for them." This section provides a standard by which school districts may make the determination as to whether it is possible to accept the students, and then (if there is sufficient space available) allows the district discretion as to whether it will actually accept the student.

Section 77-10-4(B), **supra**, provides that tuition may be charged only to students who are not residents of the state. This implies that a student who is a resident of New Mexico but not of the district may be allowed to attend the schools of that district (as per Section 77-10-4(A), **supra**), but may not be charged tuition.

{*118} All of the statutory provisions mentioned above clearly imply that no student may be forced to attend the public schools in the school district where he resides. In fact, such a restriction would be unconstitutional, violating the freedom of association guaranteed by U.S. Const. Amend. I, and the liberty rights guaranteed by N.M. Const. Art. II, §§ 4, 18. Therefore, we conclude that the legislature did not intend for the law to require a student to attend the public schools of his district, nor that such a student be required to do so by any rule of any other body.

But there are some factors which should be pointed out since they ultimately affect the situation. The State Board of Education has adopted the following Regulation pursuant to its authority for control, management and direction of the public schools, as provided in N.M. Const. Art. XII, § 6, and Section 77-2-1, **supra** :

REGULATION NO. 73-2 GOVERNING THE ATTENDANCE OF STUDENTS WITHIN THE SCHOOL DISTRICTS OF THEIR RESIDENCE

"New Mexico public school students shall attend the public schools within the school district where they reside; Provided, however, that a local school board may admit a

student who is a resident of another New Mexico school district in any of the following circumstances:

(1) When there are sufficient school accommodations to provide for the student and when written consent has been granted by the local school board of the district in which the student resides; or

(2) When state-approved transportation which crosses school district boundaries is being provided, pursuant to either Section 77-14-2(C) or Section 77-14-6, N.M.S.A., 1953 Comp.; or

(3) When it has been determined and verified in writing by the State Superintendent of Public Instruction that educational opportunities are greater or specific programs are available only in that district.

Where the local school board of the district in which a student resides withholds its written consent provided in Section (1) above, and the student does not qualify under either Section (2) or Section (3) above, the student, by his parent or guardian, shall have the right to appeal such refusal to the State Board of Education or its delegate. Such appeal shall be initiated by a simple letter of request to the Superintendent of Public Instruction, containing the facts of the case and requesting review. If the State Board of Education or its delegate find that the local school board's approval was arbitrarily withheld, it may provide written consent which shall be sufficient alternative authority under Section (1) above, for the student to attend the schools of another district.

Students non-resident to a district who do not qualify under the above, shall not be included in the membership report required under Section 77-6-14; Subsection A, Paragraph (2), N.M.S.A. and consequently shall not be eligible for computations of the basic support and other state distributions.

Nothing herein shall be construed as abrogating or enlarging a local board's obligations under State statutes.

All rules and regulations of the New Mexico State Board of Education in conflict herewith are repealed. Adopted by the State Board on December 8, 1972 (and amended on January 5, 1973).

This Regulation shall become effective at the beginning of the 1973-74 school year."

At first glance it may appear that the State Board of Education is forbidding students from attending public schools outside their school districts. But a close reading clearly indicates that the freedom of choice of the student or his parent or guardian are in no way restricted. The only penalty for violation of the regulation is the ineligibility of that student to qualify for the State financial support that would normally follow him. The

student is still free to attend the school of his choice under those circumstances if he can prevail upon the school district to receive him.

By: Oliver E. Payne

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