

Opinion No. 75-70

December 9, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Richard L. Johnson Director Legislative School Study Committee 327 State Capitol
Santa Fe, New Mexico 87503

QUESTIONS

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May a local school board suspend a student for failure to comply with the immunization statutes?

CONCLUSION

See Analysis.

OPINION

{*186} ANALYSIS

The legislature has set forth various qualifications a student must satisfy in order to be eligible to enroll in a public school. See, for example, Section 77-6-2 (1) (B), NMSA, 1953 Comp. (1974 Interim Supp.) and Section 77-10-2, NMSA, 1953 Comp. (1975 Interim Supp.). One of these qualifications is set forth in Section 12-3-4.2, NMSA, 1953 Comp. (1975 Interim Supp.), which states as follows:

It is unlawful for any student to enroll in school unless he has been immunized, as required under the rules and regulations of the health and social services board, and can provide satisfactory evidence of such immunization. Provided that, if he produces satisfactory evidence of having begun the process of immunization, he may enroll and attend school as long as the immunization process is being accomplished in the prescribed manner. It is unlawful for any parent to refuse or neglect to have his child immunized, as required by this section, unless the child is properly exempted.

The Health and Social Services Board, pursuant to its responsibilities under Section 12-3-4.1, NMSA, 1953 Comp., has promulgated the following regulation specifying the required immunizations:

The following immunizations are required for all pupils in public, private or parochial elementary and secondary schools, as well as all those pupils in Early Childhood Education facilities under the New Mexico Department of Education, and all children in licensed preschool or day care centers, except for those children who have been legally

exempted from these immunizations: DIPHTHERIA, PERTUSSIS, TETANUS, POLIOMYELITIS, MEASLES AND RUBELLA . . .

Section 12-3-4.2, **supra**, specifies that as a prerequisite to lawful enrollment in a school, a student must give to school authorities satisfactory evidence that he has been immunized or is in the process of becoming immunized unless he is exempted from doing so pursuant to the provisions of Section {**187*} 12-3-4.3, NMSA, 1953 Comp. In other words, a student is not qualified to enroll unless he has met the requirements of Section 12-3-4.2, **supra**.

This then brings us to the issue of what action the local school board may take with regard to a student who has failed to comply with Section 12-3-4.2, **supra**. Section 77-4-2 (A), NMSA, 1953 Comp. (1973 Supp.) provides that local school boards have the power to supervise and control public schools within the school district, subject to State Board of Education regulation. The authority to supervise and control public schools necessarily empowers the local school board to limit attendance to only those students who are eligible to enroll. Cf. **State ex rel. Seago v. Kirkpatrick**, 86 N.M. 359, 524 P.2d 975 (1974). If a student is not immunized, he may not lawfully enroll in school. If such a student is mistakenly enrolled or if a student who in the process of immunization discontinues that process, the local school board has the power pursuant to Section 77-4-2 (A), **supra**, to "disenroll" him or otherwise prevent his attendance at school because he would not satisfy the qualifications for lawful enrollment.

It should be pointed out that the "disenrollment" of a student for noncompliance with the immunization statutes would not constitute a deprivation of the constitutional right to a free public school education as provided in Article XII, Section 5 of the New Mexico State Constitution. That provision and Section 77-10-2, NMSA, 1953 Comp. (1975 Interim Supp.) make school attendance compulsory within the State of New Mexico. While there are no New Mexico cases directly on point, the decisions from other states with similar statutes and constitutional provisions have been uniform in holding that health measures prescribed as a condition of school attendance do not conflict with compulsory education laws. See 93 A.L.R. 1413, 1434. In addition, immunization statutes and regulations have been held to be reasonable measures for the protection of public health and a valid exercise of the police power of the legislature. **Itz v. Perick**, 493 S.W.2d 506 (1973), **app. dism.** 412 U.S. 925, 93 S. Ct. 2754, 37 L. Ed. 2d 152, **reh. den.** 94 S. Ct. 44; **Mannis v. State ex rel. DeWitt School District No. 1**, 398 S.W.2d 206, 240 Ark. 42 (1966), **cert. den.** 384 U.S. 972, 86 S. Ct. 1864, 16 L. Ed. 2d 683.

In order to insure uniformity of application, it is our recommendation that the State Board of Education promulgate regulations regarding "disenrollments" pursuant to noncompliance with Section 12-3-4.2, **supra**, in conjunction with the Health and Social Services Department which has supervisory and enforcement responsibility pursuant to Section 12-3-4.1, NMSA, 1953 Comp.

Finally, while the action of a local school board in "disenrolling" or otherwise preventing the attendance at school of students who are not immunized may indirectly affect the administration of the immunization program, Section 12-3-4.1, NMSA, 1953 Comp. specifies that ". . . (t)he state department of public health shall supervise and secure the enforcement of the required immunization program." In Opinion of the Attorney General No. 59-159, dated October 5, 1959, this office concluded that the State Department of Public Health (HSSD) was indeed charged with the enforcement of this legislation and that the department should seek the assistance of the district attorneys in {**188*} prosecuting any person or persons guilty of violating the act.

By: Albert V. Gonzales

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