

Opinion No. 31-40

January 31, 1931

BY: E. K. Neumann, Attorney General

TO: Mrs. Georgia L. Lusk, Superintendent of Public Instruction, Santa Fe, New Mexico.

{*38} This is in reply to your letter of January 31, 1931, in which you ask the following questions of law:

1. Is it legal for boards of education to close a part of the schools under their jurisdiction on account of shortage of funds without closing all at the same time? This question has special reference to the closing of the grade schools and keeping the high schools open for a longer period.
2. Must all outstanding bills up to date be paid before determining the amount that can be applied on teachers' salaries?

In answering your first question I wish to call your attention to section 4 of article 12 of the State Constitution, which provides that "a public school shall be maintained for at least five months in each year in every school district in the State" and also to section 120-1213 of the 1929 Compilation which establishes seven months as a minimum school term. Subject to these limitations the length of the school term is within the discretion of the various boards of education.

Section 120-1213 evidently contemplates that when funds permit, and other unavoidable causes do not intervene, **all** schools must be kept open for seven months. Hence, for example, it would not be permissible to close grade schools at the end of a six months term in order to keep high schools open for eight or nine months.

Section 120-804 and 120-906 of the 1929 Compilation place the supervision and control of Public Schools in the hands of boards of {*39} education. The manner of exercising this supervision and control is, except as limited by law, within the discretion of such boards. (See 24 R. C. L. p 573-574).

However, in the exercise of this discretion school boards cannot go so far as to injuriously affect the interests of any citizen within the district.

The law commits the government and conduct of the school, in general, to the discretion of the board of education of the district, and places it beyond that of the patrons. Let the results be good or bad, there is no remedy, so long as the board acts within the limits of its legal power and authority. If it employs such teachers as the law authorizes it to employ, the patrons cannot interfere by injunction or otherwise, merely because it might have found others more competent or satisfactory. The same rule applies to all other things left to its discretion. County Ct. v. Armstrong, 34 W. Va. 326, 12 S. E. 488;

County Ct. v. Boreman, 34 W. Va. 87, 11 S. E. 747. On the other hand, a governing body trespassing the bounds of its legal authority, and, in so doing injuriously affecting the interests of a citizen, may be restrained by injunction at his instance. (Spedden v. Board of Education, 52 L. R. A. (N. S.) 163).

As a general proposition, in my opinion, it would not be legal for a board of education to arbitrarily make the term of one or more schools in the district shorter than that of others, at least without providing means for such children affected to attend other schools in the district for the remainder of the term. The law does not permit an arbitrary discrimination against any group or class of citizens. (Williams v. Board of Education, 31 S. E. 985).

As to the special question of closing grade schools in order to keep high schools open for a longer period, subject to the statutory limitations above referred to, I am of the opinion that this might be done where conditions justify it.

One of the questions involved, of course, is whether this would amount to an **arbitrary** discrimination against grade school pupils. I am unable to find any decisions upon this particular question, but, as a general principle of law, where there is some reasonable basis for affording rights and privileges to one class which are denied to another, such discrimination is justified. I can think of many reasons why a board of education might think it justifiable to allow high school pupils to continue the full nine month period while shortening the term of grade schools.

In answer to your second question, I am of the opinion, that this is a matter within the discretion of the board. Teachers' salaries are a maintenance expense and there is no statute requiring teachers' salaries to be deferred to other maintenance expenses. It would follow that the obligation to pay such salaries would be the same as with respect to other maintenance charges.

By Quincy D. Adams,

Asst. Atty. General