



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

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OPINION
OF
GARY K. KING
Attorney General

Opinion No. 10-06

BY: Elizabeth A. Glenn
Deputy Attorney General

TO: The Honorable Sheryl Williams Stapleton
New Mexico State Representative
Box 25385
Albuquerque, NM 87125

QUESTION:

May the Public Education Department (“PED”) pay a publisher or depository under the Instructional Material Law, NMSA 1978, §§ 22-15-1 to -14 (1967, as amended through 2009) (“IM Law”),¹ to reimburse it for the lending of textbooks to sectarian, denominational or private schools for the use of their students² without violating the New Mexico Constitution?

¹ The effective date of the 2009 amendments to the IM Law was July 1, 2010. See 2009 N.M. Laws, ch. 221, § 11.

The opinion request and accompanying materials characterize the provision of textbooks to public and private schools under the IM Law as a loan. The IM Law does not refer to a loan of instructional materials, but provides for the distribution of instructional materials for the “free use” of students attending public and private schools. NMSA 1978, § 22-15-7. As discussed in the text, the provision of textbooks at state expense to private schools raises the same constitutional issues regardless of whether the textbooks are loaned or given outright to the schools and whether the textbooks are provided to the schools directly or solely for the use of their students.

CONCLUSION:

Judicial and other legal authority from New Mexico and other states indicate that PED's payment of public money for textbooks that are provided to students attending private schools, including sectarian and denominational schools, may violate Article IX, Section 14 and Article XII, Section 3 of the New Mexico Constitution.³

ANALYSIS:

The Instructional Materials Law

The IM Law requires PED to adopt and approve a "multiple list" of instructional materials. NMSA 1978, § 22-15-8(A). The multiple list includes textbooks and other "educational media." Id. § 22-15-2(C), (D). Each year, PED allocates money from the Instructional Material Fund¹ to public and private schools for the purchase of instructional materials. Id. § 22-15-9(A). A public school district or private school must use at least 50 percent of its allocation for materials on the multiple list. Id. § 22-15-9(C). Private schools may not spend instructional materials funds for "religious, sectarian or nonsecular materials" and must purchase instructional materials through an in-state depository. Id. PED pays the in-state depository on behalf of private schools for instructional materials. Id. § 22-15-9(E).⁵

The IM Law provides that instructional materials are intended to benefit students rather than the public or private schools they attend. In pertinent part, Section 22-15-7 states:

³ The U.S. Supreme Court has held that a federal law providing funds to state and local governmental agencies for the purpose of lending educational materials, including textbooks, and equipment to public and private schools was not a "law respecting an establishment of religion" proscribed by the First Amendment to the federal constitution. See *Mitchell v. Helms*, 530 U.S. 793 (2000). For purposes of this opinion, we assume that New Mexico's IM Law also would pass muster under the First Amendment (and N.M. Const. art. II, § 11, which is similar in effect to the First Amendment) and we focus solely on the more specific state constitutional limitations on state aid to private schools.

¹ Money in the Instructional Material Fund is appropriated to PED to implement the IM Law. NMSA 1978, § 22-15-5(A).

⁵ Before the 2009 amendments, see note 1 *supra*, the IM Law allowed PED to pay either a publisher or a depository for instructional materials provided to private schools for the use of their students. See NMSA 1978, § 22-15-9(E) (2005, prior to 2009 amendment). Current law requires PED to provide payment to "an in-state depository." Id. § 22-15-9(E) (2009).

A. Any qualified student ... attending a public school, a state institution or a private school approved by ... [PED] in any grade from first through the twelfth grade of instruction is entitled to the free use of instructional material....

B. Instructional material shall be distributed to school districts, state institutions, [and] private schools ... as agents for the benefit of students entitled to the free use of the instructional material.

C. Any school district, state institution, [or] private school as agent receiving instructional material ... is responsible for distribution of the instructional material for use by eligible students and the safekeeping of the instructional material.

Constitutional Provisions Limiting State Aid to Private Schools

The state's authority under the IM Law to provide textbooks, at state expense, to private schools for the use of their students implicates two provisions of the state constitution that restrict the benefits a private school may receive from the state.

First, the antidonation clause of Article IX, Section 14 provides, in pertinent part:

Neither the state nor any county, school district or municipality ... shall ... make any donation to or in aid of any person, association or public or private corporation....

A "donation" for purposes of the clause is "a 'gift,' an allocation or appropriation of something of value, without consideration." Village of Deming v. Hosdreg Co., 62 N.M. 18, 28, 303 P.2d 920 (1956), and may include subsidies that effectively relieve private persons or entities from financial obligations they would otherwise have to meet. See N.M. Att'y Gen. Op. No. 99-01 (1999) (Article IX, Section 14 likely prohibited proposed school voucher program under which state money would be used to provide tuition assistance to parents of private school students).

Second, Article XII, Section 3, in pertinent part, provides: "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." The constitutional provision applies to direct state aid or subsidies to private schools or to aid provided to students or parents that effectively subsidize private schools. See N.M. Att'y Gen. Op. No. 99-01 (1999) (proposed state tuition assistance improperly supported private schools for purposes of Article XII, Section 3 regardless of whether the assistance was paid to the schools, students or parents.)

Constitutionality of Allowing Private Schools to Participate in Free Textbook Program

There is little New Mexico judicial or other legal authority applying the constitutional limits on state support for private schools, but one reported case is directly on point. In Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951), the New Mexico Supreme Court affirmed, in part, a district court judgment in a case brought against the state and local boards of education and members of Roman Catholic religious orders teaching in public schools. Among other things, the district court determined that the state was subsidizing parochial schools in violation of Article IX, Section 14 and Article XII, Section 3 of the state constitution by “furnishing free textbooks to schools other than tax supported schools of this State” and “furnishing ... free school bus transportation to pupils of parochial schools....” 55 N.M. at 506, 512, 236 P.2d at 952, 956. Although the Supreme Court did not discuss this portion of the district court’s decision extensively,⁶ it held that the “judgment of the District Court will be affirmed in all things” with certain exceptions not pertinent here. Id. at 531, 236 P.2d at 969.

Thirty-eight years after the Supreme Court’s decision in Zellers, the Attorney General’s Office issued an opinion addressing whether a county could contract for the transportation of students attending private, religious schools within the county. See N.M. Att’y Gen. Op. No. 89-02 (1989). Relying on Zellers, the opinion stated: “[i]t is clear that school districts may not provide transportation of students to private schools because of Article XII, Section 3 of the New Mexico Constitution....” The opinion limited the proscription of Article XII, Section 3 to “educational” funds⁷ and, for that reason, concluded that Article XII, Section 3 did not apply to a county’s use of its general funds. However, according to the opinion, the antidonation clause of Article IX, Section 14 still applied and required the private schools or students using the transportation services to reimburse the county.

Case law from other states with constitutional provisions similar to Article XII, Section 3 supports the conclusion reached in Zellers. For example, the California Supreme Court held that a law authorizing that state’s Superintendent of Public Instruction to lend textbooks to students attending private, nonprofit schools without charge violated

⁶ The Zellers opinion sets out a detailed account of the district court’s findings of fact and conclusions of law, including those related to the provision of free textbooks and school bus transportation, see 55 N.M. at 504-516, 236 P.2d at 951-958, but devotes its analysis to the parties’ claims related to teaching religion in public schools and whether members of religious orders should be allowed to wear religious garb while teaching in public schools. See id. at 517-526, 236 P.2d at 959-965.

⁷ In contrast to the fund at issue in the 1989 Attorney General opinion, money in the Instructional Materials Fund is “appropriated, levied or collected for educational purposes” within the meaning of Art. XII, § 3.

provisions of the California Constitution that prohibited appropriations "for the support of" sectarian, denominational or other schools not controlled by officers of the public schools. California Teachers Ass'n v. Riles, 632 P.2d 953, 954 (Cal. 1981).

Significantly, in reaching its conclusion, the Riles court was not persuaded that the program was permissible because, like the IM Law, it specified that the textbooks were lent to students rather than to the private schools. The court observed that the "child benefit theory" had been criticized as "prov[ing] too much," since almost any expenditure for schools benefits students. 632 P.2d at 960. Nevertheless, the court concluded that the child benefit theory did not apply because the law directly benefited the schools as well as the students:

There is no rational reason for concluding that the school benefits only indirectly or remotely from the loan if the child is the nominal recipient, for it is an undeniable fact that books are a critical element in enabling the school to carry out its essential mission to teach the students.

Id. at 963. Accord Bloom v. School Comm. of Springfield, 379 N.E.2d 578 (Mass. 1978) (statute requiring school committees to loan textbooks to private school students offended state constitutional provision forbidding use of public money or property for the purpose of aiding any primary or secondary school not under the control of the state); Gaffney v. State Dep't of Educ., 220 N.W.2d 550 (Neb. 1974) (free loans of textbooks to private school students violated provision of Nebraska Constitution prohibiting appropriations in aid of sectarian and denominational schools or any educational institution not owned and controlled by the state or a political subdivision); Dickman v. School District No. 62C, 366 P.2d 533 (Or. 1961) (furnishing textbooks free of charge to parochial school students violated provision of Oregon Constitution prohibiting use of public money for the benefit of religious institutions), cert. denied, 371 U.S. 823 (1962). See generally A.G. Barnett, Annotation, Furnishing Free Textbooks to Sectarian School or Student Therein, 93 A.L.R.2d 986 (West 2008) (on LEXIS).

As indicated above, this Office has concluded, consistent with Zellers, Riles and other judicial opinions addressing the issue, that Article XII, Section 3's prohibition is not limited to direct aid to private schools. See N.M. Att'y Gen. Op. No. 99-01 (1999) (state tuition assistance paid to parents or students attending private schools constituted unconstitutional support to the schools). The IM Law may specify that textbooks are distributed to private schools only as agents for their students, but the private schools themselves are substantially benefitted. Under the IM Law, the private schools choose the instructional materials used in their classrooms and receive an allocation from the state to pay for those materials. As recently amended, the IM Law allows private schools to use up to 50 percent of their state allotment on materials that are not on the state approved list, as long as the materials are not "religious, sectarian or nonsecular." NMSA 1978, § 22-15-9(C) (2009). This gives a private school considerable latitude to use state money to purchase materials that advance the school's specific educational

objectives. Without the state allotments, a private school would have to purchase at its own expense instructional materials that are “critical” to its ability “to carry out its essential mission to teach the students.” Riles, 632 P.2d at 963.

The IM Law has been in effect for over 40 years and enjoys a strong presumption of constitutionality. See State ex rel. New Mexico Voices for Children, Inc. v. Denko, 2004-NMSC-011, ¶ 6, 90 P.3d 458, 459 (a statute is presumed constitutional and must be upheld unless it is clear “beyond a reasonable doubt that the legislature exceeded the bounds of the constitution in enacting it”). Nevertheless, the Zellers decision has not been overturned and the provisions of Article IX, Section 14 and Article XII, Section 3 applied in that case have not been changed.⁸ Under these circumstances, we have little choice but to conclude that the provisions of the IM Law requiring PED to provide private schools with free textbooks and other instructional materials for the use of their students may be vulnerable to constitutional challenge. In particular, by providing textbooks to private schools without charge and reducing the schools’ financial obligations, the state arguably is making a donation to or in aid of the private schools in violation of Article IX, Section 14 and is using public funds for the support of sectarian, denominational and private schools in violation of Article XII, Section 3.


GARY K. KING
Attorney General


ELIZABETH GLENN
Assistant Attorney General

⁸ The New Mexico Supreme Court’s opinion in Zellers was published in 1951. Beginning in 1971, Article IX, Section 14 has been amended five times to except various programs from the antidonation clause, none of which applies here. See 2005 N.M. Laws, HJR No. 8 (adopted 2006); 2001 N.M. Laws, HJR Nos. 10, 18 (adopted in 2002); 1993 N.M. Laws, HJR No. 12 (adopted in 1994); 1974 N.M. Laws, HJR No. 7 (adopted in 1974); 1971 N.M. Laws, HJR No. 15 (adopted in 1971). The amendments did not affect the language of the antidonation clause itself. Article XII, Section 3 has not been amended since its adoption as part of the New Mexico Constitution in 1911.