



# Attorney General of New Mexico

P.O. Drawer 1508 Santa Fe, New Mexico 87504

505-827-6000  
Fax 505-827-5826

HAL STRATTON  
*Attorney General*

February 27, 1989

OPINION  
OF  
HAL STRATTON  
Attorney General

Opinion No. 89-02

BY: Lyn Hebert  
Assistant Attorney General

TO: Robert A. Aragon  
District Attorney  
Eleventh Judicial District  
McKinley County Courthouse  
Gallup, New Mexico 87301

QUESTION:

Can McKinley County contract with the Gallup - McKinley County School District for the transportation of students of private, religious schools under the authority of Section 22-16-7 NMSA 1978?

CONCLUSION:

Yes, but only if the county is reimbursed for the costs of such transportation pursuant to a contract.

ANALYSIS:

Section 22-16-7 NMSA 1978 states:

A. A board of county commissioners may contract with a school bus service operator for the transportation of students attending schools, other than public schools, within the county in compliance with the Compulsory School Attendance Law [22-12-1 to 22-12-7 NMSA 1978]. The contract shall provide for the

school bus service operator to use the same school bus routes as established for students attending public schools in the county.

B. A board of county commissioners may provide for payment under any contract made pursuant to the provisions of this section only out of general funds of the county and not out of any funds, taxes raised or taxes levied for educational purposes or out of any money appropriated for public schools.

It 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 that states:

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.

The question remains whether the county can provide for such transportation with general county funds. In Zellers v. Huff, 55 N.M. 501, 514, 236 P.2d 949, 958 (1951), the New Mexico Supreme Court affirmed an injunction against the State Board of Education and several local school boards from "providing, permitting or authorizing free school bus transportation for pupils attending a parochial or sectarian school." The district court had declared that:

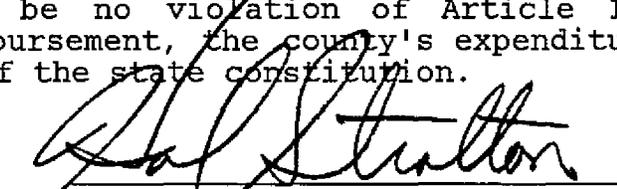
...the furnishing by the State of New Mexico of free school bus transportation to pupils of parochial schools is in violation of Section 3, Article 12 and Section 14, Article 9 of the Constitution of the State of New Mexico and the First Amendment to the Constitution of the United States of America<sup>1</sup> as made applicable

---

1 In a 5-4 decision the United States Supreme Court in Everson v. Bd of Education, 67 S.Ct. 962 (1947) held that a New Jersey state statute that authorized school districts to

to the states by the Fourteenth Amendment of  
the Constitution of the United States.

Id. at 512. As discussed, Article XII, Section 3 of the N.M. Constitution would prohibit use of educational funds only. However, Article IX, Section 14 of the N.M. Constitution, the "anti-donation clause," states, in part: "Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation...." The Supreme Court of New Mexico has rejected the argument that the receipt of some "public benefit" will remove a donation of state funds from the prohibition contained in this section. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940). If the private schools or students were to reimburse the county pursuant to an enforceable contract for funds expended in contracting with a school district for the transportation of students to the private schools, there would be no violation of Article IX, Section 14. Without such reimbursement, the county's expenditure of funds would be a violation of the state constitution.

  
\_\_\_\_\_  
HAL STRATTON  
Attorney General

  
\_\_\_\_\_  
LYN HEBERT  
Assistant Attorney General

---

provide for transportation of pupils to and from schools, including parochial schools, did not violate the "establishment of religion" clause of the First Amendment of the United States Constitution.