

Opinion No. 58-68

April 1, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Dr. John Dale Russell, Chancellor and Executive Secretary, Board of Educational,
Finance, P. O. Box 1616, Santa Fe, New Mexico

QUESTION

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1. Is the authority delegated to the Board of Educational Finance in Section 10 of Chapter 235; (the Appropriation Act), Laws of 1957, within the limits of the constitutional power of the Legislature to delegate authority?
2. If the legislative delegation of authority in Section 10 of Chapter 235, Laws of 1957, is proper, is the set of "uniform definitions" promulgated by the Board of Educational Finance "in accordance with the Constitution and Statutes of the State of New Mexico," as required in the aforesaid Act?
3. If a student attending one of the State-controlled colleges or universities in New Mexico believes that his claim to entitlement to pay tuition fees as a resident rather than as a non-resident has been decided unfairly by the officials of the institution he is attending, assuming such decision has been made in accordance with the definitions promulgated by the Board of Educational Finance, does the student's remedy lie in a court action against the Board of Educational Finance, or against the officials of the institution he is attending, or against some other agency of the State?
4. What is the recourse against an institution that fails to follow the uniform definition of resident and non-resident student, as the institution is required to do by Section 10, Chapter 235, Laws of 1957?

CONCLUSIONS

1. Yes.
2. No, see opinion
3. Officials of the institution he is attending
4. Mandamus

OPINION

ANALYSIS

The questions to be instantly considered arise from the provisions of Section 10, session laws above stated which provides in part as follows:

"The university of New Mexico, the college of agriculture and mechanic arts, the institute of mining and technology, New Mexico western college, eastern New Mexico university, Highlands university and the New Mexico military institute shall charge a minimum tuition for resident students of one hundred dollars (\$ 100) per year and shall charge for nonresident students not less than one hundred dollars (\$ 100) per year in addition to that charged resident students, except that the institute of mining and technology shall charge non-resident students not less than three hundred dollars (\$ 300) per year for tuition; **provided further, that the board of educational finance shall define resident and non-resident students for the purposes of administering tuition fees, in accordance with the constitution and statutes of the state of New Mexico** and after consultation with the appropriate officials of the institution concerned, and each of said institutions shall use the uniform definitions so established in assessing and collecting tuition fees from students. (Emphasis supplied)

For summer session students the tuition fee for resident and non-resident students, respectively, shall be the same fraction of the tuition fee for the regular academic year that the credit normally received by a full time student in the summer session is of the credit normally received by a full time student in the regular academic year."

Looking briefly to the history of present law we find by Chapter 127, Laws 1943 (General Appropriation Act) and earlier laws, "non-resident students", for purposes of charging tuition were defined as:

". . . any student having graduated from a nonresident high school shall be considered a non-resident unless he or she shall have spent not less than twelve (12) months in residence in the State of New Mexico after becoming twenty-one (21) years of age while not attending school or whose parents are legal residents of the state; . . ."

In 1951, by Section 7, Chapter 227 (General Appropriation Act) the definition of non-resident students was enacted to provide:

"A resident student is defined as one who shall have resided in the State of New Mexico for at least one year before enrolling as a student in any college or university in the State of New Mexico; or whose parents or guardian shall have resided in the State of New Mexico for at least one year before enrolling in any college or university in New Mexico."

And in 1953, this section was again considered and the following proviso added to the new law along with certain other minor changes:

". . . provided that students or their parents or guardians may during the students enrollment declare their intent to become citizens of the State of New Mexico, in which case the student may enroll as a resident student after the one year's residence requirement stated above is met by the student or the parents or guardian of the student; provided further that the Attorney General shall pass on any doubtful interpretations of this section."

The legislature in 1955, did not attempt to define the nonresident student as it had earlier done, and eliminated specific consideration by the Attorney General. The legislature did provide in Section 12, Chapter 287, however:

". . . that the Board of Educational Finance shall define resident and non-resident students for the purposes of administering tuition fees, in accordance with the Constitution and Statutes of the State of New Mexico, and after consultation with the appropriate officials of the institution concerned, and each of said institutions shall use the uniform definitions so established in assessing and collecting tuition fees from students."

And by the Appropriation Act of 1957 this last considered provision was **re-enacted**.

In keeping with the understood authorization last mentioned the Board of Educational Finance has promulgated certain definitions and rules, identified as Rule No. 10-401, revised September 27, 1957.

Turning now to the questions above put, it is our opinion that the so-called delegation of authority to the Board of Educational Finance is, by the very terms of act considered, 'within the limits of the constitutional power of the Legislature to delegate authority'. The authority to define resident and non-resident students, for the purpose of administering tuition fees, is specifically restricted to such definitions as are promulgated 'in accordance with the Constitution and Statutes of the State of New Mexico'. Any promulgation which establishes restrictions outside the laws aforesaid would accordingly be ineffectual. There logically follows then, a need to consider limitations as may be imposed by the state laws specified.

From the information furnished in the letter of inquiry, the Board of Educational Finance has relied substantially on two expressions of law, the definition of non-resident students found as part of Section 7, Chapter 227, Laws of 1951, supra, and Article VII, Section 4 of the New Mexico Constitution. Considering first the former, it is pointed out that Chapter 227 was in its entirety an act of limited duration and effectiveness. It was the General Appropriations Act and restricted, by the language of its first section to the "fortieth and forty-first fiscal years of the state of New Mexico". Since there is no incorporation nor reference to this earlier law found in the Session Laws of 1957, it is our opinion that the Board of Educational Finance may not look to the 1951 Act for guidance.

Of more fundamental importance is the language of Article VII, Section 4, New Mexico Constitution:

"No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school."

This section was specifically considered by this office in Opinion No. 1451, October 20, 1936, and it was stated that:

"Under Section 4, of Article VII, of our State Constitution, a person can neither acquire nor lose residence "while a student at any school."

It has been held in a number of cases that constitutional provisions of this type do not prevent persons who are attending school in a state from acquiring a residence in that state if said persons actually have the intention so to do coupled with some overt act corroborating the aforesaid intention.

The fact of residence or non-residence within this state depends principally upon intention coupled and connected with some overt act. Intention is sometimes hard to determine. Therefore, we must look to anything of an evidentiary nature which would tend to reveal that intention.

If Mr. Fuhrman registered here for the purpose of voting at the last state election and further has done nothing indicative of an intention to remove his residence elsewhere then the aforesaid facts, in my opinion, would be an almost conclusive intention that this state is his residence."

Concurring reference was made, in the aforequoted opinion, to No. 1348, April 7, 1936.

More recently, Article VII, Section 4 was given meaning by the Supreme Court in *Allen v. Allen*, 52 N.M. 174, 194 P. 2d 270 where the Court in determining a jurisdictional question in a divorce action said:

"However, this section of the constitution does not mean that a soldier stationed in this state may not acquire residence in this state, but it does mean that he may not acquire a residence from the mere fact that he was stationed therein for whatever period of time he may be so stationed. Apart from that service he must establish a residence in the state with the intention of making it his permanent residence."

Accordingly, it is our opinion that the set of 'uniform definitions' promulgated by the Board of Educational Finance is not in keeping with the Constitution and Statutes of the State of New Mexico. And further, it is our opinion that any revision of the considered definitions must be made so as to give effect to one's manifest intent to become a resident of the state. Although not specifically asked, we feel it proper to state as an opinion, that under existing law one's status as a resident or non-resident student, is not

conditioned by any stated period of residing in New Mexico, prior to matriculating in any state supported college or university. Determination, in final analysis, must be made by reference to the student's acts manifesting a desire to give up an earlier existing residence and to establish a new one in New Mexico, or a similar manifestation of parents in the case of unemancipated minor children.

It should be added, that while there is no constitutional nor statutory authority for requiring a student to live in New Mexico before he may attain residency status, still under the provisions the last appropriation act considered, it is proper for the Educational Finance Board to promulgate and rely on its definitions, subject to proof of residency as may be made by the student in keeping with the theories herein expressed.

In response to the third question above put, reference is made to statutory provisions governing the operation of the University of New Mexico as exemplary of those applicable to all state supported institutions of higher learning. By Section 73-25-3:

"The management and control of said university, the care and preservation of all property of which it shall become possessed, the erection and construction of all buildings necessary for its use, and the disbursements and expenditures of all moneys, shall be vested in a board of five (5) regents."

And specifically Section 73-25-10 provides:

"The university shall be open to the children of all residents of this state and such others as the board of regents may determine, under such rules and regulations as may be prescribed by said board, whenever the finances of the institution shall warrant it, and it is deemed expedient by said board of regents."

With reference to the authority vested in the Board of Educational Finance, Section 73-29-15 provides:

"There is hereby created a board of educational finance whose function shall be to deal with the problems of finance of those educational institutions designated in sections 11 and 12 of article XII of the Constitution of the state of New Mexico. The board shall be concerned with the adequate financing of each of said institutions and with the equitable distribution of available funds among them. The board shall receive, adjust and approve the budgets submitted by the several institutions prior to the submission of said budgets to the budget officers of the state and shall exercise such other powers as may hereafter be granted it by law."

Accordingly, it is our opinion that where a student feels that his residency status has been unfairly determined, that recourse lies against the board of regents immediately responsible for the operation and management of the institution, not against the Board of Educational Finance.

Considering the last question stated, and assuming as a part thereof that any enforcement contemplated would be founded upon definitions duly promulgated in keeping with the expressions in this opinion earlier stated, it is our opinion that an action in Mandamus against the Board of Regents will lie at the institution of either the Board of Educational Finance or any person who may feel aggrieved by an inconsistent determination. The language of the Act, (Section 10, Chapter 235, Laws 1957) is mandatory and is equally applicable to each of the colleges and universities therein specifically named, for the period expressly covered by the law.

It is specifically pointed out that Attorney General Opinion No. 5410, August 31, 1951, is not controlling since there the writer was relying on the Appropriation Law of 1951.