

Opinion No. 78-14

July 7, 1978

OPINION OF: Toney Anaya, Attorney General

BY: Deborah A. Moll, Assistant Attorney General

TO: Alvino E. Castillo State Auditor 302 P.E.R.A. Building P.O. Box 2383 Santa Fe, New Mexico 87503

SCHOOLS; TUITION; NONRESIDENT STUDENTS

Pursuant to Section 77-10-4, N.M.S.A. 1953 Comp., students who are nonresidents of the state attending public schools must be charged tuition by the local school boards.

QUESTIONS

Do New Mexico statutes permit out-of-state children to attend New Mexico public schools tuition free?

CONCLUSIONS

No.

ANALYSIS

The statutory requirements for nonresident students are set out at Section 77-10-4, N.M.S.A. 1953 Comp., which provides in pertinent part that:

"A. Local school boards may admit students nonresident of their school district to the public schools within their school district when there are sufficient school accommodations to provide for them.

B. Local school boards may charge only students who are nonresident of the state a nonresident tuition for the right to attend public school within the school district. The rate of the nonresident tuition shall not exceed the average cost per capita for each year of public school education within the school district based upon the average daily membership in the public schools of the school district for the preceding school year."

OPINION

Thus, Section 77-10-4(A) permits local school boards to admit nonresidents of the school district "when there are sufficient school accommodations" and Section 77-10-4(B) imposes the additional requirement that nonresidents of the state must be assessed tuition in order to attend New Mexico public schools. For the purpose of public

school education, a child is considered a resident of the state, if he lives in the state. Although Section 77-10-4(B) uses the word "may," we conclude that the tuition assessment is mandatory.

Generally, the use of the word "may" is permissive. See Section 1-2-2(I), N.M.S.A. 1953 Comp., **Application of Sedillo**, 66 N.M. 267, 347 P.2d 162 (1960). However, Section 77-10-4(B) can be construed as stating that local boards may **only** charge tuition to out-of-state students in that it authorizes tuition fees for students who are nonresidents of the state and precludes charging such fees to New Mexico residents. Indeed, if Section 77-10-4(B) is to be consistent with the New Mexico Constitution and other related New Mexico statutes, it must be interpreted as requiring a tuition payment by students who are nonresidents of the state.

Article XII, Section 1 of the New Mexico Constitution establishes a free education for "all children of school age in the state." This section has been interpreted as applicable only to those children who are residents of New Mexico. See Opinion of the Attorney General No. 65-74, dated May 4, 1965. Similarly, Section 77-1-4, N.M.S.A. 1953 Comp., provides that "a free public school education shall be available to any person who is a resident of the state." These provisions express a public policy that only residents of the state are to be the beneficiaries of a free education.

Further, Article IX, Section 14 of the New Mexico Constitution, commonly known as the anti-donation clause, prohibits the state or school districts from making donations to or in aid of individuals. To permit out-of-state students to attend New Mexico public schools without payment of any kind would constitute a gift to them. Such a gift would violate Article IX, Section 14. See **Village of Deming v. Hosdreg**, 62 N.M. 18, 303 P.2d 920 (1956).

It has been suggested that local boards need not charge tuition to out-of-state students if they do not include such students in the average daily membership (ADM) as compiled pursuant to the Public School Finance Act, Section 77-6-1, **et seq.**, N.M.S.A. 1953 Comp. This suggestion does not, however, avoid the prohibitions of the antidonation clause. To the extent that a local school district would undertake the total burden of educating nonresident students without benefit of state allotment as dispensed on the basis of average daily membership, the school district would still be making a donation in aid of those students in violation of Article IX, Section 14.

Relevant constitutional and statutory provisions do not permit the free education conferred on New Mexico residents to extend to out-of-state students. Although the language of Section 77-10-4(B) appears permissive, the interests of public policy requires that it be taken as mandatory. See, **Catron v. Marron**, 19 N.M. 200, 142 P. 380 (1914). Therefore it is the conclusion of this office that out-of-state students attending public schools in New Mexico pay a tuition fee at the rate established by law.

ATTORNEY GENERAL

Toney Anaya, Attorney General