

## Opinion No. 37-1601

April 16, 1937

**BY:** FRANK H. PATTON, Attorney General

**TO:** Honorable H. R. Rodgers Superintendent of Public Instruction Santa Fe, New Mexico

{\*75} Your letter of April 15th makes inquiry regarding school attendance and powers of various boards over resident and non-resident pupils.

In the first place, while we have no specific statutory provision permitting students who are residents of one district to attend school in another district, we do believe there is an implied right and such implication may be found in Section 2 of Chapter 98 of the Session Laws of 1935, which provides:

"In case any district shall send children to another district it shall budget for in its direct charge fund and pay to the district in which said children actually attend school the sum equal to the direct charge per capita cost of the district so educating such children for each child so attending."

Your first question is whether the county board of education or the municipal board have the right to exclude students who set up temporary residences for the purpose of attending high schools in districts other than their own.

{\*76} The matter of school attendance is not specifically regulated by statute and we must be guided by the general principles appertaining thereto beginning with the premise that the various boards of education are the governing bodies of the particular schools or school districts and that as such they have power to make reasonable rules and regulations.

From an examination of 56 C. J. in connection with schools and school districts, we find that Section 987, page 810, provides that free instruction in the district school open to residents of the district only cannot be claimed as a matter of right by a non-resident child whose primary purpose in coming into a school district is to attend the public school therein, or by children of a person who comes temporarily into a district to reside during the scholastic year for the purpose only of sending his children to the school of that district.

In Section 986 of said citation I find that children temporarily residing in an outside district for the purpose of attending the school there located are regarded as children residing in the district where the father resides and pays taxes. Whether a person is an actual resident of a particular school district is a question of fact, of course, dependent upon the circumstances of each particular case.

As a general rule, free school privileges of a district, town, or city are open only to children otherwise eligible, who are bona fide residents of such district, town, or city. The ordinary and usual indicia of residence is the proper guide and not secret mental resolutions or concealed intentions.

As a general rule, therefore, I would say that admission of non-resident pupils is a matter almost entirely within the discretion of the board, and school facilities, space, or lack of space, and matters of this nature are questions for consideration by the board.

Your second question, therefore, as to whether boards have the right to exclude children who are merely spending the school year with relatives for the purpose of attending school in districts other than their own is answered by the foregoing and you will readily see that it, generally speaking, is in the affirmative.

The same would be true relative to your third question wherein you inquire if there is any possible way to exclude children who live outside of municipal districts, but whose parents pay a property tax in the city. The payment of the property tax is not determinative of the question of residence although it may be indicia to show residence. I would say that if the parent has an actual bona fide residence outside of the district then the answer to this question would be in the affirmative.

The foregoing is written with the provisions of Section 120-1201 and 120-1202 of the 1929 Compilation in mind. Section 120-1201 provides that pupils who are residents of a district shall be permitted to attend school in the same regardless of the time when they acquired such residence, whether before or after the enumeration.

Nowhere do we find, as intimated in the first part of this letter, any statute prohibiting children from one district attending school in another district. Apparently it is merely discretionary with the board.

Section 120-1202 merely provides that the governing authorities of schools may admit non-resident pupils provided school accommodations are sufficient to provide for them and may determine the rate of tuition for such non-resident pupils.