



Genine
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert R. Corbin

May 22, 1980

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ARIZONA ATTORNEY GENERAL

Mr. Mark R. Christensen
Deputy Pima County Attorney
Civil Division, County Counsel Unit
900 Pima County Courts Building
111 West Congress Street
Tucson, AZ 85701

Re: I80-094 (R79-319)

Dear Mr. Christensen:

We have reviewed your November 27, 1979 opinion addressed to Anita Lohr, Pima County School Superintendent. Although we concur with your opinion that school officials may require a child's parents or guardian to provide proof, beyond the fact of actual physical presence in the district, of their residence in the district for elementary and secondary school admission, we are modifying your opinion in two respects. We wish to emphasize the fact that the district's requirements for proof of residence must not be arbitrarily applied so as to result in discrimination based on race or national origin. With respect to the nature of "proof" required to show residence in a district, any indicia of residence may well be sufficient; district officials cannot require the production of specific records as proof of residence.

Sincerely,

BOB CORBIN
Attorney General

BC:LPS:lfc

OFFICE OF THE

Pima County Attorney

CIVIL DIVISION
COUNTY COUNSEL UNIT
900 PIMA COUNTY COURTS BUILDING
111 WEST CONGRESS STREET

Tucson, Arizona 85701

(602) 792-8321

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

DAVID G. DINGELDINE
CHIEF DEPUTY

OPINION NO. 284

R79- 319

November 27, 1979

TO: Anita Lohr
Pima County School Superintendent

FROM: Mark R. Christensen
Civil Deputy County Attorney

QUESTION PRESENTED:

See Attached Letter.

The general subject-matter of your four questions has been discussed in several earlier Arizona Attorney General Opinions. Two recent ones, 78-43 and 79-173, are particularly instructive so I have enclosed copies of them for your consideration. For the purposes of this opinion, I believe a fair summary of Op. Atty. Gen. No. 79-173 is: a) when the parents or guardian of a student are not residents of the State, tuition must be charged, b) when the parents or guardians are residents of the district, no tuition may be charged and c) when the parents or guardians are residents of the State but not of the district, the board "probably has discretion" with regard to a tuition charge and other terms of admission.

With regard to question No. 1, I refer you to Op. Atty. Gen. No. 78-43 and the caveat contained therein. However, I do not believe that it is inappropriate for school officials to require parents or guardians to demonstrate, through documentation or otherwise, their present intention of making the district their "residence", i.e., their home. In that regard, I suggest that indicia of Arizona residence of parents or guardians include the following:

1. Evidence of previously filed state income tax returns.
2. Claimed residence on federal income tax returns.

3. Date of: Driver's license issuance, voter registration and motor vehicle registration.
4. Place of child's previous attendance in educational institutions.
5. Ownership and occupancy of residential real property.
6. Permanent employment in the State.

Other objective factors could, no doubt, be evaluated in a residency determination; the foregoing list is admittedly more illustrative than exhaustive.

Your questions numbered 2 and 4 assume the out-of-state residence of the parents (and, therefore, of the minor child) and so tuition must be charged if the child is to be enrolled in the district where he is physically present. As you know, A.R.S. § 15-302 requires that school districts admit children between certain ages "who reside in the district." A.R.S. § 15-321, which compels custodians of children to send such children to school, also speaks in terms of residence within a district. As you also know, Title 15 gives us no guidance in defining "residence" or "resident." Black's Law Dictionary, revised fourth edition, defines residence as "a factual place of abode.... It requires only bodily presence as an inhabitant of a place...." Obviously, this definition is not helpful in solving problems of school attendance and tuition in Arizona since this entire congeries of issues presupposes the physical presence of a minor child concurrently with his tuition-owing status. It is not clear whether the law contemplates one definition of "residence" for tuition purposes, another for compulsory attendance purposes and a third for the purposes of a board exercising its discretion in admitting or refusing to admit a child who is not an Arizona resident.

What seems clear is that a governing board could not establish unreasonable or arbitrary terms for the purpose of excluding State residents, A.R.S. § 15-302(D), nor it is likely that a board could discriminate in the provision of educational services against a child who is a citizen (as in question No. 2) based solely on the fact that his parents are not residents of any state. See, e.g., the language of Jenkins v. McCollum, 446 F.Supp. 667, 671 (1978). Finally, it is arguable that nonresident, alien children may not be excluded from school attendance if they comply with reasonable, nondiscriminatory terms established by a district's governing board. See Doe v. Plyler, 458 F.Supp. 569 (1978). The Plyler case, currently on appeal before the U.S. Circuit Court of Appeals for the Fifth Circuit, discusses in

considerable detail the arguments used to support a Texas statute which prohibited, by implication, the apportionment of state funds to local school districts based on the average daily attendance within such districts of resident, undocumented alien children. The Tyler Independent School District (I.S.D.) had also adopted a policy of enrolling such children upon payment of a tuition charge. The District Court struck down as unconstitutional the statute, holding that it bore no rational relationship to any legitimate state purpose. The Court discussed, inter alia, the economic argument advanced to support the statute and found that the evidence did not support either the assumptions or conclusions of the argument. Plyler, supra, at 575-577. The Court also permanently enjoined the local board from applying the statute or its policy in such a way as to deny any child residing in the Tyler I.S.D. a free public education solely on the basis of his status as an undocumented alien person.

A.R.S. § 15-1212(A), as it is presently written, prohibits the apportionment of state aid for enrolled "nonresident alien children." Duly enacted statutes are clothed with a presumption of constitutionality; whether the constitutional validity of § 15-1212(A) will be challenged is, of course, speculative. The duty of public officers and employees, in the absence of judicial interpretation, is to follow the dictates of Arizona statutory law. I would conclude, in response to your last question in No. 2, that state aid may be apportioned for properly enrolled children who are not Arizona residents but who are United States citizens.

Based upon my reading of 8 U.S.C.A. § 1101 et seq. and 8 CFR §§ 214.3 and 214.4 and my conferring with the chief investigative official in the Tucson office of the U.S. Immigration and Naturalization Service, I do not believe, in response to question No. 3, that school district officials have any specific legal duty to report persons they suspect are undocumented aliens. Compare West's Cal. Ann. Educ. Code § 42951 as cited in Plyler, supra, at 585, fn. 20. The primary duties of Arizona school officials with regard to noncitizen students are those outlined in I.N.S. form I-20(A) and detailed in Title 8, C.F.R., supra. The appropriate officials in the various school districts in Pima County are undoubtedly familiar with these duties.

In summary, Arizona public school district officials may make reasonable inquiry as to the residency status of children seeking to be enrolled in their districts and of their parents or

guardians. Once it is determined that a child is not a resident of the district but is an Arizona resident, the district's board probably has discretion as to whether to charge tuition. As the law now stands, an out-of-state student must pay a tuition charge in order to be lawfully enrolled in an Arizona district. An undocumented alien, however, may be a district resident for tuition purposes. See Op. Atty. Gen. No. 78-43. Additionally, the constitutional validity of A.R.S. § 15-1212(A) may be subject to attack based on the reasoning in Plyler, supra. The resolution of this issue must ultimately come from the Legislature and the courts.

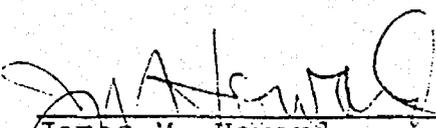
Respectfully submitted,

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By


Mark R. Christensen
Deputy County Attorney

APPROVED:


James M. Howard
Chief Civil Deputy County Attorney

MRC/amg

Attach.

OFFICE OF THE PIMA COUNTY SCHOOL SUPERINTENDENT

PIMA COUNTY GOVERNMENTAL CENTER, TUCSON, ARIZONA 85701

MRS. ANITA LOHR, *Superintendent*

MRS. MARY CROWE, *Chief Deputy*



October 19, 1979

Mr. Mark Christensen
Deputy County Attorney
Office of the Pima County Attorney
111 West Congress Street
Tucson, AZ 85701

R79- 319

Dear Mr. Christensen:

Due to a recent series of questions from the local districts in this county regarding the legal status of enrolling minor children in our Arizona public school system, I hereby submit the following questions for your immediate attention:

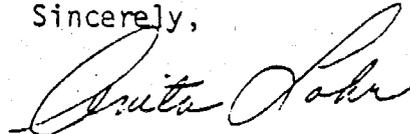
1. If a minor child attempts to enroll in a public school district in Arizona and school officials believe that the child's parents are not residents of Arizona or any other state, what proof of legal residence may such officials request of the parents for purposes of enrolling the child in the district on either a tuition or no-tuition basis?
2. If, in the situation outlined in question #1, it is found that the parents are not Arizona residents, U.S. citizens or holders of any valid document authorizing their presence in the U.S. but that the child is a U.S. citizen as evidenced by a birth certificate or otherwise, may the child be enrolled in the district either with or without payment of tuition? If the child may be enrolled, is the district entitled to receive state aid based on such enrollment?
3. In the situation outlined in question #2, what duty, if any, does the district have to report the facts to the INS or other government agency?
4. If the minor child cannot show evidence of either U.S. citizenship or local district residence of either the parents or legal guardians, may the child be enrolled in the district and if so, on what conditions?

Mr. Mark Christensen
October 19, 1979
Page 2

R79- 319

Thank you for your prompt attention to this matter.

Sincerely,



Anita Lohr
Pima County School Superintendent

AL/p1



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

R79-319

March 9, 1978

Q. Dale Hatch, Esq.
Deputy Maricopa County Attorney
400 Superior Court Building
101 West Jefferson
Phoenix, Arizona 85003

Re: 78-43 (R77-326)

Dear Mr. Hatch:

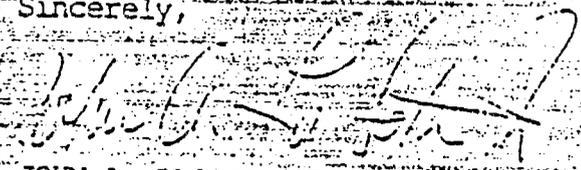
Pursuant to A.R.S. § 15-122, we have reviewed your Opinion No. 77-21 defining non-resident alien children as used in A.R.S. § 15-1212.A.

As you are aware, there is presently a lawsuit in Pima County challenging the constitutionality of this statute as applied to certain non-immigrant aliens. Although it is our policy not to opine on a question which is pending in the courts, your opinion contains language which we feel is overbroad and may cause undue harm to many people. We are, therefore, constrained to modify your opinion as stated below.

Your characterization of all illegal aliens as non-resident aliens is unfortunate. As you may be aware, many so-called "illegal aliens" have resided in this state for a long time and are residents of the respective school districts in which they reside. Under the rationale of School District No. 3 of Maricopa County v. Dailey, 106 Ariz. 124, 471 P.2d 736 (1970), they may qualify as residents within the meaning of A.R.S. § 15-302. Moreover, the children of many "illegal aliens" are born in the United States and are, therefore, citizens. Inquiry into the "illegal alien" status could result in the intimidation of the parents, jeopardize the paramount objective of educating their children and therefore would be improper.

Your opinion is modified to the extent it is inconsistent with the above analysis.

Sincerely,


JOHN A. LASOTA, JR.
Acting Attorney General

JAL:kd

Intraoffice copies to Mr. David Rich

OFFICE OF THE MARICOPA COUNTY ATTORNEY

CHARLES F. HYDER COUNTY ATTORNEY

400 SUPERIOR COURT BUILDING, 101 W. JEFFERSON, PHOENIX, ARIZONA



September 29, 1977

R79-319

The Board of Trustees
Phoenix Elementary School District No. 1
125 East Lincoln
Phoenix, Arizona 85004

School Opinion No. 77-21

Dear Members of the Board:

This letter is in response to your letter of September 1, 1977 wherein you asked the following questions:

1. What is the definition of "non-resident alien children" in A.R.S. §15-1212(A) and how may the District determine a child's status to avoid violation of this statute?
2. How is the amount of tuition determined under A.R.S. §15-302(B) and 15-302(C)?

ANSWERS:

1. See Discussion.
2. See Discussion.

DISCUSSION:

USCA Title 8, Sec. 1101(3) defines alien as a person who is not a citizen or national of the United States. A resident alien is an alien (non-citizen) who is legally in this country and who permanently resides in the school district where he attends school either by virtue of living with his parents, guardian or under a power of attorney. A non-resident alien is an alien who is legally in this country, but who does not intend to remain in the United States permanently. This is in contrast to an illegal alien who is in this country illegally. The district of attendance should check to see if the alien student's parents are permanent residents of the district. The District is not in the investigation business but it cannot ignore information that it has available such as where the child lives, what the father does for a living, how long they have lived in the district, etc.

The best guide to determine the amount of tuition to be charged under A.R.S. §15-302(B) and (C) is A.R.S. §15-449(D). Tuition according to that statute, is the per capita cost of the school attended as determined for the current school year plus \$100.00 for capital outlay. It should be pointed out that under A.R.S. §15-302(B) the governing board may admit children who do not reside in the district but who reside within the state upon terms as it prescribes. Therefore, the tuition can be any amount up to the per capita cost plus \$100.00 for capital outlay.

It should be noted that this opinion does not answer the question if state aid can be withheld from non-resident aliens or if they have to pay tuition.

A copy of this opinion is being sent to the Attorney General for his review.

Very truly yours,

CHARLES F. HYDER
MARICOPA COUNTY ATTORNEY

R79-319

By

Q. Dale Hatch
Q. DALE HATCH
DEPUTY COUNTY ATTORNEY

11/12-13



school district #1

125 EAST LINCOLN
PHOENIX, ARIZONA 85004

(602) 257-3755

September 1, 1977

R79-319

Mr. Dale Hatch
Chief Civil Deputy
Civil Division
County Attorney's Office
101 W. Jefferson
Phoenix, Arizona 85003

Dear Mr. Hatch:

We hereby request a written opinion on two questions concerning the enrollment of pupils who are not residents of this school district. The questions are as follows:

1. What is the definition of "non-resident alien children" in A.R.S. 15-1212A and how may the District determine a child's status to avoid violation of this statute?
2. How is the amount of tuition determined under A.R.S. 15-302B and 15-302C?

Your attention to this matter is deeply appreciated.

Sincerely,

Anne Croom
Anne Croom, Clerk

Julieta A. Bencomo
Julieta Bencomo, President

Georgie M. Goode
Georgie Goode, Member

Joe Johnson
Joe Johnson, Member

Charles R. Brooks
Charles R. Brooks, Member

administration

- SUPERINTENDENT DON WRIGHT, Ed.D.
- ASSISTANT SUPERINTENDENT EDUCATIONAL SERVICES LOUIS P. RODRIGUEZ
- ASSISTANT SUPERINTENDENT BUSINESS SERVICES JAMES L. HEATH
- ADMINISTRATIVE ASSISTANT BUSINESS SERVICES JAMES NEWMAN, Ph.D.
- ASSISTANT TO SUPERINTENDENT



Robert R. Corbin

June 28, 1979

R79-319

Mr. Q. Dale Hatch
Deputy County Attorney
Maricopa County Attorney's Office
400 Superior Court Building
101 West Jefferson
Phoenix, AZ 85003

Re: I79-173 (R78-105)

Dear Mr. Hatch:

We have reviewed your April 4, 1978, opinion addressed to the Mesa Public Schools and because of the complexity of the question when school districts may charge tuition, the following is a revision of your opinion.

If the child's natural parent resides out of the State of Arizona and no guardianship has been appointed by court order for a person living in the school district with whom the child resides, then a reasonable tuition must be charged by the school district.¹ If the natural parent resides outside of the state and the child lives with a guardian in the school district and the guardian was not appointed solely to avoid the payment of tuition then the district must admit the child without charging tuition.²

1. Chapp v. High School District No. 1, 118 Ariz. 25, 574 P.2d 493 (Ariz.App. 1978). However, a child is entitled to attend school without the payment of tuition when residing with a natural parent within the district whether that parent has been granted custody after a divorce and notwithstanding the fact that the other parent who may have been granted custody in a divorce decree lives in another school district or outside the State of Arizona. See Op. Atty. Gen. No. I79-2.

2. Cf. School District No. 3 of Maricopa County v. Dailey, 106 Ariz. 124, 471 P.2d 736 (1970) and Op. Atty. Gen. No. 77-235.

Mr. Q. Dale Hatch

June 28, 1979

Page 2

If the child resides with the natural parent or court-appointed guardian within the district, then the district must admit the child without charging tuition.³ If the parent lives within the state but not within the district and the child lives in the school district with a non-guardian, then the district probably has discretion to charge a reasonable tuition, to impose other terms as it may reasonably prescribe⁴ or admit the child without charging tuition.⁵

Sincerely,

Bob Corbin

R79-310

BOB CORBIN

Attorney General

BC/mm

3. See A.R.S. §§ 15-302, 15-321 and 15-449.

4. One such condition may be that the child provide transportation to and from school. Cf. Op. Atty. Gen. No. 178-246.

5. See A.R.S. §§ 15-449(B), 15-302(D) and Op. Atty. Gen. No. 78-42. A.R.S. § 15-449(B) provides generally that "the residence of the person having legal custody of the pupil shall be considered the residence of the pupil . . ." Therefore, the residence of the child, whether within the district or without the district, should be tied to the residence of the natural parent, adoptive parent or guardian for purposes of determining whether tuition may be charged under A.R.S. § 15-302. Because of this statutory limitation there can be no informal guardianship, one without court order.

The reason we conclude that the district "probably" may charge tuition in this situation is the above-quoted portion from A.R.S. § 15-449(B) and the court's treatment of this section in Chapp, supra note 1. Other states have required the admission of children to school without the payment of tuition if the child's residence in the district is other than temporary, has not been established primarily for attendance in the particular school district and a district resident is acting on loco parentis to the child. See, e.g., Fangman v. Movers, 90 Colo. 308, 8 P.2d 762, 764 (1932). However, the results reached depend upon the State's statutory scheme and not upon general common law principles. Consequently, the results reached vary widely. See "Schools-Students-Residence" 83 ALR2d 497 (1962).

OFFICE OF THE MARICOPA COUNTY ATTORNEY

CHARLES F. HYDER COUNTY ATTORNEY

400 SUPERIOR COURT BUILDING, 101 N. JEFFERSON, PHOENIX, ARIZONA



April 4, 1978

R79-319

Dr. Douglas S. Vance
Assistant Superintendent
Mesa Public Schools
549 North Stapley Drive
Mesa, AZ 85203

School Opinion No. 78-5

Dear Dr. Vance:

This letter is in response to your request for an opinion on the following questions:

(1) Do the provisions of ARS §15-449 prohibit a local school district from waiving tuition on a minor child when:

a. The natural or adoptive parents cannot be located or will not allow transfer of legal custody, and

b. The natural or adoptive parent has placed the minor child with a relative or other adult who is a legal resident of the school district, and

c. The natural or adoptive parent cannot or does not desire to raise said minor child?

(2) If your answer to Question No. 1 above is the affirmative, what are the legal conditions under which such "guardian of necessity" can be recognized for the purpose of avoiding tuition?

(3) Under the provisions of ARS §15-449, can a local school district waive tuition on a minor child when:

a. Legal custody is pending, and

b. Said minor child is residing with an adult legal resident of the school district who is attempting to secure such legal custody?

(4) If your answer to question No. 3 above is in the affirmative, what limitations are placed on such waiver of tuition?

ANSWERS: See Discussion.

R79-319

DISCUSSION:

It is my understanding that the Mesa School System has been approached by several residents of the district requesting that the school district allow children living with them to attend school as residents without paying tuition. Until the recent Court of Appeals ruling in Chapp, et al. vs. High School District No. 1, Ariz. (1973) which prohibited the use of a power of attorney, such students were admitted as residents of the district if the person caring for the children and with whom the children lived had a power of attorney from the parents.

The Court in Chapp, supra, held that the mother, who lived in California, could not change the legal residence of her son by a power of attorney since she had legal custody. The court cited ARS §15-449 (B) which makes the legal residence of the pupil the same as the person having legal custody over the child. The Court said custody can be exercised by the natural or adoptive parent with whom a pupil resides or it can be granted by an order of a court to a person with whom the pupil resides.

Therefore, in answer to Questions 1a, 1b and 1c, if the parent is living out of state and the child is living with someone in the district who is taking care of the child with the parents consent or at least approbation, it is my opinion that the school district must charge tuition. If the parent lives in the state but out of the district, the school district may admit the child "upon such terms as it prescribes" according to ARS §15-302 and the Attorney General Opinion Number 78-14.

There is one type of guardian not covered by the Court of Appeals in the Chapp, supra, case which might help answer part of Questions 1a and 1c and allow the Mesa School District to admit certain children as residents. In limited circumstances, Arizona courts

have recognized what they call a "de facto guardian." This is a person who takes over the care and control of a person, or estate, or both, of a minor without court order. The "de facto guardian" was mentioned by the Court of Appeals in Ranes vs. First National Bank of Arizona, 13 Ariz App 583 (1972), wherein the Court of Appeals said:

"This type of guardianship is established when one takes possession of an infant's or incompetent's estate without right or lawful authority. . . . A de facto guardian is subject to all the responsibilities that attach to a legally appointed guardian or trustee."

R79-319

Earlier, the Supreme Court of Arizona in two cases referred to "de facto guardians." See In re Harris, 17 Ariz 405 (1916) and in Maish vs. Valenzuela, 71 Ariz 426 (1951). In re Harris, the Court spoke of the duties of the "de facto guardian" and said:

"To all intents and purposes of this case, when that order was made and pursuant thereto, Lena R. White took the custody of the minor, she became and now remains the de facto guardian of the person of Emma J. Harris and as such is charged with the custody of the ward and must look to her support, health and education. She may fix the residence of the ward in any place within the state."

The Supreme Court recognized the "de facto guardian" or as it is sometimes called "guardian by necessity," "quasi guardian" or "guardian de son tort" as having definite responsibilities to the minor including providing education.

Accordingly, in very limited circumstances, the District could admit a child as a resident of the Mesa District if: a) the child has been abandoned by the parents; b) the parents cannot be located; and, c) the child is living with someone in the district without the parent's consent who has taken custody of the child but who is not a guardian by court order, but by necessity. The use of the "guardian of necessity" or "de facto guardian" should be strictly confined so as not to encourage abandonment of children. The school district should also encourage persons acting as "de facto guardians" to use the state protective service workers as set up in ARS §8-546 et seq.

In answer to Question 3 and 4, I would suggest that the District admit the child on a non-tuition basis with the understanding that tuition may be required under the District's policy, if the legal

custody is not granted by the court or the person does not follow through in securing such legal custody.

A copy of this opinion is being sent to the Attorney General for his concurrence or revision.

Very truly yours,

CHARLES F. HYDER
MARICOPA COUNTY ATTORNEY

J. Dale Hatch
Q. Dale Hatch
Deputy County Attorney

QDH:cap

R79-319