STATE OF IOWA • DEPARTMENT OF PUBLIC INSTRUCTION
GRIMES STATE OFFICE BUILDING • DES MOINES IOWA 50319

ROBERT D. BENTON, Ed.D., STATE SUPERINTENDENT
David H. Bechtel, M.S., Administrative Assistant
JAMES E. MITCHELL, Ph.D., DEPUTY SUPERINTENDENT

Iowa
a place to grow

Declaratory Ruling #33
(Cite as 1 D.P.I. Dec. Rul. 80)

January 30, 1984

Mr. Edgar Bittle
AHLERS, COONEY, DORWEILER, HAYNIE,
SMITH & ALLBEE
300 Liberty Building
Sixth and Grand
Des Moines, Iowa 50309

Dear Mr. Bittle:

You filed a "Petition for Declaratory Ruling" on behalf of the Iowa Association of School Boards, Inc. The Petition concerns itself with the general issue of residence for school purposes and raises a series of specific questions on the issue. I will respond to each one in due course, but I would first like to briefly discuss the general concept of residence for school purposes.

Two sections of the Iowa statutes create the structure surrounding the issue of residence for school purposes. The Iowa Code Section 282.6, 1983, provides in relevant part that "every school shall be free of tuition to all actual residents between the ages of five and twenty-one years," and Section 282.1 provides in relevant part that "nonresident children shall be charged the maximum tuition rate as determined in Section 282.24." The obvious result of these two sections is that children who are "actual residents" must be provided a tuition-free education, and those children who are not "actual residents" must be charged tuition. Those students who are determined to be "actual residents" may be counted for state aid purposes under the School Foundation Program, and those who are not "actual residents" may not be so counted. Section 442.4. The important determination is whether a child is an "actual resident."

In the vast majority of situations, a child will reside in a school district with one or both parents, and the issue of residency for school purposes is not likely to arise. However, in occasional situations the facts may not clearly indicate whether a child is an actual resident. In such situations court decisions and other interpretations need to be consulted.

The leading Iowa Supreme Court decision on the issue of student residency is Mt. Hope School District v. Hendrickson, 197 Ia. 191, 197 N.W. 47 (1924). That decision centered around a factual situation in which two boys of school-age returned to Iowa from Canada following the death of their mother. The boys' father remained in Canada but established a guardianship for the boys with a relative in Iowa. The boys resided with the guardian with the intention of all relevant persons that the boys would remain residents of Iowa at least until they came of majority age. The issue before the Court was whether the boys were residents for school purposes in the Iowa school district in which they resided with their guardian. The Supreme Court determined that they were residents and were entitled to a tuition-free education in the Iowa school district in which they resided. The Court enunicated the importance of the principle of free education and found that the statute on tuition-free education for actual residents must be liberally construed in favor of those students who claim to be residents.

While the Mt. Hope decision is not a long one, it does furnish us with much to aid us in determinations of residency for school purposes. Here follow several quotations from that decision which are helpful guidelines in determining residence for school purposes:

> Ordinarily the legal residence of a minor is the same as that of his parents, but a minor may have a residence for school purposes other than that of his parents. The test of residence which will confer school privileges is not the same as the test for taxation or for the exercise of the right of suffrage. 197 Ia. at 193, 197 N.W. at 48.
>
> "Mere intention cannot effect the change, but the intention to remain, coupled with the act of actual residence, establishes the domicile, notwithstanding a floating intention to return at some future time." 197 Ia. at 194, 197 N.W. at 48.
>
> If a minor leaves the home of his father, to reside in another place for the sole purpose of securing free public school education, without bringing with him an actual residence, and with the intent to return to his former residence, he does not become an actual resident within the purview of our school law. Id.

When I was requested in Declaratory Ruling #1, 1 D.P.I. Dec. Rul. 1, 1975, to define "resident pupil" for state foundation aid purposes, I relied heavily upon the Mt. Hope decision and Attorney General Opinions on the subject. With some modification, the definition contained in Declaratory Ruling #1 remains valid. That definition of "resident pupil" reads as follows:

> A person between the ages of five and twenty-one years of age who has either reached the age of majority or makes his or her home with parents or others standing

> in the relationship of parents who exercise full and complete control as in the case of parents, and who manifest an intent or expectation to make his or her residence in the district.

The definition is not complete in that it does not consider the circumstance of "children requiring special education," or the emancipated minor who may be a resident of a school district for a purpose other than attending school.

The issue of residence of "children requiring special education" is in most cases identical to that of nonspecial education students. It should not be forgotten, however, that eligibility for school enrollment for special education students is birth to twenty-one years of age rather than five to twenty-one, Section 281.2, and the residency of special education students who reside in an institution or boarding home or who are under the jurisdiction of a court is determined by statute. Sections 281.12 and 282.27.

The situation of an emancipated minor, a person under the age of 18 residing with persons who are not parents or guardians, also presents some modification to the general definition. The concepts of actual residence in the district and presence for another purpose than to attend school, however, are applicable. In an Attorney General's Opinion appearing at 1938 O.A.G. 69, the Attorney General determined that a minor who had become self-supporting when abandoned by his parents, and who expressed his intention to remain at the place he lived, was for school purposes a resident in the school district in which he lived. In another Opinion, at 1940 O.A.G. 23, the Attorney General determined that a minor sent to live with her grandmother, working for room and board and showing no intention of returning to her parent's home before becoming of majority age, was a resident for school purposes in the school district in which she and the grandmother lived.

Guidance in determinations of residency for school purposes of more recent vintage is found in a 1983 decision of the Iowa Supreme Court in Lakota Consolidated Independent School v. Buffalo Center/Rake Community Schools, 334 N.W.2d 704 (Ia. 1983). The Lakota decision involved the establishment of guardianships in residents of the Buffalo Center/Rake School District over children who actually continued to maintain their residence with their parents in the Lakota District. One of the issues resolved in the decision was whether the mere establishment of a guardianship without the concurrent change of residence of the child created a right for the child to attend school tuition free in the district where the guardian resided. The court stated that "we are convinced that residence for the purposes of Section 282.1 is to be determined based upon the location where the students are in fact residing and does not change merely by the appointment of a nonresident guardian." 334 N.W.2d at 709. The same concept is applicable to Section 282.6. As a result of the Lakota decision, it can no longer be argued that the mere establishment of guardianship without the establishment of actual residence results in residence for school purposes.

The foregoing merely represents some generalizations about residency for school purposes. I will now respond to your questions in the order presented.

I.

What factors should a school district consider in determining whether a student is an "actual resident"? [Sec. 282.6]

There are two factors which must be considered in determining residence for school purposes. First, the child must establish a physical presence in the district, including times other than when school is in session. Second, the physical presence in the school district must be for a primary purpose other than school attendance.

When a child lives in a school district on a full-time basis, the first criteria of residence for school purposes is present. Questions are presented, however, when a child returns to his or her former residence, especially when the latter is the residence of parents. While it is true that residence in a school district can be maintained on a less than full-time basis, such as during vacations or business trips out of the district, regular absences from the district to the home of parents or other special persons can create questions about actual residence. Residence is little more than a manifested intent to be a resident, and frequent absence from the proclaimed residence for the purpose of returning to the residence of parents could be considered a manifested intent to not be an actual resident.

Reasons for establishment of a new residence are usually clear-cut, such as continuation of the home environment when a child moves into a district upon a like change in parental residence. When the residence of a child changes without a like change in parental residence, questions of primary purpose for the child's change in residence must be addressed. If the child's change in residence is for the primary purpose of obtaining a tuition-free education, the child should not be considered a resident for school purposes. This was clearly delineated in the Mt. Hope decision.

> If a minor leaves the home of his father, to reside in another place for the sole purpose of securing free public school education, without bringing with him an actual residence, and with the intent to return to his former residence, he does not become an actual resident, within the purview of our school law. 197 Ia. at 194, 197 N.W. at 48.

This is especially true when parents continue to furnish a significant part of the child's financial support or exercise parental control over the child. See 1926 O.A.G. 457. But, when the primary purpose of establishing a residence is for home environment or economic reasons, the second criteria of residence for school purposes is fulfilled. See 1938 O.A.G. 69, 1940 O.A.G. 23, and 1958 O.A.G. 198.

The United States Supreme Court recently upheld the legality of Texas law which is similar to Iowa's in that it requires a bona fide residency for a purpose other than tuition free education. In the decision entitled Martinez v. Bynum, ___U.S.___, 103, S.Ct. 1838 (1983), the Court stated as follows:

> The provision of primary and secondary education, of course, is one of the most important functions of local government. Absent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer significantly. The State thus has a substantial interest in imposing bona fide residence requirements to maintain the quality of local public schools. 103 S.Ct. at 1843.

II.

May a school district charge tuition to a minor student whose natural parents live outside the school district who resides during the school week with friends or relatives who reside in the school district? The student resides with his or her parents each weekend and some nights during the week and on all holidays and vacations.

While there may be some exceptions, I would think that school officials are generally required by law, Section 282.1, to charge tuition for a child in the situation you describe. When a student leaves his or her parents home only a few days a week to attend school and returns to the parents home on weekends, holidays and at other miscellaneous times, a manifested intent to actually reside in the school district of attendance is not present. Neither is the primary purpose of residence in the district of attendance something other than tuition-free school attendance. It is not likely a coincidence that the child lives in the district only when school is in session.

In the situation you describe, the facts create a presumption that the child involved is not a resident for school purposes. I would recommend in such situations that local school officials charge the student and parents tuition, but provide an opportunity for the parents or child to rebut the presumption through presentation of relevant facts.

III.

May the school district charge tuition to a minor student whose parents reside outside the school district, who has had named as guardian friends or relatives who reside in the school district, when the student does not reside with the guardians on weekends, holidays or vacations? Does it make any difference whether a guardianship is formed?

The situation you describe in this question is nearly identical to that contained in Section II. The only difference is the existence of a guardianship. The Iowa Supreme Court established in the Lakota decision that the residence of students does not change through the mere appointment of a guardian. What is still required is a manifested intent to change the actual residence from that of the parents' home to that of the guardian. See 1940 O.A.G. 23.

When a child returns to the residence of his or her parents on weekends, holidays or vacations, it is difficult to conclude that the child has actually intended to change his or her residence to that of the guardian. There exists a strong suspicion that the child is present in the school district of attendance on a part-time basis for the primary purpose of school attendance. Again, the facts create a presumption of improper motives and a lack of "actual residence," but, the child and parents should be given an opportunity to rebut the inference of nonresidence status resulting from the circumstances.

The factor of a guardianship is an aspect that must always be considered when determining residence for school purposes. However, a guardianship should never be considered the sole or controlling factor in such determinations. Such can be inferred from the Lakota decision and was the basis for the ruling of the State Board in In re Jo Ellen Meerdink, 2 D.P.I. App. Dec. 257. In the Meerdink decision, the State Board said the following about the relevance of guardianships in determinations of residency:

> The existence of a guardianship in the Appellant, who is a resident of the District, is relevant to a determination of residency, but is not the conclusive deciding factor. To allow guardianships such a role would effectively emasculate the entire legal structure of school district boundaries and provisions for funding public elementary and secondary education within the state. Whenever a dispute arises as to the residence of a student and a guardianship is involved, the board of the district in which residence is claimed must take account of the guardian in its deliberations, but its decision should not be controlled by its existence.

IV.

May the school district charge a minor student tuition whose parents reside outside the school district, where the stated intention of the student is to reside in the school district solely for the purposes of attending school in the school district and participating in extracurricular activities? The stated intent of the student and his or her parents is that residency is solely for the purposes of attending school or participating in extracurricular activities. Does it make any difference if the student resides in the district only during the week on days when school is in session?

Under the circumstances you describe, the school district in which the student is attending is legally required to charge the student and parents tuition. The Iowa Supreme Court in the Mt. Hope decision stated very clearly that students cannot establish a tuition-free residence for school purposes when the primary purpose for presence in the district is the purpose of taking advantage of free public school privileges. This position was followed in an Attorney General's Opinion at 1958 O.A.G. 298, and a State Board decision entitled In re Jo Ellen Meerdink, 2 D.P.I. App. Dec. 257. For the second question, this position is strengthened when a student lives in the district only on days when school is in session.

V.

May a school district charge tuition to a minor student whose natural parents reside in another school district and the student does not reside with the appointed guardian at any time?

Clearly, if the child resided with his or her parents, tuition would be charged when he or she enrolled in the district of residence of the guardian. See Mt. Hope Sch. Dist. v. Hendrickson, 197 Ia. 191, 197 N.W. 47 (1924), and Lakota Cons. Ind. Sch. v. Buffalo Center/Rake Comm. Sch., 334 N.W.2d 704 (Ia. 1983). If the child resides with a third person in the guardian's district of residence, other factors must be considered.

While taking up full-time residence with a guardian is evidence of residence which allows tuition-free attendance, the absence of full-time residence with a guardian does not automatically mean that a student is not a resident for purposes of school attendance. As discussed previously, it is possible that a child could be a resident for school attendance purposes without residing with either the parent or appointed guardian. If a child meets the two major criteria of residency, actual physical residence and a primary purpose other than obtaining a tuition-free education, the child will be considered a resident for school attendance purposes even though the child does not reside with a parent or guardian. It is possible that a child may be so severely alienated from both parents and guardians, or that the home environment of both parents and guardians is so unsuitable that the child establishes a residence with a third person and is a resident for school purposes where the child actually resides with the third person. In an opinion appearing at 1938 O.A.G. 69, the Attorney General ruled that a self-supporting abandoned child was a resident for school purposes in the district where the child lived. See also 1936 O.A.G. 677. Both the guardianship and residence of the child must be established "in good faith" and not for purposes of circumventing the law. See 1934 O.A.G. 627.

The specific answer to this question is that schools must charge tuition to students who do not meet the criteria for residency discussed in Section I, and cannot charge tuition to students who meet those criteria. While the residences of parents and guardians are relevant to a determination of residency for school purposes, neither is the controlling factor. See also, Street v. Cobb Cty. Sch. Dist., 520 F.Supp. 1170 (W.D. Ga. 1981).

VI.

May a school district charge tuition to a student whose parents reside outside the state, and who resides in the school district with a relative or a friend and actually lives in the school district during the entire school year?

My response to this question is dependent upon the finding of local district officials as to whether the student is a resident of the district. If district officials determine that the student actually resides within the boundaries of the district and is there for a primary purpose other than school attendance, the student should not be charged tuition. The out-of-state residence of the parents is relevant to a

determination of residency for school purposes, but it is not the controlling factor. It should not be forgotten that the Iowa Supreme Court, in the Mt. Hope decision, stated clearly that the issue of residence for school purposes should be liberally construed in favor of the child claiming residence. An Attorney General's Opinion appearing at 1936 O.A.G. 678 stated equally clearly that the residence of a parent is not controlling on the issue of residence of a child for school purposes. See also 1938 O.A.G. 69. Another Attorney General's Opinion stated that the "measuring yardstick" was whether the child was acting in good faith in establishing a residence in the district. 1936 O.A.G. 604.

If, on the other hand, local school officials make a determination that the student does not live within the district's boundaries or that the student is present within the district for the primary purpose of attending school, the student is not a resident for school attendance purposes and, under the provisions of Section 282.1, must be charged tuition.

VII.

A minor student and his or her parents do not get along. The student has chosen to leave his or her family home, which is in a different district, and to make his or her home with a family living in the school district. The parents and the family with whom the student is residing have agreed to this arrangement but the family with whom the student is residing has not been appointed foster parents, guardians, or custodians by any court. The district in which the student's parents reside is aware of the situation and has agreed that as long as the student resides in the school district, the student shall be treated as a resident of the school district. The student occasionally visits his or her family on the weekends. Must the school district charge tuition in these circumstances?

If a child returns to the home of his or her parents on occasional weekends, the factual basis of alienation from the family is placed in doubt. Local school officials would be justified in determining on the facts that residence has been established for the purpose of school attendance and charging tuition. If, on the other hand, circumstances indicate some justification for returning to the home of the parents on occasional weekends and residence has truly been established in good faith for home environment rather than for educational reasons, the school district of attendance should not charge the student tuition. A temporary absence from the district of residence does not in itself negate residence for purposes of tuition-free public school attendance. See 1970 O.A.G. 10.

VIII.

A minor student obtains employment in the district. The student has chosen to leave his or her family home, which is in a different district, and to make his or her home with a family living in the school district. The parents and the family with whom the student is residing have agreed to this arrangement but the family with whom the student is residing has not been appointed foster parents, guardians or custodians by any court. The student visits his or her family on the weekends. Must the school district charge tuition in these circumstances?

When it appears that the student has made his or her residence in the district for a primary purpose other than school attendance, such as employment, the school district should not charge tuition. Several Attorney General Opinions have ruled that students who move from the home of their parents to another residence for economic purposes are residents for school purposes in the district in which they reside. See 1938 O.A.G. 69 and 1940 O.A.G. 23. Another Attorney General's Opinion at 1936 O.A.G. 677 clearly stated that the parents' residence is not controlling on the residence of a child for school purposes. See also 1936 O.A.G. 604.

If, on the other hand, employment is determined to be a secondary purpose of living in the district and the primary purpose is determined to be school attendance, tuition must be charged.

IX.

If the answer to the foregoing numbered questions 7 and/or 8 is "yes," what factors would change that conclusion?

The issue of whether tuition should be charged is a factual one. When local school officials make a factual determination that the student is actually making his or her home in the district and the student is present in the district for a primary purpose other than school attendance, the school should not charge tuition.

X.

A student on a F-1 visa resides in the school district during the school year. May the school district charge this student tuition?

A F-1 visa is granted to aliens wishing to come to the United States for the purpose of educational pursuits and is one type of student visa. Aliens can obtain F-1 visas only by asserting that they do not intend to abandon their residence in their homeland. They may remain in The United States only 30 days beyond the completion of their course of study. The F-1 visa is inherently temporary and its holder cannot intend to take up residence in the United States.

Persons visiting the United States on F-1 visas do not meet the two basic criteria for tuition-free residence in Iowa's public schools. See Section I. They are not and cannot become residents of the school districts in which they live in the state because of the temporary nature of the residence inherent in a F-1 visa, and the F-1 visa status indicates that they are in the United States for the primary purpose of obtaining an education.

This position is reinforced by an Attorney General's Opinion appearing at 1980 O.A.G. 217. That Opinion involved the issue of an indigent person's right to free medical treatment at a state hospital if the person was a "legal resident of Iowa." The Attorney General ruled that aliens present in Iowa on F-1 type visas do not qualify as legal residents of the state for purposes of free medical treatment at state hospitals because F-1 type visas inherently establish a residence of a temporary nature and on their face show a specific departure date. According to the Opinion, the holding of a F-1 type visa negates claims of Iowa residence.

On the other hand, other visas may allow for the establishment of residency for tuition-free school purposes. An Attorney General's Opinion has ruled that "children of aliens who are actual residents of the state of Iowa are entitled to school privileges without tuition in the district wherein they reside." 1928 O.A.G. 265.

XI.

A minor student's parents are divorced and have joint custody. The primary residence is with the mother who is outside the school district, but the student lives part-time with the father who resides in the school district. Prior to the divorce, the parents both resided in the school district. The parents wish to have the child continue in the school district. Is the child a "resident" for whom tuition need not be charged?

No. As discussed previously, residence for school purposes includes actual physical presence in the district and a manifested intent to be a resident. When, as you describe here, a child is only a "part-time" resident when living with the father, the student is not physically present during the time he or she is residing with the mother. In the situation you describe, the student is a resident for school purposes and does not pay tuition in the father's district of residence when the student lives with the father, and the student is a resident for school purposes and does not pay tuition in the mother's district of residence when the student lives with the mother. Support for this position is found in an Attorney General's Opinion appearing at 1970 O.A.G. 10. That Opinion states in relevant part as follows:

> If, for any purpose other than merely affording such child free public schooling, a parent or guardian maintains his or her home in any given community, the child living in that home should be considered a resident regardless of the fact that the other parent may be living in some other locality.

When the student attends school in the father's district of residence while the student's actual residence is with the mother, tuition must be charged. This result occurs only when the residence of the student is with the mother for a significant portion of the time. There is nothing prohibiting a student from visiting the other parent on a temporary basis without losing resident status. Support for this position is also found at 1970 O.A.G. 10. The relevant portion of that Opinion reads as follows:

> It is my view also that such child does not lose a residence established in a school district by leaving the district in the summertime for a vacation, travel, study, work or other reason if a home is maintained ready for the child's return.

Problems raised by the situation you describe are likely to become more prevalent as more courts award "joint custody" over children when marriages are dissolved. The courts and the legislature need to address this question soon.

XII.

If the answer to the foregoing numbered question 11 is "no," would it make a difference if the primary residence was with the father in the school district?

Yes. If the student's residence is maintained with the father, the student may attend school tuition free in the district where the student and father reside. Absence of a temporary nature from the student's residence to visit the mother does not necessarily mean a change of resident school districts. See 1970 O.A.G. 10.

XIII.

A minor student's parents are divorced and the mother has custody. She resides outside the school district. The child, with her parents' concurrence, wishes to attend school in the school district and live with her father during the school year. Is the student a "resident" for purposes of attending school tuition-free?

Assuming that the student resides with the student's father for the primary purpose of home environment and a secondary reason of school attendance, the district in which the father resides should not charge tuition. The fact that the student's mother has legal custody is a relevant factor, but is not controlling.

If, on the other hand, the primary purpose of residence with the father is school attendance, and the child returns to the mother's residence regularly, the child should not be considered a resident of the district where the father resides and should be charged tuition. Authority for this position is contained in the Iowa Supreme Court's Mt. Hope decision. That decision said the following with regard to the leaving of a primary residence for the purpose of attending school:

> If a minor leaves the home of his father, to reside in another place for the sole purpose of securing free public school education, without bringing with him an actual residence, and with the intent to return to his former residence, he does not become an actual resident, within the purview of our school law.

XIV.

A minor student lives with his or her father outside the school district. The minor student babysits for the father's brother, who lives in the district, before and after school and on weekends. The brother would like to be appointed guardian for the minor student and have the student attend school in the district. The minor student returns to the father's residence each evening. The brother has asked the district to allow the minor student to attend school without paying tuition. Must the school district charge tuition in these circumstances?

Yes. From the facts you describe, the student would not be a resident of the district where his brother resides and should be charged tuition. The Lakota decision made it very clear that the mere establishment of a guardianship does not establish residence for school purposes.

If the facts were changed so that the student lived with the brother for economic reasons, such as babysitting, the student might be a resident for school purposes in the brother's district of residence regardless of guardianship. Other factors, such as plans to return to his parents' residence, would have to be taken into account. See 1940 O.A.G. 23.

XV.

A minor student lives with his or her relatives. The minor student's mother, who is not a resident of the district, has chosen to leave the minor student with the relatives; however, the mother will not give up legal guardianship for the minor student. The Legal Aid Society has drafted a power of attorney letter which provides the relatives with power to decide issues dealing with the minor student's educational and health-related needs. Is the student a "resident" for purposes of attending school tuition-free?

If the student resides with relatives for a primary purpose other than attending school, such as home environment, the student is a resident for school purposes and should not be charged tuition. See 1938 O.A.G. 69. The residence of a parent is not controlling on the residence for school purposes of a child. 1936 O.A.G. 677, and 1936 O.A.G. 604. Neither is the presence or absence of a guardianship a controlling factor. See Lakota Cons. Ind. Sch. v. Buffalo Center/Rake Com. Sch., 334 N.W.2d 704 at 709 (Ia. 1983).

A document establishing a power of attorney is a factor which should be considered by school officials; but like the establishment of a guardianship, it should not be controlling. If the student is determined to be a resident, however, a document establishing power of attorney does aid school officials in carrying out their responsibilities in some matters such as student records, discipline and obtaining consent for educational placement.

XVI.

The parents of minor students are separated and the mother has custody. The mother and the minor students moved from the district to another school district one month after school commenced. Pursuant to district policy, the students may continue in the school district where they started until the end of the semester. The father resides in the school district. The mother has asked the school district if the minor students can attend school tuition-free if the minor students live with the father for two or three weeks at the beginning of the second semester. The district has taken the position that this would not constitute "residency" for purposes of the statute providing for tuition-free education. Is the school district correct in this determination? Would it make a difference if the students moved in with their father for the whole term, even though the mother has custody, and the students return to her on weekends, vacations and holidays?

The school is correct in its determination. The children cannot establish residency for school purposes with the father for two or three weeks when it is known and intended that the living arrangement is only