

**OPINION
69-316**

August 4, 1969 (OPINION)

Mr. Walter R. Fiedler

Director of Institutions

RE: Schools - Tuition Payments - Placement by Industrial School

This is in reply to your letter of July 28, 1969, in which you enclosed a copy of a letter from Mr. Cameron L. Clemens, Superintendent, State Industrial School, dated July 9, 1969. You note Mr. Clemens' letter is concerned with school tuition payments when placement of youngsters from the State Industrial School in the various communities is attempted. You ask for our opinion on the matter.

Mr. Clemens' letter reads in part as follows:

You are aware that all children committed to the North Dakota Industrial School are done so by court order and these children become wards of the state. Since we have our own school system in the institution, we have no particular problem educating these students. The problem arises when we release students from our institution to live in a community other than their own. Sometimes these placements are in foster homes and sometimes they are with child care agencies, such as the Home on the Range for Boys and Dakota Boys Ranch, or one of the three child care agencies in Fargo. The schools where these students attend then ask the home counties of residence for tuition payments. I must say that most school districts submit these payments willingly and do not dispute the request. However, over the last two years, more and more school districts are balking at their obligations and it has caused a strain in agency relationships, and has jeopardized several of our placements because of the reluctance of the home counties to pay school tuition. I suspect the problem will continue to worsen as long as school districts are hard pressed financially. The obligation of the school tuition payment should be clarified before it further jeopardizes placement of young people from our institution who, for one reason or another, cannot return to their home. It would be a shame to endanger placements and future adjustments of our students because of school tuition disputes between school boards.

I am asking you to request the Attorney General's office for a formal opinion concerning this problem. They may wish to make reference to Chapter 15-29-08, paragraph 3 of the North Dakota Century Code. In addition, I would also like to know what recourse there exists if the home county refuses to pay tuition if it is so obligated to do so by law."

Section 15-29-08(3) of the North Dakota Century Code, as amended, provides in part:

* * * The school district in which a child resides at the time any court order or act of juvenile commissioner, or placement by a county or state welfare agency with parental or guardian consent, shall have been issued requiring such child to stay for any prescribed period at a foster home or a home maintained by any nonprofit corporation, shall be construed to be the residence district of such child for purposes of applying this subsection or section 15-40-17 relating to tuition payments, whenever such child shall attend any public schools. Such residence district shall be liable for tuition in the amount provided in such sections upon claim by the district in which such child is attending school, except in the event of placement by a county or state welfare agency with parental or guardian consent, such determination of tuition may be subject to an appeal to the county superintendent of schools and a committee consisting of the county judge, state's attorney and the county superintendent of schools who shall within fifteen days consult with the school board of the districts concerned and with the parent or guardian of the student concerned and render a decision in regard to the tuition charges."

If the child in question was placed directly in the foster home or child care agency by court order, we would have no doubt but that the above section would be applicable to this situation. In this instance, however, it is our impression that the question is concerned with those instances in which a child is committed to the Industrial School by the Court and, subsequently, placed in a foster home or child care agency by the Industrial School and the Director of Institutions, as successor to the powers of the Board of Administration, under the provisions of Chapter 12-52 of the North Dakota Century Code governing parole and discharge from the State Training School. Section 15-29-08(3), quoted in part above, applies only to court orders, acts of a juvenile commissioner and placement by a county or state welfare agency with parental consent. It does not apply to placements by the State Industrial School and the Director of Institutions.

Prior to the amendment of section 15-29-08(3) by the 1969 Legislative Assembly, the portion with which we are here concerned provided:

* * *The school district in which a child resides at the time any court order or act of a juvenile commissioner or any other lawful authority which shall have been issued requiring such child to stay for any prescribed period at a foster home or a home maintained by any nonprofit corporation, shall be construed to be the residence district of such child for purposes of applying this subsection or section 15-40-17 relating to tuition payments, whenever such child shall attend any public school. Such residence district shall be liable for tuition in the amount provided in such sections upon claim by the district in which such child is attending school."
(emphasis ours)

The underlined phrase "or any other lawful authority" was deleted from the statute by the 1969 amendment. It seems probable the placement of a child in a foster home or agency by the Industrial School and Board of Administration under the provisions of

section 12-52-02 of the North Dakota Century Code, as amended, would have been considered placement by a "lawful authority" within the meaning of section 15-29-08(3) prior to its amendment by the 1969 Legislature, since the placement is under authority of law and the child remains under the supervision and control of the State Industrial School while in such home and is required to remain in such home as a matter of law. See sections 12-52-03 and 12-52-06 of the North Dakota Century Code. However, by removing this phrase from the statute, we can only conclude the Legislature intended the tuition provision contained in section 15-29-08(3), quoted above, to apply only when a child was placed in a foster home or child care agency by court order, order of the Juvenile Commissioner, or by a county or state welfare agency with parental consent.

Thus we cannot state, as a matter of law, that the school district of legal residence must pay the tuition in such instance; we note, under the provisions of section 12-52-02 of the North Dakota Century Code, the parole is made at the recommendation of the Superintendent of the Industrial School by the Director of Institutions and not by the Court. If, as noted above, the placement is by specific Court order, we have no doubt but that the district of residence must pay the tuition.

We must also note, however, that if a child is paroled to a foster home or child care agency by the Industrial School and Director of Institutions, without a court order, that child, unless he is placed in the foster home or child care agency for the specific purpose of attending school in the district in which such home or agency is located, would be considered a resident of the district in which such home or agency is located for school purposes and no tuition could be charged. Thus in *Anderson v. Breithbarth*, 245 NW 483 (ND 1932) the Supreme Court of North Dakota held that, in the statute providing the public schools of this State are to be all times equally free, open and accessible to all children over six and under twenty-one years of age residing in the district (section 15-47-01, N.D.C.C.) the term "residing in the district" is not restricted to the domicile of the parents of said child, but the term is to be construed in a broader sense as meaning the actual residence of the child - the place which constitutes its home when not called elsewhere for temporary purposes, the place to which it returns in seasons of repose. The Court also indicated, however, that if the student was in the district primarily for the purpose of attending school therein, such child would be considered a nonresident for school purposes. Applying this decision to the instant question, we find that it would be necessary to determine whether the child was placed in the foster home or child care agency for general purposes or merely for the purpose of attending school in the district in which such home or agency is located. If the child is not placed in the foster home or agency primarily to take advantage of the school facilities available in that district, no tuition would be due as the child would be considered a resident of that district for school purposes. If the child was placed in the foster home or agency primarily because of the school facilities available in that district, the district would be entitled to charge tuition, but the district of residence would not be responsible for the payment of such tuition unless they agreed to pay same or were ordered to do so as provided by law as hereinafter explained.

We would note the provision requiring the district of residence to pay tuition when a child is placed in a foster home by a court order was enacted in 1961. See Chapter 146, 1961 Session Laws. On April 12, 1960, this office, in an opinion by LeRoy A. Loder, Ward County State's Attorney, had held that the children residing at Dakota Boys Ranch were residents of the local school district for school purposes regardless of whether the child was placed at the agency by court order or otherwise. It appears probable that the 1961 legislation was intended to overcome that situation. As such, the legislation is an exception to the general provision set forth in section 15-47-01 of the North Dakota Century Code, providing the schools are free and open to any child between the ages of six and twenty-one residing in the district, and is subject to strict construction. See, e.g., *Knoepfle v. Suko*, 108 N.W.2d. 456 (ND 1961).

If it is determined the child has been placed in a district primarily for the purpose of attending school therein, thus entitling the receiving district to charge tuition, the tuition would have to be paid by the district of residence under agreement with the receiving district, or, if the district of residence refuses to pay the tuition, it may be required to do so under certain circumstances as provided in section 15-40-17 of the North Dakota Century Code, as amended, for high school students and section 15-29-08(14) of the North Dakota Century Code, as amended, for elementary students. These provisions provide for appeal of the tuition matter to a county committee of the county in which the district of residence is situated. The committee is composed of the county judge, state's attorney and county superintendent of schools. The decision of the county committee may be appealed to the State Board of Public School Education in instances involving high school students. If the committee requires the district of residence to pay the tuition, such tuition must be paid. The parents may also pay the tuition as provided in section 15-29-08(14) for elementary school students and section 15-40-17.1 in the case of high school students.

Insofar as those situations involving students for whom the district of residence is required to pay tuition under section 15-29-08(3) of the North Dakota Century Code, as amended, are concerned, we note the statute makes no provision for enforcing the payment of tuition by the district of residence if they refuse to do so. Presumably the only recourse available to the receiving school district would be for said district to sue the district of residence for the amount of tuition due. While it would not appear school officials would refuse to obey the dictates of the law with regard to this matter, it is possible situations in which such officials would refuse to do so will arise. We note that, in certain instances in which a district is required to pay tuition and refuses to do so, the district of residence forfeits the county equalization payments to the receiving district. See section 15-29-08(14). Or, in a different situation, upon notification to the county superintendent of schools and State Department of Public Instruction, all payments from the county equalization fund and payments from the State to the district of residence will be withheld until the tuition due the admitting district is paid. See section 15-40-17 of the North Dakota Century Code, as amended. In this instance, these remedies are not available

since the Legislature made no reference to those instances in which a district refuses to pay tuition as required by section 15-29-08(3) of the North Dakota Century Code, as amended.

HELGI JOHANNESON

Attorney General