

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-07

Date issued: May 1, 1991

Requested by: Representative James O. Coats

- QUESTIONS PRESENTED -

I.

Whether the school board of a public school district may, in appropriate circumstances, deny attendance at one of its schools to a person of school age living in North Dakota with a relative, whose parents are residents of another state.

II.

Whether a power of attorney executed by a parent under N. D. C. C. ' 30.1-26-04, delegating powers over a child to a relative in North Dakota, requires the school district of residence of the relative to admit the child to one of its schools without the payment of tuition.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that if tuition payments are not made a North Dakota school district may deny attendance to a person of school age living in North Dakota with a relative whose parents are residents of another state, if that child was sent to a North Dakota school district merely to take advantage of North Dakota school privileges.

II.

It is my further opinion that a power of attorney executed by a parent under N. D. C. C. ' 30.1-26-04, delegating powers over a child to a relative, does not grant residency status to a child for school attendance purposes and does not require the school district of residence of the relative to admit the child to one of its schools, tuition free.

- ANALYSIS -

I.

The North Dakota Constitution emphasizes the importance of education to the prosperity and happiness of the people, and provides that "the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of

North Dakota and free from sectarian control." N.D. Const. art. VIII, ' 1. (Emphasis supplied.)

In furtherance of this constitutional proviso, the Legislature has established school districts in this state and has provided that "[t]he public schools of the state shall be equally free, open, and accessible at all times to all children between the ages of six and twenty-one." N. D. C. C. ' 15-47-01. Additionally, the Legislature has provided that "[e]very parent, guardian, or other person who resides within any school district, . . . and has control over any educable child of an age of seven years to sixteen years . . . shall send or take such child to a public school each year during the entire time such school is in session." N. D. C. C. ' 15-34.1-01.

One of the duties of a North Dakota school board is "[t]o establish for all children of legal school age residing within the district, a system of free public schools which shall furnish school privileges equally and equitably." N. D. C. C. ' 15-29-08(1). (Emphasis supplied.)

While recognizing the requirement for a free public school education, our Legislature has also enacted a system for determining the requirements for the payment of tuition by parents or school boards sending students to another district. This system recognizes the right of a school district to charge and collect tuition from pupils who are not residents of this state, and authorizes the state Superintendent of Public Instruction to enter into reciprocal agreements for the determination of tuition for the education of students from other states. N. D. C. C. " 15-40.2-03 and 15-40.2-10.

Although judicial interpretation of these sections with respect to the requirement for paying tuition has been infrequent, the decisions available show that school attendance in North Dakota is intended for students who reside in the district, and students whose parents both reside outside the district are entitled to North Dakota school privileges based on the reasons for their presence in North Dakota.

In the case of Anderson v. Breithbarth, 245 N. W. 483 (N. D. 1932), our supreme court discussed the responsibility of parents who lived in South Dakota to pay tuition to the North Dakota school where their child was attending school and living with her aunt and uncle. After the child's father had deserted the family, her mother sent her to live in North Dakota for the purpose of providing a decent home for the girl and lightening the mother's financial burden. The mother's parental rights had not been terminated; however, for all practical purposes, the child was a member of her aunt's and uncle's family.

The North Dakota Supreme Court, interpreting the phrase "residing in the district," analyzed the different types of residency in this state for various purposes, and concluded that residency for school purposes was not the same as residency for many other purposes. Presently, this phrase is contained in N. D. C. C. ' 15-29-08(1).

The court in Anderson noted that the state's policy was to compel the attendance of North Dakota students. The Anderson court distinguished the situation before it from those situations where the child of a nonresident was sent to North Dakota to obtain North Dakota school privileges. The court noted that the purpose of the arrangement in Anderson was to give the child a home. The court concluded the term "residing in the district" meant that regardless of the child's parents' residence, that the child lived in a particular North Dakota district, because that place was the only home the child had, and was the place to which the child came and remained when not called elsewhere for labor or special or temporary purpose. The court noted the need for strictly construing the statutory authority for charging tuition because it was a restriction on the constitutional provision of a free public education.

The court in the Anderson case was careful to note that its construction of the statutes in question did not permit any child to come into a school district merely for the purpose of obtaining school privileges. The court noted that the law governing the payment of tuition would govern such situations and that it was immaterial whether the child came to North Dakota for those purposes with its parents or alone.

In the 1943 code revision process, the code revisor redrafted N. D. C. C. ' 15-47-01 and deleted the phrase "residing in the district." The revisor's note states that the section was revised for clarity without change in meaning. This statement of the code revisor is apparently upheld by a later decision of the North Dakota Supreme Court in the case of In the Interest of G.H. 218 N. W.2d 441, 447 (N. D. 1974). In that case, the court dealt with a handicapped child whose parents lived in a North Dakota school district but moved out of state. The child in question was made a ward of the state by judicial action brought by a local welfare board, and had been attending a crippled children's school in North Dakota. The court in G.H. noted that the issue of residency of the child had been exhaustively discussed in Anderson v. Breithbarth, supra. Even though the statutes had been amended in many respects since the Anderson case, the amendments would not change the result of the case. In G.H. the court held the child was a North Dakota resident, entitled to education at the crippled children's school where the appropriate education was available. Thus, the home school district of G.H. was required to pay tuition to the crippled children's school. Currently, the phrase "residing within the district" is contained in N. D. C. C. ' 15-29-08(1).

Although statements in the opinion request indicate certain background information concerning the reason for the subject student to be in North Dakota, including difficulty in school in another state and returning to that state during the summer months, the determination of the underlying purposes for the child being in North Dakota and attending school here is a factual question which cannot be determined in this opinion. Such factual determinations must be made by the officials directly concerned with the child in question. It is my opinion that if a school age child makes her home in a school district, whether with the child's parents or other persons, and if that place is the child's only home and is the place at which the child

remains when not called elsewhere for labor or special temporary purpose, then the child is a resident of North Dakota for school purposes and may attend school without the payment of tuition. It is also my opinion that if the child is in the school district merely for the purpose of obtaining school privileges, then the law concerning the payment of tuition governs. It is my understanding that the state Superintendent of Public Instruction has entered into reciprocal agreements with some of the surrounding states pursuant to N. D. C. C. ' 15-40.2-10. Thus, in those cases where there is a governing agreement a nonresident child could attend a North Dakota school if tuition payments are made.

The opinion expressed herein comports with previous opinions of this office. See 1961 Op. of the Atty. Gen. 217, and 1969 N. D. Op. of the Atty. Gen. 316.

II.

N. D. C. C. ' 30.1-26-04(5-104) provides:

A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding six months, any of his powers regarding care, custody, or property of the minor child or ward, except his power to consent to marriage or adoption of a minor ward.

The editorial board comment in the North Dakota Century Code, as well as the official comments in the Uniform Probate Code (U.L.A.) provide that this section permits a temporary delegation of parental powers designed to reduce problems relating to consents for emergency treatment. The examples given are those circumstances where a parent or guardian will be out of the country or out of touch with the child for some time and wishes to leave the authority for making a decision concerning emergency needs of the child in the hands of another responsible person.

It is apparent from these comments that the purpose of the section in question is for the protection of the child in emergency situations. The section is not designed to assert the residence rights of the child nor to alter the residential status of the child for long or indefinite periods of time. The duration of such a power is only six months. It is thus not designed for use as a weapon in the arsenal of those who would seek to use it to circumvent tuition requirements. It is therefore my opinion that the execution of a power of attorney under N. D. C. C. ' 30.1-26-04 should not be given persuasive effect by a school board when considering residence of the child for purposes of the payment of tuition to a North Dakota school district.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is

decided by the courts.

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