

N.D.A.G. Letter to Sanstead (Nov. 24, 1992)

November 24, 1992

Dr. Wayne G. Sanstead
Superintendent of Public Instruction
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Dr. Sanstead:

Thank you for your September 22, 1992, memorandum asking whether the Superintendent of Public Instruction (hereafter, Superintendent) may institute a residency determination policy declaring physical presence to be decisive in determining a student's residence. This policy would be used to determine whether to withhold state foundation aid payments from a school district alleged to be educating a nonresident student, without a tuition agreement or without charging the parents for tuition. You state in your memorandum that you regularly receive requests from school districts to withhold foundation aid from a neighboring school district which the complaining district believes is educating students whose residence is in the complaining district.

N.D.C.C. § 15-40.2-04 provides that a school district shall forfeit foundation aid payments for any nonresident student the school district is educating without charging and collecting tuition for the student unless the district has a tuition agreement with the school district of residence.

N.D.C.C. § 15-40.1-09 provides the framework for settling disputes on student residency for purposes of withholding foundation aid payments pursuant to N.D.C.C. § 15-40.2-04. The school district business manager is required to file, by July fifteenth, an annual verified statement with the county superintendent of schools. This statement must include each student's name and residence, among other information.

The county superintendent is required to investigate the validity of the statement and to determine the residence and other qualifications of each student named in the school district statement. If there is a disagreement between school districts on the residency of any student, those districts should alert the county superintendent of the dispute so the county superintendent can resolve it. If the county superintendent needs legal advice on residency issues, the county state's attorney should be consulted to provide the county superintendent with a written opinion. N.D.C.C. § 11-16-01(9).

If any part of a statement of a school district is disallowed by the county superintendent, notice of the names of the students disallowed must be reported to the Superintendent of Public Instruction and to the school district filing the statement. Any school district may appeal to the Superintendent of Public Instruction from the county superintendent's

determination of a student's residence "on or before September fifteenth in the year in which the determination is made." N.D.C.C. § 15-40.1-09.

If an appeal is presented to the Superintendent under N.D.C.C. § 15-40.1-09, it must be reviewed and decided pursuant to the procedure provided in N.D.C.C. § 15-21-07. This procedure includes receipt of evidence under oath, and requires a written decision including findings of fact based on a preponderance of the evidence and conclusions of law drawn from those facts. N.D.C.C. § 15-21-07, ch. 28-32. These appeals must be heard before a hearing officer assigned by the Office of Administrative Hearings. N.D.C.C. § 54-57-03. The decision of the Superintendent is final.

Based on the foregoing discussion, it is my opinion that the Superintendent of Public Instruction is not authorized to determine residency based on mere policy that presumes physical presence to be decisive of a student's residence for the purpose of withholding state foundation aid payments from a school district alleged to be educating a nonresident student without a tuition agreement or without charging the parents for tuition. The only procedure by which residency can be challenged is pursuant to the appeal procedure outlined in N.D.C.C. § 15-40.1-09. Such an appeal must be decided on the basis of the facts presented at a hearing under N.D.C.C. § 15-21-07. If the Superintendent of Public Instruction desires to impose a standard for residency, it can be done by adoption of administrative rules under the authority provided by N.D.C.C. § 15-40.1-19. Rules adopted under that section and N.D.C.C. ch. 28-32 could apply criteria to be used by the county superintendent in making the certification as well as regulating appeals from the county superintendent's decision.

Sincerely,

Nicholas J. Spaeth

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