Opinion No. 73-16

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BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable John R. Tomlin New Mexico State Representative Legislative-Executive Building Santa Fe, New Mexico 87501

QUESTIONS

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Can the Age of Majority Act be amended to provide an exception wherein, for purposes of administering tuition charges at state educational institutions, the Board of Educational Finance shall consider any person who has not reached his twenty-first birthday as a minor and thereby a resident of the same state as his parents or guardian?

CONCLUSION

No, see analysis.

OPINION

*{*27}* **ANALYSIS**

Shapiro v. Thompson, 394 U.S. 618 (1969), invalidating welfare residency requirements as an impermissible infringement on the right to travel interstate, appeared to indicate that the United States Supreme Court would also invalidate residency requirements for in-state tuition. However, when the Court did consider this problem it affirmed, in a memorandum opinion, the lower court's decision upholding the validity of Minnesota's statutory requirement that a person reside in the state at least one year to qualify for resident tuition. **Starns v. Malkerson,** 401 U.S. 985 (1971). Distinguishing **Shapiro,** the district court held the compelling state interest test inapplicable since that one year waiting period does not deter any appreciable number of persons from moving into the state; that is, the waiting period does not infringe upon the right to travel. 326 F. Supp. 234 (D. Minn. 1970).

Although the **Starns** decision forecloses debate on the constitutionality of residence requirements for tuition at state universities, it by no means resolves all constitutional questions raised by the application of the non-resident tuition fee. One recurring problem is the reclassification of those students initially classified as non-residents who have thereafter decided to become residents of the state and thereby seek to take advantage of the lower tuition offered to residents.

Current state regulations adopted by the Board of Educational Finance in the Fall of 1972, establish a conclusive presumption that a person of any age is not a resident for tuition purposes until he has lived in New Mexico for not less than one year next preceding his first enrollment. This regulation is justified in the following manner. First, the waiting period is a means of allocating the cost of higher education between residents and nonresidents in the state. As the California Court of Appeals explained in **Kirk v. Board of Regents,** 273 Cal. App.2d 430, 78 Cal. Rptr. 260 (1969), charging lower tuition fees to those persons who have lived in the state for at least one year is a "reasonable attempt to achieve a partial cost equalization," because these persons "directly or indirectly, have recently made some contribution to the economy of the state through having been employed, having paid taxes, or having spent money in the state . . ."

Second, the waiting period is often justified on the ground that it provides lower tuition only to those who intend to remain in the state permanently and thereby prove their domiciliary intent. Intentions to remain permanently, of course, is closely related to the cost equalization objective, since a resident who intends to reside in the state permanently will contribute his share of the cost of higher education by paying state taxes to the same, if not greater, extent than those persons who have lived in the state in the past.

While the regulation precluding students from becoming residents for tuition purposes once classified as non-residents, a "closed classification," presents equal protection problems analogous to those in **Carrington v. Rash,** 380 U.S. 89 (1965), the more immediate problem and that question presented today involves the effect of the Twenty-Sixth Amendment to the United States Constitution on reclassification.

The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age." This extension of the franchise to persons eighteen years of age or older and the attendant problem of students establishing voting residence in their college towns have great significance in establishing residence for tuition purposes. For example, shortly after the passage of the Amendment, five students in Kentucky challenged that state's presumption that a person who lists his occupation as "student" has not met the domiciliary requirement of the voting regulations. The Federal District Court for the Eastern District of Kentucky held that this presumption against student residency could not withstand scrutiny under the equal protection clause: "Simply put there are no salient reasons to treat registering students differently from other people merely because they are students." **Bright v. Baesler,** 336 F. Supp. 527 (E.D. Ky. 1971). Earlier the Michigan Supreme Court reached the same conclusion in **Wilkins v. Ann Arbor City Clerk,** 385 Mich. 670, 189 N.W.2d 423 (1971). See also **Jolicoeur v. Mihaly,** *{*28}* 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971). In response to the contention that students lacked sufficient connection with the university community to be considered residents, the court pointed out "numerous interrelationships between students, their local communities, and the State of Michigan." Some of the connections with the state and college communities

citied by the Michigan Court bear directly on establishment of student residency in general:

"Students pay state tax, city income tax (if any), gasoline, sales and use taxes . . . As the United States Supreme Court has recognized, property taxes are ultimately paid by renters such as some of the appellants. In addition, Michigan explicitly recognizes this fact by allowing all renters a 17% exemption on rent paid in lieu of the exemption that property owners receive for payment of property taxes. Students with children can and do enroll them in the public school system, and, therefore, have more than a passing interest in educational standards of the community."

Since the Kentucky and Michigan opinions involve infringements of the fundamental right to vote, they can be distinguished from the tuition residency situation. Yet much of the reasoning of these cases is applicable to proof of residency for tuition purposes. Indeed, one court has bridged the gap between establishing residence for voting and for tuition payments. **Board of Trustees of Colby Community Junior College v. Benton,** No. 5258 (17th Judicial Dist. of Kansas, Jan. 3, 1972). The Judge of the Seventeenth Judicial District of Kansas held that the enfranchisement of eighteen year olds by the Twenty-Sixth Amendments means that they are no longer dependent on their parents for residence. The court specifically ruled that the college had the burden of proof to show that the student claimant who registered to vote in the town in which he attended a state junior college was not a resident of the junior college district. Although the facts of this case applied to charging nonresident tuition to students outside the junior college district, though not necessarily outside the State of Kansas, the decision could easily be extended to include students from out-of-state seeking residency status.

If the reasoning of the Kansas Court is followed, the Twenty-Sixth Amendment has supplied students with a new legal argument to attack out-of-state tuition. Rebuffed in their efforts to challenge the non-resident tuition fee on a constitutional basis in **Starns** and similar cases, it is our opinion that student opponents of the non-resident tuition fee would ultimately succeed by attacking the application of the non-resident classification. The change in classification proposed in House Bill 201, setting up a special class of minors specifically for tuition purposes would present the proper means for the attack.

By: Leila Andrews

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