

Opinion No. 75-78

December 30, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Dr. Donald Stuart Board of Educational Finance Capitol Building Santa Fe, New Mexico 87503

QUESTIONS

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A. MARRIED STUDENTS

Does the marriage of a nonresident to a resident satisfy the residency criteria for tuition purposes with respect to the non-resident spouse?

B. MILITARY PERSONNEL

1. May a person who has lived on a military base use the period of time spent on a military base toward acquiring residency (provided the person completed other overt acts?)

2. May a person living on a military base acquire New Mexico residency for tuition purposes?

CONCLUSIONS

A. No.

B. 1. Yes.

2. Yes.

OPINION

{*210} ANALYSIS

A. The Board of Educational Finance has the authority to determine resident status for tuition purposes pursuant to Section 73-30-2.2(E), NMSA 1953 Comp., which specifically provides that:

"The board of educational finance shall define resident and non-resident students for the purpose of administering tuition charges in accordance with the constitution and statutes of the state, and after consultation with the appropriate officials of the

institutions concerned; each institution shall use the uniform definitions so established in assessing and collecting tuition charges from the students."

The current Board of Educational Finance Resident Status Regulation, as amended March 22, 1974, defines a resident student as one "who has been domiciled in New Mexico for not less than one year" preceding first enrollment. The regulation defines domicile as "physical presence in this state . . . coupled with the intention to remain and to make this state one's home indefinitely." This definition is consistent with the law. See **Montoya v. Collier**, 85 N.M. 356, 512 P.2d 684 (1973).

The current regulation, unlike previous regulations, does not contain a provision conferring resident status on women who marry New Mexico residents. For example, the regulation, as amended June 10, 1958, contained the provision that "a non-resident woman who marries a resident of New Mexico shall become a resident at the beginning of the next semester term following such marriage." And the regulation, as amended June 15, 1973, provided that "A non-resident woman who marries a resident of New Mexico shall be considered as acquiring domicile in New Mexico of a duration equal to that of her husband." It is our conclusion that absent any such specific provision, resident status for tuition purposes may be attained only by showing domicile in New Mexico for one year. Marriage does not automatically waive that requirement. All students, married or not, male or female, are equally bound by the current regulation.

Although the regulation does not create any exception on the basis of marriage to the requirement of one year domicile for resident status for tuition purposes, it does provide that retaining or acquiring domicile is subject to certain qualifications. One such qualification states that "the general rules of common law touching acquisition, loss or change of domicile shall be applicable in all cases," and it has been suggested that the common law rule that a wife attains the domicile of her husband would affect the determination of resident status for tuition purposes. The Board of Educational Finance does not, under the regulation, grant resident status for tuition purposes to any domiciliary of New Mexico but only to those who have been a domiciliary for more than one year. Without the year requirement, where simple proof of domicile is sufficient to attain resident classification for tuition purposes, a court has upheld a regulation under which a non-resident woman may be classified a resident upon marriage to a resident. The Court said:

"This regulation is obviously an attempt to adhere to the well established legal concept that the domicile of a wife is the same as that of her husband . . . While it is by no means controlling, such a marriage is a relevant consideration in determining {211} a student's residency for tuition purposes . . . Although it is possible that the University regulations on this point could be clarified, they do not presently constitute a constitutional violation . . ." **Clarke v. Redeker**, 259 F. Supp. 117, 124 (S.D. Io. 1966).

With the year requirement, however, marriage may be a factor in establishing domicile, but, absent a specific provision, it is not a determinative factor in establishing resident status for tuition purposes.

Moreover, even if in adherence to common law, the current regulation contained a provision which conferred resident status for tuition purposes on non-resident women by reason of marriage to residents, such a provision may not be constitutional. In **Samuel v. University of Pittsburgh**, 375 F. Supp. 1119 (W.D. Pa. 1974), the court found that a tuition regulation creating an exception for non-resident women who marry residents was contrary to the Equal Protection Clause of the Fourteenth Amendment. In **Samuel**, the regulation in question essentially provided that a married woman was presumed to have the domicile of her husband for tuition purposes. Relying on the Supreme Court decision in **Reed v. Reed**, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), the **Samuel** court found that classifications based on criteria wholly unrelated to the object of the regulation were arbitrary and the mandatory preference given thereby to members of one sex was forbidden by the Fourteenth Amendment. The court said that the residence of **all** students must be determined on the basis of the same factors, "without reference to whether the student is male or female, married or unmarried." 375 F. Supp. at 1134.

B.1. Time spent on a military base in New Mexico is physical presence in the state and may be used toward acquiring residency so long as the requisite intent is also demonstrated. It does not, however, in itself, confer domicile. Article 7, Section 4 of the New Mexico Constitution provides:

"No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States. . ."

This policy is also present as a qualification in the current regulation at Section 5B.

Service in the armed forces may not prevent a person from establishing domicile. If time spent on a military base in New Mexico is in conformance with the domicile qualifications set out in the regulation, then military personnel may, after one year of such domicile, be eligible for resident status for tuition purposes.

B.2. This question is answered conclusively by statute as well as by regulation.

Military personnel living on a military base, presumably members of the Armed Forces or spouses or children of a member of the Armed Forces, are specifically designated residents for tuition purposes. Section 73-30-2.1, NMSA, 1953 Comp. is directly on point and provides:

"A. For the purpose of tuition payment at the residence school rates at state institutions, as defined in Article 12, Section 11 of the Constitution of New Mexico, a 'resident student' includes:

{*212} "(1) any person not otherwise entitled to claim residence who is a member of the armed forces of the United States assigned to active duty within the exterior boundaries of this State; and

"(2) the spouse or minor child of any person who qualifies under paragraph (1)."

Section 73-30-2.1, **supra**, has also been incorporated in the current regulation at Section 9(B).

By: Jill Z. Cooper

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