

Opinion 11-05

OPINION OF: GARY K. KING Attorney General

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BY: Andrea R. Buzzard, Assistant Attorney General

TO: The Honorable Thomas A. Garcia, New Mexico State Representative, P.O. Box 56, Ocate, NM 87734

QUESTION:

Does the residency requirement of Subsection C of NMSA 1978, Section 22-13-8 (2009) violate the Equal Protection Clause of the United States and New Mexico Constitutions and create an irrebutable presumption of nonresidence in violation of the procedural due process protections of the United States and New Mexico Constitutions?

CONCLUSION:

We do not believe that a court would find NMSA 1978, § 22-13-8(C) in violation of the United States and New Mexico Constitutions.

ANALYSIS:

NMSA 1978, Section 22-13-8(C) simply states that “residency” may not be based “solely” on “enrollment” at a residential treatment center by school-age persons who would not otherwise be considered residents of the state. Subsection C provides:

A school district in which a private, nonsectarian, nonprofit educational training center or residential treatment center is located shall not be considered the resident school district of a school-age person if residency is based solely on the school-age person’s enrollment at the facility and the school-age person would not otherwise be considered a resident of the state.

Subsection C pertains to “school age persons,” meaning non-public school students that are not defined as “qualified students.” See definitions at Section 22-13-8(A)(1) and (2). The Public Education Department’s rule implementing Chapter 162 incorporates the statutory definitions of “school age persons” and “qualified students.” See Rule 6.31.2.7(F) NMAC.

All children with disabilities who meet certain age requirements and who “reside” in New Mexico are entitled to a free appropriate public education (FAPE) that is made available by public agencies. Only those children who meet the criteria specified in the Department’s rules may be included in calculating special education program units for state funding. See Rule 6.31.2.8 NMAC. A New Mexico public agency must develop

procedures to ensure that all children with disabilities who “reside” within the agency’s educational jurisdiction, including children who are enrolled in private facilities such as residential treatment centers, have access to a FAPE in compliance with all applicable federal and state laws. See Rule 6.31.2.9(A) NMAC.

Public agencies must adopt procedures to ensure that children with disabilities who “reside” within the agency’s educational jurisdiction, including children who attend residential treatment centers, and who are in need of special education and related services are located and evaluated. See Rule 6.31.2.10(A) NMAC. A qualified student for whom the state is required by federal law to provide a FAPE and who is attending a private residential treatment center must be counted in the special education membership of the school district that is responsible for the costs of educating as provided in the individualized education program for the student. See Section 22-13-8(K).

The placement of students in private residential treatment centers may be made by an IEP team or by a due process decision. “The school district in which the qualified student or school-age person lives, whether in-state or out-of-state, is responsible for the educational, nonmedical care and room and board costs of that placement.” See Rule 6.31.2.9(B)(3) NMAC.[1] Children with disabilities may also be placed by their parents in private residential treatment centers. However, “[a] school district in which a private school or facility is located shall not be considered the resident school district of a school-age person if residency is based solely on the school-age person’s enrollment at the facility, and the school-age person would not otherwise be considered a resident of the state.” See Rule 6.31.2.11(L)(1)(b) NMAC.[2]

Section 22-13-8(C), in providing that residency may not be based “solely” on enrollment in a private residential treatment center, does not create an irrebutable presumption of nonresidence. In fact, the statute expressly acknowledges that such enrolled school-age persons are not disabled from satisfying state residency requirements. The inability to base residency “solely” on enrollment applies to such enrolled persons who would not otherwise be considered residents of the state.

In Vlandis v. Kline, 412 U.S. 441 (1973), the United States Supreme Court struck down, as a denial of due process, a Connecticut statute that denied resident tuition rates on the basis of a permanent and irrebutable presumption of nonresidence. The irrebutable statutory presumption of nonresidence arose when the student’s legal address was outside the state at the time of his application for admission to the university or at some point during the preceding year. For so long as he thereafter remained a student at the university, he would never have the opportunity to show the bona fides of his residency within the state for in-state tuition purposes. The Court expressly recognized that a state has the right to protect and preserve the quality of its universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis. Id. at 453. Further, the Court admonished: “Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there.” Id. at 452. The Court

held only that the permanent irrebutable presumption of nonresident violated due process “because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents.” Id. at 453.

Subsection C of Section 22-13-8 is consistent with Vlandis, in that: (1) mere enrollment at the residential facility, i.e., “just because they go there,” is not sufficient to qualify for residency, and (2) enrolled persons have the opportunity to demonstrate residency, as the statute does not purport to deny residency to those who are otherwise entitled to residency status.

In Martinez v. Bynum, 461 U.S. 321 (1983), the United States Supreme Court held that a state may impose bona fide residence requirements for tuition-free admission to its public schools. Specifically, the Court upheld the constitutionality of a Texas residency requirement applicable to minors who wished to attend public free schools. The challenged statute provided that in order for a minor to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian or other person having lawful control of him under a court order, it must be established that his presence in the school district was not for the primary purpose of attending the public free schools. In upholding the constitutionality of the statute, the Court held:

A bona fide residence requirement ... furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in the public free schools does not violate the *Equal Protection Clause of the Fourteenth Amendment*...A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents.

Id. at 328-29 (emphasis in original). The Court in Martinez observed that the “service” that the state would deny to nonresidents, namely, free public education, is not a fundamental right protected by the Constitution. Id. at 329, fn. 7. See also Plyler v. Doe, 457 U.S. 202, 221 (1982) (“Public education is not a ‘right’ granted to individuals by the Constitution”).

Subsection C of Section 22-13-8 is consistent with Martinez, in that it furthers a substantial state interest in assuring that public education services are provided for residents of New Mexico. Subsection C likely would not be held violative of constitutional equal protection and due process principles.

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[1] This provision is the same as Subsection D of Section 22-13-8.

[2] This provision is the same as Subsection C of Section 22-13-8.