

Opinion No. 41-3879

August 23, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. Hugh M. Milton II, President New Mexico State College of Agriculture and Mechanic Arts State College, New Mexico

{*92} Receipt is acknowledged of your letter dated August 21, 1941, enclosing Pamphlet No. 91 containing a copy of the Act of July 2, 1862, of Congress appearing in 12 Statutes 503, and known as the First Morrill Act together with amendments thereto down to the Bankhead-Jones Act of June 29, 1935.

You ask for an opinion interpreting the meaning of the proviso appearing in the 1941 appropriation bill, being Chapter 212, Laws of 1941, at Page 465. As the same pertains to the New Mexico College of Agriculture and Mechanic Arts it is provided as follows:

"Provided that this appropriation shall be contingent upon charging non-resident students not less than One Hundred Fifty Dollars (\$ 150.00) per year, based on a nine month school year; providing that any student having graduated from a non-resident high school shall be considered a non-resident unless he or she shall have spent not less than twelve (12) months in residence in the State of New Mexico after becoming twenty-one (21) years of age while not attending school, or whose parents are legal residents of the state; and provided further, that non-resident summer school students shall be charged Fifteen Dollars (\$ 15.00) per summer session."

The legislature, at least since 1935, has provided a minimum tuition fee to be charged to nonresident students, and in the 1941 law the legislature has defined or interpreted the meaning of a nonresident student who has graduated from a non-resident high school. This definition, however, only applied to the particular class which is covered thereby, and general common law rules would apply to the definition of nonresidents not covered by this act.

In your letter you state that in the past you have required nonresident tuition fees to be paid by any person who has graduated from a high school in any state or county other than New Mexico, regardless of the age of the student or the residence of the parents. Under the express provisions of the law above mentioned, the legislature has provided that a student whose parents are legal residents of this state shall not be considered a non-resident regardless of the fact that he may have attended high school outside of the state and graduated from such high school. This same conclusion has already been reached by this office in Opinion No. 3815.

Your next question is with reference to discrimination against non-resident students in view of the Morrill act above mentioned supplemented by the Bankhead-Jones Act under which your school receives from the Federal Government approximately \$

76,000.00 per year. Aside from the restrictions pertaining to the use of the funds contained within these acts, such acts would not and do not restrict the power of the legislature and the Board of Regents to make reasonable classification as a basis for charging tuition, and since admission to a state college or university is not a matter of right, but is merely a privilege granted by the legislature, a classification upon the basis of residence or non-residence, in my opinion, is a reasonable classification and does not violate the 14th amendment of the United States Constitution nor Article II, Section 18 of the State Constitution. 11 C.J. 996: 18 N.M. 388, at Page 412.

{*93} Your next question is whether the tuition charge provided for non-resident students may be waived in the case of children of men in the military service who may be non-residents of this state. Since the legislature made no exception whatever as to men in military service but laid down a strict rule to the effect that all non-resident students should be charged tuition fee of \$ 150.00 in my opinion the Board of Regents would have no authority to waive such tuition fee as to any non-resident student regardless of the fact that the parent of the student may be in military service.

Your next question is relative to students whose parents have recently moved to Washington, D. C. to aid in the defense program. You state that the first three years of high school training of such students was received in New Mexico and the last year was received in Washington D. C., and your question is should such students be considered as non-residents under this law. Article VII, Section 4 of the State Constitution provides as follows:

"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 or of the state nor while a student at any school."

If the parents are employed by the Federal Government, their legal residence under this constitutional provision would remain in New Mexico, and while a student is out of the state attending school elsewhere, such student, if he has a separate residence apart from his parents would not lose his legal residence in New Mexico.

Your next question is relative to non-resident students who have been paying a non-resident tuition of \$ 100.00 for previous years, and your question is whether such students will now be compelled to pay an additional \$ 50.00 This question has already been answered by this office by Opinion No. 3832, Paragraph 2, and the answer is that regardless of the consequences, all non-resident students must be charged the tuition fee as provided in the 1941 appropriation bill.

As to the last question you inquire whether students who have graduated from an out-of-state high school but whose parents are residents of New Mexico should be considered as non-resident students under this law. The provision of the law itself answer this question in these words: "or whose parents are legal residents of the state." In my opinion, if a student's parents are legal residents of the state and the student is still a minor and living with his parents, the residence of the parents would be the

determining factor, and such student should be considered a resident of this state and not be required to pay the non-resident tuition fee required by this law.

For your information, I am enclosing copies of opinions No. 3695, 3815, 3832, and 3833 which have been rendered by this office in the past and which are pertinent to your consideration and may be of some value to you and the Board of Regents in determining whether the non-resident tuition fee should be charged in individual cases.

Trusting that this sufficiently answers your questions I am.

By M. M. McCULLOH,

Asst. Atty. General