



STATE OF KANSAS

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CURT T. SCHNEIDER

*Attorney General*

February 9, 1976

ATTORNEY GENERAL OPINION NO. 76- 51

Merle R. Bolton  
Commissioner of Education  
Kansas State Department of Education  
Kansas State Education Building  
120 East 10th Street  
Topeka, Kansas 66612

Re: Schools--Junior Colleges--State Credit Hour Aid--  
Out-District Tuition Residency--Inmates of Federal  
Penal Institutions

Synopsis: The privilege extended to military personnel in  
acquiring resident status for tuition purposes at  
state community junior colleges is inapplicable  
to those individuals confined at the Disciplinary  
Barracks on the Fort Leavenworth military  
reservation.

\* \* \*

Dear Commissioner Bolton:

You have requested an opinion from this office concerning  
"resident" status for computation of credit-hour state aid and  
out-district state aid for community junior colleges. Speci-  
fically, you have asked:

"Under Kansas law, may a student become a  
resident of Kansas for credit-hour state aid  
and out-district state aid while such student  
is incarcerated in the Federal Penitentiary at  
Leavenworth, Kansas, when such student had  
not previously resided in Kansas prior to  
incarceration?"

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The term "credit hour" is defined by K.S.A. 71-601 to mean:

"one hour's instruction per week for eighteen (18) weeks or its equivalent in a given subject or course which is part of the course of study approved by the state board, but shall not include any subject or course taken by a student enrolled for audit or any subject or course not approved by the state board, not any subject or course taken by a student having more than sixty-four (64) college credit hours from any institution of higher learning education by the state board. The limitation in this subsection relating to maximum college credit hours shall apply only for the purpose of determination of state aid entitlement of the community junior college, and shall not apply in determining transfer of credit hours for any student."

K.S.A. 71-602 emphasizes the importance of the residence determination by providing in pertinent part:

"The basis for distribution of state aid for community junior colleges shall be eight dollars (\$8) for each credit hour of each duly enrolled student who was a bona fide resident of the state of Kansas during the current school term".

"Out-district tuition" is defined by K.S.A. 71-702(1) to mean "a charge which is made to and paid by the county of residence of any student attending a community junior college whose residence is in Kansas and outside the community junior college district." Computation of the same is specified in K.S.A. 71-

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301(b), as amended by Chapter 361 of the 1975 Session Laws, which provides:

"The board of trustees, in accordance with rules and regulations of the state board, shall determine and collect an amount of out-district tuition to be charged for each student attending the community junior college whose residence is outside of the community junior college district. The board of county commissioners of any county charges with payment of out-district tuition shall levy a tax on all of the taxable property of the county sufficient to pay all out-district tuition charges authorized by this act. Such tax shall be deposited in a special fund for payment of out-district tuition. Upon receiving a statement of charges for out-district tuition, the board of county commissioners shall allow and pay the same promptly from such special fund. In the event there is insufficient or no money in such special fund, such out-district tuition shall be paid from the county general fund. The total out-district tuition charged by a community junior college district shall be a sum equivalent to the number of full-time equivalent out-district students times the average amintenance and operating costs per full-time student of the community junior college less the tuition paid by the students and less state aid for the student and less anticipated federal aid;"

The question of residency and resident status for computation of the above two financial matters is contained in K.S.A. 71-401 et seq. K.S.A. 71-401 specifies:

"Persons enrolling in a community junior college who, if adults, have not been, or if minors, whose parents have not been residents of the county in which is located the principal campus

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of such community junior college for six (6) months prior to enrollment for any term or session are nonresidents of such community junior college district for out-district tuition and fee purposes."

For the purpose of determining the county of residence of persons and the possible liability of such county for out-district tuition of any person as a student in a community junior college, K.S.A. 71-402 states:

"residence of minors shall be determined as provided in K.S.A. 72-1046 and acts amendatory thereof and of adults as provided in subpart Twenty-third of K.S.A. 77-201 and acts amendatory thereof."

Subpart Twenty-third of K.S.A. 77-201 specified:

"The term 'residence' shall be construed to mean the place adopted by a person as his place of habitation, and to which, whenever he is absent, he has the intention of returning. When a person eats at one place and sleeps at another, the place where such person sleeps shall be deemed his residence."

The phrase "adopted by a person as his place of habitation, and to which, whenever he is absent, he has the intention of returning" clearly is inapplicable to one incarcerated in a federal civilian penal institution. See, 25 Am. Jur. 2d Domicil § 41, pg. 32. The establishment of residence requires the concurrence of two factors: one physical, the other intellectual. There must be bodily presence at a location coupled with intent to remain there either permanently or for an indefinite period, before residence can be said to have been

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acquired. A residence once established is presumed to continue until the same has been abandoned. Keith v. Stetter, 25 Kan. 100 (1880); Palmer v. Parish, 61 Kan. 311, 313, 59 P. 6400 (1900). To effect a change of residence, there must be transfer of bodily presence to another place coupled with an intent to abide in the new location either permanently or indefinitely. Ford, Adm'x. v. Peck, 116 Kan. 74, 225 Pac. 1054 (1924). The length of the stay in the new abode is not of controlling importance, for no stated period of time is required to complete a change of residence; the change may be effectuated on the first day of arrival in the new location provided the requisite intent to establish residence therein be present. Blair v. Blair, 149 Kan. 3, 85 P. 2d. 1004 (1939); Arnette v. Arnette, 162 Kan. 677, 178 P. 2d. 1019 (1947).

In the case of an incarcerated person, neither the change of physical presence nor intent to reside indefinitely are voluntarily acquired. It is only under compulsion of law that the inmates physical present is altered. Further, it is equally obvious that the requisite intent to reside indefinitely is contingent primarily upon the term of confinement. Finally, I find it highly unlikely that an inmate in a federal institution has the desire to return to this state after release unless this state happened to be his home prior to his imprisonment.

Therefore, it is my opinion that an inmate of federal or civilian penal institution who prior to incarceration was not a bona fide resident of Kansas cannot meet the requirements for residence specified in K.S.A. 71-401 et seq., in order to establish residence for purposes of credit-hour state aid and out-district tuition while remaining involuntarily incarcerated.

The situation of military personnel confined at the Disciplinary Barracks at the Fort Leavenworth military reservation brings a somewhat different consideration into play. Kansas Administration Regulation (K.A.R.) 91-25-13 states that:

"Military personnel stationed and living in Kansas and their dependents shall be considered residents for tuition purposes

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while enrolled in any community junior college under the state board of education. Nothing in the regulation shall be construed to prevent a serviceman acquiring or retaining a bona fide residence in Kansas. (Authorized by K.S.A. 1973 Supp. 71-401 to 71-403; effective January 1, 1974.)

The interpretation applied to the word "stationed" is outcome-determinative of the residency question for imprisoned military personnel. My research has failed to locate a Kansas case in which either the word "stationed" or K.S.A. 91-25-13 has been judicially construed.

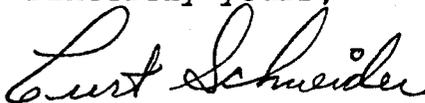
Although not precisely defining the word "stationed", the Court in United States v. Phisterer, 94 U. S. 219, 222, 24 L.Ed. 116 (1879) stated the following concerning military station:

"In the approved use of language, no doubt, the word 'station' means a place or position, and it may be said that wherever a man, in pursuance of orders, stays or remains, he is stationed, and that, if he is a military man, such place becomes a military station. Although an army captain left a military station, his home, to which he went, did not become and is not to be deemed a military station, within the meaning of army regulations. A military station is merely synonymous with the term 'military post', and means a place where troops are assembled or military stores, animate and inanimate, are kept or distributed, where military duty is performed or military protection offered, where something, in short more or less closely connected with army or war, is kept or is to be done."

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In my view, there is an inherent difference in being stationed pursuant to military orders and being confined or imprisoned subsequent to an adjudication of guilt by a military tribunal. In the latter instance, the soldier is not merely being assigned a location for the performance of specified duties, but is confined for a definite term and required to perform tasks not necessarily connected to or congruous with the inmate's prior training and capabilities. It is only after release that the individual is reassigned to permanent active duty. Furthermore, K.A.R. 91-25-13 extends a limited privilege to military personnel which without would not otherwise exist, and who only justification for being in Kansas stems from the fact that the prison happens to be located here. Accordingly, it is my opinion that the privilege extends to military personnel in acquiring resident status for tuition purposes at state community junior colleges is inapplicable to those individuals confined at the Disciplinary Barracks on the Fort Leavenworth military reservation.

Sincerely yours,



CURT T. SCHNEIDER  
Attorney General

CTS:HTW:bv