



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751

July 23, 1984

ATTORNEY GENERAL OPINION NO. 84- 73

William R. Kauffman  
General Counsel  
Kansas Board of Regents  
Merchants National Bank Building, Suite 1416  
Topeka, Kansas 66612-1251

Re: State Institutions -- State Educational Institutions --  
Residency Requirements; Rules and Regulations

Synopsis: K.S.A. 76-729 establishes a basic rule for determining whether a person may be considered a resident of Kansas for purposes of paying fees to state educational institutions, namely that persons who have not been residents for 12 months prior to their enrollment shall be nonresidents for such purposes. The board of regents is empowered by K.S.A. 76-730 to adopt rules and regulations which prescribe criteria or guidelines for residency determination, and has done so at K.A.R. 88-3-1 et seq. A state college or university is limited to the guidelines set forth in these rules and regulations, and cannot impose additional residency requirements which are not contained therein. Cited herein: K.S.A. 76-729, 76-730, K.A.R. 88-2-2, 88-2-3, 88-3-2.

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Dear Mr. Kauffman:

As General Counsel for the Kansas Board of Regents, you request our opinion on a question involving standards for determining the residency of students attending state colleges and universities. You inform us that counsel for Kansas State University have inquired concerning that institution's policy in making such determinations for the purpose of allowing a student to

pay the lower, in-state tuition rate. As you explain it, KSU classifies as non-residents those students who have reached the age of majority and are not dependent upon their parents, and who have come to Manhattan from another state or country and have been continuously enrolled as students. While the students may have met most or all other criteria for residency, the factor of continuous enrollment is taken as strong evidence of an intent to remain in Kansas only for the purpose of attending school.

The subject of residency of students for fee purposes is dealt with by two Kansas statutes, K.S.A. 76-729 and 76-730. Those statutes state as follows:

K.S.A. 76-729.

"Persons enrolling in state educational institutions under the state board of regents who, if adults, have not been, or if minors, whose parents have not been residents of the state of Kansas for twelve (12) months prior to enrollment for any term or session in a state educational institution are nonresidents for fee purposes. Notwithstanding the foregoing provision of this section, the state board of regents may adopt rules and regulations authorizing the following to pay an amount equal to resident fees: (1) Employees of the state educational institution and their dependents, (2) persons in the military and their dependents, (3) other classes of persons having special domestic relation circumstances, and (4) persons who have lost their resident status within six months of their enrollment."  
(Emphasis added.)

K.S.A. 76-730.

"The state board of regents shall adopt rules and regulations prescribing criteria or guidelines for determination of residence of students, so long as such criteria or guidelines are not in conflict with the provisions of this act. The state board of regents shall adopt rules and regulations prescribing guidelines for the membership composition and procedure of a residence committee for each state educational institution under its control and supervision."  
(Emphasis added.)

Pursuant to the above, the board of regents have adopted administrative rules and regulations which go into more detail on the question of residency. Found at K.A.R. 88-3-1 et seq., the regulations are entitled "Guidelines for the Determination of Residency for Fee Purposes." While there are a number of regulations contained therein, K.A.R. 88-3-2 is crucial for the purposes of this inquiry. That regulation states:

"Except as otherwise provided in the rules and regulations of the state board of regents, residence means a person's place of habitation, to which, whenever he or she is absent he or she has the intention of returning. A person shall not be considered a resident of Kansas unless he or she is in continuous physical residence and intends to make Kansas a permanent home, not only while in attendance at an educational institution, but indefinitely thereafter as well.

"(1) The following factors, while not conclusive, have probative value in support of a claim for resident classification: (a) continuous presence in Kansas during periods when not enrolled as a student; (b) employment in Kansas; (c) payment of Kansas state income taxes; (d) reliance on Kansas sources for financial support; (e) commitments to an education program which indicates an intent to remain permanently in Kansas; (f) acceptance of an offer of permanent employment in Kansas; (g) admission to a licensed practicing profession in Kansas; (h) ownership of a home in Kansas. Any such factor to be given weight, must be of at least one year's duration prior to enrollment or re-enrollment.

"(2) The following circumstances, standing alone, ordinarily will not constitute sufficient evidence of a change to Kansas residence: (a) voting or registration for voting in Kansas; (b) employment in any position normally filled by a student; (c) lease of living quarters in Kansas; (d) a statement of intention to acquire residence in Kansas; (e) residence in Kansas of the student's spouse; (f) vehicle registration in Kansas; (g) acquisition of a Kansas driver's license; (h) payment of Kansas personal property taxes. However, maintenance of ties with another state, such as voting, payment of personal property taxes, registering a vehicle or securing a driver's

license there, may be considered sufficient evidence that residence in the other state has been retained."

Like other regents' institutions, KSU applies the above guidelines on a case-by-case basis. In your request, you enclose two examples of completed applications for resident classification, in which the student answers a number of questions, both as to concrete acts (employment, sources of support, length of time in state, ownership of property, etc.) and general intent (purpose in coming to Kansas, length of time to be spent in state, and so forth). Such applications are considered by the registrar of the college or university in determining who is a resident for the purposes of fees. If a student is aggrieved by the determination made by the registrar, an appeals procedure is provided for by the regulations. K.A.R. 88-2-2, 88-2-3.

It is an axiom of administrative law that the power to adopt rules and regulations is administrative in nature, not legislative, and to be valid, must be within the authority conferred by the enabling statute. State ex rel. v. Columbia Pictures Corporation, 197 Kan. 448, 454 (1966). An administrative rule and regulation which goes beyond that which the legislature has authorized, or which violates the statute, or which alters, extends or limits it, is void. Goertzen v. State Department of Social and Rehabilitation Services, 218 Kan. 313, Syl. 1 (1975). We do not find such a problem here, however, given the broad authority which K.S.A. 76-730 confers on the board of regents, and the limited nature of the definition which appears in K.S.A. 76-729.

It is also acknowledged that an administrative agency cannot violate or ignore its own regulations, and where it fails to follow the rules which it has promulgated, its orders are unlawful. Amerine v. Board of Jefferson County Comm'rs, 7 Kan.App.2d 491 (1982). This has been applied in several cases involving state agencies which, having once issued rules and regulations, then acted to ignore the requirements which they had imposed on themselves. Kansas Public Service Co. v. State Corporation Commission, 199 Kan. 736, 742-43 (1967), Kansas Commission on Civil Rights v. City of Topeka Street Department, 212 Kan. 398 (1973). See also 2 Am.Jur.2d Administrative Law, §309 (1962).

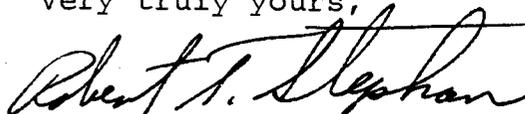
Given the above, it remains to determine whether the standard used by KSU can be derived either from the statutes or the rules and regulations. As was noted above, the statutes contain very little in the way of guidelines in determining residency questions, except for the primary requirement that a person be a "resident" for 12 months prior to his or her enrollment before being entitled to pay in-state tuition. The regulations are considerably

more specific in fleshing out what an individual must do to be considered as a resident after the initial 12 month period. The guidelines [at K.A.R. 88-3-2(1)] are stated in the affirmative, i.e. they have probative value in support of a claim of residency. Only in subsection (2) of the regulation are there listed factors which, if present, can be considered as negating any claim of residency (e.g. maintaining ties with another state in the form of continued payment of taxes, voting, vehicle registration, etc.).

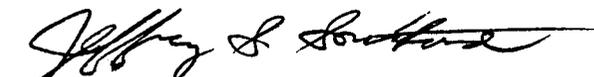
Nowhere in the rules and regulations do we find set forth the standard which KSU is applying to deny resident status to persons who come to the school from another state or country. As we understand it, the fact of person's continuous enrollment at KSU after their arrival in Kansas is taken as an indication that they do not intend to stay in the state upon completion of their course of study. This type of negative presumption, if it is to be applied, should be clearly set forth either in the statutes or in the rules and regulations, and not applied on an unwritten basis at only one of the regents' institutions. By adding this requirement, Kansas State University is going beyond the scope of the existing guidelines, and so has no support in the law for its use of such a standard. (Note: while the question of whether such a standard would be constitutional is discussed at length in the well-written memorandum which you submitted with your request, we do not have to reach this issue given the above conclusion, which is based on administrative grounds.)

In conclusion, K.S.A. 76-729 establishes a basic rule for determining whether a person may be considered a resident of Kansas for purposes of paying fees to state educational institutions, namely that persons who have not been residents for 12 months prior to their enrollment shall be nonresidents for such purposes. The board of regents is empowered by K.S.A. 76-730 to adopt rules and regulations which prescribe criteria or guidelines for residency determination, and has done so at K.A.R. 88-3-1 et seq. A state college or university is limited to the guidelines set forth in these rules and regulations, and cannot impose additional residency requirements which are not contained therein.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
Deputy Attorney General