

**Tuition—Children—Residence—Schools—School District
—Trustees.**

Pupils may attend school outside the district of their residence, provided they do not displace resident pupils, and the Trustees may fix a reasonable charge for tuition.

Temporary residence in a school district during the school year for the primary purpose of attending public school therein does not entitle the child to attend school free of tuition.

If the change of residence is bona fide then no charge may be made for tuition.

Miss May Trumper,
Superintendent of Public Instruction,
Helena, Montana.

My dear Miss Trumper:

You have submitted to this office the question whether a School Board has a right to charge tuition to non-resident pupils who are children of taxpayers in another school district. You also ask whether, if such non-residents should change their voting precinct to a district where the children are desirous of attending school, tuition may be charged.

Under the provisions of Subdivision 3, Section 1015, Revised Codes of 1921, "Every School Board unless otherwise specifically provided by law shall have power: * * *

"3. To determine the rate of tuition of non-resident pupils. * * *

"20. To allow pupils residing in other districts to attend school in the district of which they have charge, if in their judgment there is sufficient room."

It is a fundamental proposition of law that one community or taxing unit cannot be taxed and required to furnish schooling or other advantages to the inhabitants of another taxing unit free of charge. In the case of *School Dist. v. Matherly*, 84 Missouri App. Rep. 140, 142, the Court discussing this question said:

"In our opinion, to entitle one to school privileges for his children in the public schools he must bona fide reside within the school district. Coming temporarily within the district to reside during the scholastic year, for the purpose of sending children to the school of that district, can not be allowed. If this defendant has such right, then all other citizens of Nodaway county, outside of Barnard, have, of course, the same right. The result would, therefore, be that that district could be called upon to support schools for the benefit of other distinct communities. This was not contemplated by the statute. *State v. School Dist.*, 55 Neb. 317; *Gardner v. Board of Education*, 5 Dak. 259."

The Court also discussed the question of what would constitute a sufficient residence as follows:

"If one living outside a school district desires the free school privileges of another district, he must abandon his old residence and go into the other district with the intention to become a resident therein and to subject himself to all the burdens and duties of other citizens residing there. 'A temporary removal of a person for the sole purpose of educating his children, without an intention of abandoning his usual residence, and with the intention of returning thereto when his purpose has been accomplished, will not constitute such a change of residence as would, under the law, entitle him to vote at his temporary abode.' *Hall v. Schoenecke*, 128 Mo. 661. Nor would such removal entitle him to free tuition for his children."

In the case of *State v. Board of Education*, 71 N. W. 123, 124, the Court said:

"So this court has held, in effect, that, where a child of school age is sent or goes into a certain school district with the primary purpose of securing a home with a particular family, then he is entitled to the benefits of the public school of such district free of charge. *State v. Thayer*, 74 Wis. 48-59, 41 N. W. 1014. But, if the primary purpose of the locating in such district is to participate in the advantages which the public schools therein afford, then he must pay tuition, even though there be some other incidental purpose to be subserved while so attending school therein."

In the case of *State v. Joint School Dist. No. 1*, 27 N. W. 829, 830, the Court discussed the constitutional requirement: "The Legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free, and without charges for tuition to all children between the ages of four and twenty years," as follows:

"Counsel for appellant maintains (using his own language) 'that a reasonable interpretation of the constitutional provision in question places no restriction as to the residence of the scholar, except that he or she reside within this state, and is of the proper age; and also that scholars may not be admitted to the public school of another district than that wherein they reside, when such admission will in any manner interfere with the accommodation or instruction of the scholars residing therein.' From these propositions he argues that the appellant's affidavit shows that his son is absolutely entitled to the privileges of the school in the respondent district; and that he is so entitled without charge for tuition.

"We find ourselves unable to assent to the proposition that a child residing in one school district has any absolute right, under any circumstances, to the privileges of the common school of another district. The constitutional requirement is that 'the Legislature shall provide by law for the establishment of district schools.' Inasmuch as there must be school districts before there can be district schools, and inasmuch as the school district system was in full operation in the territory when the constitution was framed and adopted, it is clear that Section 3 of Article 10 is a recognition of that system, and a mandate to the Legislature to preserve and continue its essential features. One feature of that system is, and, so far as we are advised, always has been, wherever the system has prevailed, that the absolute right to the privileges of the school in any given district is confined to children residing in such district, and having the prescribed qualifications. We never before heard this proposition questioned or doubted, and we are aware of no adjudication to the contrary. We do not think any court has ever denied the proposition. Certainly no case to that effect has been cited to us.

"But it is said that, unless the right claimed is asserted and enforced, the district schools of the state are not free to the children of the state of the prescribed age. It is conceded that non-resident children are not entitled to the privileges of a district school unless those privileges may be enjoyed without detriment to resident children. This limitation of the right is not found in the constitution. To concede it is to concede that the school is not absolutely free to non-resident children, but only conditionally so. The concession de-

stroys the argument based upon the use of the word 'free' in Section 3, Article 10. The proposition we are considering is, in substance and effect, that all or any of the district schools of the state are free to each child in the state within the prescribed ages. The utter impracticability of operating the district schools on any such basis is too plain for discussion. We think, and so hold, that when the Legislature has provided for each such child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with. This the Legislature has done.

"It results from what has been said that it is competent for the Legislature to authorize the several school districts to admit non-resident children to the privileges of their respective schools, or to exclude them therefrom. The Legislature having conferred such authority upon school districts. (Rev. St. Sec. 430, Sec. 12), it is entirely in the discretion of each district to admit to its school any such non-resident children or child, or to refuse to do so. The district is the sole judge as to whether the admission of such non-residents will or will not 'interfere with the accommodation or instruction of the scholars residing therein,' (Section 430, supra), and if it would not so interfere, still the district may lawfully close the doors of its school against non-residents."

It is, therefore, my opinion that pupils may attend school outside of the district of their residence, provided their presence in the district where they attend does not displace resident pupils; in other words, where they can be accommodated without providing additional teachers and housing, and that the Trustees may fix a reasonable charge for tuition, which ought not to exceed the state and county apportionment in the district from which the child comes, when their presence does not compel the district to incur additional teachers or where the school facilities are no better than in the district of the child's residence; that temporary residence in a school district during the school year for the primary purpose of attending the public school therein is not a residence within the district sufficient to entitle the child to attend school free of tuition. If, however, the change of residence is a bona fide change, then no charge for tuition can be made and this without regard to whether there has been a change of voting precinct.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.