

Opinion No. 257.**Schools and School Districts—Superintendent of Schools—Taxes—Clerk of School Districts—Children, Schools.**

Held: Where the facts existing show a child eligible for inclusion on the census list and thereby entitled to attend school in the district without the payment of tuition, this right may not be denied because his name has erroneously been stricken and his apportionment erroneously credited to another district.

November 16, 1944.

Mr. Frank J. Roe
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Roe:

You have submitted for my consideration a letter written by the clerk of school district number one of Silver Bow County, and request my opinion on the following question based upon the facts as given:

"A child lives in district number one, but the county superintendent claims him in district number three, therefore, his tax apportionment on the eight mill levy, plus state apportionment is distributed to district number three. Does board number one have power to collect private tuition for the child when district number three refuses to make transfer?"

Upon consideration of the facts existing and as outlined in the letter of the clerk of district number one, it is apparent that several questions are involved and must be considered.

The facts show that the 1942 census taken by the clerk of district number one contains the name of the child, together with the names of his parents and their street address in Butte, Silver Bow County, Montana. Under the provisions of Section 1051.1, Revised Codes of Montana, 1935, the child's name was stricken from the census of the district number one with notation, "District Number Three."

Upon notification of this action by the county superintendent, the clerk of district number one made further inquiry to establish the fact of residence and learned that the parents were actually residing at the address shown in the census and intended that as their residence. The apportionment was made to district number three in the usual course, and the child attended school in district number one, although district number three refused to make the transfer. No tuition was demanded for the school year 1942-43. The name was again stricken from the census list of district number one for 1943, and evidently the same procedure followed. However, district number one, upon refusal of district number three to make the transfer of funds, demanded and compelled the parents to pay tuition for the school year 1943-44.

Section 1051, Revised Codes of Montana, 1935, requires the clerk of each school district between the 15th day of September and the 15th day of October, of each year, to take the census of all children between the ages of six and twenty-one years residing within his district. The term "residence" and "residing" as used in the section is defined therein as follows:

"The term 'residing' as used in this section shall be defined in such a way as to include,

"1. Children residing with their parents or guardians in such district,

"2. Children temporarily residing outside of such district for the purpose of attending any district school or county high schools or other public institution of learning or any benevolent or private institution, providing that parents or resident children of any district must be residing in the district on the first day of October and provided further that the resident children themselves must have been actual residents of the district immediately previous to such outside residence."

Further defining the word "residing" it provides:

"The term 'residing' is further defined in such a way as to exclude,

"1. Children temporarily visiting in or passing through such district,

"2. Children who have never actually resided within the district, even though their parents or guardians shall reside within the district,

"3. Children who are residing within the district for the purpose of attending any district school or county high school or other public institution of learning or any private or benevolent institution of learning who shall be listed in the school district where their parents reside,

"4. All children who may properly be included in the census or (of) some other district . . ."

The purpose of the census is to determine the apportionment for the district. The apportionment is based on the number of children of school age actually and physically living (other than temporarily present) within the district, and is not dependent upon residence of such children as the term residence is generally used. The statute excludes children temporarily within the district for the purpose of attending school, and includes children living in or whose homes are in the district, but who are temporarily residing outside of the district for the purpose of attending school, provided in the case, the parents of such child or children reside or live in the district on the 1st day of October, and that such child also resided or lived in the district before temporarily residing or living outside.

Under the facts in the instant case, it appears that when the 1942 census was taken, the parents of the child in this case was residing at 2312 Pine Street in Butte. After the name was stricken and a further check was made, it was learned that the child, was attending the Greeley school. We may assume, therefore, that at the time the census was taken the parents and the child were physically and actually present and living or residing in district number one. Under such facts, the name of the child was rightly on the census list for district number one, and was erroneously stricken therefrom by the county superintendent.

With reference to the 1943 census, it does not appear whether the same conditions as to the residence of the child and the parents existed. However, from the fact that the clerk of district number one demanded and received tuition from the parents, it must be assumed that the child was attending the district school. Assuming, therefore, that the facts were the same, then the same result must follow, viz., the child's name was correctly placed on the list and was erroneously stricken therefrom.

It is evident from the facts here that the apportionment for this child was made by the county superintendent to district number three because she determined that this name was wrongfully on the census list to district number one and rightfully on that of district number three. In view of the facts as stated above, this action of the county superintendent was error, and the apportionment for this child should have been made to district number one. Hence, inasmuch as under the facts the child was rightfully entitled to attend the schools of district number one without the payment of tuition, the fact that his apportionment was erroneously credited to another district, should not, as a matter of law, deprive him of that right.

It is therefore my opinion that where the facts existing show a child eligible for inclusion on the census list and thereby entitled to attend school in the district without payment of tuition, this right may not be denied because his name has erroneously been stricken and his apportionment erroneously credited to another district.

Sincerely yours,
R. V. BOTTOMLY
Attorney General