

VOLUME NO. 36

Opinion No. 79

SCHOOLS AND SCHOOL DISTRICTS — Student deposit fees, validity of: Article X, Section 1(3), 1972 Montana Constitution

HELD: A school district may not charge deposit fees for any course or activity for which credit may be applied toward graduation.

May 12, 1976

Mrs. Dolores Colburg
Superintendent of Public Instruction
Capitol Building
Helena, Montana 59601

Dear Mrs. Colburg:

This is in response to your request for my opinion concerning the validity of school deposit fees.

In Volume 34 Opinions of the Attorney General, Opinion No. 52 (1972), I held that on the basis of Article XI, Section 1 of the 1889 Montana Constitution and **Granger v. Cascade County School District No. 1**, 159 Mont. 516, 499 P.2d 780 (1972), a school district may not levy fees or charges for any course or activity for which credit may be applied toward graduation. However, a school district may levy such fees or charges for courses or activities not within its educational goals or offered as part of the normal school function (e.g., no-credit courses).

Apparently your office has received several inquiries regarding the effect of that opinion and the **Granger** decision on deposit (refundable) fees.

Granger expressly considered eight kinds of fees and charges, but deposit fees were not among them. See **Granger**, 159 Mont. at 523. Nevertheless, the court's treatment of a collateral matter fairly implies their disapproval of deposit fees. A defense interposed by the school district was that it waived the disputed fees and charges for persons suffering economic hardship. The court declared:

We observe that the defense of waiver has nothing to do with the constitutional issue. **Constitutional requirements are a matter of right and cannot be satisfied by their denial in the first instance and subsequent waiver of the effects of such denial.** The waiver system may well furnish a financial answer, but clearly is not legally justifiable. 159 Mont. at 528-529.

I am unable to perceive any meaningful distinction between such "waiver" and the refunding of "deposit" fees. In either situation, the issue is simply whether a school district is constitutionally empowered to collect these fees at all. The court clearly has resolved that issue in the negative.

It has been suggested that perhaps our new constitution casts a different light on this subject. **Granger** is predicated upon Article XI, Section 1 of the 1889 Montana Constitution, which stated:

It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, **free**, common schools. (Emphasis added)

The corresponding provision of the 1972 Montana Constitution is Article X, Section 1(3), which states:

The legislature shall provide a basic system of **free** quality public elementary and secondary schools... (Emphasis added)

Quite plainly these provisions are not identically phrased. However, examination of the 1972 constitutional convention transcript indicates that at least as far as the word "free" is concerned, no substantive change between the former and present provisions was contemplated:

There are possibly some other words here that need explanation, the word free. By the word free in subsection 1([3]), it is understood by the committee to mean that **those aspects of the elementary and secondary education which are essential to courses required for graduation, shall be free to the student.** Remarks by Delegate Harbaugh, Volume VIII Transcript of Proceedings, 1972 Montana Constitutional Convention, pp. 5991-5992. (Emphasis added)

Considering this comment antedated **Granger**, it bears a prophetic resemblance to the sentiments of the court. Thus, if the legality of the fees in issue in **Granger** were relitigated under the new constitution, along with the deposit fee question, in all likelihood such fees would still be condemned.

I thus conclude that both **Granger** and Opinion No. 52, above, prohibit imposition of all deposit fees by a school district for any course or activity counting as credit toward graduation, and that such prohibition is consonant with Article X, Section 1(3) of the 1972 Montana Constitution. For this reason, it has been unnecessary to treat separately the three specific questions set forth in your letter.

THEREFORE, IT IS MY OPINION:

A school district may not charge deposit fees for any course or activity for which credit may be applied toward graduation.

Very truly yours,

ROBERT L. Woodahl