

VOLUME NO. 41

OPINION NO. 50

SCHOOL DISTRICTS - Eligibility of resident county for elementary tuition offset;

TAXATION AND REVENUE - Eligibility of resident county for elementary tuition offset;

MONTANA CODE ANNOTATED - Sections 20-5-302, 20-5-303, 20-5-305;

OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 110 (1980), 40 Op. Att'y Gen. No. 42 (1984).

HELD: A school district paying the tuition of a resident elementary pupil who attends a school outside of the district pursuant to section 20-5-302, MCA, is not eligible to claim a tuition offset under section 20-5-303, MCA, for property taxes paid by the parents to the county or district in which the child attends school.

28 February 1986

Richard A. Simonton
Dawson County Attorney
Dawson County Courthouse
Glendive MT 59330

Dear Mr. Simonton:

You have requested my opinion on the following question:

Whether a resident elementary school district is entitled to deduct from its payment of tuition to a nonresident district the taxes paid by the resident family in the nonresident county and school district when the resident child has been accepted by the nonresident district pursuant to section 20-5-302, MCA.

I conclude that the plain language of the statutes does not allow the resident elementary school district to claim such a tuition offset. Before discussing the issue directly, however, a brief review of the statutes pertaining to tuition agreements generally is helpful.

Elementary-age school children in Montana may attend school outside of the district in which they live under three different statutory provisions. These provisions are distinguished by the manner in which a tuition agreement is reached and by whom the tuition is paid.

Under the first provision, § 20-5-301, MCA, the child must be granted permission to attend a nonresident school (a school located out of the elementary district in which the child resides) where certain statutory criteria are met. The criteria are based on necessity and geographical considerations. When the requirements of the statute are satisfied, the tuition approval agents in the resident and nonresident districts must approve the application for tuition. § 20-5-301(3), MCA. The tuition approval agents are identified in section 20-5-301(2), MCA, as the trustees of the elementary district in which the child resides, the trustees of the district where the child wishes to attend school, and the county superintendent of the child's resident district.

Elementary tuition for attendance in a nonresident school may also be obtained through a discretionary process. Section 20-5-302, MCA, allows a tuition application to be approved because of various general considerations, e.g., the distance to the resident school, the availability of transportation, and the type of educational programs available at the nonresident school.

Under both sections 20-5-301 and 20-5-302, MCA, the parents of the child essentially reach an agreement with the tuition approval agents. The principal difference between the two sections is that approval is mandatory in section 20-5-301, MCA, and discretionary in section 20-5-302, MCA. An important similarity between these methods, for present purposes, is the manner in which tuition is paid. Section 20-5-305, MCA, states:

Elementary tuition rates. Whenever a pupil of an elementary district has been granted approval to attend a school outside of the district in which he resides, under the provisions of 20-5-301 or 20-5-302, such district shall pay tuition to the elementary district where the pupil attends school on the basis of the rate of tuition determined by the attended district. The rate of tuition shall be determined by:

(1) totaling the actual expenditures from the district general fund, the debt service fund, and, if the pupil is a resident of another county, the retirement fund;

(2) dividing the amount determined in subsection (1) above by the ANB of the district for the current fiscal year, as determined under the provision of 20-9-311; and

(3) subtracting the total of the per-ANB amount allowed by 20-9-316 through 20-9-321 that represents the foundation program as prescribed by 20-9-303 plus the per-ANB amount determined by dividing the state financing of the district permissible levy by the ANB of the district, from the amount determined in subsection (2) above.

ANB is simply a code acronym for Average Number Belonging. § 20-9-311, MCA. The significance of the tuition formula to the question you have raised is that, where the resident district contributes the tuition, there is no provision for a tuition offset for taxes paid to the nonresident county or district by the parents of the child.

The third method by which a child can attend a nonresident school is on the election of the parents. This process is set out in section 20-5-303, MCA. The section recognizes the right of the parent to send his child at his own expense to the school of his choice. This section provides a discretionary approval process involving the trustees of the district where the nonresident school is located. If attendance is approved, the rate of tuition paid by the parents is established by the formula of section 20-5-305, MCA, with one significant modification: The tuition to be paid is determined by the section 20-5-305, MCA, formula, modified in the following manner:

[T]uition as determined in 20-5-305 shall be reduced by the amount the parent of the child paid in district and county property taxes during the immediately preceding school fiscal year for the benefit and support of the district in which the child will attend school.

§ 20-5-303(1), MCA.

The issue your request has raised is whether this tuition offset for taxes paid is available to a school district that is paying the tuition of a resident elementary school pupil attending school in a nonresident district under a section 20-5-302, MCA, tuition agreement. You have indicated that there appears to be no logical reason for charging a resident school district a greater tuition than the resident parents would pay if they elected to send their child to the favored school under section 20-5-303, MCA. You suggest that, regardless of whether the taxpayer seeks approval of his resident district (under the section 20-5-302, MCA, approval process whereby the resident district pays the section 20-5-305, MCA, amount) or elects to pay individual tuition, the payer of the tuition should be uniformly credited for taxes paid by the parent in the nonresident district.

The concern you have raised is not without merit, although it could be argued that, over time, the tuition offsets between districts will equalize. As the statutes read, however, the Legislature has unambiguously provided that only the parents paying the tuition receive the tuition offset. I nonetheless note

that the Legislature has not been hesitant to correct such arguable anomalies. Thus, after I interpreted the term "parent" in section 20-5-303, MCA, to exclude a shareholder in a family-type Subchapter S corporation in 40 Op. Att'y Gen. No. 42 (1984), the Legislature amended that section to specifically include such a shareholder in the definition of parent. 1985 Mont. Laws, ch. 611. See also 38 Op. Att'y Gen. No. 110 (1980) (individual tuition for a high school pupil attending a school outside of his district may not be waived where statute is silent as to tuition waiver). The statutory provision addressed in the latter Attorney General Opinion was amended. 1981 Mont. Laws, ch. 249; 1983 Mont. Laws, ch. 263. While legislative relief may be appropriate I am bound to construe and apply relevant statutory provisions as now drafted.

THEREFORE, IT IS MY OPINION:

A school district paying the tuition of a resident elementary pupil who attends a school outside of the district pursuant to section 20-5-302, MCA, is not eligible to claim a tuition offset under section 20-5-303, MCA, for property taxes paid by the parents to the county or district in which the child attends school.

Very truly yours,

MIKE GREELY
Attorney General