

VOLUME NO. 43

OPINION NO. 35

PRISONERS - Effect of imprisonment on residence;
RESIDENCE - Residence of special education student with imprisoned custodial parent;
SCHOOL DISTRICTS - Responsibility for tuition for out-of-district special education student;
SCHOOL DISTRICTS - School district of residence of special education child with imprisoned custodial parent;
MONTANA CODE ANNOTATED - Sections 1-1-215, 20-7-420(1), (2).

- HELD: 1. The school district of residence of a special education student whose custodial parent is imprisoned is the school district where the custodial parent resided prior to being imprisoned.
2. If a special education student is admitted to a school district that is not his district of residence, his district of residence is responsible for that student's tuition.

September 19, 1989

John W. Robinson
Ravalli County Attorney
Ravalli County Courthouse
Hamilton MT 59840

Dear Mr. Robinson:

You have requested my opinion concerning the following questions:

1. What is the school district of residence for a special education student whose custodial parent has been imprisoned?
2. If a special education student is admitted to a school district that is not his district of residence, which school district is financially responsible for the child's tuition?

Regarding your first question, I understand that the father, who was the custodial parent of a special education student, resided with the student in Lolo, Montana, which is in the Lolo School District. At the time the father

was imprisoned, the student was attending school in the Lolo School District. After the father was imprisoned, the Montana Department of Family Services was awarded temporary custody of the student by court order, although the father's parental rights were not terminated. The student was subsequently placed with a foster family residing in Florence, Montana, which is within the Florence-Carlton School District. The special education student is currently attending school in the Florence-Carlton School District.

In 1979, the Legislature passed a bill (HB 295) clarifying the rules for determining a child's school district of residence for special education purposes, and establishing responsibility for payment of tuition for a child requiring a special education program. 1979 Mont. Laws, ch. 470. Chapter 470 has been encoded at section 20-7-420, MCA, and provides in part:

(1) In accordance with the provisions of 1-1-215, a child's district of residence for special education purposes is the residence of his parents or of his guardian unless otherwise determined by the court. This applies to a child living at home, in an institution, or under foster care. If the parent has left the state, the parent's last known district of residence is the child's district of residence.

Section 1-1-215, MCA, sets forth the rules for determining a person's residence:

Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

(1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose.

(2) There can only be one residence.

(3) A residence cannot be lost until another is gained.

(4) The residence of his parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither parent has legal custody, the residence of the parent with whom he customarily resides is the residence of the unmarried minor child. In case of a controversy, the district court may declare which parental residence is the residence of an unmarried minor child.

(5) The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian.

- (6) The residence can be changed only by the union of act and intent.

Section 20-7-420, MCA, plainly evinces a legislative intent that a child's district of residence for special education purposes shall be the residence of the custodial parent, even when a child has been placed in a foster home. In the words of Representative Marks, who sponsored HB 295, the legislation was necessary "to put responsibility for those [special education] costs back on the residence of the parent rather than the district where the child lives in a group home." Minutes, Senate Committee on Education, March 14, 1979. The Senate Minutes indicate that HB 295 was enacted because section 1-1-215, MCA, did not clearly establish residency status of special education students "who reside in an institution or foster home." Minutes, Senate Committee on Education, March 14, 1979.

Therefore, for special education purposes, a child's district of residence is the residence of the custodial parent. That determination is unaffected by the fact that the Department of Family Services has temporary custody of the child under court order while the father, whose parental rights have not been terminated, is imprisoned. However, if the department has custody after a parent's rights have been terminated, the child's residence no longer follows the parent but follows instead the physical location of the district court ordering the termination. See 43 Op. Att'y Gen. No. 36 (1989).

The issue you raise thus turns on a determination of the residency of the imprisoned father, a question which is neither addressed by section 1-1-215, MCA, nor by case law interpreting that statute. However, the majority rule has been clearly established: A person does not acquire a new residence by virtue of imprisonment, but retains the residence he had prior to incarceration. Turner v. Kelly, 411 F. Supp. 1331, 1332 (D. Kan. 1976); Polakoff v. Henderson, 370 F. Supp. 690, 693 (D. Ga. 1973); Ellingsburg v. Connett, 457 F.2d 240, 241 (5th Cir. 1972); Hillman v. Stults, 70 Cal. Rptr. 295, 309 (Cal. Ct. App. 1968); Bull v. Kistner, 135 N.W.2d 545, 548-49 (Iowa 1965); United States v. Cohen, 297 F.2d 760, 774 (9th Cir. 1962), cert. denied, 369 U.S. 865 (1962); Millet v. Pearson, 173 N.W. 411, 412 (Minn. 1919); see also Restatement (Second) of Conflict of Laws § 17, comment c (1971); 25 Am. Jur. 2d Domicile § 41 (1966). The rationale for this rule is based on the common law requirement, codified at section 1-1-215 (6), MCA, that a person may change his residence only by union of act and intent. A person compelled to serve a prison sentence under court order is removed to prison without exercising any volition, and thus cannot intend to change his residence. See Turner, 411 F. Supp. at 1332; Bowers v. Baughman, 281 N.E.2d 201, 202 (Ohio 1972); Restatement (Second) of Conflict of Laws § 17, comment c (1971); 25 Am. Jur. 2d Domicile § 41 (1966); Duryea v. Duryea, 269 P. 987, 990 (Idaho 1928); Millet, 173 N.W. at 412.

In the example you present, therefore, the district of residence of the imprisoned father, and thus the residence of the special education student, continues to be the Lolo School District.

Regarding your second question, section 20-7-420(2), MCA, provides that the "district of residence is financially responsible for tuition as established under 20-5-305 and 20-5-312 for special education students." As already noted, for special education purposes the child's district of residence is the residence of the custodial parent under section 20-7-420(1), MCA. Where statutory language is plain and unambiguous, the statute speaks for itself and there is no need to engage in further construction. Matter of Blake v. State, 44 St. Rptr. 580, 584, 735 P.2d 262, 265 (1987); Yearout v. Rainbow Painting, 43 St. Rptr. 1063, 1065, 719 P.2d 1258, 1259 (1986). I therefore conclude that the Lolo School District is financially responsible for the education of the special education student mentioned in your question.

THEREFORE, IT IS MY OPINION:

1. The school district of residence of a special education student whose custodial parent is imprisoned is the school district where the custodial parent resided prior to being imprisoned.
2. If a special education student is admitted to a school district that is not his district of residence, his district of residence is responsible for that student's tuition.

Sincerely,

MARC RACICOT
Attorney General