BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

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FRENCHTOWN SCHOOL DISTRICT NO. 40 Appellant, V. LEWAYNE SCHUTTER, GUARDIAN FOR DAVID RIDENHOUR, Respondent.	)	DECISION AND ORDER OSPI 41-83

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Appellant, Frenchtown School District No. 40, has appealed a decision of the Missoula County Superintendent of Schools, dated February 17, 1983. The County Superintendent held that: 1) the appointment of LeWayne Schutter as legal guardian of David Ridenhour has made the residence of David Ridenhour that of his guardian; 2) David Ridenhour is a resident of Frenchtown School District No. 40 and is not required to pay tuition; 3) Appellant's residency policy is not inconsistent with the intent of state and federal law.

This matter was submitted on briefs. Briefs have been received from Appellant and Respondent.

In the Notice of Appeal, Appellant contends: (1) that the school district "has the authority to establish residency requirements for its students (see Section 20-3-324(3) MCA)." Such residency requirements are to be based upon Montana's residency statute (see Section 20-5-304(1) and Section 20-5-101 MCA); (2) the determination that the residency of David Ridenhour is that of his mother, who resides in California; (3) the Appellant's School District's residency policy is correct and urges this State Superintendent to approve the same.

This appeal is subject to the standards of review set forth in Section 10.6.125. That Section provides as follows:

"(4) The state superintendent may not substitute his judgement for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact upon issues essential to the decision, were not made although requested."

The basic issues arising from this appeal deal with the powers and duty of the School Board to determine residency and to what extent those powers and duties are limited by statute and/or State and Federal Constitutions.

Appellant, in the spring and fall of 1982, adopted an amended policy, binding resident students to include:

"One who is living with a grandparent, brother, sister, aunt or uncle who is a court ordered legal guardian and actually resides in Frenchtown School District No. 40."

Another exception was made for:

"One who is placed with a resident adult who actually resides in School District No. 40 by a governmental entity or in an agency licensed by a governmental entity,"

The student David Ridenhour has attended Frenchtown's School District since September, 1978. In Missoula County District Court, Cause No. A-14059, a legal guardian for

David Ridenhour was appointed by the District Court on September 11, 1981. The guardian is not a blood relative.

The student's mother resides in California. The student's father resides in Alberton School District, Missoula County.

During the hearing before the County Superintendent, one of the members of the Board of Trustees testified that the reason for the tuition limits to blood legal guardians was a concern for an influx of students as a result of a strike in other high school districts of Missoula County. (Tr., 47) Another explanation was offered by the Superintendent of Frenchtown Schools saying that "family groups are stronger." (Tr., **105)**

The record also indicates that another student attending Appellant School Districts resided with a guardian but one who was a blood relative within the policy's definition.

From the record it is evident that the requirement that Student Ridenhour pay a tuition is based exclusively on the policy adopted by the Board of Trustees and not any factual residence question.

I have before me the question of a bona fide residency requirement in the field of public education. The specific policy in question creates an irrebuttable presumption that one who resides with a non-blood legal guardian is a nonresident for high school tuition purposes.

The United States Supreme Court has on several occasions discussed the issue of such requirements. A Connecticut statute was invalidated in the case of Valandis v. Kline, 412 U.S. 441 (1973) because it violated the due process clause by classifying some bona fide state residents as nonresidents for tuition purposes. The Supreme Court recognized the general right of protecting bona fide residents. More recently in the case of Pyler v. Doe, 457 U.S. ___ (1982), a Texas statute was partially invalidated because it excluded undocumented alien children from

free public schools. The Court recognized the School District's right "to apply...established criteria for determining residence." Recently in Martinez v. Bynum, 51 Law Week 4524 (1983) the United States Supreme Court upheld a Texas residency statute which required students to have a bona fide intention to remain in the school district indefinitely and to make his home in the district. The statute also provided that the student's presence in the school district is not for the primary purpose of attending the public free schools. The Court said of this requirement:

> "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring the services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance and public free schools does not violate the equal protection laws of the Fourteenth Amendment... a bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents."

The Court noted that it would apply the "rational basis" test to weigh the bona fide residency requirement. Under the Federal Constitution public education is not a fundamental right granted to individuals. However, Article X, Section 1(3) of the 1972 Montana Constitution provides:

> "The legislature shall provide a basic system of free quality public elementary and secondary schools."

Thus the right under Montana Constitution to a free quality public education is a fundamental state constitutional right. In the instant policy, I must look to the rational basis for allowing blood relative guardians to have their charges educated at no cost while non-blood relative guardians are required to pay tuition such as in Appellant School District.

The basis for the distinction as noted above arose out of the threat of other county children taking advantage of the facilities in Appellant School District. In the instant case, Student Ridenhour has been a student of the school district since 1978. He was not required to pay tuition until the fall of 1982. At the same time another student will be allowed to attend the Appellant School District because she resides with her grandmother.

For both students the questions are: Does this requirement test whether or not they are actually physically present in the school district and are their intent to remain there? The facts indicate that such is the case for both these students and their guardians. The only difference is that the student with the blood relative guardian is given preference over the one with the non-blood relative guardian. Such criteria fails under both the state and federal equal protection guarantees as well as the Montana guarantee of a free public education. The school district has the authority to establish residency requirements under Peterson v. School Board, et al., 73 Mont. 442, 236 P. 670 (1925), 20-5-101, 20-3-323, and 20-3-324 MCA. That authority cannot contravene either or both the federal and state constitution. A tuition policy that relied on the Texas statutory language of Martinez would pass muster under both documents.

Because the decision of the Missoula County Superintendent of Schools has correctly invalidated the tuition policy of Appellant School District and because that action is supported by the state and federal constitution, the decision is hereby affirmed and Appellant is ordered to refund any tuition payments to Student Ridenhour forthwith.

DATED July 26, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
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IN THE MATTER OF THE APPEAL OF)
) MEMORANDUM OPINION
PETRONELLA SPOTTED WOLF) OSPI 52-83
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This appeal arises out of a denial by the Glacier County Transportation Committee of a room and board contract for the 1982-83 school year. Originally this matter was before the State Superintendent under OSPI No. 39-82 but pursuant to a stipulation, the parties rescheduled a hearing before the Transportation Committee. That hearing was held on May 26, 1983. Following that hearing the County Transportation Committee issued its Decision and Order on June 7, 1983. This matter arises from the same factual background as that encompassed in our Decision in the same matter rendered August 31, 1981. See In the Matter of the Appeal of Petronella Spotted Wolf, OSPI 3-81.

The Appellant has received a room and board contract from the County Transportation Committee since 1973. For school year 1980-81 the Appellant's room and board contract was denied by the County Transportation Committee and became the subject of the August 31, 1981, decision by the State Superintendent which reinstated her contract for that school year. For school year 1981-82 the trustees of School District No. 9 refused to issue a room and board contract to the Appellant and an appeal was made to the Glacier County Transportation Committee. On May 7, 1982 the Glacier County Transportation Committee reversed the decision of the school district and ordered the room and board contract restored for the 1981-82 school year.

Then for the 1982-83 school year Appellant again applied and was denied a contract by the school district and following hearing on May 26, 1983, the County Transportation Committee issued its order denying the room and