



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 86-11

Mr. Charles D. McQuillen
Executive Director
State Board of Education
Len B. Jordan Bldg., Room 307
Boise, ID 83720

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Is it constitutional to impose a five calendar year residency requirement on students who wish to participate in special graduate and professional studies programs offered by the State Board of Education?

CONCLUSION:

Although the state may impose a reasonable durational residency requirement for tuition purposes and for participation in higher education programs and courses, a five calendar year residency requirement is unreasonable and therefore violates the equal protection clause of the U.S. Constitution.

ANALYSIS:

Section 33-3717(2), Idaho Code, imposes a twelve (12) month residency requirement on students who wish to qualify for a tuition-free university or college education. For those students who wish to participate in special graduate and professional studies programs, an additional residency requirement is imposed.

For students who apply for special graduate and professional programs including, but not limited to the WAMI (Washington, Alaska, Montana, Idaho) Regional Medical Program, the WICHE Student Exchange Programs, Creighton University School of Dental Science, the University of Utah College of Medicine, and the Washington, Oregon, Idaho (WOI) Regional Program in Veterinary Medical Education, additional residency requirements shall be in force. No applicant shall be certified or otherwise designated as a beneficiary of such special program who has not been a resident of the state of Idaho for at least five (5) calendar years previous to the application date. (Emphasis added.)

Idaho Code § 33-3717(8). Therefore, before a prospective student can apply and be certified for one of the designated programs, he or she must first comply with the five calendar year requirement before making application. Certification does not guarantee admission for applicants to these professional programs, but does significantly enhance the likelihood for admission because of financial assistance available to those who have been certified.

Two reasons are usually cited supporting the five-year residency requirement. The first is that state-funded professional programs should be provided to "legitimate long-term" residents. See, Minutes of Idaho House Education Committee, February 2, 1979. The second is to insure that those residents who take advantage of the professional studies programs outside of the state, return to the state to practice in the profession and contribute to the state's economy. Kuhn v. Vergiels, 558 F.Supp. 24 (D.Nev. 1982).

Generally, reasonable durational residency requirements of one, four, six, and twelve months for tuition purposes in colleges and universities have been upheld by the courts. Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), summarily aff'd, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971), and Vlandis v. Kline, 412 U.S. 985, 93 S.Ct. 2230, 37 L.Ed.2d 63

(1973). See, also, Kelm v. Carlson, 473 F.2d 1267 (6th Cir. 1973). Residency requirements of this duration are considered reasonably related to the legitimate state purpose of insuring that only bona fide residents receive the tuition-free or reduced tuition education from a state's colleges or universities. Id.

By imposing a five-year residency requirement, on applicants to special graduate and professional studies programs, however, the state creates two classes of resident students and, in effect, distributes benefits unequally between one-year and five-year resident students. This unequal distribution of benefits implicates the constitutional guarantee of equal protection. "When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." Zobel v. Williams, 457 U.S. 55, 60, 102 S.Ct. 2309, 2313, 72 L.Ed.2d 672, 678.

In Kuhn v. Vergiels, supra, Nevada's five-year residency requirement for the WICHE program was challenged in federal court. Nevada Revised Statutes (NRS) 397.060(1) imposed the requirement on student applicants for the programs. This rule was exactly the same as that now found at Idaho Code § 33-3717(8). The requirement was challenged by a two-year student and a four-year student who were denied certification for the program because they did not meet the five-year residency requirement prior to making application. In granting the two students a preliminary injunction prohibiting the enforcement of the requirement, the court found there not only was the possibility of irreparable injury, but also probable success on the merits. Id., at 26. Irreparable injury was shown because the students possibly could not attend school without WICHE certification. Id.

The court found that the five-year requirement did not meet the traditional equal protection "rational basis" test. Zobel v. Williams, supra. (If the statute affected a fundamental constitutional right, a more stringent standard of "strict scrutiny" would have been used to review the state statute. See, e.g., Shapiro v. Thompson, 934 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969).) The court stated that the five-year

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requirement was not rationally related to the objective of giving assistance to students who intend to return to the state following completion of their studies. Kuhn v. Vergiels, at 27. The requirement does not fairly treat those individuals who intend to remain state residents but who have not lived in the state for the five years as required. Id. at 27-28. The Idaho statute would fail for this reason as well.

Additionally, Idaho Code § 33-3717 already establishes a one-year test for bona fide residency. The four additional years to establish "legitimate long-term" residency creates an impermissible distinction and would violate the principles enunciated by the U.S. Supreme Court in Zobel v. Williams, supra. As the court stated in Kuhn v. Vergiels at 27, "on its face five years appears to be a wholly unreasonable and arbitrary period of time in this context." The Nevada legislature immediately responded to the court's decision by adopting a one-year residency requirement for participation in these programs. NRS 397.060.

In summary, a one-year durational residency requirement for tuition and special program services in higher education is constitutionally permissible under both the Idaho and federal constitutions. However, the five-year durational requirement for participation in the special professional and graduate studies programs defined by Idaho Code § 33-3717(8) fails to meet the rational basis test set forth in Zobel v. Williams and creates an impermissible distinction between bona fide residents. Therefore, the five-year requirement is unconstitutional.

If we can be of assistance in correcting this statute, please do not hesitate to contact us.

AUTHORITIES CONSIDERED:

Constitutions

Fourteenth Amendment, U. S. Constitution

Article 1, § 2, Idaho Constitution

Article 9, § 1, Idaho Constitution

Idaho Statutes

Idaho Code § 33-3717

Other State Statutes

Nevada Revised Statutes 397.060

Cases

Kelm v. Carlson, 473 F.2d 1267 (6th Cir. 1973)

Kuhn v. Vergiels, 558 F.Supp. 24 (D.Nev. 1982)

Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)

Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970),
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527 (1971)

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63 (1973)

Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d
672 (1982)

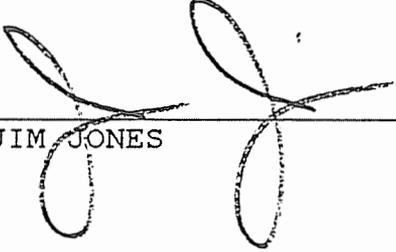
Other

Minutes of Idaho House of Representatives Education
Committee, February 2, 1979.

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DATED this 29th day of August, 1986.

JIM JONES
Attorney General
State of Idaho



JIM JONES

Analysis by:

DANIEL G. CHADWICK
Deputy Attorney General
Intergovernmental Affairs

cc: Idaho Supreme Court
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