

August 19, 1993

The Honorable Gary J. Schroeder
Idaho State Senate
1289 Highland
Moscow, ID 83843

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Senator Schroeder:

This is in response to your letter in which you ask for legal guidance regarding the residency statute for purposes of student fees and tuition, Idaho Code § 33-3717. Attached to your letter was a copy of a letter from the ASUI President and Attorney General in which the assertion is made that the statute creates an irrebuttable presumption that if a student enters the state primarily for educational purposes, he or she must forever be classified a nonresident. It also suggests that the statute is impermissibly vague.

In our opinion, the statute does not create any such irrebuttable presumption nor is it unconstitutionally vague. During the 1992 legislative session, Idaho Code § 33-2717 was amended such that the focus of the test for qualifying for resident student status is domiciliary intent rather than physical presence alone. The statute, patterned after that adopted in other states (*e.g.*, RCWA § 28.B.15.012), states in part:

The establishment of a new domicile in Idaho by a person formerly domiciled in another state has occurred if such person is physically present in Idaho primarily for purposes other than educational and can show satisfactory proof that such person is without a present intention to return to such other state or to acquire a domicile at some other place outside of Idaho. Institutions determining whether a student is domiciled in the state of Idaho primarily for purposes other than educational shall consider, but shall not be limited to the following factors:

- (a) Registration and payment of Idaho taxes or fees on a motor vehicle, mobile home, travel trailer, or other item of personal property for which state registration and the payment of a state tax or fee is required.
- (b) Filing of Idaho state income tax returns.
- (c) Permanent full-time employment or the hourly equivalent thereof in the state of Idaho.

(d) Registration to vote for state elected officials in Idaho at a general election.

Idaho Code § 33-3717(4).

According to the statute, once a student has met any applicable durational requirement (*e.g.*, Idaho Code § 33-3717(2)(b), continuous residence in state for 12 months prior to opening day of semester), he or she may attempt to offer "satisfactory proof" that his or her domicile has changed to Idaho. This is done by demonstrating compliance with the factors listed in the statute as well as others which reflect domiciliary intent. The ultimate factual determination is whether the student's primary purpose for presence in Idaho is other than educational. The statute does not preclude a student who initially enters the state primarily for educational purposes from later demonstrating a change in the primary purpose for remaining in the state. While the burden of proof is with the student to overcome the presumption which arises from the initial classification as a nonresident, this does not amount to an irrebuttable presumption.

Again, there is nothing in the statute which precludes a student "who is physically present in Idaho" from meeting the applicable durational requirements and from attempting to overcome the presumption by offering "satisfactory proof" of domiciliary intent. Contrary to the statutory scheme struck down in Vlandis v. Kline, 412 U.S. 451, 93 S. Ct. 2230 (1973), Idaho Code § 33-3717 does not prevent a student "from ever rebutting the presumption of nonresidence during the entire time that he remains a student, no matter how long he has been a bona fide resident of the state for other purposes." 93 S. Ct. at 2237, n.9. As the Vlandis Court further stated:

The state can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

93 S. Ct. at 2237.

While there is no decision by an Idaho court on the current statute, after the Vlandis decision, various statutory and regulatory schemes which are similar to Idaho's have been sustained against attack on constitutional or statutory grounds. *See* Peck v. University Residence Committee, 807 P.2d 652, 661-63 (Kan. 1991) (regulations which consider various factors in determination of "domiciliary resident" for purposes of tuition upheld against vagueness and equal protection challenge); DeCecco v. Board of Regents, University of Wisconsin, 442 N.W.2d 585, 588-90 (Wis. App. 1989) (statute creating a presumption that one "who enters and remains in [the] state primarily to obtain an

education is presumed to continue to reside outside [the] state" held "not to create the presumption declared unconstitutional in *Vlandis*" (emphasis added)); *Hauslohner v. Regents of the University of Michigan*, 272 N.W.2d 154 (Mich. App. 1978) (university rules referring to "primary or sole purpose of attending the university, rather than to establish a domicile in Michigan" applied; no irrebuttable presumption found); *Podgor v. Indiana University*, 381 N.E.2d 1273 (Ind. 1978) (university rules which permit university officials to consider various factors in determining "whether a non-resident student's predominant purpose in coming to Indiana has changed," *id.* at 1279, upheld as providing ascertainable standards and as consistent with equal protection clause, *id.* at 1283-85). *See also* *Lister v. Hoover*, 655 F.2d 123 (7th Cir. 1981); *Hooban v. Boling*, 503 F.2d 648 (6th Cir. 1974); *Hayes v. Board of Regents of Kentucky State University*, 495 F.2d 1326 (6th Cir. 1974); *Kelm v. Carlson*, 473 F.2d 1267 (6th Cir. 1973); *Arizona Board of Regents v. Harper*, 495 P.2d 453 (Ariz. 1972); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd* 401 U.S. 985, 91 S. Ct. 1231 (1971).

In summary, it is our view that the Idaho courts would not view Idaho Code § 33-3717 as violating the *Vlandis v. Kline* proscription against creating an irrebuttable presumption of non-residency.

In answer to your other questions, each situation must be evaluated on a case-by-case basis. The determination of residency in a given case depends on a review of the specific facts and circumstances presented, and further depends upon whether a student is able to meet durational requirements and to present satisfactory proof of domicile in Idaho. You are correct in your assessment that the determination is primarily dependent upon the intent of the student as evidenced by various factors such as full-time employment, payment of state taxes, etc.

You also asked whether a distinction in residency based upon marriage to an Idaho resident would be illegal. We have not found any cases which have struck down a student residency classification based upon the "marital privilege."

I hope you will find this information helpful.

Sincerely,

BRADLEY H. HALL
Deputy Attorney General
State Board of Education