

# MAINE STATE LEGISLATURE

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*Educational Responsibility For Education of Children in Foster Homes*  
*Educational Residence of Non-State Wards*  
*Municipal Responsibility For Education of Non-State Wards*  
*20 MRSA § 859*

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September 30, 1977

H. Sawin Millett, Jr., Commissioner  
Dept. of Educational & Cultural Services  
State House Complex  
Augusta, Maine 04333

Re: August 9, 1977, Opinion on the Residency  
of Non-state Wards Placed in Foster Homes

Dear Commissioner Millett:

The following is in response to your memo of September 13, 1977.

Having reviewed 20 MRSA § 859, the case of Shaw v. Small, 124 Me. 36 (1924), prior attorney general opinions on this subject and recent legislative activity in this area, it is still my opinion that "a child has the right to a free education in the administrative unit where the person who has custody of him resides regardless of whether that person is his parent, legal guardian, or a third party, whom the parent or legal guardian has assigned custody of the child to."

I think it is appropriate to add that I concur with the 1941 opinion of Deputy Attorney General Sanford L. Fogg, which emphasized the rule that "'Residence of a child with a relative only during the time he or she is attending school does not meet the requirement of the statute so as to make the town in which the relative lives liable for tuition.'" Deputy Attorney General John S. S. Fessenden in his 1942 memorandum of law to a Mr. Hutchinson of the Department of Education also concurred with the rule cited in Mr. Fogg's opinion.

Attorney General Clement F. Robinson issued an opinion in

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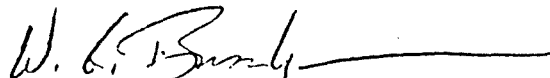
1931 stating that a child is entitled to a free education in the administrative unit in which the person who has custody of him resides provided that person "stands 'in loco parentis'" to the child. Both Mr. Fogg and Mr. Fessenden also made reference to the requirement that the person having custody of the child should stand "in loco parentis" to the child, and, in an opinion dated March 2, 1950, Attorney General Ralph W. Farris made reference to the "in loco parentis" requirement.

In light of the court's ruling in Shaw v. Small and the above opinions of this office, I feel that it is essential that the person having custody of a child must stand "in loco parentis" to the child before the child is entitled to a free education in the administrative unit where the person who has custody resides. A person who stands "in loco parentis" must stand in the place of the child's parent or legal guardian with respect to that parent or legal guardian's rights, duties and responsibilities. The definition of "guardian" in Shaw v. Small, p. 39, supports this position.

Although 20 MRSA § 859 does contain contradictory language regarding the term guardian, the language which was the subject of the Shaw v. Small decision remains unchanged. Under the 1924 statute and under today's law a child has the right to attend school in the administrative unit where his "parents or guardian has a legal residence" (R.S., chap. 16, § 30) or where his "parent or guardian has residence" (20 MRSA § 859). In 1973, the 106th Legislature rewrote the definition of residence, though, to "mean the administrative unit where the father or legal guardian maintains a home for his family" (emphasis supplied; P.L. 1973, c. 571, § 26). Earlier, the 105th Legislature enacted P.L. 1971, c. 223, "An Act Clarifying the Secondary School Tuition Law." 20 MRSA §§ 1291 and 1292 were amended at that time by adding the adjective "legal" to modify the word "guardian." In several instances the 105th Legislature even amended §§ 1291 and 1292 by deleting the words "person having custody" and "person acting in loco parentis" and replaced them with the term "legal guardian."

However, none of the above legislative amendments have altered the language which the Maine Supreme Court interpreted in Shaw v. Small to mean that a child has the right to a free education in the administrative unit where the person who has custody of him resides. Since the language is still the same today as it was in 1924, the Maine Supreme Court interpretation given to it in 1924 still controls.

Respectfully yours,



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cc: Joseph E. Brennan  
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