

OP. NO. 04-094

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT — POWERS OF CITIES AND TOWNS.

EDUCATION: SYSTEM OF PUBLIC SCHOOLS; GENERAL PROVISIONS.

No authority for city or town to enact ordinances imposing civil or criminal penalty against parent for providing false residential information to enroll child in local school system and requiring parent to pay tuition or educational costs for such child. General Assembly may enact such enabling authority for city or town. Authority for local school system to adopt policy holding parent liable for tuition or educational costs for nonresident child.

The Honorable M. Kirkland Cox
Member, House of Delegates
April 7, 2005

Issue Presented

You inquire regarding the authority of a local government or school system to require a parent to reimburse tuition costs expended in educating a student who is not a resident of the school district.¹ First, you inquire whether a locality may enact an ordinance imposing a civil or criminal penalty against a parent enrolling a child in a school system based on false information, which indicates that the parent and student are residents of the school district. Next, you ask whether a locality may enact an ordinance holding a parent liable for tuition costs or the costs of educating a child in such a situation. You next inquire whether, in the absence of statutory authority for such an ordinance, the General Assembly could enact such authority. Finally, you ask whether a school system may adopt a policy that holds a parent liable for tuition costs or the costs of educating a child in such a situation.

Response

It is my opinion that a locality² does not have the authority to enact an ordinance imposing a civil or criminal penalty against a parent enrolling a child based on false information that indicates the parent and child are residents of the local government.³ It is further my opinion that a locality does not have the authority to enact an ordinance holding a parent liable for the tuition or educational costs in such a situation. The General Assembly may enact such enabling authority if it so chooses. Finally, it is my opinion that a local school system does have the authority to adopt a policy holding a parent liable for the tuition or educational costs in the circumstances you describe.⁴

Background

You present a specific fact pattern as the basis for your inquiry. You relate that a parent completed a registration form for his child to attend public school in Colonial Heights. The parent stated in that registration that he and his child are

residents of the city of Colonial Heights. The child then attends school in the city for free pursuant to his perceived status as a resident of the city. School authorities later discover that the child was not a resident of the city during the time the child was attending the city's school and was not a resident when the parent completed the registration.

Applicable Law and Discussion

A local government and local school board are separate and distinct governmental agencies of the Commonwealth.⁵ Although a local school board depends on the local governing body for a significant part of its funding, the local school board "is a separate 'public quasi corporation ... that exercise[s] limited powers and functions of a public nature granted to them expressly or by necessary implication [of law], and none other.'"⁶ Article VIII, § 1 of the Virginia Constitution requires the General Assembly "to provide for a system of free public elementary and secondary schools," and § 2 directs the General Assembly to "determine the manner in which funds are to be provided for the costs of maintaining" those schools.

"The statutory scheme prescribed by the General Assembly envisions a symbiotic relationship between the school board and the [city], whereby the school board manages and maintains the school system and the [city] provides the requisite local funding."⁷ Article VIII, § 7 of the Virginia Constitution clearly vests supervisory authority over local schools in local school boards. Although local governments bear responsibility to provide school funding, the General Assembly has chosen to give the authority to charge tuition for access to public schools under certain circumstances to the local school boards.⁸

For clarity of discussion, I will respond to your last question first and then proceed by answering the remaining questions in order. You ask whether local school boards may enact regulations to hold nonresidents responsible for tuition costs.

Section 22.1-3 states that "[t]he public schools in each school division shall be free to each person of school age who resides within the school division." A 1982 opinion of this Office concludes that § 22.1-3 establishes a legislative presumption that a child residing with a natural parent is entitled to free admission to the schools of that local government in which the natural parent lives.⁹ The 1982 opinion further concludes that "residence" for the purpose of free admission to local public schools must be *bona fide* residence and not merely superficial residence solely for the purpose of attending school.¹⁰ Section 22.1-3 further states that "[e]very person of school age shall be deemed to reside in a school division," thereby entitling that child to free access to the division's schools under various enumerated circumstances.¹¹

Section 22.1-5(A) provides that "no person may be charged tuition for admission or enrollment in the public schools of the Commonwealth, whether on a full-time or part-time basis, who meets the residency criteria set forth in § 22.1-3." Thus, § 22.1-5(A) implies that a person who does not meet the residency requirement may not necessarily receive free tuition. This fact is confirmed by subsection 2 of § 22.1-5(A), which states that a school board of a school division has the discretion, pursuant to regulations adopted by the school board, to admit and to charge tuition to "[p]ersons of school age who are residents of the Commonwealth but who do not reside within the school division."

It is discretionary, except in limited circumstances,¹² whether a local school board admits nonresident students free of tuition.¹³ When a school board of a local school division wishes to require nonresident students to pay tuition as a condition of attending its schools, it may only do so pursuant to regulations it has adopted, and in accordance with § 22.1-5.¹⁴

You ask whether localities have the authority to impose a civil or criminal penalty against a parent providing false information indicating that the student and parent are residents of the school district. Additionally, you ask whether localities have the authority to require that nonresident students pay tuition as a condition of attending its schools, either by means of a civil or criminal penalty or by means of an ordinance.

Virginia follows the Dillon Rule of strict construction,¹⁵ which "provides that local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."¹⁶ A municipality cannot perform any function unless the General Assembly has expressly granted the power to do so.¹⁷ Virginia courts repeatedly have acknowledged this arrangement.¹⁸

It is necessary, therefore, to review the statutory grants of power to localities to determine whether the General Assembly has granted express authority to localities to enact an ordinance to impose civil or criminal penalties or to enact an ordinance to hold a parent liable for the tuition costs of educating nonresident students. I find no Virginia statute expressly authorizing a locality to enact either of the ordinances about which you inquire.

A review of the statutory grants of power made by the General Assembly to local governments generally,¹⁹ and to cities and towns specifically,²⁰ reveals that the General Assembly has not granted localities the express power to regulate or supervise school systems. Additionally, the General Assembly has not granted localities the express authority to recoup the cost of educating a child who was not a resident of the school division either by means of a civil or criminal penalty against the child's parent or by ordinance.²¹

Since localities have no express authority, in order to impose such a penalty or enact such an ordinance, a locality must have the implied authority to do so. Questions of implied legislative authority are resolved by analyzing legislative intent.²² In determining legislative intent, the Supreme Court of Virginia has looked both to legislation adopted and bills rejected by the General Assembly.²³ The Virginia Supreme Court "has consistently refused to imply powers that the General Assembly clearly did not intend to convey."²⁴ Thus, a locality will not have the power to recover tuition from nonresidents by means of an ordinance unless the General Assembly clearly intends that localities have such power. "If there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body."²⁵

I have reviewed the various statutes that are relevant to the questions you pose and cannot find a source for any express or implied authority from the General Assembly for localities to enact the types of ordinances about which you inquire. Therefore, it is my opinion that localities do not have the authority to enact ordinances imposing a civil or criminal penalty against a parent for providing false residence information or to make a parent liable for the tuition or educational costs in such a situation.

The General Assembly has empowered the governing bodies of localities to adopt ordinances,²⁶ to impose penalties for violating ordinances,²⁷ and to levy taxes and assessments.²⁸ In a number of instances, the General Assembly has granted regulatory power to local governments concurrent with the authority to impose civil or criminal penalties.²⁹ It has not done so in the context of granting cities regulatory authority over public schools to permit, set, or charge tuition to nonresidents or to impose civil or criminal penalties, and no such authority can reasonably be implied.

To the contrary, the General Assembly specifically has authorized local school boards to set tuition charges in exchange for access to public schools.³⁰ The grant of this specific authority further demonstrates that local governments do not have the implied authority to decide how and when to hold a parent responsible for the local school division's costs of educating a nonresident student. The General Assembly already has legislated in this field; it has addressed the residency and tuition issues by specific statutes,³¹ leaving no room to find any implied authority for a locality to do so. Additionally, the General Assembly has broadly legislated the areas of the source and composition of state and local school funds,³² leaving no room for any implied power of a locality to enact ordinances which raise school funds by charging nonresidents tuition for attending the locality's public schools.

There are three basic reasons why localities lack authority: (1) the General Assembly has not expressly given localities such authority; (2) no such authority may be reasonably implied; and (3) the General Assembly previously has given statutory authority to local school boards to charge tuition in certain circumstances.³³

I, therefore, conclude that no authority, express or implied, exists for a city to enact the ordinances about which you inquire. The General Assembly, however, may provide such power if it so chooses.

Finally, you ask whether the General Assembly may enact enabling authority to impose liability on a parent falsely providing information indicating that his nonresident child is a resident student. As previously noted, Virginia follows the Dillon Rule concerning the legislative powers of local governing bodies.³⁴ Article VII, § 2 of the Virginia Constitution endows the General Assembly with the ultimate authority over "the organization, government, powers ... of counties, cities, towns, and regional governments." The General Assembly's authority over local governments includes its ability to provide local governments with "powers of legislation, taxation, and assessment as the General Assembly may determine."³⁵

Article VIII, § 2 of the Virginia Constitution charges the General Assembly to "determine the manner in which funds are to be provided for the cost of maintaining an educational program ... and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions."

While the Constitution of the State provides in mandatory terms that the legislature shall establish and maintain public free schools, there is neither mandate nor inhibition in the provisions, as to the regulations thereof. The legislature, therefore, has the power to enact any legislation in regard to the conduct, control, regulation of the public free schools....^[36]

The Constitutionally-created power arrangement between the General Assembly and local governments, along with the General Assembly's broad authority to provide for and regulate a system of public schools, certainly confers on the General Assembly the capacity to enact enabling authority for local government to pass ordinances designed to impose liability on a parent falsely providing information indicating that his nonresident child is a resident student.

Conclusion

Accordingly, it is my opinion that a locality³⁷ does not have the authority to enact an ordinance imposing a civil or criminal penalty against a parent enrolling a child based on false information that indicates the parent and child are residents of the local government.³⁸ It is further my opinion that a locality does not have the authority to enact an ordinance holding a parent liable for the tuition or educational costs in such a situation. The General Assembly may enact such enabling authority if it so chooses. Finally, it is my opinion that a local school system does have the authority to adopt a policy holding a parent liable for the tuition or educational costs in the circumstances you describe.³⁹

¹Although the facts you present in your opinion request involve the city of Colonial Heights, I will focus my analysis of Virginia law as it relates to municipalities, cities, and towns, instead of the specific location that you provide. I note that many of the legal principles discussed in this opinion also apply to the county form of government.

²For purposes of this opinion, the term "locality" collectively refers to municipalities, cities, and towns.

³Effective July 1, 2005, a person who knowingly makes a false statement concerning the residency of a child to avoid tuition charges or enrollment in a school outside the attendance zone shall be guilty of a Class 4 misdemeanor. See 2005 Va. Acts ch. 178 (adding § 22.1-264.1), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?051+fuh+CHAP0178+500093>.

⁴The local school board may only do so pursuant to the authority and procedure provided in § 22.1-5 as discussed in this opinion.

⁵Harold v. Bd. of Supvrs., 38 Va. Cir. 467, 472 (1996) (citing Bd. of Supvrs. v. County Sch. Bd., 182 Va. 266, 275, 28 S.E.2d 698, 702 (1944)).

⁶*Id.* (alterations in original) (quoting Kellam v. Sch. Bd., 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960)).

⁷*Id.*

⁸See Va. Code Ann. § 22.1-5 (LexisNexis Supp. 2004).

⁹1982-1983 Op. Va. Att'y Gen. 431, 432.

¹⁰*Id.*

¹¹The only one of these circumstances relevant to this opinion is § 22.1-3(1), which provides that a person of school age is deemed to reside in a school

division "[w]hen the person is living with a natural parent, or a parent by legal adoption."

¹²See § 22.1-5(B) (requiring local school board to charge for nonresidents who are temporarily living in Commonwealth and are admitted to attend public schools).

¹³See § 22.1-5(A); see also Op. Va. Att'y Gen.: 1975-1976 at 309 (noting that school board may allow Virginia residents residing outside its jurisdiction to attend school tuition free).

¹⁴It is doubtful that such regulations, if enacted by a school board, could have a retroactive effect. Laws are presumed to be prospective in their operation and retrospective laws are considered "odious in their nature." *Elliott's Ex'r v. Lyell*, 7 Va. (3 Call) (1802).

¹⁵See *Commonwealth v. County Bd.*, 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977).

¹⁶*Tabler v. Fairfax County*, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980).

¹⁷Va. Const. art. VII, § 3.

¹⁸See, e.g., *Tabler*, 221 Va. at 200, 269 S.E.2d at 358 (noting that under Dillon Rule, locality must have express authority); *Nat'l Realty Corp. v. Va. Beach*, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968) ("The power of a municipality, unlike that of the State legislature, must be exercised pursuant to an express grant."); *Lawless v. County of Chesterfield*, 21 Va. App. 495, 499, 465 S.E.2d 153, 155 (1995) ("[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.") (quoting *County Board*, 217 Va. at 575, 232 S.E.2d at 41).

¹⁹Sections 15.2-900 through 15.2-975 (LexisNexis Repl. Vol. 2003 & Supp. 2004).

²⁰Sections 15.2-1100 through 15.2-1132 (LexisNexis Repl. Vol. 2003 & Supp. 2004).

²¹Effective July 1, 2005, a person who knowingly makes a false statement concerning the residency of a child to avoid tuition charges or enrollment in a school outside the attendance zone shall be guilty of a Class 4 misdemeanor. See 2005 Va. Acts, *supra* note 3.

²²*Tabler*, 221 Va. at 202, 269 S.E.2d at 360.

²³*Id.*

²⁴*Id.*

²⁵*Lawless*, 21 Va. App. at 500, 465 S.E.2d at 155 (quoting *City of Richmond v. Confre Club of Richmond, Va., Inc.*, 239 Va. 77, 79-80, 387 S.E.2d 471, 473 (1990)). *Lawless* was decided under former Title 15.1 governing local

government. In 1997, the General Assembly repealed Title 15.1 and recodified it as Title 15.2. See 1997 Va. Acts ch. 587, at 976, 976-1401 (adding Title 15.2, §§ 15.2-100 through 15.2-6321, and repealing Title 15.1, §§ 15.1-1 through 15.1-1705). The Act was made effective as of December 1, 1997. *Id.* cls. 7, 14, at 1401. The legal principles discussed in this opinion are not affected by the recodification.

²⁶ See § 15.2-1425 (LexisNexis Repl. Vol. 2003).

²⁷ See § 15.2-1429 (LexisNexis Repl. Vol. 2003).

²⁸ See § 15.2-1104 (LexisNexis Repl. Vol. 2003) (providing this authority to cities and towns).

²⁹ See, e.g., Va. Code Ann. § 15.2-2209 (LexisNexis Repl. Vol. 2003) (granting any locality authority to adopt ordinance that establishes uniform schedule of civil penalties for violations of specified provisions of zoning ordinance); § 15.2-901 (LexisNexis Repl. Vol. 2003) (providing that any locality may by ordinance provide that violations of trash disposal statute shall be subject to civil penalty); § 15.2-730 (LexisNexis Repl. Vol. 2003) (providing that county may adopt ordinance that establishes uniform schedule of civil penalties for violations of specified provisions of zoning ordinances regulating storage of junk and repair of motor vehicles).

³⁰ See § 22.1-5 (A), (B), (D); *but see* § 22.1-5(C) (limiting tuition charges to not exceed total per capita cost of education).

³¹ See § 22.1-3 (residency); § 22.1-5 (tuition).

³² See §§ 22.1-88 through 22.1-124 (LexisNexis Repl. Vol. 2003 & Supp. 2004); *see also* § 22.1-88 (LexisNexis Repl. Vol. 2003) (general composition of school funds), § 22.1-95 (LexisNexis Repl. Vol. 2003) (duty of local government to levy school tax).

³³ See § 22.1-5(A), (B), (D).

³⁴ See *supra* notes 15-16 and accompanying text.

³⁵ Va. Const. art. VII, § 2.

³⁶ *Flory v. Smith*, 145 Va. 164, 168, 134 S.E. 360, 362 (1926).

³⁷ See *supra* note 2.

³⁸ See *supra* note 3.

³⁹ See *supra* note 4.

[Back to April 2005 Opinion Index](#)