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1. TUITION — AVERAGE DAILY ATTENDANCE, PUPILS, TO DETERMINE DISTRIBUTION, STATE PUBLIC SCHOOL FUND — WHERE NON-RESIDENT PUPIL ADMITTED TO DISTRICT SCHOOLS, TUITION PAID BY PARENTS, GUARDIAN OR FRIENDS, DISTRICT OF ATTENDANCE ENTITLED TO CREDIT FOR SUCH ATTENDANCE — SECTION 7682 GENERAL CODE.
2. COMPENSATION, TUITION FEE, SECTION 7595-1d GENERAL CODE.
3. HIGH SCHOOL PUPIL — ASSIGNED TO SCHOOL OUTSIDE DISTRICT — WHEN HE HAS RIGHT TO ELECT TO ATTEND ANOTHER HIGH SCHOOL, EXPENSE, RESIDENCE DISTRICT — SECTIONS 7734, 7750, 7764 GENERAL CODE — HOUSE BILL 115, 94 GENERAL ASSEMBLY.
4. NON-RESIDENT ATTENDANCE OF PUPILS — WHEN INVOLVED, DETERMINE IF ATTENDANCE LAWFUL AND IF AUTHORIZED — SECTIONS 7734, 7734-1 GENERAL CODE.

SYLLABUS:

1. Where a non-resident pupil is admitted to the schools of a district by authority of Section 7632, General Code, under circumstances that no other board of education or public authority is required to pay tuition for such attendance, and the tuition is paid by the child's parents, guardian or friends, the district of attendance is entitled to credit for such attendance in determining the average daily attendance of pupils in the said school for purposes of distribution of the state public school fund.

2. The tuition fee to be paid for authorized non-resident attendance in the schools of a district is the amount computed in the manner provided by Section 7595-1d, of the General Code of Ohio, whether that tuition is paid by another board of education or otherwise.

3. The provisions of Section 7734, General Code, as amended in House Bill No. 115, of the 94th General Assembly, do not qualify or modify the provisions of Section 7750, General Code or Section 7764, General Code, as to the right of a high school pupil who is assigned to a high school outside the district of his residence to elect under certain circumstances to attend another high school at the expense of the district of his residence.

4. In determining average daily attendance of school pupils for purposes of distribution of the state public school fund, when non-resident

attendance of pupils is involved, the sole question to be determined in each case, under the terms of amended Section 7734, General Code, and supplemental Section 7734-1, General Code, as enacted in House Bill No. 115, of the 94th General Assembly, is whether or not the non-resident pupils are lawfully in attendance, and whether or not their attendance is for that reason authorized. In making that determination, it is necessary to take into consideration other sections of the law which authorize the attendance of pupils in the schools of districts other than the one in which they reside.

Columbus, Ohio, March 4, 1942.

Hon. Kenneth C. Ray, Director of Education,
Columbus, Ohio.

Dear Sir:

I am in receipt of your recent request for my opinion which reads as follows:

“The passage by the 94th General Assembly of House Bill 115 which amended Section 7734 and enacted supplementary Section 7734-1 of the General Code has resulted in numerous requests from school officials for an interpretation of these two sections. We should like a formal opinion in answer to the following questions:

1. If a parent elects to send a child to a school located in a district other than the district of the pupil's residence and is willing to pay tuition for the child's attendance in that school, which district is entitled to receive state funds on account of the pupil's attendance?
2. Should the tuition fee charged the parent be the amount calculated according to the provisions of Section 7595-1d of the General Code?
3. Does Section 7734 in its present form modify the provisions of Section 7750 or Sections 7764 as to the right of a high school pupil who resides in a school district which does not maintain a high school and who is assigned to a high school outside of the district of his residence to elect to attend another high school and have his tuition paid by the board of education of the district of the pupil's residence?”

Under the terms of Section 7595-1, and related sections of the General Code, enacted in 1935, as part of the so-called “School Foundation Law,” “average daily attendance” of pupils in each district is fixed as the basis of apportionment of the state public school fund by the Di-

rector of Education, who is by law charged with the duty of apportioning and paying said fund to the several school districts of the state. Section 7595-1a, General Code, also part of the School Foundation Law as enacted at that time contains the only statutory direction in that law as to what should be included within the term "average daily attendance." It is therein provided:

"The 'average daily attendance' certified by the reporting official for any school district as the basis of apportioning the state public school fund shall, in addition to all resident pupils, include the actual attendance of each pupil attending the schools of the district in the capacity of a 'tuition pupil' as fixed by law. * * *"

No statutory definition is afforded by the School Foundation Law of the phrase "tuition pupil" as fixed by law as it is used in Section 7595-1a, supra, except as such a definition is implied in the first sentence of Section 7595-1d, General Code, where it is provided:

"Pursuant to law, a pupil may attend school outside his district and for such pupil, his board of education shall pay tuition not more nor less than that which shall be computed as follows: * * *"

Then follow provisions of the statute setting out the manner for the computation of the proper amount of tuition to be paid by the district of residence of a pupil who attends school outside his district pursuant to law.

What constitutes "average daily attendance" for purposes of the distribution of the public school fund was somewhat modified and limited by the provisions of Amended Section 7734 and supplemental Section 7734-1, General Code, as enacted in House Bill No. 115, of the 94th General Assembly in 1941. These statutes as now in force, are as follows:

"Section 7734. The board of any district may contract with the board of another district for the admission and transportation of pupils into any school in such other district, on terms agreed upon by such boards *within the limitations of law*. The expense for the attendance of such nonresident pupils and for their transportation, if any, shall be credited and paid in the manner provided in sections 7595-1c and 7595-1d of the General Code; but no compensation from state funds shall be made to a receiving district for the *unauthorized* attendance of

nonresident pupils, but in case of such *unauthorized* attendance, compensation for the attendance of such pupils shall be made to the district in which such pupils reside.”

Section 7734-1. The reporting official, as provided in section 7595-1a of the General Code shall report separately the average daily attendance of any and all pupils attending school in such district who are not residents of the district and whose attendance in said district has not been previously provided for by contract between the boards of education of the districts affected or *who are not otherwise lawfully in attendance* in such district. No allowance shall be made under section 7595-1c of the General Code for the transportation of pupils who reside in a district other than that in which they attend school unless such attendance be by express contract between the boards of education of the districts affected.”

(Emphasis mine.)

It will be observed that it is only when the attendance of non-residents is previously provided for by contract between boards of education of the districts affected or when they are otherwise lawfully in attendance in a district, that the district where they attend may receive credit for their attendance in computing the average daily attendance of pupils for distribution of the public school fund.

Contracts for the attendance of pupils in the schools of districts other than those in the district where the pupils reside, may be effected by virtue of Section 7734, or Section 7750, General Code. Section 7734, General Code is general in terms and authorizes contracts between two boards of education for the admission of some or all of the pupils of one district into any school in the other district. Section 7750, General Code, is special, and deals entirely with contracts between boards of education in districts, one of which does not maintain a high school, for the admission of all its resident high school pupils into the high schools of the other district.

Non-resident pupils may, however, be “lawfully in attendance” in the schools of a district otherwise than by virtue of a contract between the boards of education of the district of residence and the district of attendance and such attendance be therefore authorized attendance. This fact is recognized by the terms of Section 7734-1, General Code. Non-resident pupils may lawfully attend schools either by virtue of their admission by authority of Section 7682, General Code, or when they are assigned to schools outside the district of residence in accordance with

Section 7764, General Code, or by reason of their attendance in high schools outside the district of their residence under circumstances whereby the district of residence is charged with the payment of tuition in a high school which the pupil may choose to attend. From the provisions of Section 7595-1d, that "pursuant to law, a pupil may attend school outside his district of legal residence and for such pupil his board of education shall pay tuition" it follows in my opinion that when circumstances are such that a board of education is chargeable with the payment of tuition for resident pupils who attend school outside the district that attendance is authorized and the pupils are "lawfully in attendance" in the school which they attend, for purposes of inclusion in aggregate attendance, as the basis for determining "average daily attendance."

Many times situations exist where the attendant circumstances are such that school pupils may attend school outside the district of their residence, and have their tuition, or at least part of it paid by the board of education of the district of their residence. Such situations exist by virtue of the provisions of Sections 7750 and 7764, General Code. A variety of circumstances may be involved, and it is not within the province of this opinion to detail the many and varied circumstances dependent upon availability of proper schooling within the district of residence, assignment of proper officials, distance from school, furnishing of transportation facilities, and perhaps other things which are controlling.

Questions arising with reference to such matters under a variety of circumstances have been quite thoroughly considered in a number of opinions of former Attorneys General. Section 7750 and Section 7764, General Code, are still in force as they have been for a number of years. Their terms so far as they apply to the right of school pupils to attend school outside the district of their residence, are not modified or qualified by Amended Section 7734, or supplemental Section 7734-1, General Code, as enacted in 1941. The former opinions of this office, wherein those sections are considered and applied, are as applicable now as they were when they were rendered. There were a number of such opinions rendered; reference to a few will suffice for our present purpose. See Opinions of the Attorney General for 1915, page 1381; for 1917, page 1455; for 1928, page 1925; for 1930, page 502; for 1930, page 1464; for 1932, page 248; for 1932, page 683; for 1932, page 419; for 1933, page 1789; for 1934, page 131; for 1935, page 1243.

Non-resident pupils may, however, lawfully attend school under other circumstances than those by virtue of which the board of education of the district of their residence is required under the law to pay their tuition. Section 7681, General Code, provides among other things that the schools of each district shall be free to all youth in the district who are children, wards or apprentices of actual residents of the district. Section 7682, General Code, the pertinent provisions of which prior to the codification in 1910, were a part of the same section (Section 4013) of the Revised Statutes, as the provisions of Section 7681, General Code, provides that:

“Each board of education may admit other persons upon such terms or upon the payment of such tuition within the limitations of other sections of the law as it prescribes.”

“Other persons,” as the expression appears in Section 7682, General Code, manifestly means persons or pupils other than youths who are children, wards or apprentices of actual residents, as provided in Section 7681, General Code. The statute empowers boards of education to admit such “other persons,” providing proper tuition is paid for their attendance. It does not prescribe by whom the tuition should be paid before the admission of the pupils is allowable. The admission of all such other persons whose tuition is paid as provided by law, may be admitted. By whom the tuition is paid is immaterial. It clearly follows that non-resident pupils may be admitted to the schools of the district if their parents or guardians or friends pay the proper tuition.

As the statute expressly limits the authorization to a board of education to admitting only those non-resident pupils for whom is paid “such tuition within the limitations of other sections of law as it prescribes,” it becomes necessary to inquire as to what are the limitations if any, of school tuition as fixed by other sections of law and as to how much leeway the board of education has with respect to prescribing the amount of tuition within those limitations, if any.

From the time boards of education were first authorized by statute to admit non-resident pupils to their schools and charge tuition for the attendance, until 1921, the said boards were vested with discretion as to the amount to be charged. The first act of the legislature wherein this provision was made was the Act of 1873: “An Act for the reorganization and maintenance of common schools,” 70 O. L., 195. In Section 71 of

this Act it was provided, among other things, that the schools established by the act should be free to all youth between six and twenty-one years of age who were children, wards or apprentices of actual residents of the district. This provision was qualified in said act by the further provision, "provided that each board of education shall have power to admit other persons not under six years of age upon such terms or upon the payment of such tuition as they may prescribe."

Substantially this same language was used in the several revisions of the statute in 1880 (77 O. L., 196); in 1887 (84 O.L., 69); in 1890 (87 O.L., 317); in 1904 (97 O.L., 360), until 1921, (109 O.L., 373) when the statute was amended by the insertion of the clause, "within the limitation of other sections of law." The pertinent part of the statute (Section 7682, General Code) now reads:

Section 7682. Each board of education may admit other persons upon such terms or upon the payment of such tuition within the limitations of other sections of law as it prescribes. Notwithstanding the provisions of section 7603, General Code, money received for tuition shall in all cases upon its receipt be placed in the tuition fund."

"Other sections of law" in force at the time of the amendment of Section 7682, General Code, as noted above, fixing the amount of tuition to be paid for pupils who attend school outside the district of their residence, were Section 7736, General Code, with respect to elementary pupils, and Section 7747, General Code, for high school pupils. Section 7736, prescribed a definite rule for the determination of foreign tuition in elementary schools to be paid by the district of residence to the district of attendance under certain circumstances. Section 7747, prescribed a similar rule for high school tuition and provided with respect thereto that, "No more shall be charged than" the amount so determined by the rule prescribed.

While these statutes were in force it seems clear that a board of education in admitting non-resident pupils to their schools by authority of Section 7682, General Code, had some discretion in fixing the tuition to be paid, especially so far as high school pupils were concerned, so long as the amount charged was not more than that which would result by the use of the formula prescribed in the then existing Section 7747, General Code, for the determination of the proper high school tuition.

At no time has there been in existence any statute that prescribed

the amount of tuition to be paid for non-resident pupils when the tuition is paid in some other manner than through another board of education. The legislature, however, in limiting the amount of tuition to be prescribed by a board of education, as it did upon the amendment of the statute in 1921, where pupils are admitted by authority of Section 7682, General Code, to the amount within other provisions of law manifestly must have had in mind the formulae prescribed in Sections 7736 and 7747, General Code, which were then in force, which formulae fixed the amount of tuition to be paid when the pupil attends school outside his district at the expense of his home district.

In 1935, upon the enactment of the School Foundation Law, Sections 7736 and 7747, General Code, were repealed. Section 7595-1d, General Code, was then enacted. This section provides that:

“Pursuant to law, a pupil may attend school outside his district of legal residence, and for such pupil his board of education shall pay tuition *not more nor less* than that which shall be computed as follows: Deduct the total expense * * *”
(Emphasis mine.)

The method set out in this statute for determining the amount of tuition to be paid for pupils attending school outside their district under circumstances requiring their home district to pay such tuition is the only statute pertaining to the subject of foreign tuition and in my opinion the amount so determined “not more nor less” is the amount which a board of education must charge when admitting non-resident pupils under the authority of Section 7682, General Code, regardless of how or by whom the tuition is paid. A board of education has no discretion in fixing that amount and unless the full amount, not more nor less, is paid, the attendance is “not authorized” as the term is used in Section 7734, General Code. When non-resident pupils are admitted by authority of Section 7682, General Code, and the full amount of tuition as provided by Section 7595-1d, General Code, is paid, the attendance is lawful and authorized and the district of attendance is entitled to credit for such attendance in determining its average daily attendance for purposes of distribution of the state public school fund as provided by Sections 7734 and 7734-1, General Code.

In determining average daily attendance for purposes of distribution of the state public school fund, when non-resident attendance of pupils

is involved, the sole question to be determined in every case is whether or not the non-resident pupils are lawfully in attendance and whether or not their attendance is for that reason authorized. In making that determination, it is necessary to take into consideration other sections of the law which authorize the attendance of pupils in the schools of districts other than the one in which they reside.

Two of these sections are Section 7750, General Code and Section 7764, General Code. Neither of these sections has been repealed either expressly or by implication, by the enactment of House Bill No. 115, in which Section 7734 was amended and supplemental Section 7734-1, General Code, was enacted, nor do the provisions of these latter sections in any wise modify or qualify those of Sections 7750 and 7764 of the General Code of Ohio, with respect to the right of a high school pupil under certain circumstances to select another high school than the one to which he is assigned and have his tuition or a part thereof, paid by his district of residence, dependent on circumstances. For the effect of the variety of possible circumstances which are determinative of this right and of the amount of tuition payable by the district of residence under the provisions of Section 7764, General Code, when the pupil elects to attend another high school than the one to which he is assigned, reference may be made to the numerous opinions of former attorneys general herein referred to. In answer to the specific question submitted, I am of the opinion:

1. Where a non-resident pupil is admitted to the schools of a district by authority of Section 7682, General Code, under circumstances that no other board of education or public authority is required to pay tuition for such attendance, and the tuition is paid by the child's parents, guardian or friends, the district of attendance is entitled to credit for such attendance in determining the average daily attendance of pupils in the said school for purposes of distribution of the state public school fund.

2. The tuition fee to be paid for authorized non-resident attendance in the schools of a district is the amount computed in the manner provided by Section 7595-1d, of the General Code of Ohio, whether that tuition is paid by another board of education or otherwise.

3. The provisions of Section 7734, General Code, as amended in House Bill No. 115, of the 94th General Assembly, do not qualify or

modify the provisions of Section 7750, General Code, or Section 7764, General Code, as to the right of a high school pupil who is assigned to a high school outside the district of his residence to elect under certain circumstances to attend another high school at the expense of the district of his residence.

4. In determining average daily attendance of school pupils for purposes of distribution of the state public school fund, when non-resident attendance of pupils is involved, the sole question to be determined in each case, under the terms of amended Section 7734, General Code, and supplemental Section 7734-1, General Code, as enacted in House Bill No. 115 of the 94th General Assembly, is whether or not the non-resident pupils are lawfully in attendance, and whether or not their attendance is for that reason authorized. In making that determination it is necessary to take into consideration other sections of the law which authorize the attendance of pupils in the schools of districts other than the one in which they reside.

Respectfully,

THOMAS J. HERBERT
Attorney General.