

**OPINION NO. 72-083****Syllabus:**

1. Where a student is in full-time attendance at a joint vocational school, within the meaning of "full time attendance" as properly defined by the State Board of Education under Sections 3313.48, 3313.90 and 3317.03, Revised Code, he must be included in the average daily membership figure of the public school district of his residence for purposes of state support under the school foundation program.

2. The definition of "full time attendance" must take into consideration auxiliary services provided to nonpublic school pupils under Section 3317.062, Revised Code.

3. Where a pupil attends classes at a joint vocational school under Section 3313.90, Revised Code, but receives auxiliary services through a nonpublic school under Section 3317.062, Revised Code, he should be included in the average daily membership figure for the nonpublic school under Section 3321.12, Revised Code, on a prorata basis.

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**To: Martin W. Essex, Superintendent of Public Instruction, Department of Education, Columbus, Ohio**

**By: William J. Brown, Attorney General, September 21, 1972**

I have before me your request for my opinion, which reads as follows:

"Your opinion is respectfully requested regarding the counting of pupils for state subsidy who attend joint vocational schools. The concern is whether or not pupils may be counted both in public and nonpublic school average daily membership for school foundation subsidies.

"May a student be calculated in the average daily membership figure for the public school district of his residence as provided for under R.C. 3317.03 for purposes of state support under the school foundation program, R.C. 3317.03, when such student is in full time attendance at a joint vocational school, attends a nonpublic school for purposes of extracurricular activities, and plans to graduate from that same nonpublic school?

"In the alternative, may such a student be computed in the average daily membership figure for the nonpublic school under R.C. 3321.12 for purposes of its securing state grants for auxiliary services under R.C. 3317.062?"

Since the School Foundation Act, which now appears in Chapter 3317, Revised Code, has undergone some changes since the date of your request, I shall begin with a brief history of the pertinent Sections.

The foundation program was originally enacted by the General Assembly on May 23, 1935, and became effective on July 12, 1935. 116 Ohio Laws, 585-598. As stated in the title of the Act, and in State, ex rel. Board v. Dietrich, 134 Ohio St. 474, at 476-477 (1938), the legislation was designed

"\* \* \* for the purpose of creating a public school fund in the state treasury and providing for the distribution thereof, with a view to providing a thorough and efficient system of common schools throughout the state, promoting economy and efficiency in the operation thereof, and providing for the equalization of educational opportunities; \* \* \*."

In addition to the basic financial requirements for the operation of the public schools, a number of auxiliary services were gradually made available to public school pupils during subsequent sessions of the General Assembly. See the history of Sections 3317.051 and 3317.06, Revised Code. In 1969, following a series of decisions in the Supreme Court of the United States which upheld the extension of such auxiliary services to the pupils of nonpublic schools (Everson v. Board of Education, 330 U. S. (1947); Board of Education v. Allen, 392 U.S. 236 (1968); cf. Walz v. Tax Commissioner, 397 U.S. 664 (1970), the General Assembly amended Section 3317.06 to make its benefits available to the pupils of nonpublic schools in Ohio. 133 Ohio Laws, 2297-2302. This amendment was upheld by the Supreme Court in P.O.A.U. v. Essex, 28 Ohio St. 2d 79 (1971).

As a part of Amended Substitute House Bill No. 475, which became effective on December 20, 1971, the General Assembly enacted a new Section 3317.062, Revised Code, providing for a system of educational grants from the foundation program, the purpose of which was

"\* \* \* to reimburse parents of nonpublic school children for a portion of the financial burden experienced by them in providing their children at reduced cost to the taxpayers, educational opportunities equivalent to those available to public school pupils in the district. \* \* \*"

At the same time the General Assembly transferred, from Section 3317.06 to the new Section 3317.062, the already existing provisions for extension of auxiliary services to nonpublic school pupils. The grants to the parents are carefully distinguished from the materials and services furnished to the pupils.

In an action brought against you in the United States District Court for the Southern District of Ohio, designed to test the constitutionality of this new Act, a three-judge court, on April 17, 1972, held the provision for direct grants to the parents of nonpublic school pupils to be unconstitutional. Volman v. Essex, 342 F. Supp. 399. The Court's opinion noted, however, that there was no question as to the constitutionality of the auxiliary services to such pupils. 342 F. Supp., at 401, 419-420.

As you know, on June 21, 1972, my office filed an appeal to the Supreme Court of the United States from that part of the judgment striking down the direct grants. Essex v. Wolman, No. 71-1664. That appeal is still pending, but Mr. Justice Stewart has refused to stay the effectiveness of the District Court's order.

Subsequent to the decision of the District Court, the General Assembly enacted Amended House Bill No. 1203, allowing a credit against the state income tax of a parent for amounts paid toward the cost of the elementary or secondary education of a dependent child. Section 3 of the Bill suspended, for the 1972-1973 school year, the direct grants to parents of nonpublic school pupils provided by Section 3317.062, but made it clear that the auxiliary services to such pupils provided by that Section are to continue during the 1972-1973 term in the amount of \$2,639,150. Section 3 reads as follows:

"Notwithstanding division (D) of section 3317.02 or section 3317.062 of the Revised Code or Section 11 of Am. Sub. H.B. 475 enacted by the 109th General Assembly, the amount expended for materials and services for nonpublic elementary and high schools pursuant to section 3317.062 of the Revised Code for the school year 1972-73 shall be \$2,639,150. During such year, no payments shall be made under division (D) of section 3317.02 of the Revised Code for educational grants to parents of pupils attending grades one through twelve in the nonpublic schools in this state."

This Bill, approved by the Governor on June 21, 1972, becomes effective on September 20, 1972.

In the light of this history, I approach your questions which are concerned with the calculation of payments from the foundation fund to the various school districts in the state. The basic controlling legislation is to be found in Sections 3317.02 and 3317.03, Revised Code. The former sets out the method of calculation; the latter provides that the school superintendents shall certify, for use in the calculation, the average daily class membership in each school district. Prior to December 20, 1971, when Amended Substitute House Bill No. 475, supra, became effective, the calculation of payments under Section 3317.02 was based primarily on classroom or teacher units. Compare 133 Ohio Laws, 2295-2297, with the present Section 3317.02; and see Drury's Ohio School Guide, Text, Section 4.34. As amended by that Bill, Section 3317.02 now makes the "average daily membership of the school district" the most important element in the calculation of the amounts to be paid from the foundation fund.

Section 3317.02 provides for four separate computations, (A), (B), (C) and (D). The calculation of the amounts due each eligible school district is made by an addition of the greater of either (A) or (B) plus the figures obtained by both (C) and (D). See also Sections 3317.15 and 3317.16, Revised Code. The importance of the "average daily membership of the school district" is readily apparent from the first two elements of the computation prescribed in subsection (A), which read as follows:

"(A) The amount derived by the following

calculation of a basic program calculation to be the sum of the following calculations:

"(1) Multiply the kindergarten average daily membership by three hundred dollars. The average daily membership shall not include any pupils counted in division (C) of this section.

"(2) Add the product obtained by multiplying the average daily membership in grades one to twelve, inclusive, including twenty-five per cent of the pupils residing in the district and attending a joint vocational school by six hundred dollars. The average daily membership used to make this calculation shall not include any pupils counted in division (C) of this section."

Subsections (B), (C) and (D) also rely heavily on the average daily membership.

Section 3317.03, Revised Code, provides for the certification of the average daily membership figures in the following language:

"The superintendent of schools in each county, city, and exempted village school district shall, for the schools under his supervision, certify to the state board of education on or before the fifteenth day of October in each year the total average daily membership in regular day classes for the first full school week in the month of October for kindergarten; grades one through six; grades seven through twelve in each school under his supervision; the average daily membership based upon full time equivalency in approved vocational units and in joint vocational school districts; the average daily membership of all deaf, blind, emotionally disturbed, neurologically handicapped, and crippled children in classes approved annually by the state board of education; and the average daily membership in approved educable mentally retarded units.

:The average daily membership in vocational units, in approved classes in licensed proprietary schools, and in joint vocational districts shall be based upon the number of full time equivalent students in attendance in such units and districts. The state board of education shall adopt rules and regulations defining full time equivalent students and for determining the average daily membership therefrom. The average daily membership of pupils enrolled in approved vocational classes in licensed proprietary schools may be counted, pursuant to section 3313.90 of the Revised Code, only where standards as to facilities and staffing are comparable, as determined by the superintendent of public in-

struction, to those established by the state board of education for public schools. No child shall be counted more than once in the average daily membership of a school district. The superintendent of each joint vocational school district shall similarly certify to the superintendent of public instruction the average daily membership for all classes in the joint vocational school, also indicating the school district of residence for each pupil.

\* \* \* \* \*

\* \* \* \* \* For the purpose of determining average daily membership, the membership figure of any school shall not include any pupils except those who are school residents of the school district in which the school is located and those who are attending the school in the capacity of tuition pupils pursuant to section 3327.04 of the Revised Code. Part-time pupils may be included on a prorata basis, as defined by the superintendent of public instruction, as regular day class students in average daily membership. \* \* \*"

It will be noted that this Section provides that no pupil shall be counted more than once in the average daily membership of a district. On the other hand, joint vocational school districts are treated somewhat differently from all others. The average daily membership of such districts is based upon "full time equivalency", or "the number of full time equivalent students in attendance." The State Board of Education is required to adopt regulations defining "full time equivalent students and for determining the average daily membership therefrom." Furthermore, the Section also provides that part-time pupils may be included in the average daily membership of a district on a prorata basis. There can be no doubt, therefore, that, although a pupil at a joint vocational school may not be counted more than once, his attendance time may be divided prorata according to the time spent in schools other than the joint vocational school.

Your first question asks how the calculation is to deal with a student who is in full-time attendance at a joint vocational school, but who attends a nonpublic school for extracurricular activities and will graduate from that nonpublic school. You then ask, in the alternative, whether such a student may be computed in the average daily membership figure of the nonpublic school for the purpose of securing state grants for auxiliary services.

I find it somewhat difficult to understand, in the light of the statutory language, how the situation which your questions suggest can arise. The first question assumes that a student who attends a nonpublic school for some purposes, may at the same time be in full-time attendance at a joint vocational school. Your second question seems to assume that the same student attends the nonpublic school for the purpose of securing auxiliary services. Participation by a nonpublic school pupil in the educational program of a joint vocational school is authorized by Section 3313.90, Revised Code. That Section provides that the State Board of Education shall adopt standards governing the vocational education programs of all school districts,

"\* \* \* which standards shall include criteria for the participation by nonpublic students in such programs without financial assessment, charge, or tuition to such student except such assessments, charges, or tuition paid by resident public school students in such programs. Such nonpublic school students shall be included in the average daily membership of the school district maintaining the vocational education program as a part-time student in proportion to the time spent in the vocational education program.

"\* \* \* \* \*  
(Emphasis added.)

It seems clear from this language and from the language of Section 3317.03, *supra*, that the legislature intended that a student who attends two different schools for different purposes should be included in the "average daily membership of the school district" as one unit based on the proportionate time he attends each separate school. It must be remembered that the legislature has just re-enacted its previous allowance of auxiliary services to nonpublic school pupils, and that this has been upheld, both by our Supreme Court in *P.O.A.U. v. Essex*, *supra*, and by the United States District Court in *Wolman v. Essex*, *supra*. Your letter states that the pupils in question attend the nonpublic school for "extracurricular" activities, without further specification. If these activities involve any of the auxiliary services provided by Section 3317.062, and this seems to be suggested by your second question, I think it would be clearly improper to consider such students in full-time attendance at the joint vocational school. The auxiliary services are to be taken into consideration in the calculation of the amounts to be paid out of the foundation fund.' Section 3317.02 (C) and (D), Revised Code. Section 3313.48, Revised Code, provides in part:

"\* \* \* The state board of education shall adopt standards for defining "school day" as used in sections 3313.481 \* \* \* and 3317.01 of the Revised Code. Except as otherwise provided in this section, each day for grades seven through twelve shall consist of not less than five clock hours with pupils in attendance, \* \* \*."  
(Emphasis added.)

A definition of "school day" for the purposes of Section 3317.01, which would exclude time spent with auxiliary services, would conflict with the intent of the legislature in its enactment of Chapter 3317. Such an interpretation of Section 3313.48 should, of course, be avoided.

In specific answer to your questions it is, therefore, my opinion, and you are so advised, that:

1. Where a student is in full time attendance at a joint vocational school, within the meaning of "full time attendance" as properly defined by the State Board of Education under Sections 3313.48, 3313.90 and 3317.03, Revised Code, he must be included in the average daily membership figure of the public school district

of his residence for purposes of state support under the school foundation program.

2. The definition of "full time attendance" must take into consideration auxiliary services provided to nonpublic school pupils under Section 3317.062, Revised Code.

3. Where a pupil attends classes at a joint vocational school under Section 3313.90, Revised Code, but receives auxiliary services through a nonpublic school under Section 3317.062, Revised Code, he should be included in the average daily membership figure for the nonpublic school under Section 3321.12, Revised Code, on a prorata basis.