

OPINION 65-10**Syllabus:**

1. The board of education of a city, exempted village, or local school district may not, as part of its curriculum, teach certain subjects to pupils who live in the district but who attend private or parochial schools for the majority of their classes.

2. Only those pupils who are enrolled in regular day classes may be included in calculating school membership under Section 3317.03, Revised Code, for purposes of receiving state foundation money.

3. Under Section 3313.77, Revised Code, a local school district may, upon request and the payment of a reasonable fee, permit parochial school students to use its classrooms for in-

structions in any branch of education, learning, or the arts, when such classrooms are not being used by the board for regular school purposes.

4. If, upon a grant of permission from a local school district, private or parochial school students use local district school facilities for purposes of holding classes to give instructions in any branch of education, learning, or the arts, such classes need not be open to the general public.

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To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio
By: William B. Saxbe, Attorney General, January 25, 1965

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

"1. May a local school district, as part of its curriculum, teach certain subjects to pupils who live in the district but who attend parochial schools for the majority of their classes? The local school district would be required to keep attendance records and grades for such students.

"2. Can these part-time students be included in calculating student population for purposes of receiving state foundation money?

"3. May a local school district permit parochial school students to use its classrooms when they are not being used by the board for regular school purposes?

"Section 3313.77, Ohio Revised Code, provides, in subparagraph A, that rooms, where not in actual use for school purposes, may be used for, '* * * giving instructions in any branch of education, learning or the arts.' Subparagraph B provides that these rooms may be used for, '* * * holding educational, religious, civic, social or recreational meetings * * *.' However, educational uses under subparagraph B must be open to the public, whereas there is no such requirement for giving instructions in any branch of education under subparagraph A. If otherwise permissible, would teaching parochial school students in public school classrooms fall under subparagraph A or subparagraph B?"

Section 3313.48, Revised Code, is pertinent to the first question presented in your request, and that section provides in part that:

"The board of education of each city, exempted village, and local school district shall provide for the free education of the youth of

school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof. Every day school so provided shall be open for instruction with pupils in attendance for not less than one hundred seventy-six days in each school year, less the number of days the school is closed as a result of public calamity, as provided in section 3317.01 of the Revised Code. Each day for grades seven through twelve shall consist of not less than five clock hours with pupils in attendance, except in such emergency situations, including lack of classroom space, as shall be approved by the state board of education. * * *

The purpose of this section of the Revised Code is to provide for the free education of the youth of Ohio, and to provide certain minimum standards for the school year and school day in which such educational program is offered. The effect of this section of the Code is that the board of education of each city, exempted village, and local school district is required to provide a free educational program consisting of five clock hours of one hundred seventy-six days in each school year, for the youth of school age residing within its jurisdiction.

In Opinion No. 517, Opinions of the Attorney General for 1963, which held that city, local, and exempted village school district boards of education have no authority to furnish transportation to private and parochial school students either voluntarily or by contract, I pointed out that:

"The extent of the powers and duties of boards of education has been the subject of a number of court cases in Ohio. Without exception the cases hold that the authority of boards of education is derived solely from statute and is limited to those powers expressly given to them and to powers necessarily implied from those powers expressly granted. Board of Education v. Best, 52 Ohio St., 469; State, ex rel Clarke v. Cook 103 Ohio St., 465; Schwing v. McClure, 120 Ohio St., 335; Verberg v. Board of Education, 135 Ohio St., 246; Board of Education v. Board of Education, 167 Ohio St., 543; Board of Education v. State Board, 116 Ohio App. 515."

In view of Section 3313.48, *supra*, and the case law just cited, it is apparent that a board of education of a city, exempted village, or local district is required to provide a free education for resident high school pupils in high schools open for instruction for five block hours of one hundred seventy-six school days in each school year, pursuant to the authority vested in it by Section 3313.48, Revised Code, *supra*; but in the absence of express provision or necessary implication, such board has no authority to provide an educational program that is inconsistent with these standards.

In several instances the General Assembly has seen fit to make provision for a variation in the educational program.

Section 3313.52, Revised Code, gives boards of education the authority to establish evening schools, which those persons more than twenty-one years of age may be permitted to attend upon payment of tuition; Section 3313.53, Revised Code, provides that boards of education may establish manual training, industrial arts, domestic science., and commercial departments, and agricultural, industrial, vocational and trade schools, and kindergartens; Section 3313.54, Revised Code, provides that upon proper application a board of a school district may establish and conduct an Americanization school; Section 3313.55, Revised Code, provides for schools for tubercular children to be established by boards of education; Section 3313.56, Revised Code, provides that the board of education of any city, exempted village, or local school district may establish and maintain part-time schools or classes for the further education of children who are employed on age and schooling certificates; and Section 3317.04, Revised Code, provides that the state board of education may establish separate standards and regulations for the education of children of migrant workers. Nowhere in the Revised Code is there express provision made for a part-time educational program for those who attend private or parochial schools for the majority of their classes. Therefore, if a board of education has the power to establish such a program, such power must be implied from the powers which it has been expressly granted.

It is generally accepted in this State that an exception to a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions. Barnfit v. Winans, 3 Ohio, 135; Lima v. Cemetery Association, 42 Ohio St., 128; Powell v. Koehler, 52 Ohio St., 103; Richards v. The Market Exchange Bank Co., 81 Ohio St., 348; Ransom v. New York C. and St. L. Ry. Co. 93 Ohio St., 223; Kroff v. Amrhein, 94 Ohio St., 282; McVeigh v. Fetterman, 95 Ohio St., 292; DuBois v. Coen, 100 Ohio St., 17; Swetland v. Miles, 101 Ohio St., 501. Therefore, since the General Assembly has prescribed the minimum number of school days and class hours to be contained in the high school educational programs offered by the cities, exempted villages, and local school districts of this State, and since express exceptions have been made to the application of these minimum standards, all other exceptions should be deemed to be excluded. It is therefore apparent that authority to conduct a part-time educational program for high school pupils of the district, who attend private or parochial schools for the majority of their classes, cannot be implied from those powers expressly granted.

It is my opinion that the plan presented in your request, by which parochial school students would be allowed to attend a public school on a part-time basis in order to take certain subjects which are a part of the regular curriculum of such public school, is in essence a plan to establish a part-time educational program for the benefit of such students. Even though this plan does not involve establishing separate classes for such students, it does require that an exception be made to the prescribed academic program which local boards of education are authorized to conduct, and for such an exception there is neither express nor implied authority.

The second question which you have presented for my determination is whether or not such part-time students may be

included in calculating student population for purposes of receiving state foundation money. Section 3317.03, Revised Code, sets forth the procedure to be followed in the certification of average daily membership figures. This section provides in its parts here pertinent that:

"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 twenty-fifth day of October in each year the total average daily membership in regular day classes for the first two full school weeks of said month of October for kindergarten, for grades one through eight and for grades nine through twelve in each school under his supervision. In each school there shall be maintained a record of school membership which record shall accurately show, for each day the school is in session, the actual membership enrolled in regular day classes. * * * For each school week, the aggregate days of membership for any school shall be determined by adding the total number of days of attendance for the days in session of all pupils lawfully in membership to the total number of days of absence for such pupils. The average daily membership figure shall then be determined by dividing the figure representing the aggregate days of membership by the number of days in session. For the purpose of this section, "number of days in session" is the total number of days the school was actually open for instruction."

The above quoted section of the Revised Code states that those "pupils lawfully in membership" are to be counted in computing the average daily membership figures. Since I concluded in my answer to your first question that a board of education is without authority to establish such a program, such part-time students are not "lawfully in membership." Therefore, I am of further opinion that they cannot be included in calculating student population for purposes of receiving state foundation money.

I might also add that since the legislature spoke of daily membership and days of attendance in Section 3317.03, Revised Code, this indicates to me that it contemplated the inclusion of only those students who attend the respective schools on a full-day or full-time basis.

The answer to your third question is contained in the provisions of Section 3313.77, Revised Code. That section provides in part:

"The board of education of any city, exempted village, or local school district shall, upon request and the payment of a reasonable fee subject to such regulation as is adopted by such board, permit the use of any school house and rooms therein and the grounds and other property under its control, when not

in actual use for school purposes, for any of the following purposes:

"(A) Giving instructions in any branch of education, learning, or the arts;

"(B) Holding educational, religious, civic, social, or recreational meetings and entertainments, and for such other purposes as promote the welfare of the community; provided such meetings and entertainments shall be non-exclusive and open to the general public;"

This section explicitly states that a board of education of a city, exempted village, or local school district may, upon request and the payment of a reasonable fee, permit the classrooms and other facilities of a school within its jurisdiction to be used for the purposes stated therein. Subparagraph (A) states simply that one of the purposes for which such facilities may be used is for giving instruction in any branch of education, learning, or the arts. Subparagraph (B) includes the holding of educational, religious, civic, social, or recreational meetings and entertainments among the purposes for which a board of education may permit the facilities of a school within its jurisdiction to be used. However, the latter subparagraph contains a proviso stating that "such meetings and entertainments shall be nonexclusive and open to the general public."

It is a generally accepted rule of statutory construction that unless a contrary intention clearly appears, a proviso is to be construed with reference to the paragraph immediately preceding it. Zumstein v. Mullen, 67 Ohio St., 382; Buckman v. State, 81 Ohio St., 171; State ex rel Shively v. Lewis, 15 N. P. (N.S.), 582. Accordingly, the proviso contained in subparagraph (B) of Section 3313.77, Revised Code, pertains solely to that subdivision of which it is a part, and does not operate as a restriction upon the provision of subparagraph (A). Therefore, the only question to be determined is whether the use to which the classrooms are to be put is properly classified under subparagraph (A), as for instruction in a branch of education, learning, or the arts, or whether it is properly included under subparagraph (B), as for those meetings to which reference is made therein.

If, as I presume from the first question contained in your request, the school facilities are to be used for the purpose of giving instruction in certain subjects which are normally a part of a high school curriculum, it is my opinion that subparagraph (A) of Section 3313.77, Revised Code, is controlling, and that such classes are not subject to the proviso contained in subparagraph (B), and need not be open to the general public.

Therefore, it is my opinion and you are hereby advised that:

1. The board of education of a city, exempted village, or local school district may not, as part of its curriculum, teach certain subjects to pupils who live in the district but who attend private or parochial schools for the majority of their classes.

2. Only those pupils who are enrolled in regular day classes may be included in calculating school membership under Section 3317.03, Revised Code, for purposes of receiving state foundation money.

3. Under Section 3313.77, Revised Code, a local school district may, upon request and the payment of a reasonable fee, permit parochial school students to use its classrooms for instructions in any branch of education, learning, or the arts, when such classrooms are not being used by the board for regular school purposes.

4. If, upon a grant of permission from a local school district, private or parochial school students use local district school facilities for purposes of holding classes to give instructions in any branch of education, learning, or the arts, such classes need not be open to the general public.