

OPINION NO. 76-037**Syllabus:**

1. A board of education may pursuant to R.C. 3313.64, adopt a policy allowing persons over twenty-one years of age to attend regular high school classes upon the payment of tuition at a rate fixed by the board of education.

2. A board of education which has, pursuant to R.C. 3313.64, admitted persons over twenty-one years of age to regular high school classes, may not count such students in computing its average daily membership under R.C. 3317.03 for purposes of state foundation payments under R.C. Chapter 3317.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, May 11, 1976

Your request for my opinion poses the following questions:

1. Does Ohio Law permit a board of education to adopt a policy allowing persons over 21 years of age to attend regular high school classes free of charge, or in the alternative at some fixed tuition rate?
2. If students over the age of 21 years may be permitted to attend regular high school classes, may such students be counted in the minimum number of students required for funding under the school foundation program?
3. If such students are permitted to attend high school classes, is the board of education required to establish a tuition rate to cover the cost of their education?

Boards of education are by statute given general control over the operation of the schools which are a part of their districts. See R.C. 3313.20 and R.C. 3313.47.

Further, it has been held that these statutory provisions vest broad authority in boards of education and that courts will not interfere with the exercise of that authority in the absence of a showing of an abuse of discretion by the board. Greco v. Roper, 145 Ohio St. 243 (1945); State, ex rel. Idle v. Chamberlain, 34 Ohio Op. 2d 262 (C.P. 1961).

However, with respect to the admission of pupils, the General Assembly has required boards of education to provide free education to "school residents" of "school age," while authorizing the admission of other persons "upon the payment of tuition within the limitation of law." See R.C. 3313.48 and 3313.64, which may be set out in pertinent part as follows:

R.C. 3313.48

"The board of education of each city, exempted village, local, and joint vocational 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.
. . . ."

R.C. 3313.64

"The schools of each city, exempted village, or local school district shall be free to all school residents between five and twenty-one years of age, but the time in the school year at which beginners may enter elementary school shall be subject to section 3321.01 of the Revised Code, and the rules and regulations of the board of education. School residents shall be all youth who are children or wards of actual

residents of the school district. . . ."

". . . .

"The board of education of a city, exempted village, or local school district may admit other persons to the public schools of its respective district upon the payment of tuition within the limitation of law."

"A board of education, after approving their admission, may waive the payment of tuition for the attendance of students who are residents or domiciliaries of a foreign nation, who seek admission as foreign exchange students, and who are temporarily residing in the school district."

(Emphasis added.)

It follows that these statutes contemplate the admission of pupils who are ineligible for free schooling, either because of non-residency or because they are not of "school age". As to whether a school board may admit such pupils free of charge, it should be noted that R.C. 3313.64 provides that in the case of non-resident pupils tuition, as computed pursuant to R.C. 3317.08, be paid by the district of residence. With respect to pupils who are beyond school age, the board of education is empowered to admit such persons "upon the payment of tuition within the limitation of law."

However, while the General Assembly specifically provided for the waiver of tuition in the case of certain foreign students, no such authority is granted to waive the tuition in the case of students who are beyond school age. On this point I would refer you to 1972 Op. Att'y Gen. No. 72-099, in which I approved and followed an earlier opinion and held that a board of education was neither obligated to nor permitted to pay the tuition of a child under school age, who resides in the district and attends a kindergarten program in another district. In the earlier opinion, 1969 Op. Att'y Gen. No. 69-111, my predecessor reasoned that R.C. 3313.64 implicitly required a child under the mandatory school age to pay tuition. The same rationale is applicable to students, who are above school age and, therefore, not entitled to free education.

Therefore, in answer to your first question, a board of education may adopt a policy allowing persons over twenty-one years of age to attend regular high school classes, but only upon the payment of tuition.

Your second question is whether such students, if admitted to regular high school classes, may be counted in the minimum number of students required for funding under the school foundation program. R.C. 3317.022 provides for the computation and distribution of state basic aid to each school district in accordance with a formula set out in that section. Among other factors used in the formula is the average daily membership, which is determined pursuant to R.C. 3317.03. That section reads in pertinent part:

"(C) 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 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. . . .

There shall not be included in the membership of any school any pupil who has graduated from the twelfth grade of a public high school, any pupil who is not a resident of the state, or any pupil who has attained the age of twenty-one years except persons suffering from tuberculosis and receiving treatment in any approved state, county, district, or municipal tuberculosis hospital who have not graduated from the twelfth grade of a public high school and veterans of the armed services whose attendance was interrupted before completing the recognized twelve year course of the public schools by reason of induction or enlistment in the armed forces and who apply for re-enrollment in the public school system of their residence not later than four years after termination of war or their honorable discharge."

(Emphasis added.)

Therefore, while a board of education may admit to its schools students who are over twenty-one years of age, it may not count such persons in its average daily membership for purposes of state foundation payments.

Your final question is whether the board of education is required to establish a tuition rate to cover the cost of the education of students who are over twenty-one years of age. I find no statute which fixes the amount of tuition which must be charged such students. However, as discussed in my answer to your first question, the board may not waive tuition for these students. Therefore, the board of education must determine a rate of tuition to be charged. In doing so the board may take notice of other sections in which the General Assembly has set out guidelines for the computation of tuition.

Specifically, R.C. 3317.08 provides for the payment of tuition by the district of residence to another school district which provides education to non-resident pupils of school age. The amount of tuition is determined according to a formula which yields what may be characterized as the net operating cost per pupil.

Similarly R.C. 3313.641 authorizes the admission of adults to evening or day schools for adults and out of school youth, upon the payment of such tuition as the board prescribes. R.C. 3313.644 authorizes a board of education to enter a contract with a state or federal agency for the education of adults, provided that if the board permits the attendance of non-residents, the contract must provide for reimbursement to the district of the entire cost of educating such non-residents.

It appears then that the determination of tuition for adults attending regular classes is a matter within the discretion of the board of education. However, while the General Assembly has

not prescribed a formula to be used in computing the amount to be charged, the nature of the requirement of tuition is such that the board of education should establish a rate adequate to meet the actual cost of providing such education. It should be noted, though, that since this is a matter left by the General Assembly to the discretion of the board of education, the board's determination of a tuition charge would not be subject to challenge in the absence of a showing of an abuse of discretion. State, ex rel. Idle v. Chamberlain, supra.

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

1. A board of education may, pursuant to R.C. 3313.64, adopt a policy allowing persons over twenty-one years of age to attend regular high school classes upon the payment of tuition at a rate fixed by the board of education.

2. A board of education which has, pursuant to R.C. 3313.64, admitted persons over twenty-one years of age to regular high school classes, may not count such students in computing its average daily membership under R.C. 3317.03 for purposes of state foundation payments under R.C. Chapter 3317.