

OPINION NO. 74-066

Syllabus:

1. R.C. 3317.03 provides a uniform method of determining the average daily membership for any school, and such membership must be calculated on the basis of enrolled persons. The average daily membership may be determined by dividing the figure representing the aggregate days of membership by the number of days in session. The aggregate days of membership 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 authorized absence for such period. Those persons who are absent for unauthorized reasons are not properly included among enrolled persons and are not, therefore, to be included in the calculation of average daily membership.

2. The superintendent of schools of the district in which a child resides may excuse such child from attendance for any of the reasons set forth in R.C. 3321.04. Moreover, pursuant to R.C. 3321.04, the board of education may in its discretion promulgate rules and regulations prescribing the circumstances under which a child's absence will be excused.

3. "Lawful membership" includes all enrolled students 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 R.C. 3327.04. Such membership also includes part-time students on a pro-rata basis.

4. Although a membership record must be kept pursuant to R.C. 3317.021, formal enrollment of students is not a prerequisite for state foundation payments.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio

By: William J. Brown, Attorney General, August 13, 1974

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

"The recent strike situation in the Vinton

County Local School District has raised some serious questions about the often-amended school foundation program. Distributions under this program, which are subject to my approval, must be calculated in part from the "average daily membership" of students in each school system. Section 3317.03 of the Revised Code seems to offer at least two definitions of that term, one of which refers only to "attendance", and the other of which refers to attendance plus absences. Furthermore, according to subsection (c) thereof, "aggregate days of membership" must include "all pupils lawfully in membership," but there is little indication of what must be counted as lawful membership. Presumably this derives some meaning from the definition of "enrollment", which was recently added to subsection (c) by Am. H.B. 274, effective November 21 of this year. With these thoughts in mind, I respectfully request your opinion on the following questions:

"1. Is there a uniform definition of "average daily membership" for all types of schools?

"2. Does "average daily membership" include students who are absent for unauthorized reasons?

"3. What constitutes an 'authorized reason', for a pupil's absence?

"4. When is a pupil considered to be 'lawfully in membership' for purposes of counting his attendance among the 'aggregate days of membership'?

"5. What effect, if any, does formal enrollment have upon eligibility for school foundation payments?"

The statute to which you refer is R.C. 3317.03, which provides for the certification of average daily membership figures. Because of the unusual length of the statute, I will merely paraphrase the relevant provisions.

R.C. 3317.03(A) requires that the superintendent of schools certify to the state board of education, for the schools under his supervision, the average daily membership for kindergarten and all regular day classes including grades one through twelve; the average daily membership of all the handicapped in approved classes; and the average daily membership in approved mentally retarded units. Furthermore, subsection (A) requires that the average daily membership be computed on or before the fifteenth day of October in each year.

R.C. 3317.03(B) provides that in addition to the average daily membership calculated in subsection (A), a superintendent must estimate the number of students in the various schools who are not actually enrolled in the first full week of October but whose enrollment is anticipated in the next succeeding trimester, quarter, or pentamester. Subsection (B) further provides that the total average daily membership figures shall be calculated on the basis of students actually enrolled during the first full

week of October plus students who were not actually enrolled during the first full week of October but who are enrolled in the third full week of the subsequent trimester, quarter or pentameter. A similar approach is taken with respect to the average daily membership for districts operating schools in accordance with R.C. 3313.485.

Your first and second questions ask whether or not there is a uniform definition of average daily membership and whether or not membership includes students who are absent for unauthorized reasons. R.C. 3317.03(C), which provides a method of calculating average daily membership, reads in part as follows:

"* * * 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. For purposes of state funding, 'enrolled' persons are only those pupils who are attending school, those who have attended school during the current school year and are absent for authorized reasons, and those handicapped pupils currently receiving home instruction."

Since the foregoing provision specifically applies to "any" school, it would appear that the statute contemplates a uniform method of calculating the average daily membership.

Determining the basis upon which such average daily membership is to be calculated, however, is less clear. The overriding reference throughout R.C. 3317.03 is to "enrolled" students. Although it fails to specifically so state, the unmistakable thrust of the statute is that average daily membership is to be calculated on the basis of enrolled students. For instance, R.C. 3317.03(B) requires the superintendent to certify the average daily membership of students "who were not actually enrolled during the first full week of October but who are enrolled in the third full week of the subsequent trimester * * *." R.C. 3317.03(B) also speaks of the average daily membership of students "actually enrolled during the first full week of October." R.C. 3317.03(A) refers to the "average daily membership of pupils enrolled in approved vocational classes in licensed proprietary schools * * *."

Moreover, the formula set forth for the calculation of average daily membership calls for the number of students in attendance plus those in absence, the sum of which necessarily represents the number of pupils enrolled in the school. The provisions of R.C. 3317.03 seem to indicate, therefore, that the average daily membership is to be calculated on the basis of pupils who are enrolled in the particular school or school district.

This conclusion is the more reasonable and practical, and therefore should be favored. See R.C. 1.47(C) and (D). R.C.

3317.02 makes the average daily membership of a school district the most important element in the calculation of the amounts to be paid from the foundation fund. The number of students in attendance on a particular day or days has, at most, a peripheral impact upon the overall operating expenses of a school district. The decisive figure in the determination of school expenses must be the number of students enrolled. I conclude, therefore, that if the statute is to be construed logically and effectively, the basis of the calculation must be the number of students enrolled.

The statute lacks clarity with respect to the provisions calling for the inclusion of absences in the calculation of average daily membership. The provision setting forth the method by which average daily membership shall be determined merely requires the addition of the total number of days in attendance to the total number of days of absence. The provision immediately thereafter however, which was added by Am. H.B. 274, defines an enrolled person as follows:

"For purposes of state funding, 'enrolled' persons are only those pupils who are attending school, those who have attended school during the current school year and are absent for authorized reasons, and those handicapped pupils currently receiving home instruction."

Since it has already been determined that average daily membership is calculated on the basis of enrolled persons, it is, I feel, necessary to incorporate the definition of enrolled persons in determining such membership. I must conclude that for purposes of state funding, persons absent for unauthorized reasons are not properly included among enrolled persons and, as such, are not to be included in the calculation of average daily membership.

In answer to your first and second questions, therefore, R.C. 3317.03 provides a uniform method of determining the average daily membership for any school and that such membership must be calculated on the basis of enrolled persons. The average daily membership may be determined by dividing the figure representing the aggregate days of membership by the number of days in session. The aggregate days of membership 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 authorized reasons for such period. Those persons who are absent for unauthorized reasons are not properly included among enrolled persons on that day and are not, therefore, to be included in the calculation of average daily membership.

With regard to your third question, R.C. 3321.04 specifies the conditions under which a pupil's absence will be excused. It provides as follows:

"Excuses from future attendance at or past absence from school may be granted for the causes, by the authorities, and under the following conditions:

"(A) The superintendent of schools of the district in which the child resides may excuse him from attendance for any part of the remainder of the current

school year upon satisfactory showing of either of the following facts:

"(1) That his bodily or mental condition does not permit his attendance at school during such period;

"(2) That he is being instructed at home by a person qualified to teach the branches in which instruction is required, and such additional branches, as the advancement and needs of the child may, in the opinion of such superintendent, require. In each such case the issuing superintendent shall file in his office, with a copy of the excuse, papers showing how the inability of the child to attend school or the qualifications of the person instructing the child at home were determined. All such excuses shall become void and subject to recall upon the removal of the disability of the child or the cessation of proper home instruction; and thereupon the child or his parents, guardians, or other persons having him in charge may be proceeded against after due notice whether such excuse be recalled or not.

"(B) The state board of education may adopt rules and regulations authorizing the superintendent of schools of the district in which the child resides to excuse a child over fourteen years of age from attendance for a future limited period for the purpose of performing necessary work directly and exclusively for his parents or legal guardians.

"All excuses provided for in divisions (A) and (B) of this section shall be in writing and shall show the reason for excusing the child. A copy thereof shall be sent to the person in charge of the child.

"(C) The board of education of the city, exempted village, or county school district in which a public school is located or the governing authorities of a private or parochial school may in the rules and regulations governing the discipline in such schools, prescribe the authority by which and the manner in which any child may be excused for absence from such school for good and sufficient reasons.

"The state board of education may by rules and regulations prescribe conditions governing the issuance of excuses which shall be binding upon the authorities empowered to issue them."
(Emphasis added.)

It is therefore, impossible to enumerate the various reasons for which an excused absence will be granted. Pursuant to the foregoing statute, the superintendent of schools of the district in which the child resides may excuse him from attendance for any of the reasons so specified. In the case of day-to-day absences, however, the authority is vested in the board of education of the district in which a public school is located to determine for

which good and sufficient reasons an absence will be excused. Moreover, such a determination will not be questioned by the courts unless there is fraud, abuse of discretion, arbitrariness or unreasonableness in the decision of the board of education. The second and third syllabi of Brannon v. Board of Education, 99 Ohio St. 369 (1919), read as follows:

"2. A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question it is authorized by law to determine.

"3. A court will not restrain a board of education from carrying into effect its determination of any question within its discretion, except for an abuse of discretion or for fraud or collusion on the part of such board in the exercise of its statutory authority."

See also Opinion No. 71-046, Opinions of the Attorney General for 1971, and Opinion No. 73-114, Opinions of the Attorney General for 1973. Thus, the board of education possesses latitude in determining under what circumstances a student's absence will be excused, pursuant to R.C. 3321.04.

In conclusion, therefore, the superintendent of schools of the district in which the child resides may excuse him from attendance for any of the reasons set forth in R.C. 3321.04. Moreover, the board of education may in its discretion, promulgate rules and regulations prescribing the circumstances under which a child's absence will be excused.

Your fourth question asks when a pupil is considered to be lawfully in membership for purposes of counting his attendance among the aggregate days of membership.

R.C. 3317.03, itself, includes no indication of what is meant by the term. Moreover, there is little authority which has considered this question. However, my predecessor, in Opinion No. 65-10, Opinions of the Attorney General for 1965, in deciding whether or not a local school district may teach certain subjects to pupils who live in the district but who attend parochial schools for the majority of their classes, and whether these part-time students may be included in calculating student population for purposes of receiving state foundation money, stated as follows:

"The above quoted section [3317.03] 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."

The language cited seems to indicate that a pupil's inclusion in membership is lawful only if it is authorized or sanctioned by the statutory provisions.

In Ohio Automatic Sprinkler Co. v. Fender, 108 Ohio St. 149 (1923) the Supreme Court dealt with the problem of interpreting the term "lawful requirement" as used in the Ohio Constitution and Workmen's Compensation Law. The Court, in noting that Webster's International Dictionary defines "lawful" as that which is constituted or authorized by law, stated at 171 and 172 as follows:

"The court holds that any 'lawful requirement,' as the term is used in Section 35, Article II of the Constitution, and Section 29 of the Workmen's Compensation Law (Section 1465-76, General Code, 103 O.L., 84) means any requirement imposed by law; including statutes and ordinances, lawful orders of duly authorized officers, specific and definite requirements constituted by law, and laws embodying in general terms, duties, and obligations of care and caution, and further includes requirements relating to safety of the place of employment and to the furnishing and use of devices, safeguards, methods, and processes designed for the reasonable protection of the life, health, safety, and welfare of employes."

Although the foregoing language does not specifically apply to the problem at hand, it can be fairly inferred from the Court's treatment of "lawful" that a pupil is lawfully in membership if the inclusion of that pupil in the membership is warranted or authorized by law.

For the various calculations of average daily membership, the determination of what pupils are to be included in the membership can be found in R.C. Sections 3317.02 and 3317.03. In addition to being enrolled, the students must satisfy the standards set forth in R.C. 3317.03(C), which provides as follows:

"(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. 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. The record of membership for each school shall be maintained in such manner that no pupil shall be counted as in membership prior to the actual date of his entry in the school and also in such manner that where for any cause a pupil permanently withdraws from the school he shall not be counted as in membership from and after the date of such withdrawal. 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. If any such veteran elects to enroll in special courses organized for veterans for whom tuition is paid under the provisions of federal laws, or otherwise, he shall not be included in such membership. * * * For purposes of state funding, "enrolled" persons are only those pupils who are attending school, those who have attended school during the current school year and are absent for authorized reasons, and those handicapped pupils currently receiving home instruction."

In conclusion, therefore, "lawful membership" includes all enrolled students 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 R.C. 3327.04. Such membership also includes part-time students on a pro-rata basis.

Your final question asks whether formal enrollment has any effect upon eligibility for state foundation payments. I am unable to find any language in R.C. Chapter 3317. which requires "formal" enrollment as a prerequisite for foundation payments. To the contrary, the General Assembly in R.C. 3317.03(C) has defined enrolled pupils for purposes of state funding to be those "who are attending school, those who have attended school during the current school year and are absent for authorized reasons, and those handicapped pupils currently receiving home instruction." The statute merely defines who is enrolled rather than prescribing any procedure for formal enrollment. It should be noted, however, that R.C. 3317.021 requires that a membership record be kept by grades in each school district and, if the provisions of this Section are not followed, the state board of education may withhold any money due any school district pursuant to R.C. Sections 3317.02 and 3317.06. Thus, although a membership record must be kept pursuant to R.C. 3317.021, formal enrollment is not a prerequisite for state foundation payments.

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

1. R.C. 3317.03 provides a uniform method of determining the average daily membership for any school, and such membership must be calculated on the basis of enrolled persons. The average daily membership may be determined by dividing the figure representing the aggregate days of membership by the number of days in session. The aggregate days of membership 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 authorized absence for such period. Those persons who are absent for unauthorized reasons are not properly included among enrolled persons and are not, therefore, to be included in the calculation of average daily membership.

2. The superintendent of schools of the district in which a child resides may excuse such child from attendance for any of the reasons set forth in R.C. 3321.04. Moreover, pursuant to R.C. 3321.04, the board of education may in its discretion promulgate rules and regulations prescribing the circumstances under which a child's absence will be excused.

3. "Lawful membership" includes all enrolled students 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 R.C. 3327.04. Such membership also includes part-time students on a pro-rata basis.

4. Although a membership record must be kept pursuant to R.C. 3317.021, formal enrollment of students is not a prerequisite for state foundation payments.