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1. ATTENDANCE OF PUPILS IN PUBLIC SCHOOLS—DUTY OF OFFICIAL WHO MAKES REPORTS TO SEPARATELY REPORT AVERAGE DAILY ATTENDANCE OF ALL PUPILS ATTENDING SCHOOL IN DISTRICT—NON-RESIDENTS OF DISTRICT—ATTENDANCE NOT PROVIDED FOR BY CONTRACT BETWEEN BOARDS OF EDUCATION OF DISTRICTS OR PUPILS NOT OTHERWISE LAWFULLY IN ATTENDANCE.
2. DIRECTOR OF EDUCATION—SCHOOL FUNDS—TO COMPUTE AVERAGE DAILY ATTENDANCE SHOULD INCLUDE ONLY ATTENDANCE OF RESIDENT PUPILS AND NON-RESIDENT PUPILS WHERE VALID TUITION AGREEMENTS EXIST WITH DISTRICT OF RESIDENCE, PARENTS, GUARDIANS OR OTHER PERSONS IN LOCO PARENTIS.
3. WHERE PUPIL ATTENDS SCHOOL OTHER THAN THAT OF RESIDENCE AND NO VALID TUITION AGREEMENT HAS BEEN ENTERED INTO, DIRECTOR OF EDUCATION, TO COMPUTE AVERAGE ATTENDANCE, MAY NOT CONSIDER ATTENDANCE AT SCHOOL IN DISTRICT OTHER THAN THAT OF HIS RESIDENCE.

SYLLABUS:

1. It is the duty of the official who makes reports of daily attendance of pupils in the public schools to report separately the average daily attendance of any and all pupils attending school in his district who are non-residents of the district and whose attendance in the said district had not been previously pro-

vided for by contract between the boards of education of the districts affected, or who are not otherwise lawfully in attendance.

2. The Director of Education, in making allotment and distribution of school funds with respect to a school at which there are in attendance pupils who are not residents of the district, as well as those who are residents of such district, should in computing the average daily attendance include only the attendance of resident pupils and of those who are non-resident pupils concerning whom there exist valid tuition agreements either with the district of residence or their parents, guardians or other persons in loco parentis.

3. Where a pupil is in attendance at a school other than that of his residence but for whom no valid tuition agreement has been entered into between the board of education of the district of his attendance and that of the district of his residence or other person legally liable for his support, the Director of Education may not consider his attendance at the school in the district other than that of his residence in computing his average attendance.

Columbus, Ohio, August 12, 1943.

Hon. Frederick R. Parker, Prosecuting Attorney,
Bryan, Ohio.

Dear Sir:

You have submitted for my opinion a letter addressed to you by the Superintendent of Schools of Williams County. The superintendent's letter is as follows:

"Approximately twelve pupils who are legal residents of the Edgerton-St. Joseph Village Board of Education attended the Farmer Rural School of Defiance County during the school year 1941-1942. The Edgerton-St. Joseph Village Board of Education did not contract with the Farmer Rural School for these pupils. At the close of the 1941-42 school term, the Edgerton-St. Joseph Village Board of Education requested the County Superintendent of Schools to make a report of this illegal attendance to the State Department of Education, Columbus, Ohio.

Section 7734, General Code, State of Ohio, reads: '* * * but in case of such unauthorized attendance compensation for the attendance of such pupils shall be made to the district in which pupils reside.'

R. L. R., Director of Finance, stated verbally that the State Department of Education did not have the legal right to pay Edgerton-St. Joseph Village Board of Education compensation for the attendance of their pupils to Farmer Rural School District since the Farmer Rural School District did not make a

separate report on the unauthorized attendance of pupils the Farmers Rural School District was 'bootlegging' from the Edgerton-St. Joseph Village School District.

The Board of Education, Edgerton-St. Joseph Village School District are requesting you as County Prosecutor to give their Board of Education legal opinion with regard to their right to collect compensation for the unauthorized attendance of their pupils to the Farmer Rural School District."

In what is popularly known as the "School Foundation Law" (Section 7595, et seq., General Code), enacted originally in 1935, provision is made for the creation of a state public school fund in the state treasury for the support and maintenance of the state public school system and for the equalization of educational advantages throughout the state, to be administered by the Director of Education, with the approval of the State Controlling Board and subject to the restrictions of law.

In Sections 7595-1, 7595-1c and 7595-1d, General Code, provision is made for the distribution by the Director of Education, with the approval of the Controlling Board, to the several school districts of the state of fixed specific amounts for each school pupil in average daily attendance in such schools, and for the allocation and payment of tuition for pupils who attend school pursuant to law outside the district of their legal residence under circumstances whereby the charges for such tuition are a liability of the district of residence of the pupils.

The determination of the average daily attendance of pupils, for the purpose of enabling the Director of Education to make proper allotments of state public school funds as provided by law to the several school districts of the state, is provided for by means of reports to be made to the said Director of Education in accordance with Sections 7787, 7788 and 7789, General Code.

Speaking generally, the public schools are open only to those children whose parents or guardians or other persons having them in charge are residents of the school district. 24 Ruling Case Law, 623. There are many situations, however, where by express provision of statute non-resident pupils are accorded the status of public school attendants. Instances of such a condition that might be mentioned are where high school education is not available in a district to resident pupils who qualify and are eligible therefor and arrangements are made by the superintendent in charge for them to pursue such education in other districts, or where for other reasons pupils are assigned to a district or to districts other than their home district. A recital of the many and varied situations

where, by statute, pupils are permitted or directed to attend school outside the district of residence, either upon the payment of tuition or otherwise, would serve no particular purpose here as that subject was discussed in Opinion No. 4881, Opinions of the Attorney General for the year 1942, page 154.

It is noted in Ohio Jurisprudence, Volume 36, page 301, that :

“Under the Ohio statute, the schools of each district are open to all youth between the ages of six and twenty-one who are children, wards or apprentices of actual residents of the district and to all youth of school age in the district living apart from their parents or guardians and supporting themselves by their own labor. * * * The board of education may admit to its schools persons who are non-residents upon such terms and the payment of such tuition as it may, within the terms of the law prescribe.”

Where such situations exist, the actual attendance of the pupils must be taken into consideration in accordance with the applicable statute in determining the “average daily attendance”, so as to fix the amount allocable to the districts in question from the state public school fund.

Continuously, with slight amendments, since 1873 (70 O. L. 214), there has been in force a statutory provision authorizing a board of education of one district to contract with another board for the admission of pupils into the schools of the other district, the expense thereof to be paid out of the school funds of the sending district. Upon the codification of 1910, this statutory provision became Section 7734, General Code. In 1941, Section 7734, General Code, was amended to read as follows:

“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.”

The pertinent part of Section 7595-1c of the General Code referred to in the above quotation reads :

"For the purpose of distributing the state public school fund, the minimum operating cost of a foundation program is hereby defined to be: * * *

(e) For districts with pupils in approved attendance in the schools of other districts, an amount equal to the total of the approved budget of tuition cost which shall be in addition to the amounts specified in paragraphs (a) and (b) or (c) of this section, provided, however, that if the total tax rate for current operating expenses of the district of residence is less than that of the district of attendance, there shall be deducted from the budget of tuition cost of the district of residence an amount equal to the computed yield of a tax on the general tax list and duplicate of the district of residence at a rate equal to fifty per centum of the difference in such total tax rates of the respective districts, and that if the tax rate for current operating expenses of the district of residence is less than that of the district of attendance and the district of residence maintains no schools, there shall be deducted from the budget of tuition cost of the district of residence an amount equal to the computed yield of a tax on the general tax list and duplicate of the district of residence at a rate equal to one hundred per centum of the difference in the tax rates of the respective districts. * * *

Section 7595-1d of the General Code referred to therein reads:

"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: Divide the total expense of conducting the school attended, excluding the costs of permanent improvements and debt service; but including depreciation charges not exceeding five per cent per annum, based on the actual cost of all property used in conducting such school, by the average daily attendance in such school. The average daily attendance, so used, shall be the same as that used as a basis for the distribution of state or county funds, as provided by law.

In computing such total expenses the proceeds of any and all moneys apportioned and paid to such district out of the state public school fund and the state common school fund shall be deducted from the gross expenses of conducting such school, and in the case of attendance from within the same county school district there shall be deducted also the moneys apportioned to the said district from the county funds. Attendance for any fractional part of a month shall be regarded as attendance for a full school month, unless the annual session is terminated before the end of a full month.

Pursuant to law or to rules and regulations formulated in accordance with law, the amount of tuition, computed as hereinbefore provided, shall be certified by the clerk of the board of

education of the district of attendance, to the board of education of the district in which the pupil resides, and to the director of education who, upon ascertaining that such amounts are fairly and correctly determined, shall deduct the same from the amount of state public school moneys, if any, allocated to the district of residence and add the same to the amount allocated to the district attended. The department of education shall send to said district of residence an itemized statement showing such deduction at the time of such deductions. If no money is allocable from the state public school fund to the district of residence, such district of residence shall pay to the district of attendance the tuition charge computed in accordance with the provisions of this section.”

From the foregoing, it will be observed that while the statute authorizes the admission of non-resident pupils and expressly directs that under such circumstances the expense for such attendance shall be credited and paid to the receiving district in accordance with Sections 7595-1c and 7595-1d, it is equally definite in providing that when the attendance is unauthorized credit for attendance shall be made not to the receiving district but to the district where the pupils reside. This provision, however, must be read in conjunction with the next succeeding section which was also enacted in 1941, at the same time and in the same Act as was Section 7734, General Code. Said Section 7734-1, General Code, reads as follows:

“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.”

Section 7595-1a of the General Code defines the term “average daily attendance” as that term is used in the above quoted sections, as follows:

“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, and it shall be illegal for any reporting official to include any child in the average daily attendance certified for the dis-

trict for which he is reporting unless such child shall have been in attendance at a public school located in such district."

Section 7595-1h of the General Code provides that :

"The director is hereby given power, and it shall be his duty, to reapportion the amount due any school district from the state public school fund, on the basis of the current aggregate days of attendance rather than on the aggregate days of attendance for the previous school year, whenever it shall appear to him that the attendance or length of term has changed to such an extent as to render the original apportionment either excessive or inadequate. *He shall prescribe standards for determining and certifying such change in attendance or length of term upon the basis of which such reapportionment will be considered and made.*" (Emphasis mine.)

Section 7600-9 of the General Code prescribes that each board of education shall provide the Director of Education with such reports and information as, from time to time, may be required by law or by the rules and regulations prescribed by the Director of Education.

Section 7595-1e of the General Code provides that if a board of education of any district has not conformed with the requirements of law and the rules and regulations of the Director of Education with respect to the matters under discussion, it shall not be entitled to participate in the distribution of the fund. Such section reads :

"A school district, the board of education of which has not conformed with all the requirements of the law and the rules and regulations pursuant thereto, including the annual plans of reorganization, in or of the county school district (as they apply to such school district) adopted by the county board of education and approved by the director of education as provided in sections 7600-1 to 7600-5 and section 7600-9, shall not participate in any portion of the state public school fund, except for good and sufficient reason established to the satisfaction of the director of education and state controlling board; provided further, that no school district wherein the total of the annual salaries paid the teachers of the district is less than seventy-five per cent of the total cost of the foundation program of such district, exclusive of transportation and tuition costs, shall participate in any portion of the state public school fund."

From the foregoing it would appear that in computing the "average daily attendance" of a particular school district for purposes of distribution of the school fund there should be included therein those persons in attendance in such school who are not residents of such district concern-

ing whom there exists a valid tuition agreement with the district of their residence or whose tuition is being paid by such pupils, their parents or guardians, in addition to the resident pupils so in attendance and shall not include any other persons. It would also appear from such statutes that it is the duty of the official who makes reports of daily attendance of pupils in the public schools to report separately the average daily attendance of all pupils attending school in his district who are non-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 district of attendance and the district of residence or who are not otherwise lawfully in attendance.

It would appear that under the provisions of Section 7595-1b of the General Code it is the duty of the Director of Education to make the apportionment of the state public school fund. I find no provision of law which states that the apportionment must be made on the basis of the reports as filed, whether they be true or false. If, therefore, it is the duty of the Director of Education to make the apportionment of the funds on the basis provided by statute and he is given the power to require reports in such manner as he deems proper, it would seem that there is no statutory limitation upon the type of evidence which he may require or consider in order to establish the amount of money to be distributed to a particular district. The statute specifically provides that if a particular school district does not comply with the requirements of the statute and the rules and regulations made pursuant thereto, it is not entitled to share in the distribution of the fund "except for good and sufficient reason established to the satisfaction of the Director of Education and State Controlling Board". See Section 7595-1e, General Code.

Specifically answering your inquiry, it is my opinion that:

1. It is the duty of the official who makes reports of daily attendance of pupils in the public schools to report separately the average daily attendance of any and all pupils attending school in his district who are non-residents of the district and whose attendance in the said district had not been previously provided for by contract between the boards of education of the districts affected, or who are not otherwise lawfully in attendance.

2. The Director of Education, in making allotment and distribution of school funds with respect to a school at which there are in attendance pupils who are not residents of the district, as well as those who are residents of such district, should in computing the average daily attendance include only the attendance of resident pupils and of those who are non-

resident pupils concerning whom there exist valid tuition agreements either with the district of residence or their parents, guardians or other persons in loco parentis.

3. Where a pupil is in attendance at a school other than that of his residence but for whom no valid tuition agreement has been entered into between the board of education of the district of his attendance and that of the district of his residence or other person legally liable for his support, the Director of Education may not consider his attendance at the school in the district other than that of his residence in computing his average attendance.

Respectfully,

THOMAS J. HERBERT,
Attorney General.