OPINION NO. 84-083

Syllabus:

1. Pursuant to R.C. 5705.21 and R.C. 5705.19(A), (D), and (F), the board of education of a school district may submit to the electors of the school district a tax levy in excess of the ten-mill limitation for any one of the following purposes: (a) current expenses; (b) library purposes; or (c) permanent improvements.

2. Pursuant to R.C. 3313.53, the board of education of a school district may expend funds derived from a tax levy for current expenses which is levied under R.C. 5705.21 and R.C. 5705.19(A) for the expenses "of directing, supervising, and coaching the pupil-activity programs in music, language, arts, speech, government, athletics, and any others directly related to the curriculum."

3. Pursuant to R.C. 3315.062, the board of education of a school district may expend funds derived from a tax levy for current expenses which is levied under R.C. 5705.21 and R.C. 5705.19(A) for the operation of such student activity programs as are approved by the State Board of Education and included in the program of the school district as authorized by its board of education, provided that total expenditures by the board from its general revenue fund for the operation of such student activity programs may not exceed five-tenths of one per cent of the board's annual operating budget.

4. A board of education may establish reasonable charges for admission to athletic events. An arrangement to charge admission fees for nonresidents of the school district while providing free admission for residents will be constitutionally permissible if it bears a reasonable relationship to the achievement of a legitimate governmental purpose.

To: John J. Plough, Portage County Prosecuting Attorney, Ravenna, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 19, 1984

I have before me your request for an opinion on the question whether a local board of education may submit to the electorate a tax levy in excess of the ten-mill limitation for the purpose of supporting athletic programs and, in particular, for the purpose of eliminating the entrance fee to athletic events for all residents of the school district, while continuing to charge an entrance fee for nonresidents. Funds from the levy would also be used to pay for uniforms, supplies, security, officials, and related expenses.

Provisions governing the adoption of voted school levies, apart from emergency situations,[1] appear in R.C. 5705.21, which states, in part:

> At any time the board of education of any school district by a vote of two-thirds of all its members may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation by levies on the current tax duplicate will be insufficient to provide an adequate amount for the necessary requirements of the school district, that it is necessary to levy a tax in excess of such limitation for one of the purposes specified in division (A), (D), or (F) of section 5705.19 of the Revised Code, and that the question of such additional tax levy shall be submitted to the electors of the school district at a special election on a day to be specified in the resolution. (Emphasis added.)

Thus, R.C. 5705.21 authorizes a board of education to submit to the voters a levy in excess of the ten-mill limitation for one of the purposes specified in R.C. 5705.19(A), (D), or (F). The purpose specified in R.C. 5705.19(A) is "current expenses." R.C. 5705.19(D) speaks of "a public library of, or supported by, the subdivision under whatever law organized or authorized to be supported," and R.C. 5705.19(F) references "the construction or acquisition of any specific permanent improvement or class of improvements that the taxing authority of the subdivision may include in a single bond issue." Funds used for the operation of athletic programs clearly do not come under R.C. 5705.19(D) or (F). See R.C. 5705.01(E) (defining "[p]ermanent improvement" to mean "any property, asset, or improvement with an estimated life or usefulness of five years or more, including land and interests therein, and reconstructions, enlargements, and extensions thereof having an estimated life or usefulness of five years or more"). Therefore, if a levy to support such programs is authorized, it must be adopted for the purpose of "current expenses," as described in R.C. 5705.19(A). See R.C. 5705.01(F) (defining "current expenses" to mean "the lawful expenditures of a subdivision, except those for permanent improvements, and except payments for interest, sinking fund, and retirement of bonds, notes, and certificates of indebtedness of the subdivision"). Such a levy would not be limited to the particular purposes which you

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[1] R.C. 5705.194 authorizes the board of education of any school district, at any time, to "declare by resolution that the revenue which will be raised by all tax levies which the district is authorized to impose, when combined with state and federal revenues, will be insufficient to provide for the emergency requirements of the school district or to avoid an operating deficit, and that it is therefore necessary to levy an additional tax in excess of the ten-mill limitation." It does not appear that a levy for the purposes which you have described would be adopted pursuant to this provision. See generally R.C. 5705.195-.197.

have described, but could, pursuant to R.C. 5705.19(A) and R.C. 5705.21, be used for any current expenses of the district.[2] See 1965 Op. Att'y Gen. No. 65-187 (syllabus) ("[w]hen a tax is proposed to be levied under [R.C. 5705.19(A)], the term 'current expenses' must appear on the ballot, and additional words suggesting a limitation within the category of current expenses may not be added to the ballot"). Revenue derived from such a levy would, pursuant to R.C. 5705.10, be paid into the general fund of the school district.

I turn now to the question whether it would be permissible for a board of education to carry out the program which you have described--that is, to use the proceeds of a tax levy for current expenses to pay for uniforms, supplies, security, officials, and related expenses, and to eliminate the entrance fee to athletic events for all residents of the school district while continuing to charge an entrance fee for nonresidents.

R.C. 3313.53 authorizes a board of education to "pay from the public school funds, as other school expenses are paid, the expenses. . .of directing, supervising, and coaching the pupil-activity programs in music, language, arts, speech, government, athletics, and any others directly related to the curriculum." It is not clear from your request which of the proposed expenses would come within this provision. To the extent that the proposed expenditures are for the direction, supervision, or coaching of athletic programs they are, however, authorized by R.C. 3313.53. See generally 1980 Op. Att'y Gen. No. 80-060. Funds derived from a tax levy for current expenses which is levied under R.C. 5705.21 and 5705.19(A) may be used for such purposes. See R.C. 5705.01(F).

R.C. 3315.062 provides more generally for the expenditure of funds for student activity programs. It states, in part:

> (A) The board of education of any school district may expend moneys from its general revenue fund for the operation of such student activity programs as may be approved by the state board of education and included in the program of each school district as authorized by its board of education. Such expenditure shall not exceed five-tenths of one per cent of the board's annual operating budget.
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> (B) The state board of education shall develop, and review biennially, a list of approved student activity programs.
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> (C) If more than fifty dollars a year is received through a student activity program, the moneys from such a program shall be paid into an activity fund established by the board of education of the school district. The board shall adopt regulations governing the establishment and maintenance of such fund, including a system of accounting to separate and verify each transaction and to show the sources from which the fund revenue is received, the amount collected from each source, and the amount expended for each purpose. Expenditures from the fund shall be subject to approval of the board. (Emphasis added.)

Within the limitation set forth in R.C. 3315.062(A) that expenditures from the general revenue fund for the operation of student activity programs may not exceed five-tenths of one per cent of the board's annual operating budget, the board may expend funds derived from a levy for current expenses for the operation of such student activity programs as are approved by the State Board of Education

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[2] Prior to the enactment of Am. Sub. H.B. 372, 115th Gen. A. (1983) (eff. Nov. 8, 1983), R.C. 5705.19 applied directly to school districts, authorizing the adoption of a levy if necessary for any of the purposes set forth therein, and R.C. 5705.21 referred to the levy of a tax generally for "school district purposes," rather than only for the purposes specified in R.C. 5705.19(A), (D), and (F). R.C. 5705.19(H) then, as now, authorized a levy for "recreational purposes." Thus, it was then possible for a school district to adopt a special levy which was limited to recreational purposes. See 1963 Op. Att'y Gen. No. 157, p. 249.

and included in the program of the school district as authorized by its board of education. Therefore, assuming that the expenditures with which you are concerned are for the operation of student activities that are included in the program of the school district and approved by the State Board of Education, the expenditures may properly be made from funds derived from a levy for current expenses, provided that total expenditures by the board of education from its general revenue fund for the operation of student activity programs do not exceed five-tenths of one per cent of the board's annual operating budget.

From your indication that the board of education intends to eliminate the entrance fee to athletic events for residents of the school district while continuing to charge an entrance fee for nonresidents, I assume that the board has been charging such fees to persons who attend school-related athletic events. The charging of such fees clearly comes within the general authority of a board of education to regulate school activities. R.C. 3313.20 ("[t]he board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises"); R.C. 3313.47 ("[e]ach city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district"). See 1982 Op. Att'y Gen. No. 82-014 (local board of education may charge a student reasonable fees to participate in an extracurricular athletic program); 1939 Op. Att'y Gen. No. 356, vol. I, p. 432. A board of education has broad authority over the activities of schools within its district, which will be restricted only in instances of fraud or abuse of discretion. See State ex rel. Ohio High School Athletic Ass'n v. Judges of the Court of Common Pleas, 173 Ohio St. 239, 181 N.E.2d 261 (1962); Brannon v. Board of Education, 99 Ohio St. 369, 124 N.E. 235 (1919).

If admission fees have been charged in the past, it is likely that more than fifty dollars has been received in a year and that the board has been required to establish an activity fund under R.C. 3315.062(C) to handle moneys received. Moneys in such a fund may, pursuant to R.C. 3315.062(C), be expended for such purposes as the board may approve. See 1975 Op. Att'y Gen. No. 75-021 at 2-82 ("approval of the board of education is specifically required before an expenditure can be made from the fund. However, no guidelines are prescribed for distinguishing a proper expenditure from an improper one. Thus the determination of which expenditures are proper lies within the sound discretion of the board"); 1975 Op. Att'y Gen. No. 75-008. Such moneys are not subject to the restriction of R.C. 3315.062(A) that not more than five-tenths of one per cent of the board's annual operating budget may be spent from the general revenue fund for the operation of student activity programs.[3] If changing the source of funds for the support of athletic programs from admission receipts to tax levy funds would bring the amount expended for student activity programs by the board of education from its general revenue fund above the five-tenths of one per cent limitation set forth in R.C. 3315.062(A), then the funds derived from the proposed levy would not be available to cover all expenses relating to athletic programs that had previously been paid with admission receipts, except to the extent that expenditures in excess of the limitation are authorized by R.C. 3313.53. Further, to the extent that funds derived from admission receipts have been used for any purposes other than the operation of student activity programs which are approved by the State Board of Education and included in the program of the school district under R.C. 3315.062(A), R.C. 3315.062 does not authorize the use of funds from a levy for current expenses for such purposes, though there may be other statutory authority for so expending the funds. See generally R.C. 3313.53; Op. No. 75-021; Op. No. 75-008.

An important issue raised by your request is whether it is permissible for a local board of education to eliminate the entrance fee to athletic events for all the residents of the school district, while continuing to charge an entrance fee for

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[3] Expenditures under R.C. 3313.53 for directing, supervising, and coaching pupil activity programs, including athletics, are, similarly, not subject to the percentage limitation set forth in R.C. 3315.062(A). 1980 Op. Att'y Gen. No. 80-060.

nonresidents. As you noted, I addressed a similar question in 1984 Op. Att'y Gen. No. 84-048, when I considered whether township trustees may establish a program under which residents of the township receive free ambulance services but nonresidents are charged for such services. I concluded in the first paragraph of the syllabus of that opinion that "[a] n arrangement to charge nonresidents but provide free services to residents will satisfy the rational basis test for equal protection if it bears a reasonable relationship to the achievement of a legitimate governmental purpose." Essentially the same conclusion is applicable to your question.

It is clear, as discussed above, that a board of education is authorized to expend money from its general revenue fund for the direction, supervision, and coaching of an athletic program and for the operation of any student activity programs that are approved by the State Board of Education and included in the program of the school district. It is, similarly, clear that a board of education may charge reasonable fees for attendance at athletic events. See R.C. 3313.20; R.C. 3313.47; R.C. 3315.062. There is, however, no statutory provision which specifies when or to whom admission may be charged. It appears, then, that a board of education may establish any reasonable scheme for charging admission to athletic events. See generally State ex rel. Ohio High School Athletic Ass'n v. Judges of the Court of Common Pleas; Brannon v. Board of Education.

As I discussed in Op. No. 84-048, when a local governmental body has authority to establish reasonable charges for the provision of services, the body must observe the limitations imposed by relevant provisions of the state and federal constitutions—in particular U.S. Const. amend. XIV and Ohio Const. art. I, §2, which guarantee the equal protection of the laws. See City of New Orleans v. Dukes, 427 U.S. 297 (1976). Both the United States Supreme Court and the Ohio Supreme Court have adopted the reasonableness of a classification with respect to the achievement of a legitimate governmental purpose as the standard of constitutionality under the equal protection provisions, provided that no suspect class is involved and the right claimed is not a fundamental one. Zobel v. Williams, 457 U.S. 55 (1982); Dandridge v. Williams, 397 U.S. 471 (1970); Porter v. City of Oberlin, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965). The class of nonresidents does not, in itself, constitute a suspect class. County Board of Arlington County, Va. v. Richards, 434 U.S. 5 (1977); Taylor v. Crawford, 72 Ohio St. 560, 74 N.E. 1065 (1905). Further, it does not appear that the charging of a fee for nonresidents to attend a school-related athletic event would touch upon a fundamental interest. Menke v. Ohio High School Athletic Ass'n, 2 Ohio App. 3d 244, 245-46, 441 N.E.2d 620, 623 (Hamilton County 1981), considered a related question, the constitutionality of a rule of a high school athletic association which made children of nonresidents ineligible for athletics in a member school, and stated:

> Education is not one of the rights that has been recognized by the Supreme Court as being "fundamental." The rights so recognized include the right to vote, the right of access to and equal treatment in civil and criminal litigation, and the right to migrate, but education is not among them. On the contrary, education is not protected by the United States constitution either explicitly or implicitly. San Antonio Independent School District v. Rodriguez (1973), 411 U.S. 1. Education is a process having a number of components including studies, social and other extracurricular activities and athletics, and as only one of those components, participation in interscholastic athletics, in and of itself, has never been held to be a constitutionally protected civil right. Albach v. Odle (C.A. 10, 1976), 531 F.2d 983; Mitchell v. Louisiana High School Athletic Assn. (C.A. 5, 1970), 430 F.2d 1155; Kentucky High School Athletic Assn. v. Hopkins County Bd. of Edn. (Ky. Ct. App. 1977), 552 S.W.2d 685. Further, we believe that whatever are the benefits associated with participation in interscholastic athletics, the regulation of the right to participate therein by Rule 9-2(g) for the stated purposes of eliminating recruitment and balancing competition does not impinge on plaintiffs' other "fundamental" rights (such as freedom of association, freedom of religion, freedom to migrate, and privacy rights) to such an extent or in such a manner as to invoke the strict scrutiny analysis.

Even as it has been concluded that the right to participate in interscholastic athletics is not a constitutionally protected civil right and the exclusion of nonresidents from such participation does not impinge upon other fundamental rights to such an extent or in such a manner as to invoke the strict scrutiny analysis, I believe that it may also be concluded that the charging of a fee for nonresidents to attend a school-related athletic event does not impinge upon fundamental rights of such nonresidents to such an extent or in such a manner as to invoke the strict scrutiny analysis. See Cole v. Housing Authority of the City of Newport, 435 F.2d 807, 811 (1st Cir. 1970) (a residency requirement for obtaining a library card is probably permissible); Op. No. 84-048 at 2-153 through 2-154. Cf. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (striking down a statute which required an indigent to have been a resident of a county for twelve months in order to be eligible for free nonemergency medical care); Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down certain durational residence requirements for voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down a one-year residency requirement for welfare assistance).

I find, therefore, that, in the situation you have presented, the standard to be met in determining whether the proposed distinction in entrance fees between residents and nonresidents is constitutionally permissible is whether it rationally serves a legitimate governmental purpose. You have not specified what purpose is sought to be served in this instance. You have, however, indicated that the funds received from a tax levy approved by the electorate of the school district would be used to offset losses resulting from the elimination of an entrance fee for residents of the school district. Thus, an apparent purpose of the proposed distinction would be to permit school district residents, who pay real property taxes (either directly, for property owned, or indirectly, as part of their rental payments) to support their schools, to attend school-related athletic events free of charge, while charging a fee to nonresidents, who presumably pay no real property taxes to the school district. To satisfy the test of reasonableness, the two classes need not be perfectly drawn, as long as the distinctions between the two have a rational basis. Dandridge v. Williams.

It is true that certain distinctions between residents and nonresidents have been held to violate equal protection provisions. See, e.g., Richter Concrete Corp. v. City of Reading, 166 Ohio St. 279, 142 N.E.2d 525 (1957) (holding that an ordinance which prohibited the operation of trucks over a certain weight on streets of a municipality, with exceptions for those dealing with residents of the municipality, constituted an unreasonable classification, in violation of state and federal equal protection guarantees); Myers v. City of Defiance, 67 Ohio App. 159, 36 N.E.2d 162 (Defiance County 1940) (holding that an ordinance which required licenses for dry cleaning establishments and imposed a bond requirement only upon nonresident establishments violated federal and state equal protection provisions); State v. Whisman, 24 Ohio Misc. 59, 263 N.E.2d 411 (C.P. Scioto County 1970) (striking down municipal ordinance which required permits for on-street parking in a designated area and provided for issuance of permits only to residents and certain visitors on the basis that it violated equal protection and no valid justification for the classification existed); 1966 Op. Att'y Gen. No. 66-151 (finding that municipal ordinance which prohibited hunting by nonresidents was invalid). See also Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972) (holding that the public trust doctrine prevented a municipality from charging nonresidents higher fees for use of a beach); 1966 Op. Att'y Gen. No. 66-114 at 2-206 ("[w]hen fire protection is available in a township or a fire district. . .it must be furnished to all on an equal basis. This should be true notwithstanding that the one benefiting from the fire protection may not be a taxpayer in the township or fire district. . ."). The courts have, however, recognized as legitimate distinctions between residents and nonresidents which reflect the fact that residents support local services with their taxes. For example, in City of Clarkston v. Asotin County Rural Library Board, 18 Wash. App. 869, 573 P.2d 382 (1977), the court upheld a scheme in which persons who were not residents of a library district and, thus, did not contribute to the support and maintenance of the library, were denied the privilege of checking out books, though residents of other library districts were granted that privilege through a reciprocal arrangement. See Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371 (1978) (recognizing the tax support provided by residents as a factor supporting the reasonableness of charging nonresidents

higher fees for hunting elk); Vlandis v. Kline, 412 U.S. 441 (1973) (striking down a scheme which provided a permanent irrebutable presumption of nonresidence for purposes of charging higher tuition to certain students, on the basis that it violated due process guarantees, but recognizing that a state has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its residents to attend such institutions on a preferential tuition basis). See also Toomer v. Witsell, 334 U.S. 385, 399 (1948) (striking down scheme for charging much higher license fees to nonresident fishermen but acknowledging that a state may "charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay"); Hyland v. Borough of Allenhurst, 148 N.J. Super. 437, 444, 372 A.2d 1133, 1137, modified on other grounds, 78 N.J. 190, 393 A.2d 579 (1978) (upholding scheme whereby municipality charged nonresidents a higher fee for membership in a municipal beach facility on the basis that residents were already paying for the facilities as part of their tax bill and the difference "represents an attempt to equalize the nonresident and resident financial contributions to the maintenance of club facilities").

You have not indicated what purposes the proposed fee distinction would serve, how qualification as a resident would be established, or what fees would be charged. Therefore, I am unable to fully evaluate the reasonableness of the plan which you have outlined. In any event, it is the province of the courts to make determinations as to the constitutionality of particular governmental actions. State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N.E.55, aff'd on other grounds, 241 U.S. 565 (1916). Based upon the foregoing, however, it appears that a board of education may constitutionally establish a scheme for charging admission fees to athletic events for nonresidents of the school district while providing free admission for residents, provided that the scheme bears a reasonable relationship to the achievement of a legitimate governmental purpose.

In conclusion, it is my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 5705.21 and R.C. 5705.19(A), (D), and (F), the board of education of a school district may submit to the electors of the school district a tax levy in excess of the ten-mill limitation for any one of the following purposes: (a) current expenses; (b) library purposes; or (c) permanent improvements.

2. Pursuant to R.C. 3313.53, the board of education of a school district may expend funds derived from a tax levy for current expenses which is levied under R.C. 5705.21 and R.C. 5705.19(A) for the expenses "of directing, supervising, and coaching the pupil-activity programs in music, language, arts, speech, government, athletics, and any others directly related to the curriculum."

3. Pursuant to R.C. 3315.062, the board of education of a school district may expend funds derived from a tax levy for current expenses which is levied under R.C. 5705.21 and R.C. 5705.19(A) for the operation of such student activity programs as are approved by the State Board of Education and included in the program of the school district as authorized by its board of education, provided that total expenditures by the board from its general revenue fund for the operation of such student activity programs may not exceed five-tenths of one per cent of the board's annual operating budget.

4. A board of education may establish reasonable charges for admission to athletic events. An arrangement to charge admission fees for nonresidents of the school district while providing free admission for residents will be constitutionally permissible if it bears a reasonable relationship to the achievement of a legitimate governmental purpose.