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A BOARD OF EDUCATION IS WITHOUT AUTHORITY TO WAIVE THE PAYMENT OF TUITION BY ANY STUDENT IN THE SCHOOLS OF THE DISTRICT WHETHER OR NOT THE STUDENTS CONCERNED ARE FROM FOREIGN COUNTRIES—§3313.64 R.C., OPINION NO. 4864, OAG 1932, OPINION NO. 106, OAG 1927, §3313.17 R.C., OPINION NO. 1890, OAG 1933, §3313.19, R.C. OPINION NO. 5178, OAG 1936.

SYLLABUS:

A board of education is without authority, by rule or otherwise, to waive the payment of tuition by any students in the schools of the district where under Section 3313.64, Revised Code, such students may be admitted to the schools only upon the payment of tuition; and this is true whether or not the students concerned are from foreign countries.

Columbus, Ohio, January 19, 1962

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Section 3313.64 of the Revised Code provides that the schools of each city exempted village or local school district shall be free to all school residents between six and twenty-one years of age, with school residents being defined as all youth who are children or wards of ‘actual residents’ of the school district. This section also provides that 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 payment of tuition within the limitation of law.

“The examiners, in making the audits and examinations of the various school districts, for the most part city school districts, have noted several instances of students being accepted from foreign countries for instruction in the regular school curriculum, with such course of instruction covering the educational attainments leading to the issuance of a diploma upon graduation.

“Tuition is not collected from the foreign students and in certain instances the board, by the passage of a resolution, waives the collection of the tuition on the basis that the board of educa-

tion is interested in encouraging good will and a greater understanding between nations, with the opinion being that this objective is furthered by the exchange of ideas resulting from, and having local students enjoy and benefit from association with students from foreign countries.

“Negotiating with a foreign country or an individual from a foreign country for the purpose of providing aid to a foreign student through the expenditures of tax moneys would seem to be a prerogative of the federal level of government and that such authority, under the Constitution of the United States, would not be available to the state level of government or any lesser subdivision thereof.

“Numerous applications from youth of foreign countries requesting to be enrolled in school districts of Ohio without the payment of tuition have been noted. Giving consideration to the foregoing, and due to the interest in this subject, will you please issue your formal opinion on the following question :

“May a board of education, under the corporate powers of the board as set forth in Section 3313.17, Revised Code, and the authority granted by Section 3313.20, Revised Code, in authorizing the board of education to make such rules and regulations as are necessary for its government, accept for enrollment in the classes of the schools in the district, without the payment of tuition, students from foreign countries for the purpose of pursuing and matriculating in the curriculum of the school district?”

Under Section 3313.64, Revised Code, the schools of all school districts are free to school residents between six and twenty-one years of age. The same section states that school residents “shall be all youth who are children or wards of actual residents of the school district.”

Section 3313.64, *supra*, also states :

“* * * All youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed.

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“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.”

It could be possible that some of the students to whom you refer are of school age and live as children or wards of actual residents of school

districts. Also, some of such students could be living apart from their parents or guardians and working to support themselves by their own labor. In such instances, the students would, under Section 3313.64, *supra*, be entitled to free schooling.

And as to being a ward of a resident, I note that the term "ward" should be liberally construed. In this regard it is stated in Opinion No. 4864, Opinions of the Attorney General for 1932, page 1472 at 1475:

"See Opinions of the Attorney General for 1927, page 160. As pointed out in the opinion referred to, it is well settled that the term 'ward' as used in Section 7681, General Code, should be liberally construed in the interests of the education of the youth of school age in this state. See also, Opinions of the Attorney General for 1918, page 453. The syllabus of the 1927 opinion referred to, is as follows:

"1. The term ward, as used in Section 7681, General Code, should not be limited to its technical meaning, but should be construed liberally in the interests of the education of the youth of school age in this state.

"2. A determination of the question of whether or not a child has been in good faith committed by its parents to the care and custody of another for the purpose of having a home provided for it, or whether such living with another is merely for the purpose of evading the law requiring the payment of tuition for school attendance, is in all cases a question of fact to be determined from a consideration of all the facts and circumstances surrounding the case.

"3. A child who resides permanently in the home of an actual resident of a school district and to which child such actual resident stands in loco parentis may attend the public schools of such district without paying tuition, even though the parents of such child reside outside the district."

"As these children appear to be residing permanently in the home of an actual resident of the school district in question, the whole question is whether or not that resident stands in loco parentis, or in the place of the parent, to the children. If so, the children are entitled to attend the public schools of that district without the payment of tuition, if not, and the estate of the children can bear the expense of tuition, it should be paid."

However, in the instances to which you refer, the respective boards have determined that tuition was due, but have waived such tuition. Thus, it appears that the students do not qualify for free schooling, and the question is whether boards may properly waive the payment of tuition.

Boards of education have only those powers expressly granted by statute or necessarily implied from those granted. 48 Ohio Jurisprudence 2d, Section 78, pages 481, 482.

Section 3313.17, Revised Code, provides :

“The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.”

While this section does state that a board of education may sue and be sued, I do not believe that such power encompasses the right to compromise claims. And in this regard, I am in agreement with the words of one of my predecessors as found in Opinion No. 1890, Opinions of the Attorney General for 1933, Vol. III, page 1780, in which it is stated at pages 1783 and 1784:

“An examination of the sections of the statute by means of which the legislature has granted and defined the powers of boards of education and township trustees failed to disclose any express grant of power to such boards to settle and compromise claims due such subdivisions as in the case of county commissioners; although there is a similar provision granting such bodies the right to sue and be sued. I am not unmindful of the fact that cases are reported in other states holding that a grant of power to sue and be sued gives power to the grantee thereof to compromise and settle the claim forming the subject matter of the suit, yet such does not appear to have been the intent of the legislature of Ohio, for to give such effect to such language would render superfluous all of the provisions of Section 2416, General Code, with reference to the powers of county commissioners.”

And further evidence of the intent of the legislature, as referred to by my predecessor, is evidenced in the fact that in 1935 a specific provision was passed allowing a board of education of a school district to compound or release debts owed to the district by a bank. The provision was enacted as Section 4749-1, General Code (116 Ohio Laws, 451) and is now Section 3313.19, Revised Code, reading as follows :

“The board of education of any school district may compound or release, in whole or in part, a debt, obligation, judgment, or claim due the school district, or due the board of the school district

from a bank in process of liquidation or operating under a conservatorship, except where any member of the board is personally interested as a stockholder. The board shall enter upon its records a statement of the facts and the reasons for such compounding or release.”

While said Section 3313.19 might on first impression appear to allow a board to compound or release *any* debt, obligation, judgment, or claim due the school district, I am of the opinion that the power refers only to debts, etc., due from a bank in the process of liquidation or operating under a conservatorship. As stated by the then Attorney General in Opinion No. 5178, Opinions of the Attorney General for 1936, Vol. I, page 217, at pages 218, 219:

“In an opinion reported in Opinions of the Attorney General, 1933, Vol. III, p. 1780, I held that boards of education do not have power to settle and compromise claims due them similar to that granted county commissioners by Section 2416, General Code. I compared this section with Section 4749, General Code, and pointed out that boards of education and county commissioners are both granted the powers to sue and be sued but that only the latter are granted the power to settle and compromise suits. This principle was affirmed in an opinion reported in Opinions of the Attorney General, 1934, Vol. I, p. 222. *Subsequently the General Assembly enacted Section 4749-1, General Code (116 O.L., 451) specifically granting boards of education the power to compound or release claims due them from banks. * * **” (Emphasis added)

Further, if the intent was to release *any* debt, etc., owing a school district, there would have been no need for the language referring specifically to banks.

In view of the foregoing, I conclude that neither Section 3313.17 nor 3313.19, *supra*, provide authority for a board of education to waive the payment of tuition where tuition is due.

Further, I have the same opinion as to Section 3313.20, Revised Code, under which boards of education are given the power to make “such rules and regulations as are necessary for its government and the government of its employees and the pupils of the schools.” It is self-evident that a board of education may not by a rule evade the express provisions of Section 3313.64, *supra*, with respect to pupils who must pay tuition.

I can find merit in the desire of the boards of education concerned to encourage good will and a greater understanding between nations by

allowing certain students to attend school free, even though under the statutes they are required to pay tuition. As I noted earlier, however, such boards of education have only those powers expressly granted or necessarily implied from those granted, and I have been unable to find any authority, either express or implied, for the waiving of the collection of tuition where tuition is due.

Answering your specific question, therefore, it is my opinion and you are advised that a board of education is without authority, by rule or otherwise, to waive the payment of tuition by any students in the schools of the district where under Section 3313.64, Revised Code, such students may be admitted to the schools only upon the payment of tuition; and this is true whether or not the students concerned are from foreign countries.

Respectfully,

MARK MCELROY

Attorney General