OFFICIAL OPINION NO. 64

October 19, 1948.

Mr. Ben H. Watt,
State Superintendent of Public Instruction,
State House,
Indianapolis, Indiana.

Dear Mr. Watt:

Your letter of September 11, 1948, has been received, in which you requested an official opinion on the following questions:

“1. If a pupil is not sixteen years of age, can he or she be compelled to attend school if there is an elementary and high school in the corporation where the child resides?

“2. If the answer to question one is yes, can pupils who are not sixteen years of age and who have completed the eighth grade be compelled to attend high school?

“3. If a pupil is not sixteen years of age, can he or she be compelled to attend school if there are no schools in the corporation where the child resides?

“4. If a pupil is not sixteen years of age, and has completed the eighth grade, can he or she be compelled to attend a high school in another school corporation if: there are no schools in the corporation where the child resides, or if there are only elementary schools in the school corporation where the child resides?”

1-2. In answer to your first and second questions, attention is called to the provisions of the compulsory education statutes same being Section 28-501 et seq. Burns' 1948 Replacement, same being Chapter 131, Acts 1921, as amended. Section 5 of said Act, same being Section 28-505 Burns' 1948 Replacement, provides as follows:

“Unless otherwise provided herein, every child between the ages of seven (7) and sixteen (16) years shall attend public school or other school taught in
the English language which is open to the inspection of local and state attendance and school officers; and such child shall attend such school each year during the entire time the public schools are in session in the school district in which such child resides. The school superintendent of any attendance district may make, or have made, an examination of any or all children between the ages of seven (7) and sixteen (16) years and may exclude or excuse from school any child found mentally or physically unfit for school attendance, provided such exclusion or excuse is approved and certified to by a physician in good standing, and providing further that such exclusion or excuse shall be valid for not longer than the school year during which it is issued: Provided, That no pupil or minor shall be compelled to submit to medical examination or treatment under authority of this section whose parent or guardian objects to the same. Such objection shall be made by written and signed statements delivered to the pupil's teacher or to any person who might conduct such examination or treatment in the absence of such objection. Every principal and teacher in every public or other school which is attended by one (1) or more minors between the ages of seven (7) and sixteen (16) years shall furnish, on the request of the superintendent of the attendance district wherein such school is located, a list of names, addresses and ages of all minors attending such school, and shall further report immediately to such superintendent the name, address and date of withdrawal of every such minor under sixteen (16) years of age withdrawing from such school and shall also immediately report to such superintendent the name and address of every such pupil absent from school without lawful excuse.

"Provided, If a child, otherwise subject to the provisions of this act, shall, by reason of deafness or partial deafness, or of blindness or partial blindness, be unable to secure in the school named a proper education by use of the sense of hearing or of the sense of sight, the parent, guardian or other person having control or charge of such children shall cause them
(those) between seven (7) and eighteen (18) years of age to attend the Indiana State School for the Deaf or the Indiana State School for the Blind, during the full scholastic terms of said schools, unless discharged therefrom by the board of trustees of either of said schools; and the employment, under the provisions of this act, of any of said children between the ages of seven (7) and eighteen (18) years during the school terms of said schools respectively is hereby prohibited, unless a certificate of discharge issued by the superintendent of either of said schools be presented as herein provided. Provided, That no such child shall be employed contrary to the provisions of the law concerning the employment of minors in industry. Application for admission of such children to such schools respectively shall be made out in the usual form and passed upon by the board of trustees of said respective schools, and no child shall be permitted to enter either of said schools until the application shall have been accepted by the proper board of trustees, and, upon the rejection of any child's application by either of said boards, neither such child nor its parent, guardian or other person having control or charge of it, shall thereafter, in respect of such child, be subject to the provisions of this act, until such child's application shall be accepted: Provided, further, That the judge of the court having juvenile jurisdiction may suspend the provisions of this act in cases of juvenile delinquents and incorrigibles whenever, in his judgment, the welfare of any child warrants such action."

Section 28-506, Burns' 1948 Replacement, same being Section 6 of said act, further provides:

"Any child over fourteen (14) and under sixteen (16) years of age who has completed the work of the first eight (8) grades of the public school or its equivalent may be permitted to withdraw from school upon the issuing to such child of a lawful employment certificate. Any child so permitted to withdraw from school shall return to school within five (5) days after the termination of the employment for which such
employment certificate was issued. No child holding a lawful employment certificate at the time this act goes into effect shall be required to re-enter school because of any increase in educational or age standards for the issuance of employment certificates continued in this section."

Section 14 of said Act, same being Section 28-514, Burns’ 1948 Replacement, makes reference to the taking of the enumeration of children in such school districts. Enumeration of school children has, for all practical purposes and in all probability as a matter of law, been supplanted by the new law regarding distribution of state tuition funds based upon the average daily attendance rather than enumeration. (Sec. 28-1013, Burns’ 1938 Replacement, being Chap. 1, Sec. 114, Acts 1865, as amended. Also, see footnotes thereto in the Burns’ Statutes references.) As hereinafter pointed out average daily attendance is now the basis for abandonment of schools. (Sec. 28-2808, Burns’ 1948 Replacement.)

Sec. 28-517, Burns’ Replacement, same being Sec. 17 of said act, provides a penalty for the violation of said act, and imposes a penalty against any person who encourages a minor to violate said act or hinders the school officials in the performance of their duties under said act.

The foregoing statute has been held to be constitutional and enforceable:

State v. Bailey (1901), 157 Ind. 324;
Miller v. State (1921), 77 Ind. App. 611.

From the foregoing I am of the opinion that all pupils under the age of sixteen years can be compelled to attend school if there is an elementary and high school in the corporation where the child resides, unless they come within one of the exceptions, such as being deaf or blind or mentally or physically unfit, in which case the statute above quoted must be compiled with in taking advantage of any such exception.

Another exception to the statute exists where a child is over fourteen years of age and under the age of sixteen years, who has completed the work of the first eight grades of a public school or its equivalent, who may be permitted to withdraw from school upon the issuing to such child of a lawful employment certificate pursuant to said act. However, such
child so permitted to withdraw from school is required to return to school within five days after the termination of the employment for which such employment certificate was issued.

3-4. Your third and fourth questions may be considered together as there seems to be no exception to the compulsory education law for a pupil who has completed the eighth grade, except as pointed out in answer to your questions numbered one and two, *supra*.

In answer to your first two questions, it was pointed out that the enumeration statute is considered superseded by the average daily attendance law. This is important because in considering your third and fourth questions, it is necessary to determine the construction and definition to be given the words "school district in which such child resides" in order to determine what schools pupils are required to attend under the provisions of Sec. 28-505, Burns' 1948 Replacement, *supra*.

In this connection it is pointed out that in the interpretation of statutes, courts may take into consideration other acts in *pari materia*, whether passed before or after the act in question:

Sherfey v. City of Brazil (1937), 213 Ind. 493, 497, 498.

It might be well to consider how the status of the legal rights of parents and children changed under the old system of enumeration. In the case of Ireland v. State *ex rel.* (1905), 165 Ind. 377, it was held that prior to the Act of March 7, 1901 (Acts 1901, p. 159, Sec. 5920f, Burns 1901), the township trustee could abolish a school district when in his judgment the public interest required it, subject to the right of appeal of the county superintendent, and the parents, guardians and those having charge of children entitled to school privileges were, under the then effective statutes, transferred from the school corporation in which they resided to another, and the property, real and personal, situated in the township in which they resided was transferred with them to the school corporation to which they were transferred, and was taxable, and for school purposes, the same as if located therein, and they became legal voters of the school district to which they were attached and all school meetings of said district. (Citing Johns v. State *ex rel.* (1892), 130 Ind. 522.) Said case further
held that radical change was made as to transfer by said act of 1901 (Secs 5959a-5959e, Burns 1901), under which act the child of school age, and not the parent, was transferred from one school corporation to another for educational purposes and no transfer of the parents’ property for taxation was made nor would the parents become voters at school meetings of the school corporation to which transfer of the child was made. Our present statutes on transfer (Sec. 28-3701 et seq., Burns’ 1948 Replacement) continue to transfer the child, rather than the parent, to the receiving school corporation for educational purposes.

It is, therefore, necessary to consider some of the statutes under which our school system is established. Sec. 28-2410, Burns’ 1938 Replacement, regarding the general duties of school officials in the establishment of schools, provides:

"The school trustees shall take charge of the educational affairs of their respective townships, towns and cities. They shall employ teachers, establish and locate conveniently a sufficient number of schools for the education of children therein, and build, or otherwise provide, suitable houses, furniture, apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of said schools. Such school trustees may also establish and maintain in their respective corporations, as near the center of the township as seems wise, at least one (1) separate graded high school, to which shall be admitted all pupils who are sufficiently advanced: Provided, That the school trustees of two (2) or more school corporations may establish and maintain joint graded high school (2) in lieu of separate graded high schools, and when so done, they jointly shall have the care, management and maintenance thereof: Provided further, That any trustee, instead of building a separate grade high school for his township, shall transfer the pupils of his township competent to enter a graded high school to another school corporation: Provided further, That all payments of tuition, provided for under this act, herefore made by school trustees for such high school privileges are hereby legalized: Provided further,
That no such graded high schools shall be so built unless there are, at the time such house is built, at least twenty-five (25) common school graduates of school age residing in the township.” (Acts 1899, Ch. 192, Sec. 1, p. 424; 1901, Ch. 224, Sec. 1, p. 514.)

It is provided by statute that township trustees must discontinue and temporarily abandon all schools in which the average daily attendance during the last preceding school year has been fifteen (15) pupils or fewer; and may discontinue and temporarily abandon all schools at which the average daily attendance during the past preceding school year has been twenty (20) pupils or fewer.

Section 28-2803, Burns' 1948 Replacement.

The statute further provides that high schools shall be abandoned by township trustees on petition of sixty percent (60%) of the resident taxpayers of the school township and in such case the township trustee shall provide for the education of children of high school age in other high schools in the township or in the high schools of other townships or other school corporations.

Section 28-2807, Burns' 1948 Replacement.

Transportation of such children is required to be furnished such pupils.

Section 28-2804, Burns' 1948 Replacement.

Many other statutes of this state authorize joint schools in specific instances, while other statutes provide for consolidation of schools under certain conditions. Some of these statutes were in existence at the time of the enactment of the compulsory education law, and some have been enacted since that time.

It has been held that the course of study to be pursued in the public schools in our state is prescribed either by statute or by the school authorities in pursuance thereof. These schools include not only elementary schools, but high schools as well. A parent, therefore, is not at liberty to exercise a choice in that regard, but, where not exempt for some lawful reason, must send his child to the school where instruction is
provided suitable to its attainment as the school authorities may determine.


In the case of State v. Bailey (1901), 157 Ind. 324, at p. 329, the court said:

"The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the State, and may be restricted and regulated by municipal laws. One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth. If he neglects to perform it, or wilfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child, and the best interests of society require that the State shall exert its sovereign authority to secure to the child the opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools * * * have not only been upheld as strictly within the constitutional power of the legislature, but have generally been regarded as necessary to carry out the express purposes of the Constitution itself. * * *

"The matter of education is deemed a legitimate function of the State, and with us is imposed upon the legislature as a duty by imperative provisions of the Constitution. * * * The subject has always been regarded as within the purview of legislative authority. * * *

"* * * No parent can be said to have the right to deprive his child of the advantages so provided, and to defeat the purpose of such munificent appropriations."

In the case of Carter, Trustee v. State ex rel. (1931), 202 Ind. 655, at 659, the court said:

"The Supreme Court has frequently declared that the public school system of Indiana is a state institu-
tion organized and administered for the benefit of the children of school age of the state and indirectly for the benefit of the state itself, and that local school corporations are mere agencies of the state. The Constitution places upon the General Assembly the duty of providing by law 'for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all.' Under our present administrative organization of the public school system, each school corporation is charged directly with the obligation of providing tuition without charge for each child of school age whose school residence is within the territorial boundaries of the school corporation. The law contemplates that most children of school age will be accommodated in the schools of their respective school corporations; but, to prevent a practical nullification of the privilege of free tuition, the General Assembly has provided by statute for transfer of school children from their home corporations to other corporations when such transfer will result in better school accommodations. * * *"

When the foregoing statutes are construed in pari materia with each other and the above authorities are considered, I am of the opinion the words "school district in which such child resides" as used in the compulsory education statutes is not limited to the particular boundaries of a school corporation, but includes the school corporation in which he resides and the school corporation to which such child has been transferred or assigned for educational purposes pursuant to the school laws of this state.

In answer to your questions three and four, I am, therefore, of the opinion that a pupil under sixteen years of age, residing in a school corporation in which there are no schools, is required to attend a qualified and approved private school of the choice of its parents, or is required to attend a public school designated by the school officials of the school corporation in which such child resides, under the same conditions and subject to the same qualifications as have been heretofore stated in answer to your questions numbered one and two.