

OFFICIAL OPINION NO. 39

July 21, 1947.

Hon. James A. Knapp, Director,
State Personnel,
141 S. Meridian St.,
Indianapolis, Indiana.

Hon. Arthur C. Campbell, Chairman,
Indiana State Personnel Board,
141 S. Meridian St.,
Indianapolis, Indiana.

Gentlemen:

Your letter of July 11, 1947 has been received in which you jointly request an official opinion on the following questions:

"1. Are any or all of the licensed teachers while employed on and after August 1, 1947 by the Indiana State School for the Deaf, the Indiana State School for the Blind, and the Indiana Boys' School, The Indiana Girls' School, and the Indiana State Soldiers' and Sailors' Children's Home serving 'in the public schools of the state', or a 'teacher', and entitled to the 'base minimum salary' as defined and provided for in the Acts of 1945, Chapter 231, Page 1076, as amended by the Acts of 1947, Chapter 358, effective August 1, 1947, (Burns' 28-4332 Supp. through 28-4337 Supp.) ?

"2. Is the compensation of any or all of the licensed teachers employed by the Indiana State School for the Deaf, the Indiana State School for the Blind, the Indiana Boys' School, the Indiana Girls' School, and the Indiana State Soldiers' and Sailors' Children's Home fixed by law on August 1, 1947 by the Acts of 1945, Chapter 231, page 1076, as amended by the Acts of 1947, Chapter 358 (Burns' 28-4332 Supp. through 28-4337 Supp.), so as to preclude the Director of State Personnel from preparing and recommending and the Indiana Personnel Board from adopting a pay plan for said licensed teachers within the intent of the Personnel Act, being the Acts of 1941, Chapter 139, Sections 6 (b) and 12, Page 387 (Burns' 60-1306 (b) and 60-1312) ?

“3. Can the Indiana Personnel Board adopt, effective August 1, 1947, a pay plan with a minimum and maximum salary for each of the classes of the licensed teachers in said institutions pursuant to the Acts of 1941, Chapter 139, Sections 6(b) and 12, Page 387 (Burns’ 60-1306 (b) and 60-1312) to the minimum of the prevailing licensed teachers’ salaries in the public schools as provided for in the Acts of 1947, Chapter 357, effective August 1, 1947, when all or part of said institutions’ appropriations are not sufficient to pay the said minimum, maximum, and intermediate salaries?”

You preface your third question with the statement that you are informed the appropriations for all or part of the above named institutions are materially insufficient to pay the base minimum salaries of their licensed teachers on the basis of the salary schedule set up in Chapter 358 of the Acts of 1947.

In considering your first and second questions, it is pointed out Clause (b) of Section 60-1306 Burns’ 1943 Repl., same being Section 6, Chapter 139, Acts of 1941, being a part of the State Personnel Act, provides as follows:

“(b) To adopt, with or without modification, such pay plan as may be recommended by the director and as is in conformity with the provisions of this act, and, upon approval of the state budget committee, to promulgate and enforce the same: Provided, That any pay plan so adopted shall provide salary ranges, within which the appointing authorities may fix the salaries to be paid.”

Section 60-1312, Burns’ 1943 Repl., same being Section 12, Chapter 139, Acts 1941 reads as follows:

“After consultation with appointing authorities and the state fiscal officers, the director shall prepare and recommend to the board a pay plan for all employees holding positions for which compensation is not fixed by law. Such pay plan shall include employees in the unclassified, as well as the classified service and shall provide, for each class of positions, a minimum and

maximum rate of pay and such intermediate rates of pay as the director considers necessary or equitable. In establishing such rates, the director shall give consideration to the experience in recruiting for positions in the state service, the prevailing rates of pay for the service performed, and for comparable services in public and private employment, living costs, maintenance or other benefits received by employees, and the state's financial condition and policies. Such pay plan shall take effect when adopted by the board and approved by the state budget committee. Each employee in the classified service shall be paid at a rate fixed by the appointive authority within the salary range of the pay plan for the class of positions in which such employee is employed."

It is, therefore, clear that unless the salaries of teachers in the five state institutions referred to in your questions, are fixed by statute, it would be the duty of the State Personnel Board to fix such minimum, maximum or intermediate salaries of teachers employed in such schools pursuant to the other pertinent provisions of the State Personnel Act.

Section 28-4333 Burns', 1945 Supp., same being Section 2, Chapter 231, Acts 1945, in part provides as follows:

"The term 'teacher' as used in this act (§§ 28-4332—28-4335) shall be construed to include all persons working in the public schools who are required by law to secure a license from the licensing board of the state department of education as a prerequisite to the performance of such work and the salary provisions of this act shall apply to all such teachers for as long a period as their work in the public school shall continue unless the trustee or board of education of any township, town, city or county shall adopt a salary schedule for teachers not less remunerative, which shall then be effective as a minimum schedule for all teachers within that system during the year or years for which it is adopted and with the exception that kindergarten teachers may be engaged for a school term of less than eight (8) months: Pro-

vided, however, that no such locally adopted salary schedule which differs from the schedule as otherwise provided in this act (§§ 28-4332—28-4335) shall be used as the basis for distributing funds to local school corporations from the state school tuition fund.”

Section 1 of Chapter 358 of the Acts 1947, which act amends Sections 1 and 3 of Chapter 231 of the Acts of 1945 *supra*, and which is effective August 1, 1947 provides in part as follows:

“That the base minimum salary of any teacher in the public schools of the state shall be, provided that such teacher on the first day of service in the current school year shall be legally licensed and have completed years of professional training in an accredited teachers’ training institution, as follows:”

From the foregoing, it is clear the answer to each of your first two questions depends upon the meaning of the words “public schools” as used in said statutes as applied to schools being conducted in the state institutions referred to. It is to be noted the Supreme Court of Indiana in the case of *State v. O’Dell* (1917), 187 Ind. 84 at 87, in ruling upon the applicability of the compulsory education statute to high schools held, that the words “public schools” and the term “common schools” are synonymous under the Indiana School laws. The “common schools” of the State are grades 1 to 12 inclusive (Section 28-3413 Burns’ 1933; *Greathouse v. Board of School Commissioners, City of Indianapolis*, (1926), 198 Ind. 95-102).

The words “common schools” and “public schools” have been generally defined as schools free and open to all on equal terms and include grammar and high schools.

47 Am. Jur., Schools, Section 3, page 298;
Vol. 35, Words and Phrases, Permanent Edition, Public Schools, page 332 *et seq.*;
56 Corpus Juris, School and School Districts, Section 2, page 167.

In connection with the above definition it is pointed out the schools conducted by the above named state institutions

are only open to children who have been admitted to such state institutions, and are not in the generally accepted meaning of the words "free and open to all."

It has been held that similar state institutions are generally of statutory creation and are governed by boards, and when so created are regarded as governmental agencies (26 Am. Jur., Section 2, Page 607), and that such boards have only such powers as expressly conferred upon them by the general law under which they are organized, and have such other powers that are incident and necessary to the execution of their express powers. (26 Am. Jur., Section 4, Page 609).

A search of the law fails to reveal any case in this State or in any foreign state defining the words "public schools" as used in relation to schools conducted in state institutions. It is, therefore, necessary to determine the legislative intent in the use of such words in said statute, and in doing so, it is necessary to take into consideration other acts in *pari materia* whether passed before or after the acts in question. (Sherfey v. City of Brazil (1937), 213 Ind. 493, 497, 498).

Section 22-123 Burns' 1945 Supp. *et seq.* same being Chapter 336, Acts 1945 provides for the manner of appointment of the board of trustees in "benevolent, reformatory and penal institutions", and enumerate within that classification each of the above named state institutions. Section 22-128 Burns' 1945 Supp., same being Section 6, Chapter 38, Acts 1941, as amended by Section 5, Chapter 336, Acts 1945 provides in part: "Such board of trustees shall have supervision of their respective institutions", and Section 22-130 Burns' 1945 Supp., same being section 8, Chapter 38, Acts 1941, provides in substance that "all prior duties, powers and functions, not otherwise set out therein should continue to be performed by said board of trustees under the existing statutes."

It is, therefore, deemed advisable to consider some of the pertinent features of the statutes regulating the education of children in each of such institutions.

The statute applicable to the Indiana State Soldiers' and Sailors' Children's Home was before our Supreme Court for construction in the case of Board of Trustees of the Indiana Soldiers' and Sailors' Children's Home v. Wright (1936), 211

Ind. 264. In that case the superintendent of the institution had previously executed a contract with a teacher, which contract was a uniform contract prescribed by the superintendent of public instruction, and which contained the provision relative to teacher tenure. The plaintiff sought to protect tenure rights under such contract and the court beginning on page 265 of the opinion said:

“* * * This raises a question as to the authority of the superintendent of the school, who made the contract, to bind appellant to renew appellee’s contract from year to year until charges were preferred against him, and the procedure set up in the Teachers’ Tenure Law followed in removing him. At the time the contract was entered into, the statute provided for the management of the institution by a board of trustees. The board appointed the superintendent. The superintendent was empowered to ‘appoint and employ’ a matron, and assistant matrons, teachers, attendants, etc. Section 22-2312 Burns’ Ann. St. 1933, section 4410 Baldwin’s Ind. St. 1934. Section 22-2314 Burns’ Ann. St. 1933, section 4412 Baldwin’s Ind. St. 1934, provides that the superintendent at any time may remove and exclude any employee appointed by him, but only for cause which removal and the cause therefor he shall report in writing to the board at its next monthly meeting at the home. The superintendent was without power, by contract or otherwise, to limit the causes for which an employee might be removed, or to extend the time for which he should be employed beyond the terms of the statute. In other words, the will of the legislature, as expressed in the statute, controls, and the superintendent has no power to limit or enlarge the condition of employment. The provision in the contract that it should be governed by the terms of the Teachers’ Tenure Law was void and of no force and effect. * * *”.

It is clear the Supreme Court did not consider the school being conducted in the Soldiers’ and Sailors’ Home as a “public school” or otherwise it would have come squarely within the provision of the 1927 tenure statute which pro-

vided for a teacher teaching in any "public school corporation" in the state. (See footnotes 2, Section 28-4307 Burns' 1933). It is, also, pertinent to note that the powers of the superintendent under the statute giving the right to hire and discharge teachers at will, in fact, constituted a limitation on his powers to bind himself to a tenure contract.

The statute relative to the education of children in the Indiana Boys' School (Sections 13-929, 13-930 and 13-931, Burns' 1942 Repl.) was the subject of an official opinion of this office found in the 1933 Opinions of the Attorney General, page 295, where it was held that the Indiana Boys' School was not a "public school" within the meaning of the Indiana teachers' minimum wage law, and after consideration of authorities stated such a term indicates a school "open and public to all in the locality, which is subject to and under the control of the qualified voters of the school district in which it is situate, and which is supported and maintained primarily by monies raised by general taxation."

It is, also, pertinent to note that Section 13-930 Burns' 1942 Repl. *supra*, provides "the course of study in the literary school department of the Indiana Boys' School shall insofar as practicable, be the same as the course of study in the corresponding grades of the *public schools* of this State." By this reference the legislature has indicated the Boys' School was separate from the public schools of the State.

The statutes governing the Indiana Girls' School are Section 13-701 *et. seq.* Burns' 1942 Repl., Section 13-707, thereof, same being Section 2, Chapter 266, Acts 1913, provides for their commitment to such institution until they reach the age of twenty years where they shall be *properly cared for subject to the rules and regulations of the board of trustees.*

As to the education of children in the Indiana State School for the Deaf, it is provided by Section 22-916 Burns' 1933, that all mutes shall be entitled to education in the institution free of charge, under such regulations as to age, character and punctual attendance as the board of trustees shall adopt. Under Section 22-917 Burns' 1933, it is provided that the trustees shall expel from the institution any pupil whose longer continuance in the same would be injurious thereto. These statutes are 1 R. S. 1852, Chapter 26, Sections 26 and 27 respectively. This would clearly indicate the qualification

for admission as well as the right of continued attendance in the school of such institution is restricted and is not within the same classification as the general definition of a public school.

Under the statute providing for education of children in the Indiana State School for the Blind and the Deaf (Section 22-114 Burns' 1933 same being Section 7, Chapter 3, Acts 1879), it is provided that the superintendent may employ teachers, with the approval of the board of trustees, and for good cause discharge the same and appoint other competent persons in their place. This is analogous to the authority conferred upon the board of trustees of the Indiana State Soldiers' and Sailors' Children's Home, which was the subject of the opinion in the case of Board of Trustees v. Wright, 211 Ind. 264, *supra*.

As pointed out in the authorities cited in the 1933 Opinions of the Attorney General, 295 *supra*, the words "public schools" are generally considered to be those regularly established schools for the education of every class of children which must be maintained everywhere according to the size and ability of cities and towns, and must be attended by all the children of school age, as distinguished from other special schools.

Commonwealth v. Connecticut Valley St. Railroad Co. (1907), 196 Mass. 309, 82 N. E. 19, 20;

People v. Hendrickson (1909), 104 New York State 122, 109 N. Y. Supplement 403, 90 N. E. 1163;

Lawrence Board of Education v. Dick (1904), 70 Kans. 434, 78 Pac. 812;

State v. Preston (1914), 79 Wash. 286, 140 Pac. 350.

It is further pointed out that under the teachers' retirement act (Section 28-4511 Burns' 1945 Supp., same being Section 3, Chapter 328, Acts 1945), it is provided that the members of the fund should include any teacher "in any of the public schools of this State." Said statute then further provides special designations to include as members those teaching in the public state normal schools; those in other

public state educational institutions supported wholly by public money; and the regularly employed teachers in state *benevolent, charitable and correctional institutions*. By specially designating those employed in such state institutions the legislature clearly indicated it did not consider them as coming within the general classification first mentioned of those teachers employed in the "public schools" of the state.

From the foregoing, I am of the opinion schools maintained in the above named institutions are not "public schools" within the meaning of the Indiana statutes requiring the payment to teachers therein of the salaries provided in the minimum teachers' salary act.

1. I am, therefore, of the opinion, in answer to your question number one, that such teachers are not serving in the "public schools of the state" within the meaning of the minimum teachers' salary act.

2. In answer to your second question, it is, therefore, clear that since the salary of such teachers is not fixed by law, that it is within the province of the State Personnel Board, acting in compliance with the State Personnel Act, to fix a pay plan for such teachers containing the minimum, maximum and intermediate rates of pay for such teachers, which salary is thereafter actually fixed by the appointing authority of the institution, as provided in the personnel act.

3. I am of the opinion your third question does not present a legal question for consideration by this department as it is more in the nature of a state fiscal policy matter to be determined by conferences with the State Budget Department. If money is made available for any such deficiencies, I see no reason why your board would not have authority to fix such pay schedule for teachers in all said institutions.