

It would appear therefore, that the express mention of the 60-day limitation would exclude any other limitation and that the intent of the law was that the election board be newly appointed for each primary and general election. There is certainly no authority to warrant the insertion in this statute of a limitation requiring the board to be appointed after January 1 of an election year.

It is, therefore, my opinion that it is legal to appoint members of the election board prior to January 1 of the year in which elections are held.

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OFFICIAL OPINION NO. 91

August 28, 1945.

Hon. Clement T. Malan,  
State Superintendent of Public Instruction,  
Room 227 State House,  
Indianapolis, Indiana.

Dear Sir:

I have your letter in which you ask an official opinion upon the following questions:

“1. Must every city and every county having fifteen hundred or more children in average daily attendance employ an attendance officer?”

“2. In determining the average daily attendance of an attendance district, is the school corporation permitted to include the average daily attendance of children in parochial schools?”

“3. Are school attendance officers ‘teachers’ as defined in S. B. No. 130, Chapter 231, Acts of 1945?”

“4. Must the public school corporation which employs and pays a substitute teacher hold a contract with such substitute teacher?”

“5. Is a substitute teacher entitled to the minimum rate of pay as determined by training and experience?”

1. In answering your first question reference must be made to Section 1 of Chapter 171 of the Acts of 1945, which

Act amended the prior law concerning attendance officers. Section 1 of the 1945 law provides as follows:

“\* \* \* Section 1. That every county and every city having an average daily attendance of fifteen hundred or more children of school age, shall constitute a separate attendance district. The county superintendent of schools shall nominate and the county board of education may appoint an attendance officer who shall be qualified as required by this act and by the state board of education and who shall act as attendance officer for every school corporation of the county not organized as a separate attendance district. If the county board of education is of the opinion that it is not necessary in the proper enforcement of this act to appoint an attendance officer, no attendance officer shall be appointed. If no attendance officer be appointed, the county superintendent of schools shall be *ex officio* the attendance officer for all of the schools of his county which are under his immediate jurisdiction and the school superintendent of any school city or school town which is not organized as a separate attendance district shall be *ex officio* the attendance officer of such school city or school town. The superintendent of schools of the county, city or town who is *ex officio* the attendance officer of such county, city or town may designate one or more teachers of such county, city or town to act as assistant attendance officers, under the direction of the superintendent, and to perform such duties in connection therewith as such superintendent may assign, and such teachers for their services as assistant attendance officers shall receive no additional compensation. The superintendent of schools of each city and/or county having fifteen hundred or more children in average daily attendance in school shall nominate and the board of school trustees of such city and/or county shall appoint one attendance officer, and in like manner one additional attendance officer may be nominated and appointed for every seven thousand five hundred children of school age in average daily attendance in the schools in such city and/or county. Every such city may hire

additional attendance officers and may require additional services of attendance officers not herein provided for, and may provide additional compensation for attendance officers above the maximum fixed by this act, but such additional attendance officers and such additional compensation shall be paid out of the funds of such school city. The board of school trustees of any city or town having less than fifteen hundred children in average daily attendance in school may organize such city or town as a separate attendance district under this act and may appoint an attendance officer in the manner herein provided, but such officer shall be paid entirely out of the funds of such board of school trustees."

The legislative history of the foregoing amended statute reveals that it was originally enacted in 1921 as Section 1 of Chapter 132 of the Acts of 1921, page 337. That statute provided in part as follows:

"\* \* \* That every county and every city having a school enumeration of two thousand (2000) or more children of school age, *shall* constitute a separate attendance district. The county superintendent of schools *shall* nominate and the county board of education *shall* appoint an attendance officer who shall be qualified as required by this act and by the state board of attendance and who shall act as attendance officer for every school corporation of the county not organized as a separate attendance district. The superintendent of schools of each city having two thousand (2000) or more children of school age *shall* nominate and the board of school trustees of such city *shall* appoint one attendance officer, and in like manner one additional attendance officer shall be nominated and appointed for every ten thousand (10,000) children of school age enumerated in such city. \* \* \*"

(My emphasis.)

The above statute clearly made it mandatory to have attendance officers in every city and every county having a

school enumeration of two thousand or more children of school age.

This 1921 statute was amended by Section 1 of Chapter 29 of the Acts of 1932 (Spec. Sess.), which provided in part as follows:

“\* \* \* That every county and every city having a school enumeration of two thousand or more children of school age, shall constitute a separate attendance district. The county superintendent of schools shall nominate and the county board of education *may* appoint an attendance officer who shall be qualified as required by this act and by the state board of attendance and who shall act as attendance officer for every school corporation of the county not organized as a separate attendance district. *If the county board of education is of the opinion that it is not necessary in the proper enforcement of this act to appoint an attendance officer, no attendance officer shall be appointed. If no attendance officer be appointed, the county superintendent of schools shall be ex-officio the attendance officer for all of the schools of his county which are under his immediate jurisdiction and the school superintendent of any school city or school town which is not organized as a separate attendance district shall be ex-officio the attendance officer of such school city or school town. The superintendent of schools of the county, city or town who is ex-officio the attendance officer of such county, city or town, may designate one or more teachers of such county, city or town to act as assistant attendance officers, under the direction of the superintendent, and to perform such duties in connection therewith as such superintendent may assign, and such teachers for their services as assistant attendance officers shall receive no additional compensation.* The superintendent of schools of each city having two thousand or more children of school age shall nominate and the board of school trustees of such city shall appoint one attendance officer, and in like manner one additional attendance officer may be nominated and appointed for every ten thousand children of school age enumerated in such city. \* \* \*”

(My emphasis.)

The words and sentences italicized above indicate the manner in which the former statute was amended. From such amendment it appears that the appointment of attendance officers in every city having a school enumeration of two thousand (2000) or more children was mandatory, while in the county having such enumeration it was no longer mandatory, but was within the discretion of the county board of education as to whether an attendance officer should be appointed. The Attorney General so ruled in 1933 Ind. O. A. G. p. 312.

This latter law was then amended by Section 1 of Chapter 171 of the Acts of 1945, first quoted above. In comparing the 1945 statute with the 1932 statute it is apparent that the first five sentences of the 1945 statute were substantially a re-enactment of the 1932 statute which, as pointed out above, made the appointment of attendance officers mandatory in cities with a school attendance in excess of a certain amount, but discretionary in counties. However, the 1945 statute then provides:

“\* \* \* The superintendent of schools of each city *and/or county* having fifteen hundred or more children in average daily attendance in school *shall* nominate and the board of school trustees of *such city and/or county shall* appoint one attendance officer, \* \* \*”  
(My emphasis.)

By adding the new phrase *and/or county* in the 1945 Act it was the apparent intent of the Legislature to make the appointment of attendance officers mandatory both in cities and counties having an average daily attendance in excess of fifteen hundred (1500) children of school age. While there is an apparent conflict between the first part of the 1945 statute and the last part, as to whether the appointment of attendance officers is mandatory in counties, it is my opinion that the last part controls. It is a familiar rule of statutory construction that if any new provision is incorporated in the statute by an amendatory act, or there is a change in the phraseology, it must be presumed the Legislature intended to change the existing law.

Chism v. State, 203 Ind. 241;  
Department, etc. v. Mussel, 218 Ind. 250;  
State *ex rel.* v. Board, 196 Ind. 472.

It is therefore my opinion that the appointment of attendance officers is mandatory in every city and every county having fifteen hundred (1500) or more children of school age in average daily attendance.

2. In answering your second question reference must be made again to Section 1 of Chapter 171 of the Acts of 1945 above quoted. However, that Act merely provides that every county and every city having an *average daily attendance of fifteen hundred or more children of school age* shall constitute a separate attendance district. No mention is made in the Act as to whether the average daily attendance shall include children in parochial schools, as well as the children in the public schools. The Act includes the average daily attendance of children of *school age*.

Ordinarily, in computing average daily attendance for the purpose of applying the school laws of the State to school corporations, it is usually confined to pupils in the public schools, since the public schools are the only ones which are supported by public funds. However, in the case of attendance officers it seems clear that their duties apply not only to pupils of the public schools, but also to pupils of the parochial schools. The compulsory education law which is enforced by the attendance officers is applicable to children of school age in general, whether they attend the public schools or the parochial schools. Section 5 of Chapter 132 of the Acts of 1921, the same being Section 28-505, Burns' I. S. A. 1933, provides that every child between the ages of seven (7) and sixteen, (16) shall attend public school or *other school*. Said section also requires every principal and teacher in every public or *other school* which is attended by one or more minors between the ages of seven (7) and sixteen (16) years to furnish information concerning the attendance of pupils at said schools.

Furthermore, it is the duty of attendance officers, in addition to seeing that all children of school age attend school, to visit the homes of children who are absent from school or who are reported to be in need of books, clothing or parental care; to visit factories where minors are employed, to serve written notices on parents or guardians or custodians whose children are out of school illegally, and to enforce the provisions of the compulsory education law. (Section 28-502, Burns' 1933 I. S. A. (Pocket Supp.) ).

It therefore appears that the duties of attendance officers are concerned with, and apply to all children of school age, whether they be enrolled in the public or parochial schools, and the need for such attendance officers is based not merely on the average daily attendance at the public schools, but also upon the average daily attendance at the parochial schools within the particular community. Accordingly, it is my opinion that in determining the average daily attendance of an attendance district, the school corporation is permitted to include the average daily attendance of children in the parochial schools.

3. In answering your third question reference must be made to Chapter 231 of the Acts of 1945, effective August 1, 1945, which provides for the minimum compensation of teachers. In said Act the term "teacher" is defined as follows:

"The term 'teacher' as used in this act 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 months: *Provided, however,* That no such locally adopted salary schedule which differs from the schedule as otherwise provided in this act shall be used as the basis for distributing funds to local school corporations from the State School Tuition Fund." (My emphasis.)

Whether or not a person is a "teacher" under the above statute, and entitled to the minimum compensation therein depends upon whether such person works in the public schools and is 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.

Section 28-4201 of Burns I. S. A. 1933, provides for the licensing of school officers and employees and reads as follows :

“The licensing of all superintendents, supervisors, principals, teachers, *attendance officers*, and of all other regular public school employees shall hereafter be vested in the state board of education. (Acts 1923, ch. 11, Sec. 1, p. 36.)” (My emphasis.)

Section 28-4208 of Burns I. S. A. 1933, provides :

“No person, after December 1, 1923, may be employed as superintendent, assistant superintendent, supervisor, principal, teacher, *attendance officer*, or as any other kind of regular school employee unless such person holds a license issued by the state board of education of the kind and grade required for the particular position, and such license is registered with the proper superintendent; but any county board of education, board of school trustees, or city board of education may impose higher requirements as a condition of employment than those herein imposed for the given position. (Acts 1923, ch. 11, Sec. 8, p. 36.)” (My emphasis.)

Chapter 330 of the Acts of 1945, effective May 1, 1945, reorganized the state board of education under the name of Indiana State Board of Education and divided it into three (3) commissions—a commission on general education, a commission on textbook adoption, and a commission on teacher training and licensing. Section 1 of said Act provided in part as follows :

“All powers and duties of the predecessor state board of education, including those delegated to said board by the Eighty-Fourth General Assembly are hereby and shall be transferred, distributed, and assigned to the board and commissions created in this act,\* \* \*”

Section 2 of said Act provides in part as follows :

“The commission on general education shall exercise all the powers and duties heretofore exercised by the



state board of education except those hereinafter assigned to the commission on teacher training and licensing and the commission on textbook adoptions.”

Section 4 of said Act provides in part as follows:

“The commission on teacher training and licensing shall exercise all the powers and duties heretofore exercised by the state board of education with reference to examination, training, and licensing of persons desiring to teach in the elementary and secondary schools of the State, \* \* \*”

From the foregoing statutes it is clear that attendance officers for many years have been licensed by the state board of education, and under the 1945 Acts above quoted are licensed by a licensing board of the state department of education as a prerequisite to the performance of their work.

This same matter was the subject of an official opinion of the Attorney General of Indiana reported in 1943 Ind. O. A. G., p. 364. That opinion held that attendance officers were teachers, and therefore entitled to the minimum compensation of teachers provided by Chapter 112 of the Acts of 1943. The 1943 law defined the term “teacher” as follows:

“The term ‘teacher’ as used in this act shall be construed to include all persons working in the public schools who are required by law to secure a license from the *State* as a prerequisite to the performance of such work. \* \* \*” (My emphasis.)

The 1945 law somewhat narrowed the definition of the term “teacher” from one who was required to obtain a license from the *State* to one required to obtain a license from *the licensing board of the state department of education*. However, as shown before, attendance officers are required to obtain a license from the licensing board of the state department of education.

Based upon the foregoing statutes and the 1943 opinion of the Attorney General above referred to, it is my opinion that school attendance officers are “teachers” as defined in Chapter 231 of the Acts of 1945.

4. In your fourth question asking whether a school corporation must hold a contract with a substitute teacher, you do not indicate what kind of contract you refer to, but I assume that you mean a written contract.

Section 28-4302 of Burns' I. S. A., 1933, provides as follows:

"All contracts hereafter made by and between teachers and school corporations of the State of Indiana shall be in writing, signed by the parties to be charged thereby, and no action shall be brought upon any contract not made in conformity to the provisions of this act. (Acts 1899, ch. 111, Sec. 1, p. 173.)"

Furthermore, it has been consistently held by the decisions of the courts of this state that all contracts to teach in the public schools must be in writing and signed by the persons to be charged or they may not be enforced,

Board of School Commissioners v. Wolfolk  
(1935), 209 Ind. 498;  
Lee v. York School Twp. (1904), 163 Ind. 339;  
School City of Evansville v. Hickman (1910), 47  
Ind. App. 500.

Accordingly, in my opinion, a school corporation which employs and pays a substitute teacher must hold a written contract with such teacher.

5. In answering your fifth question, reference must be made to the following statutes:

Section 1 of Chapter 231 of the Acts of 1945, effective August 1, 1945, providing for the minimum compensation for teachers, defines the term "teacher" as follows:

"The term 'teacher' as used in this act 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 \* \* \*"

Section 28-4201 of Burns' I. S. A., 1933, provides as follows:

"The licensing of all superintendents, supervisors, principals; *teachers*, attendance officers, and of all

other regular public school employees shall hereafter be vested in the state board of education. (Acts 1923, ch. 11, Sec. 1, p. 36.)" (My emphasis.)

Section 28-4208 of Burns' I. S. A., 1933, provides as follows:

"No person, after December 1, 1923, may be employed as superintendent, assistant superintendent, supervisor, principal, *teacher*, attendance officer, or as any other kind of regular school employee unless such person holds a license issued by the state board of education of the kind and grade required for the particular position, and such license is registered with the proper superintendent; but any county board of education, board of school trustees, or city board of education may impose higher requirements as a condition of employment than those herein imposed for the given position. (Acts 1923, ch. 11, Sec. 8, p. 36.)" (My emphasis.)

Section 28-5005 of Burns' I. S. A., 1933, provides in part as follows:

"Trustees shall employ no person to teach in any of the common schools of the state unless such teacher shall have a license to teach issued from the proper state or county authority, and in full force at the date of the employment. Any teacher who shall commence teaching any such school without a license shall forfeit all claim to compensation out of the school revenue for tuition for the time he or she teaches without such license, but if a teacher's license shall expire by its own limitation within a term of employment, such teacher may complete such term of employment with the then current school year. \* \* \*"

The first part of the statute last quoted above requiring a license to teach has been held by the Supreme Court of Indiana to be applicable to cities and incorporated towns as well as to school townships. (*Putnam v. The School Town of Irvington* (1879), 69 Ind. 80, 83.)

Also, it has been decided by the Supreme Court of Indiana that under the laws of this State no person may be employed or permitted to teach in our common schools in the absence

of his holding some grade of license required or provided for by the statute.

*State ex rel. Benham v. Bradt* (1908), 170 Ind. 480;

*Jackson School Tp. v. Farlow* (1881), 75 Ind. 118.

Based upon the foregoing statutes and decisions it seems clear that *all* teachers who teach in the public schools are required to be licensed, regardless of whether they are regular or substitute teachers. As shown in my answer to your third question, the licensing of teachers is now vested in the licensing board of the state board of education under Chapter 330 of the Acts of 1945.

Since substitute teachers are required by law to secure licenses from the licensing board of the state board of education, as a prerequisite to the performance of their work, such persons are "teachers" within the meaning of Section 1 of Chapter 231 of the Acts of 1945, and are therefore entitled to the minimum compensation provided for therein.

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OFFICIAL OPINION NO. 92

August 28, 1945.

Hon. Clement T. Malan,  
State Superintendent of Public Instruction,  
State House,  
Indianapolis 4, Indiana.

Dear Sir:

Your letter of August 10, 1945, has been received, in which you requested an official opinion on the following question:

"1. Chapter 156 of the Acts of 1945 of the Indiana General Assembly states in part that 'The county superintendent of schools together with such other persons employed for supervisory or administrative duties shall be deemed to be supervisors of instruction and as such eligible, subject to the rules that have been or shall be adopted by the state board of education, to