

common council, and whose salaries are paid from two (2) or more funds or appropriations, the total sum of such appropriation being in excess of the salaries of such employees or assistants as fixed by the mayor with the approval of the common council, cannot exceed the salary fixed by the mayor under the clear provisions of Section 48-1222 Burns' 1943 Supplement, *supra*, which in part provides:

“* * * The salaries of each and all of such appointive officers, employees, deputies, assistants and departmental and institutional heads, other than those fixed by the common council under the provisions of this act, shall be fixed by the mayor subject to the approval of the common council, *which may reduce but in no event shall raise the salary so fixed.* * * *”
(Our emphasis.)

Such employees' salaries therefore would remain at the amount fixed by the mayor subject to the approval of the common council, regardless of any excessive appropriation therefor by the common council, in the absence of a special statute controlling in any particular case. An appropriation is a legal setting apart or assigning of public funds for a named use, and it does imply a fixing of salaries.

However, it is pointed out this answer would not apply to the additional five thousand dollars (\$5,000.00) per year salary authorized for such city engineer under the provisions of Section 48-3404 Burns' 1933, *supra*, for the reasons pointed out in answers to your questions numbered one (1) and two (2).

OFFICIAL OPINION NO. 15

March 14, 1945

Hon. A. V. Burch,
Auditor of State,
State House,
Indianapolis, Indiana.

Dear Sir:

I have the inquiry of Hon. Richard T. James, Auditor of State, which reads as follows:

“The Superintendent of Public Instruction has certified to this office for payment the amounts due different school corporations in the matter of reimbursing because of special classes operating pursuant to the provisions of Chapter 211 of the Acts of 1927, BRS 28-3501 to 28-3512. The amount certified covers the school year 1943-44 and was due in July 1944.

“The provisions of Chapter 211 of the Acts of 1927 are that the corporations operating these classes shall be reimbursed an amount equal to three-fourths of the additional expenses, this reimbursement to be paid by the State from Common School Revenue Fund.

“‘Section 28-3506. All claims authorized by this section shall be paid out of the Common School Revenue Fund and a sufficient amount to pay all such claims shall be reserved by the State Superintendent of Public Instruction at the time of making the semiannual apportionment.’

“Chapter 263 of the Acts of 1943 created the State School Tuition Fund and made school revenue a part of said fund.

“‘Chapter 263, Section 2. In addition to the amounts provided by the tax levy as set out above the funds accruing in the State Treasury as such after December 1st, 1943, to the excise fund, common school fund interest, common school revenue, intangible tax, and the dog fund which are for distribution to the schools shall be credited to the state school tuition fund.’

“Chapter 263 of the Acts of 1943 makes provisions for the distribution of the State School Tuition Fund to school corporations under certain specific conditions, payment of school relief claims, the auditing and other expenses in connection with school relief claims, but makes no specific provisions for the payment of claims filed pursuant to Chapter 211 of the Acts of 1927.

“In your opinion, can the amounts due to the several school corporations approved for payment by the Superintendent of Public Instruction for reimbursing because of the additional expenses in maintaining special classes under the 1927 Act be paid from the School Tuition Fund created by Chapter 263 of the Acts of 1943?”

In order to arrive at any satisfactory answer to your question, a historical survey of the various school revenue statutes involved is essential.

The common school fund was established by Section 2 of Article 8 of the Indiana Constitution. The various properties and revenues which comprise that fund are specifically set forth in that section.

Section 3 of Article 8 of the Indiana Constitution reads as follows:

“The principal of the Common School fund shall remain a perpetual fund which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.”

Consequently, we may begin with the basic premise that the constitutional common school fund may be supplemented but may not be diminished below the constitutional income, nor may the income from the constitutional funds become a part of the general fund of the state.

See State, *ex rel.* v. Hamilton, 70 Ind. 241 at 244.

To the constitutional fund, the Legislature has from time to time made additions. For instance, by Chapter 1, page 3 of the Acts of 1865 as later amended (28-101 Burns' R. S. 1933) the income of the common school fund as provided in the Constitution, together with income from licenses to sell alcoholic beverages, unclaimed fees and taxes, since repealed, was denominated as “school revenue for tuition,” and the whole was appropriated exclusively to furnishing tuition to the common schools of the state. By subsequent amendment provision was made for apportionment of the school revenue for tuition on the fourth Monday of June and the first day of

January of each year. So far as I am able to ascertain this constituted for many years the sole distribution by the state for common school purposes.

By Chapter 201, page 539 of the Acts of 1921 (6526 Burns' R. S. 1926) a 7c tax was levied in addition to a poll tax of 50c which was to be paid into the state treasury for a supplement to the income from the common school fund and apportioned to the several counties in the manner provided by that Act. The Act set forth that upon the date of apportionment of school revenue the Superintendent of Public Instruction should add to the sums in readiness for apportionment in the counties, those sums in readiness for apportionment by the state and 70% of the levy provided. The distribution of that combined sum was exclusively for the purpose of paying teachers' salaries. No mention is made of "school revenue for tuition," but since that fund was undisturbed, it must have been the one intended. It thus appears that in 1921 the "school revenue for tuition" remained as constituted in 1865. Of course at this time the income from liquor licenses was not included but otherwise the fund remained the same.

By Chapter 211, page 599 of the Acts of 1927 boards of school trustees or school commissioners or the trustee of a township were authorized to organize special classes for physically disabled children. Section 6 of that Act (28-3506 Burns' R. S. 1933) provided that the state would reimburse the school unit in an amount equal to three-fourths of the cost of instruction in excess of the cost of the same number of children in regular classes. Claims were to be presented on the first of July of each year for the preceding school year and those claims were to be paid out of the "common school revenue fund." The Superintendent of Public Instruction was directed to reserve out of that fund sufficient monies to pay the cost of instruction for disabled children at the time of his semiannual apportionment, and the claims were to be paid in the same manner as the common school revenue fund was paid at the time of its apportionment. Since the only funds other than the special tax levy which were apportioned at that time by the State Superintendent of Public Instruction were those funds originally called "school revenue for tuition," that must have been the fund intended when the words "common school revenue fund" were used.

By Chapter 163, page 566 of the Acts of 1931 the percentage of apportionment of the tax levy was changed to 55% of that levy for tuition and 45% for relief. Otherwise the tax levy and tuition fund as established by the 1865 Act remained combined in one tuition fund composed of constitutional income from common school funds, statutory additions and 55% of the tax levy.

By Chapter 167, page 863 of the Acts of 1933 (28-901 Burns' R. S. 1933) the whole of the 7c levy plus 50c poll tax became a relief fund. The same year the Legislature by Chapter 96, page 670 (28-1001 Burns' R. S. 1933) directed that the Auditor of State should transfer semiannually upon the order of the State Finance Board from the general fund of the state treasury to "the common school revenue fund" sufficient funds to make partial payment of salaries of licensed instructors computed on a per capita pupil basis. It is noted that in both the 1927 and 1933 Acts the words "common school revenue fund" are used. In both cases, the fund originally known as "school revenue for tuition" must have been intended since that is the fund distributed. Thus, by 1933 the whole of the tax levy has been withdrawn from the tuition fund, but an appropriation from the state general fund is substituted for the tax revenue and added to the "school revenue for tuition" before apportionment.

Chapter 96 of the Acts of 1933 as set forth above did not repeal the 1927 Act providing for state aid in classes for disabled children. By an Attorney General's opinion in 1937 (O. A. G. 1937, page 411) upon inquiry from the Assistant State Superintendent of the Department of Education, those things which could be paid under the 1927 Act were itemized. All parties apparently assumed that the 1927 Act was still in existence. In fact, there was no reason why a repeal should have been implied.

By Chapter 212, page 642 of the Acts of 1941 (28-3514, *et seq.*, Burns' R. S. 1933, Pocket Supplement) aid was provided for hard of hearing students and it was specifically provided in Section 5 of that Act (28-3518 Burns' R. S. 1933, Pocket Supplement) that it should be supplemental to the 1927 Act. It was said in an opinion of the Attorney General of August 8, 1941 (O. A. G. 1941, page 275) that payments made under the provisions of the supplemental Act were to be made from unappropriated state funds. Thus, the Legis-

lature considered the 1927 Act still in effect in 1941. Nor has it been later repealed.

By Chapter 263, page 738 of the Acts of 1943 (28-912 Burns' R. S. 1933, Pocket Supplement) there was created a fund known as the "state school tuition fund" from which there was to be apportioned to the several school taxing units amounts of money as provided in the Act. That Act, in Section 2 (28-913 Burns' R. S. 1933, Pocket Supplement), provided for a 7c tax levy and a poll tax of 50c and that section further provided:

"In addition to the amounts provided by the tax levy as set out above the funds accruing in the state treasury as such after December 1st, 1943, to the excise fund, common school fund interest, common school revenue, intangible tax, and the dog fund which are for distribution to the schools shall be credited to the state school tuition fund."

The excise fund consists of fees and taxes from alcoholic beverages distribution and sale.

Section 40, Chapter 226, p. 1056, Acts 1935, as amended (12-810—12-811 Burns' 1942 Replacement.)

Thirty-three and one-third per cent ($33\frac{1}{3}\%$) of the fund is allocated to schools to become a part of "the tuition fund" of each. This was not a part of the original "school fund for tuition" and has been added since the 1927 Act.

The common school fund and common school revenue are constitutionally inviolate and were a part of the old "school fund for tuition."

The intangible tax was added after 1927 and was not a part of the original "school fund for tuition."

Section 22, Chapter 81, p. 523, Acts 1933 (64-922 Burns' 1943 Replacement).

Likewise, the dog fund is a recent addition and was not a part of the "school fund for tuition."

Section 11, Chapter 33, p. 766, Acts 1937, as amended (16-327 Burns' R. S. 1933, Pocket Supplement.)

My conclusion is, that the common school income was created by the Constitution. At various times this distributive fund has been augmented by the addition of taxes and other funds and at other times taxes and funds so added have been withdrawn from future distribution by repeal of statutes. But the basic fund and substantially all funds enumerated in the original 1865 Act remain the same and would have to remain the same under constitutional mandate. Various Acts dealing with the fund have employed different names for it. But in each case the fund intended was the constitutional school income with additions by statute as they stood at that time.

Specifically answering your question, I am of the opinion that the reimbursement for maintenance of special classes for disabled children is not payable out of the newly created state school tuition fund as such. Reimbursement for those classes should be made from the school revenues available for distribution as provided by law in 1927, namely, the income from the common school fund as augmented by unclaimed fees. The reimbursement for special classes for disabled children constitutes a prior claim upon the income and should be reserved therefrom before inclusion into the state school tuition fund.

OFFICIAL OPINION NO. 16

March 15, 1945.

Hon. Thurman A. Gottschalk, Administrator,
Department of Public Welfare,
141 South Meridian Street,
Indianapolis 14, Indiana.

Dear Sir:

Your letter of January 31, 1945 received, requesting an official opinion on the following question:

“With regard to the appointment of the employees of a county children’s home do the provisions of Sec. 22-2805 of Burns’ Ind. Stat. 1933, control as to the appointment of such employees in children’s homes operated by the county welfare department as suc-