PUBLIC INSTRUCTION, DEPT. OF: Rights of respective school corporations to include child in "average daily attendance" computation for purposes of chapter 96, Acts 1933, when attending school outside of resident school corporation without legal transfer.

October 2, 1933.

Hon. Grover Van Duyn,
Assistant Superintendent,
Department of Public Instruction,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of September 15, 1933, submitting the following questions:

"1. According to the provisions of chapter 96 of the Acts of 1933, is it necessary for the school corporation educating non-resident children to have valid transfers from the legal resident corporation in order to include them in the average daily attendance for remuneration from the state?

"2. May the legal resident school corporation count the average daily attendance of a child who attends school in an adjoining school corporation without a legal transfer from the proper local official?"

Section 2 of the act in question, provides in part as follows:

"For every legally licensed instructor who is employed and engaged in the work of instruction in the grades, from one to twelve, inclusive, the employing school corporation shall be paid an amount not to exceed six hundred dollars; * * *."  

Section 3 of the act, contains the further provision that:

"The number of instructors employed and engaged for which any public school corporation shall receive state support as provided in this act for the first eight grades shall not exceed one instructor for each thirty-five pupils in average daily attendance in any one school corporation and for grades nine to twelve, inclusive, shall not exceed one instructor for each twenty-five pupils in average daily attendance in any one corporation, * * *." (My italics.)
No attempt is made to define or explain the term "average daily attendance," nor is any method provided by the act for computing or determining the "average daily attendance."

Under the old Enumeration Law, children of school age were to be enumerated in the township where they resided.

Section 6542, Burns 1926;
Weir v. State, ex rel., 161 Ind. 435.

The apportionment of school revenue by the state was made on the basis of enumeration—on the theory, unquestionably, that the enumeration fixed the number of children each school corporation was legally obligated to educate, and that the apportionment was to aid such school corporation in carrying out its obligation, and that the revenue should be apportioned on the quantum of such obligation existant in each school corporation.

Section 6552, Burns Revised Statutes, 1926.

Clearly, the spirit and intent of chapter 96, Acts of 1933, providing for state financial assistance to the respective school corporations within the state, was the same as that of the law originally providing for apportionment of school revenue; namely, to assist each school corporation in educating those children it was legally obligated to educate, in proportion to the extent of such obligation. And it cannot be disputed that the school corporation is legally obligated to educate only the children of school age who reside for school purposes within the corporation; and those who may be legally transferred to such corporation as by law provided. Express recognition of, and provision for, the fact that a school corporation is legally obligated to educate children of school age transferred to it from another school corporation, is found in section 3 of the act concerning which you inquire. (Chapter 96, Acts of 1933.) It provides that:

"Where a child is transferred from the school corporation in which such child resides to another school corporation, the school authorities of the school corporation to which such child is transferred shall deduct from the transfer tuition which the corporation from which such child is transferred is required to pay, as provided by law, an amount equal to the per capita pupil allowance received from the state, and the
amount so remaining shall be paid as transfer tuition for each pupil so transferred.” (My italics.)

The further effect of the provision above quoted is to recognize expressly the right of the school corporation to which a pupil is transferred to count such transferred pupil in computing the average daily attendance upon which the amount of the state’s financial assistance is based. This express recognition as to transferred pupils, in my opinion, clearly shows the intent of the legislature to confine the computation of the “average daily attendance” to pupils resident in the school corporation or legally transferred to the same. Strict application of the recognized rules of statutory construction might not warrant reading into the act a definition of the term “average daily attendance” to conform with the spirit and intent of the enactment as interpreted above, in view of the fact that the legislature made no attempt to define the term or to prescribe the method by which the “average daily attendance” should be computed. However, the act specifically provides that: “The method of determining the average daily attendance shall be prescribed by the board of department of education and shall be uniform throughout the state.” (Section 3, chapter 96, Acts of 1933.) Furthermore, the recent act changing the basis of apportionment of school revenue from “enumeration” to “average daily attendance,” passed in 1932 and amended in the 1933 session, which we must assume the legislature had in mind when it used the term “average daily attendance” in chapter 96, supra, goes even farther in its grant of power to the board of education. It provides that:

“It shall be the duty of the state board of education to issue such rules and regulations as may be necessary to define and provide for the computation of the average daily attendance of children in grades one to twelve in the several schools of this state, and each teacher shall keep the necessary prescribed records.” (Chapter 238, Acts 1933. My italics.)

In answer to your first question, I will say that it is not necessary for the school corporation educating non-resident children to have valid transfers from the legal resident school corporation in order to include them in the average daily attendance for remuneration from the state under the provisions
of chapter 96 of the Acts of 1933, *in the absence of a rule or regulation to that effect* duly adopted by the board of education. However, I believe the board has ample authority to adopt such a regulation, and that the same would be in complete harmony with the spirit and intent of the act and would tend to effectuate the object had in mind by the legislature.

Your second question is answered in the negative.

PUBLIC INSTRUCTION, DEPT. OF: Effect of abandonment and subsequent reinstatement of subjects which tenure teacher is licensed to teach, on tenure status.

October 4, 1933.

Hon. Grover Van Duyn,
Assistant Superintendent,
Administration Division,
Department of Public Instruction,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of September 29, 1933, in which you submit the following question:

"In case the subjects for which a given tenure teacher is licensed are abolished in the school corporation for the year 1933-1934, will the teacher automatically regain her tenure upon the reinstatement of the subjects into the school curriculum?"

The tenure law provides that:

"Upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract. Such an indefinite contract *shall remain in force unless succeeded by a new contract signed by both parties or unless it shall be cancelled* as provided in section 2 of this act: * * *.*" (Section 1, chapter 97, Acts 1927; amended, section 1, chapter 116, Acts 1933. My italics.)

Unless the indefinite contract of the teacher, in a case such as you present, has been cancelled by the school corporation on account of justifiable decrease in the number of teaching