

violation of the prison rules and regulations, Davis can no longer comply with the provisions of Sec. 1 of the Good Time Law and is no longer in that category of prisoners who are entitled to credits for good time. The end result, therefore, is that all of the good time which Davis has already earned or might earn can be taken away from him by the warden with the consent of the board of trustees. Therefore, the action of the parole board in setting him full time, which means fining him all the good time which it was possible to earn under a determinate sentence of 10 years, was proper, save for one thing—that the board can only pass upon and consent to such action as taken by the warden.

PUBLIC INSTRUCTION, SUPERINTENDENT OF: Right of Board of Education to make rules respecting payment of school relief fund.

November 19, 1937.

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

My Dear Mr. Van Duyn:

I have before me your letter requesting an official opinion in answer to the following question:

“May the Board of Education withhold state school relief funds from a school corporation under any of the following conditions:

1. For a school in which the average daily attendance in the past year is fifteen or less.
2. For a school in which the township trustee refuses to furnish supplies recommended by the State Board of Education such as reference material, library and science equipment.
3. For a school in which the township trustee has neglected the upkeep of the building by refusing to decorate and supply other physical needs.
4. For a school whose commission has been revoked by the State Board of Education.

5. For a school whose attendance has been built up by bringing children from other sections of the township in order to affect the average daily attendance."

The 1933 Act (Acts of 1933, p. 863) governing an allocation of the common school relief fund to the several school units of the state confers very broad powers upon the board of department of education in that behalf. It will be noted that section 2 of the Act provides expressly that:

"* * * the total amount collected under the levy provided for in section 1 of this Act shall be a relief fund to be distributed to the several school taxing units of the State of Indiana under *regulations and orders* to be promulgated from time to time by the board of department of education; * * *" (Our italics.)

Acts of 1933, p. 863.

Section 3 of the Act provides for the preparation by the local officials of a certificate as to certain facts bearing upon the eligibility of the unit making the certificate for school relief.

Acts of 1933, p. 864.

The certificate is required to be under oath and to state the rate of the levy for local tuition and special school fund for current operating expenses; the taxes on each taxable poll made for the supplementary tuition tax in the year immediately previous to the school year in which the deficiency in school funds occurs and also the full amount received from the levies made in the local tuition fund and in the special school fund for operating purposes, together with the state apportionment of common and congressional school fund and interest, surplus dog fund, transfers, interest and miscellaneous receipts in the tuition and special school funds. The certificate is also required to contain the names and number of teachers employed with the minimum daily and yearly wage of grade teachers as fixed by law and of high school teachers as determined by the board of department of education, the number of days each will teach, together with the amount expended and to be expended during the current school year for current operating expenses, including transportation, transfer, fuel, janitor service, institute fees, supplies, reference books, equipment, and repairs on buildings,

and an estimate of the amount that will be necessary over and above the tuition and special school revenue then on hand for these purposes to complete a term in all of the public elementary schools of eight months, or in the public commissioned or certified high schools for a minimum term required for holding a commission or certificate from the board of department of education, or both.

Acts of 1933, p. 864.

Section 4 of the Act provides as follows:

“Said county superintendent shall immediately examine such certificate and if he shall find the facts stated therein to be true and shall further find that the school corporation has levied such further supplementary tuition and special school tax for the purposes prescribed in this Act in such an amount as may have theretofore been prescribed by the board of department of education by proper regulation as hereinafter provided, he shall forward such certificates to the board of department of education, together with the results of his examination, and with the name and post office address of such township trustee or treasurer of such school corporation.”

Acts of 1933, p. 865.

Section 5 of the Act also confers express power upon the board to determine the amount to be allocated to any unit “under and pursuant to the regulations heretofore promulgated by such board of department of education, as in this Act provided.”

Acts of 1933, p. 866.

In an opinion addressed to you under date of May 26, 1937, I went into considerable detail in consideration of the foregoing provisions. Your attention is called to that opinion which, I think, defines in general terms the limitations which must be observed by the board in the enactment of its rules and regulations governing the distribution of this fund. In that opinion I said, among other things:

“All school relief legislation where the relief granted is extended to less than all the units in the state sys-

tem to be determined upon some defined basis, rests upon the theory that common school education is a state-wide obligation whether the terms and conditions upon which the units to receive aid is fixed is determined by the legislature or by some administrative agency authorized so to do by the legislature. The legislature, however, is without power to pass local or special laws 'providing for supporting common schools' (article 4, section 22, Indiana Constitution) and I think the same would necessarily apply to rules and regulations of any administrative agency to which such a power has been delegated.

"It will be observed that section 6, *supra*, contains a very broad delegation of power to the board of the department of education to 'promulgate regulations and issue orders defining and setting forth the terms and conditions upon which the various school taxing units of the state may avail themselves of any portion of said relief fund.' Such regulations, however, cannot be arbitrary, local or special; and any regulation of the type suggested by your questions would have to meet the constitutional test already indicated as respects Acts of the General Assembly 'providing for supporting common schools.'"

The above language applies to your present question with equal force as it applied to the question then submitted.

I also said in that opinion, and the same language is applicable here, that:

"The several subdivisions of your question all relate to the classification of the several school units of the state separating them into two classes, one of which would be entitled to state relief and the other not entitled to such relief. In the first place, to justify the classification as general and not arbitrary, it must be based upon some point or points of differentiation related to the purpose of the classification and must reasonably tend to effect that purpose. Unfortunately, the statute is not very clear upon that subject, but I think it is fair to assume that since the purpose is relief in order to furnish not less than a fixed minimum educational standard throughout the state, such classi-

fication must be based primarily upon need, notwithstanding relatively similar local tax burdens.”

To the above language it may perhaps properly be added that since need may be relieved by economy that the question of advantageous use may also in proper cases enter into consideration.

Referring now to your question :

You first ask whether the board of education may withhold state school relief funds from a school corporation for a school in which the average daily attendance in the past year is fifteen or less. Obviously, however, this is not the question which you desire answered. It is apparent at once that the board cannot make special cases. It must act pursuant to its rules and regulations so that the question after all is this :

“Would a rule and regulation of the board of department of education to the effect that it would withhold state school relief funds from a school corporation for a school in which the average daily attendance in the past year is fifteen or less, notwithstanding the fact that such corporation had complied with all other requirements entitling it to relief—would such a rule be valid?”

This raises a very important question as to the balancing of discretionary power. Under the 1937 Act (Acts of 1937, p. 1272) a township trustee has a discretion in the maintenance of a school if he feels assured of an average attendance of more than twelve during the school year. Usually I think cases where such conditions exist are in the localities of the greatest need, although that would not necessarily be true. The discretion lodged with the trustee in such cases is pursuant to the statute equally recent with the statute which confers upon the board of department of education the right to promulgate regulations and issue orders defining and setting forth the terms and conditions upon which the various school taxing units of the state may avail themselves of any portion of the relief fund. The question is which of these discretionary powers is to prevail—because there is not very much discretion involved in a grant of discretion where to exercise it is to result in a very definite disadvantage to the person so exercising the discretion. To provide that an

officer has discretion but to tell him if he exercises it he will be punished for it is an empty grant.

It may be that the maintenance of a school with such a small attendance is economically unsound, but apparently the legislature has not taken that position when it has definitely and expressly by statute authorized a trustee to maintain such a school in the exercise of his sound discretion.

The only basis upon which the classification of such a school as being one which is not entitled to state aid, it seems to me, would be the assumption that its maintenance is economically unsound and, therefore, notwithstanding the need, the furnishing of funds to support it amounts to waste.

As said earlier in the opinion, it is unfortunate that the School Relief Act is not more definite with respect to the power of the board to make classifications. If we give the general terms used their full significance, the board is apparently empowered to make any kind of a classification, but, as we have already seen, that, of course, cannot be done, and it seems to me that in view of the statutes giving the trustee the right to maintain a school of limited attendance it is hardly to be supposed that the legislature intended to give another board the right to deprive the unit of some advantage offered by the state because the trustee had taken advantage of an authority vested in him by law. I doubt whether average daily attendance, unless it is below that which requires the abandonment of a school, would be sufficient basis for the denial of school relief.

What has been said with reference to subdivision 1 of your question applies to subdivision 5. The statute authorizes the use of school transfers in certain cases. Subdivision 5 of your question is the same as subdivision 1.

As to subdivisions 2 and 3 of your question, I think it must be apparent that conditions therein set out cannot be made the basis of refusing state relief. The purpose to be served by a different answer to these questions probably can be served in another way by making the conditions general rather than specific. In other words, subdivision 2 sets out conditions which, in their nature, are local and special. In my opinion, there would be no objection to the board's fixing certain minimum requirements as to reference material, library and science equipment, but to make the basis of refusal the failure to follow the recommendation of the board addressed to

any particular unit would be highly special and local in its character. Conceivably the board might recommend one thing to one unit and something entirely different to another. If the board desires to effectuate the purpose of requiring a minimum of such equipment, such a general order could doubtless be drawn and when promulgated would be valid.

The 4th subdivision of your question is interesting. You ask in effect whether the board of department of education may enact a rule to the effect that it will withhold state school relief funds from a school corporation for a school whose commission has been revoked by the state board of education. I think the answer to this question depends upon the ground upon which the revocation took place. Of course, one of the purposes of the relief fund is to enable a commissioned high school to maintain its school for the minimum required to qualify it for retaining its commission. It would seem to me that if the revocation was for failure to maintain the school for the required minimum term it would be a harsh rule that would prevent the school from obtaining relief when it might very well be that the relief was desired in order to enable it to maintain the school for the required term. Before answering this question more definitely, it will be necessary to have a more definite statement of the grounds for the revocation.

I think the foregoing answers are as specific as I can make them upon the basis of the question as submitted. If the board desire to promulgate rules relating to the above subjects, I think greater progress will probably be made by submitting a proposed rule for criticism or approval rather than submitting a question such as is above set out. This suggestion is made for the reason that, as already pointed out, it may be possible to achieve some of the purposes indicated by the above question by the formulation, adoption and promulgation of a rule which shall have a uniform operation throughout the state and which will avoid the local and special applications apparent in the conditions set out in your question.