

December 27, 2011

OFFICIAL OPINION 2011-9

Dr. Tony Bennett
Superintendent of Public Instruction
Indiana Department of Education
200 W. Washington St.
Indianapolis, IN 46204

RE: Denying or Delaying Enrollment to Students Who Attempt to Enroll After Deadline

Dear Dr. Bennett:

In your correspondence of July 27, 2011, you asked whether it is permissible for an Indiana public school corporation to deny or delay enrollment to a student who otherwise has legal settlement because the student was not presented for enrollment during the registration period designated by the Indiana public school corporation. You also asked whether an Indiana public school corporation may deny enrollment to a student who presents himself for enrollment in the middle of the semester. According to your correspondence, it has been reported that some school corporations have advised such students to return at the beginning of the next semester.

The Indiana Department of Education (DOE) believes that the unilateral refusal by a public school corporation to enroll an otherwise eligible student based solely on the time the student presents himself for enrollment contravenes several particulars of the Compulsory School Attendance Act, Ind. Code § 20-33-2 *et seq.* This will be addressed in more detail *infra*.

BRIEF ANSWER

An Indiana public school corporation cannot bar or otherwise prevent a student who has legal settlement in the school corporation from enrolling in the school corporation based solely upon the time the student presents himself for enrollment. Such unilateral action is contrary both to the Indiana Constitution, Art. 8, § 1, and numerous statutory provisions; violates other statutory provisions; and undermines expressed legislative intent that the public schools will be open equally to all and denied to none.

ANALYSIS

The Indiana Constitution provides at Art. 8, § 1 as follows:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Often referred to as the “Education Clause,” it expresses two duties of the General Assembly. One duty is aspirational in nature (to encourage moral, intellectual, scientific, and agricultural improvement). “The second is the duty to *provide* for a general and uniform system of open common schools that do not charge tuition.” *Bonner v. Daniels*, 907 N.E.2d 516, 520 (Ind. 2009) (emphasis original). The second duty is “more concrete” in that certain performance standards must be established by the legislature, to wit: establishment of system of Common Schools¹ that are “general and uniform,” where “tuition shall [be] without charge,” and “equally open to all.” *Id.* A “common school” is one that is “open to the children of all the inhabitants of a town or district.” *Embry v. O’Bannon*, 798 N.E.2d 157, 162 n. 4 (Ind. 2003). See also *Nagy v. Evansville-Vanderburgh School Corporation*, 844 N.E.2d 481, 491 (Ind. 2006) (“The duty rests on the legislature to adopt the best [school] system that can be framed[.]”); *Robinson v. Schenck*, 1 N.E. 698 (Ind. 1885) (the Education Clause “imperatively enjoins the general duty upon the legislature” to establish a system of Common Schools).

Legal Settlement and “Equally Open To All”

Pursuant to its constitutional responsibility, the General Assembly has enacted a number of statutes to establish a system of Common Schools, which includes the school corporation.²

“Legal settlement” of a student determines the “responsibility” of a school corporation “to allow the student to attend its local public schools without the payment of tuition[.]” Ind. Code § 20-18-2-11. Typically, “legal settlement” is where the student “resides.” See Ind. Code § 20-26-11-1. There are a number of statutory provisions that expand upon the concept of “legal settlement” and assist in its determination. See, *e.g.*, Ind. Code § 20-26-11-2, Ind. Code § 20-26-11-2.5, and Ind. Code § 20-26-11-30.³ “Legal settlement” is important to a school corporation because a school corporation has attendance areas.⁴

Public schools in Indiana “are matters of State, and not of local jurisdiction,” with “[t]he authority over schools and school affairs... [as] a central power residing in the legislature of the State.” *State ex rel. Clark v. Haworth*, 23 N.E. 946, 947 (Ind. 1890). The Indiana Supreme Court added that “our Constitution, in language that cannot be mistaken, declares that [the control of schools and school affairs] is a matter of the State and not the locality.” *Id.* The Court later observed:

[T]he Constitution recognizes that the business of education is a governmental function and makes public education a function of state government as distinguished from local government. It was evidently the intention of the framers of the Constitution to place the common school system under the direct control and supervision of the state, and make it a quasi-department of the state government.

¹ The phrase “common schools” is synonymous with “public schools.” See *State v. O’Dell*, 118 N.E. 529, 530 (Ind. 1918).

² See Ind. Code § 20-18-2-16.

³ The State Board of Education does have the authority to determine administratively the “legal settlement” of a student, as well as a student’s “right to attend school in any school corporation.” See I.C. § 20-26-11-15(a)(3)(A), (C).

⁴ “Legal settlement” applies to a school corporation and not a public charter school. A public charter school does not have an attendance area. See, *generally*, Ind. Code Chpt.20-24-5. As a consequence, public charter schools will not be addressed in this Advisory Opinion.

State ex rel. Osborn v. Eddington, 195 N.E. 92, 94 (Ind. 1935). See also *United States v. Board of School Commissioners of Indianapolis*, 368 F. Supp. 1191, 1200-01 (S.D. Ind. 1973), *aff'd*, 483 F.2d 1406 (7th Cir. 1973), *cert. den.*, 421 U.S. 929, 95 S. Ct. 1654 (1975) (Indiana's common schools, under the 1851 Constitution, are, as a whole, made a state institution; local school corporations are agents of the State for the purpose of administering the State system of education).

The Indiana Constitution imposes the duty upon the Indiana General Assembly to establish “a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.” To this end, the legislature has enacted numerous laws providing for a system of common schools that are equally open to all.⁵

“A school corporation *shall*...conduct an educational program for all children who reside within the school corporation in kindergarten and in grades 1 through 12[.]” Ind. Code. § 20-26-5-1(a)(1) (emphasis added). Notwithstanding, the legislature has indicated circumstances where a student otherwise eligible to attend the student's public school corporation can be separated from attendance. A school corporation has the authority, under specific circumstances, to suspend, expel, or exclude a student from its schools. This would include suspension and expulsion as disciplinary sanctions under Ind. Code. § 20-33-8-14 and Ind. Code § 20-33-8-15; expulsion for lack of legal settlement under Ind. Code § 20-33-8-17;⁶ prohibiting enrollment during the period of expulsion or separation determined by a previous school, as permitted by Ind. Code § 20-33-8-30; exclusion for failure to present immunization record under Ind. Code § 20-34-4-5; or exclusion for illness, infestation with parasites, or having a communicable disease, as permitted by Ind. Code § 20-34-3-9.

Absent the exigent circumstances noted *supra*, “It is true, as insisted, that the privilege of children in the State to attend the public schools is guaranteed by the Constitution, at least to the extent that tuition shall be free and such schools shall be equally open to all.” *Blue v. Beach*, 155 Ind. 121, 141, 56 N.E. 89 (Ind. 1900). This was applied by the Office of the Attorney General in a 1944 opinion addressing whether public school corporations could exclude from attendance students who were married or who were over the age of 21 years but had not completed their high school education.

⁵ The Home Rule Act for school corporations, Ind. Code Chpt. 20-26-3, does not confer upon a school corporation the power to contravene the Constitution and legislative enactments. See Ind. Code § 20-26-3-4. Although there is no case law construing the Home Rule Act for school corporations, constructions of the older Home Rule Act for local governmental entities, Ind. Code Chpt. 36-1-3, are instructive. See, e.g., *Ind. Dep't of Natural Resources v. Newton County*, 802 N.E.2d 430, 433 (Ind. 2004) (“An impermissible conflict with state law will be found if the Ordinance seeks to prohibit that which a statute expressly permits.... The Home Rule Act explicitly denies this power to a county.”) See also *Suburban Homes Corp. v. City of Hobart*, 411 N.E. 2d 169, 171 (Ind. Ct. App. 1980) (“It is well established in our law that where the legislature properly enacts a general law which occupies the area, then a municipality may not by local ordinance impose restrictions which conflict with rights granted or reserved by the General Assembly.”)

⁶ An expulsion for lack of legal settlement is not a disciplinary sanction. Such an expulsion can be appealed to the Indiana State Board of Education under Ind. Code § 20-26-11-15(a)(1).

Relying upon the Education Clause, *Blue v. Beach*, and other sources addressing whether such school rules are so unreasonable and unjust as to amount to an abuse of discretion, the Indiana Attorney General concluded:

I am, therefore, of the opinion that under the above authorities the school officials cannot by a general rule, or ordinance, exclude from the public schools of this State married pupils, or those over twenty-one (21) years of age, otherwise eligible to attend such schools. Any such exclusion must depend upon the facts in each individual case and then the additional fact must be present to show that the age of such pupil, or the married status of such pupil in such particular case, results in immorality or misconduct of the pupil, or that the welfare and discipline of the pupils of the school is injuriously affected by the attendance of such pupil in such school.

1944 *Ind. Att’y Gen. Op.* No. 87 at p. 389-90.⁷ Consistent with the Attorney General’s earlier opinion, a school corporation refusing to enroll a student otherwise eligible to attend the school corporation would be engaged in unreasonable, unjust, and impermissible conduct that would not only be an abuse of discretion but would be contrary to the Indiana Constitution and the direction of the legislature.

As noted *supra*, the Education Clause requires the General Assembly to ensure that the system of Common Schools is “equally open to all.” To this end, the legislature has declared that Indiana public schools “are open to all children until the children complete their course of study, subject to the authority vested in school officials by law.” Ind. Code § 20-33-1-2. The General Assembly has also determined that a “student is entitled to be admitted and enrolled in a public school in the school corporation in which the student resides,” Ind. Code § 20-33-1-4(a).

The “public policy of the state” declares that Indiana public schools will be “open equally to all, and prohibited and denied to none,” and by such means “provide a uniform democratic system of public school education to the state and the citizens of Indiana.” Ind. Code § 20-33-1-1(1), (2), (4). “Every student is free to attend a public school,” Ind. Code § 20-33-1-4(c), and the state’s public policy on ensuring equal educational opportunities for its citizens is supplementary to all laws “applicable to the public schools.” Ind. Code § 20-33-1-7.

The legislature has not authorized school corporations to refuse enrollment of students who have legal settlement based on the time of the year they present themselves for enrollment. Such unilateral action contravenes the public policy of the state.

Due Process

In addition to the above, the circumstances you described would also constitute a denial of due process. “[T]here is no dispute that [a student] has a property interest in his free public education.” *In re the Matter of B.S. v. Bd. of Trustees, Fort Wayne Community Schools*, 255 F.Supp.2d 891, 898 (N.D. Ind. 2003), citing *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975). A student cannot

⁷ Also see 1925-26 *Ind. Att’y Gen. Op.* at p. 46 (“Under the law a child is entitled to be admitted to the public schools of the school corporation in which it resides, and its residence is presumed to be that of its parents[.]”)

be deprived of such a property interest absent minimal due process procedures, such as adequate notice and a meaningful opportunity to be heard. *Id.*

“It is now clearly established that the state does not possess an absolute right arbitrarily to refuse opportunities such as education in public schools[.]” *Crews v. Cloncs*, 432 F.2d 1259, 1263 (7th Cir. 1970). Students have fundamental rights, including the opportunity for an education. *Id.*, citing *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 511, 89 S. Ct. 733 (1969).

In order to protect these rights from arbitrary infringement, courts must judge the constitutionality of disciplinary action which denies a student the opportunity to attend classes or to obtain equal opportunity to education. In making this judgment, we must weigh and consider competing individual rights and the state’s claim to an orderly and efficient educational system.

Id. A school rule or regulation, to justify impinging a student’s constitutional rights, must have a reasonable relationship “to some purpose within the school’s competence, such as avoiding substantial disruption of school activities or discipline.” *Arnold v. Carpenter*, 459 F.2d 939, 943 (7th Cir. 1972), citing *Tinker*, 393 U.S. at 507, 514. In the absence of such justification, the school rule must fall. *Id.*

Indiana does define “school purposes”:

IC 20-33-8-4 "School purposes"

Sec. 4. As used in this chapter, "school purposes" refers to the purposes for which a school corporation operates, including the following:

- (1) To promote knowledge and learning generally.
- (2) To maintain an orderly and effective educational system.
- (3) To take any action under the authority granted to school corporations and their governing bodies by IC 20-26-5 or by any other statute.⁸

Under the fact situations you presented, a student presenting himself for enrollment after the start of the school year (or at any other time during the year) creates for a school corporation, at most, an administrative inconvenience. Mere administrative inconvenience does not justify a rule or policy that interferes with a student’s right to a public education under the Indiana Constitution and expressed legislative intent. The legislature has not made provisions permitting a school corporation to avoid its responsibility to discharge the purposes for which it was created. Denying a student this right and in this fashion also contravenes the student’s due process rights. A public school corporation may suspend, expel, or exclude a student only for the reasons provided by statute, none of which is present herein.

⁸ “School purposes” is also defined at Ind. Code § 20-26-2-5 by cross-referencing to I.C. § 20-26-5-1 (requirement that a school corporation conduct K-12 educational programs for all children residing within the school corporation, cited *supra*) and Ind. Code § 20-26-5-4 (enumeration of specific powers of a school corporation). “However, the delineation of a specific power in IC 20-26-5-4 is not a limitation on the general powers and purposes set out in IC 20-26-5-1.” Ind. Code § 20-26-5-4 does not authorize a school corporation to unilaterally deny enrollment to an otherwise eligible student based solely on the time the student is presented for enrollment.

Compulsory School Attendance

As noted *supra*, the DOE believes the unilateral refusal by a public school corporation to enroll an otherwise eligible student based solely upon the time the student presents himself for enrollment is contrary to Compulsory School Attendance Act, Ind. Code Chpt. 20-33-2. Children of school age are required to attend school under the Compulsory School Attendance Act, and have the right to attend school in the school corporation where they have legal settlement, pursuant to Ind. Code Chpt. 20-26-11. In addition, the DOE asserts that school officials, including local superintendents, are required to enforce Indiana's compulsory school attendance laws. See Ind. Code § 20-33-2-26 (enforcement of compulsory school attendance), Ind. Code § 20-33-2-29 (responsibility of person operating an educational institution). DOE's position is that a local superintendent's intention to bar such students from enrolling is contrary to Indiana law in that it infringes upon a student's right to an education as guaranteed by the Indiana Constitution and as provided for in statute. DOE also asserts that such action may constitute a Class B misdemeanor.

The General Assembly expressed its purpose for establishing the Compulsory School Attendance Act ("to provide an efficient and speedy means of insuring that students receive a proper education whenever it is reasonably possible"). Ind. Code § 20-33-2-1. The Act determines who will be considered of "school age" for compulsory attendance, Ind. Code § 20-33-2-6, and requires that such students attend either "[a] public school that the student is entitled to attend" or "another school taught in the English language." Ind. Code § 20-33-2-4. Such students are required "to attend school each year for the number of days public schools are in session...in the school corporation in which the student is enrolled in Indiana[.]" Ind. Code § 20-33-2-5.

The enrollment process also serves other purposes, including identifying missing children or missing endangered adults and reporting same to the Indiana Clearinghouse for Information on Missing Children and Missing Endangered Adults.⁹ Ind. Code § 20-33-2-10(c). A school corporation is required to have a policy that addresses excused and unexcused absences, especially for any excused absences that would result in a student not attending at least 180 days in a school year. Ind. Code § 20-33-2-14(b).¹⁰

A student of compulsory school age who is not attending school and not enrolled in any school can be taken into custody and is to be delivered "into the custody of the principal of the public school in the attendance area in which the child resides." Ind. Code. § 20-33-2-23(b). In some instances, the person taking the child into custody may be the superintendent as an *ex officio* attendance officer. Ind. Code § 20-33-2-35. The principal is required to "immediately place the child in class in the grade or course of study in which the child is enrolled or to which the child may be properly assigned." The principal will then try to contact the student's parent. Ind. Code. § 20-33-2-24(a), (b).

As DOE noted, Ind. Code § 20-33-2-26 requires, *inter alia*, a superintendent to enforce the Compulsory School Attendance Act in the superintendent's school corporation. Ind. Code § 20-

⁹ See Ind. Code Chpt. 10-13-5.

¹⁰ Although not a part of your inquiry, a student suspended or expelled from a school corporation is not subject to the Compulsory School Attendance Act during the period of such suspension or expulsion. In essence, the student's absence is not "unexcused." See Ind. Code § 20-33-8-31.

33-2-29(a) makes it “unlawful for a person operating or responsible for an educational . . . institution or training school to fail to ensure that a child under the person’s authority attends school as required under this chapter. Each day of violation of this section constitutes a separate offense.” A knowing violation of the Compulsory School Attendance Act is a Class B misdemeanor. Ind. Code § 20-33-2-44.

It would be inconsistent with the stated legislative intent and duties imposed upon school corporations and its personnel to refuse enrollment to an otherwise eligible student solely because the student sought to enroll after a registration date or some other time during the school or calendar year. Refusal to enroll the student may constitute a Class B misdemeanor offense.¹¹

CONCLUSIONS

The General Assembly is charged with the establishment of system of Common Schools that are, *inter alia*, “equally open to all.” To this end, the legislature has established the public school corporation and charged it with the establishment of certain grades and has directed students of certain ages to attend their public school corporation (or its equivalent). A student has the right to attend the public school of the school corporation in which the student resides or has legal settlement, subject to the authority vested in a school corporation to suspend, expel, or exclude the student. A student has a constitutional right to attend the public schools, a right that cannot be impinged upon except through due process.

The General Assembly has not authorized a school corporation to refuse enrollment to a student who resides or has legal settlement in the school corporation based solely upon the student’s seeking to enroll in the public school corporation after a registration date or at any other time during the school or calendar year. Refusing enrollment under such circumstances would defeat expressed legislative intent for establishing the Compulsory School Attendance Act; would violate the public policy of the state that the public schools be open equally to all and prohibited or denied to none; would undermine the purposes for which the school corporation was established; would be inconsistent with the constitutional provision that public schools be “equally open to all”; and would be a dereliction of duties expressly imposed upon school personnel by the legislature. The failure to discharge duties under the Compulsory School Attendance Act could constitute a Class B misdemeanor.

A school corporation that refused enrollment to a student under such circumstances would have engaged in activity that is both unconstitutional and illegal.

Sincerely,

Gregory F. Zoeller
Attorney General

Kevin C. McDowell,
Deputy Attorney General

¹¹ Should a parent or guardian “deprive[] a dependent of education as required by law,” the parent or guardian could be guilty of a Class D felony. See Ind. Code. § 35-46-1-4(a)(4) (2011).