

1714.

SCHOOLS—PAYMENT OF TUITION OUTSIDE OF OWN SCHOOL DISTRICT—POWERS OF BOARDS OF EDUCATION DISCUSSED—ABUSE OF DISCRETION—TRANSPORTATION DISCUSSED.

SYLLABUS:

1. *A school pupil, who attends school in districts other than the one in which he has a school residence, is required to pay his own tuition and provide his own transportation, unless circumstances are such that a liability is imposed by law on the board of education for the school district of the pupil's residence to pay his tuition in or furnish his transportation to a school outside the district.*

2. *Boards of education being creatures of statute are limited in their powers to those expressly granted by statute and those necessary to carry into effect the powers expressly granted. Where discretionary powers are vested by statute in a board of education such discretion is limited only by judicial review in case of fraud or abuse of discretion.*

3. *Where a board of education, which provides transportation for the pupils of the district, arranges its transportation schedule in such a manner as to cause the pupils to be delivered to the school forty-five minutes before the regular time for the opening of the school day, it may or may not constitute an abuse of discretion depending upon all the surrounding circumstances.*

COLUMBUS, OHIO, February 15, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication wherein are set forth certain facts respecting the manner in which the schools are conducted in one of the school districts in this state.

A number of the residents of this district, who are not satisfied with the manner in which the schools are conducted, have been sending their children to schools in other districts, and my opinion is requested not only as to the legality of the administration of school affairs in the district in question, but also as to whether or not residents of this district, who send their children to other districts, are required to provide their own transportation to the other school and pay tuition therein.

It appears that the district mentioned does not own its own school building, and the district board of education leases a school building owned by the Roman Catholic Church. On this building are erected a number of crosses, and over the front entrance to the building there is carved in stone "Immaculate Conception School." The teaching force consists of a superintendent and principal and nine teachers, all of whom are members of a religious order connected with the Catholic Church and known as the "Society of the Precious Blood." The teachers while engaged in teaching, wear the distinctive garb or uniform of the order. It is also claimed that the parish priest and his associates, as stated in the communication submitted with your letter,

"visit said school at specified times and give instruction to the pupils during school hours in the doctrines of the Roman Catholic Church."

It further appears (quoting from the communication) that,

"by direction of the local board of education of said district, the truck drivers start on their routes at a time sufficiently early in the morning to transport the children or pupils of said school to the Roman Catholic Church, where they are let out of the trucks forty-five minutes before the time for opening said schools."

I am advised that the teachers in this school hold proper certificates to teach, and no complaint is made as to any act or omission in the conduct of the schools on the part of the board of education other than those mentioned above.

The organization, administration and control of the public school system of the state is, by virtue of the Constitution, governed in all respects by general laws, except as city school districts may by referendum determine the number of members and organization of its district board of education. Sections 2 and 3, Article VI of the Constitution of Ohio provide in part as follows:

"Sec. 2. The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; * * * "

"Sec 3. Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the numbers of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts."

In pursuance of these constitutional provisions the Legislature has provided for the organization of a public school system by dividing the state into school districts and providing for the control of the schools in each district by an *elective* board of education with powers defined by law.

Each district board of education is charged with the duty of exercising supervisory control over the school under its jurisdiction and with the duty of administering and conducting such schools in accordance with general laws. Being creatures of statute, boards of education have such powers and only such as are vested in them by the Constitution of Ohio and the statutes enacted in pursuance thereof. It is a well settled principle of law that boards, bureaus, commissions and administrative officers, created by statute, have only such powers as are expressly granted to them or necessarily included within such expressly granted powers for effectuating the purposes for which the express powers were granted. The Supreme Court concisely states this rule in its application to boards of education in the case of *State ex rel. Clark vs. Cook*, 103 O. S. 465, in the following language:

"Boards of education and other similar governmental bodies are limited in the exercise of their powers to such as are clearly and distinctly granted."

There is a distinction, however, between the powers of a board of education and the discretion vested in it, in the carrying out of such powers. The one is governed by statute, while the other is limited only by judicial review in case of fraud or other abuse of discretion. Our Supreme Court has jealously guarded the

discretionary powers of boards of education and similar statutory boards and officers and has repeatedly held that the carrying into effect of the board's determination of any question within its discretion will not be interfered with by the courts except for an abuse of discretion or for fraud; and it is held that an abuse of discretion or fraud will never be presumed but must be affirmatively and conclusively averred and proven before the courts are justified in setting aside the determination of a board of education respecting matters with which they are clothed by statute with authority to determine. Thus it is said in *Brannon vs. Board of Education*, 99 O. S. 373:

"A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question it is authorized by law to determine."

In the case of *Kneale vs. Jennings*, 111 O. S. 637, wherein it was sought to control by injunction the discretion vested in a county board of education in carrying out its statutory authority to create new school districts, in the course of the opinion the court said:

"It must be conceded that because of its acquaintance with local conditions the county board presumably is qualified to speak on matters of district formation, and also presumably full consideration is given by a board so engaged to all the facts and circumstances pertinent to the inquiry. * * *

The action of the county board is further challenged, in that it is averred the board proceeded arbitrarily, whimsically, and unreasonably. The presumption is otherwise. * * * "

Similarly it was held in *State ex rel. Maxwell vs. Schneider*, 103 O. S. 492:

"The action of a public officer, or of a board, within the limits of its jurisdiction conferred by law is not only presumed to be valid, but it is also presumed to be in good faith and in the exercise of sound judgment. Before a court will take cognizance of a claim that the action of such officer or board is unlawful, arbitrary, unreasonable or of such character as to constitute an abuse of discretion facts must be set forth which would warrant such conclusion."

By virtue of Section 7738, General Code, boards of education are charged with the duty of providing sufficient accommodations to conduct the schools within their district. Said Section 7738, General Code, reads as follows:

"Every board of education in this state must provide sufficient accommodations in the public schools for all children in their districts compelled to attend the public schools under the provisions of this chapter. Authority to levy the tax and raise the money necessary for such purpose, is hereby given the proper officers charged with such duty under the law."

As to school houses and school grounds, it is provided by Section 7620, General Code:

"The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or

rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control. * * * "

With particular reference to high school buildings, it is provided by Section 7666, General Code:

"Such board of education shall build, repair, add to and furnish the necessary school houses, purchase or lease sites therefor, or rent suitable rooms, and make all other necessary provisions relative to such schools as may be deemed proper."

By the terms of the two foregoing statutes it will be noted that discretion is vested in the board of education to either purchase, build or rent suitable school buildings or school rooms. There is no provision or limitation as to from whom these buildings should, or may, be bought, or rented, and it clearly follows that the fact that a church organization happens to own a building, which the board of education in its discretion sees fit to lease, does not render the lease illegal. The fact that the rental paid by the board inures to the benefit of a church treasury and thus may be used for religious purposes, or in furtherance of religion, can not in any sense be said to be a use of public funds for religious purposes any more than would be the use of public funds for religious purposes, if a building were purchased from the church, or lands purchased from the church, upon which to erect a school building. I am, therefore, of the opinion that there is nothing illegal so far as the board's leasing school rooms from the church is concerned.

The employment of teachers is, by virtue of Section 7705, General Code, vested exclusively in the board of education in rural and village school districts. In city and exempted village school districts teachers are appointed by the superintendent of schools subject to the approval and confirmation of the board of education (Section 7703, General Code).

No limitation is placed on the board or the superintendent as to who shall be employed as teachers other than that they must hold certificates to teach in the grades for which they are employed issued by the proper certificating authorities. Before this certificate can be procured, the applicant therefor must possess certain qualifications as to scholarship and teaching experience. At no place is there any provision of law prohibiting examining boards from issuing teachers' certificates to persons, or boards of education from employing teachers, because of their affiliation with any church organization, or fraternal or civic society; nor is there any law prohibiting teachers from wearing the insignia of any order to which they belong.

Boards of education might control the style of dress of teachers, by refusing to employ persons who insisted on dressing in a style peculiar to a religious or fraternal order, with which they were affiliated, or might possibly, after employing them, reasonably regulate the dress of teachers by the promulgation of reasonable and proper rules to that effect. It is a matter not regulated by law and is purely within the discretion of the board, whether such teachers be employed or not.

In this connection, your attention is directed to Section 67, page 154, of Voorhees on The Law of Public Schools, citing *Hysong vs. Gallitzin, etc.*, 164 Pa. St. 629, 30 Atl. 482; *Hutchinson vs. Skinner*, 21 Misc. Rep. 729, 49 N. Y. S. 360; and *O'Connor vs. Hendrick*, 184 N. Y. 421, 77 N. E. 612, which section reads as follows:

"It has been held that the employment of teachers in the public schools, representatives of a religious order, who wear in school a distinctive sectarian garb of their order is not a violation of the law or an abuse of discretion on the part of the school authorities which the courts could control, and that this situation was not changed by the fact that the teachers contributed all their earnings beyond their support to the treasury of their order for religious purposes. This case arose by a suit for an injunction to restrain the school board from continuing the employment of such teachers, and there had been no rule by the school authorities against the wearing of such garb and emblems by the teachers.

The action brought, however, was rather an attempt by individual citizens to override the judgment and discretion of the school board on the ground that they were violating the provisions of the State constitution guaranteeing equal rights of conscience and prohibiting preference by law to religious establishments or modes of worship, and the use of public money for sectarian schools. The court, however, sustained the lawfulness of the employment of such teachers for the reason that in the matter was involved solely the exercise of discretion by the school board in their performance of the official duty, for which they alone were responsible, and that this discretion when it does not transgress the law is not reviewable by any court.

It has been held, however, that a superintendent of public instruction may prohibit a teacher from wearing a distinctly religious garb while teaching in the public schools that are under his charge, and such regulation is reasonable and valid."

You state that the parish priest visits the school at specified times, and gives instruction to the pupils during school hours in the "doctrines of the Roman Catholic Church." As you state the proposition, that is, that instructions are given in the "doctrines" of the church, it would appear that these instructions savored of sectarianism, or a certain form of worship; and if so, in so far as the facts here presented are concerned, it would amount to the introduction of sectarianism in the public schools and a use of the public school property for sectarian purposes, which are prohibited by the Constitution of Ohio. Article I, Section 7 of the Constitution of Ohio provides as follows:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools, and the means of instruction."

Article VI, Section 2, of the Constitution of Ohio reads as follows:

“* * * but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”

To my mind the “doctrine” of a church organization, or what may be termed the creed, or the theological tenets, peculiar to any so-called church denomination, or its form of worship, whether it be Catholic, Protestant or what-not is not a proper subject for promulgation in the public schools, and is violative of the constitutional provisions above set forth. Attendance in public schools is compulsory and such a practice would necessarily result in compelling the pupils to participate in a form of worship against their consent. If, however, instructions are given in the moral teachings of the Christian Church, or in the historical aspects of the Bible, illustrated with Bible stories and founded upon passages of scripture contained in the Bible, so long as these scriptural passages are not so interpreted as to conform with some distinctive theological belief, the fact that the instructions are given by a Catholic priest or a minister or some one of the several denominations of the Protestant Church or by a Jewish Rabbi, does not serve to give to a religious sect or sects the control of any part of the school funds of the state within the inhibition contained in Article VI, Section 2, supra.

Whether or not any religious instruction may be given in a public school is a matter peculiarly within the discretion of the board of education under whose jurisdiction the school is maintained. There being no statutory regulation on the subject the matter stands today exactly as it did when our Supreme Court, in the case of *Board of Education vs. Minor*, 23 O. S. 211, held as follows:

“The constitution of the state does not enjoin or require religious instruction, or the reading of religious books, in the public schools of the state.

The Legislature having placed the management of the public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what books shall be read therein.”

In Opinion No. 483, rendered by this department, under date of May 12, 1927, wherein it was held that boards of education might lawfully permit the use of school buildings for religious meetings when such use did not interfere with the use of the school building for school purposes even though such religious exercises were conducted by some particular religious society, it was said:

“If the holding of religious exercises in a public school building by some particular sect or denomination is the using of public property for sectarian religious purposes the same objection might be made to chaplains in the Legislature or our penal institutions, and it has been well recognized that such chaplains from time to time may be Jewish Rabbis, Catholic Priests or Protestant Ministers and no one has ever thought of making any objection to them on that account.”

Boards of education are authorized to make reasonable rules and regulations governing the conduct of pupils and teachers and with reference to any of the activities of the school. Transportation laws have been enacted to enable pupils better to attend the schools and for no other purpose, and any rules of the board permitting the diversion of transportation facilities contracted for and paid for by

the board to other than transportation to the schools, would be an abuse of discretion on the part of the board, and would, without doubt, be unreasonable and illegal. To require school busses to so time their trips as to deliver children to school forty-five minutes earlier than the taking up of school may or may not be an abuse of discretion, dependent upon *all* the surrounding facts and circumstances.

It was held by my predecessor in an opinion published in the Opinions of the Attorney General for 1925 at page 721, that a board of education might in its discretion excuse children from school for the purpose of attending catechism. If the necessity therefore exists, and in the opinion of the board it is proper, the children, who desire to attend catechism, may be excused during school hours, if it is inconvenient for them to attend at other times, but school sessions should not be suspended therefor, and the other children should not be required to submit to being transported to school a sufficiently long time before the regular school hours solely to permit those who desire to attend catechism to do so.

With reference to the sign or designation carved in stone on the front entrance or door of the school building, I would direct your attention to Section 7655-8, General Code, which provides as follows:

“The superintendent of public instruction shall furnish the boards of education in the village and rural school districts metal placards which shall be placed on the various school buildings showing the grades of such schools.”

There is no similar provision of law with reference to city and exempted village school districts. Whether or not the sign carved in stone over the door of this school building should be covered or temporarily obliterated while the same is under lease to the public school authorities, and public school is being conducted therein, is within the discretion of the board of education. In any event, the sign should not be permanently obliterated, but such temporary measures might be taken to cover it so that at the expiration of the lease the building may be returned to the church without permanent damage thereto.

I come now to the question of whether or not resident pupils of one district who attend school in other districts must pay tuition in the other districts and provide their own transportation thereto. Sections 7681, 7682 and 7684, General Code, provide in part as follows:

Sec. 7681. “The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district. * * * ”

Sec. 7682. “Each board of education may admit other persons upon such terms or upon the payment of such tuition within the limitations of other sections of law as it prescribes. * * * ”

Sec. 7684. “Boards of education may make such an assignment of the youth of their respective districts to the schools established by them as in their opinion best will promote the interests of education in their districts.”

It will be observed that by the provisions of Sections 7681 and 7682, *supra*, the schools of each district are free to resident pupils and others may be admitted to the school upon the payment of tuition. The district is of course not interested in how or by whom this tuition is paid. Unless, however, the tuition is paid by the school district wherein the pupil is a school resident, it must necessarily be paid, if at all,

by the pupil himself, or the person who stands to him in the relation of parent or guardian.

It is provided by Section 7735, General Code, that where elementary school pupils reside more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school, and, if the school they attend is in another district and proper notice is given the board of education of the district where the pupil resides, such board must pay their tuition in the other school. Similar provisions are made with reference to high school pupils who live more than four miles from the school in their own district and in districts where no high school is maintained. Unless, however, the pupil comes within the provisions of law which require the district of the pupil's residence to pay the tuition of a pupil who attends school in another district, the mere fact that a pupil or his parents are not satisfied with the conduct of the schools in the pupil's own district, and, for that reason, the pupil attends some other school, does not cause liability for tuition to be imposed on the district wherein the pupil resides. The same observations may be made with reference to transportation. Transportation laws are enacted for the benefit of the pupils who attend school, and when proper transportation is provided and the patrons of the school do not see fit to take advantage of these facilities and attend another school, they must provide their own transportation.

The school electors of each school district elect a board of education for their district schools. Into the hands of this board the law of our state commits, in general, all the powers respecting the maintenance of schools in such districts, such as the determination of the number of school buildings necessary, the selection and purchase or lease of school buildings, school rooms and playgrounds and their furnishing and equipment, the assignment of pupils, the hiring and paying of teachers, and the raising of money by taxation to meet proper and legal expenditures. These powers, subject to general laws, are broadly vested in the local boards, which in the judgment of the law, are best qualified by residence, interest and knowledge of local conditions to exercise them wisely and with discernment and to the best interests of the school children of the district.

So long as boards of education keep within the statutory powers granted to them, the courts will not interfere, unless they be guilty of fraud or the discretion vested in them is otherwise abused.

In my opinion the administration of the schools in the district you mention, so far as the matters to which you have directed my attention are concerned, is not illegal except in so far as the board may have permitted, if such be the case, the teaching of doctrinal or sectarian religious dogmas in the school and unnecessarily subjected the patrons of the school to an inconvenient and wholly unauthorized transportation for pupils. The school building should of course be provided with a proper placard designating its grade as provided by law, and the sign now on the building designating it as a *private* school is inappropriate.

It is also my opinion that resident school pupils in this district who attend schools in another district must provide their own transportation and pay their tuition in the other district, unless circumstances are such that, because of the failure of the district to provide proper school facilities, a liability rests on the board of education to pay the pupil's tuition in another district.

Respectfully,
EDWARD C. TURNER,
Attorney General.