question, notwithstanding the fact that under the provisions of the act of the legislature above referred to now governing the execution of Ohio Canal land leases in said county, the Superintendent of Public Works is authorized to execute leases only for terms of fifteen years or some multiple thereof. In any event, I do not feel that I can take a position in this matter which will prevent the State from recovering rent from persons who continue to hold and occupy canal lands after the expiration of their leases.

It follows from what is said above that by reason of the act of the tenant under the expired lease in holding over after such expiration, there is now accruing to the State for the current year the annual rental provided for in said lease. And in this view, it is not seen how a finding can be made which will authorize you to sell this property to the holdover tenant at a valuation less than that upon which he is obligated to pay rent as a holdover tenant.

Upon the consideration above noted, I am unable to approve the transcript of the proceedings for the sale of this property to Mr. Wohlwend and I am herewith returning the same without my approval endorsed thereon.

Respectfully,

JOHN W. BRICKER,

Attorney General.

4695.

TUITION—AGREEMENT BETWEEN SCHOOL DISTRICTS—RECOVERY OF TUITION ON BASIS OF AGREEMENT BY SCHOOL DISTRICT—CHARGES WHERE NO AGREEMENT EXISTS.

SYLLABUS:

1. *Where the rate of tuition for high school pupils who attended high school in a school district other than the district where they resided had been fixed by agreement between the boards of education of the two districts involved, for the school year* 1934-1935, *the school district where the pupils attended school in pursuance of that agreement is entitled to recovery from the district of residence of the pupils the full amount of tuition so fixed by the said agreement, without credit to the district of residence for the proceeds of any funds that might have been distributed to the district where the pupil attended school on the basis of average daily attendance of pupils in the said district.*

2. *Where no agreement existed with respect to said tuition, the district where the pupil attended school may recover from the district of residence of the pupil the amount of tuition as fixed by former Section* 7747, *General Code,*

without credit to the district of residence for the proceeds of any funds that might have been distributed to the district where the pupils attended school on the basis of average daily attendance of pupils in said district.

COLUMBUS, OHIO, September 21, 1935.

HON. F. E. WARREN, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

> "The Cloverdale Consolidated School District of Putnam County, Ohio, has requested me to secure your opinion as to the following set of facts:
>
> The Cloverdale Consolidated School District sends its fourth year high school students to the Monroe Township School under the provisions of General Code Section 7747. During the year 1934-1935, Monroe Township School District charged the Cloverdale Consolidated School District the sum of $11.25 per month, or $101.25 for the school year, for each of such pupils. This rate is the same as the rate charged in 1933-1934. The Monroe School District listed these pupils among their own students for the purpose of deriving State Aid from the Sales Tax, Liquid Fuel Tax and Intangible Tax. The Cloverdale Consolidated School District offered to pay Monroe Township School District the sum of $101.25 per pupil less the tax paid the Monroe Township School Board by the State.
>
> Are they entitled to collect this sum?"

Inasmuch as the tuition charges referred to in your inquiry accrued prior to the effective date of House Bill No. 466 of the 91st General Assembly, sometimes referred to as the School Foundation Bill, wherein Section 7595-1d, General Code, which fixes the manner of computing foreign tuition rates in the future was enacted, and Section 7747, General Code, was repealed, the said tuition charges should be computed in accordance with the terms of said Section 7747, General Code, as then in force, unless the rates were fixed by contract between the boards of education, in pursuance of Sections 7750 and 7688, General Code.

Former Section 7747, General Code, provided that the tuition of pupils who are eligible for admission to high school and who reside in districts in which no high school is maintained, shall be paid by the board of education of the school district in which they had a legal school residence. The statute fixed the manner of computing the rate of tuition in such cases and provided further that no more should be charged than would result by computing it in

the manner fixed by the statute. The way was left open for the charging of a lesser amount if the boards of education concerned saw fit to fix by agreement such lesser amount. Section 7750, General Code, authorized the making of such agreements and Section 7682, General Code, provided that non-resident pupils might be admitted to the schools in any district upon such terms and the payment of such tuition "within the limitations of other sections of law" as might be agreed upon.

Where no express agreement existed between the boards of education concerned, the tuition rate was fixed by Section 7747, General Code, and the board of education charged with the payment of tuition could not insist upon credit for moneys received by the other school district on account of the attendance of the pupils in the schools of that district, such as moneys distributed to the district on the basis of average daily attendance of pupils, although in many instances such credit has been allowed by mutual consent of both boards of education even where no prior express agreement had been made. Although strictly speaking, no authority exists for so doing, boards of educatoin to whom foreign tuition is paid have allowed credit for moneys received from state funds on account of the attendance of the pupils whose tuition was involved, in the absence of a prior express agreement to that effect, and the Bureau of Inspection and Supervision of Public Offices has sanctioned this practice by permitting boards of education to compromise claims for tuition by taking into consideration the facts relating to the distribution of funds to the district where the pupils attended school, on the basis of average daily attendance.

This question has been discussed in two opinions of this office which will be found in the reported *Opinions of the Attorney General for* 1934, pages 351 and 1053. In the first of these opinions it is held:

> "Boards of education are without authority to pay over to other boards of education the amount of the proceeds of the liquid fuel tax distributed to their school districts on account of the attendance in their schools of pupils resident in the districts of the other boards of education. By agreement of two boards of education, the claim of one board against another for tuition of non-resident pupils may be credited with the amount received from the liquid fuel tax incident to the attendance in their schools of the pupils on account of whose attendance the claim for tuition arises."

In the course of this opinion it is said:

> "It will be noted that the distribution of the proceeds of this tax is to be made to the several school districts in this state, on the basis of 'the average daily attendance in the schools thereof.' This can mean nothing else than that the school which a pupil attends receives

the benefit of the distribution of the tax for that pupil, regardless of whether or not he lives in that district.

Where a pupil resides in one district and attends school in another district, under circumstances which require the payment of tuition for the pupil by the district of residence to the district where the pupil attends school, a distinct advantage is gained from the operation of the law to the district of attendance and a corresponding disadvantage results to the district of residence. However, there is no statutory provision for remedying this situation.

It would probably be more equitable if some provision had been made whereby the district of residence of school pupils should have benefited for those pupils in the distribution of the tax to some extent at least, whether they attend school in their home district or in some other district, especially if tuition for their attendance in the full amount authorized by law is paid by the home district to the district in which they attend school. The law does not so provide, and is incapable of such construction, nor does the law authorize boards of education to remedy the matter by paying over or 'rebating' as you term it, to the district of residence the amount received by the district of attendance on account of the attendance of the pupils in the schools of that district.

It is well settled that boards of education being creatures of statute, have such powers only as are expressly given them by statute, or are necessary to carry out the express powers granted. Courts consistently apply this rule and sometimes quite drastically. *State ex rel. Clark* vs. *Cook,* 103 O. S., 405; *Schwing* vs. *McClure,* 120 O. S., 335.

As no express power has been granted to boards of education to do what you state is being done in some districts in your county with respect to receipts of fuel tax distributed to the district and clearly this power can not be said to be implied within any express power granted to boards of education, it necessarily follows that boards of education in so acting, do so entirely without authority.

Substantially the same result may be accomplished by agreement between the boards of education of two districts as to the terms of admission of the resident pupils of one district into the schools of another, whereby the paying district receives a credit of the amount distributed to the receiving district of the liquid fuel tax incident to the attendance of the pupils whose tuition is involved."

In the second of these opinions it is held:

"1. After deducting from the proceeds of the liquid fuel tax

provided for by Sections 5542-1, et seq., of the General Code of Ohio, the requirements of a rotary fund and the cost of administration as provided for by Section 5542-18, General Code, the balance of said proceeds should be distributed to the several school districts of the state on the basis of the average daily attendance of pupils in the schools thereof during the next school year preceding each apportionment to said school districts, as determined by the Director of Education.

2. The per pupil share of the proceeds of the liquid fuel tax to be distributed to the several school districts on the basis of average daily attendance, should be distributed to the district where the pupil actually attends school and not to the district where the pupil resides, in cases where pupils attend school outside the district of their residence.

3. A board of education may lawfully contract with another board of education for the admission of its resident high school pupils into the schools maintained by the other board, upon such terms as to tuition as may be agreed upon, within the limits prescribed by Section 7747, General Code, and in so doing, the fact that the district where the pupils attend school will receive some financial return on account of such attendance from the distribution of the proceeds of the liquid fuel tax, may be taken into consideration."

It does not appear from your letter whether the tuition charge of $101.25 per year for each pupil attending the school in the Monroe Township Rural School District was definitely fixed by agreement or whether it is the result of the computation made in accordance with Section 7747, General Code. Apparently, however, the moneys distributed to the Monroe Township District from the Sales Tax and other taxes, on the basis of average daily attendance of pupils was not taken into consideration when the said tuition charge was determined, and I am therefore of the opinion, in specific answer to your question, that the Monroe Township Rural School District is entitled to collect the full amount of this tuition charge for each pupil residing in the Cloverdale District who attended the schools in the Monroe Township District during the school year 1934-1935.

Respectfully,

JOHN W. BRICKER,

Attorney General.