

submitted to me is one substantially amounting to insurance within the meaning of Section 665, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

829.

SCHOOL PUPILS—TRANSPORTATION—BUSSES—STATE DEPARTMENT OF EDUCATION, THROUGH DIRECTOR, MAY PROMULGATE RULES AND REGULATIONS IN RE: CONTRACTS, TRANSPORTATION, EQUIPMENT, INSPECTION, EXAMINATION, BUSSES, ETC.—BOARDS OF EDUCATION MUST CONFORM WHETHER CONTRACT ENTERED INTO PRIOR TO PROMULGATION OF RULES OR LATER.

SYLLABUS:

1. *The State Department of Education may through its Director, promulgate rules and regulations providing for the inspection and examination of transportation equipment used for the transportation of school pupils and boards of education throughout the state must conform to such rules and regulations whether they own transportation equipment or not, and if they have contracted for such transportation these contractors, whether the contract was entered into prior to the promulgation of the rule or later, must submit to having the equipment inspected and examined in accordance with regulations.*

2. *When a contract for transportation of school pupils has been entered into by a board of education prior to April 15, 1938, the effective date of the rule promulgated by the State Department of Education with respect to annual inspection of school pupil transportation equipment used in its district, and the said contract does not either expressly or impliedly provide for the payment to the contractors of the necessary expense if any, of moving its transportation equipment to the proper place for such examination and inspection, the contractors can not be made to bear such expense and the same should be borne by the board of education.*

3. *Where a board of education enters into a contract for the transportation of school pupils within its district subsequent to April 15, 1938, the effective date of the regulation promulgated by the State Department of Education with respect to the examination and inspection of school busses, the said regulation is a part of such contract the same as though it had been expressly written therein, whether or not the contracting parties had actual knowledge of the existence of the said regulation.*

COLUMBUS, OHIO, June 29, 1939.

HON. LEO J. SCANLON, *Prosecuting Attorney, Crawford County, Bucyrus, Ohio.*

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

"I desire your opinion on a matter which has caused some difficulty in our county. The Board of Education of the New Washington School District, on August 3, 1936, entered into a contract for the transportation of its pupils with the firm of High and Rothschild, of New Washington, Ohio. This contract was made for a period of five years.

The Department of Education of the State of Ohio, in the year 1938, issued a ruling to the effect that school busses used in transporting school children to and from school should be examined and inspected by the State Highway Patrol before being placed into service. The school boards in this County were advised to have their busses brought to the Crawford County Fair Grounds for examination on a specified date.

The owners of the school busses transporting the New Washington School children refused to comply with this request on the grounds that it would necessitate employing five drivers to take the busses to and from the Crawford County Fair Grounds, and for the further reason that a round trip to and from New Washington for each bus would amount to approximately thirty-two miles per bus, unless the Board of Education agreed to reimburse High and Rothschild for their actual expenses, including mileage, to deliver said busses to the Crawford County Fair Grounds for inspection.

The contract is silent regarding any such a requirement, and the contract further provides that High and Rothschild shall receive for transporting the children of this district the sum of twenty-two dollars (\$22.00) per day per school day.

The State Department of Education has notified the Board of Education of the New Washington School District that their transportation money will be held up until such a time as High and Rothschild comply with the regulation of the Department of Education, and present their busses for examination. The school board, incidentally, believes that the proposition of High and Rothschild is very fair and desires to pay a reasonable sum for any expenses incurred in bringing said busses to the Crawford County Fair Grounds for inspection, if they can legally do so.

Question 1: Can the Department of Education of the State

of Ohio, withhold the fund of a school district by reason of their failure to comply with a regulation which went into effect after the contract of transportation was entered into?

Question 2: Can the Board of Education of the New Washington School District, under the facts stated, pay the reasonable expenses in connection with delivering of said busses to the Crawford County Fair Grounds for examination by the State Highway Patrol?"

By the terms of Section 7731, General Code, boards of education are required where certain conditions exist, to provide transportation for pupils attending the public schools in their district. Other statutes authorize the furnishing of transportation for such children under certain circumstances if the board of education of the district deems it advisable to do so. There are no statutory limitations on how such transportation should be provided other than the regulations set out in Sections 7731-1, 7731-2 and 7731-3 of the General Code, wherein requirements are made as to the designation of depots for gathering the children, the qualifications of drivers of vehicles used in providing such transportation and precautions to be taken by the drivers with respect to safety. A former Attorney General in an opinion published in Opinions of the Attorney General for 1928, page 1570, held:

"A board of education may use its discretion as to whether or not it will provide necessary transportation for pupils in the district by letting contracts therefor or by purchasing vehicles and hiring drivers."

Where a board of education determines to let contracts for the transportation of pupils, it has been held that inasmuch as there is no express limitation fixed by law as to the length of the term such contracts may run, a board of education may in its discretion contract for the transportation of pupils for an entire school year or for any reasonable length of time, providing the general provisions of law with respect to the making of contracts by boards of education are complied with. See Opinions of the Attorney General for 1927, page 1472, and for 1928, page 1733. It is a common practice of boards of education to make such contracts for a period of five years and in view of the original investment of the contractors and other circumstances the reasonableness of such a contract can not be questioned.

There are no regulations fixed by statute with reference to the regular examination or inspection of vehicles used for the transportation of school children by the Highway Patrol or anyone else. Without a doubt such a provision if made by someone having authority and power to do so would be a highly desirable and proper regulation as it is of the highest

importance that every possible precaution be taken to insure the safety of school children who are being transported to and from school, and the condition of the vehicle used for such transportation should be such that no possible danger would arise from that source. A school board when making a contract for transportation might lawfully include in such contract provisions for the regular examination and inspection of the vehicles used in carrying out the contract at the expense of the contractor or otherwise.

In Section 7595-1c, General Code, which is a part of the so-called School Foundation Law enacted primarily, as stated in the title of the Act, "For the purpose of creating a public school fund in the state treasury and providing a thorough and efficient system of common schools throughout the state promoting economy and efficiency in the operation thereof, and providing for the equalization of educational opportunities" (116 Ohio Laws, 585) it is provided inter alia :

"The director of education shall prescribe regulations governing methods and means of transportation and shall make recommendations as to the cost of foundation programs for pupil transportation in which transportation is deemed necessary."

Section 7595-1e, General Code, a part of the same Act, provides in part :

"A school district, the board of education of which has not conformed with all the requirements of the law and the rules and regulations pursuant thereto * * * shall not participate in any portion of the state public school fund, except for good and sufficient reason established to the satisfaction of the director of education and state controlling board; * * *"

On April 15, 1938, the Director of Education in pursuance of the duty reposed in him by Section 7595-1c, General Code, supra, to prescribe regulations governing methods and means of transportation of school pupils promulgated among others, the following rule :

"'Inspection'—The school bus shall be presented for an annual inspection at a time and place designated by the State Highway Patrol, and at any other time an inspection is requested by the Highway Patrol or the State Department of Education. At such inspection the equipment will be checked for physical and mechanical conditions, and the requirements established by the motor vehicle laws, the State Bureau of Motor Vehicles and the State Department of Education. Copies of the inspection reports will be presented to the owners, the Superintendent of Schools and the State Department of Education. If the equipment is

regarded as unsuitable for the transportation of pupils the local school authorities will be notified. No state funds will be allowed for unsafe school busses."

The above rule is in my opinion a reasonable and proper rule and should be complied with by boards of education. It also, in my opinion, becomes a part of any contract for transportation made by a board of education subsequent to the effective date of the regulation. Its effect so far as a contract for transportation is concerned, is the same as though the regulation had been made by the local board of education with whom the contract for transportation was made, or as though it had been actually written into, in terms, the contract made by a board of education for the transportation of school pupils. In principle it is the same as are rules and regulations made by a board of education which the law recognizes as being part of contracts made with teachers. This principle is stated in Ruling Case Law, Volume 24, page 613, as follows:

"Rules and regulations adopted by a board of education prior to the making of a contract of employment with a teacher which are known or ought to be known to the teacher when he enters into the contract, form part of the contract, and the teacher's employment is subject thereto."

See *People vs. Chicago*, 278 Ill. 318.

The above stated principle of law in its application to contracts with teachers was applied by two former Attorneys General in opinions which will be found in Opinions of the Attorney General for 1931, page 443, and in Opinions of the Attorney General for 1934, page 1351. In the 1931 opinion it is held:

"When teachers contract with a board of education for service in the schools of the district, the contracts so made are subject to rules and regulations of the board lawfully made and adopted, whether or not the teachers so contracting are actually cognizant of such rules and regulations."

In the 1934 opinion it is held:

"When a board of education adopts a reasonable rule for the government of teachers in its employ, and thereafter enters into contracts of employment with teachers who have or should have knowledge of such rule, such rule is a part of the teacher's contract the same as though expressly rewritten therein."

In the instant case about which you inquire, the regulation of the Director of Education with respect to the inspection and examination of

busses did not become a part of the contract of the board of education of the New Washington Rural School District as the contract was entered into prior to the effective date of the rule. It is, however, binding on the board of education, and unless the board sees that the rule is complied with it can not be said to have "conformed with all the requirements of law and the rules and regulations pursuant thereto" as required by the terms of Section 7595-1e, supra, and under the terms of that statute it shall not participate in any portion of the state public school fund until it does meet the requirements of the regulations by having the busses used for the transportation of its school pupils examined and inspected in accordance with the regulations.

While under the circumstances all contractors may be required to submit to having the transportation equipment used by them in fulfilling their contract with the board of education in question examined and inspected as they impliedly have contracted that such equipment is safe and suitable for the purpose and conforms to the law, and the only way to determine whether the transportation equipment does meet the requirements of law is by inspection and examination, they can not be required to bear the expense of having such inspection made. The contract may, however, be modified, and that expense borne by the school district. In Donnelly on Public Contracts, Section 164, it is stated:

"Public bodies, from the fact that they possess the power to contract, have also the power to modify or change contracts the same as natural persons in the absence of statutory restriction * * *. If a public contract, because of changed circumstances or through some mistake, becomes oppressive it is within the power of the public body to modify it and allow additional compensation, or it may annul it."

In support of the text there are cited the cases of *Meech vs. Buffalo*, 29 N. Y., 198, and *Bean vs. Jay*, 23 Me., 117, 121.

In applying the above principle of law to the transportation contracts a former Attorney General in an opinion published in *Opinions of the Attorney General for 1930*, at page 1716 held:

"A board of education after making a contract for the transportation of school pupils may later lawfully modify or change the contract if changed conditions make such action necessary."

And again, in 1932 the then Attorney General held:

"Where a board of education enters into a contract for the transportation of pupils within the district, and later a bridge is removed by the State Highway Department along the route to

be traveled in the transportation of said pupils thus necessitating a long detour in the carrying out of said contract, which facts were not foreseen at the time of originally entering into the contract, the board of education may lawfully modify the said contract and pay to the said contractor an additional sum in consideration of the additional service which must be rendered in the carrying out of said contract."

See Opinions of the Attorney General for 1932, page 112.

In 1935 a similar question was considered by the then Attorney General, whose opinion with reference thereto will be found in the reported Opinions of the Attorney General for 1935, page 223. It was there held:

"Where a board of education enters into a contract with the driver of a school bus to drive that bus over a certain designated route for the transportation of school children, at a specified salary, and it later becomes necessary, in order to transport children who do not reside upon the original route provided for, to increase the mileage to be covered as provided for in the original contract, the board of education may lawfully modify the said contract and pay to the said driver an additional sum in consideration of the additional services to be rendered in the carrying out of said contract as so modified."

Under the existing circumstances in the instant case as related by you in your inquiry, the contract of the board of education with its contractors for transportation is on a per diem basis for substantially definite transportation service known to both contracting parties at the time the contract was entered into. Under those circumstances, the contractor can not be required to bear any additional expense for some service not then in contemplation and which could not have then been foreseen.

Since it is now necessary for this board of education to conform to the regulations of the State Department of Education with respect to the examination and inspection of the equipment used for the transportation of its pupils and to do so have the equipment at the place designated when the examination is to be made, it will be necessary for the board to provide for the expense if any, of producing the equipment at the proper time and place. This may be done by modifying the original contract or by paying the contractor's expenses incident to moving the equipment to the place designated for the examination without formally modifying the contract.

I am therefore of the opinion, in specific answer to your questions:

1. The State Department of Education may through its Director, promulgate rules and regulations providing for the inspection and exam-

ination of transportation equipment used for the transportation of school pupils and boards of education throughout the state must conform to such rules and regulations whether they own transportation equipment or not, and if they have contracted for such transportation their contractors, whether the contract was entered into prior to the promulgation of the rule or later, must submit to having the equipment inspected and examined in accordance with the regulations.

2. When a contract for transportation of school pupils has been entered into by a board of education prior to April 15, 1938, the effective date of the rule promulgated by the State Department of Education with respect to annual inspection of school pupil transportation equipment used in its district, and the said contract does not either expressly or impliedly provide for the payment to the contractors of the necessary expense if any, of moving its transportation equipment to the proper place for such examination and inspection, the contractors can not be made to bear such expense, and the same should be borne by the board of education.

3. In view of the facts stated in your inquiry, the board of education of the New Washington School District may lawfully pay the reasonable expense incident to producing the school busses at the Crawford County Fairgrounds for examination by the State Highway Patrol in accordance with the rules and regulations promulgated by the State Department of Education with respect to the examination and inspection of school busses.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

830.

AUTOMOBILE LICENSE TAX FUNDS—COLLECTED BY AUTHORITY SECTIONS 6291 ET SEQ. G. C., PRIOR TO EFFECTIVE DATE, AMENDED SUBSTITUTE SENATE BILL 40, 93RD GENERAL ASSEMBLY—MAY NOT BE TRANSFERRED AS LOAN TO POOR RELIEF FUND, SECTION 6309, PARAGRAPH 3A, G. C.—STATUS, MOTOR VEHICLE LICENSE TAXES COLLECTED AFTER EFFECTIVE DATE OF SAID ACT—MAY BE LOANED TO SAID POOR FUND—SECTION 6309-2 PARAGRAPH 3A G. C., HOUSE BILL 675, SECTION 2, 93RD GENERAL ASSEMBLY—SPECIAL TAXING UNIT OF COUNTY, OUTSIDE MUNICIPALITIES—COUNTY COMMISSIONERS AUTHORIZED TO LEVY TAX FOR POOR RELIEF UPON TAXABLE PROPERTY.

SYLLABUS:

1. *Under the authority of Amended Substitute Senate Bill No. 40 enacted by the Ninety-third General Assembly, the automobile license*