1340.

BOARD OF EDUCATION—DUTY TO PROVIDE HIGH SCHOOL FACILITIES—TRANSPORTATION OF PUPILS AND THREE MILL LEVY OUTSIDE OF LIMITATION, DISCUSSED.

SYLLABUS:

1. *The duty of a board of education to provide high school facilities for all the youth of the district entitled to the same is as mandatory as its other duties. Obligations incurred in the performance of this duty are of equal force and binding effect as are any of the other obligations of the board, except that a three mill tax levy outside of tax limitations can not be ordered to be made by the director of education, under authority of Section 7596-1, General Code, for the purpose of providing funds for paying the cost of transportation of high school pupils to schools outside of the district in cases where such levy would not be necessary for maintaining the schools of the district.*

2. *If the discharge of obligations incurred by a school district for the purpose of paying the cost of transportation of high school pupils to schools outside of the district depletes the treasury of the school district to such an extent that schools can not be maintained therein without state aid, the tax levy of three mills outside of tax limitations may be made by order of the director of education, as authorized by Section 7596-1, General Code, and thereafter state aid may be extended to the district.*

COLUMBUS, OHIO, December 8, 1927.

HON. G. O. MCGONAGLE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication in which you state that since writing your former letter, in response to which this department rendered Opinion No. 1261, under date of November 15, 1927, the voters of Malta Township Rural School District, Morgan County, defeated a proposition to authorize its local board of education to levy a tax of three mills, for school purposes, outside of tax limitations. You state that because of the defeat of this proposition the said Malta Township Rural School District can not participate in the distribution of the state equalization fund for the school year 1927 and 1928.

You also enclose copies of resolutions passed by the County Board of Education of Morgan County School District on July 23, 1927, September 10, 1927 and September 17, 1927, and submit for answer the following specific question:

> "If the county board has the authority to pass such a resolution, and since Malta Township can not be the recipient of state aid, would the obligations made by this resolution be as binding on the board of education of said township as any other claim—such as the payment of teachers' salaries?"

The only one of the enclosed resolutions pertinent to your inquiry reads as follows:

> "ADJOURNED MEETING OF THE COUNTY BOARD OF EDUCATION
>
> Sept. 17, 1927.
>
> It was moved by Oglevee that the transportation of high school pupils residing within the districts of Morgan County which do not provide high school work suitable to the state of advancement of such pupils and concerning which similar action has not already been taken (viz., Center,

Deerfield, Malta, Morgan and York Townships) be declared practicable and advisable for the school year 1927-1928 in all cases where the residences of such pupils are more than four miles from the nearest high school which offers such work, provided that it will be considered as substantially meeting the transportation requirement if such districts pay the cost of board and room, or a part of such cost in an amount to be determined by the state department of education when state aid allotments for the current year are made. The motion was seconded by Henderson and was carried by the following vote: Oglevee, Yea; Henderson, Yea; Hart, Yea; Abel, Yea."

Sections 7749-1 and 7749-2, General Code, read as follows:

Section 7749-1. "The board of education of any district, except as provided in Section 7749, may provide transportation to a high school within or without the school district; but in no case shall such board of education be required to provide high school transportation except as follows: If the transportation of a child to a high school by a district of a county school district is deemed and declared by the county board of education advisable and practicable, the board of education of the district in which the child resides shall furnish such transportation."

Section 7749-2. "A board of education in a district which does not maintain a high school and which pays the tuition of a child resident of the district in a high school in another district, or a board of education which pays the tuition of a child resident of the district in a high school in another district of higher grade than that maintained in the given district may furnish the cost of such child's room and board while attending such school or a part of such cost, provided such amount is less than the cost of transportation of such child and provided such action is approved by the county board of education."

In the case of *State ex rel. Masters* vs. *Beamer,* 109 O. S. 133, the Supreme Court of Ohio held that it was the mandatory duty of the local board of education, or, in case of the failure of the local board to perform its duty, the mandatory duty of the county board of education, either to provide work in high school branches at some school within four miles of the residence of pupils eligible to pursue high school branches, or to have such branches made accessible to the said pupils by providing transportation to, or board and lodging within, four miles of the school wherein such high school branches are offered.

It is optional with the local board whether high school facilities are made accessible by transportation of the pupils who reside more than four miles from the high school, or by paying their board and lodging while attending such school, but the obligation rests on the board to exercise one of these options. If the board fails, it may be forced so to do by an action in mandamus, or the pupil may have such transportation or board furnished, and recovery may be had against the board for the proper cost thereof by the person so furnishing the same. *Sommers* vs. *Board of Education,* 113 O. S. 177.

While the board has the option of choosing by which method it will make available high scohol privileges to its pupils, it appears by the terms of Sections 7749-1 and 7749-2, supra, that, in either case, before it is authorized to expend public funds for transportation, it must first be deemed and declared by the county board of education to be advisable and practicable. If it should be determined that payment of the board and lodging would be cheaper, and the board chooses that method of making high school facilities available for the pupils, in lieu of transportation, it must be

approved by the county board of education. This was done by the board of education of Morgan County, in so far as Malta Township Rural School District is concerned, by virtue of the resolution of September 7, 1927, to which you refer.

The fact that the board has included within the resolution the statement that the furnishing of board and lodging will be considered as substantially meeting the transportation requirements, at the option of the local board of education, does not serve to lessen or detract from the injunction upon the local board to furnish transportation for those pupils whose board and lodging it does not pay, and vice versa.

Although a county board of education has no authority to order a district board within the county to expend any money as you will have noted was held in Opinion No. 1261, above referred to, yet, if the local board fails to furnish school facilities, as provided by law, it becomes the duty of the county board to furnish such facilities and to pay the expenses so incurred from the general fund of the county. It then becomes the duty of the county auditor to reimburse the county general fund to the extent of monies expended therefrom and deduct the same from the local district's funds at the time of the next semi-annual tax settlement. (Section 7610-1, General Code).

The furnishing of all necessary school facilities by local boards of education is an obligation which must be met in some way. In some instances the board has the option of doing certain things in one of several ways, but it must be done in one of the ways authorized by law. In order to make funds available for the furnishing of school facilities and for reimbursing the general fund of the county, if funds have been paid from that fund by county boards of education in performing duties which should have been performed by local boards of education, resort may be had to the authority conferred by Section 7596-1, General Code, which section reads as follows:

> "In addition to the powers conferred in Section 7510-1 (7610-1), the county board of education shall have the power, if necessary to maintain in operation the schools of any school district of the county school district, with the advice and consent of the director of education, to borrow money on the credit of that village or rural school district, with like powers in respect thereto to those conferred by Section 5655 of the General Code, upon the village or rural board of education. In case the statements presented in accordance with Section 7595-1 and the examinations directed by Section 7595-2 and 7596 prove that the board of education in question has failed to put to a vote the proposition to levy additional taxes above certain tax limitations in order that the levy may meet the requirements for the district to share in the state educational equalization fund, or that the district has voted upon such proposition and has failed to give it the necessary majority, the director of education upon ascertaining such action to be necessary to enable the district to receive the sum from the state educational equalization fund necessary to maintain the schools for eight months in the year shall direct the county board of education to levy the additional taxes on the property of the given village or rural school district necessary for such purpose and the county board of education shall be empowered to levy such additional taxes. The expression 'maintain the schools' shall mean to discharge the obligations incident thereto, provided no cost of transportation of high school pupils to schools outside of the district shall be included."

Although the electors of Malta Township Rural School District failed to return the necessary majority to authorize the proposed tax levy of three mills, and thus qualify the district to participate in the State Educational Equalization Fund, the Director of Education should, if the district needs more money to pay its obligations

and maintain its schools than a three mill levy will amount to, empower the county board of education to make the levy anyway. When so empowered, it becomes the duty of the county board of education to make the levy. After the levy is made the Director of Education is authorized and required to extend state aid to the district. As stated by Judge Newcomer in the case of *State ex rel. Weaver* vs. *Board of Education of Northwest Township,* 26 O. N. P. ____, Ohio Law Bulletin and Reporter, January 25, 1926:

> "Where necessary to keep the schools open the granting of state aid should be demanded as a right by the local school board not granted as a favor by the State Director of Education."

I am not unmindful of the fact that the aforesaid Section 7596-1, General Code, contains this statement:

> "The expression 'maintain the schools' shall mean to discharge the obligations incident thereto, provided no cost of transportation of high school pupils to schools outside of the district shall be included."

I am also aware that the court in the Weaver case, supra, in speaking of the tax levy made by the county board of education upon the order of the Director of Education under authority of Section 7596-1, supra, held:

> "No part of the tax so levied shall be used to pay the cost of transportation of high school pupils."

The Supreme Court has by its decision of the Beamer and Sommers cases, supra, definitely made the furnishing of high school privileges, including transportation when authorized and directed by law, an obligation of school districts of equal standing and importance to that of their other obligations, and it makes no difference, so far as I am able to determine, whether obligations arising for the furnishing of high school transportation are met from this particular levy and the amount thereafter brought into the district's treasury from other sources, or whether high school transportation obligations are met from the district's funds in the first instance and the funds thereby depleted to such an extent that the extra three mill levy and state aid are made necessary to "maintain the schools." Clearly, a tax levy could not be made by the county board of education upon the order of the Director of Education, by virtue of Section 5695-1, General Code, for the express purpose of providing funds to pay high school transportation charges. However, these charges must be paid, and if by paying them the funds are so depleted as to require state aid, the levy may then be made. In the last analysis it narrows down to a matter of bookkeeping.

In the case of *State ex rel. Masters* vs. *Beamer,* 109 O. S. 133, it is said:

> "If a board of education in a district fails to provide sufficient school privileges for all the youth of school age in the district including the privilege of having high school branches offered at some school within four miles of the residence of each and every child of compulsory school age in the district, or of having such branches made accessible to such children by transportation to or board and lodging within a district which offers such high school branches, under Section 7610-1, General Code, a mandatory duty rests upon the county board of education of the county to which such district belongs to perform the acts necessary to provide such high school branches

or to make the same accessible to all children of school age within the district." (As corrected in 113 O. S. 181.)

A board of education which has not applied under Sections 7575, 7595, 7596 and 7597, General Code, for participation in the state equalization fund, cannot plead lack of funds as a valid defense to an allegation of nonperformance of a duty made mandatory under the statute."

By the terms of Section 7610-1, General Code, it is made the mandatory duty of the county board of education to provide sufficient school privileges for all the youth of school age in the district when the local board fails to do its duty in that regard. The obligation to furnish the several kinds of school facilities provided for by law are of equal importance. In my opinion the furnishing of high school transportation, when made necessary by law, is equally as important, from a legal standpoint, as the keeping open and the maintaining of the elementary schools.

Neither have I overlooked the fact that Judge Newcomer, in the Weaver case, supra, held Section 7610-1, supra, to be unconstitutional, in so far as it provides that county boards of education shall perform the duties enjoined by law on local boards of education, when such local boards fail with respect thereto, and pay for the same from the general fund of the county. Said portion of Section 7610-1 reads as follows:

"All salaries and other money so paid by the county board of education or by the probate court or by the court of common pleas shall be paid out of the county treasury from the general fund on vouchers signed by the president of the county board of education or by the judge of the probate court or by the judge of the court of common pleas as the case may be, but they shall be a charge against the school district for which the money was paid. The amount so paid shall be retained by the county auditor from the proper funds due to such school district at the time of making the semi-annual distribution of taxes."

The court in the Weaver case, supra, held this to be in violation of Article XII, Section 5 of the Constitution of Ohio, which provides:

"No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

There is nothing, however, in the constitution to prevent the legislature from temporarily transferring funds whether these funds be the proceeds of tax levies or otherwise, providing of course proper provision is made for reimbursing the funds from which such temporary transfer has been made.

In specific answer to your question, therefore, it is my opinion that:

1. The county board of education of the Morgan County School District had authority to pass the resolution of September 17, 1927, above referred to, the effect of it being to meet the requirements of Section 7749-1 and 7749-2, General Code. It does not create any new or additional obligations, other than those provided by law, but has the effect merely of stating that the county board of education deems and declares it advisable and practicable for the Malta district board to provide transportation for high school pupils, and when proper, consent is given to the local board to pay board and lodging in lieu of transportation. That part of the resolution authorizing the local board of education to pay such portion of the cost of high school pupils' board

and lodging as may be determined by the State Department of Education, in lieu of providing transportation for such pupils, is of no effect. The obligation rests upon the local board either to provide transportation or board and lodging for such pupils, and the State Department of Education has nothing whatever to say about the matter, or make the manner of performing these duties a condition of extending state aid to the district. These obligations are of equal strength and binding force with the other obligations of the district.

2. If Malta Township School District, after taking care of its obligations, needs more funds to maintain its schools than would accrue to it from a three mill tax levy, the Director of Education may direct the county board of education to make such levy, even though the electors residing in the district have failed to return a majority for the same at the election. After such levy is made the Director of Education may extend to the district the advantages of the state educational equalization fund.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1341.

APPROVAL, BONDS OF THE VILLAGE OF SOUTH EUCLID, CUYAHOGA COUNTY, OHIO—$39,080.00.

COLUMBUS, OHIO, December 9, 1927.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

1342.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN MEIGS AND SUMMIT COUNTIES, OHIO.

COLUMBUS, OHIO, December 9, 1927.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

1343.

BOARD OF HEALTH—AUTHORITY TO REQUIRE CONNECTION OF CESSPOOLS TO SANITARY SEWERS—GENERAL AUTHORITY OF BOARD OF HEALTH, DISCUSSED.

SYLLABUS:

Local boards of health may, in the exercise of a sound discretion, regulate the location, construction and drainage of cesspools and the like, where offensive and