

5399.

TUITION—HIGH SCHOOL—WHEN MAY BOARD OF EDUCATION PAY FOR PUPILS WHO ATTEND HIGH SCHOOL IN ANOTHER DISTRICT.

SYLLABUS:

A board of education which maintains a third grade high school cannot be held for the tuition of resident pupils who attend another high school in pursuance of the first two years of high school work, regardless of the distance from the home of the pupil to the high school maintained by the board and whether or not transportation is furnished to the high school maintained by the board or whether or not transportation to the other high school is available to the pupil, unless the pupil lives more than four miles from the high school maintained by the board and transportation is not furnished thereto and he attends a nearer high school in another district; nor is the board of education authorized by law to pay such tuition.

COLUMBUS, OHIO, April 21, 1936.

HON. KARL H. WEANER, JR., *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR: This will acknowledge receipt of your inquiry which reads as follows:

“The Board of Education of the Highland Township Rural School District maintains within its district a third grade high school. Mr. L. lives four and one-half miles from said school, and the board refuses to transport his daughter, who was eligible to attend said high school. Mr. L. also lives seven miles from the Continental High School but only one mile from the route of the school bus owned by the board of education maintaining the Continental High School. Mr. L.’s daughter takes the bus to the Continental High School. There is no charge made for transportation but the Highland Township Board of Education refused to pay tuition for the first two years Mr. L.’s daughter attended Continental High School.

Question 1. Will the Board of Education of Highland Township be required to pay the tuition for Mr. L.’s daughter, who attended Continental High School?

Question 2. Would your answer to question No. 1 be changed by the fact that the Highland Board paid the tuition of another student who attended Continental High School who lived

the same distance from the schools as Mr. L. for the reason that said child's parents were indigent?

The elementary schools of the Highland Township Rural School District are not centralized, and the county board has not required the township board to furnish transportation for high school pupils."

A third grade high school is defined in Section 7752, General Code, as a school in which the courses require normally two years beyond the eighth grade. Other pertinent statutory provisions which are controlling with respect to your inquiry, are as follows:

"Sec. 7748. A board of education providing a third grade high school shall be required to pay the tuition of graduates from such school, and of other children who have completed successfully two years of work in a recognized high school, residing in the district at a first grade high school for two years, or at a second grade high school for one year and at a first grade high school for one additional year. * * * A board of education may pay the tuition of all high school pupils residing more than four miles by the most direct route of public travel from the high school provided by the board when such pupils attend a nearer high school, or in lieu of paying such tuition the board of education may pay for the transportation to the high school maintained by the board of the pupils living more than four miles therefrom. * * *

"Sec. 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, General Code, referred to in Section 7749-1, supra, relates to transportation in school districts where the schools have been centralized.

Since the enactment of Section 7749-1, General Code, it is never mandatory for a board of education in a school district in which the schools are not centralized to provide transportation for its resident high school pupils unless such transportation has been deemed and declared by the county board of education to be advisable and practicable. This statute

was held to be constitutional by the Supreme Court of Ohio, in the case of *Minshall v. State*, 124 O. S., 61. In the case of *Brown v. Board of Education*, 30 O. N. P. (N. S.), 588, it is held:

“Except where the schools of a district are centralized, Section 7749-1, General Code, provides the only circumstance under which it is mandatory upon the board of education to transport high school pupils, the same being where transportation is ‘deemed and declared’ by the county board of education advisable and practicable.”

Although the furnishing of transportation to high school pupils is not mandatory except as noted above, there are cases where if such transportation is not furnished, the board becomes liable for the tuition of a resident pupil in another high school which he may attend, as for instance, where he lives more than four miles from the school maintained by the board and he attends a nearer high school. (Section 7748, G. C., *supra*.)

In an opinion of my predecessor found in *Opinions of the Attorney General* for 1929, page 1828, it is held:

“A board of education which maintains a high school, is liable for the payment of tuition for all pupils who reside more than four miles from such school if such pupils attend a nearer high school in another district unless transportation is furnished for the pupils to the high school maintained by the board.”

See also *Board of Education v. Board of Education*, 126 O. S., 575.

By applying the maxim, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), which the Supreme Court has held, in the case of *Cincinnati v. Roettinger*, 105 O. S., 145, to be applicable in the construction of statutes to the provisions of Section 4748, General Code, where it is stated that a board of education may pay the tuition of resident high school pupils who live more than four miles from the high school maintained by the board, if they attend a nearer high school, in cases where transportation is not furnished by the board to the high school maintained by it, the proper construction of this provision is that the authority extended to pay tuition does not apply unless the pupil attends a nearer high school maintained by the board. In other words, there is an implied denial of authority to pay tuition where the pupil attends another high school that is not nearer to his place of residence than the school maintained by the board. *Nicholson v. Franklin Brewing Company*, 82 O. S., 94. At least, authority cannot be gathered from this statutory provision to pay tuition where the pupil attends a high school

which is further from his home than the school maintained by the board, nor is there any other statutory provision which extends such authority. In view of the well known rule that administrative boards, such as boards of education, have such powers only as are expressly or by necessary implication granted to them, as exemplified by many cases, among which may be mentioned *State ex rel. Clark v. Cook*, 103 O. S., 465, and *Schwing v. McClure*, 120 O. S., 335, it clearly follows that a board of education is without authority to expend public funds in payment of tuition for high school pupils in schools outside the district where the board maintains a high school, unless the pupils live more than four miles from that school and transportation is not furnished thereto and the pupils attend a nearer school.

In the case you mention, the pupil attended a school seven miles from his home, although the school in his home district was but $4\frac{1}{4}$ miles from his home. The fact that transportation to the school outside the district is available to the pupil at a comparatively short distance from his home has nothing whatever to do with the matter. The statute makes no exception in cases of that kind, and we are bound by the statute as it is.

Practically the same question here involved was passed upon by me in an opinion found in *Opinions of the Attorney General for 1933*, at page 48. It was there held:

“1. A district board of education which maintains a high school is not liable for the tuition of its resident high school pupils who attend school in another district, except those pupils who live more than four miles from the high school maintained by the board in the event that transportation is not furnished for them to that high school and they attend a nearer high school in another district.

2. A district board of education may, but is not required to furnish transportation for resident high school pupils to schools maintained by it, except in rural districts where the schools have been centralized and transportation is furnished to such centralized school for elementary pupils, unless such high school transportation is deemed and declared by the county board of education to be advisable and practicable.”

My immediate predecessor also had occasion to consider a very similar situation. His conclusion is set forth in an opinion found in the *Opinions of the Attorney General for 1932*, page 1128, as follows:

“Under no circumstances is a board of education which maintains a high school liable for the tuition of its resident high school pupils who attend school in another district except where

those pupils live more than four miles from the high school maintained by the board and transportation is not furnished for them to that high school. Under those circumstances the board may be held for their tuition if they attend a nearer high school."

In the 1933 opinion referred to above, it is stated:

"There is no provision of law requiring high school pupils who reside in a district which maintains a high school to attend that high school. If they do not attend the high school maintained by the board in the district of their residence however, no means are provided by law whereby they may have their tuition paid by the district of their residence if they attend another high school, except that provision quoted above with reference to the payment of tuition where the pupil resides more than four miles from the school maintained in the district of its residence and transportation is not furnished thereto. If they reside within four miles of the high school maintained in the district of their residence, and they attend some other high school, they will be required to pay their own tuition."

The fact that under practically the same circumstances which existed with reference to the pupil referred to in your first question, except as you state, the pupil's parents were indigent, the board paid tuition, can make no difference with respect to the matter, and my conclusion with respect to the first question submitted is not affected in any respect by reason of the facts set forth in the second question.

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

1. The Board of Education of Highland Township Rural School District in Defiance county is not required under the law to pay tuition for Mr. L.'s daughter who attended Continental High School under circumstances mentioned in your inquiry, and no authority exists for the board of education to pay such tuition.

2. The fact that tuition was paid for another resident pupil in this school district who attended Continental High School and whose parents or guardians were unable to pay the tuition, does not serve to change the conclusion set forth in answer to question No. 1.

Respectfully,

JOHN W. BRICKER,
Attorney General.