

It is believed the issuing of notes in anticipation of such special assessment might well be considered as a means of relieving the situation herein.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

2949.

SCHOOLS—TRANSPORTATION OF PUPILS TO ELEMENTARY AND HIGH SCHOOLS CONSIDERED—WHEN IT IS OPTIONAL AND ALSO WHEN IT IS MANDATORY FOR BOARD OF EDUCATION TO FURNISH TRANSPORTATION.

1. *Except in a centralized school district (7749 G. C.) the transportation of an elementary pupil to school by a board of education is optional (7731 G. C.) unless such pupil has been assigned to a school "without the district" distant more than two miles from the residence of the child (7764 G. C.).*
2. *Where a local board of education decides in its discretion that the transportation of an elementary pupil residing more than two miles from a school within the district is "unnecessary," such judgment of the local board must be confirmed by the county board of education, or the probate court, as the case may be; and if not so confirmed the transportation of an elementary pupil resident more than two miles from school is mandatory (7731 G. C.).*
3. *The transportation of elementary pupils residing two miles or less from school is optional with a board of education (7731) except in a centralized school district (7749).*
4. *The transportation of a pupil eligible to high school by a board of education is optional (7731 G. C.) unless (a) the pupil resides in a district as described in 7749 G. C., or (b) has been assigned to a high school "without the district" and distant more than four miles from the residence of the pupil (7764 G. C.).*
5. *Every board of education must provide "work in high school branches" at some school within four miles of the residence of any pupil eligible to high school (7764-1 G. C.); but if the local board rather than furnish such work in its local district desired (a) to provide transportation to any recognized high school, or (b) pay for transportation under 7731-4 G. C., instead of directly providing it, or (c) pay for the pupil's room and board, or part of same, in an amount less than it would cost, as provided in 7749-2 the local board has the privilege or option of thus furnishing "high school work."*

COLUMBUS, OHIO, March 28, 1922.

HON. C. A. RADCLIFFE, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department upon the following questions:

- "1. In a rural school in the county school district of a given township an elementary school pupil of compulsory school age lives slightly more than two miles from the school to which such child is assigned. Transpor-

tation of such child is demanded by the parent. The township board of education, acting under 7731 G. C., as amended in 109 O. L., 289, refused to furnish or pay for said transportation, the local board finding 'such transportation is unnecessary.' Said action of the local board being *confirmed* by the judgment of the *county board of education*. In such case is transportation or payment for same mandatory or optional?

"2. A child of compulsory school age having completed the course in his elementary school, residing in a county school district of a given township, is assigned *within* the district to a high school more than four miles from such child. Transportation of such child is demanded of the local board of such township. Such local board finds that such transportation is 'unnecessary' and that transportation of pupils who are pursuing high school branches is *optional* with the board (7731 G. C., as amended 109 O. L., 289) and said local board exercising such option refuses to transport such child, which ruling was *confirmed* by the judgment of the county board of education. What is the status of such child as regards transportation?

"3. A child of compulsory school age having completed the course in his elementary school, residing in a county school district of a given township, is assigned *without* the district to a high school more than four miles from such child. Transportation of such child is demanded of the local board of such township. Such local board finds that such transportation is 'unnecessary' and that transportation of pupils who are pursuing high school branches is *optional* with the board (7731 G. C. as amended 109 O. L., 289), and said local board exercising such option refuses to transport such child, which ruling was confirmed by the judgment of the county board of education. What is the status of such child as regards transportation?

"4. Can section 7731 G. C. (as amended 109 O. L., 289) be harmonized with section 7764 G. C. and section 7764-1 G. C.?"

As your questions are based upon the requirements appearing in the new compulsory education law (H. B. 111), a very brief synopsis of that long act will be given (for future reference), as it may bear on the question of schooling up to eighteen years.

The ages for compulsory school attendance are 6 to 18 years, but a local board of education may by resolution change this to 7 to 18 years. A child who is 6 years of age (or 7 in case the board sets the age at 7), after the beginning of a semester, may not be required to attend until the beginning of the following semester. See section 7763 (end) and section 7681. A child may be released from school on an age and schooling certificate after reaching the age of 16 unless he has failed to complete the seventh grade by that age. It is only during employment, however, that the child is excused from school (Sec. 7766), but a graduate of a first grade high school need not attend school further (Sec. 7764-2). Children whose bodily condition does not enable them to attend school may be excused by the superintendent, but the disability must be fully proved and when able the child must enter or return to school. A child can be excused on the ground of physical or mental disability only by the superintendent of the public schools (or person designated by him). (See Sec. 7763.) However, all children who are blind, deaf or crippled, or who are of defective mentality, should be sent to schools suited to them. (See Sec. 7763-5.) Children may be assigned by the juvenile court to suitable institutions. (See Sec. 7780 and Sec. 7781.) In case a child is supposed to be of seriously defective mentality, the services of the State Bureau of Juvenile Research should be asked that advice as to his education and care may be secured. Children need not be admitted

at five, though the school census includes children from 5 to 18 years of age. (Sec. 7794.) This contemplates kindergartens for those five years of age. However, the schools are required by law to be free only to those from 6 to 21 years of age (Sec. 7681). Children must attend the entire year, for the law provides that a child must enter within the first week of the school term or within one week from the date of his moving to the district. The attendance must be for the full time the school attended is in session. (Sec. 7763, first paragraph). A child actually resident in the state must attend school whether his parents are residents or not. (Sec. 7775 and Sec. 7778.) The board of education may aid an indigent child (Sec. 7777), the intent being that no child should be deprived of education because of poverty.

The obligation that a child shall attend school rests primarily on the parents of the child and prosecution for failure of a child to attend school is primarily instituted against the parents (Sections 7762, 7763—first paragraph— and 7773), but if a child, contrary to the directions of his parents, fails to attend school, he may be prosecuted as a delinquent child (Sec. 7762-6 and 7774). The child shall attend the school and grade to which he is assigned by the superintendent of schools, or if he attends a parochial school, the grade to which he is assigned by the principal thereof. In any case the grade or class must be suited to his age and state of advancement. (Sec. 7762 and Sec. 7764.) The completion of the grades does not excuse a child from further school attendance, for he may be assigned by the superintendent to further study in the elementary school or to a high school.

If there is no high school in a given rural district, the child may be assigned to a high school within four miles in another district, and the board of education must pay his tuition. The same is true if the high school is in another district and more than four miles distant from his residence, except that the child may not be required to attend the high school in that case unless his transportation or board in lieu thereof is provided. See Sec. 7764, Sec. 7749-1 and Sec. 7749-2. If high school training is not thus provided any child, the board in his district must provide work in high school branches in connection with some elementary school, or otherwise, within four miles of the child's residence. (Sec. 7764-1.)

Prior to the enactment of House Bill 216 by the present General Assembly, there was no authority for a board of education in a rural district to transport its high school pupils outside of its own district. This authority, however, has now been given to boards of education under the provisions of section 7749-2, but there is no mandate therein that the board of education is required to furnish such transportation of a high school pupil to the high school outside the district where the pupil resides. House Bill 216 (Sec. 7749-2 G. C.) leaves it optional with the board of education not maintaining a high school as to whether the board shall transport the high school pupils outside of the district where they reside. Similarly this authorization "shall have power to furnish such transportation" appears also in section 7764 G. C., supra, as enacted in House Bill 111, but section 7764-1 G. C. apparently goes further than either of the above two cited sections, for it says that *boards of education shall provide work in high school branches for each child of compulsory school age* (up to 18 years) who has finished the ordinary grade school curriculum. This means that "work in high school branches" must be available to children up to eighteen years of age, *unless the child has been graduated from a high school of the first grade*, as provided in section 7764-2 G. C., when such child "shall not be required to longer attend school."

"The positive duty is cast upon each board of education by section 7764-1 to provide work in high school branches the board has provided work in high school branches in its district when it operates a second or third

grade high school which teaches the 'high school branches, as mentioned in 7648 (7649) G. C.' The General Assembly has not said in 7764-1 G. C. the manner in which such 'work in high school branches' shall be provided, nor has it said the amount of such work to be provided. Apparently this has been left as an administrative question (7690) to each board of education as to method in carrying out the mandate that 'high school work' must be provided. It is not within the province of the Attorney-General to legislate upon any matter, that function resting with the General Assembly. The legislature in two laws upon transportation of high school pupils has said that (1) such transportation is 'optional' with the board (H. B. 216) and (2) 'power' to transport has been conferred in section 7764 (H. B. 111) to 'without the school district.' In neither is there a provision for compulsory transportation of high school pupils, except as to 7649 G. C. But a board of education may transport high school pupils in lieu of furnishing high school work in its district (Opinion 2447)." (Opinion 2693, issued December 1, 1921.)

Section 7762-6, as amended in 109 O. L., page 378, reads as follows:

"Every child of compulsory school age who is not employed on an age and school certificate shall attend a public, private or parochial school under the conditions prescribed in sections 7763, 7763-1, 7764 and 7764-1, General Code."

Section 7763 G. C. provides that "compulsory school age shall mean six to eighteen years of age" and the effect of this is that a child between those ages must be in either the elementary schools or high school, or a private school, unless saved by other provisions of the law as to instruction at home, employment part time and part time schooling, as arranged for in detail for certain specific cases. If a child must go to school between the ages of six and eighteen years of age under the compulsory education law, then the board of education must furnish a place of schooling for the child to attend because *the law does not contemplate the impossible thing of ordering a child to school when there is no school available.* This is the situation which is apparently provided for in section 7764-1, that *the board of education must provide work in high school branches "at some school within the four miles of the residence of each such child"* for those children under eighteen years of age who live over four miles from a high school and those not transported to high school. One way of doing this would be for a teacher employed to teach the elementary branches "at some school within four miles of the residence of each such child," and also to be equipped for and required to teach high school branches, thus providing work "in high school branches" at the school in question, as required under the provisions of section 7764-1. This, of course, means that the teacher, in addition to having an elementary teacher's certificate, must also have a certificate to cover the high school branches taught.

Apparently this instruction (7764-1 G. C.) might be secured in either of three ways: (1) by the establishment of a high school, (2) *by providing work in high school branches* at some elementary school within four miles of the residence of such child, and (3) by transporting the pupil to a high school where such high school work is provided. In many cases throughout the state boards of education do "provide work in high school branches" by transporting their pupils to a high school.

It is not believed that the General Assembly had in mind, when enacting section 7764-1 G. C., that every board of education in the state should mandatorily establish

a high school, for if the General Assembly had that view in mind, the law-making body would have amended section 7663, which is still in force, and reads as follows:

"A board of education *may establish* one or more high schools whenever it deems the establishment of such school or schools proper, or necessary for the convenience or progress of the pupils attending them, or for the conduct and welfare of the educational interests of the district."

Here there appears a discretionary right of a board of education to say for itself as to whether, taking everything into consideration in its rural school district, it is in position to establish a high school. This is also apparent from the language of section 7668 G. C., which is still in force and reads in part as follows:

"In rural school districts where a high school or high schools are, or *may be established*, by the rural board of education, it annually shall determine," etc., etc.

Bearing specifically on your first question, it is noted that during the recent session of the present General Assembly there were two laws passed treating upon school transportation in more or less degree, one of which was H. B. 111 (Bing Law), discussed heretofore. The other was H. B. 216 (Bloom Law), which amended and supplemented the former sections upon school transportation. Prior to the enactment of amended section 7731 G. C., as amended by the 84th General Assembly, section 7731 provided as follows:

"In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school the transportation for pupils living less than two miles from the school house by the nearest practicable route for travel accessible to such pupils shall be optional with the board of education. * * *"

It will be noted that this section *was mandatory* as to the transportation of pupils living more than two miles from the nearest school. As amended in 109 O. L., p. 289, section 7731 G. C., in its first paragraph, reads as follows:

"*In all city, exempted village, rural and village school districts* where resident elementary school pupils live more than two miles from the school to which they are assigned *the board of education shall provide transportation* for such pupils to and from such school *except when in the judgment of such board of education, confirmed, in the case of a school district of the county school district, by the judgment of the county board of education, or, in the case of a city or exempted village school district, by the judgment of the probate judge, such transportation is unnecessary.* The transportation for pupils living less than two miles from the school house by the nearest practicable route for travel accessible to such pupils *and the transportation of pupils who are pursuing high school branches shall be optional with the board of education, except as provided in section 7749, General Code.*"

Stripped of all unnecessary words of limitation and qualification, the first sentence of section 7731 G. C. now provides:

"In all * * * school districts * * * the board of education shall provide transportation * * * except when in the judgment of such board of education * * * such transportation is unnecessary."

The first sentence of section 7731 G. C., as amended in H. B. 216, is upon the subject of the transportation of elementary school pupils who live more than two miles from the school to which they are assigned. Where this transportation of elementary pupils was mandatory upon a board of education under former section 7731 G. C., the local board of education can now avoid such transportation by simply pronouncing the same to be "unnecessary" and then have their judgment confirmed by either the county board of education or by the judgment of the probate judge, as the case may be. The amended section (7731) also provides that the transportation of elementary pupils living less than two miles from the school house shall be optional with the board of education, except where the schools are centralized and transportation of pupils is provided (7749), and the transportation of pupils who are pursuing high school branches shall be optional also with the board of education, except as provided in section 7749 G. C. Under existing section 7731 (Bloom law) school transportation for pupils living more than two miles from the elementary school and those living less than two miles from the elementary school and those who are pursuing high school branches (regardless of distance) need not be furnished at all if the officers indicated in section 7731 G. C. (first paragraph) deem such transportation to be "unnecessary."

The Bloom law (H. B. 216) and the Bing law (H. B. 111), both speaking upon school transportation, must be dovetailed together where it is possible to do so, and where they conflict the well-known rule of the law will prevail that the last law enacted upon a subject shall be considered to be the one in force.

An examination of the history of these two laws passed by the 84th General Assembly, upon the question of transportation of school children, shows that House Bill 111 (Bing Law) was introduced in the 84th General Assembly January 27, 1921. Some twenty days later there was introduced House Bill 216 (February 17, 1921), but due to the discussion and hearings held upon H. B. 111 (the compulsory education law) the latter was passed later by the General Assembly than was H. B. 216. It is found that H. B. 216 (Bloom Law) became effective on August 16, 1921, and H. B. 111 (Bing Law) became effective on August 25, 1921. The result would be that the law last passed (Bing Law) would govern over the law first passed *on those points where there was conflict* between the two. From the above discussion we find that as far as H. B. 216 (Bloom Law) applies the transportation of elementary pupils living less than two miles from the school house by the nearest practicable route for travel accessible to such pupils is optional, as is also the transportation of pupils who are pursuing high school branches, the sole exceptions being those pupils who fall within section 7749 G. C., that is, where the district has been legally centralized and transportation has been provided. Under this same law (section 7731) the transportation of elementary pupils who live more than two miles from the school to which they are assigned is also optional under the existing statute, because the power given to the local board of education to pronounce such transportation to be "unnecessary" in its judgment, is an option, the only requirement being that its pronouncement that such transportation is unnecessary must be confirmed by the county board of education or the probate judge, as the case may be. We thus come to an analysis of sections 7764 and 7764-1 of the General Code, appearing in H. B. 111 (Bing Law), effective nine days later than the day on which section 7731 G. C., as it now reads, became effective. These sections read:

"Section 7764: The child in his attendance at school shall be subject to assignment by the principal of the private school or superintendent of schools as the case may be, to the class in elementary school, high school or other school, suited to his age and state of advancement and vocational interest, within the school district; or, if the schooling is not available within

the district, without the school district, provided the child's tuition is paid and provided further that transportation is furnished in case he lives more than two miles from the school, if elementary, or four miles from the school, if a high school or other school. The board of education of the district in which the child lives shall have power to furnish such transportation."

"Section 7764-1: Boards of education shall provide work in high school branches, as mentioned in section 7648, General Code, at some school within four miles of the residence of each such child for those children of compulsory school age who have finished the ordinary grade school curriculum except those who live within four miles of a high school and those for whom transportation to a high school has been provided."

Bearing upon section 7764 G. C., it was held in Opinion 2693, issued December 14, 1921, as follows:

"The section speaks of assignment of * * * pupils (1) 'within the district' and (2) 'without the district,' being separated by a semi-colon. As to assignment 'within the district' nothing is said on transportation, the provision as to 'power' to transport appearing relative to assignment 'without the district.'"

In your first question you say that an elementary pupil has been assigned to a school which is more than two miles from the residence of the child. Under the language of section 7764 G. C. if this school to which the child is assigned is "within the district," then no right to transportation for such child exists. But if the child lives more than two miles from the school house to which assigned and such school is without the school district, then the child's tuition must be paid and transportation must be furnished in order to make such assignment "without the district" effective. Putting it another way, a board of education should not assign an elementary pupil to a school outside the pupil's district a distance of more than two miles, unless transportation by the resident board of education is furnished.

Your second and third questions are upon high school transportation, first where a high school pupil is assigned "within the district" to a high school more than four miles from the residence of such child. Here again we are confronted with the language of section 7764 G. C. from which it appears that no right to transportation lies if the high school pupil has been assigned to a high school "within the school district," there being no mention of distance of such high school from the residence of the high school pupil.

Your third question is similar to your second question except that the high school pupil in question has been assigned "without the school district" and thus the second part of section 7764 G. C., that is, the portion following the semi-colon, applies. This reads that if a high school pupil has been assigned "without the district" the high school pupil's tuition must be paid in any event, regardless of distance, and if the assignment that is made is one which places the high school pupil in a school outside his district, located more than four miles from his residence, then in addition to the tuition of such high school pupil his transportation to the high school to which he is assigned outside of his district must be furnished in order to make such assignment effective. In other words, the school authorities should not assign a high school pupil to a high school outside the district more than four miles distant unless the board contemplates that transportation to such foreign high school is to be furnished. However, it is important to notice the language of sec-

tion 7764-1 which is supplementary to section 7764 G. C. just discussed, for section 7764-1 requires that each and every board of education shall provide work "in high school branches" at some school within four miles of the residence of each child of compulsory school age who has finished the ordinary grade school, and if this work "in high school branches" is furnished by a board of education, then the question of transportation to a high school does not enter so largely, because this "high school work" is to be furnished at some school within four miles of the residence of the child. The language appearing in section 7764-1 G. C., relative to furnishing high school work at some school within four miles of the residence of each high school pupil, is mandatory upon each and every board of education, but if a board of education, rather than furnish the high school work within four miles of the residence of each high school pupil, desires to transport to a high school, either in the district or outside the district, the board of education has that privilege or option.

In reply then to your questions, you are advised that it is the opinion of this department:

1. Except in a centralized school district (7749 G. C.) the transportation of an elementary pupil to school by a board of education is optional (7731 G. C.) unless such pupil has been assigned to a school "without the district" distant more than two miles from the residence of the child (7764 G. C.).

2. Where a local board of education decides in its discretion that the transportation of an elementary pupil residing more than two miles from a school within the district is "unnecessary," such judgment of the local board must be confirmed by the county board of education, or the probate court, as the case may be; and if not so confirmed the transportation of an elementary pupil resident more than two miles from school is mandatory (7731 G. C.).

3. The transportation of elementary pupils residing two miles or less from school is optional with a board of education (7731) except in a centralized school district (7749 G. C.).

4. The transportation of a pupil eligible to high school by a board of education is optional (7731 G. C.) unless (a) the pupil resides in a district as described in 7749 G. C., or (b) has been assigned to a high school "without the district" and distant more than four miles from the residence of the pupil (7764 G. C.).

5. Every board of education *must* provide "work in high school branches" at some school within four miles of the residence of any pupil eligible to high school (7764-1 G. C.); but if the local board rather than furnish such work in its local district desired (a) to provide transportation to any recognized high school, or (b) pay for transportation under 7731-4 G. C. instead of directly providing it, or (c) pay for the pupil's room and board, or part of same, in an amount less than it would cost as provided in 7749-2 G. C., the local board has the privilege or option of thus furnishing "high school work."

Respectfully,
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