

contained in the petition. It is true that the petition may be amended by the petitioners on leave of the commissioners and that territory may be added provided another hearing is had. However, there is no authority for the petitioners or commissioners to eliminate all the platted lands as set forth in the petition. If it should be held that the petitioners could, by amendment, omit all the platted lands and incorporate only the unplatted lands, the provisions of sections 3526; General Code, et seq., requiring that when unplatted territory only is to be incorporated, a petition shall be filed with the township trustees and an election held thereon, would be circumvented.

It is my view that the power granted to the petitioners to amend the petition does not give power to eliminate the basic requirements of the petition. In 43 Corpus Juris, 94, 95, it is said:

“General laws relating to the incorporation of municipalities provide that a designated board, court, judge, or officer shall determine to its or his satisfaction whether or not there has been a compliance with the statutory conditions * * *. Except where and as authorized by statute, the court cannot direct that certain territory be taken in or omitted, but is limited to the acceptance or rejection of the application as it stands.

Inasmuch as an amendment by the petitioners eliminating the platted lands could not be allowed by the county commissioners, it follows that the county commissioners may not, after hearing, incorporate a village from the unplatted portion of the lands included in the petition under discussion. The only way such unplatted lands can be incorporated as a village is by the filing of a new petition with the township trustees, under the provisions of section 3526, et seq., General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3594.

CHILDREN—PLACED IN FOSTER HOMES—ENTITLED TO PRIVILEGES OF PUBLIC SCHOOLS IN THAT DISTRICT—ASSESSING OF SUCH EDUCATIONAL EXPENSE—HOUSE BILL NO. 624.

SYLLABUS:

1. *Children who have been permanently committed to the Department of Public Welfare, Division of Charities, and who thereafter, by order of the Division of Charities, are placed in foster homes, are entitled to the privileges of the public schools in the district where the foster home is located, free of charge.*

2. *A child placed by the Division of Charities in a so-called boarding home, must be admitted to the public schools of the school district wherein the boarding home is located. Tuition for such child during its attendance at such school is a proper charge against its legal guardian, the Department of Public Welfare, Division of Charities. Such tuition may be paid by the Division of Charities from funds appropriated by the General Assembly, to the use of the said Division of Charities for that purpose. If no such appropriation exists, payment thereof can not be made, and the only available resource under such circumstances, for the*

recovery of such tuition, is through the Sundry Claims Board. Of course, if a youth of school age lives apart from his parents or guardian, and works to support himself by his own labor, he is entitled to attend school free, in the district where he is employed, whether or not he had been previously committed to the Division of Charities and placed by said Division in the home where he is employed.

3. *There is no provision of law which authorizes charging back to the county or school district of last residence of a child committed to or transferred to the Department of Public Welfare, Division of Charities, the cost of providing school advantages for such child except the provisions with reference to crippled children.*

4. *The General Appropriation Act, of the 89th General Assembly (House Bill 624), carries no appropriation to the Department of Public Welfare, Division of Charities, which is available for the purpose of paying tuition for wards of the said Division of Charities who are placed in boarding homes and who attend school in the school districts where those boarding homes are located.*

COLUMBUS, OHIO, September 23, 1931.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

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

“The Reynoldsburg Village School District has been caring for the educational needs of children from the State Department of Welfare. These children are boarded in homes in this school district.

Can Reynoldsburg in any way obtain tuition for these children?”

By the terms of section 154-57, General Code, as enacted in 1929, the Department of Public Welfare is vested with all the powers, and charged with all the duties vested in, or imposed upon the Ohio Board of Administration and the Board of State Charities. It is therein provided *inter alia*:

“Wherever powers are conferred or duties imposed by law upon the boards and officers mentioned in this section such powers and duties, excepting as aforesaid, shall be construed as vested in the department of public welfare.”

The exceptions spoken of are the power to purchase supplies for the support and maintenance of state institutions, which power, upon the enactment of the so-called Administrative Code, was transferred to the Department of Finance, and the control of the State School for the Deaf and the State School for the Blind which control has been transferred to the Department of Education.

Both the State Board of Charities and the Ohio Board of Administration are in terms empowered by statute to receive and care for children committed to them by the several juvenile courts or transferred to them from certain county, district and state institutions.

Section 1352-3, General Code, appearing in the chapter relating to the Board of State Charities, reads as follows:

“The board of state charities shall, when able to do so, receive as its wards such dependent or neglected minors as may be committed to it by the juvenile court. County, district, or semi-public children’s homes

or any institution entitled to receive children from the juvenile court or the board of administration may, with the consent of the board, transfer to it the guardianship of minor wards of such institutions or board. If such children have been committed to such institutions or to the board of administration by the juvenile court that court must first consent to such transfer. The board shall thereupon ipso facto become vested with the sole and exclusive guardianship of such child or children.

The board shall, by its visitors, seek out suitable, permanent homes in private families for such wards; in each case making in advance careful investigation of the character and fitness of such home for the purpose. Such children may then be placed in such investigated homes upon trial, or upon such contract as the board may deem to be for the best interests of the child, or proceedings may be had, as provided by law, for the adoption of the child by suitable persons. The board shall retain the guardianship of a child so placed upon trial or contract during its minority, and may at any time, if it deem it for the best interest of the child, cancel such contract and remove the child from such home. The board, by its visitors, shall visit at least twice a year all the homes in which children have been placed by it. Children for whom on account of some physical or mental defect it is impracticable to find good, free homes may be so placed by the board upon agreement to pay reasonable board therefor.

The board shall provide needed clothing and personal necessities for such children. When necessary any children so committed or transferred to the board may be maintained by it in a suitable place until a proper home is found. So far as practicable children shall be placed in homes of the same religious belief as that held by their parents. The traveling expenses in connection with the placing of such children in homes, the amount of board, if any, and expenses for clothing and personal necessities and for mental, dental and optical examination and treatment shall be paid out of funds appropriated to the use of the board by the general assembly."

Section 1352-5, General Code, provides that the Board of State Charities may, when willing to do so, receive as its wards, with all the powers given it by Section 1352-3, supra, delinquent children committed to it by a juvenile court or from any institution to which such children may be committed by a juvenile court or assigned by the Board of Administration. When such delinquent children are received by the Board of State Charities as wards of said board, such children are to be placed in homes, in accordance with the provisions of Section 1352-3, supra. Said Section 1352-5 provides that when such delinquent children are committed by the court to the Board of State Charities, the court shall make an order that the parent or parents of such children shall pay the Board of State Charities periodically, reasonable sums for the maintenance of such children. Similar provisions are made with reference to dependent children in Section 1653, General Code, found in the chapter relating to Juvenile Courts.

Section 1352-7, General Code, provides that whenever the Board of State Charities receives money for board from an individual liable therefor under Sections 1352-5 and 1658, of the General Code, the same shall be paid to the Treasurer of State, and credited to the fund appropriated for the purpose of maintaining the child-placing work of the board.

By the terms of section 1352-8, General Code, it is provided that in order

to provide suitable medical and surgical treatment, and education, when necessary, of crippled children whose parents or guardians fail, or are financially unable to provide such treatment, the Board of State Charities is authorized and empowered to receive into its custody such children.

Section 1352-9, General Code, provides that the Board of State Charities shall arrange for the treatment and education of crippled children committed to it by the Juvenile Court.

Section 1352-4, General Code, provides that the actual traveling expenses of any dependent, neglected, crippled or delinquent child and of the agents and visitors of the said Board of State Charities, and expense necessary for suitable clothing, personal necessities, mental, medical, surgical, dental and optical examination and treatment, including massaging and other beneficial treatment and braces, artificial limbs and accessories and their upkeep, and for the education when necessary, of a crippled child, shall be paid from funds appropriated to said board and charged by the Board of State Charities to the county from which such child was committed or transferred, as provided in sections 1352-3, 1352-5, and 1352-8, General Code.

There is no statutory provision which authorizes charging back to the county of commitment the necessary expenses incident to the education of children committed to the Board of State Charities other than the provisions relating to the expense of educating crippled children and such other children as may, after commitment to the Board of State Charities, be transferred to the Institution for the Feeble-Minded or Insane, the cost of maintenance of whom is governed by the statutes relating to those particular institutions.

In fact there is no direct statutory provision, charging the Board of State Charities, in terms, with the duty of educating normal children who have been committed to it. This duty is of course implied from the fact that, upon commitment of a child to the Board of State Charities, the board becomes the guardian of the child and would for that reason, if for no other, be charged with the duty of providing means for the child to receive an education. A part of the definition of a "dependent child", as contained in Section 1645, General Code, is that it is one "who is prevented from receiving proper education", and Section 1683, General Code, found in the chapter relating to juvenile courts, provides:

"This chapter shall be liberally construed to the end that proper guardianship may be provided for the child, in order that it may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare. * *"

It is significant, as noted above, that by the terms of Section 1352-4, General Code, specific provision is made to the effect that the expenses incident to the education of a crippled child committed to the Board of State Charities or transferred to said board, shall be charged to the county from which such child was committed or transferred, whereas, no similar provision is made with respect to the cost of educating children so committed who are not crippled, although the statute provides for charging the county from which a child is committed or transferred, with the actual traveling expenses of any child, whether crippled or not. The county to be charged with the cost of educating a crippled child and with the traveling expenses of any child committed to the Board of State Charities, is the county from which the child was committed, or transferred, as the case may be, and not necessarily the county where the parents of the child reside.

In fact, the residence of the parents or the legal settlement of the parents has nothing to do with the question.

At this point it might be well to note that similar provisions are made by statute with reference to the expense of educating children committed to county, semi-public or district children's homes. Section 7678, General Code, provides in part:

"A child who is an inmate of a county, semi-public or district children's home and who was previously a resident of the school district in which such home is located shall be entitled to an education at the expense of such school district, but any child who was not a resident of such school district shall be educated at the expense of the school district of its last residence. * *"

In the absence of any statutory authority for charging the cost of educating a child committed to the Board of State Charities to the county of his last residence, I am of the opinion that the cost of such education must be met from the funds of the board as are the expenses for clothing and personal necessities, in accordance with section 1352-3, supra. Of course, in many instances these expenses would necessarily be paid by the parents of the child, in accordance with the order of the court made by authority of sections 1352-5, 1653, and cognate sections of the General Code.

When children are committed to the Board of State Charities, it becomes the duty of the board, as provided by section 1352-3, supra, to seek out suitable permanent homes in private families for such children. In many cases it is impracticable, for a time at least, and perhaps, in some cases, impossible to find suitable permanent homes for such children. In the meantime, the children are placed in homes on trial, upon such agreement with the home as may be most advantageous and for the best interests of the child; in some cases at least, where such permanent homes are provided, board is paid. In most cases, and perhaps in all cases where permanent homes are provided, no board is paid; and the child is taken in as one of the family and becomes in a sense, at least, a permanent resident of the school district where the home is located. Such homes have come to be called foster homes, in contradistinction to temporary homes or boarding homes.

Similar provisions with reference to the power of the Board of State Charities to seek out and place children in their custody in suitable homes is made by statute with reference to the trustees of county, semi-public and district children's homes. The question of the right of children placed by the trustees of county, semi-public and district children's homes in foster homes to attend school in the district where the foster home is located, free of charge, was the subject of an opinion rendered by me on February 27, 1929, and addressed to the Prosecuting Attorney of Pickaway County. See Opinions of the Attorney General for 1929, page 195. The syllabus of said opinion reads as follows:

"1. Inmates of a county, semi-public or district children's home who have been placed in foster homes by the trustees of such home, by authority of sections 3095 and 3096, General Code, may attend the public schools in the district where the foster home is located free of charge.

2. Children who are placed by the trustees of a county, semi-public or district children's home, in so-called boarding homes, by authority of section 3093, General Code, should be educated at the expense of the

school district which was the last residence of the children before being admitted to the said county, semi-public or district children's home.

3. Children who are in care of, or in charge of residents of a school district, with the exception of children in private children's homes, must be admitted to the public schools of such district. If circumstances are such that some person or other school district, or any public or private agency is liable for the tuition of such child in such school, the board of education of the school district where the child attends school may enforce that liability in an action at law. In the meantime, the child should not be deprived of the privileges of attending school."

I believe many of the principles upon which said Opinion No. 130 is grounded are applicable to the question here presented although, of course, the statutes authorizing the charging back to the school district of the last residence of the child committed to a children's home have no application to children committed to the Board of State Charities. However, when children are placed by the Board of State Charities in a foster home, they are entitled to the same rights as are children so placed by the trustees of a children's home. Similarly, if children are placed by the Board of State Charities in a so-called boarding home, the school district in which the boarding home is located is entitled to have paid to it by someone the proper tuition for the child's attendance in the schools of the district, and inasmuch as the legal guardian is primarily responsible for tuition for such child, and no legal authority exists for charging back to the county of last residence or school district of last residence the amount of such tuition, I am of the opinion that the Board of State Charities must pay such tuition from the funds appropriated to it for child-placing purposes by the General Assembly.

It has been suggested that because of the provisions of Section 7681, General Code, to the effect that the schools of each district shall be free to all youth between six and twenty-one years of age who are children, wards and apprentices of actual residents of a school district, wards of the Board of State Charities may attend school in a district of the State free of charge, for the reason that the Board of State Charities can be said to be a resident of any district in the state.

It is true, in a sense, that the Board of State Charities is as much a resident of one district as another. It is a state functionary and acts in a sovereign capacity as an arm of the state. While it has offices and headquarters in the City of Columbus and Franklin County, it cannot be said to be a resident of the City of Columbus and Franklin County any more than it can be said to be a resident of any other city or county of the state.

It is true that the Board of State Charities has a potential or constructive residence all over the state. In its sovereign capacity it can be said to be omnipresent at any point in the state. This fact, however, does not in my opinion, make it an actual resident, in the sense that the word "actual" is used in Section 7681, General Code, of any school district of the state.

In an opinion of a former Attorney General, reported in the Opinions of the Attorney General for 1922, at page 22, where the phrase "actual resident of the district", as used in Section 7681, General Code, was under consideration, it was held, as stated in the syllabus:

"The phrase 'actual residents of the district' occurring within the provisions of section 7681, General Code, requires an actual residence in fact, or the physical presence or dwelling of the parent or person

standing in loco parentis to the pupil, for the time being at least, within the school district."

In the course of the opinion, the definition of the word "actual", as the same is defined by the Century Dictionary and Bouvier's Law Dictionary is referred to. One of the definitions of the word "actual" as given by the Century Dictionary, is:

"In full existence; real; denoting that which not merely can be, but is; opposed to potential, apparent, constructive and imaginary."

Bouvier's Law Dictionary defines "actual" as:

"Real, in opposition to constructive or speculative, something existing in fact."

It is the sense of the opinion of the Attorney General referred to above, that the word "actual", as used in Section 7681, General Code, contemplates the physical presence and dwelling of the parent or person standing in loco parentis to the pupil rather than his potential or constructive presence in the district.

In my opinion the provisions of Section 7681, General Code, permitting the wards of actual residents of a school district to attend school in a district free of charge cannot be construed so as to permit the wards of the Division of Charities to attend school in any district of the state, free of charge, unless those wards have been placed in foster homes, under which circumstances, of course, the foster home becomes in loco parentis to the children so placed there and such children become wards of the foster home in the sense that the word "ward" is used in Section 7681, General Code. See Opinions of the Attorney General for 1927, at page 160, and Opinions of the Attorney General for 1929, at page 195.

It is my conclusion that in school districts wherein there are children in boarding homes, who are wards of the Department of Public Welfare, Division of Charities, those children must be admitted to the schools of the district but the district should not be required to bear the expense of educating such children. Their tuition should be paid by their legal guardian, the same as that for all such children in similar circumstances. The legal guardian of such children is the Department of Public Welfare, Division of Charities. The question of how this tuition is to be paid, and how the district to which the tuition is payable may recover the same, is one which presents considerable difficulty.

The Constitution of Ohio, in Article II, Section 22, provides:

"No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law. * *"

It clearly follows that unless the Department of Public Welfare, Division of Charities, has available an appropriation which may be used for the purpose of paying this tuition, it can not be paid, and, if the Department of Public Welfare, Division of Charities, does not pay the tuition, no action is available to a local board of education to collect the same, for the reason that no action may be brought against the state, nor could an action in mandamus to compel the proper officers to draw a warrant for the tuition charge be tenable, for the reason that no appropriation existed against which the warrant might be drawn.

The provisions of the General Appropriation Bill, of the 89th General Assembly (House Bill 624), making appropriations to the Department of Public Welfare, Division of Charities, are too long to quote in this opinion. An examination of these provisions, however, will disclose that the appropriation is made in considerable detail and there is not one item of this appropriation which may be construed, in my opinion, so as to permit the payment of charges, such as those which might be made for tuition for the wards of the department who are maintained in boarding homes. For that reason, I am of the opinion that while tuition charges such as are here under discussion are a proper charge against the Department of Public Welfare, Division of Charities, there is no way under the present status of the appropriations made by the 89th General Assembly, whereby such claims may be paid, and unless the status of those appropriations is in some way modified during the present biennium, the only available source of securing payment for such tuition by local school districts is to present the same to the Sundry Claims Board, for consideration by the 90th General Assembly:

I am therefore of the opinion:

First, children who have been permanently committed to the Department of Public Welfare, Division of Charities, and who thereafter, by order of the Division of Charities, are placed in foster homes, are entitled to the privileges of the public schools in the district where the foster home is located, free of charge.

Second, a child placed by the Division of Charities in a so-called boarding home, must be admitted to the public schools of the school district wherein the boarding home is located. Tuition for such child during its attendance at such school is a proper charge against its legal guardian, the Department of Public Welfare, Division of Charities. Such tuition may be paid by the Division of Charities from funds appropriated by the General Assembly, to the use of the said Division of Charities for that purpose. If no such appropriation exists, payment thereof can not be made and the only available recourse under such circumstances, for the recovery of such tuition, is through the Sundry Claims Board. Of course, if a youth of school age lives apart from his parents or guardian, and works to support himself by his own labor, he is entitled to attend school free, in the district where he is employed, whether or not he had been previously committed to the Division of Charities and placed by said Division in the home where he is employed.

Third, there is no provision of law which authorizes charging back to the county or school district of last residence of a child committed to or transferred to the Department of Public Welfare, Division of Charities, the cost of providing school advantages for such children except the provisions with reference to crippled children.

Fourth, the General Appropriation Act, of the 89th General Assembly (House Bill 624), carries no appropriation to the Department of Public Welfare, Division of Charities, which is available for the purpose of paying tuition for wards of the said Division of Charities who are placed in boarding homes and who attend school in the school districts where those boarding homes are located.

Respectfully,

GILBERT BETTMAN,

Attorney General.