bonds purchased by you. These bonds comprise part of an issue of Department of Public Service bonds in the aggregate amount of $100,000, dated August 1, 1929, bearing interest at the rate of 4¾% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

2023.

DIRECTOR OF EDUCATION—BOARD OF EDUCATION OF SCHOOL DISTRICT—STATE CONTROLLING BOARD—WHERE SCHOOL DISTRICT HIGH SCHOOL NOT CLASSIFIED AND CONDUCTED TO MEET REQUIRED STANDARDS—AMOUNT OF FUNDS APPORTIONED CANNOT BE DISTRIBUTED UNLESS GOOD AND SUFFICIENT REASON ESTABLISHED TO CLASSIFY SCHOOL.

SYLLABUS:

The director of education, with the approval of the state controlling board, cannot include in the distribution to a board of education of a school disrtict the amount that was apportioned to the school district for its high school when such school has not been classified and thereby is being conducted in a manner not authorized by law, unless such board of education can establish to the satisfaction of the director of education and the state controlling board a good and sufficient reason for its high school not having been classified.

COLUMBUS, OHIO, March 7, 1938.

HON. E. N. DIETRICH, *Director of Education, Columbus, Ohio.*

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

> "In view of your recent opinion relative to the authority of a board of education to operate a school which had not been classified as a first, second or third grade high school, we are

faced in the allocation of the State Public School Fund with another problem. It is specifically this:

Is the Director of Education within his legal rights in allocating funds to a board of education for the operation of a school which does not meet the standards established for qualification as a first, second or third grade high school?

In view of the fact that we have a distribution to make on the last day of February, 1938, we should appreciate your formal opinion as early as possible."

The opinion referred to in your letter was rendered December 8, 1937. numbered 1583 and held:

"1. If a board of education, in its discretion, establishes a high school within its school district, a mandatory duty then becomes imposed upon that board to maintain a high school which will meet certain standards so that the high school can be classified by the director of education as a first, or second, or third grade high school.

2. If the board of education maintains a high school that has not been classified; it is expending public funds for maintaining and conducting a type of school that is not authorized by law.

3. A board of education must offer within its high school a course of high school studies that requires four years, or three years, or two years for completion. If it offers a four year course, it must meet such standards that will entitle it to be classified by the director of education as a first grade high school; if it offers a three year course, it must meet such standards that will entitle it to be classified as a second grade high school; and if, it offers a two year course it must meet such standards that will entitle it to be classified as a third grade high school."

Section 7595, General Code, creates a state public school fund and provides for the administration of the same. This section reads as follows:

"There shall be a state public school fund in the state treasury, for the support and maintenance of the public school system and for the equalization of educational advantages throughout the state. To this fund shall be credited by the auditor of state any funds appropriated thereto by the general assembly and the proceeds of any taxes and fines which are by law to be applied

to that fund and which are received by the treasurer of state. *The state public school fund shall be administered by the director of education, with the approval of the state controlling board and subject to the restrictions of law.*" (Italics, the writer's.)

Section 7595-1f, General Code, provides for the procedure to be followed by the Director of Education with the approval of the State Controlling Board in making the apportionment of the state public school fund among the school districts of the state. Section 7595-lg, relates to the distribution of such apportionments to the various school districts.

The question presented is: Whether or not the Director of Education with the approval of the State Controlling Board can include in the distribution to a board of education of a school district the amount that was apportioned to the school district for its high school when such high school has not been classified, and thereby, is being conducted in a manner not authorized by law?

Opinion No. 1583 held, in effect, that if a board of education, in its discretion, establishes a high school, *it is a mandatory requirement of the law* to maintain such high school so that it "will meet certain standards so that the high school can be classified by the Director of Education as a first, or second, or third grade high school."

As stated in the case of *The State of Ohio ex rel. W. H. Sturdevant* vs. *The Board of Education of Freedom Township*, 8 O. N. P., page 207:

> "(4) The legislature from the beginning has asserted its authority to control the application of school funds, and has repeatedly done so, and it is clearly within its constitutional powers."

The legislature exercised this prerogative when it enacted Section 7595-1e, General Code, which reads as follows:

> "*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,* including the annual plans of reorganization, in or of the county school district (as they apply to such school district) adopted by the county board of education and approved by the director of education as provided in Sections 7600-1 to 7600-5 and Section 7600-9 *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;* provided

further, that no school district wherein the total of the annual salaries paid the teachers of the district is less than seventy-five per cent of the total cost of the foundation program of such district, exclusive of transportation and tuition costs, shall participate in any portion of the state public school fund." (Italics, the writer's).

It is to be observed from a reading of Section 7595-1e, supra, that the conformance "with all the requirements of the law and the rules and regulations pursuant thereto" is a mandatory condition precedent to a school district participating "in any portion of the state public school fund," unless the school district is excepted by operation of the exception contained in said Section 7595-1e, supra. The language employed in the statute is plainly mandatory and unambiguous as to the condition precedent to participating in the state public school fund, and therefore, it must be said that the legislature meant what it so plainly expressed, that is that all requirements of the law must be performed before participation in the state public school fund. The situation here presented calls for the application of the well recognized rule of law stated by 2 Sutherland on Statutory Construction (2nd Ed.) Section 627, as follows:

> "Mandatory statutes are imperative; they must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void. Compliance therewith, substantially, is a condition precedent; that is, the validity of acts done under a mandatory statute depends on a compliance with its requirements."

As stated in Opinion No. 1583, the mandatory requirement of the law is that the high schools of the state be classified by the Director of Education. Therefore, it must be said that where a board of education maintains a high school that has not met certain standards so that the high school can be classified by the Director of Education, the board of education "has not conformed with all the requirements of law and the school district can 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 the state controlling board." The conclusion that the mandatory requirement of the law must be complied with in order to participate in the fund, is strengthened when we consider that the requirements to be met in order for a high school to be classified by the Director of Education, as stated in Opinion No. 1583, "are such that can be met by a board of education if it so desires."

There are also other factors to be considered in arriving at this

conclusion. One is the purpose of establishing the state public school fund. This purpose was well expressed in the recent case of *State ex rel. Dunipace* vs. *Board of Education of Fulton County School District,* 23 *Abstract,* 581, wherein the Court held:

> "The law is not intended to deal directly with the subject of transfer of territory. *Its purpose is to create a public fund in the state treasury and provide for its distribution, the object being to provide an efficient system for common schools in the state and for the equalization and economical operation of our common schools.*" (Italics, the writer's.)

It is to be presumed that in enacting Section 7651, General Code, which makes it mandatory that "the high schools of the state shall be classified by the director of education," the legislature assumed such a provision would make for more efficient high schools within the state.

It is further to be presumed that when in the enactment of the "School Foundation Law" the legislature made provision for the payment fom the state public school fund of a certain specified amount for each pupil in average daily attendance in grades nine to twelve, inclusive, it assumed that the high schools in the state to which money from the state public school fund would be apportioned and paid, would be high schools that had been classified as required by law; that, in computing the allotted specified amount for each pupil in average daily attendance in grades nine to twelve, inclusive, the legislature took into consideration the cost of maintaining and operating a classified high school. It therefore would thwart the very purpose of the "School Foundation Law" to permit some boards of education to maintain and operate high schools that were not classified, and participate in the state public school fund on an equal basis with high schools that were classified.

Another factor that must be given consideration in strictly construing Section 7595-1e, supra, is that its provisions deal with participating in a public fund. That no disbursement of such fund can be made unless clearly authorized is well expressed in the case of *The State, ex rel. Smith, Pros. Atty.,* vs. *Maharry,* 97 O. S., 272, wherein it held:

> "All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law."

I have been unable to find any case involving the exact question

herein presented. However, I desire to call attention to an interesting case appearing in 11 Ohio, 386, the style of which is *James C. Chalmers* vs. *Robert Stewart.* The facts therein were: A teacher was employed by the directors of the district to teach a school organized under the statute regulating common schools. The teacher was authorized only to admit those that had the privilege of attending common schools. He admitted others. The directors refused to pay the teacher for teaching services.

The court held the teacher could not recover. That if the teacher admits others than those entitled to the privilege of attending common schools, "he violates the obligation on his part to keep a legal school; * * and where the statute imposes the prohibition for reasons which were satisfactory to the lawmaking power as to whom the teacher may admit to the privileges of the school, its enactments, if disregarded, must be followed by the same consequences."

From all the foregoing it is clear that the director of education, with the approval of the state controlling board, cannot include in the distribution to a board of education of a school district the amount that was apportioned to the school district for its high school when such school has not been classified and thereby is being conducted in a manner not authorized by law, unless such board of education can establish to the satisfaction of the director of education and the state controlling board a good and sufficient reason for its high school not having been classified.

It is obvious that Section 7595-1e, supra, contains an exception as to a school district participating in the state public school fund in a case where the board of education has not conformed with all the requirements of law. The general rule of an exception is as expressed in 37 O. J., 781:

> "Statutory exceptions to the operation of laws, especially if such laws are entitled to a liberal construction, should receive a strict but reasonable, interpretation."

The exception in Section 7595-1e, supra, must be construed, in reference to this opinion, as excepting from the operation of the provisions of this section, a board of education of a school district that has failed to maintain and operate its high school in order that the high school can be classified by the director of education as mandatorily required by law, if, the board of education maintaining such a school can establish to the satisfaction of the director of education and the state controlling board a good and sufficient reason for having failed to meet the standards for classification. The statute vests exclusive discretion in the director of education and the state controlling board to determine whether or not the

board of education has had a good and sufficient reason for not having met the requirements in order that the school could have been classified by the director of education as mandatorily required by the provisions of Section 7651, General Code.

It must be remembered that this discretion vested in the director of education and the state controlling board is subject to the limitation that such discretion must not be exercised in an arbitrary and prejudicial manner. The rule applicable is expressed in 32 O. J., 934, as follows:

> "If the power to determine a question of fact has been given by law to an officer, his determination is final in the absence of any controlling provision of the statute, provided he has not been guilty of an abuse of discretion."

Therefore, in specific answer to your question, it is my opinion that, the director of education is within his legal rights in allocating or distributing "funds to a board of education for the operation of a school which does not meet the standards established for qualification as a first, second or third grade high school," if the board of education maintaining and operating such school establishes to the satisfaction of the director of education and the state controlling board a good and sufficient reason for not having met the requirements in order that the school could have been classified by the director of education as mandatorily required by the provisions of Section 7651, General Code.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

2024.

APROVAL — BONDS VILLAGE OF BLOOMDALE, WOOD COUNTY, OHIO, $11,000.00, PART OF ISSUE DATED DECEMBER 1, 1935.

COLUMBUS, OHIO, March 8, 1938.

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

GENTLEMEN:

RE: Bonds of Village of Bloomdale, Wood County, Ohio, $11,000.00 (Unlimited).