635.

SCHOOL FUNDS—BOARD OF EDUCATION NOT AUTHORIZED TO EXPEND PUBLIC SCHOOL FUNDS TO SUPPORT INTERSCHOLASTIC ATHLETICS—PHYSICAL EDUCATION AND INTERSCHOLASTIC ATHLETICS DISTINGUISHED.

SYLLABUS:

1. *Boards of education are without power to expend public school funds under their control to support or promote the competitive playing of games by picked teams from the pupils of the public schools.*

2. *The authority granted by law to the Director of Education to prescribe or approve courses of physical education in the public schools does not authorize the inclusion within such courses of what is commonly termed interscholastic athletics or the competitive playing of athletic games by picked teams from the pupils of the several public schools.*

3. *Interscholastic athletics as the term is commonly used, is not a proper public school activity under the law.*

4. *A board of education in Ohio is not authorized to pay from public funds under their control the expense of furnishing basketball, football or baseball uniforms for the high school basketball, football or baseball teams, as the case may be.*

5. *A board of education is not authorized to pay from public funds for the expense of transporting their basketball, football or baseball team to a distant point for the purpose of holding an athletic contest between that school team and a team representing another school.*

COLUMBUS, OHIO, April 18, 1933.

HON. CHARLES S. LEASURE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion in answer to the following questions:

> "1. Can a board of education, out of its general funds, pay the expense of furnishing basket ball uniforms to the high school basket ball team?
>
> 2. Can a rural board of education pay the expense of transporting a basket ball team to a distant point for the purpose of holding a basket ball contest between that school team and another high school team out of its general funds?"

Because of the difficulty of definitely drawing the line between what constitutes "physical education" in the public school and the inter-scholastic playing in competition of football, basket ball, baseball and similar games by picked teams from among the pupils of the several schools more commonly referred to as "school athletics" or "interscholastic athletics" the question of how far boards of education may go in fostering these activities and expending public funds in support of them has always been quite troublesome.

Physical education and athletic training in coordination with regulations for the protection and conservation of health according to the modern theory of education are regarded as one of the essentials of the public schools. In a recent

report published through the Federal Office of Education it is stated that health and physical education in this decade is the fastest growing part of the curriculums established for the public schools. It is stated therein:

> "It is not to be thought of as extra-curricular."

Section 7721, General Code, providing that all pupils in the elementary and secondary schools of the state shall receive as a part of their instruction such physical education as may be prescribed or approved by the Director of Education, provides also, that:

> "Credits and penalties shall be applied for success or failure in physical education courses as in other school subjects."

The language of this statute would seem to imply that courses in physical education are to be regarded as being as teachable as other curricular elements and as amenable to established standards of measurement of progress in education as are other recognized school courses.

Section 7721-1, General Code, provides that the superintendents of schools in all city, exempted village and county school districts shall submit annually to the Director of Education for his approval, courses in physical education to be pursued by the schools under their supervision, or shall indicate that the courses outlined by the Director of Education will be followed by these schools. At the close of each month a report is to be made to the Director of Education of the amount of time devoted in each school to physical education.

Section 7721-3, General Code, provides that all institutions for the training of teachers in the state of Ohio shall include courses of study designed to prepare teachers to give instruction in physical education, and that no state wide certificate shall be granted after June 1, 1924, to persons who have not had such work in physical education in college or normal school as may be required by the Director of Education.

Section 7721-4, General Code, provides that after September 1, 1926, no person shall be granted a certificate or be employed to teach or supervise physical education as a special subject, who does not present satisfactory evidence of having creditably completed a special course in physical education of not less than two years, or its satisfactory equivalent, unless such person has served as a full time teacher or supervisor of physical education prior to January 1, 1925.

Section 7721-5, General Code, provides that the Director of Education shall publish a program covering the several subjects and activities required in physical education courses and these publications are to be distributed for the use of the teachers of the state.

Section 7721-6, General Code, provides that the Director of Education may appoint a supervisor of physical education to administer, supervise and direct the varied program and activies of physical education and to promote the training of teachers of physical education and to promote cooperation with the State Department of Health and district boards of health and to advise with boards of education and to assist the Director of Education in the performance of the various duties devolving upon him in the execution of laws relating to physical education.

Section 7721-7, General Code, provides that it shall be the duty of boards of education or other officials in charge of all schools in the state to make provisions

for the establishment and maintenance in their schools of the courses in physical education prescribed by Section 7721 of the General Code.

The Director of Education in pursuance of the duty reposed in him by Section 7651, General Code, to classify high schools into high schools of the first, second and third grades, has provided that a high school in each of such grades must provide for the uses of the school, gymnasiums and gymnasium appliances and equipment as well as playgrounds and necessary equipment for the playing of games, including football, basket-ball, baseball and kindred types of games included in the curriculum prescribing courses in physical education for each grade of high school.

It is apparent that the General Assembly by its legislation concerning physical education in the public schools meant to make this type of education as essential a part of public school work as other branches of knowledge taught in the schools and to repose in the proper school authorities great latitudes in exercising their discretion as to what shall be included within courses of physical education in the public schools.

It is equally clear that the necessary equipment and appliances necessary to carry on the prescribed courses in physical education may be provided by boards of education and paid for from public funds.

Section 7620, General Code, expressly authorizes a board of education to provide necessary "apparatus" for the schools. This authority, in my opinion, includes the power to provide such physical equipment as may be needed for courses in physical education in the schools. (*Board of Education* vs. *Andrews & Company,* 51 O. S. 199.)

Courts are agreed that boards of education may exercise such powers and such only as are expressly granted by statute, those clearly and necessarily implied and those essential to the accomplishment of the object of their existence, or, as is sometimes stated, those powers which are expressly granted and those reasonably necessary to make the express powers effective. If the Director of Education, in his discretion, may include the playing of inter-scholastic games by picked teams from the schools competing by virtue of his authority to prescribe and approve courses in physical education in the schools, it clearly follows, in my opinion, that boards of education may provide the physical equipment, such as suits and other paraphernalia necessary to play the games. The power to pay the expense of transporting the teams, and other necessary expenses on their trips under such circumstances, is not so clear. As I view the matter, it will not be necessary to pass on that question in this opinion.

It is well settled that when a public board or officer has power to act the courts will not control the discretion thus reposed unless it is abused or exercised arbitrarily or unreasonably. Such discretion, however, must be exercised within the power reposed and with reference to matters included within this power. The power extended to provide a curriculum for courses in physical education in the public schools and extending to the Director of Education the discretion to determine what is to be included within that curriculum does not extend to provide something therein which is not inherently a school purpose. The question here presented is whether or not so-called "inter-scholastic athletics" is inherently such a school purpose as to be an essential of physical education, as the term has been used in legislation providing for physical education in the schools.

The legislature has provided no all-inclusive definition of "physical education" nor has it provided an answer to this question, neither have the courts of Ohio ever passed on the question. The decisions of courts of other states on similar

matters are not numerous. Such as there are, are all practically of one accord and although not binding on the courts of Ohio would no doubt be given great weight and would most likely be followed especially in so far as they dealt with statutes practically identical with those in Ohio. (*Kulp* vs. *Flemming,* 65 O. S. 321.)

Many health and physical education enthusiasts insist that inter-scholastic athletics are proper and essential school purposes to be fostered and maintained as a part of the physical education courses in the public schools. In a recent publication dealing with health and physical education programs in junior and senior high schools, edited by a former supervisor of health and physical education in Ohio, the author said:

> "Interscholastic athletics should not be divorced from the physical education program. Athletics are part of the physical education curriculum. Therefore they are not extra-curricular activities and should not be administered as such. Interscholastic athletics should be so organized as to permit attendance and academic credit both to be earned from successful participation. Athletics are not one thing and physical education or 'gym' another. They are the same—parts of a curriculum aiming at the physical education of the child."

The text just quoted is not borne out by the comparatively few decisions of courts touching this subject.

After an exhaustive search I have found but three cases which are, to my mind, helpful in this connection.

A case involving the expenditure of public funds for the employment of a football coach in a public school (*Rockwell* vs. *School District of Deschutes County,* 109 Oregon 480, 220 Pac. 142) which apparently was a case of first impression was decided in 1923 by the Supreme Court of Oregon. It appeared in this case that a teacher was employed on a written contract as a "high school and athletic instructor" at a salary of $180.00 per month, for ten months. After one month he was discharged because of his inability to coach the football team. After the expiration of the time for which he had been employed, he sued to recover for nine months salary, alleging that he was at all times ready, able and willing to perform the contract on his part and that the school directors had wrongfully discharged him. He was allowed to recover the amount he would have earned if he had been permitted to perform the contract, less the amount he had earned at other employment during said period. At that time there was in force in the state of Oregon a statute very similar to Section 7721, supra, making "physical training" a part of the prescribed course of instruction in the public schools. The first branch of the syllabus of this case reads as follows:

> "Oregon Law 5275 making 'physical training' a part of the prescribed instruction in public schools is not authority for the expenditure of district funds for the hiring of a football coach, and, there being no other statute authorizing school districts to expend public moneys for coaching football teams nor making qualifications of a teacher depend on his ability to do so, inability to act as football coach was not ground for discharge under a contract for service as a high school and athletic instructor."

In the course of the opinion the court said:

"The briefs filed confine their discussion purely to the question of the sufficiency of defendant's alleged ground for discharging the plaintiff, namely, his inability to coach a high school football team. We know of no provision of the statute authorizing school districts to expend public moneys for the instruction or coaching of high school football teams, nor making the qualifications of a teacher in the public schools depend upon his ability as a coach of a football team.

'By section 5275, Or. L. approved February 21, 1919, physical training is made a part of the prescribed courses of instruction in public schools, and pursuant to this section school boards are authorized to employ teachers competent to give physical training instruction and to require them to give such instruction, but this physical training is not coaching high school boys in the art of playing football. If they are to receive such instruction from a teacher of the public schools, it ought to be done after school hours and without expense to the district. The physical training contemplated by the statute is a course of training for all of the pupils of a school, and not for the training of a few. Physical training is required to be given, in order to better the physical condition, and welfare of all pupils, and under the statute such physical training shall conform to that prescribed by the state superintendent of public instruction. This prescribed course does not include the playing of football, nor the coaching of pupils for competition in football playing with other teams. The defense plead, therefore, is insufficient to justify plaintiff's discharge.'"

In the case of *Brine* vs. *City of Cambridge,* 164 N. E. 619, 265 Mass 452, decided by the Supreme Court of Massachusetts in 1929, there was involved the question of the right of the school authorities to purchase basket-ball uniforms to be used by the pupils on the basket-ball team of the school in question for wear during practice and in the playing of basket-ball games.

At the time this controversy arose there was in force in the state of Massachusetts, a statute known as St. 1906 c. 251, which gave to the school committee of a school district supervision and control of athletic organizations composed of pupils of the public schools and bearing the name of a school, and authorized this committee to determine under what conditions such organizations might enter into competition with similar organizations from other schools. A statute with practically the same provisions was known as St. 1919 c. 292, Section 4. There was in force another statute providing that school committees in cities and towns may expend money as it is now expended for public school purposes, for the supervision of play and games on land under their control and for the equipment thereof. This statute provided that expenditures by the committee for the supervision of play and games on land under a committee's control or for the equipment thereof, should be deemed to be for a "school purpose." Another statute required public schools to give instruction and training in indoor and outdoor games and athletic exercise. Still another statute authorized a school committee to purchase articles to be loaned to the pupils in the schools, in this language:

"The committee shall,, at the expense of the town, purchase textbooks and other school supplies, and, under such regulations as to their care and custody as it may prescribe, shall loan them to the pupils free

of charge. If instruction is given in the manual and domestic arts, it may so purchase and loan the necessary tools, implements and materials."

It was said by the court in the course of the opinion in this case that the articles described in the declaration that is, the basket-ball uniforms over which the controversy was had, could not be purchased by the committee to be loaned to pupils unless they came within the description of school supplies as used in the statute referred to above. It was held that the school committee exceeded its powers in purchasing these articles, and recovery was therefore denied. The syllabus in this case reads as follows:

"City held not liable for price of basket-ball uniforms ordered by school committee to loan pupils of public school on team, to wear during practice and games, some of which were held on land not under control of school committee, since such articles are not 'school supplies,' within meaning of G. L. c. 71, §48, relative to loaning of 'text-books and other school supplies,' nor within section 47, authorizing school committee's expenditure for play and games equipment thereof on land under their control, notwithstanding St. 1906, c. 251, St. 1919, c. 292, §4, and St. 1921, c. 360, amending G. L. c. 71, §1, in view of St. 1894, c. 320, §2, and G. L. c. 71, §3, since 'school supplies' means maps, charts, globes, and other necessary apparatus."

This case was followed in 1930, by another case in the same court involving practically the same queston. In this case, *Wright & Ditson* vs. *City of Boston,* 170 N. E. 72, suit was brought against the City of Boston for payment for football suits which had been ordered by the city's school committee for use by a football team representing one of the high schools of the city. An agreed statement of facts filed in the case, provided:

"It is agreed that it is impossible to organize and conduct football teams without such wearing apparel as that for which the plaintiff in the case is seeking to recover the purchase price. Playing football without the protection of pads, head guards, etc., would subject the participants to serious danger to health and even life. Athletic training is an essential part of the modern theory of education and football is one of the most popular forms of athletics. Many students in the Boston public schools are financially unable to furnish their own athletic wearing apparel and if the school committee is unable to furnish it the result will be that many students will be barred from competition for the school teams."

The court held, as stated in the syllabus of this case:

"Under St. 1907 c. 295, Sec. 1, the school committee of defendant city was authorized to conduct physical training and athletics and to provide proper equipment. HELD, in actions of contract to recover the price of athletic wearing apparel purchased by the school committee plaintiff was not entitled to recover, when such apparel was bought for the purpose of being loaned to certain pupils of a public school while members of a football team representing the school in view of General Laws, Chap. 71, Sec. 48 and Special Statutes, 1919 c. 206, Section 1 (d)."

Measured by the definitions of "physical education"" and "physical training" adopted by the courts in the cases reviewed above, and in the light of the holdings and reasoning of these courts, I am of the opinion that the term "physical education" which the statutes of Ohio direct shall be included in the curriculum of the public schools of Ohio does not include what is commonly called "interscholastic athletics," that is, the playing of games in competition by picked teams representing the several schools. Interscholastic athletics is not a proper public school activity within the scope of "physical education" as the term is used in our statutes. That being the case, it is not a proper subject for which the Director of Education may, in his discretion prescribe or approve as a part of the courses in physical education and therefore it is not within the powers of a board of education to expend public funds for necessary "apparatus" to enable the school teams to engage in such interscholastic athletics or to support or promote such activities in any respect.

I appreciate the difficulty of definitely drawing the line between what is properly physical education in the public schools and so-called interscholastic athletics. That, however, is an administrative problem and not strictly a legal problem.

In some instances attempts have been made by school authorities to go even farther than the purchase of uniforms and the paying of traveling expenses for their football, basket-ball and baseball teams. I have before me an inquiry which reads as follows:

> "A Superintendent of Schools in one of the larger cities of the state has written me that the Bureau of Inspection and Supervision of Public Offices has ruled that the payment of expenses of official school athletic organizations by the Board of Education is not legal. He informs me that such expense includes trophies of various kinds, rental of grounds, payment of officials, payment for official printing and postage, etc.
>
> May I have your opinion as to the legality of such payments?"

In my opinion, expenditures of public funds for purposes enumerated in the above inquiry are not justified under the law.

Interscholastic athletics is oftentimes conducted by organizations separate and apart from the regular school authorities. These organizations are sometimes incorporated as corporations not for profit. More often, perhaps, they consist of mere voluntary associations composed of the principal of the school and some of the instructors, and occasionally, outsiders who are interested in athletics become members of such organizations.

The actual promotion and conducting of so-called "interscholastic athletics" involves the expenditure of a considerable amount of money for the payment of coaches, purchase of uniforms and equipment, traveling expenses, payment of officials and other employes for the conducting and management of the actual competitive games that are played, the cost of correspondence, rental of grounds and purchase of trophies of various kinds. This expense is borne by the organizations, and the moneys necessary therefor are derived, to a great extent, from admission fees which are charged patrons of the games. Sometimes these funds are supplemented by voluntary contributions from persons who are interested in such activities. There is no statutory authority in Ohio for the expenditure of public funds for such purposes.

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

1. A board of education is not authorized by law to pay the expense of furnishing basket-ball uniforms for a high school basket-ball team.

2. A board of education is not authorized under the law to pay the expense of transporting a basket-ball team to a distant point for the purpose of holding a basket-ball contest between that team and another high school team.

Respectfully,
JOHN W. BRICKER,
Attorney General.

636.

CLERK OF BOARD OF EDUCATION—ENTITLED TO FIXED REMUNERATION FOR APPOINTED TERM ALTHOUGH WITHOUT DUTIES BECAUSE BOARD OF EDUCATION SUSPENDED — DUTIES OF CLERK DISCUSSED.

SYLLABUS:

A clerk of a board of education appointed for a definite term, who lawfully occupies the position and holds himself in readiness to perform the duties incident thereto is entitled to the remuneration fixed by the board for the position during the full term for which he was appointed, even though all the members of said board of education may have been suspended for a portion of that term during which time the board did not function and the clerk had no duties to perform.

COLUMBUS, OHIO, April 18, 1933.

HON. JOHN H. HOUSTON, *Prosecuting Attorney, Georgetown, Ohio.*

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

> "Mr. W. F. is the Clerk of the Board of Education of Russellville-Jefferson School District, also a member of the Board of said District. He was duly appointed and qualified. Upon petition of qualified electors of said district duly filed in accordance with law, the said Board of Education of Russellville-Jefferson School District was suspended by the Common Pleas Court of Brown County, Ohio. Thereupon, under the law the county board of education assumed their duties. However, there was no order of court suspending W. F. as said Clerk but since there is no Board functioning he has no duties to perform as said clerk.
>
> I wish to have answered the question of the county superintendent as to whether his salary for the period during which the Board of Education of Russellville-Jefferson School District is suspended should be paid by the County Board of Education or whether his employment as said Clerk lapses during such time as the board from whom he holds the appointment is suspended."

By the terms of Section 4747, General Code, each board of education is directed to organize on the first Monday in January after the election of the members of said board, by the election of a president, vice president and clerk