all respects regular and in conformity with law, the sale of this property by you is hereby approved by me, and my approval is accordingly endorsed on the deed form which is herewith returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3082.

TUITION OF PUPIL—MEASUREMENT OF DISTANCE—DIFFERENT HIGHWAYS AVAILABLE—MEANING OF "MOST DIRECT ROUTE" IN ASCERTAINMENT OF FOUR-MILE LIMITATION.

SYLLABUS:

The expression "more than four miles by the most direct route of public travel" as used in section 7748, General Code, means four miles over a public highway that is open to public travel and is capable of being travelled by the use of any one of the various types of vehicles in common use for the transportation of passengers.

COLUMBUS, OHIO, March 23, 1931.

HON. V. F. ROWLAND, *Prosecuting Attorney, Cadiz, Ohio.*

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

> "I desire your opinion in the following G. C. Sec. 7748. In said above Sec. the following appears: 'A board of education may pay the tuition of all high school pupils residing more than four miles by most direct route of public travel from the high school provided by the board when such pupils attend a nearer high school.'
>
> Opinion desired by the board of education of Shortcreek Township, Harrison County, Ohio.
>
> Statement of facts: In present case the most direct route is less than four miles, however it is over mud roads which are impassable in winter.
>
> The other route is over good hard surface road. Please let us have your opinion as to the phrase 'Most direct route.'"

The expression "by the most direct route of public travel" as used in that portion of Section 7748, General Code, quoted by you has not been construed by the courts so far as reported decisions show, nor has it been definitely passed upon by this office.

Several former opinions of this office have dealt with questions arising under other statutes relating to the manner of measuring the distance school pupils must travel in going to and from school. In an opinion found in the Opinions of the Attorney General for 1928, at page 7, it is said in the syllabus:

> "In determining the distance which a pupil lives from the school to which he has been assigned, within the meaning of Section 7731, General Code, the distance should be computed by beginning at the door of the school house which would be the most accessible to the pupil in traveling from his home 'by the nearest practicable route for travel accessible to such pupil', thence by the regularly used path to the center of the highway,

thence along the center of the highway (which is the nearest practicable route for travel accessible to such pupil) to a point opposite the entrance to the curtilage of the residence of the pupil, or, if the curtilage of the residence of the pupil does not extend to the highway, to the path or traveled way leading to the entrance to such curtilage, thence to the entrance of the curtilage, along the path or traveled way to said entrance."

The 1928 opinion cited above, followed an earlier opinion reported in the Opinions of the Attorney General for 1927, at page 2489, where a similar rule was laid down. This latter opinion contains quite an extensive discussion of the question and cites several court decisions which are more or less pertinent. See also Opinions of the Attorney General for 1928, page 2729; Opinion 2428, rendered under date of October 9, 1930, a copy of which is enclosed herewith; *Concord School District* v. *Blue Ash School District,* 34 O. C. C., 213, affirmed by the Supreme Court without report, 88 O. S., 549. The facts involved in the Concord School case are quite fully set out in the opinion of the Court of Common Pleas which was later affirmed by the Circuit Court. See *Blue Ash School District* v. *Concord Special School District,* 11 O. N. P., N. S., 286. See also *State ex rel* v. *Board of Education,* 20 O. N. P., N. S., 126.

The question here presented, is not so much how to measure the distance as it is the fixing of the route over which the distance is to be measured. It is well settled that "distance," when spoken of in statutes relating to school attendance, is measured over travelled highways rather than "as the crow flies." *Board of Education* v. *Board of Education,* 58 O. S., 390. The statute here under consideration is specific in that the distance spoken of is to be over a "route of public travel."

Clearly, the words "the most direct route of public travel" import a public highway that may be travelled. If it is really "impassable" it can not be said to be a "route of public travel." It may be impassable however for some types of vehicles and not impassable for others. Many roads may be travelled by horse-drawn vehicles and be impassable for motor vehicles. They may also be passable for the lighter types of automobiles and impassable for heavier cars. A road may also be solid, and capable of being travelled by almost any sort of conveyance during a part of the year, and practically impassable for certain types of vehicles during other times of the year.

A somewhat similar provision for the payment of tuition to that here under consideration, was contained in earlier statutes. Section 4029-3, Revised Statutes, as enacted in 1902, 95 O. L., 72, contained a provision to the effect that boards of education were required to pay the tuition of certain qualified school pupils "residing more than three miles from the high school provided by the board when they attend a nearer high school." This provision was carried along in substantially its original form in later revisions of the statute including Section 7748, General Code, which is a codification of said Section 4029-3, Revised Statutes. At the time of the enactment of Section 4029-3, Revised Statutes, in 1902, motor vehicles were not in general use especially by people residing in the country, to whom this provision of the statute more particularly applied. There were practically no hard surface roads at that time, such as we now have. People thought nothing of travelling over mud roads even when they were in their worst condition. In fact, it was the usual thing during certain portions of the year for the roads to be very muddy and although it was inconvenient and unsatisfactory to travel over them, the roads were not impassable. Questions such as you submit could not have arisen. No public road that was open could be said to be impassable for horse

drawn vehicles, and the same is still true. An impassable road was at that time a rare exception and only existed when parts of a highway had been washed away or covered from landslides, or some similar catastrophe had occurred.

A former Attorney General in an opinion found in Opinions of the Attorney General for 1919, at page 1439, considered certain questions arising with reference to the meaning of the expression "nearest travelled highway" as used in the then existing Section 7731, General Code. The syllabus of this opinion reads as follows:

> "The distance from the residence of pupils to the schoolhouse to which they are assigned must be measured from the nearest travelled highway, that is the highway that is at all times practicable, convenient and accessible to such pupils and one that can be used by vehicles of travel."

That opinion dealt with a situation where a road had been permitted to become in such a condition by reason of gulleys washed in it and by the growth of weeds that it could no longer be considered a highway open for public use. The impassable condition of the road considered in that opinion was permanent rather than temporary in nature. The syllabus of the opinion is somewhat misleading. In a later opinion found in Opinions of the Attorney General for 1927, page 2489, the doctrine with reference to this matter is more correctly stated on page 2491, as follows:

> "In construing statutes relating to school accommodation, where there is contemplated the passage to and from school of pupils attending school, it is well recognized that the distance is to be measured by the highways which are actually open, passable and available to the pupils for use in going to and from the schools. This does not mean that the closing of a road for ever so short a time necessarily creates a liability on the part of the board of education to transport pupils, which liability would not have existed but for such temporary closing of the road. What is contemplated is that the distance is to be measured along the most direct highway which, but for some unusual happening temporarily obstructing the way, would be open and available for use by the school pupils who desire to avail themselves of its use."

None of these opinions, however, is decisive of the question here presented. The difficulty lies in determining whether or not a highway, if open for public travel and capable of being travelled by the use of any type of vehicle in common use, may be said to be impassable to persons who do not ordinarily use that type of vehicle and own and ordinarily use types of vehicles which can not, because of the condition of the road, be used on the said road. The real question is whether or not the legislature intended by the enactment of the statute, to impose a liability for the payment of tuition on boards of education, in cases where school pupils resided less than four miles from the high school maintained by the board and attended a nearer high school, simply because the four mile route was over a road other than a hard surface road during a portion of the year at least, and thus could not be travelled by the type of conveyance which the pupil chose to use.

Even the worst mud roads are not entirely impassable for some kinds of vehicles. People who live on these roads usually provide themselves with the kind of conveyance that can be used on the roads. It will be observed that these people do not consider themselves completely isolated simply because the road upon which they live is in such condition as to be impassable for heavy motor cars or even

lighter types of automobiles. They manage to get to market, to church, to entertainments and parties or any place they really want to go, except perhaps on rare occasions. They realize the necessity of the situation, and provide themselves accordingly with the means of travel suitable to their needs. At the most, the bad condition of mud roads does not, ordinarily at least, extend through the entire school year. Such condition lasts in most cases for not more than a few weeks or possibly months of a school year, and for only a portion of that time, ordinarily, are the roads impassable for motor vehicles of the lighter type. The so-called impassable condition can not be said to be permanent. It is a temporary condition, in any event, although it may in some instances last for a considerable time and cause considerable inconvenience.

The legislature has seen fit to definitely fix the distance here under consideration, at four miles over the most direct route of public travel and has not restricted the term "public travel" to any particular kind of public travel, whether on foot or by conveyance. It is reasonable, however, to construe the term "public travel" as meaning travel by conveyance, rather than on foot, because of the specified distance of four miles, and the courts and this office have so construed it. We are not justified, however, in my opinion, in limiting the term "public travel" further by saying that that travel must be by conveyance of any particular type. One resident may own the type of conveyance by which a road could be travelled, while his neighbor might not have anything but a heavy car that could not be used on the road at all during certain seasons of the year. Both these families may be within four miles of the high school maintained by the board of education of their school district if the distance were measured over the route of the bad road. Yet we would not be justified in holding that the tuition of the child of the one family could not lawfully be paid by the board, if it attended a nearer high school, while that of the child of the other family could lawfully be paid, simply because it would be required to go to the school maintained by the board over a hard surface road which was more than four miles because of the type of vehicle they owned.

The rule must work uniformly and a line must be drawn some place. The legislature has fixed the standard by which the liability of a board of education maintaining a high school, for the payment of the tuition of pupils who attend another high school, as being limited to those who reside beyond the four mile limit from said local high school, measured over the most direct route of public travel from the said high school, and I can not believe it was the intention of the legislature to make the rule depend on the type of conveyance that the pupil might choose to use and thus cause the most direct route of public travel to one pupil's residence to be different from that of another in the same situation.

I am therefore of the opinion that the expression "more than four miles by the most direct route of public travel" as used in Section 7748, General Code, means four miles over a public highway that is open to public travel and is capable of being travelled by the use of any one of the various types of vehicles in common use for the transportation of passengers.

Respectfully,

GILBERT BETTMAN,

Attorney General.