

1524.

BOARD OF EDUCATION—TRANSPORTATION FOR ELEMENTARY PUPILS LIVING LESS THAN TWO MILES FROM SCHOOL BUILDING WITHIN SUCH BOARD'S DISCRETION.

SYLLABUS:

A board of education may in its discretion lawfully provide transportation for elementary school pupils who reside less than two miles from the school to which they are assigned, but cannot be required to provide that transportation.

COLUMBUS, OHIO, February 14, 1930.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

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

"You are respectfully requested to furnish this department with your written opinion upon the following:

Section 7731, General Code, 109 O. L. 289, relating to the transportation of elementary school pupils living more than two miles from the schools to which they are assigned, provides that the transportation for pupils living less than two miles from the schoolhouse shall be optional with the board of education, except as provided in Section 7749 of the General Code. This section, as amended, 111 Ohio Laws, page 123, and in the form that it now appears in the General Code, does not contain the provision as to the transportation of pupils living less than two miles from the schoolhouse being optional with the board of education, as that has been eliminated.

Question: May a board of education in its discretion furnish transportation to elementary pupils living less than two miles from the schoolhouse to which they are assigned?

The question arises by reason of certain instances where elementary pupils are required to travel on state roads carrying heavy traffic, which is thought to be dangerous to the children."

It is a familiar principle of law that boards of education being creatures of statute have only such powers as are granted to them by statute or which may be necessary to carry out the express powers so granted. It is an equally familiar principle of law that administrative officers, such as boards of education, in the expenditure of public funds are limited to such expenditures as are expressly authorized or which may be necessary to effectuate the powers granted to them.

In certain instances boards of education are authorized to provide from public funds for the transportation of pupils to school. In 1921 there was enacted Section 7731, General Code (109 O. L. 289), which read in part 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. * * * ”

In 1925 the statute was amended to read 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 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. * * * ”

It will be observed that upon the amendment of the statute in 1925, the provision providing for the transportation of elementary pupils who live less than two miles from the schoolhouse at the option of the board of education was left out of the statute. If we were to apply strict rules of construction to the statute in question, we would necessarily be driven to the conclusion that the Legislature intended to negative the express power previously possessed by boards of education to transport children who live less than two miles from the school to which they have been assigned. This conclusion, however, cannot be maintained if we take into consideration other statutes which were not repealed or changed at that time.

Irrespective of the implied powers that may be possessed by a board of education charged with providing necessary facilities for the public schools and the doubt that arises of whether or not those implied powers would be so strictly limited, in view of the changed conditions under which our public schools are now operated, as to not permit boards of education in their discretion to transport pupils under certain circumstances, there is to my mind clear statutory authority for the transportation of pupils living less than two miles from the school which they attend when in the judgment of the board of education such transportation is necessary.

So far as elementary pupils in centralized districts are concerned, provision is made for transportation by Section 7749 of the General Code. Although the provisions of the statute are somewhat vague, it seems clear that the intent of the statute is to authorize the transportation of the elementary school pupils in those districts, regardless of the distance they live from the school.

Section 7735, General Code, provides in substance that when pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or, if there be none nearer therein, then the nearest school in another school district in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils in the district where they attend school.

Section 7736, General Code, provides the manner of the payment of the tuition spoken of in Section 7735, General Code, and Section 7737 provides as follows:

“When the schools of a district are centralized or transportation of pupils provided, the provisions of the next two preceding sections shall not apply.”

Said Section 7737, supra, was in existence in 1925, when Section 7731 was last amended, and clearly imports that children who live more than one and one-half miles from the school to which they are assigned may lawfully be transported even though they do not live two miles from that school. It would be absurd to hold that the Legislature intended by the amendment of Section 7731, General Code, to deprive

boards of education of the power to transport pupils who lived less than two miles from the school to which they had been assigned and retain in force Section 7737, General Code.

Moreover, it should be noted that in the act of the Legislature, passed in 1925 (111 O. L. 123), wherein Section 7731 of the General Code was last amended, by which amendment the language extending the optional right to boards of education to transport pupils living less than two miles from school was deleted, there was contained Amended Section 7749-1, General Code. This section before amendment extended to boards of education of a village or a centralized rural school district the power to provide transportation to a high school in another district, if none was maintained in the given district. See 109 O. L. 290. As amended, it extended to a board of education of any district the right to provide transportation to a high school *within or without the school district*.

It would seem to me to be the height of absurdity to contend that the Legislature intended by the amendment of Section 7731, General Code, in 1925, to deprive boards of education of the power to provide transportation of elementary school pupils who live less than two miles from the school to which they might be assigned and in the same act extend to a board of education the power to transport high school pupils regardless of the distance they live from the school.

I am of the opinion, therefore, that a board of education may in its discretion lawfully provide transportation for elementary school pupils who reside less than two miles from the school to which they are assigned, but cannot be required to provide that transportation.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1525.

PAYMENTS—MADE TO STATE TREASURER FOR ASSURANCE FUND
UNDER TERMS OF TORRENS LAW—NEED NOT BE BY PAY-IN-OR-
DER OR DRAFT OF STATE AUDITOR.

SYLLABUS:

Payments made to the Treasurer of State by county clerks, in pursuance of Section 8572-103 of the General Code, need not be by pay-in-order or draft of the Auditor of State as is provided for payments into the state treasury by Section 248 of the General Code.

COLUMBUS, OHIO, February 14, 1930.

HON. H. ROSS AKE, *Treasurer of State, Columbus, Ohio.*

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

“It has come to my notice that for a number of years past it has been the custom and practice of the Treasury Department to receive moneys paid under Section 8572-103, Ohio Laws, generally referred to as the Torrens Law, without compliance with the general Section 248, which provides that ‘all payments into the state treasury shall be by pay-in-order or draft of the Auditor of State.’

Will you kindly advise me as to whether or not the provisions of Section