

in the November election of 1937, for a term of four years, would have served if he had lived, until the first Monday of January, 1942. Having died after qualifying for and assuming the office, the vacancy was filled by appointment, in pursuance of Section 1579-746, and the appointee is by the terms of that statute to serve until his successor is elected and qualified according to law. The next general election for the office occurring more than thirty days after the vacancy occurred would be the general election for that office to be held in November, 1939, and it is my opinion that the vacancy should be filled by election at that time and the person so elected will serve for the unexpired term of Mr. Hosterman, to wit, until the first Monday in January, 1942.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

707.

BOARD OF EDUCATION—LOCAL DISTRICT—WITHIN DISCRETION TO MAINTAIN SPECIAL CLASSES FOR UNDERNOURISHED CHILDREN—STATUS, CHILDREN AFFLICTED WITH TUBERCULOSIS—NO POWER GRANTED BY LAW TO FURNISH FOOD FREE OF CHARGE TO UNDERNOURISHED CHILDREN—NO PROVISION TO EXPEND PUBLIC SCHOOL FUNDS FOR CLOTHING, SLEEPING GARMENTS, COOKING MEALS, LAUNDERING CLOTHES FOR PUPILS IN SPECIAL SCHOOLS—SECTION 7644-1 G. C.

SYLLABUS:

1. *A local district board of education may, in its discretion, establish and maintain special classes for undernourished children within the schools under its jurisdiction.*

2. *A board of education in a city school district may establish and maintain special elementary schools for resident school pupils of compulsory school age who are afflicted with tuberculosis, and furnish transportation for such pupils to the schools so established. Where such schools are established and maintained resident elementary school children afflicted with tuberculosis may be excluded from the other schools of the district.*

3. *Power is not extended by law to boards of education to expend public school funds under their control for food to be furnished free of charge to undernourished children in attendance in the schools of their districts or to expend such funds for the furnishing of food or clothing such as sleeping garments and the like, or for cooking meals or launder-*

ing clothing for pupils in attendance in special schools provided for children by authority of Section 7644-1, General Code.

COLUMBUS, OHIO, June 5, 1939.

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

GENTLEMEN :

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

“In a city school district, the board of education has been operating in a number of their schools, what is known as Fresh Air or Open Window classes for under-nourished children and children who are susceptible to tuberculosis. No fee is charged such pupils, and in the operation of such clauses, the board pays items of expense such as for free meals, cooks' salaries, clothing, such as sleeping garments, and laundry.

Your opinion is requested as to whether the board of education is authorized to maintain such classes, and to incur expenses such as listed above, for the benefit of such children.”

In all modern states public education is recognized as one of the essential functions of government and a public school system controlled by law is now universally recognized as a department of government. In Ohio there has been established by the Legislature in pursuance of constitutional mandate a state-wide public school system whereby the state is divided into school districts for purposes of local school administration. For each school district there is created an administrative board known as a board of education which board is charged by law with the duty of establishing and maintaining necessary schools within each such district. A “school” is defined in Ohio Jurisprudence, Vol. 36, page 47, as “a place where instruction is imparted to the young, an institution for learning, an educational establishment, a place for acquiring knowledge and mental training.”

In Ruling Case Law, Vol. 24, page 558, it is stated :

“The primary purpose of the maintenance of the common school system is the promotion of the general intelligence of the people constituting the body politic, and thereby to increase the usefulness and efficiency of the citizens on which the government of society depends.”

Many authorities are cited by the textwriter in support of the principle stated above.

Bearing in mind the source of the powers of boards of education and the purpose of their creation, it is manifest that inasmuch as they are creations of legislation for administrative purposes within a limited field they have no powers except such as are granted to them by statute and all such grants of power should be construed with a view to the purposes of their existence. Any functions performed by or through a board of education in addition to the establishment and maintenance of schools for the imparting of knowledge to the pupils therein, the power to perform which is not expressly in terms granted to them must be incidental to expressly granted powers and necessary to properly perform and carry out the duties and obligations imposed upon them in express terms.

Speaking generally, the rule relating to powers of boards of education is well stated in *Corpus Juris*, Volume 56, page 331, as follows:

“The powers and authority of the officers and directors, trustees, or the like, of school districts and other local school organizations like those of other public officers are ordinarily purely statutory and derivative and are under the control of the legislature which may enlarge or abridge them as it sees fit. So, such officers or boards possess such powers, and such only, as have been expressly conferred upon them by statute or are necessarily implied from those so conferred or from the duties imposed upon them.”

The above rule has been stated and rigidly applied many times by the courts in this state. Typical of such instances is the case of *Perkins vs. Bright*, 109 O. S., 14, at page 21, where Judge Day speaking for the Supreme Court of Ohio, stated:

“Boards of education are creatures of statute and their duties and authority are marked by legislation, and those who contract with them must recognize the limitations placed by law—by the power that created such boards.”

This rule is applied with strictness where the expenditure of public funds is involved. A case decided by the Supreme Court of Ohio—*State ex rel. Locher, Prosecuting Attorney vs. Mening*, 95 O. S., 97, is frequently cited as illustrative of the application of this principle of law to a board of county commissioners, a board whose source of power is the same as that of a board of education. It is there stated:

“The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be

clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county."

Again, in a similar case—State, ex rel. A. Bentley & Sons Co., vs. Pierce, Auditor, 96 O. S., 44, the Supreme Court said :

"In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

In the case of State ex rel. Clark vs. Cook, 103 O. S., 467, it is stated :

"That boards of education are purely the creatures of statute is an old and uniformly accepted doctrine. * * *

As administrative board created by statute their powers are necessarily limited to such powers as are clearly and expressly granted by the statute."

Following the above statement, Judge Wanamaker, speaking for the court in the above case, referred to the case of State ex rel. Locher vs. Menning, supra, and quoted that portion of the opinion in the Menning case which is quoted above, and then said :

"This doctrine as applied to boards of county commissioners in their financial transactions must in principle be equally obligatory upon boards of education in their financial transactions."

If it is within the powers of school authorities to maintain classes for undernourished children or children susceptible to tuberculosis, and to provide for the children in attendance at such classes free meals and clothing, such as sleeping garments, and to pay for the laundering of such garments and the salaries and wages of persons who prepare the free meals all at public expense, the power to do so must necessarily have been extended to them by statute either expressly or by proper implication. Such items of expense if paid by a board of education, must of course be paid from revenues derived from local taxation for school purposes or from funds allotted to local school districts from state funds appropriated for school purposes.

Clearly the general authority extended to boards of education to provide necessary school facilities such as school buildings, gymnasiums, playgrounds and necessary apparatus for the conduct of the schools and in some instances for certain purposes the services of a physician and nurse

can not, in my opinion, be construed as including the power to furnish meals and clothing for the pupils who attend the schools. A search of the statutes discloses no express statutory authority for a board of education to expend public funds for the furnishing of free meals or clothing for school pupils, nor does it disclose the granting of any express powers to such boards within which, in my opinion, there may be said to be implied the power to furnish such things as being necessary to carry out the express powers granted. This conclusion is fortified by the fact that under emergency conditions as they existed in 1931, the Legislature, realizing no doubt, that no lawful power then existed for a board of education to provide food and clothing for children so that they might attend school, enacted a special act which was codified as Section 777-1, General Code, temporarily extending that power. This act provided in part:

“When any board of education is satisfied that a child, compelled to attend school, is unable to do so because absolutely in want of shoes, clothing, medical attention, or other necessities, and those upon whom he is dependent are unable to support and care for themselves and the child, the given board of education shall provide such necessities as may enable the child to attend school. * * * This section shall not be effective after July 15, 1931.”

An apparent exception to the strict application of the conclusion hereinbefore stated might be thought to be contained in the provisions of Section 7777, General Code, which has been in force for a number of years. An examination of this statute, however, will disclose that it applies only in a very limited number of situations. It applies in cases only where a child is compelled by the terms of the compulsory education law to attend school but is unable to do so because absolutely required to work at home or elsewhere in order to support himself or help support or care for others lawfully entitled to his services who are unable to support or care for themselves. The provisions of this section cannot be extended to the point of empowering a board of education to provide food for under-nourished children, or sleeping garments or similar things.

Desirable as it might be, and commendable as may be the impulse that prompts teachers and school authorities and people generally to see that children who are by the terms of the compulsory school laws compelled to attend school, are provided with the necessities of life and especially under-nourished children provided with proper nourishment, there will be found no statutory law in this state directing the expenditure of public school funds for that purpose. In fact the term “under-nourished” is not found to my knowledge, in any statutory provision of law relating to the public schools.

Section 7762, General Code, provides that a child between six and

eighteen years of age is of compulsory school age. Succeeding statutes provide that such children must attend the public schools or be afforded the opportunity of acquiring an education approximately equivalent to that afforded by the public schools. Section 7681, General Code, provides that the schools of each district shall be free to all youth between six and twenty-one years of age who are children, wards or apprentices of actual residents of the district. Under the terms of these statutes, all children coming within the classes mentioned, would or could attend the schools established for the education of the youths of the district. Apparently realizing the dangers of the association of children afflicted with tuberculosis with children not so afflicted, the Legislature provided in express terms, that tubercular children might be excluded from regular elementary schools, and taught in special schools provided for them. Section 7644-1, General Code, enacted for that purpose, reads as follows:

“The board of education in any city school district may establish such special elementary schools as it deems necessary for youth of school age who are afflicted with tuberculosis, and may cause all youth, within such district, so afflicted, to be excluded from the regular elementary schools, and may provide for and pay from the school funds, the expense of transportation of such youth to and from such special schools.”

The manifest purpose of the enactment of the above statute is by its terms to provide for the segregation of school pupils afflicted with tuberculosis from other pupils not so afflicted and at the same time to provide for such tubercular children the opportunity to acquire an education. It will be noted, however, that the statute does not extend any authority to a board of education to provide special food or clothing for pupils who attend the special schools there provided for.

I would not be understood as saying that a wide discretion is not possessed by boards of education in the carrying out of the duties imposed upon them by law in the conduct of the public schools within their respective districts. In the exercise of a sound discretion no doubt a board of education would not be required to conduct special schools established by authority of Section 7644-1, General Code, in all respects to ventilation and otherwise as other schools are conducted, and I have no doubt that if a board of education should think it to be wise to provide special classes for under-nourished children they would have a right to do so and while it might be desirable for a board of education to have the authority to supply food for under-nourished children and sleeping garments and similar apparel for tubercular children at public expense, yet in the present state of the law, that power is not reposed in boards of education, and until the Legislature acts to grant that power it must be held that they have no authority to expend public school funds for the purposes mentioned.

I am therefore of the opinion, in specific answer to your question that boards of education are not empowered by law to expend public school funds under their control for the furnishing of food for under-nourished children or clothing, such as sleeping garments and the like, for any of the pupils attending the schools of their district, whether or not these pupils are in attendance in special schools for tubercular children established under the provisions of Section 7644-1, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

708.

CONTRACT — STATE WITH THE ARCHIBLE ELECTRIC COMPANY, ELECTRIC WORK, NEW KITCHEN, CENTRAL DINING HALL AND COLD STORAGE, LONGVIEW STATE HOSPITAL, CINCINNATI.

COLUMBUS, OHIO, June 5, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval, a contract between The Archible Electric Company, an Ohio Corporation, and The State of Ohio, acting through you as Director of the Department of Public Works for the Department of Public Welfare, for the construction and completion of Contract for Electric Work for a project known as New Kitchen, Central Dining Hall and Cold Storage, Longview State Hospital, Cincinnati, Ohio, as set forth in Item 4, Electrical Contract, of the Form of Proposal dated May 10, 1939. This contract calls for an expenditure of \$9,790.00.

You have submitted the following papers and documents in this connection; Contract encumbrance record No. 52; Form of proposal dated May 10th, 1939, containing the contract bond signed by the Seaboard Surety Company of New York; its power of attorney for the signer; its certificate of compliance with the laws of Ohio relating to surety companies; Estimate of cost; Notice to bidders; Proof of publication; Division of contract; Recommendation of State Architect; Approval of PWA; Controlling Board's Release; Workmen's Compensation Certificate, showing a compliance with the laws of Ohio relating to Workmen's Compensation; Letter from the Auditor of State, showing all necessary papers are on file in his office; Tabulation of bids.

Finding said contract in proper legal form, I have noted my approval