

To the same effect, see Opinions of the Attorney General for 1922, Vol. I, page 421.

The above authorities indicate that these expenses should be paid into the public treasury from which the same were advanced.

It is therefore my opinion, in specific answer to your questions, that:

1. The Municipal Court of Marion may issue warrants directed to the sheriff of Marion County where the offense charged is a violation of the laws of the state. The sheriff serving such processes is entitled to the statutory fees for such services which are to be paid into the county treasury. Opinion No. 859, rendered May 22, 1933, discussed and distinguished.

2. Wholly salaried minor court officers by virtue of section 3017, General Code, are entitled to receive in state cases from the county treasury the actual necessary expenses incurred by them in executing warrants to arrest, orders of commitment or other processes. When such expenses are collected from the defendant or from the state, they should be paid into the county treasury.

Respectfully,

JOHN W. BRICKER,
Attorney General.

1570.

TUITION—OBLIGATION OF BOARD OF EDUCATION TO PAY TUITION
OF RESIDENT STUDENTS ATTENDING HIGH SCHOOL IN AN-
OTHER DISTRICT—DUTY OF LATTER TO ADMIT STUDENTS.

SYLLABUS:

1. *The obligation of a school district to receive into its schools high school pupils from other districts, where circumstances are such that a duty fixed by law rests on the board of education of the pupil's residence to pay the tuition of those pupils as provided by Sections 7747 and 7748, General Code, is not dependent on the issuance of a certificate by the clerk of the board of education of the pupil's residence, under Section 5625-33, General Code, to the effect that money has been appropriated and is in the treasury or in the course of collection, unencumbered, with which to pay the child's tuition.*

2. *The obligation of a board of education of a school district wherein a high school is not maintained, to pay the tuition of resident high school pupils who attend high school in other districts, as fixed by Section 7747 and 7748, General Code, is an obligation fixed by law, and is not contractual in its nature.*

3. *Foreign tuition cannot be paid without an appropriation. It cannot be said that an unpaid balance due for foreign tuition at the beginning of a fiscal year automatically constitutes an encumbrance upon the funds of the school district against which the claim exists.*

COLUMBUS, OHIO, September 16, 1933.

HON. GEORGE L. LAFFERTY, *Prosecuting Attorney, Lisbon, Ohio.*

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

“Referring to your Opinion No. 421 dated March 30, 1933, in the first paragraph of the syllabus you state that:

‘Where, by reason of the assignment made in pursuance of Section 7764, General Code, or otherwise, a school pupil is entitled to admission to high school, and is entitled under the law to attend that high school

at public expense, the authorities in charge of the said high school must admit the pupil to said school and allow him all the advantages of the school, the same as other pupils in the school regardless of whether or not his tuition is paid in advance, and even if it is probable that it will be necessary to bring suit to enforce collection of the tuition.'

We have had several school districts raise the question of whether or not the school board of one district must admit high school pupils resident of another district when the school district from which the pupils come has no funds with which to pay for the tuition of said pupils.

We therefore will appreciate your opinion as to whether or not the board of education receiving high school students from other districts is required to receive said students when the board of education of the students' legal residence cannot comply with Section 5625-33 by supplying a certificate that money is appropriated, on hand or in course of collection and unincumbered, with which to pay said child's tuition or the aggregate tuition for all children attending from the said other district during the fiscal year.

Is the obligation of the board of the child's legal residence to the board where said child attends high school a contract under General Code 5625-33, such as to require the certificate mentioned in the above paragraph?

Is an unpaid balance due for tuition at the beginning of the fiscal year an incumbrance against the tuition appropriation within the meaning of General Code 5625-33, during the present fiscal year?"

By the last three paragraphs of your letter, you submit three questions for answer. The first of these questions is answered by the first paragraph of the syllabus of Opinion No. 421 quoted in your letter.' Reasons for that holding are fully set out in the opinion and it is not necessary to repeat them here. It is pointed out in that opinion that the legislature, in enacting legislation in pursuance of the constitutional mandate to provide a system of schools throughout the state and in making provision as a part of that system in mandatory terms, that the tuition of resident high school pupils of a school district which does not maintain a high school shall be paid from school funds of the district of the pupil's residence in the high school which they attend, clearly implies that a school district in which a high school is maintained could not refuse to admit a pupil from another district if circumstances are such that a legal obligation rests on the district of the pupil's residence to pay his tuition. Especially is this conclusion incapable in view of the fact that it is made a part of the system of public schools by legislative enactment, that all children must attend school until eighteen years of age unless excused therefrom in the manner provided by law. The completion of the grades below the high school grades is not made a legal ground for excusing the child from further attendance at school. No other conclusion can be reached in my opinion consistent with a proper conception of a state wide system of free public schools.

This conclusion is further fortified by the observation of Judge Matthias in *State ex rel vs. Bushnell*, 95 O. S., 203, 210, where he said:

"The right of a pupil to attend a high school elsewhere and the obligation of the board to pay tuition have at all times been treated in

legislation as two entirely separate and distinct matters, the privilege of the pupil being broader than the obligation of the board."

Moreover, this conclusion is not without precedent in Ohio. In the case of *Board of Education vs. Board of Education*, 10 O. C. C. 617, there was involved the question of the payment of tuition by a board of education for resident school pupils who live more than one and one-half miles from the school where they have a legal residence and who attend a nearer school in another district. Provision was made therefor by Section 4022a of the Revised Statutes, now Section 7735, General Code. It was contended that a board of education could not be held for payment of tuition under such circumstances unless permission was given by the board for the children to attend the nearer school. While the precise question before us at this time was not presented in that case, the observations of the court are illuminating not only with respect to this question but as bearing on the other questions submitted by you as well. In the course of the court's opinion it is said:

"Original section 4022, as found in the Revised Statutes provided that one board of education might contract with another for the admission of pupils into any school in such district upon such terms as might be agreed upon, and that the expenses should be paid out of the school funds of the sending board. Then the whole matter of the education of pupils in schools outside of the district of their residence was the subject of contract between the boards. If there was no contract, no rights or liabilities arose. But in April, 1892 (89 O. L. 233) said original section was supplemented by section 4022a, which provides that boards of education shall permit children of school age who reside more than one and one-half miles from the school where they have a legal residence, to attend the nearest sub-district, special district or joint sub-district school, and that the tax paid into the district where they have a legal residence shall, upon demand by the board of the district where such children attend school, be paid per capita to such board by the board of the district where said children have a legal residence * *

It seems clear that the object of the supplementary section was to obviate a well known inconvenience due to the arrangement of sub-districts and the location of school houses in many parts of the state, it being the purpose of the legislature to provide for school children, who if confined to their own districts, would be required to travel an inconvenient and burdensome distance, by giving them the right to attend a more convenient school in an adjoining district, independently of any contract between the respective boards of education.

If this permission provided for is to proceed from the board of education of the district where the children reside, how is it to avail? If the other board is unwilling to receive the children, what is to be done? It seems to us that such permission would be but an empty ceremony.

But if the permission is to be given by the receiving board, then there is no obstacle to the children attending school. They cannot be deprived of school privileges; for they must be admitted if they fall within the class entitled to attend outside the district of their residence; and the sending board is not concerned in the matter beyond

paying for the tuition, which it was entirely competent to the general assembly to require of them. * *

We see no difficulty in a board of education to which application is made for the admission of a non-resident pupil, ascertaining whether such pupil is entitled to the benefit secured to it by the act in question. That done, the board must permit the pupil to attend; and the board of the district where the pupil resides must pay for it."

The judgment of the court in the above case was sustained by the Supreme Court without opinion in *Board of Education vs. Board of Education*, 54 O. S. 643.

It is true that no consideration was given in the former opinion to the provisions of the so-called Budget Law. (Sections 5625-1 et seq. General Code.) The provisions of this law have nothing whatever to do with the necessity for children to attend high school or the obligation of a high school to receive them as pupils, or the obligation of the district of their residence to pay their tuition in other high schools in cases where high school facilities are not made available to the pupil within his home district. The obligation of a school district which does not maintain a high school, to pay the tuition of its resident high school pupils in other high schools, is definitely fixed by the statutes and is not dependent on the action of the board or the state of the finances of the district or a contract between the district and another district where the child attends school. See Sections 7747 and 7748, General Code. A very similar question was presented in the case of *Jenkins, Auditor, vs. State ex rel. Jackson County Agricultural Society*, 40 O. App. 312. This case involved the obligation of a board of county commissioners to appropriate and pay from county funds to a county agricultural society within the county, a sum of money not greater than \$2,000 or less than \$1500.00 for the purpose of encouraging agricultural fairs, as provided by Section 9894, General Code. It was held that the duty to appropriate and pay this money is fixed by statute and is not in its nature contractual. The syllabus of the case reads as follows:

1. "The benefits accorded to an agricultural society by Section 9894, General Code, are not affected by the subsequently enacted appropriation code, Sections 5625-1 to 5625-39, General Code.

2. An agricultural society qualified under Section 9894, General Code, to receive the benefits provided by that section cannot be deprived of those benefits by any act of the budget commission under Section 5625-24, General Code.

3. In preparing an appropriation measure under Section 5625-29, General Code, the taxing authority is bound to provide first for all those expenditures made imperative by statute."

In the course of the court's opinion, after referring to the Budget Act, he said:

"It is now claimed that this act impliedly limits the operation of Section 9894, and in effect repeals the unqualified nature of the claim arising under Section 9894 in favor of the agricultural society. With this view we cannot agree. Rights created by the positive provisions of one statute are not to be destroyed by an implication arising from a subsequently passed statute, if such implication can be avoided. At the

time the new budget law was passed there were many sections, of which 9894 was but one, creating fixed and inescapable liabilities of the county, such as salaries of county officers, and it is unthinkable that it was the purpose of the Legislature to make any claims of this character subject to the action or nonaction of the county commissioners. Such a construction would impose legislative functions on the commissioners and render the act of doubtful constitutionality."

In my opinion the cases referred to above are dispositive of the questions submitted by you. I am therefore of the opinion in specific answer to your questions:

1. The obligation of a school district to receive into its schools high school pupils from other districts, where circumstances are such that a duty fixed by law rests on the board of education of the pupil's residence to pay the tuition of those pupils as provided by Sections 7747 and 7748, General Code, is not dependent on the issuance of a certificate by the clerk of the board of education of the pupil's residence, under Section 5625-33, General Code, to the effect that money has been appropriated and is in the treasury or in the course of collection unencumbered, with which to pay the child's tuition.

2. The obligation of a board of education of a school district wherein a high school is not maintained, to pay the tuition of resident high school pupils who attend high school in other districts, as fixed by Sections 7747 and 7748, General Code, is an obligation fixed by law and is not contractual in its nature.

3. Foreign tuition cannot be paid without an appropriation. It cannot be said that an unpaid balance due for foreign tuition at the beginning of a fiscal year automatically constitutes an encumbrance upon the funds of the school district against which the claim exists.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1571.

OFFICES COMPATIBLE—OFFICIAL SHORTHAND REPORTER OF COMMON PLEAS COURT, AND COUNTY EMPLOYED STENOGRAPHERS NOT IN CLASSIFIED SERVICE MAY REPORT HEARINGS BEFORE TAX COMMISSION IN SUCH COUNTY.

SYLLABUS:

1. *An official shorthand reporter of a court of common pleas of a county may report Hearings before the Tax Commission of Ohio in such county and draw compensation for such providing that it is physically possible for such county stenographer to properly perform and discharge the duties of both positions.*

2. *Assuming that other county employed stenographers are not in the classified civil service, they may report Hearings before the Tax Commission of Ohio in such county and draw compensation for such providing that it is physically possible for them to properly perform and discharge the duties of both positions.*