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1. TRANSFER, SCHOOL TERRITORY WITHIN RURAL OR VILLAGE SCHOOL DISTRICT OF COUNTY SCHOOL DISTRICT TO CONTIGUOUS COUNTY SCHOOL DISTRICT — PETITION FILED WITH COUNTY BOARD OF EDUCATION — 75% QUALIFIED ELECTORS SIGNED — WHERE NO ACTION TAKEN BY BOARD OF EDUCATION, SUCH BOARD PRIOR TO HOLDING CENTRALIZATION ELECTION MAY, BUT IS NOT REQUIRED TO TRANSFER TERRITORY TO COUNTY SCHOOL DISTRICT — SECTION 4696 G. C.
2. RESOLUTION FOR CENTRALIZATION OF SCHOOLS OF DISTRICT — ELECTION — NEW DISTRICT — PETITION SIGNED BY 66 $\frac{2}{3}$ % QUALIFIED ELECTORS — POWERS AND LIMITATIONS, COUNTY BOARD OF EDUCATION — SECTION 4736 G. C.

SYLLABUS:

1. When, in pursuance of Section 4696, General Code, a petition is filed with a county board of education seeking the transfer of school territory located within a rural or village school district of the county school district to a contiguous

county school district, which petition contains the signatures of 75% of the qualified electors residing in the territory sought by the petition to be transferred, and no action is taken with reference thereto by the county board of education prior to the adoption of a resolution for centralization and the fixing of a time for an election thereon by the local board of education in the district within which lies some of the territory sought by the petition therefor to be transferred to the county school district, the county board of education may thereafter and prior to the holding of the centralization election transfer the territory sought to be transferred to the county school district, but is not required to do so.

2. When a board of education in a rural or village school district adopts a resolution for the centralization of the schools of the district, and fixes a time for the holding of an election thereon, the county board of education for the county school district within which is located the rural or village district proposed to be centralized, is not thereafter empowered to create a new district in pursuance of Section 4736, General Code, embracing therein any of the territory included within the district proposed to be centralized, until such time as the election for centralization is held, unless a petition seeking such action is filed with the said county board of education, signed by 66⅔% of the qualified electors residing in the territory which may be detached from the proposed centralized district to become a part of the proposed new district.

Columbus, Ohio, July 24, 1943.

Hon. James W. Williamson, Prosecuting Attorney,
Wauseon, Ohio.

Dear Sir:

I am in receipt of your request for my opinion which reads as follows:

"In Swancreek Township Rural School District, Fulton County, Ohio, hereinafter referred to as Swancreek District, a special election for the centralization of schools of that district was held on April 6, 1943, at which election centralization failed to carry by seven votes.

Delta Village School District, hereinafter referred to as Delta District, is located at the northwest corner of Swancreek Township, contiguous to Swancreek District. Swanton Village School District, hereinafter referred to as Swanton District, is located in the northeast corner of Swancreek Township, contiguous to Swancreek District. Henry County School District is contiguous to the south end of Swancreek District, the Village of Liberty Center being only a short distance south in Henry County. Delta, Swanton and Liberty Center have adequate facilities to care for all the pupils from Swancreek District.

Several square miles of land in the northeast corner of Swancreek Township are now a part of Swanton District, and

eight sections at the south end of the township are now a part of Liberty Center (Henry County) School District, leaving twenty-four sections presently in Swancreek District. Some of the electors desire that the Swancreek District be abandoned; that the south end be set off to Liberty Center; the northwest part to Delta; and the northeast part to Swanton.

If all the suggested transfers are made, no territory will remain in Swancreek District.

A petition signed by seventy-five per cent of the electors for the transfer of four square miles in the south part of Swancreek District (contiguous to the Henry County School District), to the Henry County School District was filed with the Fulton County Board of Education on April 16, 1943, at 9:15 A. M.

At 3:00 P. M. on April 16, 1943, a petition signed by forty per cent of the electors of Swancreek District was filed with the Swancreek District Board, requesting another election on centralization under Section 4726 of the General Code. This board immediately acted favorably on the petition and a certified copy of their resolution was filed with the clerk of the board of election at 4 P. M. on the same day.

The Fulton County Board of Education desires your opinion on the following points:

(1) Must it, under the mandatory provisions of Section 4696 of the General Code, act favorably at this time on the petition for transfer of territory from Swancreek District to the Henry County School District?

(2) May it, under the provisions of Section 4696 of the General Code, act favorably at this time on the petition for transfer of territory from Swancreek District to the Henry County School District?

(3) May it, under the provisions of Section 4736 of the General Code, at this time, create a new school district out of the territory in Delta Village School District and the northwest portion of the Swancreek District, another new district out of the Swanton Village School District, and the northeast corner of the Swancreek District, and appoint new boards of education for the districts so created?"

In a later communication submitted by you there was enclosed a certified copy of the resolution of the Swancreek Rural Board of Education acknowledging the petition for centralization and determining to

proceed with the centralization as requested. Under the terms of this resolution the time for the holding of the election thereon is fixed at the regular election time, November 2, 1943.

From your statement of the matter it appears that twenty-four sections of land lie in Swancreek Township Rural School District in Fulton County contiguous to Henry County; eight sections of land in the said Swancreek District lie immediately south of the twenty-four sections mentioned, in Henry County, all of said territory being included in the Swancreek Rural School District of the Fulton County School District. Delta Village School District lies in the Fulton County School District northwest of and contiguous to the Swancreek District. Swanton Village School District lies in Fulton County School District northeast of and contiguous to the Swancreek District.

It is the desire of some of the electors residing in the Swancreek District, that the said district be dissolved, and that for that purpose, the territory thereof which now lies in Henry County be transferred by appropriate action to the Henry County School District, the northwest part be attached to the Delta Village District, and the northeast portion to the Swanton Village District, in such a manner that the entire existing Swancreek District be thereby dissolved and all its present territory be included in the districts mentioned. Looking to that end, a petition to transfer the existing sections of land mentioned now lying in the south end of Swancreek District to the Henry County School District, was filed on April 16, 1943, at 9:15 A. M., with the Fulton County Board of Education. The petition was signed by seventy-five per cent of the electors residing in the territory sought to be transferred.

Transfers of school territory from a district of a county school district to another county school district are controlled by the provisions of Section 4696, General Code, the pertinent part of which reads as follows:

"A county board of education may, upon a petition of a majority of the electors residing in the territory to be transferred, transfer a part or all of a school district of the county school district to an exempted village, city or county school district, the territory of which is contiguous thereto. Upon petition of seventy-five per cent of the electors in the territory proposed to be transferred the county board of education shall make such transfer. A county board of education may accept a transfer of territory from any such school district and annex same to a contiguous school district of a county school district.

* * *

Any territory which has been transferred to another district, or any part of such territory, shall not be transferred out of

the district to which it has been transferred during a period of five years from the date of the original transfer without the approval of the state director of education to such a transfer."

In the case of *State, ex rel. Board of Education v. Board of Education of Perry County, et al.*, 122 O. S., 463, it is held in the syllabus:

"Section 4696, General Code, as amended in 1929 (113 O. L., 296) imposes a mandatory duty upon a county board of education to order a transfer of territory from one school district to another where seventy-five per cent of the electors in the territory proposed to be transferred petition therefor. By the same statute the county board of education of the district to which such transfer is sought to be made in its discretion may or may not accept such transfer."

As no mention is made in your inquiry of the territory or any part thereof sought to be transferred by the petitions mentioned having been transferred to the Swancreek District within five years prior to April 16, 1943, I assume for the purposes of this opinion that such a transfer was not made and therefore the approval of the State Director of Education will not be necessary to effectuate the proposed transfer if other requirements of the law are met, nor does it appear that centralization of the schools of the Swancreek District has as yet been effected as an election for the centralization of these schools which was held on April 6, 1943 failed to carry, and proceedings were instituted on April 16, 1943 for the purpose of holding another election on the question of centralizing the Swancreek district schools which, of course, would not have been done if the schools had already been centralized. Centralization of schools in a rural or village school district may be effected in pursuance of Sections 4726 and 4727, General Code, and it is well established that when centralization in such a district is effected a mandatory duty may not be imposed on a county board of education to transfer any territory of such a district from the district by the filing of a petition therefor in pursuance of Section 4696, General Code, even though the petition contains the names of seventy-five per cent of the electors residing in the territory sought to be transferred. In the case of *State, ex rel. v. Underhill*, 141 O. S., 128, it is said in the third branch of the syllabus:

"Where schools have been centralized under Section 4726, General Code, a county board of education may not be required under the mandatory provisions of Section 4696, General Code, to transfer any part of such centralized district to another district."

In support thereof there are cited :

Fulks v. Wright, 72 O. S., 547 ;

State, ex rel. Snapp v. Goul, et al. Board of Education of Champaign County School District, 97 O. S., 259 ;

State, ex rel. Darby v. Hadaway, et al., 113 O. S., 658 ;

Summit County Board of Education v. State, ex rel. Stipe, 115 O. S., 333 ;

State, ex rel. Apple v. Pence, et al., Board of Education of Shelby County, 137 O. S., 569.

It is equally well established that when such a petition signed by sixty-six and two-thirds per cent of the electors residing in the district sought to be transferred is filed the county board may make the transfer but is not required to do so. Section 4727, General Code, provides as follows :

“When the schools of a village or rural school district have been centralized such centralization shall not be discontinued within three years, and then only by petition and election, as provided in Section 4726. Nothing in this or the foregoing sections, namely, Sections 4726 and 4726-1, shall prevent a county board of education upon the petition of two-thirds of the qualified electors of the territory petitioning for transfer, from transferring territory to or from a centralized school district, the same as to or from a district not centralized.”

Prior to the amendment of Section 4727, General Code, supra, in 1919, by the incorporation therein of the last sentence thereof, it was held in the case of State v. Goul, 97 O. S., 259, supra, that the statute as it then existed forbade decentralization of the school for three years and therefore constituted an exception to Section 4696, General Code. After the amendment of said Section 4727, General Code, as noted above, it was held in the case of State, ex rel. v. Hadaway, et al., 113 O. S., 658, followed in State, ex rel. Apple v. Pence, 137 O. S., 569, and State, ex rel. v. Underhill, 141 O. S., 128, that :

“Under the provisions of Sections 4696 and 4727, General Code, a board of education of a county school district is *authorized* to transfer territory from a centralized school district to another district upon the petition of two-thirds of the qualified electors of the territory sought to be transferred, *but is not required* to make such a transfer though the petition therefor be signed by seventy-five per centum of such qualified electors.” (Emphasis the writer's.)

See also, State v. Dietrich, 135 O. S., 529.

Apparently for the purpose of forestalling the mandatory duty devolving upon the County Board of Education of the Fulton County District to make the transfer of territory to the Henry County District as requested by the petitioners, it was sought to centralize the schools of Swancreek District. For that purpose a petition of forty per cent of the electors residing in Swancreek District was filed with the Swancreek Board of Education. This petition was filed on the same day that the petition for transfer was filed with the County Board of Education, at 3 P. M. The petition for centralization was immediately acted upon favorably by the Swancreek Board of Education and a certified copy of the resolution for centralization was certified to the Fulton County Board of Elections at 4 P. M. on the same day. In the resolution, a copy of which was submitted to this office under date of July 19, 1943, it appears that the date fixed in the resolution for the holding of the centralization election was the time fixed for the holding of the next regular election within the said school district, to wit: "the second day of November, 1943." So far as appears no action has been taken by the Fulton County Board of Education by way of the passage of a resolution by the said board, to transfer the territory to Henry County District, as requested by the petitioners thereof.

As the matter now stands, the Swancreek District is not a centralized district, and could not become one under the terms of the resolution adopted by the Swancreek District Board of Education prior to the holding of an election for centralization, which might result favorably if the election were to be held on November 2, 1943, the time fixed therefor by the terms of the resolution. In the case of *State, ex rel. County Board of Education of Wood County v. Board of Education of Bloom Township Rural School District*, 104 O. S., 75, and followed in *State, ex rel. Apple v. Pence*, 137 O. S., 569, it is held:

"A school district is a centralized district within the contemplation of the statute regulating the same from the time of the election resulting in favor of the proposition of centralization."

The corollary of this proposition is that until an election for centralization in a district is held which results in favor of the proposition of centralization the district is not a centralized district. However, in the instant case we are confronted with a rule of priority laid down by the Supreme Court of Ohio in the light of which the mandatory duty as imposed on the County Board of Education of the Fulton County School District by the terms of the petition therefor to transfer certain described territory to the Henry County District is suspended by reason of the action of the Swancreek District Board of Education in adopting its reso-

lution for centralization and fixing the date for an election thereon, and the County Board of Education is precluded during such suspension from taking any action thereon so far as a mandatory duty to do so is concerned.

In the case of *Trumbull County Board of Education v. The State, ex rel. Van Wye*, 122 O. S., 247, it is held as stated in the first branch of the syllabus:

“Where power is given under the statutes to two different governmental boards to act with reference to the same subject-matter, exclusive authority to act with reference to such subject-matter is vested in the board first acting under the power.”

Here, the Swancreek Board of Education acted by adopting a resolution to centralize the schools of Swancreek District and certifying its resolution to hold an election for that purpose to the county board of elections. The county board has not acted, but the action of the local district board is such as to render the mandatory duty of the county board impotent in the premises. The petition for transfer addressed to the county board of education does, however, contain the names of sixty-six and two-thirds per cent of the electors residing in the territory sought to be transferred, and thereby confers power on the county board to make the transfer if it should see fit to do so. In other words, to quote from the *Hadaway*, *Pence*, and *Underhill* cases, *supra*, the county board is authorized to make the transfer requested, but is not required to do so. Inasmuch as a county board of education has the power to make a transfer such as is here under consideration upon a petition therefor being filed, signed by sixty-six and two-thirds per cent of the electors involved even if the schools are centralized it would be a vain and futile thing to entirely suspend its permissive power to do so until an election for centralization was held even if the election should be held and it resulted in a favorable vote.

With respect to the proposed creation of new school districts under and in pursuance of Section 4736, General Code, from the Delta Village District and the Swanton Village District and parts of the Swancreek District, it does not appear that petitions containing sixty-six and two-thirds per cent of the electors residing in the territory proposed to be transferred from the Swancreek District for that purpose have been filed with the County Board of Education requesting such transfers as is the case in the proposed transfer to the Henry County District. To create these districts would be the equivalent of and amount to the same thing as transferring parts of the territory of the Swancreek District out of the district, which may not be done if the district were a centralized dis-

trict, unless a petition for that purpose, signed by sixty-six and two-thirds per cent of the qualified electors residing in the territory so sought to be taken from the district is filed with the County Board of Education. Such action would amount to an unauthorized decentralization of the schools of the district, which is forbidden. See Section 4727, supra, and State, ex rel. Snapp v. Goul, et al., 97 O. S., 259, supra.

Although the Swancreek District is not now a centralized district and cannot become such a district until an election for that purpose is held which results favorably to such centralization action has been taken by the Swancreek Board of Education to bring about that result and under the rule stated by the Supreme Court in the Trumbull County case, supra, no power is vested at this time in the county board of education to act with reference to the same subject matter by creating the proposed new districts mentioned.

In answer to the questions submitted, I am of the opinion :

1. The County Board of Education of the Fulton County School District, at this time, is authorized to transfer the territory of the Swancreek District sought by the petition therefor to be transferred to the Henry County School District but is not required to do so.

2. The Fulton County Board of Education is not empowered at this time to create new school districts consisting in part of territory now within the Swancreek District in the Fulton County School District.

Respectfully,

THOMAS J. HERBERT,
Attorney General.