

4223.

BOARD OF EDUCATION—WHERE NO HIGH SCHOOL, STUDENTS MAY ATTEND SCHOOL IN ANOTHER DISTRICT—NOTICE OF SUCH ATTENDANCE MUST BE GIVEN DISTRICT OF RESIDENCE BEFORE LIABLE FOR TUITION—FURNISHING OF BOARD AND LODGING IN LIEU OF TRANSPORTATION.

SYLLABUS:

1. *Before a board of education which does not maintain a high school and does not contract with another board or other boards in the same or an adjoining civil township for the schooling of its high school pupils, can be required to pay the tuition of resident high school pupils attending high school outside the district, due notice of such attendance must be filed in writing with the clerk of the board of education upon which board it is sought to impose the liability for the payment of tuition, as provided by Section 7750, General Code.*

2. *The provisions of Section 7749-2, General Code, which relate to the furnishing of board and lodging near a high school in lieu of furnishing transportation thereto, are permissive, and apply only in those cases where a board of education is required to furnish transportation for high school pupils by direction of the county board of education, or when the board determines, on its own initiative, to furnish such transportation.*

COLUMBUS, OHIO, April 1, 1932.

HON. FRED W. EVERETT, JR., *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion with reference to the following:

“A pupil residing in a school district, which did not maintain a high school, attended a high school in an adjoining county during the school year of 1930-31. This pupil was not assigned to any high school by the board of education of the district in which he resided. He gave no notice to his own board of education of his intention to enter a high school outside of his district. The attention of the board of education in the district in which he resided was first called to this matter by presenting the bill for tuition from the high school which the pupil attended. Must the board of education of the district in which the above mentioned pupil resided pay tuition for the year 1930-31 to the board of education maintaining the high school attended by this pupil, in the absence of written notice to the clerk of the board of education as provided for in Section 7750 of the General Code?”

This pupil, while attending high school, resided with his aunt and uncle. He claims to have worked for his board. At the time of this attendance, the county board of education had taken no action declaring transportation to high school advisable and practicable. Must the board of education of the district in which the above mentioned pupil resided pay for his board in lieu of providing transportation for him, under Section 7749-2, General Code?”

Your inquiry calls for a consideration of Sections 7747, 7748, 7750 and several other sections of the General Code of Ohio. Sections 7747 and 7748, General Code, read in part, as follows:

Sec. 7747. "The tuition of pupils who are eligible for admission to high school and who reside in districts in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, * * *"

Sec. 7748. "A board of education providing a third grade high school shall be required to pay the tuition of graduates from such school, and of other children who have completed successfully two years of work in a recognized high school, residing in the district at a first grade high school for two years, or at a second grade high school for one year and at a first grade high school for one additional year.

A board providing a second grade high school shall pay the tuition of graduates, and of other children of like advancement, residing in the district at a first grade high school for one year. * * *"

Section 7750, General Code, reads as follows:

"A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

Former section 7764-1, General Code, provided in substance that all boards of education must provide work in high school branches at some school within four miles of the residence of each resident child who had completed the ordinary grade school curriculum and was eligible to attend high school except those who live within four miles of a high school and those for whom transportation to a high school had been provided, or board and lodging near a high school in lieu of such transportation.

In 1925 said section 7764-1, supra, was repealed and at the same time section 7749-1, General Code, was amended so as to provide that in no case should a board of education be required to provide transportation for high school pupils except in centralized districts where transportation is furnished for the elementary pupils, unless such high school transportation is deemed and declared by the county board of education to be advisable and practicable.

By the same act of the legislature which repealed Section 7764-1, General Code and amended Section 7749-1, General Code, Section 7764, General Code, was amended.

As amended, this section provided that high school pupils are subject to assignment to high schools either within or without their district, and when they are assigned to a high school outside the district which is less than four miles from their residence or to one more than four miles from their residence and transportation is furnished thereto, and they attend some other high school than the one to which they are assigned, the transportation and tuition which the board of education of the district of the pupils' residence is required to pay shall be based on the cost of transportation and tuition incident to attendance at the school to which they had been assigned.

The effect of the repeal of Section 7764-1, General Code, and of the amendment of Sections 7749-1 and 7764, General Code, was to change the obligation of a board of education with respect to the furnishing of transportation for high school pupils but did not materially affect the liability of a board of education which does not maintain a high school for the payment of high school tuition.

The provisions of Section 7747 and 7748, General Code, quoted above, clearly impose on boards of education which do not maintain a high school a duty to pay the tuition of resident pupils who attend high school outside the district. Standing alone, the provisions of the two statutes noted above would appear to impose an absolute duty on boards of education to pay the tuition of those pupils coming within its provisions regardless of any notice to the board of their attendance at schools outside the district.

It should be noted, however, that practically the same statutory provisions as are now contained in these statutes together with those now contained in Section 7750, General Code, were originally contained in Section 4099-3, Revised Statutes. All these statutory provisions must therefore be considered as being in *pari materia* and construed accordingly.

Under the law as it exists today, a board of education may provide high school facilities for resident high school pupils in a school maintained by it. If the board does not see fit to maintain its own high school it may contract for the schooling of all its high school pupils by authority of Section 7750, *supra*, or it may assign the pupils to schools outside the district as provided by Section 7764, General Code. It is sometimes more advantageous for a board of education to contract either for the schooling of all its resident high school pupils or for certain pupils in schools to which they may be assigned if circumstances are such that contracts of this kind may be entered into, than to let the pupil select a school they wish to attend. If no opportunity is given the board to arrange for the schooling of a high school pupil by some one of the methods which the law permits the board to choose, the board can not, in my opinion, be held for the pupil's tuition.

Under a somewhat similar state of facts, the Supreme Court, in the case of *Board of Education of Swan Township vs. Cox*, 117 O. S., 406, held as stated in the second branch of the syllabus of said case:

"In order that such boards of education may have a choice of the means of discharging the duties imposed upon them, it is the duty of such children or their parents to communicate to such boards the fact of readiness for high school work and the further fact of residence more than four miles from a high school in order that the board may have an opportunity to take official action in exercising such choice of means and to make provision therefor."

Although the above case was decided on a state of facts which arose before the repeal of Section 7764-1, supra, and had special reference to the transportation of pupils the principle set forth in that portion of the syllabus which is quoted above, has peculiar application to the question before us. As stated above, a board of education has the option of furnishing high school facilities for resident high school pupils in one of several ways, either by the maintenance of a high school within the district, or by contracting for the schooling of its high school pupils by authority of Section 7750, General Code, or by assigning the pupils to a school outside the district within four miles of its residence or more than four miles from its residence and furnishing transportation thereto, or board and lodging near the school in lieu of such transportation. Unless the board is advised of the pupil's readiness for high school and its intention to attend high school, the board manifestly has no opportunity to exercise a choice of means with reference to the matter.

Moreover, the provisions of Section 7750, General Code, are quite clear with reference to the question of giving notice before the liability of a board of education which does not maintain a high school, for the payment of foreign high school tuition, becomes fixed.

So far as I know, the only instance wherein the question of notice, as provided for in this statute, has been before the courts, was in the case of *New Madison Special School District vs. Harrison Township Board of Education*, 14 O. D., 62. It was there held by Judge Allread, then judge of the Common Pleas Court of Darke County, as follows:

"Where no high school is maintained by the township board of education and no agreement has been made by such township board with one or more boards of education of the same or adjoining townships for the schooling of high school pupils of such township, the high school pupils resident of such township may attend any high school in the state, and tuition in such case shall be chargeable to such township board of education, providing written notice thereof is given to the clerk of the board of education before the attendance begins."

In a former opinion of this office which will be found in the reported Opinions of the Attorney General for 1929, at page 1828, it is held:

"Before a board of education, that does not maintain a high school and does not contract with another board or other boards in the same or an adjoining civil township for the schooling of its high school pupils, can be required to pay the tuition of resident high school pupils attending high school outside the district, due notice of such attendance must be filed in writing with the clerk of the board of education upon which board it is sought to impose the liability for the payment of tuition, as provided by Section 7750, General Code.

Where a claim for the payment of foreign tuition for a high school pupil is made against a board of education and it appears that no legal liability exists for the payment of such tuition because of the failure on the part of the pupil or his parents or persons in charge of him, to file a written notice of his attendance in the high school in accordance with Section 7750, General Code, such a claim lawfully may be paid as a moral obligation."

See also, in this connection, Opinions of the Attorney General for 1912, page 1265; for 1913, page 1205; for 1915, page 1381; for 1917, page 1435; for 1927, page 2692; for 1928, pages 1925, 1955 and 2613 and for 1930, page 1464.

With reference to your second question, your attention is directed to the provisions of Section 7749-1, General Code, which provides in substance, that a board of education is never required to provide high school transportation except in districts where the schools are centralized and transportation is furnished for the elementary pupils, unless such transportation is deemed and declared by the county board of education to be advisable and practicable. The provisions of Section 7749-2, General Code, to which you refer, are permissive, and apply only in those cases where a board of education is required to furnish transportation for high school pupils, by action of the county board of education, or when the board determines on its own initiative, to provide such transportation. It will be noted that this statute was enacted before Section 7749-1, General Code, was amended to provide as it now does.

In view of the facts submitted by you, when considered in the light of the law as outlined above, I am of the opinion, in specific answer to your questions:

1. The board of education in question can not be held for the tuition of the pupil who had attended school in another district, in the absence of notice to the board of education of the district of its residence prior to its attendance at the said high school, as provided by Section 7750, General Code.

2. The board of education is not liable for the board of this pupil.

I might suggest in this connection, that circumstances may be such that the pupil is entitled to attend school in the district where he is living with his aunt and uncle without the payment of tuition by anyone. You will observe from the provisions of Section 7681, General Code, that a child of school age living apart from his parents or guardian, who works to support himself by his own labor, shall be entitled to attend school free in the district in which he is employed. Whether or not that is the case in this instance is of course a question of fact.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4224.

OPTOMETRY—AUTHORITY OF BOARD OF OPTOMETRY TO ISSUE
AND REVOKE LICENSES—RELATED DUTIES OF SUCH BOARD
DISCUSSED.

SYLLABUS:

1. *The State Board of Optometry has no authority to reinstate the license of a former optometrist whose license has been revoked for the non-payment of annual license fees after the expiration of the period of five years.*

2. *Former optometrists whose licenses have been revoked for non-payment of fees, or who have retired from the practice for a period of more than five years, must comply with the provisions of Section 1295-28, General Code, in order to again obtain a license to practice optometry.*

3. *Prosecutions may be instituted in the courts under Section 1295-22, General Code, against any person who practices optometry after his license has been revoked.*