

or in part in an ensuing fiscal year, it is necessary only to certify the amount required to meet the same in the fiscal year in which such contracts are made), is in the treasury or is in process of collection to the credit of an appropriate fund, free from any previous encumbrances.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1261.

BOARD OF EDUCATION—NOT REQUIRED TO TRANSPORT PUPIL TO ELEMENTARY SCHOOL AFTER SAID PUPIL HAS GRADUATED THEREFROM—DUTIES OF BOARDS OF EDUCATION AS TO TRANSPORTATION—CERTIFICATE OF FISCAL OFFICER DOES NOT APPLY TO EMPLOYMENT OF TEACHER BY BOARD OF EDUCATION.

SYLLABUS:

1. *A board of education is not required to transport a pupil to the elementary schools, after such pupil has graduated therefrom and is eligible to attend a high school.*

2. *A county board of education has no authority to order a district board of education within the county to expend any money, and any order so issued is not binding upon the district board.*

3. *When a district board of education fails to furnish school facilities as provided by law, it is the duty of the county board of education so to do and any expenses incurred in connection therewith shall be paid from the county treasury and deducted from the local school district's funds at the next tax settlement date.*

4. *When a board of education fails to furnish school privileges to any pupil, as required by law, and it becomes necessary for the parent of the pupil to transport his child to a high school located more than four miles from the home of such pupil because such board failed to perform its duty with respect thereto, as provided by law, the parent has a valid claim against the board of education for the expenses so incurred.*

5. *The statutory requirement that no contract shall be entered into by any subdivision until the fiscal officer has certified that the money for the payment thereof is in the treasury or in the process of collection, has no application to the contract of employment between boards of education and the teachers of the district.*

COLUMBUS, OHIO, November 15, 1927.

HON. G. O. MCGONAGLE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion on several matters relative to schools.

Your first inquiry is as follows:

"In Meigsville Township, this County of Morgan, -----, age 16 years in January, 1927, residing two miles from elementary school, was transported until she graduated from the eighth grade and received a diploma at the close of the school year 1926. Last year, instead of attending high school, this pupil again attended the same elementary school and is now claiming payment for transportation. During last year and after having graduated from the eighth grade, she produced a certificate from the district health officer to the

effect that she was unable to walk to school. If this girl is crippled or frail must she be transported? If so, is this true in case of her voluntarily attending same school after graduating, instead of attending high school?"

The statutes require a board of education to furnish to the pupils of their district instructions in the elementary branches of learning and in high school subjects. They require such boards to have the courses of study graded. The pupil who finishes one grade is entitled to receive instructions in the next higher grade, and upon the completion of all the grades in the elementary course of study, the board of education must furnish such pupil instruction in high school branches, as provided by law.

Sections 7755-3 and 7731 of the General Code require boards of education to transport crippled children and children in the elementary schools who reside more than two miles from the school building, to which they are assigned.

In your inquiry, you stated that the pupil in question completed the work in the elementary grade and received her certificate and diploma evidencing the same.

Your question involves a consideration of whether or not this duty is imposed upon the board of education after the pupil has completed the course of study in the elementary school, merely because the pupil wishes to pursue the studies of that course a second time.

As stated above, it is mandatory on the board of education to furnish instruction in the elementary branches of learning, as provided by statute, to all of the pupils in the school district, and in the proper cases must furnish transportation to the schools to which the pupils are assigned. After the pupil has completed the course of study in elementary branches, and successfully passed examinations upon those subjects, such pupil is then entitled to pursue the studies of high school branches, and it is mandatory upon the board of education to furnish instructions in those subjects.

There is no provision of law that makes it mandatory for the board of education to transport a pupil, when such pupil merely wishes to review, or again study the branches of the elementary grades from which the pupil has graduated.

In answer to your first question, it is therefore my opinion that the statutory provisions which require the board of education to transport pupils for the purpose of instruction in the elementary branches do not apply to a pupil who has graduated therein but wishes to review the eighth grade subjects.

Your second inquiry is as follows:

"Bristol Township has heretofore maintained a third grade high school (2 year course). During the past year a number of pupils of said township, having completed the course in said high school, attended high school elsewhere, and more than five miles distant to complete the full high school course. On July 23, 1927, after the close of the school year our county board of education ordered said Bristol Township local board to pay transportation, or rather in lieu thereof, for all such pupils at the rate of 75c per day for first pupil and 50c additional for each pupil so attending from same family a school of higher grade in another township. Has the county board the authority to make such order against a local board. If so, may it so order after close of school year and on behalf of pupils whose attendance was prior to present fiscal year? Or, does the duty devolve upon the local board to fix the amount to be paid for transportation in such cases if such local board is at all liable?"

This inquiry requires a consideration of Section 7610-1, General Code, which reads as follows:

"If the board of education in a district under the supervision of the county board of education fails to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages as required by this title, or to provide suitable school houses for all the schools under its control, or to elect a superintendent or teacher, or to pay their salaries, or to pay out any other school money, needed in school administration, or to fill any vacancies in the board within the period of thirty days after such vacancies occur, the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform any and all such duties or acts, in the same manner as the board of education by this title is authorized to perform them. But in a city district, or in an exempted village district, or where the county board of education is unable or fails for any reason to fill any vacancies in such county board of education as provided by Section 4748 of the General Code, within the period of thirty days after such vacancies occur, the probate court, or in counties in which the probate court and the court of common pleas have been combined, the court of common pleas, upon being advised and satisfied thereof, shall act instead of the county board of education.

All salaries and other money so paid by the county board of education, or by the probate court, or by the court of common pleas, shall be paid out of the county treasury from the general fund on vouchers signed by the president of the county board of education, or by the judge of the probate court, or by the judge of the court of common pleas, as the case may be, but they shall be a charge against the school district for which the money was paid. The amount so paid shall be retained by the county auditor from the proper funds due to such school district, at the time of making the semi-annual distribution of taxes."

It will be noted that said section provides that it is the duty of the county board of education "to provide sufficient school privileges" for the school district of any local board of education, in case such local board fails so to do. This section is quite broad and it places practically the same duty upon the county board of education as is imposed by law upon the district board of education. See *State ex rel. vs. Beamer*, 109 O. S. 122. It provides that all monies paid by the county board of education for such purposes

"shall be paid out of the county treasury from the general fund, on vouchers signed by the president of the county board of education. The amount so paid shall be retained by the county auditor from the proper funds due to such school district at the time of making the semi-annual distribution of taxes."

There is no provision of law which authorizes the county board of education to make any order directed to the local board of education requiring it to pay any of its obligations.

Section 7748, General Code, reads as follows:

"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. No board of education is required to pay the tuition of any pupil to high school for more than four school years.

A board of education may pay the tuition of all high school pupils residing more than four miles by the most direct route of public travel from the high school provided by the board when such pupils attend a nearer high school, or in lieu of paying such tuition the board of education may pay for the transportation to the high school maintained by the board of the pupils living more than four miles therefrom. * * *

In the case of *State ex rel vs. Beamer, supra*, the Supreme Court held that it was mandatory upon a district board of education and also upon the county board of education, in case the district board failed, to provide a high school within four miles of the residence of the pupil, or furnish instructions in high school branches in the schools of the district or pay the board or transportation or such pupil to a high school. It is optional with the board of education to determine which of said methods will be used to give the pupil such instruction.

In the case of *Sommers vs. Putnam County Board of Education et al.*, 113 O. S. 177, the court held :

"While a board of education has an option as to the method by which it will make high school branches accessible to school children in the district, it can not, by refusing to exercise any one of the options, absolve itself from liability.

A parent who resides more than four miles from any high school in a rural school district who is compelled to transport his children of compulsory school age who have finished the ordinary grade school curriculum to a high school more than four miles from his residence by reason of the refusal of the local board of education and the county board of education either to provide work in high school branches at some school within four miles of the children's residence, or to transport the children to and from a high school, may recover in an action at law for such transportation."

I am not unmindful of the provisions of Section 7749-1, General Code, which was amended since the hereinabove referred to decisions of the Supreme Court. Said section reads as follows :

"The board of education of any district, except as provided in Section 7749, may provide transportation to a high school within or without the school district ; but in no case shall such board of education be required to provide high school transportation except as follows : If the transportation of a child to a high school by a district of a county school district is deemed and declared by the county board of education advisable and practicable, the board of education of the district in which the child resides shall furnish such transportation."

Said section was originally enacted in 109 Ohio Laws, page 290. The title of said act states that among other things the purpose of the act is to " * * * add supplemental sections * * * 7749-1 * * * ." This section as amended does not

change the rule of law as announced by the Supreme Court in the cases of *State ex rel., vs. Beaman*, and *Sommers vs. Board of Education, supra*.

It provides that a local board need not transport pupils unless the county board deems such to be advisable and practicable. Such board can not however be arbitrary and refuse so to find when such finding is not at all supported by the facts. Transportation is still one of the optional features whereby a board of education may provide "sufficient school privileges" to high school pupils as provided by law. Therefore, the parents of the children who furnished transportation would have a valid claim as set forth in the case of *Sommers vs. Board of Education, supra*, against either the county board of education or the township board of education for the expenses of such transportation of the pupils under the facts set forth in your inquiry. If the county board pays such claim, the same should be paid from the county treasury and deducted from the next semi-annual distribution of taxes to the local school district.

Your third question is as follows :

"At the November election in 1926 the voters of three rural school districts, Meigsville, Malta and Union, defeated the proposition to authorize their local boards of education to levy three mills for school purposes outside of limitations. These districts had prior to 1926 authorized such levies and the terms thereof expired with the school year of 1926-1927 and they received state aid during the period such additional levies were in force. All three of these boards of education will submit the three mill levy proposition again at the November election. The question now is,—May the boards of these districts now employ teachers and open the schools in September? Under the provisions of Section 5660, G. C., boards may not enter into contracts unless the fiscal officer is able to certify that the money for payment of salaries is in the treasury or in process of collection.

It is provided by law that the state director of education may direct the county board of education to place the three mill levy on the duplicates; this however the present director has failed to do thus far, so the question still remains with us, may these boards or any boards so situated legally employ teachers and open the schools in September or must the schools remain closed until the electors of the district authorize a three mill levy or failing in that the state director of education authorize it?"

I call your attention to the fact that Section 5660, General Code, is repealed by the 87th General Assembly, by House Bill No. 80. In lieu thereof, we have the provisions of Sections 33, 34, 35 and 36 of said act codified as Sections 5625-33, 5625-34, 5625-35 and 5625-36, of the General Code. Section 33 (Section 5625-33, General Code,) of the Act provides in part as follows:

"No subdivision or taxing unit shall: * * *

Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any

amount due thereon. In case no certificate is furnished as hereinbefore required, upon receipt by the taxing authority of the subdivision or taxing unit, of a certificate of the fiscal officer that there was at the time of the making of such contract or order, and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract; but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; provided, however, that if the amount involved is less than fifty dollars, the fiscal officer may authorize it to be paid without the affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid."

Said section also provides:

"The term 'contract' as used in this section shall be construed as exclusive of current payrolls of regular employees and officers."

A consideration of this language together with the entire provisions of the Act discloses that it was the intention of the legislature that the term "contract" as used in that section should not be applied to the contract of employment of the regular employes and officers who were paid by current payrolls. Therefore, even though the teachers are employed by contract as specifically provided for by law, they are placed in the same class as other employes and the provision that the money must be appropriated before the contract is entered into has no more application to such teachers than it has to other employes. The only provision relative thereto is that the money must be appropriated before it is expended. This is set forth in paragraph "b" of said section and provides that no taxing subdivision shall

"Make any expenditure of money unless it has been appropriated as provided in this act."

Therefore, there is nothing to prevent the board of education in question from employing teachers at this time and no certification relative to the funds being in the treasury or in the process of collection is necessary before said contract is executed. The statute does however provide that there shall be no expenditures made until the money is appropriated. If, however, the board of education will be unable to make an appropriation because of the lack of funds and it can not get state aid because of the failure of the electors to authorize the three mill levy outside of limitations as provided by law, relief may be had as provided by Section 7596-1, General Code, which reads as follows:

"In addition to the powers conferred in Section 7510-1 (7610-1), the county board of education shall have the power, if necessary to maintain in operation the schools of any school district of the county school district with the advice and consent of the director of education, to borrow money on the credit of that village or rural school district, with like powers in respect thereto to those conferred by Section 5655 of the General Code, upon the village or rural board of education. In case the statements presented in accordance with Section 7595-1 and the examinations directed by Section 7595-2 and 7596 prove that the board of education in question has failed to put to a vote the proposition to levy additional taxes above certain tax limitations in

order that the levy may meet the requirements for the district to share in the state educational equalization fund, or that the district has voted upon such proposition and has failed to give it the necessary majority, the director of education upon ascertaining such action to be necessary to enable the district to receive the sum from the state educational equalization fund necessary to maintain the schools for eight months in the year shall direct the county board of education to levy the additional taxes on the property of the given village or rural school district necessary for such purpose and the county board of education shall be empowered to levy such additional taxes. The expression 'maintain the schools' shall mean to discharge the obligations incident thereto, provided no cost of transportation of high school pupils to schools outside of the district shall be included."

Since the district in question has been receiving state aid, I assume all conditions have been met so as to make it a "state aid district," save and except that it has failed to meet the requirement to make the additional levy. In such case, it would therefore be the duty of the director of education to direct the county board of education to make the levy for the local district and thereafter the district would be eligible to receive its portion of the state educational equalization fund.

Therefore, in answer to your specific questions it is my opinion :

1. A board of education is not required to transport a pupil to the elementary schools, after such pupil has graduated therefrom and is eligible to attend a high school.

2. A county board of education has no authority to order a district board of education within the county to expend any money, and any order so issued is not binding upon the district board.

3. When a district board of education fails to furnish school facilities as provided by law, it is the duty of the county board of education so to do, and any expenses incurred in connection therewith shall be paid from the county treasury and deducted from the local school district's funds at the next tax settlement date.

4. When a board of education fails to furnish school privileges to any pupil, as required by law, and it becomes necessary for the parent of the pupil to transport his child to a high school located more than four miles from the home of such pupil because such board failed to perform its duty with respect thereto, as provided by law, the parent has a valid claim against the board of education for the expenses so incurred.

5. The statutory requirement that no contract shall be entered into by any subdivision until the fiscal officer has certified that the money for the payment thereof is in the treasury or in the process of collection, has no application to the contract of employment between boards of education and the teachers of the district.

Respectfully,
EDWARD C. TURNER,
Attorney General.