

OPINION NO. 72-043**Syllabus:**

1. A board of education which provides fare support on public transportation or payments in lieu thereof for its pupils, is eligible for pupil transportation reimbursement under Sections 3327.01 and 3317.051, Revised Code.
2. For purposes of reimbursement by the State Board of Education, the language of Section 3327.01, Revised Code, providing for situations wherein "it is impractical to transport a pupil by school conveyance", covers situations where pupil transportation is inaccessible to certain pupils.

To: Martin W. Essex, Public Instruction Supt., Department of Education,
Columbus, Ohio

By: William J. Brown, Attorney General, May 22, 1972

I have before me your request for my opinion, which asks the following questions:

"1. When a school district's transportation policy provides for fare support on public transportation or payments in lieu thereof for pupils in grades K-8 residing between one and two miles from school and pupils in grades 9-12 residing between two and four miles from school, and such policy further provides for payment of 100 percent of the cost of transportation for pupils in grades 1-8 residing over two miles from school, and pupils in grades 9-12 residing over four miles from school, is such school district eligible for pupil transportation reimbursement by the State Board of Education?

"2. For purposes of reimbursement by the State Board of Education, may the language of Revised Code 3327.01 providing for situations wherein 'it is impractical to transport a pupil by school conveyance' be interpreted in such a manner so as to include situations in which public transportation is inaccessible, when such public transportation is utilized as the primary part of a school district's pupil transportation program?"

Basically, your question is: can a board of education provide transportation for its students mainly by means of fare support on public transportation, instead of school buses?

The importance of this question stems from an amendment to Section 3317.051, Revised Code, enacted in Amended Substitute House Bill No. 475, effective December 20, 1971. The new Section reads as follows:

"The total amount of money approved for transportation operating costs for each school district, in which transportation of pupils is necessary, shall be determined on the basis of a formula adopted by the state board of education and in accordance with the rules and regulations prescribed by it to secure an efficient and economical program of pupil transportation. The number of pupils transported, the total number of miles traveled and other factors beyond the control of the board of education of each school district shall be considered in the formulation of such rules and regulations and in the adoption and application of such formula in determining the amount of money to be included for pupil transportation in each district as a part of Chapter 3317. of the Revised Code. All rules, regulations, and formulas adopted by the state board of education as prescribed by this section shall be submitted to and approved by the state controlling board before the computed amounts for school transportation are included in calculating the school foundation program for each district."

Prior to the amendment, this Section contained an additional, final sentence, which read as follows:

"A district receiving a payment pursuant to division (B) of Section 3317.02 of the Revised Code is not eligible for reimbursement for transportation operating costs * * *."

Section 3317.02, Revised Code, provides that payments to schools (foundation grants) shall consist of the amount of money derived from the calculation in either Division (A) or (B) of that Section, whichever is greater, plus the amount in Divisions (C) and (D). Division (B) is a minimum payment schedule. The school districts which receive payment under Division (B) are those which have a high value tax duplicate. I am informed that these districts, known as "non-aid" districts, include every large city in Ohio except Columbus.

Because of the deletion of the last sentence in Section 3317.051, supra, these non-aid districts are now eligible for reimbursement for transportation costs. The legislature further effected this change by moving from Division (A) to Division (C) of Section 3317.051, supra, the mention of transportation costs. As you will recall from the discussion, supra, non-aid districts do not receive the amount calculated in Division (A), but all districts receive the amounts calculated in Divisions (C) and (D). Hence, non-aid districts are now eligible for reimbursement for transportation costs.

Since almost all large cities are non-aid districts, and these cities rely on readily-available public transportation for their students, the question of whether school districts can be reimbursed for fare support on public transportation now has great economic importance.

The main Section which authorizes pupil transportation, and provides for reimbursement for it by the State, is Section 3327.01, Revised Code, which reads in pertinent part as follows:

"In all city, exempted village, and local school districts where resident school pupils in grades kindergarten through eight live more than two miles from the school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code and to which they are assigned by the board of education of the district of residence or to and from the non-public school which they attend the board of education shall provide transportation for such pupils to and from such school except when, in the judgment of such board, confirmed by the state board of education, such transportation is unnecessary or unreasonable.

"In all city, exempted village, and local school districts the board may provide transportation for resident school pupils in grades nine through twelve to and from the high school to which they are assigned by the board of education of the district of residence or to and from the non-public high school which they attend for which the state board of education prescribes

minimum standards pursuant to division (D) of section 3301.07 of the Revised Code.

"In determining the necessity for transportation, availability of facilities and distance to the school shall be considered.

* * * * *

"Where it is impractical to transport a pupil by school conveyance, a board of education may, in lieu of providing such transportation, pay a parent, guardian, or other person in charge of such child, an amount per pupil which shall in no event exceed the average transportation cost per pupil, such average cost to be based on the cost of transportation of children by all boards of education in this state during the next preceding year.

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"When transportation of pupils is provided the conveyance shall be run on a time schedule that shall be adopted and put in force by the board not later than ten days after the beginning of the school term.

"The cost of any transportation service authorized by this section shall be paid first out of federal funds, if any, available for the purpose of pupil transportation, and secondly out of state appropriations, in accordance with regulations adopted by the state board of education.

"No transportation of any pupils shall be provided by any board of education to or from any school which in the selection of pupils, faculty members, or employees, practices discrimination against any person on the grounds of race, color, religion, or national origin."

This Section states that a board of education may "provide transportation", or if that is impractical, pay a parent or guardian for furnishing transportation. It does not make clear, however, just what types of transportation the board may provide. Instead of specifying the permissible types of transportation, the legislature chose the more flexible method of granting the State Board of Education rule-making power with respect to reimbursements for transportation costs. (See the penultimate paragraph of the Section.) In addition, Section 3317.051, supra, grants the State Board wide-ranging powers to regulate this subject, "* * * to secure an efficient and economical program of pupil transportation"; subject to the approval of the State Controlling Board.

The State Board of Education has exercised this rule-making power, and has specified that fare support on public transportation is a means of "providing transportation" for purposes of Section 3327.01, Revised Code. The current regulations of the State Board, adopted July 1, 1969, read in pertinent part as follows:

"The fiscal year operating cost of transporta-

tion service provided for resident pupils attending the school to which they are assigned by the board of education of the district of residence or the non-public school which they attend, as authorized by Section 3327.01 of the Revised Code of Ohio, shall be determined in the following manner:

"A. Board-Owned Buses

1. An amount for the number of pupils transported, to be computed by multiplying sixteen dollars by the net number of pupils transported. (The 'net number of pupils transported' is the number of resident pupils transported on board-owned buses and the number of non-resident pupils whose transportation on board-owned buses has been authorized in writing by the board of education of the district of legal residence, who are regularly enrolled in kindergarten classes or in grades one through twelve, and who live one mile or more from the school which they attend).

2. An amount for the approved number of miles per day computed as follows: For districts with 'A' road conditions, \$22 per mile; for districts with 'B' road conditions, \$24 per mile; for districts with 'C' road conditions, \$26 per mile; for districts with 'D' road conditions, \$28 per mile.

"B. Contract Bus Service

1. Transportation by contract shall be governed by the same rules that apply to transportation provided by buses owned by boards of education.

2. The reimbursement to eligible district boards of education for contract service shall be calculated as follows:

a. The 'net number of pupils transported' multiplied by \$18.00.

b. The approved number of miles per day for district with 'A' road conditions, \$29 per mile; for districts with

'B' road conditions, \$31 per mile; for districts with

'C' road conditions, \$33 per mile; for districts with

'D' road conditions, \$35 per mile.

"C. Pupils Transported by Public Utility Carrier

An amount not exceeding \$38.00 per year for each pupil transported by a public utility carrier.

"D. Payments to Parents, Guardians of Other Persons

For pupils whose transportation is deemed impractical by school conveyance and where the district board pays the parent, guardian, or other person in charge of such child, an amount which shall not exceed the average transportation cost per pupil, such average cost to be based on the cost of transportation of children by all boards of education in Ohio during the next preceding year. In the event an amount smaller than the state average cost per pupil is paid by the district board, the actual amount shall be used in the calculation.

" * * *

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* * *"

(Emphasis added.)

The proposed new regulations, subject to hearing in June of 1972, are quite similar. They increase the amount of fare support, under Section C. to \$42. They also provide the following definitions:

"(1) * * * * *"

"(2) Conventional Transportation: Refers to the availability of transportation by a board owned school bus, contractor owned school bus or public utility bus as defined in Section 4511.01 (F) of the Ohio Revised Code.

"(3) Public Utility Vehicle: Defined as any type vehicle operating under regulations of PUCO not used exclusively for the transportation of pupils to and from school.

Section 4511.01 (F), Revised Code, reads as follows:

"'School bus' means every bus designed for carrying more than nine passengers which is owned by a public, private, or governmental agency or institution of learning and operated for the transportation of children to or from a school session or a school function, or owned by a private person and operated for compensation for the transportation of children to or from a school session or a school function; provided 'school bus' does not include a bus operated by a municipally owned transportation system, a mass transit company operating exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous to such municipal corporation, nor a common passenger carrier

certified by the public utilities commission unless such bus is devoted exclusively to the transportation of children to and from a school session or a school function."

Clearly, Part C. of the State Board's regulations expressly authorizes the type of program outlined by your first question, in which transportation is provided by fare support on public transportation. Part D. answers your second question. It implies that payments may be made to parents when the primary type of transportation used by the board of education, as specified by Parts A., B., and C., is impractical. If the primary method used is that mentioned in Part C., fare support on public transportation, such transportation would obviously be impractical if inaccessible.

The State Board's regulations have additional weight because they are approved by the Controlling Board (which, for Bill No. 475, supra, is established by Section 20 of that Bill, at page 220). Regulations subject to the approval of the Controlling Board are in effect products of the joint discretion of two boards. In an analagous situation, the Court states in State, ex rel. Kauer v. Defenbacher, 153 Ohio St. 268, 279 (1950), as follows:

"The requirement of approval and consent of the controlling board, in effect, places a limit on the administrative power which the General Assembly has conferred upon the Director of Highways. In giving its approval and consent, the controlling board is exercising administrative and not legislative power. In effect, instead of having conferred the administrative power to determine whether to expend available moneys for the study of a turnpike project on the Director of Highways alone, the General Assembly has conferred that administrative power on the director and the controlling board acting together. See State, ex rel. McCaw, Chief, v. Ferruson, Aud., 139 Ohio St., 1, 38 N.E. (2d), 68; Sims v. Brooklyn Street Rd. Co., 37 Ohio St., 556."

Aside from the State Board's regulations, a consideration of House Bill No. 475, supra, reveals a clear legislative intent to authorize programs such as that outlined by your question. As I indicated, supra, that Bill makes all large cities eligible for transportation payments in their foundation grants. It is common knowledge that public transportation is a practical, economical, and widely used method of transporting pupils in such cities. Hence, the legislature must have intended to authorize reimbursement for such a program as well as for school bus transportation. Any other construction of the Bill would be unreasonable.

Before concluding, I should note that I have read your question narrowly, and ignored incidental questions which may be raised by the fact situation you outlined, but which I do not believe you are asking at this time.

In specific answer to your question it is my opinion, and you are so advised, that:

1. A board of education which provides fare support on public transportation or payments in lieu thereof for its pupils, is eligible for pupil transportation reimbursement under Sections 3327.01 and 3317.051, Revised Code.

2. For purposes of reimbursement by the State Board of Education, the language of Section 3327.01, Revised Code, providing for situations wherein "it is impractical to transport a pupil by school conveyance", covers situations where pupil transportation is inaccessible to certain pupils.