3470.

APPROVAL, NOTES OF MADISON TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN COUNTY, OHIO—$7,000.00.

COLUMBUS, OHIO, August 1, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3471.

MORAL OBLIGATIONS—WHEN BOARD OF EDUCATION MAY RECOGNIZE SUCH CLAIMS—SPECIFIC CASE.

SYLLABUS:

Where a child attending the public schools is injured during its attendance at school, under circumstances which would render the board of education liable in damages for such injury, were it not protected by the rule of non-liability in tort which exists in favor of governmental agencies acting in a governmental capacity, the board of education, in its discretion, lawfully may recognize as a moral obligation, a claim for damages growing out of said injury and pay the same or any part of the same from public funds.

COLUMBUS, OHIO, August 3, 1931.

HON. J. L. CLIFTON, *Director of Education, Columbus, Ohio.*

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

> "A pupil was injured in the manual training shop of a public school while working under the direction of the teacher. The board of education apparently will pay the bill of the physician and surgeon who took care of the injury if the board may do this legally, expending the money from the current funds of the school district. Please advise whether such expenditure may legally be incurred."

In a former opinion, reported in the Opinions of the Attorney General for 1929 at page 378, it is held:

> "A board of education is not liable in its corporate capacity for damages for an injury resulting from the use of the machines or apparatus in the manual training department of a school."

To the same effect is the holding of the Court of Appeals in the case of *Conrad, a Minor,* v. *Board of Education of Ridgeville Township,* 29 O. A. 317, where it is held:

> "In the absence of a statute specifically creating a civil liability a board of education is not liable in damages to a pupil who is taking manual training course in its mechanical department and who suffers injury

as a result of the board's failure properly to protect, as required by law, the machinery used by said pupil."

The principle of law upon which these holdings are based, is well settled in Ohio. A board of education in carrying out its functions acts in a governmental rather than a proprietary capacity and in the absence of statute creating such liability it is not responsible in damages for misfeasance, malfeasance or nonfeasance in office. *Finch* v. *Board of Education,* 30 O. S., 27; *Board of Education* v. *Volk,* 72 O. S., 469; *Board of Education* v. *McHenry, Jr.,* 106 O. S., 357.

Whether or not a claim against a political subdivision which lacks the elements of a legal obligation because of the intervention of technical rules of law, but which in equity and good conscience should be paid, may lawfully be paid as a moral obligation, has been the subject of a number of opinions of this office, and has been frequently considered by the courts.

It is not necessary at this time to review the numerous authorities on this subject. It will be sufficient to direct your attention to the several prior opinions of this office where the subject is quite extensively treated and the authorities reviewed. See Opinions of the Attorney General for 1928, pages 352 and 3056; for 1929, pages 325, 915 and 1939; Opinion 1442, rendered under date of January 24, 1930.

Particularly pertinent to your inquiry is the 1929 opinion, found in the published Opinions of the Attorney General for that year, at page 915, where it is held as stated in the syllabus:

"1. Boards of education may lawfully, under proper circumstances, recognize moral obligations of the school district and pay claims as such from the public funds of the district.

2. A moral obligation of the State or a political subdivision thereof is a claim sounding either in tort or contract, whereby the State or political subdivision thereof, received some benefit, or the claimant suffered some injury, which benefit or injury would be the basis for a legal claim against the State or political subdivision, were it not that because of the intervention of technical rules of law, no recovery may be had."

The above opinion was rendered in response to the following question:

"Child seriously injured in the gymnasium in the Greenfield schools. It was necessary to call a local physician. It was also necessary that the child be confined in a hospital for some little time thereafter. The physician and hospital board have presented their bills for services rendered for said child to the board of education of Greenfield, Ohio.

Can the board of education legally pay from school funds either or both of the aforesaid bills which have been presented?"

In the course of the opinion it is said:

"It would be beyond the scope of this opinion to discuss the question of negligence generally. Suffice it to say that a claim of the physician and hospital for services rendered to the injured child cannot lawfully be paid by the board of education of Greenfield schools as a moral obligation of the school district unless the circumstances surrounding the injury were such that the child would have had a legal claim for damages on account of said injury, save for the fact that no recovery may be had against a board of education in tort for injuries suffered by school children in the course of their attendance at school."

From the foregoing, it will be noted that the question of whether or not a claim may be paid as a moral obligation when it falls short of being a legal obligation because of the intervention of technical rules of law, such as the rule that boards of education act in a governmental capacity as distinguished from a proprietary capacity in carrying out their functions and are therefore not liable in tort in any case, depends entirely on the circumstances of each particular case.

If an injury occurs to a pupil or to anyone else in such a way that the board of education would be liable in damages for said injury if it had been acting in a proprietary capacity as distinguished from a governmental capacity the damages directly and proximately growing out of such injury may lawfully be compensated for as a moral obligation, otherwise not.

To definitely determine this question involves consideration of questions relating to negligence and contributory negligence and proximate and remote cause and involves the judicious weighing of evidence pertaining to the facts of the case.

Ordinarily, a child pupil who would be using tools in the manual training shop of a school would not be held to the same degree of care as should be exercised by older persons. The care which it should exercise and which the law would require of it to absolve it from contributory negligence depends to a great extent on its age and probably its previous experience and training. Then, too, the circumstances under which the injury occurred must be considered, to determine whether or not negligence existed and whether or not the injury was the direct and proximate result of what would be actionable negligence if proprietary relations existed between the child and the board of education. This involves consideration of questions relating to the guarding of dangerous machinery, of proper supervision of the pupil, of proper warning to the pupil, of the promulgation and enforcement of proper rules and regulations, and many other considerations which might be peculiar to each individual case.

From this it will readily be seen that it is impossible to give a direct categorical answer to your question without considering all of the facts pertinent to the particular inquiry.

The best that may be said by way of categorical answer to your question is that if the injury to the child in question occurred in such a way and under such circumstances that recovery for damages could be had against the school authorities, if the school were a private school which was not protected by the rule of non-liability which exists in favor of governmental agencies, instead of a public school, the board of education about which you inquire may lawfully recognize the claim of the attending physician as a moral obligation and pay the same from school funds.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3472.

APPROVAL, CONTRACTS FOR GRADE SEPARATION IMPROVEMENTS IN SPRINGFIELD, CLARK COUNTY, OHIO.

COLUMBUS, OHIO, August 3, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*