

to which Hutchinson was elected at the November, 1923, election until the beginning of the term for which he was elected. *State, ex rel., vs. Dahl*, 55 Ohio St., 195, 45 N. E., 56. The action taken at that time by council was authorized by the provisions of Section 4242, General Code, which provides that council may declare vacant the office of any person elected or appointed to an office who fails to qualify therefor within the time required by law, and the election of Larsen to fill the vacancy was authorized by Section 4236, General Code. *State, ex rel., Spaulding, vs. Baldwin*, 101 Ohio St., 65, 127 N. E., 871."

It is obvious that the reasoning of the above case is dispositive of your query. I am therefore of the opinion, in specific answer to your question, that neither Mr. C nor Mr. H is entitled to hold over until a successor to Mr. L is elected and qualified, and I am further of the opinion that a suitable person having the qualifications of an elector in the township should forthwith be appointed for the remainder of the term to which L was elected in November, 1931, by the justice of the peace holding the oldest commission in Brown township, Carroll county, in accordance with sections 3265 and 3262, General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4081.

SCHOOL TERRITORY—DISCRETIONARY WITH EXEMPTED VILLAGE SCHOOL DISTRICT TO ACCEPT TRANSFER FROM COUNTY BOARD OF EDUCATION—TUITION OF HIGH SCHOOL PUPILS RESIDING IN DISTRICTS WHERE NO HIGH SCHOOL LOCATED.

SYLLABUS:

1. *When a transfer of school territory is made by a county board of education to an exempted village school district, by authority of Section 4696 of the General Code, the board of education of the exempted village school district to which the transfer is made, in its discretion, may or may not accept such transfer.*
2. *School pupils of all grades are subject to assignment by the proper school authorities to the schools within the district of their residence, or to schools outside the district, if the proper school facilities suitable to their age and state of advancement are not obtainable within the district.*
3. *The tuition of pupils who are eligible to high school and who reside in districts in which no high school is maintained, must be paid by the school district in which they have a legal school residence.*
4. *When a high school is maintained by a board of education and resident high school pupils are assigned to this school, and transportation furnished thereto, the district can not be held for any tuition in the event the pupils choose to attend a school outside the district.*
5. *When a high school pupil is assigned, by authority of Section 7764 of the General Code, to a high school outside the district of his residence, which is more than four miles from his residence and transportation is furnished for him to that school by the board of education of the district of his residence that board is*

liable for so much tuition only, as it would be required to pay in the school to which he is assigned, regardless of where he attends school.

COLUMBUS, OHIO, February 20, 1932.

HON. DAVID D. PORTER, *Prosecuting Attorney, Medina, Ohio.*

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

“On June 15th, 1931, the Medina County Board of Education, under provisions of Section 4736, General Code of Ohio, created a new school district out of Sharon Township School District and parts of Medina Township and Montville Township School Districts.

By misrepresentation a remonstrance was secured from over 50% of the electors in the newly created school district. This was presented to the County Board of Education just before the expiration of the 30 day period allowed for remonstrance.

On August 29, 1931, the Medina County Board of Education created a new school district out of portions of Montville and Medina Township School District and Sharon Township School District. Changes were made in the territorial lines so that this was not the same district as created on June 15th, 1931.

Former circulators of the remonstrance realized the futility of an attempt to secure such a remonstrance and no remonstrance was presented.

A Board of Education was appointed and organized as provided under Section 4736. (a) Upon petition of more than 75% of the electors in the Medina Township School District and a portion of Montville Township School District on September 19th, 1931, the Medina County Board of Education under provisions of Section 4696, transferred to Medina Village School District the territory requested in the petition. (b) A portion of the territory thus transferred on September 19th, 1931, was a part of the new school district created by action of the County Board of Education August 29th, 1931.

On January 26th, 1932, the Medina Village Board of Education refused to accept the transfer.

Pending action of the Medina Village Board of Education no distribution of the funds of the newly created school district was made.

* Transportation *

The Board of Education of the new Sharon School District as created by the County Board of Education August 29th, 1931, provided a means of transportation for all of the children in the newly created school district—a portion of these children refused such transportation and went to the Medina Village School District. Two months later this group was notified that the bus would be discontinued, but that the board of education of the Sharon School District was ready at all times to furnish transportation of said group to the Sharon School District.

The parents of the children attending the Medina Village School and the Medina Village Board of Education were notified that the Sharon Board of Education would not be responsible for tuition or any expense incident to the attendance of any of these children at the Medina Village School.

* Tuition *

(State Aid School District)

Weymouth School District maintains a two-room elementary school and provides education for high school pupils elsewhere.

All high school pupils live more than four miles from any high school and transportation is furnished.

State Department of Education ordered (presumably under Sections 7595, 7595-1, 7596) the Weymouth Board of Education to send the high school pupils to Granger, another State Aid District, maintaining a first grade high school. A yearly saving of approximately \$2,000.00 was thus effected.

The County Superintendent of Schools assigned the Weymouth High School students to the Granger Township High School.

Some of the high school pupils of the Weymouth School District attended Medina Village, an exempted village school district. Parents of these pupils attending Medina Village School were notified of the conditions and that tuition would not be paid by the Weymouth Board of Education.

* Questions *

Does the newly created school district stand as per the action of the Medina County Board of Education August 29th, 1931?

Is the Sharon Board of Education in any way responsible for tuition expense of pupils attending Medina Village School?

Is the Weymouth Board of Education responsible for the whole or any part of the tuition of those pupils from Weymouth who attended the Medina Village School?"

By force of Section 4736, General Code, a county board of education is authorized to create new school districts from two or more districts of the county school district, or parts thereof. The statute further provides that when a new district is created by action of the county board of education, a board of education for the district shall be appointed. It provides, however, *inter alia*:

" **Such action of the county board of education shall not take effect if a majority of the qualified electors residing in the territory affected by such order shall within thirty days from the time such action is taken file with the county board of education a written remonstrance against it. **"

I assume from your statement that a proper remonstrance against the action of the board taken on June 15, 1931, was filed. At least the board chose to consider this remonstrance as having rendered its action in creating a new school district on June 15, 1931, of no effect, and later, on August 29, 1931, created a new school district which included parts of the same districts involved in their former action, and parts, and possibly all, of the total which had been included in the district which the board formerly attempted to create. The fact, if it is a fact, that the signatures to this remonstrance were obtained by misrepresentation, is not material at this time. It is possible that some action might have been taken at the time, to have had those signers of the remonstrance whose signatures had been obtained by misrepresentation to withdraw, but, as this does not appear to have been done, we should now consider the remonstrance good and the attempt

on the part of the board to create a new district on June 15, 1931, as being ineffectual.

As no remonstrance was filed following the action of the board in creating a new district on August 29, 1931, the district as then created became a separate school district and still exists as such. I am informed that this district is called the "Sharon Township Rural School District." Distribution of the funds and indebtedness between this Sharon Township Rural School District, as created on August 29, 1931, and the several districts from which portions of territory were taken to constitute the Sharon District should now be made, if it has not already been done.

The action of the board, of September 19, 1931, in transferring a portion of this Sharon District to Medina Village District (an exempted village district) in pursuance of Section 4696 of the General Code, was ineffectual, for the reason that Medina Village District refused to accept this transfer, as it was privileged to do. See *State ex rel. vs. Board of Education*, 122 O. S. 463.

With reference to the question of whether or not the Sharon Board of Education is responsible for the tuition of resident pupils who may attend the schools in Medina Village District, you do not state whether the pupils in question are elementary or high school pupils, or whether the Sharon District maintains a high school of its own.

The liability of a school board for foreign tuition is somewhat different for high school pupils than for those pupils who attend school in the elementary grades.

The law is clear that a board of education is not liable for tuition for resident elementary pupils who attend school in another district, providing the board furnishes, or is ready and willing to furnish transportation to the local schools to which the pupils are assigned. The resident pupils of a school district are subject to assignment by the proper school authorities to the schools of the district and, under some circumstances to schools outside the district. See Sections 7684 and 7764 of the General Code.

The only statutory authority for elementary school pupils to attend any other school than the one to which they are assigned at the instance of the district of their residence, is that contained in Section 7735 of the General Code, which provides in substance, that when pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein than the nearest school in another district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect, providing of course, proper notice is given as provided by the statute.

Section 7737, however, provides that when the schools of a district are centralized or transportation of pupils provided the provisions of Section 7735 of the General Code, shall not apply.

The law is not so clear with reference to the liability of a school district for the tuition of its resident high school pupils who attend high school outside the district, especially if no high school is maintained by the board.

If high school facilities are available within a school district, and the board of education of the district authorizes transportation to the high school maintained by it, no liability will attach to the board for the payment of tuition for resident pupils who attend high school outside the district. If, however, high school privileges are not available within the district the board of education within the district is liable for the tuition of its resident high school pupils who

attend high school in other districts. See Sections 7747 and 7748, General Code. Section 7747, General Code, provides in part as follows:

"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, such tuition to be computed by the school month. **"

Even though a board of education may maintain a high school, if transportation is not furnished to the high school, the board will be liable for the tuition of pupils who reside more than four miles from the high school maintained by it and who attend a nearer high school. Section 7748, General Code, provides with reference to this matter:

" **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. **"

Prior to the codification of the statutes, in 1910, the liability of boards of education for foreign tuition of high school pupils was fixed by Section 4029-3 of the Revised Statutes. This statute was codified as Sections 7747 to 7751, inclusive, of the General Code. Since that time, most of these sections have been amended, some of them several times; Section 7751 has been repealed and supplemental Sections 7748-1, 7749-1 and 7749-2 have been enacted. Section 7764, General Code, formerly Section 4022-1, Revised Statutes, has been amended several times during the past few years. As so amended it now very materially affects questions relating to the liability of boards of education for tuition and transportation of high school pupils. All these several sections of the statutes are in *pari materia*, and must be construed together.

By reason of these several enactments made at different times, many complicated questions arise in this connection, particularly with reference to the liability of a school board, which does not maintain a high school for tuition and transportation of its resident high school pupils.

A number of opinions have been rendered by this office dealing with these questions, under a variety of circumstances. Many times the liability of a board of education for tuition of its resident high school pupils who attend school in another district, depends on the distance the pupil lives from the high school to which he is assigned and whether or not transportation is furnished.

A board of education may furnish transportation for its high school pupils but in no case is it required to do so, unless it be a centralized district and transportation is furnished for the elementary school pupils or unless such high school transportation is deemed and declared by the county board of education, to be advisable and practicable. A board's liability for tuition, however, may, under certain circumstances, be materially affected by its failure to furnish transportation.

Your attention is directed to the following opinions of this office, where

these questions in their many phases, are discussed: Opinions of the Attorney General for 1927, page 2692; for 1928, pages 1925, 1955 and 2613; for 1929, page 1828; for 1930, page 1464. The syllabus of the last opinion referred to, which opinion quite thoroughly covers questions that may arise in connection with the liability of a school board which does not maintain a high school for tuition of its resident high school pupils who have been assigned to a high school outside the district, is as follows:

"1. A board of education may, in its discretion, furnish transportation for pupils attending high school, but it is not required to do so, except in centralized districts which maintain a high school and furnish transportation for elementary school pupils, unless the said transportation is deemed and declared by the county board of education to be advisable and practicable.

2. Even though a high school pupil residing in a school district which does not maintain a high school is assigned to a high school outside the district of his residence, by authority of Section 7764, General Code, the pupil may elect to attend another high school. If, however, the school to which he is assigned is within three miles of his residence, and the board of education of the district of his residence contracts with the board of education of the district which maintains the school to which he is assigned for the schooling of all its high school pupils, by authority of Section 8750, General Code, the said board of the district of the pupil's residence will be exempt from the payment of tuition in any other school to which the pupil may elect to go.

3. When, upon such assignment of pupils, transportation is furnished to the high school by the board of education of the district of a pupil's residence either of its own volition or by reason of the action of the county board of education in deeming and declaring such transportation to be advisable and practicable; the liability of said board for tuition and transportation in another school to which a pupil may elect to go, shall be based upon the cost of transportation and tuition incident to attendance at the school to which he may have been assigned, regardless of the distance the pupil may live from the school to which he had been assigned or of any contract which may exist between the boards of education, if the pupil lives three miles or more from such school. If the pupil lives within three miles of the school to which he is assigned, and the board of the district of his residence has contracted with the board of the district maintaining the school to which he is assigned, for the schooling of its high school pupils, the rule with respect to the payment of tuition set forth in syllabus No. 2 above, will apply, whether transportation is furnished or not.

4. When, upon such assignment of pupils, transportation is not furnished to the high school to which they are assigned, either by the board upon its own volition, or by order of the county board, those residing more than four miles from the school to which they are assigned, who elect to attend some other high school, are entitled to have all their tuition paid by the board of education of the district of their residence in the high school which they choose to attend, regardless of any contract that may exist between the two boards for the schooling of the pupils. They are not entitled, under those circumstances, to have any part of their transportation paid. Those residing four miles

or less from the school to which they are assigned, are entitled to have so much of their tuition paid in another school which they may elect to attend as would be paid by the board of the district of their residence if they attended the school to which they had been assigned, providing no contract exists between the two boards made by authority of Section 4750, General Code. If such a contract does exist, those living within three miles of the school to which they are assigned, must attend that school or pay their own tuition in another school if they choose to attend such other school; those living three miles, and not more than four miles from the school to which they are assigned, may attend another school and have so much of their tuition paid by the board of education of the district of their residence as would be paid for them if they attended the school to which they had been assigned. None of these pupils may claim the right to be transported."

The determination of the liability of the Sharon School Board for tuition of its resident high school pupils who may attend the Medina Village High School is not difficult, regardless of the distance the pupils live from the school maintained by the board or the one to which they may be assigned, whether the district maintains a high school or not, as it appears transportation was being furnished or would be furnished for all the pupils of the district.

Under those circumstances, the pupils must attend the school to which they are assigned within or without the district, or pay their own tuition in any other school they attend, unless the district does not maintain a high school and the pupils are assigned to a school outside the district which is more than four miles from their residence, in which event the Sharon School Board would be liable for so much of their tuition in the Medina High School if the pupils attended that school, as it would be required to pay in the school to which they had been assigned. See Section 7764, General Code.

I come now to the question of the liability of the Weymouth School District for the tuition of its resident high school pupils. It appears from your statement that this district does not maintain a high school and that all its resident high school pupils have been assigned to the Granger District High School, which is more than four miles from the residence of any of the pupils. Transportation, however, is being furnished for these pupils.

The liability of the Weymouth School District for tuition of any of its resident pupils, under the circumstances, who may attend the Medina Village High School, is controlled by Section 7764 of the General Code.

Under the circumstances, these pupils are not required to attend the Granger High School, even though they have been assigned to that school, inasmuch as the school is more than four miles from their residence. If they attend the Medina Village High School the Weymouth Board of Education is liable for their tuition, but only to the extent, and in such an amount, as it would be required to pay to the Granger District if the pupils attended the Granger High School as will be observed from a reading of the last sentence of Section 7764 of the General Code, which reads as follows:

"**Provided, however, that when a high school pupil shall attend a high school other than that to which such pupil has been assigned, the transportation and tuition shall be based on the cost of the transportation and tuition incident to attendance at the school to which they shall have been assigned."

In specific answer to your questions, I am of the opinion:

1. The Sharon School District, as created by the Medina County Board of Education, on August 29, 1931, exists at this time as it was so created.

2. Assuming that the Sharon Board of Education maintains elementary schools and furnishes transportation for its elementary pupils to those schools, no liability exists against the Sharon Board of Education for tuition of any of its elementary pupils who attend schools outside the district.

If the Sharon Board of Education maintains a high school and furnishes transportation for its resident high school pupils to that school, it can not be held for tuition for any of its resident pupils who attend school outside the district.

If the Sharon Board of Education does not maintain a high school and assigns its high school pupils to a school outside the district, and furnishes transportation thereto, it is not liable for the tuition of any of its pupils who attend another school than the one to which they are assigned, unless the school to which they are assigned is more than four miles from the residence of the pupils, in which event, the pupils may attend another high school and the Sharon Board of Education will be liable for their tuition in that school to the extent, and in the amount that it would be required to pay in the school to which they had been assigned.

3. The Weymouth Board of Education, under the circumstances stated in your inquiry, is liable for the tuition of its resident high school pupils who attend the Medina Village High School. The amount of such tuition for which they are liable is that amount which they would be required to pay to the Granger Township Board of Education if the pupils had attended the Granger Township High School to which they had been assigned. The fact that the parents of these pupils who attend the Medina Village High School were notified that tuition would not be paid by the Weymouth Board of Education has nothing to do with the matter as the law fixes the liability of the Weymouth Board of Education under the circumstances mentioned.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4082.

APPROVAL, NOTES OF WILLOUGHBY RURAL SCHOOL DISTRICT,
LAKE COUNTY, OHIO.—\$16,500.00.

COLUMBUS, OHIO, February 20, 1932.

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

4083.

APPROVAL, NOTES OF SMITH RURAL SCHOOL DISTRICT, MAHON-
ING COUNTY, OHIO—\$8,000.00.

COLUMBUS, OHIO, February 20, 1932.

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