

2349.

TRANSPORTATION OF PUPILS—BOARD OF EDUCATION—WITHIN BOARD'S DISCRETION TO TRANSPORT HIGH SCHOOL PUPILS—EXCEPTION— ASSIGNMENT OF PUPILS—ELECTION OF HIGH SCHOOL BY PUPIL—DISTANCE FROM SCHOOL—LIABILITY OF BOARD FOR PAYMENT OF TRANSPORTATION AND TUITION IN PARTICULAR INSTANCE DISCUSSED.

SYLLABUS:

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 7750, General Code, the said board of the district of the pupils 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.

COLUMBUS, OHIO, September 16, 1930.

HON. MERVIN DAY, *Prosecuting Attorney, Paulding, Ohio.*

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

“We desire your opinion upon the construction of Sections 7750 and 7764 upon the following state of facts:

Auglaize Township Rural School District and Brown Township Rural School District are school districts lying contiguous to each other and both are in Paulding County School District. Auglaize Township School District has no high school within its borders; Brown Township Rural School District has and maintains a first class high school within its borders at Oakwood, Ohio, hereinafter called the Oakwood High School.

All of Auglaize Township Rural School District lies more than three miles from Oakwood, Ohio, and also lies more than three miles from Defiance, Ohio, where the city of Defiance maintains a first class high school in the city of Defiance and in Defiance County.

Heretofore, Auglaize Township Rural School District has not paid transportation of high school pupils and part of the high school pupils have been attending the Defiance High school and part have been attending the Oakwood High School. For the coming school year the superintendent of the Paulding County School District who has jurisdiction over both Township Rural School Districts and high school at Oakwood, Ohio, has assigned the pupils of the Auglaize Township Rural School District to the Oakwood High School for school attendance, saving and excepting that all seniors in high school who have hitherto been attending at Defiance have been granted the privilege of finishing their high school course at the Defiance High School. The Auglaize Township Board of Education has purchased two trucks and hired men to run them at public expense to transport all of the high school pupils of the Auglaize Township Rural School District to Oakwood, Ohio. The cost of tuition at Oakwood is \$72.00 for the school year and the cost at Defiance is \$120.00 for the school year. We wish to have the following specific questions answered:

1. In case any of the Auglaize Township High School pupils elect to attend the Defiance High School, what rate of tuition for each pupil is Auglaize liable to pay, that is, the Oakwood rate or the Defiance rate?

2. Would the Auglaize Township Rural School Board be liable to pay the transportation of pupils to the Defiance High School in case they should so elect to attend the Defiance High School?

3. If the Auglaize Township Rural School Board is legally liable to pay transportation to Defiance High School in the above state of facts, how would the cost of such transportation be ascertained and to what amount would they be liable for such transportation having in mind the proviso in the latter part of Section 7764, General Code?

I might further add that the provisions the Auglaize Township Board have made for transportation are adequate to transport all high school pupils to the Oakwood school.

If they are liable for any further transportation charges to the Defiance High School, this burden on the Auglaize Township District will be in addition to the burdens they have already assumed."

By the terms of Sections 7747 and 7748, General Code, all boards of education which do not furnish high school facilities within their districts, are required to pay the tuition of pupils who reside in the district and who are eligible for admission to high school and do attend high schools in other districts. This liability is governed to some extent by the terms of Sections 7750 and 7764, of the General Code of Ohio. Said Sections 7750 and 7764, General Code, read as follows:

Sec. 7750. "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."

Sec. 7764. "The child in his attendance at school shall be subject to assignment by the principal of the public school or superintendent of schools as the case may be, to the class in elementary school, high school or other school, suited to his age and state of advancement and vocational interest, within the school district; or, if the schooling is not available within the district, without the school district, provided the child's tuition is paid and provided further that transportation is furnished in the case he lives more than two miles from the school, if elementary, or four miles from the school, if a high school or other school. The transportation of high school pupils under this section shall be in accordance with the provisions of 7749-1. The board of education of the district in which the child lives shall have power to furnish such transportation. 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 the interpretation and application of the above Sections 7750 and 7764 of the General Code, it is well to bear in mind that the provisions of Section 7764, General Code, are of later enactment than those of Section 7750, General Code. Section 7750, General Code, was enacted in its present form in 1909 (100 O. L. 74), whereas the provisions of Section 7764, General Code, with respect to the assignment of pupils were incorporated in the statute in 1921 (100 O. L. 380). In 1925, Section 7764, General Code, was amended, by the addition of the following:

"The transportation of high school pupils under this section shall be in accordance with the provisions of Section 7749-1. * * * 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." (111 O. L. 125).

Section 7749-1, General Code, referred to in Section 7764, General Code, as amended in 1925, was enacted by the same Legislature that amended said Section 7764, by the insertion of the reference to said Section 7749-1, and in the same act. (111 O. L. 124). Said Section 7749-1, General Code, as then enacted and now in force, provides in substance that whether or not high school pupils shall be transported in any case is purely discretionary with local boards of education, except in centralized districts which maintain a high school and transport elementary school pupils, unless the county board of education determines and declares that such transportation is advisable and practicable, in which case the local board must furnish transportation or board and lodging in lieu thereof.

It is well settled that the proper interpretation of Section 7749-1, General Code, as amended in 1925, is to the effect that a local board of education is not compelled to transport high school pupils or pay for such transportation or for board and lodging in lieu of such transportation in any case, except in centralized districts as noted above, (See Section 7749, General Code) unless the county board of education deems and declares such transportation advisable and practicable. Such was the holding in the case of *State ex rel. Plance vs. Wayne County Board of Education*, decided October 17, 1929. Ohio Law Abstract, issue of November 16, 1929, 7th Abstract, 666. The same conclusion was reached by the Court of Appeals of Belmont County in the unreported case of *Ewers et al. vs. Cook*, where the decision of the Common Pleas Court of Belmont County (27 O. N. P. (N. S.), page 438, was reversed. Motion to certify the record in this case was overruled by the Supreme Court, February 5, 1930, case No. 22084.

Because of the terms of Section 7749-1, General Code, as interpreted by the courts, the provisions of Section 7764, General Code, to the effect that children are subject to assignment to a high school within, or outside of the district in which they reside, providing transportation is furnished if the school be more than four miles from their respective residences, does not have the effect of requiring such transportation to be made in all such cases, but does require the transportation to be furnished if the district of the children's residence is to have the benefit of the clause in the statute limiting the amount of tuition and transportation to be paid by the board, if the children attend another school than the one to which they are assigned, to that which would be paid if the children attended the school to which they had been assigned.

In other words, if an assignment of high school pupils were made to a high school within or without the district and transportation is not furnished beyond the four mile limit, the children residing beyond that limit may attend another high school and have all their tuition paid in such school even though it be more than it would have been if they had attended the school to which they were assigned. The same is true with reference to transportation, if in fact the board is required to furnish transportation at all, that is if the county board deems and declares such transportation advisable and practicable.

So far as children who live less than four miles from the school to which they are assigned are concerned, the question of transportation is not material so far as the question of the payment of tuition is concerned. That is to say, the amount of tuition and transportation for which the board may be held for such pupils, no matter where they attend school, is based on the amount that would have to be paid for them if they attended the school to which they are assigned, whether transportation is furnished or not.

If such pupils live within three miles of the school to which they are assigned in another district, and the board of education of the district where they reside has a contract with the board which maintains the high school to which they are assigned, for the schooling of all its high school pupils, the home board cannot be held for any tuition if they attend another school. Such children must attend the school to which they are assigned if they want their tuition paid by the board of education of the school district in which they reside. Section 7750, General Code, is clear on that point. If, however, they live more than three miles and less than four miles from the school to which they are assigned, they may attend another school, if they wish, and so much of their tuition in the other school must be paid by the board of education of the district of their residence as would have to be paid if they attended the school to which they had been assigned.

In short, if a local board of education makes a contract with another board for the schooling of all its high school pupils, by authority of Section 7750, General Code, naturally the pupils will be assigned to that school, but whether a formal assignment is made or not and whether transportation is furnished or not, all such pupils who live within three miles of such school must attend the school to which they are assigned and with whom the board has a contract, or pay their own tuition in another school which they may attend. If the board does not have such a contract, those pupils may attend another school and have so much of their tuition paid as would have been paid in the school to which they had been assigned. Regardless of any contract, if they live three miles and less than four miles from a school to which they have been assigned they may attend another high school, and the board of education of their home district will be required to pay their tuition at the same rate it would have been required to pay it if they had attended the school to which they had been assigned, whether transportation is furnished or not. If they live more than four miles from the school to which they are assigned, and transportation is furnished, the board is only required to pay tuition at the rate which it would be required to pay if they attended the high school to which they had been assigned, even if they attend some other high school. If transportation is not furnished such pupils may have their entire tuition paid in some other school.

Coming now to apply the foregoing principles to the concrete case about which you inquire, it appears that inasmuch as all of Auglaize Township Rural School District is more than three miles from the high school in both Brown Township and Defiance districts, a contract between the Board of Education of Auglaize Township District and either of the other districts named would not serve to release the board from the payment of tuition for any pupils who would attend another school than the one in the district with which such a contract might be made. All of the said pupils live more than three miles from the school in either of the other districts.

The fact that transportation is furnished makes no difference, so far as such a contract is concerned. You will observe that the statute, Section 7750, General Code, makes no mention of transportation.

You do not state whether the Auglaize Township Board has contracted with the Brown Township Board for the schooling of its high school pupils, or not. Be that as it may, the pupils have been assigned to the Brown Township School and the respective rights of the pupils and the board are controlled wholly by the terms of Section 7764, *supra*.

Inasmuch as transportation is to be furnished for all the high school pupils residing in Auglaize Township District to the Brown Township School whether they live four miles from the school, more or less, and all reside more than three miles from that school, their rights with respect to tuition are all the same, whether

or not a contract for the schooling exists between the two boards. That is to say, if they attend any other school, only so much of their tuition will be paid by the Auglaize Township Board in the other school as would be paid by the board if they attended the Brown Township School.

The law is not so clear with reference to the payment of transportation under those circumstances, if the pupil elects to attend another school than the one to which he is assigned. As before stated, the board is not required to transport any high school pupils, unless ordered to do so by the county board. Apparently, the Auglaize Township Board has elected, of its own accord, to transport all the high school pupils to the Oakwood School, and having done so, it is my opinion that it would be guilty of unjust discrimination, and thus of an abuse of discretion to refuse to furnish equal facilities to those who choose to attend another school. The law seems to indicate that transportation shall be furnished to pupils attending another school than the one to which they are assigned to the same extent it is furnished to those who attend the school to which they are assigned by stating that when a high school pupil attends a high school other than that to which he 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, therefore, I am of the opinion:

1. In the event any of the Auglaize Township School pupils elect to attend the Defiance High School, the tuition which the Auglaize Township Board must pay for such pupils is limited to the amount it would pay if the pupil attended the Oakwood School.

2. If any of the Auglaize Township District pupils choose to attend Defiance High School, the Auglaize Township Board is obligated to pay so much of the cost of transportation to said Defiance High School as it would cost to transport the pupil to the Oakwood School.

Respectfully,

GILBERT BETTMAN,

Attorney General

2350.

APPROVAL, LEASE TO THE OHIO FUEL GAS COMPANY, COLUMBUS, OHIO, FOR RIGHT TO LAY DOUBLE GAS PIPE LINE ACROSS THE ABANDONED HOCKING CANAL IN BERNE TOWNSHIP, FAIRFIELD COUNTY, OHIO, AND ACROSS THE ABANDONED OHIO CANAL IN LIBERTY TOWNSHIP, FAIRFIELD COUNTY, OHIO.

COLUMBUS, OHIO, September 16, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certain lease in triplicate executed by you as Superintendent of Public Works and as Director of said department by which there is leased and granted to the Ohio Fuel Gas Company of Columbus, Ohio, for a term of fifteen years and for an annual rental of \$24.00 the right to lay and maintain a double gas pipe line across the abandoned Hocking Canal in Berne Township, Fairfield County, Ohio, and across the abandoned Ohio Canal