

Finding said contract and resolution proper as to form and legality, I have accordingly endorsed my approval thereon and return the same herewith to you.

Respectfully,

GILBERT BETTMAN,  
Attorney General.

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1671.

TRANSPORTATION OF ELEMENTARY PUPILS LIVING MORE THAN TWO MILES FROM SCHOOL, DISCRETIONARY—ALL PUPILS WITHIN SAME CLASSIFICATION ENTITLED TO EQUAL TRANSPORTATION FACILITIES—SPECIFIC EXAMPLES.

*SYLLABUS:*

1. *It is within the discretionary powers of a board of education to furnish transportation for school pupils who reside less than two miles from the school building in which they attend school.*
2. *A board of education, although vested with discretionary powers with reference to transporting pupils within the two mile limit, is not permitted to abuse that discretion by exercising undue and arbitrary discrimination in providing such transportation.*
3. *When a board of education, by resolution, formally classifies pupils who reside less than two miles from the school building where they attend school, basing such classification on real and substantial differences either with reference to the age of the pupils or the distance they live from the school, or otherwise, and formally resolves to transport the pupils within a certain class, it is the board's duty to provide substantially the same transportation facilities for all the pupils in each class.*
4. *The board of education of a school district may lawfully provide transportation for pupils who attend the first, second and third grades of school, regardless of the distance they reside from the school building where they attend school, even though transportation is not furnished for pupils who live less than two miles from school and who attend the higher grades.*

COLUMBUS, OHIO, March 25, 1930.

HON. G. H. BIRRELL, *Prosecuting Attorney, Warren, Ohio.*

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

"Section 7731 of the General Code provides that all elementary pupils living more than two miles from the school building must be transported; and according to an opinion of the Attorney General in 1927 (Vol. IV, page 2489), this distance should be computed by measurement from the nearest door of the school building, along the highway, to a point opposite the entrance to the curtilage of the residence of the pupil, (or the path or traveled way leading to the entrance of such curtilage as the case may be) thence to the entrance of the curtilage, along the path or traveled way to said entrance if the curtilage of the residence of the pupil does not extend to the highway."

Warren Township is a centralized district, and the board of education of this district has been providing transportation for all pupils who live more than one and one half miles from the school building, the distance being determined according to the rule given in the opinion just quoted.

The board now deems it desirable to extend its transportation to pupils living more than one mile from the building. A certain allotment area has a frontage on a public highway leading to the school building, which frontage is entirely within the mile distance. The lanes of this area are not public highways nor are they passable to school busses. Some of these lanes extend so far back that some pupils would actually travel more than a mile in reaching the school building, although their exit upon the highway is within the mile.

The question is: May the Warren Township Board of Education furnish transportation to those pupils whose residence or exits lie beyond one mile from the school building, without providing similarly for those pupils living in the area just described, so long as none of these latter live more than a distance of two miles as determined by application of the rule previously cited?

A second question is: May the Board furnish transportation to pupils in the lower grades (1, 2 and 3) at a distance of one mile, while requiring those in the higher grades to walk one and one half miles?"

Transportation of elementary school pupils who reside less than two miles from the school to which they are assigned, is not compulsory. In fact, the power of a board of education to furnish such transportation has been questioned.

By the terms of Section 7749-1, General Code, the right of a board of education to furnish transportation for high school pupils, regardless of the distance they live from school, is clear, but since the amendment of Section 7731-1, General Code, in 1925, (111 O. L. 123) by which amendment the language formerly incorporated in the statute extending the optional right to boards of education to transport pupils living less than two miles from school was taken out of the statute, some doubt has existed whether a board of education could lawfully expend public funds to transport such pupils. It was held, however, in Opinion No. 1524, rendered under date of February 14, 1930, and addressed to the Bureau of Inspection and Supervision of Public Offices, that such transportation may lawfully be furnished. The syllabus of the said opinion reads as follows:

"A board of education may in its discretion lawfully provide transportation for elementary school pupils who reside less than two miles from the school to which they are assigned, but cannot be required to provide that transportation."

It of course is desirable, in providing transportation for pupils, that all pupils similarly situated, be treated alike, but I know of no law positively requiring that this be done in all cases. Even though some pupils living within the two mile limit are transported incidentally in connection with the transportation of other pupils, the transportation of whom is required by law, the board is not bound, for that reason, to transport all the pupils within the two mile limit. When that happens, some of the pupils of the school district living less than two miles from school, may be transported, while others who live less than two miles from school are not transported, and in my opinion, those who are not transported under those circumstances have no recourse.

It frequently happens that in transporting pupils who live more than two miles from the school, which pupils the board is required to transport under the law, the vehicle used in transporting the pupils passes the residence of pupils who live less than two miles from school, thus affording those pupils the opportunity to ride, while in another part of the district where no pupils reside who are more than two miles from the school, and no vehicle for the transportation of pupils is operated in that part of the district, the pupils are not afforded the opportunity to ride. The mere fact that some of the pupils are afforded an opportunity to ride would not require the board to furnish the same opportunity to other pupils in the district who live less than two miles from the school which they attend. It is simply the ill fortune of those who do not have the opportunity to ride the school bus operated for pupils beyond the two mile limit, and the good fortune of those who do have that opportunity.

Absolute uniformity in the transportation of pupils, while much to be desired, is in many cases a physical impossibility, and it is my opinion that none of the pupils who live less than two miles from the school which they attend in Warren Township measuring that distance by the rule laid down in the 1927 opinion referred to, can claim the absolute right to be transported, even though some of the other pupils similarly situated, are transported.

However, the board of education, although vested with discretionary powers with reference to transporting pupils within the two mile limit, is not permitted to abuse that discretion by exercising undue and arbitrary discrimination in providing such transportation. If the board, formerly, by resolution, classifies such pupils, basing the classification on real and substantial differences, either with reference to the age of the pupils, the distance they live from the school, or otherwise, and formally resolves to transport the pupils within a certain class, it is my opinion that it is the board's duty to provide substantially the same transportation facilities for all the pupils in each such class.

I gather from your inquiry that the board of education of Warren Township Rural School District has formally determined to transport all pupils in the district who live more than one mile from the school they attend. That being the case, all pupils who come within the class should be furnished the means of being transported to school.

The rule for measuring distance which a child lives from the school attended is correctly stated, I believe, in the 1927 opinion referred to in your letter. Under this rule it is necessary to include, as a part of the distance from a child's home to his school the distance he would have to travel from the entrance to the curtilage of his residence to the public highway. In other words, the length of any lane leading to his home is included in the distance he lives from his school.

This same rule is stated by the Supreme Court of Kansas as the proper rule for measuring distance, under a statute very similar to the statute providing for transportation of pupils in Ohio. In the case of *Purkeypyle vs. School District, No. 101*, 275 Pac. 146, decided by the Supreme Court of Kansas within the past year, it is held as stated in the syllabus:

"The provision of Revised Statutes 1923, 72-601, referring to pupils 'who live three or more miles, by the usually traveled road, from the school attended' does not limit such distance to that actually traveled over and along a public road or highway, but includes the additional distance from the residence where the pupils live to such highway, and the distance from the road to the schoolhouse in which they attend school."

Applying the principles hereinbefore stated, it is my opinion that if the board of education of Warren Township Rural School District has formally determined to transport the pupils who reside more than one mile from the school, the pupils who reside in the allotment area spoken of in your letter are entitled to transportation if the distance from their homes to this schoolhouse measured along the lanes spoken of, and the public highway, is more than one mile.

I might suggest that the provisions of Section 7731, General Code, wherein it is provided that:

"When transportation of pupils is provided, the conveyance must pass within one-half mile of the residence of such pupils or the private entrance thereto.",

would be applicable to the proposed transportation of the pupils in Warren Township Rural School District. That is to say, if the board classifies the pupils of the district on the basis of distance they "live from school", and determines to transport those "living more than one mile from school", it is probable that the pupils living in the allotment area spoken of may be transported in accordance with the rule without operating the school conveyance on the lanes in question.

Of course, the adoption of a classification of pupils residing two miles or less from school, on any basis, and a determination to transport those of a particular class, does not preclude the board from changing the rule at any time, because, so far as the law is concerned, the board cannot be required to provide transportation to any pupils living two miles or less from any school. The right of any pupil who lives two miles or less from school to be transported, if he has such right at all, is based entirely on a rule which may be adopted by the board of education of the district in which the pupil resides, classifying the pupils of the district and determining to transport those within a particular class, and the injustice that would result if the board should discriminate among pupils within any class by failing to provide substantially the same transportation facilities for all pupils of the class while the rule is in force.

Assuming that the board of education of Warren Township adopts a rule classifying the pupils of the district on the basis of the "distance they live from school", and determines to furnish transportation to school for those pupils "who live more than one mile from the school building", as stated in your inquiry, I am of the opinion that while the rule is in force it is the duty of the board to furnish transportation for such of those pupils living in the allotment area spoken of who live more than one mile from the school building, the distance to be measured in accordance with the rule set forth in the 1927 opinion referred to.

I am also of the opinion that the board of education of Warren Township Rural School District may lawfully provide transportation for pupils residing two miles or less from a school and attending the first, second and third grades, even though transportation is not furnished to those pupils who live two miles or less from school and who attend the higher grades.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*