

SYLLABUS:

City, local and exempted village school district boards of education have no authority under existing statutes to furnish transportation to private and parochial school pupils either voluntarily or by contract.

Columbus, Ohio, September 12, 1963

Hon. James W. Foreman
Prosecuting Attorney
Medina County
Medina, Ohio

Dear Sir:

I am in receipt of your request for my opinion which reads as follows:

"1. Can the Board of Education of the Medina City School District legally lease school buses owned by the Medina City Board of Education to the St. Francis Xavier Parochial School, which buses would be used for the purpose of transporting parochial school children living with the area of the Medina City School District?

"If such action would be legal, a committee made up of parents of the parochial school children, known as the Parents Bus Committee, would pay the school board a fair sum mutually agreed upon for such bus services. The buses would be leased during hours which would not conflict with their present use.

"2. What is your opinion as to the legality of the proposed leasing if the leased buses were used to transport parochial school children living outside the Medina City School District?

"3. Can the Medina City Board of Education legally transport parochial school children who reside on established school bus routes within the Medina City School District to a public school, where the parochial school children would then be transported, by other conveyances, to the parochial school?"

The several questions raised by the foregoing must be answered by resort to the appropriate statutory enactments. I am constrained to note that the United States Supreme Court in

Everson v. Board of Education, 330 U.S. 1, 91 L. ed. 711 (1947) has already determined that activity such as here involved is an exercise of public welfare powers for the benefit of the children concerned and does not violate the First or Fourteenth Amendments of the Constitution of the United States.

Transportation for school pupils is the subject of Chapter 3327, Revised Code. Specifically, Section 3327.01, Revised Code, provides:

“In all city, exempted village, and local school districts where resident elementary school pupils live more than two miles from the school to which they are assigned the board of education shall provide transportation for such pupils to and from school except when, in the judgment of such board confirmed, in the case of a local school district, by the county board of education, or, in the case of a city or exempted village school district, by the judge of the probate court, such transportation is unnecessary.

“In all city, exempted village, and local school districts the board may provide transportation for resident high school pupils to the high school to which they are assigned.

“In all city, exempted village, and local school districts the board shall provide transportation for all children who are so crippled that they are unable to walk to the school to which they are assigned. In case of dispute whether the child is able to walk to the school or not, the health commissioner shall be judge of such ability.

“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.”

While the term “school” is not defined in this chapter, I am of the opinion that it is used in this section to mean a common school which is a part of the public school system provided by the General Assembly of Ohio under the mandate of Sections 2 and 3, Article VI, Constitution of Ohio. This is the definition given to this term by the courts and my predecessors in office over the years, and it is the only definition which gives meaning to this section.

In each instance of its use in Section 3327.01, Revised Code, the term is either preceded or followed by the language “to which * * * assigned.” I think it clear that boards of education can assign

pupils only to schools within the public school system and that the meaning of "school" is limited accordingly.

A reading of Section 3327.01, *supra*, and related sections discloses no express authority by which boards of education may furnish transportation for pupils of schools other than public schools in the public school system.

The question, then, is whether boards of education of city, exempted village or local school districts have an inherent power or implied authority to furnish transportation, on any basis, to pupils attending privately controlled and parochial schools.

The extent of the powers and duties of boards of education has been the subject of a number of court cases in Ohio. Without exception the cases hold that the authority of boards of education is derived solely from statute and is limited to those powers expressly given to them and to powers necessarily implied from those powers expressly granted. *Board of Education v. Best*, 52 Ohio St., 138; *Board of Education v. Volk*, 72 Ohio St., 469; *State, ex rel. Clarke v. Cook*, 103 Ohio St., 465; *Schwing v. McClure*, 120 Ohio St., 335; *Verberg v. Board of Education*, 135 Ohio St., 246; *Board of Education v. Board of Education*, 167 Ohio St., 543, *Board of Education v. State Board*, 116 Ohio App. 515.

In *Schwing v. McClure*, *supra*, the Supreme Court of Ohio specifically held, as disclosed by its syllabus:

"1. Members of a board of education of a school district are public officers, whose duties are prescribed by law. Their contractual powers are defined by the statutory limitations existing thereon, and they have no power except such as is expressly given, or such as is necessarily implied from the powers that are expressly given.

"2. The members of the board of education of a school district are not authorized to convey or transfer to private parties, without consideration, any of the property of the school district, real or personal. Hence, the acceptance by such members of the board of education of a school district of a deed providing that if at any time the premises in question shall cease to be used for school purposes, the same shall at once vest in the said grantors, their heirs and assigns forever, is not effectual to constitute a public school building erected upon such premises with public funds a part of the realty, so that such build-

ing passes with the realty upon reversion to the heirs of the grantor."

In *Vergerg v. Board of Education*, the court held as disclosed by the first branch of its syllabus:

"1. Boards of education are creatures of statute and have only such jurisdiction as thus conferred. They may not, under their rule-making power granted by statute, confer upon themselves further jurisdiction or authority. (*Davis et al., Civil Service Comm., v. State, ex rel. Kennedy, Dir. of Public Service*, 127 Ohio St., 261, approved and followed.)"

It is apparent from the foregoing authority that boards of education have neither inherent nor plenary powers in all matters concerning education.

The specific question remains whether boards of education have implied authority to furnish transportation to pupils attending privately controlled and parochial schools.

The question is not entirely one of first impression in this office. In Opinion No. 1094, Opinions of the Attorney General for 1927, the Attorney General was asked whether, under Section 7731, General Code, students attending a parochial school situated near a common school were entitled to transportation as far as the common school on buses provided for the common school. Section 7731, General Code, provided to the extent material:

"In all city, exempted village, rural and village school districts where resident elementary school pupils live more than two miles from the school to which they are assigned the board of education shall provide transportation for such pupils to and from school except when in the judgment of such board of education, confirmed, in the case of a school district of the county school district, by the judgment of the county board of education, or, in the case of a city or exempted village school district, by the judgment of the probate judge, such transportation is unnecessary."

It was concluded in Opinion No. 1094 thus:

"1. Boards of Education in providing transportation for pupils attending school are limited to the providing of such transportation for pupils attending schools which are a part of the public school system of the state.

"2. Pupils attending private schools are not entitled

to the use of transportation facilities provided for pupils attending the public schools.”

In Opinion No. 5586, Opinions of the Attorney General for 1942, it was held in material part:

“1. A board of education is not authorized to engage in the business of transporting persons for hire or of using or permitting the use of school buses for the purpose of transporting passengers other than school children to and from public schools or to and from public school functions.”

There have been no material changes in the language of Section 3327.01, Revised Code, (Section 7731, General Code) since the issuance of the foregoing two opinions. In the absence of legislative change, I can only conclude that they correctly declare the law to be that a board of education may not contract to transport students to privately operated or parochial schools nor may they lease public school system buses for this purpose.

You have also asked whether they may transport pupils of privately operated schools living on established public school bus routes as far as the public schools.

The 1927 opinion concluded that boards of education were limited to providing transportation for pupils attending schools which are a part of the public school system of the state. The issue before my predecessor, however, was whether such pupils were entitled to such transportation, and any conclusion beyond this question is *obiter dictum*.

However, in Opinion No. 3100, Opinions of the Attorney General for 1953, the Attorney General was asked whether non-resident pupils who attended a high school other than a high school designated by the resident board of education could, under Section 4855-3, General Code, be furnished transportation to school by the board of education of their residence.

Section 4855-3, General Code, is as follows:

“The board of education of any city, exempted village or local school district may contract with the board of another district for the admission or transportation or both, of pupils into any school in such other district, on terms agreed upon by such boards within the limitations of law.

Whenever a board of education not maintaining a high school enters into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils, the board of education making such agreement 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; provided, however, that in case no such agreement is entered into, the high school to be attended can be selected by the pupil holding an eighth grade diploma, and the tuition shall be paid by the board of education of the district of school residence."

It was concluded by the Attorney General that:

"1. A pupil residing in a school district which has no high school may attend a high school in another district with which his district has entered into a contract for such schooling and if no such contract has been entered into, or the school designated is situated more than three miles from his residence, he may attend a high school of his own choosing.

"* * *

* * *

* * *

"3. A board of education is under no obligation to provide transportation for its high school pupils under any circumstances, but is authorized by Section 4855, General Code, Section 3327.01, R.C., to furnish transportation to any high school where such board is liable either by contract or by operation of law for the tuition of such pupils. *The board of the district of residence is not authorized to furnish transportation to pupils who are attending a school where there is no such liability.*"

(Emphasis added)

With the exception of limited changes in wording by the Bureau of Code Revision with the enactment of the Revised Code, the provisions contained in Section 4855-3, General Code, are now contained in Section 3327.04, Revised Code.

The sum of Opinion No. 3100 is that boards of education lack the authority to furnish transportation to pupils attending a school in the public school system outside their district of residence; unless assigned by the board of education, or unless by law the board is responsible for the expense of the schooling of such pupils. It would seem, *a fortiori*, that they likewise lack authority to furnish transportation to pupils attending privately controlled and parochial schools.

It is true that boards of education are given broad power under Section 3313.20, Revised Code, in the management of public schools within its district. Section 3313.20, Revised Code, providing:

“The board of education shall make such rules and regulations as are necessary for its government and the government of its employees and the pupils of the schools. Any employee may receive compensation and expenses for days on which he is excused by such board for the purpose of attending professional meetings, and the board may provide and pay the salary of a substitute for such days. The expenses thus incurred by an employee shall be paid by the board from the general fund of the school district or the county board fund.”

The rule making power given by this section, however, is not a general power but is limited to the government of a board of education or its pupils or employees. A board of education may not, under this rule making power, confer upon itself jurisdiction or authority not otherwise conferred by statute. *Verberg v. Board of Education, supra*.

The transportation of private and parochial school pupils is unrelated to the government of a board of education or of its employees or of the pupils in the public schools within the school district. A board of education may not, under Section 3313.20, *supra*, assume the authority to transport private or parochial school pupils under either plan suggested by your request.

In contrast to the limited power under Chapter 3327, Revised Code, to provide transportation, Sections 3313.75 to 3313.79, Revised Code, specifically authorize the use of schoolhouses and school grounds for recreational, civic, educational, religious and social activities which will not interfere with the normal and necessary uses of such properties. This contrast but points up that the powers of boards of education are statutory and that, in the absence of express authority comparable to that relating to the use of schoolhouses and school grounds, boards of education may not use school buses for other than the transportation of pupils in the public school system.

While admittedly the overall interest of the public school system might be served by some such plan as that proposed by the Medina City School District board of education, the legislature

has not yet been willing to delegate such policy making power to city, local or exempted village school district boards of education.

Being confronted with a lack of express statutory authority, and being confronted with the precedent of prior opinions of the Attorney General, and with the repeated expressions of the Supreme Court of Ohio on the subject generally of the power and authority of boards of education, I can only conclude that, under existing statutes, boards of education lack the authority to lease school buses to parochial schools or to transport parochial school children living on established school bus routes to a school within the public school system for pick-up by other conveyance.

I am, therefore, of the opinion that legislative action is necessary before private or parochial school pupils may be furnished transportation in public school system buses. I would point out that such legislation could either be a grant of discretionary power to boards of education with regard to the use of school buses or it could specifically authorize such service as that proposed, thereby evidencing a legislative intent that is lacking in existing statutes.

In specific answer to your question: city, local and exempted village school district boards of education have no authority under existing statutes to furnish transportation to private and parochial school pupils either voluntarily or by contract.

Respectfully,
WILLIAM B. SAXBE
Attorney General