

has been provided by the board of education, and the action necessary in the premises can be had by a resolution spread upon the minutes of such board of education and passed by a majority vote, and thereupon the clerk of the board of education of such school district shall perform all the services and duties of such treasurer.

2. The express repeal of a section of the statutes providing for the appointment of a treasurer of the board of education cannot be held to work an implied repeal of the various sections conferring power upon and assigning duties to the clerk of the board of education, in view of the express provisions enacted at the same time whereby such clerk of the board of education succeeded to those very powers and duties. These provisions are thus specifically kept in force and effect, and in assigning the duties of the treasurer of a board of education to the clerk of such board of education, no repealed statute was revived or attempted to be revived as were the facts involved in the case of *Godfrey vs. O'Brien*, 95 O. S., 166.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1466.

COUNTY BOARD OF EDUCATION—COUNTY SCHOOL DISTRICT REDISTRICTED—DATE EFFECTIVE—WHEN PRESIDENTS OF BOARDS OF EDUCATION MAY ELECT DISTRICT SUPERINTENDENT IN NEW DISTRICT—WHEN DISTRICT SUPERINTENDENT NOT QUALIFIED—WHEN MAJORITY OF PRESIDENTS OF BOARDS OF EDUCATION MAY CALL MEETINGS.

1. *Where a county board of education has redistricted the county school district into new supervision districts, such division is effective as of the following September 1st, but there is no prohibition in the law against the presidents of the boards of education in such supervision district electing the district superintendent in the new district soon after such new district has been created by the county board of education. The contemplation of the law is that this duty should be performed by the electing body in the new supervision district and the county board of education shall perform such duty only where such electing body has failed to elect a district superintendent before the first day of September.*

2. *Where a person has been elected as a district superintendent by the electing body provided for in section 4739 G. C., and such person is thereafter found not qualified for such position as required by the statutes (4744-5 G. C.), it is the duty of such electing body prior to the beginning of the school year on September 1st to elect a new district superintendent, who is qualified, and a meeting for this purpose should be called in the manner provided for in section 4742 G. C.*

3. *Where the president of the board of education in a village or rural district having the largest number of teachers in a supervision district, refuses to issue a call for the meeting of the presidents of the boards of education in such supervision district as provided for in section 4742 G. C., then a majority of the personnel in such electing body in such district can call themselves together for the purpose of performing the duties placed upon them by the statutes.*

COLUMBUS, OHIO, July 29, 1920.

HON. CARROLL A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter of July 12th, requesting the opinion of this department upon the following:

"The county board of education of Mercer county recently redistricted the county making three school districts instead of four as formerly, action being under section 4738-1, 107 O. L., 622.

1. The question now arises as to whether or not these boards of education of the new districts are governed by section 4742 in the electing of district superintendents for these new districts, being newly created districts and not being a question of electing a successor.

2. Further, section 4738-1 sets forth that the newly created districts are effective as of September 1st following their creation. Have these new districts power to elect a superintendent before that date as provided by section 4742 or in any other manner? If not power to elect before that time may the county board elect a district superintendent for such district as provided in section 4741 before the new district has an opportunity to act?

In one of the Mercer county districts thus newly created a district superintendent was elected a month ago and was later found to be unqualified for the position. May this board now act under section 4742 and call another meeting or have they no power to act until September 1st? The president of the district having the most teachers refuses to call another meeting claiming he has already called the only meeting required by law. The county board seems to want to have the district to elect their own superintendent if there is any provision by law whereby it may be properly done."

It is noted you refer to section 4738-1, 107 O. L., 622. An examination of the act appearing on page 622, 107 O. L., shows that section 4738 G. C. was supplemented in that act by the enactment of section 4738-1, but such supplementary section on examination is found to be exactly the same language as that occurring in section 4738 G. C. itself. Therefore, since the supplemental section is exactly the same language as the main section (4738) itself, reference will be made herein to section 4738, as regards prior holdings of this department, the language of both sections enacted being identical.

Section 4738 (106 O. L., 396), reads in part as follows:

"The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts * * *"

The important part as regards the question at hand, appearing in section 4738, is that the county board of education can divide the county school district in any year, but that such division when once made shall not take effect until the first day of the following September. In providing for the election of a district superintendent to supervise the school territory provided for in section 4738, the intent of the General Assembly as to who should select this district superintendent is set out in section 4739 G. C., which reads as follows:

"Sec. 4739: Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district, except that where such supervision district contains three or less rural or village school districts the boards of education of such school district in joint session shall elect such superintendent. The district superintendent shall be employed upon the nomination of the county superintendent but the board electing such district superintendent may by a majority vote elect a district superintendent not so nominated."

"Sec. 4741: The first election of any district superintendent shall be for a term not longer than one year, thereafter he may be re-elected in the same district for a period not to exceed three years. Whenever for any cause in any district a superintendent has not been appointed by September first, the county board of education shall appoint such superintendent for a term of one year."

"Sec. 4742: Not less than sixty days before the expiration of the term of any district superintendent, the presidents of the boards of education within such supervision district, or in supervision districts which contain three or less village or rural districts, the boards of education of such district shall meet and elect his successor. The president of the board in the village or rural district having the largest number of teachers shall issue the call giving at least ten days' notice of the time and place of meeting. He shall also act as chairman and certify the results of such meeting to the county board of education."

Your question is whether section 4742, supra, governs in the case of a new district in the election of its district superintendent, having in mind that section 4738, supra, says that "the county board of education shall divide the county school district * * * to take effect the first day of the following September, in supervision districts * * *." It may be said that a strict construction of these three sections might show that if the action of the county board of education in dividing the county school district was to take effect the first day of the following September," then such district newly created would not be in existence at all for any purpose prior to such first day of the following September. This construction would mean, then, that even though the county board of education had divided the county school district as early as January in any year, the choice of a superintendent for that district might have to wait until the first day of the following September if it was intended that the presidents of the boards of education, located in such supervision district, should elect the district superintendent for that district. As heretofore pointed out, it seems apparent in several sections that the whole plan was that there should be a measure of local self government in the local supervision district in providing that the district superintendent should be elected by the presidents of the village and rural boards of education *within such district*, except that where such supervision district contains three or less rural or village school districts then all of the members of the boards of education, located in such school districts comprising the supervision district, shall meet in joint session and elect the district superintendent. (4739). This, then, seems to have been the intent of the general assembly, that even though section 4738 says that the division shall take effect the first day of the following September, it possibly did not mean that all arrangements for the schools in that supervision district, starting with the first day of September, should be put off until that date. If it were put off until that time it would be contrary to good school administration in having the organization of the district ready, because it must be admitted that if the district went into effect on September 1st and the district presidents received their power from that date, then they would have to elect a district superintendent immediately in order to have such official ready with the opening of the schools, which might start in the very first week of September, that is within a few days. That view certainly was not the intent of the general assembly when it enacted the sections which you cite. The idea seems to have been that the county board of education, as mentioned in section 4741 G. C., should act only when the proper persons in the district itself had failed for some reason or other prior to September 1st.

"Whenever for any cause a district superintendent has not been appointed by September 1st in the manner provided in section 4739 G. C., * * * the county board of education, acting under authority of section

4741 G. C. * * * shall appoint such superintendent for a term of one year." (Opinion 913, Vol. 2, page 1956, Opinions of the Attorney-General, 1915.)

"* * * it will readily appear that the election of district superintendents devolves primarily upon the presidents of the boards of education of the several village and rural school districts constituting the supervision district, * * *"

District superintendents are therefore not subject in the first instance to election, appointment or employment by the county board of education. It is only when by reason of the failure of the presidents of the boards, or the boards of education fail or refuse for any cause to elect or appoint a district superintendent for any supervision district, that the county board of education is authorized, ex officio, to exercise that function. When so acting, the county board of education is rather acting instead of the otherwise constituted authority, and when a district superintendent is so elected and his compensation determined, * * * the county board of education then loses all authority or jurisdiction in the matter. * * *" (Opinion 1747, Vol. 2, page 1128, Opinions of the Attorney-General, 1916.)

"Section 4742 G. C., supra, clearly requires that all district superintendents shall be elected prior to sixty days before September 1st each year, so that it is contemplated that on August 1st of each year the number and compensation of district superintendents will have been finally determined. * * * All elections of district superintendents should be made before July 2d of each year, and it is upon the election so made that the certification on or before August 1st, required by section 4744-2 G. C., supra, is required to be made." (Opinion 2069, Vol. 2, page 1858, Opinions of the Attorney-General, 1916.)

"Money paid to a district superintendent for services rendered prior to the beginning of school for which he was hired, is an illegal payment and should be recovered." (Opinion No. 334, Vol. 1, p. 891, Opinions of the Attorney-General, 1917.)

The language of the above syllabus of opinion 334 indicates that there was no objection to and that it was intended for the district superintendent to be employed prior to the beginning of the school year, that is, September 1st, but even though employed prior to that time, he is not entitled to any payments for services rendered during the period of the time of his contract and the actual beginning of his work on September 1st. The inference to be drawn from the opinion above quoted is that it was proper for the district presidents to choose a district superintendent, for in this case in Hardin county the county board of education divided the county into supervision districts on June 19, 1915, thus creating new supervision districts. Thereafter, between said June 19, 1915, and August 1, 1915, the presidents of the boards of education met and elected district superintendents in each of the four supervision districts newly created. More than likely had this been error in the opinion of the Attorney-General, at that time, it would have been pointed out that such elections were illegal on the ground that the provision was effective as of September 1st. On the contrary, the action of the presidents of the boards of education in the districts interested appears to have been approved by the Attorney-General as being entirely regular.

In opinion No. 1252, appearing at page 769, Vol. I, Opinions of the Attorney-General, 1918, the following language occurs:

"* * * the new supervision district, as formed by the county board

of education must employ a district superintendent for such new supervision district * * *, and the next question to be determined is whether or not such new supervision district may hire a superintendent for more than one year * * *. Whenever a supervision district is changed either by adding to such district or by taking from such district any territory of the county school district, then the supervision district is a new district, that is, it is a different district from what it was before such redistricting was had, * * * each supervision district when so formed shall elect a district superintendent * * *. When, then, a new supervision district is formed by adding to an old supervision district another district, the electing body is a new electing body and it will be the first election for such new electing body. That some of the electing body had participated in a previous election of a district superintendent cannot, in any manner, affect the status of the body as a whole”

“Where a district superintendent is not elected by the electing body of a supervision district for any reason prior to September 1st in any year, then the county board shall appoint a district superintendent for such district for the term of one year.” (Opinion 1461, Vol. 2, page 1182, 1918.)

In arriving at the above syllabus the attorney-general also said in the body of such opinion:

“If the schools * * * contain not less than thirty teachers, and if, when Lucas county school district was redistricted into supervision districts, it was the intention of the county board to create a supervision district of said rural and village districts, then and in that event *the boards of education of said districts could select the district superintendent, provided the same was done prior to the first day of September*. If, however, for any cause a district superintendent has not been appointed by September first by the local boards, then under section 4741 the county board of education must appoint such superintendent for a term of one year.”

In opinion No. 176, issued by this department on April 9, 1919, and appearing at page 298, Vol. I, Opinions of the Attorney-General, 1919, the following language occurs in two branches of the syllabus of such opinion, to wit:

“3. Following a redistricting of a county school district, the meeting of the presidents of village and rural school boards in any supervision district for the purpose of choosing a district superintendent must be called by the president of the local district having the most teachers in such supervision district, and not less than ten day’s notice of such meeting shall be given to all presidents in such supervision district.

* * * * *

5. A county school district cannot be redistricted into supervision districts and district superintendents in such new districts chosen on the same day, and the election of district superintendents on the same date as the redistricting, is illegal.”

In opinion No. 705, issued under date of October 15, 1917, and appearing at page 1912, Vol. 2, Opinions of the Attorney-General for 1917, the syllabus reads:

“Where a vacancy occurs in the position of a district superintendent the same is filled by the electing power, that is, by the presidents of the boards of education, or the members thereof, as the case may be, and is not filled by the county board of education *in the first instance*.”

In the body of such opinion this language occurs:

"It is the duty of the county board of education to act in the election of a district superintendent only when the act is not performed by those persons whose duty it is to perform same. In other words, when a supervision district is formed, the presidents of the board of education of such district * * * shall elect a district superintendent. If for any cause such district superintendent is not elected by the first day of September * * * then the county board of education shall perform the duty which the presidents or members of the various boards should have performed.

* * * Aside from mere supervision during the school session, it must be held that his (the district superintendent) position was created for the purpose, in part, of having the organization ready for reopening after September first * * *." (Op. 104, p. 193, Vol. I, Opinions of the Attorney-General, 1919.)

"4. * * * the electing body in such supervision district shall fix the compensation of the district superintendent as well as his term, which may be for a period not to exceed three years following his contract for one year." (Opinion 542, p. 941, Vol. 1, 1919.)

From the above holdings of this department on several occasions, though the specific question set out by you has never been passed upon directly by this department in an official opinion, it would appear that if the presidents of the local boards of education in a supervision district should elect a superintendent of such district prior to September 1st, such election would be legal, as they are the personnel which is contemplated by the law to do the electing of district superintendents; if they have not performed this duty by September 1st, then the county board of education must appoint a district superintendent for a term of one year.

In the closing paragraph of your letter you indicate that in one of these supervision districts of your county a district superintendent was elected by the presidents of the boards of education in that supervision district, but that later the district superintendent elected was found to be unqualified for the position. The statutes set out what are the qualifications for a district superintendent (4744-5 G. C.) and a person elected to such position who could not qualify under the law as to its requirements for such position, would therefore be illegally elected, that is, the presidents of the boards of education in the district had committed an error, possibly later discovered, and now desire to correct the matter. You indicate further that the county board of education desires to have the district to elect its own superintendent, which view is believed to have been the one in the mind of the General Assembly when the present school code was enacted. It is true that this gathering of the presidents of the boards of education in a supervision district is not a board of education, in fact it has no particular name in the statutes, but it is at least an electing body for that particular occasion and for the performance of those duties set out in the law, and it is a well recognized rule that where a board or body finds it has committed error and desires to correct its records, it has full power so to do by a majority vote of all of those who have a place in such body and if all have been properly notified of any and all meetings.

In your closing paragraph you also say:

"The president of the district having the most teachers refuses to call another meeting."

Such officer being the person who is to call together these presidents of the various boards of education in the district for the purpose of choosing a district superintendent, should such official refuse to call this meeting or a subsequent one to correct the records, such presidents of the local boards would thus have no opportunity prior to September 1st to carry out the intent of the General Assembly that the selection of a district

superintendent should be made in the first instance by the presidents of such local supervision district. Some opportunity or some method should exist for bringing them together for this purpose, where the president of the board in the village or rural district having the largest number of teachers has failed to issue such call.

Should such local board of education president fail to call this meeting, the presidents of the boards of education in the district could call themselves together for necessary purposes as decided in opinion 515, issued July 23, 1919, and appearing at page 877, Vol. I, Opinions of the Attorney-General for 1919, the second branch of the syllabus of such opinion reading as follows:

"Where the county superintendent of schools has neglected and refused to call a meeting of the presidents of the village and rural boards of education after January, for the purpose of electing the successor of a county board member whose term has expired, such district presidents can issue their own call for a meeting, giving reasonable notice to all district presidents in the county school district, and a person receiving a majority vote of all the village and rural districts of the county school districts, for the office of member of the county board of education, is a legally elected member of such county board of education."

In arriving at such conclusion the following language also appears in the body of said opinion:

"* * * The group of presidents is a continuing body that can be called into action on short notice, and the presidents come direct from the districts, that is, the people themselves.

* * * Every opportunity should be given to these district presidents to elect the members of the county board rather than to retard them, for they come direct from the people, far more so than a county board * * *"

In the above opinion it appears that the presidents in the supervision district can issue their own call for a meeting for the purpose of electing a member of the county board of education, and it would be only right and proper that in a supervision district where the president of the district having the most teachers had failed to call such meeting, such presidents could issue a similar call for a meeting to choose a district superintendent prior to September 1st in order that the intent of the General Assembly should be carried out, that is, that the local community should in the first instance have the selection of the district superintendent rather than that the matter should go after September 1st to the action of the county board of education.

It is, therefore, the opinion of the Attorney-General that:

(1) Where a county board of education has redistricted the county school district into new supervision districts, such division is effective as of the following September 1st, but there is no prohibition in the law against the presidents of the boards of education in such supervision districts electing the district superintendent in the new district soon after such new district has been created by the county board of education. The contemplation of the law is that this duty should be performed by the electing body in the new supervision district and the county board of education shall perform such duty only where such electing body has failed to elect a district superintendent before the first day of September.

(2) Where a person has been elected as a district superintendent by the electing body provided for in section 4739 G. C., and such person is thereafter found not qualified for such position as required by the statutes (4744-5 G. C.), it is the duty of such electing body prior to the beginning of the school year on September 1st to elect a new district superintendent, who is qualified, and a meeting for this purpose should be called in the manner provided for in section 4742 G. C.

(3) Where the president of the board of education in a village or rural district having the largest number of teachers in a supervision district, refuses to issue a call for the meeting of the presidents of the boards of education in such supervision district as provided for in section 4742 G. C., then a majority of the personnel in such electing body in such district can call themselves together for the purpose of performing the duties placed upon them by the statutes.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1467.

ANTITOXIN—FREE DISTRIBUTION FOR TREATMENT OF DIPHTHERIA—SECTION 1261-29 G. C. (108 O. L. 241) REPEALS SECTIONS 2500 AND 2501 G. C.

Section 1261-29 (108 O. L. 241) is intended as a substitute for sections 2500 and 2501 G. C., and so repeals or supersedes said sections.

COLUMBUS, OHIO, July 29, 1920.

State Department of Health, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your request of recent date asking for an opinion of this department on the following matter:

“Section 2500 and 2501 G. C. (O. L. 99, Vol. 19, section 1) provide for furnishing antitoxin for the treatment of diphtheria in persons in indigent circumstances where the antitoxin is furnished on application to a health officer and certification of indigency is made by the health officer to the county commissioners.

Section 1261-29 (O. L., 108, Pt. 1, 241, section 14) provides that ‘each district board of health shall provide for the free distribution of antitoxin for the treatment of cases of diphtheria and shall establish sufficient distributing stations to render such antitoxin readily available in all parts of the district.’

The question is now raised that the section just quoted impliedly repeals sections 2500 and 2501, whereby the county commissioners are no longer required or authorized to pay for diphtheria antitoxin. This department does not believe that there has been any such repeal and that until such time as city and general health district boards of health are provided with sufficient funds to carry out the provisions of 1261-29 that the county commissioners can pay for antitoxin.”

Since your letter quotes section 1261-29 G. C. in full it will not be repeated. The other sections are as follows:

“Sec. 2500. When a physician, regularly authorized to practice medicine under the laws of this state, is called upon to treat a person suffering from diphtheria who is in indigent circumstances, or a child suffering from diphtheria whose parents are in indigent circumstances, and he is of the opinion that antitoxin should be administered to such person or child or to others who may have been exposed to the contagion of such disease, he may make application to any health officer within the county therefor.