

a specific appropriation, properly made, the constitution is thereby satisfied and the appropriation remains at all times available to pay the contract.

On the contrary, I am clearly of the opinion that there is no condition imaginable which can prolong the life of an appropriation beyond the constitutional period of two years; and that when the end of the constitutional period transpires before work under a lawful contract is completed, and the succeeding session of the general assembly makes no appropriation for the completion of the work the contractor, whatever may be his rights and remedies in the premises, cannot compel the executive officers of the state to make further payments on account of his contract and the work done under it, nor to answer to him in damages."

In my opinion the latter of the opinions above mentioned contains the better discussion and correctly states the law. The conclusion therefore is inescapable that the appropriation lapses even though contracts have been entered into and the fund has been properly encumbered. Unless, therefore, the legislature has made appropriations to cover the liabilities arising out of such contracts there will be no funds out of which such liabilities can be discharged.

Your attention is, however, directed to Section 2 of the Appropriation Act (House Bill No. 502), passed by the 87th General Assembly on April 21, 1927, which reads in part as follows:

"Unexpended balances of all appropriations and re-appropriations, made by the 86th General Assembly, against which contingent liabilities have been lawfully incurred, are to the extent of such liabilities, and whether the same have been lapsed prior to the taking effect of this act with respect thereto or not, hereby appropriated from the funds from which they were originally appropriated or reappropriated and made available for the purpose of discharging such contingent liabilities."

By virtue of the provisions of Section 2 of the Appropriation Act, supra, the appropriation made by the 86th General Assembly for the Agronomy Building, at Wooster, Ohio, has been reappropriated by the 87th General Assembly to the extent that the same was encumbered prior to July 1, 1927. However, the above act was not filed in the office of the Secretary of State until May 11, 1927, and, in so far as appropriations for other than current expenses are concerned, will not become effective until August 9, 1927. In other words no payments may be made on account of any contract entered into pursuant to the appropriation for the Agronomy Building made, by the 86th General Assembly from the period beginning July 1, 1927, until August 9, 1927, when the appropriation act passed by the 87th General Assembly goes into effect.

Respectfully,

EDWARD C. TURNER,

Attorney General.

726.

BOARD OF EDUCATION—NOT AUTHORIZED TO PAY TUITION OR FURNISH TRANSPORTATION FOR PUPILS ATTENDING PRIVATE SCHOOLS.

SYLLABUS:

There is no authority for the payment of tuition or the furnishing of transportation

from public funds for pupils attending private schools, and any payments made therefor by a board of education are illegal.

COLUMBUS, OHIO, July 11, 1927.

HON. E. B. UNVERFERTH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—This will acknowledge receipt of your inquiry as follows:

“The following inquiry is submitted to you and an early reply will be appreciated. The facts are as follows:

There is a School District in this County which does not maintain a High School and therefore is required to pay tuition for its pupils to a High School in another district. Now the question is whether the Board of Education of this school district can, under the laws of Ohio, pay tuition to a Parochial School in another district? In the particular case at hand, the amount of tuition is less than that which is required at another public High School and I would also state that the Parochial High School is a first grade High School and has been recognized as such by the State Department of Education.

Kindly take the above facts into consideration and state whether the same result will be had as to the matter of transportation.”

Although the situation which has prompted your inquiry has especial reference to the tuition and transportation of high school pupils, you have submitted the question in such form as to call for a consideration of the question from the standpoint of the authority of boards of education, in Ohio, to pay tuition and transportation of pupils of both high schools and schools of lower grade, when such pupils attend schools other than the public schools conducted as a part of the public school system of the state.

Your inquiry resolves itself into two questions which will be considered separately, inasmuch as they involve the consideration of different statutes.

First, may a board of education under the laws of Ohio pay tuition to a parochial school in another district?

Your question might be otherwise stated: Are boards of education as established by virtue of the laws of the state of Ohio authorized by law to pay tuition for pupils residing within the district wherein such board functions and attending other than a public school?

Parochial schools are understood to be schools conducted under the supervision of some particular sect, and as such have been held to be private schools as distinguished from public schools. *Waterson vs. Haliday*, 77 O. S. 175; *Quigley vs. State of Ohio*, 5 C. C. 638.

Statutory recognition is given to private schools in that attendance in such schools satisfies the requirements of the law relating to compulsory education. Private high schools may be granted certificates of grade so as to put their work on a parity with public high schools if the director of education is satisfied that the quality and extent of the work done in such schools merits such recognition. The statute (Section 7651-1, General Code), which authorizes the issuing of certificates of grade to private high schools is as follows:

“The director of education shall have power to inspect private high schools or junior high schools and issue certificates of grade thereto provided the inspections are made with the consent of such schools; but such certificate of grade shall not make such school eligible to receive public funds for tuition, and such certificates of grade unless renewed shall expire at the end of the second school year after their issue.”

The mere fact that private high schools may be recognized as being on a par with public high schools, so far as the kind and quality of instruction given therein entitles them to be recognized as of the same grade as a similar public school is concerned, would in no way authorize boards of education to pay tuition to such private schools unless the statutes authorizing the payment of tuition in any case either specifically provides for payment of tuition to private schools or by their terms include both private and public schools.

The language of the statute, Section 7651-1, *supra*,

“Such certificate of grade shall not make such school eligible to receive public funds for tuition”

was no doubt intended to counteract any idea that might be entertained to the effect that recognition of the work of the school from an academic standpoint constituted it a high school in the sense that the term is used in the statute relating to the payment of tuition for attendance upon a high school. The school being a private institution would at least not be ineligible to receive tuition no matter what the statute may have said about it if there is any authority to pay tuition to it and the authorities so empowered saw fit to do so.

It is well recognized that boards of education have only such powers as are expressly granted to them or necessarily included within the powers expressly granted, and that all laws authorizing the expenditure of public funds are to be strictly construed, limited only to the accomplishment of the purpose for which they are enacted.

To determine when, and under what circumstances, boards of education may pay tuition for pupils attending schools outside their district it will be necessary to examine the statutory provisions wherein such authority is granted.

The obligation of a board of education to pay tuition may be incurred by reason of contracts entered into between the boards of education of the several school districts, or when no contract is made, the obligation may, under certain circumstances, arise by operation of law. The making of a contract by one board of education with another for the payment of tuition is authorized by Section 7734, General Code, as to elementary schools, and Section 7750, General Code, as to high schools. Circumstances under which obligations for the payment of tuition may be incurred by operation of law are dealt with in Sections 7735 and 7736 (elementary schools), and 7747 to 7752 inclusive (high schools) of the General Code.

These statutes are reviewed and their applicability to the question of the payment of tuition to private schools is discussed in an opinion of this department found in the Opinions of the Attorney General, 1919, p. 497, wherein it is held that boards of education are not authorized to pay tuition for the attendance of pupils to other than public schools.

Inasmuch as the statutes have not been materially changed since the rendition of that opinion, and it contains a complete answer to your question, with which I am in accord, I do not deem it necessary to add anything further to the observations therein made.

Coming now to the second question raised by your inquiry which may be stated thus: Are boards of education authorized to pay for the transportation of pupils who attend schools other than public schools? It should be understood at the outset that children are required to attend the school provided for them by the board of education of the district wherein they reside. Under certain circumstances where boards of education do not provide the necessary school facilities or where the distance to the district school is so far that it is more practicable to attend some other school it is permissible and proper that they attend some school outside their own district, but in no

case can transportation be furnished for such pupils unless the law gives specific authority to the board of education to pay such transportation.

The transportation of pupils attending elementary schools is provided for by Sections 7684, 7730 and 7731, General Code, pertinent parts of which read as follows:

"Sec. 7684. Boards of education may make such an assignment of the youth of their respective districts to the schools established by them as in their opinion best will promote the interests of education in their districts."

"Sec. 7730. * * * Whenever any school is suspended the board of education of the district shall at once provide for the assignment of the pupils residing within the territory of the suspended school to such other school or schools as may be named by the said board of education. Upon such suspension the board of education in authority over such village or rural school shall provide for the transportation of all pupils so assigned who reside in the territory of the suspended school and who live more than two miles by the nearest traveled highway from the school to which they have been assigned, to a public school in the rural or village district or to a public school in another district, except when in the judgment of such board of education confirmed by the judgment of the county board of education such transportation is unnecessary."

"Sec. 7731. 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 will be noted by the provisions of Section 7730, supra, that the transportation authorized therein must be to a public school. The transportation authorized by the provisions of Section 7731, supra, is to be to a school to which the pupils have been assigned. As Section 7684, supra, authorizes boards of education to assign pupils to but one class of schools, to wit, "schools established by them" and they have no authority to establish private schools, it follows that the transportation authorized by Section 7731 must be to a public school.

Transportation of high school pupils is authorized by Sections 7748, 7748-1, 7749 and 7749-1, General Code, pertinent parts of which read as follows:

"Sec. 7748. * * * 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. * * *"

"Sec. 7748-1. * * * Transportation laws which apply to elementary school pupils shall apply to pupils of the seventh and eighth years in a junior high school organization; transportation laws which apply to high school pupils shall apply to pupils of the ninth year in a junior high school organization."

"Sec. 7749. When the elementary schools of any rural school district in which a high school is maintained, are centralized and transportation of pupils is provided, all pupils resident of the rural school district who have com-

pleted the elementary school work shall be entitled to transportation to the high school of such rural district, and the board of education thereof shall be exempt from the payment of the tuition of such pupils in any other high school for such a portion of four years as the course of study in the high school maintained by the board of education includes."

"Sec. 7749-1. The board of education of any district, except as provided in Section 7749, may provide transportation to a high school within or without the school district; but in no case shall such board of education be required to provide high school transportation except as follows: If the transportation of a child to a high school by a district of a county school district is deemed and declared by the county board of education advisable and practicable, the board of education of the district in which the child resides shall furnish such transportation."

By the plain terms of Section 7748 and 7749 the transportation therein authorized to be paid must be for that of pupils attending public schools. While the terms of Section 7749-1, *supra*, are not so clear, I am of the opinion that the high schools referred to therein are public schools and that the terms of that section cannot be extended to authorize the transportation of a child to a private high school. An examination of the related sections of the Code shows that in each instance the only schools under discussion are public schools, and their provisions have no application whatsoever to private schools. I feel that I should be unwarranted in extending the meaning of this particular section to include private schools, in the absence of specific language on the part of the legislature. Especially is this so in view of the inhibition against the payment of tuition to private schools, since the transportation of a pupil to and from school, while in one sense purely for the benefit of the pupil, nevertheless is actually thus as effectual a financial assistance to the private school as would be the payment of tuition.

Answering your question specifically, therefore, I am of the opinion that there is no authority for the payment of either tuition or cost of transportation from public funds for pupils attending private schools, and any such payment to a private school of tuition or expense incurred in the transportation of a pupil to a private school is illegal.

Respectfully,

EDWARD C. TURNER,
Attorney General.

727.

CLEMENCY BOARD—CONCERNING AUTHORITY TO ANNUL A SENTENCE—RESTORATION TO PAROLE—VIOLATION OF PAROLE.

SYLLABUS:

1. *Under the provisions of Section 2174, General Code, where a prisoner has violated the conditions of his parole or conditional release, and the Ohio Board of Clemency has declared such prisoner to be delinquent and entered such facts in the proceedings of the board, such prisoner shall thereafter be treated as an escaped prisoner owing service to the state and, when arrested, shall serve the unexpired period of the maximum term of his imprisonment and the Ohio Board of Clemency is without authority again to restore such prisoner to parole.*