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SYLLABUS:

1. The provision of Section 5127.04, Revised Code, that a board of education pay an amount as specified in said section to a child welfare board is mandatory.

2. Where a board of education fails to pay the amount due under Section 5127.04, Revised Code, to a child welfare board, the child welfare board may proceed in mandamus, or other proper legal remedy, to enforce the payment; and in such action, the child welfare board should be represented by the county prosecuting attorney, which officer has a duty under Section 309.09, Revised Code, to represent the child welfare board.

3. A board of education must pay the full amount required by Section 5127.04, Revised Code, to the county child welfare board, where all other requirements of that section have been met, regardless of whether such board of education claims that the child welfare board owes the school district an amount for the use of a classroom.

Columbus, Ohio, February 5, 1963

Hon. R. K. Dean

Acting Director

Department of Mental

Hygiene & Correction

State of Ohio

Columbus, Ohio

Dear Sir:

Your request for an opinion reads as follows :

“We hereby request your opinion on the following questions. Section 5127.04, Revised Code, requires the Board of Education of a School District, in which a mentally retarded person resides, who has received training at a mentally retarded training center and workshop, to pay to the County Child Welfare Board an amount equal to the computed amount of tuition that would be due the School District if a non-resident pupil attended the schools of such district for the same period of time that the mentally deficient person attended the training center.

“(1) Is this provision for payment mandatory?

“(2) If the provisions for payment are mandatory, how may they be enforced against five local school boards that have refused to make such payment?

“(3) The Prosecuting Attorney has refused to represent the County Child Welfare Board for the stated reason that he is required to represent the local Boards of Education. Under such circumstances, who should represent the County Child Welfare Board in the controversy?

“(4) Another local School Board has admitted liability but has arbitrarily attempted to deduct \$600.00 for the use of a class-room.”

Section 5127.01, Revised Code, provides for the establishment of training centers or workshops for the special training of mentally deficient persons, reading, in part, as follows :

“The commissioner of mental hygiene, with the approval of the director of mental hygiene and correction, shall establish in any county or district a training center or workshop for the special training of mentally deficient persons, including those who have been adjudged by the proper authorities to be ineligible for enrollment in public schools under sections 3317.01 to 3317.15, inclusive, 3321.01, and 3323.01 of the Revised Code, and who are determined by the division of mental hygiene to be capable of profiting by specialized training.* * *”

Section 5153.161, Revised Code, provides, in part:

“The county child welfare board, subject to the rules, regulations, and standards of the commissioner of mental hygiene shall :

“(A) Administer and supervise the provisions of sections 5127.01 to 5127.05, inclusive, of the Revised Code,

and exercise such powers and duties as prescribed by the commissioner;

“* * *

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Section 5127.04, Revised Code, reads as follows:

“The county child welfare board which during the school year has administered and supervised pursuant to the provisions of section 5127.01 of the Revised Code, a training center for the mentally deficient shall prepare a statement for each person under twenty-one years of age who has received such training, such statement to show the name of the person, the name of the school district in which the person is a school resident, the name of the board providing the training, and the number of months the person received training. Not later than the thirtieth day of June the board shall forward a certified copy of such statement to the clerk of the board of education of the school district in which the person is a school resident and shall forward a certified copy of such statement to the commissioner of mental hygiene. Within thirty days after the receipt of such statement the board of education shall pay to the county child welfare board submitting the statement an amount equal to the computed amount of tuition that would be due the school district receiving the statement if a nonresident pupil attended the schools of such district for the same period of time that the mentally deficient person attended the training center, such amount to be computed in the manner prescribed by section 3317.08 of the Revised Code.”

Thus, the county child welfare board is given the duty to operate the training center or workshop established by the commissioner of mental hygiene under Section 5127.01, *supra*, and under Section 5127.04, *supra*, is entitled to payments from school boards, as specified, for the persons under twenty-one years of age receiving training in such training center or workshop.

Section 5127.04, *supra*, provides that a certified copy of a statement as to each person under twenty-one years of age attending the training center *shall* be forwarded to the clerk of the board of education of the school district in which the person is a school resident, and that within thirty days after receipt of such statement, the board of education *shall* pay to the county child welfare board the proper amount under the tuition basis.

In 50 Ohio Jurisprudence 2d, 29, Section 19, it is stated:

“The word ‘shall’ is usually interpreted to make the

provision in which it is contained mandatory, especially if frequently repeated. 'Shall' is generally construed to be mandatory when the right of the public or of third persons depends on the exercise of the power or the performance of a duty to which it refers."

I am of the opinion that the use of the word "shall" in referring to the board of education paying the specified amount makes it a mandatory duty of the board to make the payment. The reason for the payment strengthens my opinion in this regard. Having given the child welfare board the duty to operate a training school, the legislature also had to find ways for the board to finance such school. One of the ways provided is to require the Board of Education of school residents to pay for the person attending the school. Thus, the school district where the person would be entitled to free schooling (if he could be admitted to the schools of the district) pays at least part of the cost of his training. It appears clear that to properly operate these schools, the payments from the boards of education are essential. I thus answer your first question in the affirmative.

Coming to your second question, if a board of education refuses to make a payment which is required under Section 5127.04, *supra*, the requirement to pay can be enforced only by the child welfare board proceeding in mandamus, or other appropriate legal remedy, against the board of education.

As to your third question, under Section 309.09, Revised Code, the prosecuting attorney is the legal advisor of all county officers and boards and, by that section, is required to "prosecute and defend all suits and actions which any such officer or board directs or to which it is a party" Accordingly, the county prosecutor is the proper party to represent the child welfare board in an action to compel a board of education to make a payment required by Section 5127.04, *supra*. I might add that this is so even if the board of education is a local board also entitled to representation by the county prosecutor, and note in this regard that under Section 309.10, Revised Code, a local board of education is authorized to engage its own counsel to represent it should such be deemed more appropriate in a given situation.

Regarding the fourth question, it appears that the school board

there concerned has allowed the county child welfare board the use of a school classroom and now seeks to deduct \$600.00 from the amount which it owes under Section 5127.04, *supra*, for the use of the classroom. From the facts as given, I do not know whether the child welfare board contracted with the school board to pay a rental for the use of the classroom (which in itself might raise a legal question). Regardless of whether such a contract was entered into, however, it appears clear that the board of education is without authority to pay to the child welfare board a lesser amount than is due under Section 5127.04, *supra*. That section clearly requires that an amount based on a tuition basis be paid, and that amount is required to be paid even though, because of a contract, the child welfare might owe the school board an amount for the use of a classroom.

In conclusion, therefore, it is my opinion and you are advised:

1. The provision of Section 5127.04, Revised Code, that a board of education pay an amount as specified in said section to a child welfare board is mandatory.

2. Where a board of education fails to pay the amount due under Section 5127.04, Revised Code, to a child welfare board, the child welfare board may proceed in mandamus, or other proper legal remedy, to enforce the payment; and in such action, the child welfare board should be represented by the county prosecuting attorney, which officer has a duty under Section 309.09, Revised Code, to represent the child welfare board.

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Respectfully,

WILLIAM B. SAXBE

Attorney General