

election was had thereon one hundred and ninety days after the passage of the ordinance, the council never having taken any action thereon, the failure to file such referendum petition with the legislative authority of the village, and the failure of the council thereof to submit the ordinance to the electors within the time required by section 8 of Article XVIII of the Ohio Constitution, rendered such election invalid.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

421.

TUITION—HIGH SCHOOL PUPIL—BOARD OF EDUCATION MAY NOT REQUIRE PAYMENT OF TUITION OF PUPIL FROM ANOTHER DISTRICT AS A CONDITION PRECEDENT TO ADMITTING PUPIL.

SYLLABUS:

1. *Where, by reason of the assignment made in pursuance of Section 7764, General Code, or otherwise, a school pupil is entitled to admission to a high school and is entitled under the law to attend that high school, at public expense, the authorities in charge of the said high school must admit the pupil to said school and allow him all the advantages of the school the same as other pupils in the school, regardless of whether or not his tuition is paid in advance, and even if it is probable that it will be necessary to bring suit to enforce collection of the tuition.*

2. *A board of education is not authorized to enforce collection of moneys due it for tuition from other districts on account of the attendance in its schools of high school pupils residing in the other districts, liability for which is fixed by Sections 7747 and 7748, General Code, by withholding from said pupils the privilege of attending school until such tuition is paid.*

3. *Boards of education are limited, in the collection of foreign tuition which has accrued on account of the attendance of high school pupils in the schools of its district, to an action in the courts for the collection of the amount accrued.*

COLUMBUS, OHIO, March 30, 1933.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—You have requested the opinion of the Attorney General as follows:

“The question as to whether a rural board of education maintaining a high school may demand the tuition of pupils resident in adjoining districts having no high school to be paid in advance, and, if such demand is not complied with, whether such non-resident pupils may be excluded from such high school, has been brought to our attention and your opinion is requested.”

In the interpretation and application of all legislation relating to public schools and public education it is well to bear in mind certain fundamental principles and purposes that were the corner-stone of organized government in this state.

When the Northwest Territory was first established and provisions were made for its government by "the Ordinance of 1787" it was provided therein:

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Practically this same language was used in the Constitution of 1802, and again in the Declaration of the Bill of Rights contained in the Constitution of 1852.

In Section 2 of Article VI of the present Constitution, express direction is given to the General Assembly to make such provision by taxation or otherwise, as with the income arising from the school trust fund will insure a thorough and efficient system of common schools throughout the state. In Section 3 of said Article VI of the Constitution of Ohio it is declared that

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds."

Upon consideration of the applicable provisions of fundamental law, together with the history of school legislation in Ohio it is manifest that the intent and purpose of all such legislation has ever been to establish and maintain a system of public schools to the end that all resident youth in the state of Ohio of school age, should have the opportunity of acquiring an education and of pursuing their studies through the different grades, at public expense and without cost to the individual student or his parents or guardian, at least so far as tuition charges were concerned, providing the pupil in his attendance at school conformed with the system of schools established. There have been times, however, when this principle was lost sight of in legislation respecting schools as will hereafter appear, and it was to remedy this that later legislation was enacted.

It will be observed that the admonition of the Constitution is to provide a "system of common schools throughout the state" and it is to the upbuilding of a state-wide system of schools so denominated by express declaration of the people, that all legislation with respect thereto has been directed. *Miller vs. Korns*, 107 O. S. 287.

Provision was first made in 1878, expressly authorizing local school authorities to establish schools of a grade higher than the primary grade (75 O. L. 513). Such schools, when established, came to be called "high schools." Only a comparatively few communities at that time, and for many years later, were able to take advantage of the power to establish high schools, and it seems that for many years school pupils residing in districts which did not establish and maintain high schools had no means of pursuing their education beyond the grades given in the schools of the district where they resided unless they paid for the privilege from their own resources. At that time, and for a long time thereafter, local school authorities were not empowered to admit pupils not residing in the school district to the schools of the district without charge unless they were children, wards or apprentices of freeholders in the district, nor were local school authorities empowered to pay tuition from public funds for resident children who attended school in another district.

In 1892, there was enacted what was known as the "Boxwell Law" (89 O. L. 123). By the terms of this law provision was made for the "gradua-

tion" of pupils from the common schools of sub-districts and special school districts after successfully passing an examination to be given by the county board of school examiners. Upon such graduation the pupil was awarded a diploma which permitted him to enter any high school in the county. By Section 3 of this law it was provided that the tuition of such graduates as may attend any city or village high school of the county might be paid by the board of education of the district of his residence. The payment of such tuition was not made compulsory. This law was amended in 1896 so as to provide that "graduates" from the common schools of sub-districts and special districts might enter any high school in the county in which they resided or in an adjoining county "upon the payment of tuition." (92 O. L. 198). The law as amended at this time did not make the payment of this tuition by the district of the child's residence compulsory. The provision for the payment of tuition from public funds was permissive in form the same as in the former law.

In 1902, this law was amended so as to create a liability on the district of residence of a primary school "graduate" for the tuition of such child in his attendance at a high school which, under the law, he was permitted to attend. (95 O. L. 72). This law, originally Section 4029-3 of the Revised Statutes, and codified as Sections 7747, 7748, 7749, 7750 and 7751, General Code, has been amended a number of times since 1902, until there have finally evolved therefrom Sections 7747 and 7748, General Code, which provide in substance, that the tuition of pupils who are eligible to high school and who reside in districts which do not maintain a high school shall be paid by the board of education of the district of their residence. It is also provided that a board of education providing limited courses in high school work must pay the tuition of resident pupils who pursue, in other high schools, regular high school courses not available to them in their home district. The method of determining when a pupil is eligible for admission to a high school is now altogether different than it was under the Boxwell Law.

Upon review of the history of this legislation it will be observed that for a time pupils in townships and special school districts who had successfully passed the required examination were permitted to attend high schools in other districts, and no compulsory provision was made for payment of tuition by anyone. This no doubt prompted the remarks of Judge Matthias in the case of *State ex rel. vs. Bushnell*, 95 O. S. 203, 210, where he said:

"It is to be borne in mind that the right and privilege of pupils to attend high school in districts other than those wherein they reside was conferred long prior to the passage of any law requiring boards of education to pay tuition for such attendance. It is therefore manifest that the right to take the examination, and, if successful, the privilege of attending a high school in another district, did not imply any obligation whatever upon the local board of education to pay tuition. The right of the pupil to attend a high school elsewhere and the obligation of the board to pay tuition have at all times been treated in legislation as two entirely separate and distinct matters, the privilege of the pupil being broader than the obligation of the board."

Not until after 1902, when the payment of tuition by local boards of education for resident "graduates" who attend high school in their districts was

made mandatory, did the compulsory school law require pupils to attend high school. Although the so-called compulsory school law, in some form, had been in effect since 1889, and at all times required children to attend school until at least twelve years of age, and during a part of this time the compulsory school age was fourteen and sixteen years, provision was made prior to 1902, and perhaps later, for the excusing of children from attending school after they had completed the elementary grades.

The present compulsory school law, as contained in Section 7762, General Code, fixes the maximum school age for attendance of children at school at eighteen years, and does not provide for excusing children from such attendance solely on the ground that they have completed the courses of study below those regarded as high school courses.

The present law clearly contemplates, in my opinion, that children must attend high school as normally, a child will have completed the first eight grades of school work commonly called the elementary grades at the age of fourteen and yet he is required to attend school under quite severe penalties until he is eighteen years old, unless legally excused from such attendance. The mere completion of the elementary courses of study does not justify his being excused.

Section 7764, General Code, provides that a child in his attendance at school shall be subject to assignment to the class in elementary school, high school or other school suited to his age and state of advancement and vocational interest within the school district of his residence, or without such district if the schooling is not available in the district.

If the child attends the school to which he is assigned his tuition is to be paid in accordance with Section 7747 and 7748, General Code.

There are perhaps some circumstances under which a pupil may attend some other school than the one to which he is assigned and still the district of his residence will be required to pay his tuition. It is not necessary to go into that question further for the purposes of this opinion. It will be found that the law provides a method whereby high school work may be provided at public expense for all pupils who have completed the work of the elementary grades, providing the pupil conforms to the method provided by law.

It certainly would not be consistent with, and in furtherance of the constitutional mandate contained in Sections 2 and 3 of Article VI of the constitution of Ohio, whereby the General Assembly is directed to "secure a thorough and efficient system of public schools * * * supported by public funds" for the legislature to definitely and expressly require pupils to attend a high school and to provide for the expense of such attendance from public funds and yet permit the high school authorities, where the pupil is required under the law to attend school, to refuse the pupil admission to the school simply because the machinery provided by the legislature for the payment of tuition for the pupil from one public treasury to another does not properly function. The law not only provides in mandatory terms for the payment of this tuition from public funds, but affords a remedy for its collection if not paid in due course. The remedy for the collection of this money is the same as that for the collection of any other moneys due from a public treasury.

I can not conceive that the legislature intended to make the right and privilege granted to pupils to attend a high school dependent on the payment of tuition by the board of education of their residence. As stated by the Supreme Court, the privilege of the pupil is broader than the obligation of the board. The

right and privilege of pupils to attend high school at public expense is as definite and broad as the right of pupils to attend elementary school.

It is fundamental that the laws should be construed to carry out the intent of the legislature, and equally fundamental that it will be conclusively presumed that any law enacted by a legislature is in furtherance of applicable constitutional mandates.

It is a well known principle of law, supported by many authorities, that boards of education and similar statutory boards have such powers only as are granted to them by statute. With this principle in mind, a former Attorney General was prompted to hold in an opinion found in Opinions of the Attorney General for 1922, at page 1068:

“Under existing law, there is no authority for a board of education conducting a high school to refuse to admit to the high school conducted by it any pupil holding a diploma showing completion of the elementary school work, where such pupil’s tuition is paid or will be paid.

Where boards of education refuse to pay tuition already past due, the remedy of the creditor board of education is in an action in the courts for the amount accrued.”

I am therefore of the opinion, in specific answer to your questions, that:

1. Where, by reason of the assignment made in pursuance of Section 7764, General Code, or otherwise, a school pupil is entitled to admission to a high school, and is entitled under the law to attend that high school at public expense, the authorities in charge of the said high school must admit the pupil to said school and allow him all the advantages of the school the same as other pupils in the school regardless of whether or not his tuition is paid in advance, and even if it is probable that it will be necessary to bring suit to enforce collection of the tuition.

2. A board of education is not authorized to enforce collection of moneys due it for tuition from other districts on account of the attendance in its schools of high school pupils residing in the other districts liability for which is fixed by Sections 7747 and 7748, General Code, by withholding from said pupils the privilege of attending school until such tuition is paid.

3. Boards of education are limited, in the collection of foreign tuition which has accrued on account of the attendance of high school pupils in the schools of its district, to an action in the courts for the collection of the amount accrued.

Respectfully,

JOHN W. BRICKER,
Attorney General.

422.

APPROVAL, NOTES OF McARTHUR-HUNTSVILLE VILLAGE SCHOOL DISTRICT, LOGAN COUNTY, OHIO—\$3,459.00.

COLUMBUS, OHIO, March 30, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.