It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

634.

BOARDS OF EDUCATION—RURAL SCHOOL DISTRICT—SUSPENSION OF SCHOOL—PETITION FOR REOPENING—MANDAMUS—PARTICIPATION IN SCHOOL FUND.

SYLLABUS:

Where in accordance with the provisions of Section 7730, General Code, the board of education of a rural school district suspends by resolution a school in such district and a petition is filed to reopen such school, as provided for in Section 7730, supra, and the board of education refuses to reopen the suspended school and a writ of mandamus is issued by a court of competent jurisdiction to reopen the school, such reopened school is entitled to participate in the State Public School Fund.

COLUMBUS, OHIO, May 21, 1937.

HON. JAMES W. LANG, JR., *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication which reads as follows:

> "A question has arisen relative to certain schools located in this county under the so-called School Foundation Law, and I am writing you for an opinion on the same. Certain school districts in our county suspended by resolution a number of schools in their respective districts under and by virtue of Section 7730, of the General Code of Ohio, and the County Board of Education on May 22, 1936, made the following recommendations in regard to the rural schools: "A plan of organization for the operation of the schools in Adams County, Ohio, for the school year 1936-37—
>
> (1) Green Township. Operate eight one-room schools for the school year 1936-37. Close two.
>
> (2) Meigs Township. Operate ten one-room schools for

the school year 1936-37. Close, Colon, Measley, Purtee, Hoop Ridge and Fawcett.

(3) Monroe Township. Operate seven one-room schools for the school year 1936-37. Close one.

(4) Tiffin Township. Operate seven one-room schools for the school year 1936-37. Close two one-room schools."

After the suspension of various schools by the local boards of education, the parents of twelve or more children petitioned the boards to re-establish certain schools, which petitions were filed with such boards before August 1st, 1936, and all of the local boards where such petitions had been filed to re-open such suspended schools, rejected the petitions and refused to re-open the same.

The first part of September, 1936, two mandamus suits were filed against the Green Township Board of Education to compel the reopening of two one-room schools in said district, and a suit was filed by a parent to re-open Colon School in Meigs Township; two suits were filed against the Tiffin Township Board of Education to re-open two one-room schools; two suits were filed by the parents against the Green Township Board of Education to re-open two schools in that district; one suit was filed against the Jefferson Township Board to re-open one school and a suit was filed against the Board of Education of Oliver Township to re-open one school.

A hearing was had before Honorable J. R. B. Kessler, Judge of the Court of Common Pleas of Adams County, Ohio, on all of these mandamus suits, and on September 11, 1936, Judge Kessler ordered the various Boards of Education to re-open the above mentioned schools, which schools were re-opened and have been operating since said date.

The State Department of Education has refused to include or make distribution for any of the schools which were ordered re-opened by mandamus proceedings, and such boards are without funds for the payment of the teachers in such schools.

I wish that you would advise whether or not the schools that were ordered closed by the various local Boards of Education and then ordered re-opened by mandamus proceedings would be entitled to participate in the distribution of funds under the Foundation Program, because if they do not participate in such distribution they will be without funds with which to pay the teachers, but if they are entitled to share as is provided by Section 7595-1c of the General Code of Ohio, they can pay these teachers."

Section 7730, General Code, provides in part, as follows:

> "The board of education of any rural or village school district may suspend by resolution temporarily or permanently any school in such district because of disadvantageous location or any other cause, and teachers' contracts shall thereby be terminated after such suspension. Whenever the average daily attendance of any school in the school district for the preceding school year has been below ten the county board of education may, before the first day of August, direct the suspension and thereupon the board of education of the village or rural school district shall suspend such school.
>
> * * * * *
>
> Upon petition filed with a local board of education between May 1 and August 1 of any year signed by the parents or guardians of twelve children between seven and fifteen years of age, living in the district and enrolled in school, whose residences are nearer to a certain school which has been suspended than to any other school of the district, asking that such suspended school be reopened, the local board of education shall reopen such school for the ensuing school year provided there is a suitable school building in the territory of such suspended school as it existed prior to suspension."

A reading of the facts set forth in your communication shows: that, the board of education of the rural school districts suspended by resolution said rural schools; that, after suspension of said rural schools and before August 1, 1936, petitions were filed with the boards of education of the rural school districts asking that such suspended schools be reopened; that, said boards of education refused to reopen the schools; that mandamus proceedings were commenced against the various boards of education of the rural school districts; and that hearings on said mandamus actions were had before the Honorable J. R. B. Kessler, Judge of the Court of Common Pleas of Adams County, Ohio, and it was ordered that the various boards of education "reopen the above mentioned schools, which schools were reopened and have been operating since said date."

We must assume that at the hearing of the mandamus actions the court found that there had been a compliance with the provisions of Section 7730, supra.

The question asked in your letter is "whether or not the schools that were ordered closed by the various local boards of education and then ordered reopened by mandamus proceedings would be entitled to participate in the distribution of funds under the Foundation Program."

In other words, this question is, whether or not the procedure taken by the parents under Section 7730, supra, and the mandamus proceedings are such actions that by the provisions of Section 7595-1e, General Code, would bar the various local boards of education from participating in any portion of the state public school fund. Section 7595-1e, General Code, provides as follows:

> "A school district, the board of education of which has not conformed with all the requirements of the law and the rules and regulations pursuant thereto, including the annual plans of reorganization, in or of the county school district (as they apply to such school district) adopted by the county board of education and approved by the director of education as provided in Sections 7600-1 to 7600-5 and Section 7600-9, shall not participate in any portion of the state public school fund, except for good and sufficient reason established to the satisfaction of the director of education and state controlling board; provided further, that no school district wherein the total of the annual salaries paid the teachers of the district is less than seventy-five per cent of the total cost of the foundation program of such district, exclusive of transportation and tuition costs, shall participate in any portion of the state public school fund."

The first question to be determined is, whether or not House Bill No. 466, or what is better known as the "School Foundation Program Law," repealed Section 7730, supra.

There is no express provision in the School Foundation Program Law repealing the provisions of Section 7730, supra. The repeal, if any, of this section must be by implication.

Section 7730, supra, provides:

> (1) The machinery of "suspension" of schools, temporarily or permanently, by resolution of the board of education of any rural or village school district;
> (2) Reopening or re-establishment of the school, either,
> (a) Whenever such suspension is had on the direction of the county board of education then upon the direction of such county board, or upon the finding by the board of education ordering such suspension that such school ought to be re-established, such school shall be re-established.
> (b) Upon petition filed with a local board of education.

Action taken under this section amounts to only a suspension of the school. "Suspension," implies the possibility of re-establishment. In

State, ex rel. Meyers vs. *The Board of Education,* 95 O. S., 367, at page 372, the Court said:

> "The use of the term 'suspend' necessarily implies the possibility of a revivor or reestablishment, and the terms of the proviso indicate, of course, that the legislature contemplated the reopening of any 'suspended school.'
>
> Now, consider the terms of the proviso. It enacts that any suspended school 'may be reestablished by the suspending authority upon its own initiative.' Here is an explicit and plenary grant of power to the board of education of the rural or village district to reestablish the school. The grant could not be more comprehensive. Then follows the language, 'or upon a petition asking for a reestablishment, signed by a majority of the voters of the suspended district, at any time the school enrollment shows twelve or more pupils of lawful school age.' "

Also, see *Elmer Feasel* vs. *The Board of Education,* 24 O. N. P. (N. S.), 329.

The terms of the "School Foundation Program Law" provide for a plan of organization of county school districts and an annual "plan of reorganization" of county school districts through the cooperation of county boards of education and the Director of Education. These sections are Sections 7600 to Section 7600-8, General Code, and read as follows:

> "Sec. 7600. After each semi-annual settlement with the county treasurer each county auditor shall immediately apportion school funds for his county. On or before the first day of April of each year, the county board of education shall make a survey of the county school district to determine the number of teachers and other educational employees, and the number of transportation routes necessary to maintain the schools of the county school district. The clerk of the county board of education shall certify the findings of such survey to the director of education.
>
> Money received from the state on account of interest on the common school fund shall be apportioned to the school districts and parts of districts within the territory designated by the auditor of state as entitled thereto on the basis of the total enumeration of youth of school age in each whole district entitled thereto, and the enumeration of youth of school age residing in parts of districts so entitled, and all other money in

the county treasury for the support of common schools and not otherwise appropriated by law shall be apportioned annually to the school districts and parts of districts in the county in proportion to their respective numbers of pupils in average daily attendance used as a basis for the distribution of the state public school fund."

"Sec. 7600-1. On or before the first day of September, 1935, and on or before the first days of April, 1936, 1937 and 1938, each county board of education of the state shall prepare a diagram or map of the county showing the then location and position of all school districts therein, the location and character of roads, the location of streams and natural barriers, the location of each school building and of each route over which pupils are transported, together with a statement of the size and condition of each building and the number and ages of children attending the same. The territory in adjoining counties, or in any adjoining city or exempted village school district, which, in the opinion of the county board of education, should be attached to or detached from any such county, city or exempted village school district for the purpose of economy, efficiency and convenience, shall also be shown on such diagram or map. The board of education of each rurel and village school district which is located wholly or partially within the county, shall, upon the request of the county board of education promptly furnish to the board of education, such information as it may require in the praparation or subsequent modification of such diagram or map."

"Sec. 7600-2. Upon completion of each of these surveys, the county board of education shall prepare a new diagram or map of the school districts in the county school district prescribing the transfers of territory, eliminations of school districts or the creation of new school districts which will provide a more economical and efficient system of county schools; and on or before June first, annually, shall adopt the same as the plan of school district organization."

"Sec. 7600-3. Before adopting the plan of reorganization each year the county board of education shall call a meeting of all members of boards of education of rural and village school districts within the county school district, as well as of interested persons, and shall lay the proposed plan before them for advice and suggestions. There shall be published for four consecutive times in a newspaper of general circulation in the territory affected, a notice of the time and place of a hearing

to consider a plan of organization, or a contemplated change of an adopted plan. Such publication shall be made at regular intervals of not less than one week each within sixty days prior to such hearing."

"Sec. 7600-4. In case the county board of education deems it necessary to modify or change the adopted plan, the board shall provide for a public hearing before any change therein shall be made."

"Sec. 7600-5. In case the affected boards of education fail to agree on transfers of territory as hereinbefore provided, a complete transcript of all proceedings with respect thereto shall be transmitted to the director, who shall thereafter order such tranfers of territory or the creation of such new school districts as he shall deem in harmony with principles of economy, efficiency and convenience."

"Sec. 7600-6. The director shall carry out steps involved in the formulation of a plan of district reorganization as hereinbefore required, in the event any county or other board of education fails to act. The director, in such case, shall proceed to make the survey, prepare and adopt a plan of county school district organization for such county. For that purpose the director is hereby vested with all the rights, powers and duties, hereinbefore conferred upon the county boards of education, relative to the adoption of such plan, with such additional power as will enable the director to procure and furnish such information as he deems necessary."

"Sec. 7600-7. On or before the 15th day of October, 1935, and on or before the first day of July, 1936, 1937 and 1938, the county board of education shall transmit such adopted plan of reorganization to the director who shall approve the same with such modification and additions thereto as he deems desirable, and shall certify his approval to the county board of education: Provided, however, that the director shall grant one or more hearings to the county board of education, to any affected board of education and to any interested persons affected, with reference to any such modifications or additions. Upon approval, of the director, such plan of organization within any county shall take effect upon a date to be fixed by the director, and thereafter no school district or parts thereof shall be transferred or the boundary lines thereof changed unless such transfer or change of boundary lines is in accordance with such adopted plan of organization. Nothing in this act shall be construed as a delegation of authority to the county board of

education or the director to create a debt in any school district for any purposes."

"Sec. 7600-8. A county plan of organization may be modified and changed at any time after adoption, by a county board of education, or by the director, in the same manner as provided for the adoption of such plan."

It must be observed by a reading of Sections 700 to 700-8, inclusive, supra, that nowhere is any authority given for suspension of a school. Section 7600, supra, provides for the making of a survey; Section 7600-1 for preparing a map of the county; Section 7600-2, for a new map prescribing the transfers of territory, elimination of school districts, or the creation of new school districts," and adopting said map as the plan of school district organization. It is obvious that the adoption of a plan of organization by a county board of education which prescribes the transfers of territory, of school district elimination, or creation of new school districts does not in and of itself provide for suspension of any school. Transfer of school territory, elimination of school districts or the creation of new school districts must be regarded as permanent if the purpose of the statute is to be attained, that is, securing a more economical and efficient system of county schools. The only provision in the "School Foundation Program Law" that restricts a change in school districts not in accordance with the adopted plan of organization by the county board of education is contained in Section 7600-7 supra, and reads as follows:

"* * * and thereafter no school district or parts thereof shall be transferred or the boundary lines thereof changed unless such transfer or change of boundary lines is in accordance with such adopted plan of organization."

The import of this provision in Section 7600-7, supra, is that when a plan of organization has been legally adopted and approved, no transfers can be made or boundary lines changed except in conformity with the plan. No interpretation or construction can be given to this provision which relates to transfers and boundary lines so that it will include a "suspension" of a school.

As already pointed out: the "School Foundation Program Law" provides, in plain, concise, unambiguous and easily understood words, for a plan or organization of county school districts and an annual plan of county school district organization through *transfers of school territory, elimination of school districts and creation of new school districts;* that, Section 7730, supra, provides for "suspension" of a

school, temporarily, which may become permanent by failure to take action for reestablishment or reopening as provided for in said section. There is nothing irreconcilable in the provisions of the "School Foundation Program Law" and those of Section 7730, supra. I do not think the Legislature intended to repeal by implication the provisions of Section 7730, supra. It has been the consistent policy of the Legislature in the enactment of "school legislation" dealing with the changing of school districts to give so much control as possible to the electors residing in the affected school districts. This policy is clearly seen in enactment of Section 7730, supra. If a rural board of education desires to close a school in the district it must do so by a resolution, temporarily, "suspending" the school. Action by parents or guardians of twelve children living and enrolled in the school, if they deem that such closing of the school is unfavorable or is unsatisfactory to them, can prevent a permanent closing of the school.

The courts of Ohio have consistently held that if by a reasonable construction a later statute can be reconciled with a former one the former will not be held to have been repealed by implication. *Goff, et al,* vs. *Gates, et al.,* 87 O. S., 142.

> In 37 Ohio Jurisprudence, Section 140, page 401, it is stated:
> "Repeals by implication are not favored and have been declared to be 'abhorred.' They will not be indulged if there is any other reasonable construction."

In *City of Cleveland* vs. *Purcell, et al.,* 31 O. App., 495, at page 500, the court said:

> "Now, the universal rule of construction of statutes is, I believe, that the law abhors the idea of the repeal of a statute by implication, and it is only when the existing statute is incongruous and cannot be reconciled with the new legislation that the latter will have such effect." (Affirmed in 119 O. S., 606.)

It, therefore, is my opinion: that, Section 7730, supra, was not repealed by the enactment of the "School Foundation Program Law"; and that, there is no provision in the said law that expressly or impliedly directs that a school district, in which a school has been suspended and reopened on petition as provided for in Section 7730, supra, shall not participate *in any portion of the state public school fund.*

This question contained in your request is of general school interest. Therefore, I think it advisable at this time to state that action taken for "reopening" a school as provided for in Section

7730, supra, will probably result in the school district receiving a lesser amount than it would have received had the school not been reopened. In an informal opinion that was rendered by my predecessor in office to you on June 22, 1936, he set forth the reason the reopening of such a school may affect the amount of money the district will obtain from the public school fund. Upon consideration of said informal opinion, the conclusion therein reached appears to be sound, and I concur in its conclusion, and set forth the material part of the same:

> "Section 7595-1, General Code, fixes a specific amount per pupil in average daily attendance in the different types and grades of schools in a school district that shall be distributed from the public school fund to the district, with the following limitation:
>
> 'Except that in districts maintaining one or more schools, each or any of which have fewer than three teachers the amount to be paid such districts on account of attendance in such schools shall be limited by the *minimum operating cost of the foundation program as defined by law or as determined by the director of education pursuant to law.*' (Italics the writer's.)
>
> The clause, 'or as determined by the director of education pursuant to law' as found in the above statute, is pertinent and important. It apparently was the outgrowth of a studied attempt on the part of the framers of the law to discourage the maintenance of small schools and especially so far as this particular statute is concerned, of the maintenance of schools with fewer than three teachers as will be seen from the provisions of Section 7595-1d, General Code, which provides for 'additional aid' to school districts and Section 7595-1c, General Code, which defines the expression 'minimum operating cost of a foundation program' and sets up prerequisites for additional aid to school districts. It is provided in Section 7595-1b, General Code, that 'additional aid' may be apportioned to a school district from the public school fund by the Director of Education, where the district has a tax levy for current school operation of at least three mills if the revenue resources of the district are insufficient to enable the board of education thereof to conduct the schools in such district upon the minimum operating cost of a foundation program 'as defined by or established pursuant to law.'
>
> Section 7595-1c, General Code, in paragraphs (a), (a-1) and (b) defines the normal 'minimum cost of a foundation

program,' in terms of a specific amount per pupil per day for elementary schools, kindergarten schools and high schools. Paragraph (c) provides as follows:

'For pupils in elementary schools and high schools having an average daily attendance of less than one hundred eighty pupils, such amounts per day as will be sufficient to meet the increased cost per pupil due to small classes, to be determined as follows:

If and when the board of education of a school district maintaining one or more schools, each or any of which has an average daily attendance of less than one hundred eighty pupils shall establish to the satisfaction of the director of education and the state controlling board that such schools are essential and efficient parts of the state school system, the amount to be allowed per pupil for the purpose of determining the minimum operating cost of a foundation program of education shall be such as will enable such school or schools to operate at a reasonable level of educational efficiency. For this purpose, schedules of foundation program operating costs for schools of less than one hundred eighty pupils in average daily attendance shall be established by the director of education; but in no case shall the minimum operating cost of a foundation program of education, upon which is based the allotment of moneys from the state public school fund, be less than one thousand one hundred and fifty dollars per annum, for each one-teacher elementary school and two thousand four hundred dollars per annum for each two-teacher elementary school, plus the cost in each case of maintaining approved pupil transportation and tuition foundation programs, or either, as hereinafter provided. Such schedules shall define the minimum operating cost of each of the several foundation programs for schools with small average daily attendance in terms of a specific amount per pupil per day for each size type of school and such specific amount shall be used in place of the amounts specified in paragraphs (a) and (b) of this section.

Pupils in attendance in part-time, continuation and evening schools shall in no case be included in the average daily attendance upon which calculations are made under sub-sections (a) and (b) or (C).'

It will be seen from the foregoing that the Director of Education has considerable discretion in the apportionment of the public school fund, both the normal distribution and the distribution of additional aid to school districts wherein

there are one or more schools each or any of which has an average daily attendance of less than 180 pupils, or wherein there are maintained one or more schools, each or any of which has fewer than three teachers.

In practically all cases where a school is suspended and reopened by authority of Section 7730, General Code, the reopening of the school will result in there being maintained in the district a school with less than 180 pupils or with fewer than three teachers, or both, and in that way the reopening of a school by petition of the school patrons in pursuance of Section 7730, General Code, may affect considerably the amount of money the district will obtain from the public school fund. Such reopening, however, does not deprive the district in any case from receiving any funds from that source."

I desire to make this further observation in regard to the withholding of any portion of the state public school fund from the various boards of education. In a communication from your office dated May 11, 1937, it is stated:—that the Board of Education of Adams County did not call a meeting, advertise and hold a public hearing as provided for in Section 7600-3 and 7600-4, supra; and that, the Director of Education failed to take the necessary action in accordance with the provisions of Section 7600-6, supra. Thus it is seen that there was no legally adopted "plan of school district organization" for Adams County.

A mandatory duty is imposed upon the county board of education to prepare annually a county plan of school district organization, and in event of a failure of the county board of education to act, for the Director of Education to prepare the same. The failure of the county board of education and the Director of Education to perform the statutory duty imposed upon them cannot deprive the various boards of education from participating in the State Public School Fund. It is to be observed that the action taken by the petitioners for reopening the schools and the mandamus proceedings cannot be said to be questionable in any way whatsoever, since no legally adopted plan of school district organization for Adams County for 1936-37 existed.

In specific answer to your question it is my opinion that the schools that were ordered closed by the various local boards of

education and then ordered reopened by mandamus proceedings would be entitled to participate in the State Public School Fund.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

635.

APPROVAL — CERTIFICATE OF TITLE AND WARRANTY DEED EXECUTED BY THE NORTHERN OHIO GUARANTEE TITLE COMPANY AND RELATING TO CERTAIN PROPOSED PURCHASE OF LANDS IN GREEN TOWNSHIP, SUMMIT COUNTY, OHIO.

COLUMBUS, OHIO, May 22, 1937.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval certificate of title No. 36,859 executed by The Northern Ohio Guarantee Title Company under date of February 26, 1937, warranty deed and contract encumbrance record No. 28, relating to the proposed purchase by the State of Ohio for the use of your department in the construction of the Nimisila Creek Basin Reservoir of a parcel of land which is owned of record by one Emma F. Hughes in Green Township, Summit County, Ohio, and which is more particularly described as being Lot No. 17 of C. C. McCue's Little Farms Allotment in the west half of the northwest quarter of Section 19 in said township, as surveyed by S. G. Swigart and Son, and as recorded in Plat Book 36, page 7, of Summit County Record. Said lot as described is subject to all legal highways and there is excepted and reserved therefrom a right of way through said land conveyed to The Canton, Massillon and Akron Railroad Company by deed dated August 14, 1901, and recorded in Vol. 273, page 613, of the Deed Records of Summit County, Ohio.

As previously pointed out to you in opinions on the title to other lots in C. C. McCue's Little Farms Allotment which you have acquired in connection with the project above referred to, the exception from said lot as the same is described of a right of way through the same is that granted to The Canton, Massillon and Akron Railroad Company by Charles A. Smith and wife under the above mentioned date,