provisions of the code." 142 Ohio St. at 332, 51 N.E.2d at 903-904. The court in Neffner did not explicitly address the question whether statutory provisions had to be followed in order to remove a classified employee in violation of R.C. 124.57. This point, along with the persuasive authority, including due process considerations, which indicate that the statutory removal procedures must be followed, lead me to the conclusion that Neffner is not compelling authority for the proposition that a classified employee's employment is automatically terminated by his involvement in political activities.

I am also aware of 1962 Op. Att'y Gen. No. 3005, p. 361, which concluded that an employee who violated R.C. 124.57 was subject to removal under R.C. 124.34 but went on to state that a classified employee who accepted a second, incompatible position, automatically vacated his first position. To the extent that 1962 Op. No. 3005 concludes that an employee may be deemed to have vacated his classified position by the acceptance of a second position, it is overruled.

Because I have answered your first question in the negative, I need not respond to your second question. You may wish to examine the removal provisions of R.C. 124.34, set forth above, the rules promulgated thereunder, see 1 Ohio Admin. Code Chapters 123:1-31; 124-3; 124-5; 124-11; 124-13; 124-15, and the constitutional requirements surrounding the discipline of classified employees, see footnote 2, with regard to the specific action which must be taken by an appointing authority in order to remove a classified employee.

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

1. R.C. 124.57 may not constitutionally be enforced to prohibit classified employees from engaging in nonpartisan political activity.

2. An appointing authority has the authority to take action pursuant to R.C. 124.34 to remove or otherwise discipline a classified employee who is engaged in partisan political activity in violation of R.C. 124.57, but such authority is discretionary not mandatory in nature. (1962 Op. Att'y Gen. No. 3005, p. 361, overruled in part.)

3. A classified employee who engages in partisan political activity may be prosecuted pursuant to R.C. 124.62. The position of an employee convicted under R.C. 124.62 is rendered vacant by virtue of such conviction.

## OPINION NO. 83-096

**Syllabus:**

If a nonpublic school adopts a calendar which is asynchronous to the calendar of a local school district, the local school board, if it is required under R.C. 3327.01 to provide transportation to the students of such nonpublic school, must provide such transportation to resident nonpublic school students when the public school district is not open for instruction and is not itself providing transportation for its own public school students. (1968 Op. Att'y Gen. No. 68-156, approved and followed.)

---

**To: Gregory A. White, Lorain County Prosecuting Attorney, Elyria, Ohio**
**By: Anthony J. Celebrezze, Jr., Attorney General, December 21, 1983**

I have before me your request for my opinion on the following question:

If a non-public school adopts a calendar that is asynchronous to a local public school district, is transportation of non-public school students required to be furnished by the public school district when the public school district is not open for instruction and is not itself providing transportation for its own public school students?

You pose the example of a situation "whereby a non-public school, in order to save energy costs, may adopt a calendar opening school on August 1st, running through the month of December, closing for January and February, and re-opening for the remainder of the school year, March through July."

The transportation of school students is provided for in R.C. 3327.01, which reads:

> In all city, exempted village, and local school districts where resident school pupils in grades kindergarten through eight live more than two miles from the school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code and to which they are assigned by the board of education of the district of residence or to and from the non-public school which they attend the board of education shall provide transportation for such pupils to and from such school except when, in the judgment of such board, confirmed by the state board of education, such transportation is unnecessary or unreasonable.
>
> In all city, exempted village, and local school districts the board may provide transportation for resident school pupils in grades nine through twelve to and from the high school to which they are assigned by the board of education of the district of resident or to and from the non-public high school which they attend for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code.
>
> In determining the necessity for transportation, availability of facilities and distance to the school shall be considered.
>
> A board of education shall not be required to transport elementary or high school pupils to and from a non-public school where such transportation would require more than thirty minutes of direct travel time as measured by school bus from the collection point as designated by the coordinator of school transportation, appointed under section 3327.011 [3327.01.1] of the Revised Code, for the attendance area of the district of residence.
>
> Where it is impractical to transport a pupil by school conveyance, a board of education may, in lieu of providing such transportation, pay a parent, guardian, or other person in charge of such child, an amount per pupil which shall in no event exceed the average transportation cost per pupil, such average cost to be based on the cost of transportation of children by all boards of education in this state during the next preceding year.
>
> In all city, exempted village, and local school districts the board shall provide transportation for all children who are so crippled that they are unable to walk to and from the school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code and which they attend. In case of dispute whether the child is able to walk to and from the school, the health commissioner shall be the judge of such ability. In all city, exempted village, and local school districts the board shall provide transportation to and from school or special education classes for educable mentally retarded children in accordance with standards adopted by the state board of education.
>
> When transportation of pupils is provided the conveyance shall be run on a time schedule that shall be adopted and put in force by the board not later than ten days after the beginning of the school term.
>
> The cost of any transportation service authorized by this section shall be paid first out of federal funds, if any, available for the purpose of pupil transportation, and secondly out of state

> appropriations, in accordance with regulations adopted by the state board of education.
>
> No transportation of any pupils shall be provided by any board of education to or from any school which in the selection of pupils, faculty members, or employees, practices discrimination against any person on the grounds of race, color, religion, or national origin. (Emphasis added.)

Thus, pursuant to R.C. 3327.01, a local school district is required to provide transportation for resident nonpublic school students in grades kindergarten through eight who live more than two miles from the school they attend, as long as the school meets minimum standards established by the State Board of Education and does not practice discrimination, unless such transportation would require more than thirty minutes of direct travel time or unless such transportation is unnecessary or unreasonable.[1] See Hartley v. Berlin-Milan Local School District, 69 Ohio St. 2d 415, 433 N.E.2d 171 (1982). See also Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the use of the word "shall" in a statute renders its provisions mandatory in nature). Under no other circumstances may a school board refuse to provide transportation to nonpublic elementary school students.

A school district may, but is not required to, transport high school students, regardless of whether they attend public or nonpublic schools. See Dorrian v. Scioto Conservancy District (the use of the word "may" in a statute renders its provisions permissive or optional). If, however, transportation is provided to high school students attending public schools, transportation must also be provided to students attending nonpublic high schools. 1974 Op. Att'y Gen. No. 74-040. Indeed, as a general matter, when optional transportation is provided to students attending public schools such transportation must be provided to students attending nonpublic schools which meet the requirements of R.C. 3327.01. 1968 Op. Att'y Gen. No. 68-156. See 1980 Op. Att'y Gen. No. 80-012 (school boards have the option to transport elementary students who live within two miles of their schools and school boards may transport students to nonpublic schools even if such transportation would require more than thirty minutes of travel time).

In Op. No. 68-156, the question was considered whether a board of education had the authority to suspend or continue transportation services for nonpublic school children when such services had been suspended for a period of time for public school children due to the closing of the public schools. In recognizing the

---

[1] In Hartley v. Berlin-Milan Local School District, 69 Ohio St. 2d 415, 433 N.E.2d 171 (1982), the court equated the standard of "unnecessary or unreasonable" with the "impractical" standard found in paragraph five of R.C. 3327.01, which is used by a school board in determining whether payments in lieu of transportation should be provided to parents, and concluded that a board of education could not make payments in lieu of transportation unless the board determined transportation was unnecessary or unreasonable, and such decision was confirmed by the State Board of Education. But cf. Hartley v. Berlin-Milan Local School District (concurring opinion, Holmes, J.) (construing in pari materia R.C. 3327.01 and R.C. 3327.02, which also provides, under specified circumstances, for payment in lieu of transportation when transportation is "impracticable," and deciding that after a determination by a school board, confirmed by the State Board, that the provision of transportation was unnecessary or unreasonable, the board had no obligation to provide transportation or payments in lieu of transportation; however, once the board intended to make provision for transportation, but determined that it would be impractical or impracticable to transport a student, it could make payments in lieu of transportation).

A finding of unreasonableness or impracticality under R.C. 3327.01 or R.C. 3327.02 is limited to the circumstances of a particular student or students. These provisions may not be used to excuse a school board from providing transportation to all nonpublic school students. See 1981 Op. Att'y Gen. No. 81-025; 1974 Op. Att'y Gen. No. 74-040.

mandatory nature of a school board's duty to transport all elementary school children and to provide the same services to nonpublic high school as offered to public high school students, the opinion stated:

> Therefore, the closing of the public schools in December, 1968 should not affect the Board's duty to provide transportation for pupils attending non-public schools.
>
> The Youngstown City Board of Education cannot, of course, control the school calendar of the non-public schools in the area. However, the above transportation duties clearly devolve upon the Board even if the calendars do not coincide.
>
> Therefore, if the Board decides to close the public schools for the month of December, 1968, it still must provide the usual pupil transportation services to those pupils who will be attending the non-public schools in its area.

Op. No. 68-156 at 2-195.

Although Op. No. 68-156 involved the possible closing of public schools due to the failure of a tax levy, while your question involves the operation of nonpublic schools during the summer months when public schools are normally closed, I see no legal basis upon which to distinguish the two situations. I agree with the conclusion reached in Op. No. 68-156 and find it to be directly applicable to your question.

In response to your question it is my conclusion that a local school district is required to furnish transportation to nonpublic school students when the public school district is not open for instruction and is not itself providing transportation for its own public school students. Of course, a school district need not provide transportation to nonpublic school children under these circumstances when the duty to provide transportation is excused under R.C. 3327.01. For example, under a particular set of circumstances, it may be possible for a board to find that the transportation of students to a nonpublic school which has adopted an asynchronous calendar is unreasonable, unnecessary or impractical.

As pointed out in Op. No 68-156, school districts are reimbursed for costs in transporting students to nonpublic schools by the state according to a formula adopted by the State Board of Education pursuant to R.C. 3317.024(K). See R.C. 3317.01-.023; R.C. 3317.024(P); R.C. 3317.06; R.C. 3317.11 See also R.C. 3327.012; 1981 Op. Att'y Gen. No. 81-025. School districts are reimbursed for transporting nonpublic students regardless of whether the public schools are open. See 2 Ohio Admin. Code 3301-83-01(F)(9). In addition, I draw your attention to R.C. 3327.01 which states that the "cost of any transportation service authorized by this section shall be paid first out of federal funds, if any, available for the purpose of pupil transportation, and secondly, out of state appropriations, in accordance with regulations adopted by the state board of education."

In conclusion, it is my opinion, and you are advised, that if a nonpublic school adopts a calendar which is asynchronous to the calendar of a local school district, the local school board, if it is required under R.C. 3327.01 to provide transportation to the students of such nonpublic school, must provide such transportation to resident nonpublic school students when the public school district is not open for instruction and is not itself providing transportation for its own public school students. (1968 Op. Att'y Gen. No. 68-156, approved and followed.)

## OPINION NO. 83-097

**Syllabus:**

1. When a full-time county employee is tardy, ill or otherwise absent without approved leave, the appointing authority may not reduce the amount of vacation leave which accrues to the employee pursuant to R.C. 325.19(A) for the biweekly pay period in which the tardiness or absence occurs.