

## FORMAL OPINIONS OF COUNSEL

BOARD OF EDUCATION (Powers and Duties) (Employment of Architect)—SCHOOL BUILDINGS (Approval of Plans)—DISTRICT MEETING (Powers) — DISTRICT OFFICERS (Clerk) (Qualifications) (Incompatibility) — EDUCATION LAW, Secs. 2102, 2130.

No. 1

I have your letter of July 12, 1951, in which you ask my opinion whether a board of education of a central school district has the legal right to employ an architect to prepare plans and specifications without the necessity of presenting the matter to a school meeting and obtaining approval from such body.

You also ask my opinion whether the principal or his wife may be clerk of the school board.

Both of your questions are answered in the affirmative.

In order that a school building proposition may be presented to the voters it is essential that the board have a definite proposition to present. The voters, before they are able to determine intelligently whether or not a building should be erected, must know something about the proposed building—its probable cost etc. For that reason the Department has consistently held that a board of education has full power to employ an architect for the preparation of preliminary plans. If, however, the architect is to prepare final plans it is necessary that authorization be obtained from the school meeting in order that he may do so.

The Education Law, section 2130, authorizes a member of a board of education to serve as its clerk. Section 2102 of the Education Law prescribes that a person in order to hold the office of clerk must be a qualified voter. If a member of the board of education himself can legally serve as clerk of the school district, there can be no debate that an employee such as the principal can also serve provided he is a qualified voter.

*Dated July 17, 1951*  
*H. B. Ostrander*

**RETIREMENT (Teachers) (Additional Annuity)—EDUCATION LAW, Sec. 511-b.**

No. 2

This opinion relates to your recent letter.

Question arises as to whether under the provisions of chapter 415 of the Laws of 1951, adding section 511-b to the Education Law, a person who has made additional contributions for the purpose of purchasing additional annuities must credit such annuity for the purpose of determining whether he may accept employment. The statute permits a person who has retired to receive compensation from employment by the State or political subdivision of the State in an amount of not to exceed \$750 in any calendar year without loss or suspension from his retirement allowance. The statute permits a person to continue to receive retirement allowance under such circumstances provided it does not exceed \$1500.

Your question arises presumably because there are some instances where the retirement allowance would be less than \$1500 but the amount of annuity purchased would bring the figure above \$1500. The statute speaks of "retirement allowance." Additional annuities purchased by an individual on an optional basis does not in my opinion come within the purview of this term. Such allowance was intended to be the amount which accrues to the teacher on retirement within the regular terms of the retirement statute. Instead of purchasing additional annuity through the retirement system, the teacher might have purchased the same annuity through some insurance company. Then clearly it could hardly be said that it was part of his retirement allowance. I do not think that it makes any difference that he happened to purchase it through the retirement system. Such amount is to be excluded in figuring the \$1500.

*Dated July 27, 1951*

*New York State Teachers Retirement Board*

**CITY SCHOOL DISTRICT — TAX LIMIT (Exclusions) — TAX OVERLAY—BUDGET (Transfer Between Items) (Lapse of Appropriations) (Contingent Fund)—STATE AID TO CITY SCHOOL DISTRICTS RE. 1951 TEACHERS' SALARY LAW —EDUCATION LAW, Sec. 2516, 2521, 3651, 3652.**

No. 3

Your first two questions seek to ascertain whether capital expenditures, debt service and possibly other items of the budget of the city school district of the city of Amsterdam can be excluded from the 2 per cent constitutional tax limit.

Under the express language of section 10 of article VIII of the State Constitution as amended in 1949 (effective January 1, 1950), the amounts necessary to provide for payment of the interest on and the principal of all indebtedness, are computed "in addition to" the prescribed percentage of the average full valuation of taxable real estate of the city school district. Thus, in effect, debt service is excluded from the limitation.

It is to be noted, however, that this is not true of all types of debt service, inasmuch as the same section also reduces such prescribed percentages by the following language: "less the taxes levied in such year for the payment of the interest on and redemption of" tax and revenue anticipation notes, or renewals thereof, "and certificates or other evidence of indebtedness (except serial bonds of an issue having a maximum maturity of more than two years) issued for purposes other than the financing of capital improvements and contracted to be redeemed in one of the two fiscal years immediately succeeding the year of their issue." This latter category would include budget notes and such capital notes as are not issued for capital improvements (such as, for instance, for the financing of the payment of judgments). Thus, debt service on tax and revenue anticipation notes, budget notes and certain capital notes would not be excluded from the limitation.

As far as the exclusion of capital expenditure items is concerned, however, the question must be answered in relation to the presently pending amendment of section 11 of article VIII of the Constitution, which will be submitted to the electorate of the State in November. If adopted, the amendment will become effective on January 1, 1952.

Until such time and event, therefore, the question must be answered on the basis of the present language of section 11 of article VIII.

If a school district (by vote of a meeting) determines to establish a capital reserve fund pursuant to sections 3651 and 3652 of the Education Law, the annual appropriation from tax sources which is required to be paid into such fund would be excludable from the limitation. In such case the amount of such appropriation would be deemed to be indebtedness to the same extent and in the same manner as if the amount had been financed through indebtedness in equal annual instalments over the period of the probable usefulness of the capital improvement involved as provided in section 11.00 of the Local Finance Law. To recapitulate, under the present provisions of the Con-

stitution appropriations for reserve funds may be excluded from the tax limitation, but if so excluded, must be included in the debt limitation.

If the amendment referred to, however, is adopted by the electorate in November 1951, any amount deemed to be indebtedness, as set forth above, will no longer be deemed to be such on and after January 1, 1952. Thereafter, whenever your city school district provides by direct budgetary appropriation for any fiscal year or in any future fiscal year or years of all or any part of the cost of an object or purpose for which a period of probable usefulness is contained in section 11.00 of the Local Finance Law, the taxes required for such appropriation are excluded from the tax limitation applicable to your district. Thus, if the budget contains an appropriation for an object or purpose for which bonds could be issued, that amount will be excluded from the limitation. Similarly, if the budget contains an appropriation for payment into a reserve fund established under section 3651 of the Education Law, such amount will be excluded from the limitation.

Debt service and reserve fund appropriations are the only types of amounts excludable from the constitutional limitation.

You further ask where, in the budget, the tax overlay is listed and whether or not the overlay may be excluded from the tax limitation. Tax overlay is, of course, the popular term to cover the annual appropriation of the amount of money required by the statute to be contained in the budget to replace the amount of taxes which it is anticipated will not be collected during the fiscal year. There is no exclusion which the Constitution authorizes in this respect.

The tax overlay is required by section 2516, subdivision 2, paragraph d, of the Education Law (see also section 2520). The tentative budget must be in the form prescribed by the Commissioner of Education. The overlay appears on page 4 of such form, under "Detail of Estimated Expenditures"—"Fixed Charges," and on page 6 thereof, under "Supplemental data required by law"—"Schedule 11—Reserve for uncollected taxes."

Your next question relates to transfers between budget items. The Governing provision is section 2521 of the Education Law. Under this section the Board of Education, during a fiscal year, may make additional appropriations or increase existing appropriations. The funds therefor are to be provided from the contingent fund, surplus revenues or unencumbered balances

in appropriations (or, of course, by borrowing in accordance with the Local Finance Law). If the district receives, during a fiscal year, revenues of any kind (except from loans and except where the tax overlay was greater than required) in excess of the aggregate of estimated revenues and where such funds are not otherwise committed, such moneys constitute surplus revenues. Such surplus revenues may at any time be transferred to new appropriations or used to increase existing appropriations. The Board of Education may apply all or any part of an unencumbered balance of an appropriation (other than debt service) to new items not contained in its budget or it may transfer the same to existing items.

Your next question relates to the carryover of surplus appropriations in one budget to the next budget.

The governing provisions in reference to the last mentioned point are section 2522 and section 2516, subdivision 3, of the Education Law. Pursuant to the former section, all appropriations which are not expended or encumbered automatically lapse at the end of the fiscal year for which they were made (except that appropriations for capital improvements continue in force until the purpose for which they were made is either accomplished or abandoned). It would, therefore, be necessary to credit any such unexpended and unencumbered amounts under "estimated receipts—balance on hand" in the next ensuing budget.

Your attention is further called, however, to the provision of subdivision 3 of section 2516. Under this provision the Board of Education may include in the tentative budget a contingent fund. This fund would be available for contingent purposes such as unexpected expenses for substitutes or changes in program. The amount of the contingent fund is subject to certain limitations, however, depending upon the total amount of the budget (exclusive of debt service amounts). If such amount is \$500,000 or less, the contingent fund may not exceed 5 percent of the budget, exclusive of debt service. If the total amount is more than \$500,000 but not more than \$1,000,000, the contingent fund may not exceed \$25,000 plus a sum not exceeding 3 percent of the excess over \$500,000 (exclusive of debt service). If the budget exclusive of debt service exceeds \$1,000,000, the contingent fund is limited to \$40,000 plus 2 percent of the excess of the total budget, exclusive of debt service, over \$1,000,000.

Your final question seeks to ascertain the amount of state aid

payable to your district in relation to the additional expenditures required by the new Teachers' Salary Law.

The payment of additional state aid for increased costs of administering the new Teachers' Salary Law is governed by chapter 758 of the Laws of 1951. Under section 2 thereof, since your district receives its apportionment of state aid according to subdivision 2 of section 3609 of the Education Law (your fiscal year being identical with the calendar year), there will be apportioned and paid to your district, on September 15, 1951, an amount equal to  $2\frac{1}{4}$  percent of the moneys apportioned or to be apportioned to you, as based on the school records of 1949-50, exclusive, however, of that part of such apportionment which relates to special classes, night high schools, part-time continuation schools, approved summer schools and approved adult education classes. In addition thereto, under section 3 of such chapter, your district may make an application to the Commissioner of Education (on forms prescribed by him). Thereupon, the Commissioner will apportion and pay, prior to January 1, 1952, the net difference, if any, between the amount apportioned under section 2 of the act (above) and the minimum amount to be paid in order to provide increases in salaries for July 1-December 31, 1951, required by the new Teachers' Salary Law. It is evident, of course, that if your district pays its teachers in excess of the mandate of sections 3101 *et seq.* as amended by chapter 756 of the Laws of 1951, the amount of such excess is not reimbursable under section 3 of the act.

It is to be noted, further, that under section 4 of the act referred to, an additional payment would be made, during the period of January 1-June 30, 1952, if the so-called expense check provisions of the Feinberg-Becker formula (subdivision 4 of section 3603-a) are used for the district and result in a lowering of the apportionments for the district. In such case an additional 9 percent of the moneys apportioned and paid under section 3603-a (exclusive of amounts relating to special classes, night high schools, part-time continuation schools, approved summer schools and approved adult education classes) will be paid to the district during such period. In no event, however, may this additional payment exceed the amount of the expense-check reduction in state aid apportionments to the district. In making apportionments under section 2 of the act as indicated above, it should be noted that the necessary computation will be based on the provisions of subdivision 2 of section 3603-a as in effect prior to the amendment made by section 1 of the

act, that is, prior to July 1, 1951. As you know, this last mentioned amendment further increases state aid to all school districts, by a general revision of the formula, in order to help districts with the payment of the new and higher mandated teacher salaries.

*Dated July 25, 1951*

*Edward V. Cushman*

*Superintendent of Schools*

*Amsterdam, N. Y.*

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**LIBRARY (Free Association) (Tax) (Moneys) (Charter)—DISTRICT MEETINGS (Powers)—EDUCATION LAW, Secs. 253, 254, 255, 256, 259.**

**No. 4**

You inquire whether or not it is legally proper for a school district or municipality to make a lump sum payment to a free association library.

Section 259 (formerly section 1122) of the Education Law provides that a school district may vote taxes for library purposes in addition to those otherwise authorized. The section goes on to state:

All moneys received from taxes or other sources for library purposes shall be kept as a separate library fund by the treasurer of the municipality or district making the appropriation and shall be expended only under direction of the library trustees on properly authenticated vouchers, except that money received from taxes for the support of a free association library shall be paid over to the treasurer of the official body maintaining such library upon the written demand of its directors or trustees.

You state that an objection against such lump sum payment has been raised based on the allegation that a free association library is a private organization and that, therefore, such payment might be considered to be a gift, and hence unconstitutional.

Section 1 of article VIII of the New York State Constitution provides in part as follows:

No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking,...



The first question, then, is whether or not such a payment amounts to a gift within the meaning of article VIII, section 1, of the State Constitution.

Section 253 (formerly section 1117) of the Education Law provides in part as follows:

Public and association libraries and museums.

2 The term "public" library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free public purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term "association" library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or a deed of trust; and the term "free" as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located.

Section 79 of the General Municipal Law, referring to free public libraries, provides as follows:

Any municipal corporation may establish and maintain a free public library . . . in accordance with the library provisions of sections two hundred fifty-three to two hundred seventy-three, both inclusive of the Education Law.

Section 255 (formerly section 1118) provides in part that any county, city, village, town, school district or other body authorized to levy and collect taxes may establish a public library and may raise money by tax to equip or provide a building or rooms for its use.

Section 256 (formerly section 1118-a) provides in part that any municipality or school district may grant money for the support of free association libraries provided such libraries are registered by the Regents or may share the cost of the public library by agreement with other municipalities or districts or may contract with the trustee of a free library registered by the Regents to furnish library privileges to the people of the municipality or district for whose benefit the contract is made.

A municipality or school district, hence, in spending money for a library "maintained for the benefit and free use on equal terms of all the people" of such municipality or district is spending money for its own municipal or district purpose. It may do so directly, by establishing a municipal or district

library in conformity with section 255 (formerly section 1118), in which case, under the laws of the State, the Regents would incorporate such library as a public library which is subject to the control of the Regents. However, the municipality or district may also perform this function through the medium of an institution which, while it may be established and controlled in the first instance by a group of private individuals operating as an association, nevertheless by the terms of its incorporation by the Regents is an institution "maintained for the benefit and free use on equal terms of all the people of the community." If this service were not rendered indirectly through the medium of the free association library, it would have to be rendered directly by the municipality or district. Any money which the municipality or district appropriates for the support of the free association library and pays to it for such purpose, therefore, is paid for services rendered to the community, that is, a municipal or district purpose. The library receives an annual appropriation and in consideration therefor maintains free library service to the community. Such service is sufficient consideration to remove the annual appropriation from the classification of gifts or donations in the sense of the constitutional provision quoted above. This is all the more so in view of the following provision of section 254 (formerly section 1117, subdivision 3):

*Standards of library service.* The regents shall have power to fix standards of library service for every free association or public library which receives any portion of the moneys appropriated by the state to aid such libraries, or which is supported in whole or in part by tax levied by any municipality or district. If any such free association or public library shall fail to comply with the regents requirements, such library shall not receive any portion of the moneys appropriated by the state for free libraries nor shall any tax be levied by any municipality or district for the support in whole or in part of such library.

Hence it is clear that any appropriation by a municipal corporation or school district to a free association library as consideration for the maintenance of public library service can not be considered to be a gift or donation within the meaning of article VIII, section 1 of the Constitution.

Such a lump sum appropriation can not be considered a gift, furthermore, for another reason.

It is a well established rule of equity that where A grants property to B with the clearly expressed intent that such grant

be for the benefit of a third party, a trust is created, even where the expression of intent is not in the form of a written instrument or involves the actual use of the words "trust" or "trustees" etc. No technical language is necessary to create a trust, but a court of equity will affix such character to property conveyed with the intention appearing from the whole transaction that it be held or dealt with for another's benefit. (*Kibbe v. Rochester*, 57 Fed. 2d 542.)

The grant of funds to a free association library by a municipality or school district is clearly intended for the benefit of a third party, that is, the public at large in the area involved. It is equally clear that the free library association does not operate for private gain and does not receive, hold or use such grants for a private use, but does so for "the benefit and free use on equal terms of all the people of the community." To the extent that the free association library administers such public purpose, it is in effect a subordinate governmental agency (see *People v. Brooklyn Cooperage Company*, 187 N. Y. 142) and participates *pro tanto* in the principle that all government agencies, in effect, are trustees administering public funds and property for the benefit of the public. The relationship is essentially a trust relationship (in at least one case this principle has found express legislative recognition; see Second Class Cities Law section 22; see also *Meriwether v. Garrett*, 102 U. S. 472). The relationship between the municipality, the free association library and the public benefited by the arrangement is clearly that of settlor, trustee and *cestui que trust* respectively. In so far as the statutes involved do not adequately provide remedies for the enforcement of such a trust, the courts of equity have jurisdiction. It may well be, in addition, that an action under section 51 of the General Municipal Law would lie for such purpose, inasmuch as the library board acts "for and on behalf of" the municipality in the effectuation and administration of a public purpose (the precise question does not seem to have been heretofore adjudicated).

Under this theory the control over the free association library is so complete that such library can not apply the funds granted by the municipality or school district for any other thing than the intended public purpose. Thus the grant from the municipality or school district to the free association library cannot possibly be construed as a gift contravening the provisions of article VIII, section 1 of the Constitution, any more than the grant of state aid moneys to the school districts of the State,

or to its municipalities is a gift. [See also *Mount Sinai Hospital v. Hyman*, 92 App. Div. 270; see also *Lewis v. LaGuardia*, 172 Misc. 82, aff'd 258 App. Div. 713, aff'd 282 N. Y. 757.]

The complete control over the application of grants of public moneys other than the state moneys to free association libraries may also be based on the following:

1 The powers of the Regents under section 246.

2 In cases where misuse of funds or failure to comply with library standards and the free use of the public occur during a time of the year where public funds already have been placed into the hands of such library, and to the extent of such funds or property, the free association library may be compelled to comply with such standards and the purpose involved upon the theory of a resulting trust. It is a well-established theory that where property is misused by a person or corporation holding full title but holding such title for the benefit of another, courts of equity will impress a trust upon such property for the benefit of the purpose for which such property is intended under all the circumstances involved. [See *Wendt v. Fischer*, 215 App. Div. 196, aff'd 243 N. Y. 439; *Superior Brassiere Company v. Zimetbaum*, 214 App. Div. 525; *Milliner v. Morris*, 219 App. Div. 425; *Burhans v. Van Zandt*, 7 N. Y. 523; *Grote v. Grote*, 121 App. Div. 841; *May v. Hettrich Brothers Company*, 181 App. Div. 3, aff'd 226 N. Y. 580; *Delafield v. Colwin*, 1 Paige 139; *Provisional Government of the French Republic v. Cabot*, 53 N. Y. S. 2d 293, aff'd 269 App. Div. 745.]

It is further my view that the relationship between the municipality or school district and a free association library is a relationship based on an implied contract. The library receives public funds and in return impliedly promises to render free library service to the community. Such implied contracts can be enforced by or against municipal corporations, as well as against or by individuals [*McCloskey v. Albany*, 7 Hun 472; *Port Jervis Water Works Company v. Port Jervis*, 71 Hun 66, aff'd 151 N. Y. 111; *Nelson v. Mayor*, 63 N. Y. 544; *Lines v. Otego*, 91 N. Y. Supp. 785; *Kramroth v. Albany*, 127 N. Y. 581; *People v. Schenectady*, 60 N. Y. S. 2d 911]. It is, therefore, immaterial whether or not an express contract is entered between the parties concerned and such express contract will neither add nor detract from the question of constitutionality in the premises.

In view of the statutory definition of a free association library as quoted above, it may well be argued that such a free

association library is not a private association within the meaning of the constitutional provision. While the free association library is an institution established and controlled in part by a group of private individuals operating as an association and as such partakes to a certain extent of a private nature, the paramount feature of such a library is the fact that it is maintained solely as a public service, for the benefit and free use on equal terms of all the people of the community. The corollary of such paramount feature is the control which the Regents exercise through its incorporation and more specifically through section 254 (formerly section 1117, subdivision 3). Under this provision the library receives state money and moneys from municipalities or districts, as long as they comply with the Regents requirements, that is, fixed standards of library service. The Regents under this provision may terminate all payments (both state and municipal or district appropriations) if the library fails to live up to such standards. The Regents, furthermore, may "for sufficient cause" revoke the charter of any free association library which fails to live up to its obligations (section 219, Education Law). In addition, article XI, section 3 of the Constitution expressly provides for the payment of state funds to libraries. The term libraries in that provision is used without restriction and certainly includes free association libraries. In the light of all these provisions, the thought appears extremely persuasive that such a free association library is not a private association but rather a public, or at least quasi-public, association. If it cannot be considered a public corporation because of the private nature of its origin and some of its control, it certainly must be held to be quasi-public and *sui generis*. While it is under the law a hybrid, partaking of both the public and the private, the paramount characteristic is its public nature and service and its classification as a private association appears at least highly doubtful.

In view of the foregoing, it would appear that section 259 (formerly section 1122) is not in violation of the Constitutional provision of article VIII, section 1, insofar as it provides that money received from taxes for the support of a free association library shall be paid over, in lump sum or otherwise, to the treasurer of such a library.

*Dated August 1, 1951*  
*Director, Division of Library Extension*  
*State Education Department*

# BOARD OF EDUCATION (Powers and Duties)—INSURANCE (Accident).

No. 5

I have your recent letter in which you ask whether chapter 531 of the Laws of 1951 permits school districts to insure all students against all accidental injuries received on school property or in school buses.

The power given to the board by this amendment to the Education Law is in its discretion to insure damages occasioned because of accident or personal injury sustained while participating in physical education classes, intramural or interscholastic sports activities, in an insurance company authorized to do business in the State.

You will note that the authority is limited to injuries sustained while participating in physical education classes, intramural and interscholastic sports activities, and for this reason, it would be my view that the board is not empowered to insure all pupils for damages occasioned by accidental injuries while in the school grounds or in the school building or traveling to and from school for school activities. Of course, a board of education has always had power to obtain liability insurance which would protect the board in the event of a verdict based upon negligence arising out of injury to a child while in school or on school buses or at any time while under school supervision. In my opinion, however, medical reimbursement insurance is authorized only for the activities specifically provided for in chapter 531.

*Dated July 23, 1951*  
*School District Clerk*  
*Spencerport Central School*

## CITY SCHOOL DISTRICT (Board of Education) — BOARD OF EDUCATION (Qualification of Members)—DISTRICT OFFICERS (Incompatibility)—EDUCATION LAW, Sec. 2502 (7).

No. 6

I have your letter of July 4th in which you inquire whether under the provisions of the City School Law the city health officer may serve as a member of the board of education.

Section 2502, subdivision 7, of the Education Law provides that no person shall hold at the same time the office of member of the board of education and any city office.

I am in agreement with you that the city health officer is a city officer.

In my opinion, when chapter 762 became effective on July 1, 1951, the person who was a city officer and a member of the board of education was not in a position to continue in both positions but would need to resign from one position or the other. That such was the intent of the City School Law is indicated, I think, by the transition provisions contained in section 50 of chapter 762 of the Laws of 1950 which provided that any city officer, who by virtue of his office is a member of the board of education, shall cease to be a member thereof on the effective date of the act and the remaining members of the board shall have power to appoint a qualified person to fill the vacancy until the next succeeding election.

*Dated July 11, 1951*  
*City Attorney*  
*Batavia, N. Y.*

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**CONTRACT (Personal Interest of Trustee) — DISTRICT OFFICERS (Trustee) (Member of Board of Education)—EDUCATION LAW, Sec. 1617.**

No. 7

You ask whether it is permissible for a school board to purchase supplies and equipment from a store which is operated as a partnership when the wife of one of the partners is serving as a member of the school board.

Section 1617 provides that no trustee or member of a board shall make any contract in behalf of the district in which he has a personal interest, either directly or indirectly. Furthermore, section 1868 of the Penal Law provides that the making of such contract by a school officer is a misdemeanor.

It is rather difficult, it seems to me, to envision a case where a wife could be said to be without a personal interest in her husband's business. The husband is legally responsible for his wife's support and under normal circumstances where the wife resides in the home provided and supported by the husband, it seems quite obvious that she has a direct personal interest in contracts made with a partnership from which the husband derives his income. For this reason, it would be my view that a board education may not legally enter into a contract with a

partnership in which the husband of a board member is a partner.

*Dated July 24, 1951*  
*Supervising Principal*  
*Cato-Meridian Central School*

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**LIBRARY (Public) (Budget) (Tax)—BOARD OF EDUCATION (Powers and Duties) — DISTRICT MEETING (Powers) — DISTRICT MONEYS (Expenditure) — EDUCATION LAW, Secs. 259, 2015.**

No. 8

You requested my opinion concerning the power of the president of a board of education to alter the budget submitted by the Greenwood Lake Public Library (school district public library).

Section 2015 of the Education Law provides in part as follows:

The inhabitants entitled to vote, when duly assembled in any district meeting, shall have power, by a majority of the voters of those present and voting: . . .

11 To vote a tax for the establishment of a school library and the maintenance thereof, or for the support of any school library already owned by said district, and for the purchase of books therefor, and such sum as they may deem necessary for the purchase of a bookcase or bookcases.

Section 259 of the Education Law, formerly section 261, provides in part as follows:

Taxes, in addition to those otherwise authorized, may be voted for library purposes by any authority named in section eleven hundred and eighteen (now Section 255) and shall, unless otherwise directed by such vote, be considered as annual appropriations therefor till changed by further vote and shall be levied and collected yearly, or as directed, as are other general taxes. . .

The president of a board of education is wholly without power to alter the budget of a school district library. As stated in the above quoted section, the amount once voted by the voters of the school district remains an annual appropriation until changed by the voters of the school district. The voters of the school district have the power to appropriate the money for the school

district library. The president of the board of education has no power whatsoever in regard to this matter.

*Dated July 11, 1951*  
*Director, Division of Library Extension*  
*State Education Department*

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**LIBRARY (Tax) (Moneys).**

No. 9.

You requested my opinion concerning the limitation which the town board of the town of Hammond claims there is upon the amount which it may appropriate for library purposes.

Section 259 of the Education Law governs library taxes. Section 259 was formerly section 261, being renumbered by chapter 273 of the Laws of 1950. Prior thereto, said section was section 1122. Chapter 466 of the Laws of 1947 omitted from the first sentence of this section a former proviso which limited the amount of tax which might be levied and collected in certain municipalities or districts.

The limitation which the town board of the town of Hammond is undoubtedly thinking of is this old limitation which as stated above was removed in 1947.

*Dated July 11, 1951*  
*Director, Division of Library Extension*  
*State Education Department*

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**UNION FREE SCHOOL DISTRICT—INSURANCE (Proceeds)—  
DISTRICT MONEYS (Expenditure) (Reserve Fund)—  
SCHOOL DISTRICT OBLIGATIONS—CENTRAL SCHOOL  
DISTRICT (Establishment)—DISTRICT MEETING (Powers)  
—EDUCATION LAW, Secs. 3651, 3652.**

No. 10

You requested my opinion regarding the situation which has arisen in the Warwick Public Schools. As I understand the situation, the Warwick Public Schools, also known as Union Free School District No. 12, had three school buildings; two of these buildings were elementary buildings and one was a high school building. During the current school year one of the elementary buildings was destroyed by fire and the school district collected \$72,000 from the proceeds from various insurance policies. Thereafter, by a vote of the district the Board of Education sold the site and ruins of the burned building for the sum of \$2,510.

The district was forced to rent and equip temporary quarters due to the destruction of the one school building.

The question now arises as to the manner of handling the various financial matters. As you know, it has always been felt that the proceeds of a fire insurance policy stand in the place and stead of the building destroyed by fire. It would seem that this would be so even though the district has sold the site and ruins. This fund is earmarked as a trust fund to replace the building so destroyed. The district would not be able to disburse any of the proceeds of this fund to pay for current expenses.

As I understand it, \$3,500 of the insurance proceeds were upon contents of the building, and of course the Board of Education could spend this \$3,500 to replace the contents that were destroyed.

I would see no objection to the voters of the district establishing the building reserve fund under the provisions of article 74 of the Education Law. If this fund was established, \$72,000 less than \$3,500 plus the \$2,510 should be placed in this reserve fund. The district could then, pursuant to this article, purchase its own obligations from this fund, provided the applicable sections of the Education Law and the Local Finance Law were met.

Article 74 of the Education Law provides a manner in which the reserve fund may be abolished and the proceeds of the fund disbursed. It would further be my opinion that once the voters voted to establish the reserve fund and place the proceeds of this insurance policy as well as the proceeds from the sale of the site and ruins into this reserve fund the so-called trust which was impressed upon these funds would be removed and that thereafter the voters could abolish the fund and disburse the proceeds as provided in said article 74.

In the event of centralization the proceeds of this insurance and sale of the site would be handled in the same manner as if the building were still in existence provided that the voters do not vote to establish a reserve fund. If the voters vote to establish the reserve fund and thereafter the district becomes centralized the proceeds of the reserve fund would be handled in the manner provided for in article 74.

*Dated June 28, 1951*  
*Chief, Bureau of Field Financial Services*  
*State Education Department*



**TEACHERS (Salary) (Leave of Absence).**

No. 11

I have your recent letter concerning teachers' salaries.

Teachers in tenure districts serve on a continuous basis, that is, 12 months of each year. Such teachers receive an annual salary and each teacher is entitled to receive one-twelfth of this annual salary at the end of each calendar month. If a teacher is appointed on July 1st, she is entitled to receive one-twelfth of her annual salary at the end of July and one-twelfth at the end of each succeeding month. If a teacher is granted a leave of absence without pay, her salary ceases upon the effective date of such leave. A teacher is deemed to be on duty during the summer months and is entitled to receive her salary for such period. A teacher actually serves for 12 months of the year and not ten months. A teacher who serves only five months is entitled to receive only five-twelfths of the annual salary.

In some districts, if a teacher is appointed on July 1st, no salary is paid at the end of July and August and the first salary is paid at the end of September. Thereafter at the end of the succeeding June the teacher is paid her June salary and the salary for the preceding July and August. Such arrangement is permissible only as long as the teachers acquiesce.

The determining factor is the date of appointment of the teacher in your situation. If the teacher was appointed on July 1st and went on leave of absence without pay at the end of the following September, such teacher would be entitled to her pay for the months of July and August and for that portion of September which she served until her leave of absence became effective.

*Dated July 18, 1951*

*Principal*

*Peru Central School*

**BOARD OF EDUCATION (Powers and Duties)—DISTRICT  
MONEYS (Expenditure)—EDUCATION LAW, Sec. 1618.**

No. 12

I have your letter of July 3d requesting an opinion with respect to the legality of payment by central school boards of monies to carry on the central school study which is being undertaken by the New York State School Boards Association pursuant to resolution adopted at the 1949 annual convention.

As you are aware, section 1618 of the Education Law pro-

vides that boards of education may determine to expend and raise by taxation annually such sums as may be required toward defraying the actual and necessary expenses of maintaining and continuing the New York State School Boards Association, Inc., and any of its activities in this State for the purpose of devising practical ways and means for obtaining greater economy and efficiency in the administration of school district affairs.

It is my view that the above-mentioned section provides authority for the expenditure by central school boards of monies for the purpose of defraying the costs of this activity of the association.

*Dated July 10, 1951*

*Executive Secretary*

*New York State School Boards Association, Inc.*

**DISTRICT MONEYS (Reserve Fund, Disposition of)—LIBRARY  
(Moneys).**

No. 13

This will acknowledge your letter of June 30th in connection with the disposition of the reserve fund of Union Free School District No. 8 of the Town of Hamburg, which is now part of a central school district. I would call your attention to the provisions of subdivision 6 of section 3651 of the Education Law.

You will note that the statute directs that such reserve fund is to be used first for the purpose of paying any outstanding indebtedness of the existing district (in this case Union Free School District No. 8), and the remaining portion may be offset against taxes to be levied on the property of that district.

You will further note that with the approval of the Board of Education of the central district and the affirmative vote of the voters of District No. 8, the balance of the fund may be used for the purpose originally established or may be transferred to the central district to be used for such purpose as the voters of the existing district determine. The purpose would need to be a school district purpose.

School districts are authorized under the Education Law to establish public libraries, and it would be my view that if the central school district or the village has established a library under the above-mentioned provision and if the Board of Education of the central school district approves, the voters of the existing district would have power by vote to determine that

the monies be used for such a library. I doubt whether the establishment of a community hall would be an authorized purpose.

The above is the only provision relating to disposition of reserve funds when the district which has established the fund becomes centralized, and it would seem to be broad enough to cover all reserve funds. If, however, the repair reserve fund was established under section 6-d of the General Municipal Law, attention is called to subdivision 3 of that section which provides in part:

3. Moneys in such fund may be appropriated only:

\* \* \* \* \*

d. In the case of a school district, to a reserve fund established pursuant to section thirty-six hundred fifty-one of the education law.

In view of the fact that subdivision 2 of that section requires a public hearing by the board before appropriating moneys from such a fund, after five days' notice it may seem desirable to present the matter of transferring this fund, as well, to the meeting of the voters of Union Free School District No. 8.

In relation to your inquiry as to what becomes of property owned by the existing district which is not used by the central district, section 1804, subdivision 6 provides in part as follows:

6. The board of education shall not sell or otherwise dispose of the property of any such existing district except with the approval of a majority of the qualified voters of such existing district present and voting upon the question at a meeting of such voters duly called by such board of education. For that purpose the proceeds of such sale or disposal of property belonging to such existing district, after deducting the cost of repairs or improvements made after the organization of the central school district, shall be apportioned among the taxpayers of such existing district as they appear upon the last completed town or city assessment roll preceding the date of sale.

*Dated July 13, 1951*  
*Clerk of the Board of Education*  
*Blasdell High School*

**STUDENT SAFETY PATROLS — BOARD OF EDUCATION**  
**(Powers and Duties)—EDUCATION LAW, Sec. 806.**

No. 14

I have your letter of July 12th in connection with the matter of advice as to the legality and regulations affecting the use of student patrols for motor vehicle direction.

There is no provision of law which authorizes the use of students for directing motor vehicle traffic and, in my opinion, such procedure would be beyond the power of the school district and illegal.

Section 806 of the Education Law makes provision for the organization of student safety patrols for the purpose of influencing and encouraging safe use of highways and highway crossings by pupils, but contains the specific limitation that it does not authorize the use of any safety patrol member for the purpose of directing vehicular traffic. It further prohibits stationing such a patrol member in the portion of the highway intended for use of motor vehicles.

This office has repeatedly been asked to comment on this situation and it has always been our view that the direction of motor traffic is a municipal function and beyond the powers of school districts. Assuming functions which are beyond its powers as set forth in the Education Law might entail a financial responsibility in the event of accidents.

*Dated July 25, 1951*  
*J. Kenin Murphy*

**TEACHERS (Salary) (Substitute)—EDUCATION LAW, Sec. 3105.**  
**No. 15**

I have your recent letter in regard to salaries for substitute teachers.

There are two types of substitute teachers—those known as “regular” substitutes and those denominated as “itinerant” substitutes. A “regular” substitute is a person who is assigned to a regular position to take the place of a regular teacher who is absent on maternity leave, sick leave etc. for at least a full term. An “itinerant” substitute is one who is assigned by the day to take the place of a teacher who happens to be out because of a brief absence.

The 1947 Salary Law provided that in districts employing eight or more teachers, beginning July 1, 1947, each “regular” substitute must be placed on the mandated salary schedule no lower than at the first salary step, irrespective of his years of service in the school district, and was entitled to be paid on an annual basis the salary provided for the step. “Regular” substitutes who have 30 hours of approved study beyond the baccalaureate degree were entitled to be placed no lower than on the first step in the schedule for regular teachers similarly



qualified. In the following school years, each regular substitute was entitled to advance in accordance with his years of service but not beyond the sixth step.

Beginning July 1, 1947, an "itinerant" substitute was entitled to one two hundredths of the minimum annual salary for each full day he served. Two hundred days of service count as one year in determining his proper place on the salary schedule and these substitutes are entitled to increments due since July 1, 1947, and up to the sixth step. The new law does not change the rule under which substitute teachers in these districts who acquired a backlog of service prior to July 1, 1947, are entitled to credit such service at the rate of 200 days for a year for the purpose of advancing from step to step. This is so because the new statute not only preserves all the rights the teachers had under the Feinberg Law, but also because of the specific mandate of the new law to increase such teachers' salaries by increments due since July 1, 1947.

You will have to bear in mind the distinction between "regular" substitutes and "itinerant" substitutes. An "itinerant" substitute is to be granted all prior credit on a daily basis and in this case, it would seem to me that this teacher would be entitled to 191 days plus 61 days prior service credit in order to ascertain her correct minimum mandated salary.

*Dated August 21, 1950*  
*Superintendent of Schools*  
*North Tonawanda, N. Y.*

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**STATE AID (Days School in Session) (Average Daily Attendance)  
(Failure to Maintain School)—EDUCATION LAW, Sec. 3604.**  
**No. 16**

I am in receipt of your application for approval of delayed opening of school because the building program consisting of an addition to the building and remodeling of the old building has not been completed.

You request that the week of September 10th be excused by the State from school attendance and that state aid be granted for that period because of the emergency existing.

I regret to state that there is no provision of law which gives the Department the power to approve the delayed opening and thereby grant state aid for the time when school will not be maintained on this account. As you know, the Education Law, section 3604, gives the Commissioner certain discretionary

power when failure to maintain school is caused by epidemic conditions, extraordinary weather conditions, impairment of heating facilities or the shortage of fuel. By legislative action in this regard, the Commissioner's discretion to excuse failure to maintain school is limited to those causes only.

If the Board of Education finds that it is possible to operate during the completion of the building program on curtailed sessions, a new application may be submitted for consideration on the question of approval of the curtailed sessions. If the board is unable to hold any sessions during the opening week of school, it may still obtain its full state aid by making up the days lost at some time during the school year.

*Dated August 28, 1951*  
*Supervising Principal*  
*Clifton Springs Central School*

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**EDUCATIONAL CORPORATION (Consent to Incorporation)  
(Practice of Medicine)—MEDICINE (Practice of)—EDUCATION LAW, Sec. 224.**

**No. 17**

Sidney B. Gordon, Deputy Secretary of State, has suggested that I write you concerning an inquiry which you made to that office as follows:

Will you also advise if there is any objection to the incorporation of an organization which has among its purposes the creation of a blood and plasma bank. The sponsors are individuals associated with a private hospital. Kindly also advise whether any other State Department should be consulted for preliminary approval in connection with the filing of any certificate of incorporation.

As far as this Department is concerned, we would have no *per se* objection to the formation of a corporation which would have among its purposes the creation of a blood and plasma bank. It would require, however, the consent of the Commissioner of Education. We would want to examine the statement of purposes to be clear that the corporation was not so organized as to practise medicine. We would also wish to assure ourselves that the incorporators were functioning within an area of responsibility.

*Dated September 11, 1951*  
*Irving Levin, Esq.*

**RETIREMENT SYSTEM (Power to Invest Funds)—EDUCATION LAW, Sec. 508.**

**No. 18**

I have your letter of September 10, 1951, regarding the authority of the New York State Teachers Retirement Board to purchase first mortgage loans upon real property insured by the Federal Housing Administration.

Subdivision 1 of section 508 of the Education Law reads in part as follows:

\* \* \* Investments shall be made only in securities in which the *trustees of a savings bank* may invest the moneys deposited therein as provided by law. \* \* \* (emphasis supplied)

Section 235 of the Banking Law reads in part as follows: §235. Investments of funds

A savings bank may invest in the following property and securities and no others:

\* \* \* \* \*

20. Subject to such regulations and restrictions as the banking board finds to be necessary and proper, (a) any bond and mortgage insured by the federal housing commissioner, or for which a commitment to insure has been made by the federal housing commissioner, \* \* \*

\* \* \* \* \*

I have been informed by the Superintendent of Banks, under date of September 4, 1951, that the Banking Board has issued no regulations or restrictions in connection with subdivision 20 of section 235 of the Banking Law.

Pursuant to the above quoted sections, it would be my opinion that the New York State Teachers Retirement Board is authorized to purchase first mortgage loans upon real property which are insured by the Federal Housing Administration.

*Dated September 13, 1951*

*Executive Secretary*

*New York State Teachers Retirement Board*

**CONTRACT (Transportation) (Assignment of)—TRANSPORTATION (Contract).**

**No. 19**

I have your recent letter in which you inquire about the legality of the assignment of a transportation contract by the contractor to a local bank.

It has always been the view of this office that since the performance of the services under a transportation contract is a

personal contract and entered into upon the basis of the responsibility of the contractor, the performance of the service may not be assigned.

However, as I understand the present situation, the contractor will continue to perform the services but will simply assign the payments due him to the bank. If it is only the assignment of the moneys under the contract that is contemplated, I would see no legal objection to it.

*Dated September 20, 1951*

*District Superintendent of Schools, Saratoga 1*

**LIBRARY (Board of Trustees, Vacancy in and Election of)—EDUCATION LAW, Sec. 226.**

**No. 20**

It would be my view that a trustee appointed to fill a vacancy on a library board in accordance with the charter granted by the Board of Regents, would serve for the balance of the unexpired term. This provision is in accordance with section 226 of the Education Law, which defines powers of trustees of corporations created by the Regents.

Subdivision 4 of section 226 gives the board power to fill any vacancy occurring in the office of any trustee by electing another for the unexpired term. This specific statute in relation to educational corporations is controlling and consequently the provisions of the Public Officers Law would not be applicable.

*Dated July 2, 1951*

*Edward S. Bentley, Esq.*

**DISTRICT OFFICERS (Clerk) (Treasurer)—DISTRICT MONEYS (Expenditure)—UNDERTAKING—EDUCATION LAW, Sec. 1723.**

**No. 21**

I have your letter in which you request my opinion as to the power of a board of education to designate an alternate officer to sign district checks in the absence of the president and clerk of the board.

I call your attention to chapter 492 of the Laws of 1950, which amends section 1723 of the Education Law, which provides that the board of education may by resolution designate one of its members other than the president or clerk to sign checks in lieu of either the president, clerk or treasurer, in case of the

absence or inability of these officers. A person who signs in place of the treasurer, of course, would need to file a bond in the same manner as the treasurer.

*Dated July 11, 1951*  
*Superintendent of Schools*  
*Mount Kisco, N. Y.*

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**BUDGET (Adoption of) (Notice)—DISTRICT OFFICERS (Clerk)**  
**—EDUCATION LAW, Secs. 1716, 1724.**

**No. 22**

I have been asked to give my opinion in relation to the following question: "In preparing the detailed statement in writing of monies required for the ensuing year under the provisions of section 1716 of the Education Law, is it necessary to include therein a comparable statement for the preceding fiscal year?"

Section 1716 of the Education Law requires the preparation of a detailed statement in writing of the amount of money needed for the ensuing school year for school purposes, that such statement shall be completed at least seven days before the annual meeting and be available during that period of seven days preceding the meeting. A notice that copies thereof may be obtained must be published.

The section does not require that the board of education present at the same time for comparison the figures for the preceding year, although, of course, the annual report is required to be published in accordance with section 1724 during the month of July. The budget for the preceding years is a district record, which like all district records may be inspected by qualified voters at the office of the clerk during the usual business hours of the day.

*Dated July 11, 1951*  
*District Clerk*  
*Union Free School District No. 1, Town of Aurora*

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**CONTRACT (Personal Interest of Trustee)—BOARD OF EDUCATION (Employment of Attorney) (Qualification of Members)—EDUCATION LAW, Sec. 1617.**

**No. 23**

The question presented is whether a member of the board of education can serve as attorney and receive compensation as such.

Section 1617 of the Education Law prohibits a member of a board of education from making a contract with the school district in which he has a personal interest either directly or indirectly.

Therefore, in my opinion, a member of a board of education may not legally serve as attorney for the board of education and receive compensation for such service.

*Dated July 16, 1951*  
*District Superintendent of Schools, Chenango 1*

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**CONTRACT (Personal Interest of Trustee) (Employment of Physician) — BOARD OF EDUCATION (Qualification of Members)—EDUCATION LAW, Sec. 1617.**

**No. 24**

This will acknowledge your letter of July 11, 1951, in which you ask whether a board member may serve as a school physician and receive compensation as such.

Section 1617 of the Education Law prohibits a member of a board of education from making any contract on behalf of a school district in which he is personally interested either directly or indirectly. If a person employed as a school physician is elected a member of the board of education, it would be necessary to determine the status of the employment in such a position. If the physician had been hired upon a contract for a stated period the physician would be able to serve out the term of the contract while also serving as a member of the board of education. If, however, the school physician had been engaged by a hiring at will, the physician would need to resign as school physician in order to serve as a board member.

In the event that the physician served out the term of a contract, of course, the contract could not thereafter be renewed.

No official has any power under the law to waive this provision in any instance.

I might mention also that section 1868 of the Penal Law provides that a school officer making such a contract is guilty of a misdemeanor.

*Dated July 16, 1951*  
*Principal*  
*De Ruyter Central Rural School*

**BOARD OF EDUCATION (Powers and Duties)—TEACHERS  
(Salary, Deductions from).**

No. 25

This will acknowledge receipt of your recent letter in which you ask about the legality of making individually authorized payroll deductions from salaries of teachers and other employees for purposes of group membership in medical and hospital insurance plans.

Provided the proper authorization is given by the individual concerned, I see no legal objection to the school district making the deductions.

This, of course, is a public relation service and, even though it adds to the cost of administration, the board has full power to assume such service. No statutory provision is necessary, as the service is part of the contract pay arrangements for the employment of teachers.

*Dated July 25, 1951  
Supervising Principal  
Candor Central School*

**MEDICINE (Corporate Practice of) — HEALTH INSURANCE  
PLAN—EDUCATION LAW, Secs. 6512, 6514.**

No. 26

This will acknowledge your letter of July 17th in which you request an opinion as to whether there would be a violation of the Education Law by a group of doctors now participating in the Health Insurance Plan of the City of New York, if this group were to be retained by a fraternal organization under an employment contract to render medical services to the fraternal organization's members who would pay a stated sum per year to the fraternal organization, which in turn would pay the sum to the group of doctors and notify the latter group of the persons entitled to receive such services.

You also state that an employee of an industrial organization has asked whether a group of doctors could render medical service to a group of employees of this industrial organization, who, subject to their employer's consent, would form a group and enter into an employment contract for medical services with the group of doctors.

It is well settled that corporations may not legally practice medicine. The only exception to that general rule would appear to be found in section 6512 of the Education Law, subdivision 1,

which provides that article 131 of the Education Law shall not be construed to prevent, among other things, "a corporation organized under article 9c of the Insurance Law from employing duly licensed physicians or from entering into contracts with duly licensed physicians or with partnerships or groups of duly licensed physicians to practice medicine on its behalf for persons insured under its contracts or policies." The Health Insurance Plan is a corporation organized under article 9c. Whether other corporations could follow a procedure similar to the Health Insurance Plan would depend upon whether they would come under the provisions of that exception; in other words, whether they are organized under article 9c of the Insurance Law. If the employee group to which you refer in your second question were incorporated, I suppose the same reasoning would apply in that case. In addition, the group covered by a medical indemnity corporation would be required to conform to the requirements of subdivision 243 of section 221 of the Insurance Law (see Insurance Law, section 253, subdivision 6).

You are correct in stating that section 6514, subdivision 2 (f), provides that physicians are not prevented from practicing medicine as partners nor in groups nor from pooling fees received for professional services provided a certificate of doing business under an assumed name has been filed under section 444 of the Penal Law and provided further that practice in groups is prohibited with respect to medical care under the Compensation Law. As I stated above, I feel that the troublesome feature in relation to the arrangement which you cite is not the practice of physicians in groups but rather the providing of professional care by corporations or unlicensed persons.

*Dated August 3, 1951  
Anthony J. Maucieri, Esq.*

**OPTOMETRY (Use of Title Doctor) (Practice of)—EDUCATION  
LAW, Secs. 7102, 7111.**

No. 27

This is in reply to your memorandum of August 6th inclosing a letter inquiring about the right of an optometrist who was granted the degree of doctor of optometry in another state, after having earned a B.S. or B.A. accompanied by a certificate of graduation in optometry from a registered school in this State, to use the title "doctor" in connection with his practice in this State.

As you state, section 7111 of the Education Law, subdivision 3, prohibits the use of the title "doctor" by an optometrist unless the right to use the same has been conferred upon him pursuant to section 7102.

Section 7102 provides that only the degrees of doctor of optometry or doctor of optical science may be conferred in this State. Subdivision 2 of that section provides that the said doctors' degree shall not be conferred except where the candidate has received either a B.A. or a B.S., accompanied by a certificate of graduation in optometry and has, thereafter, completed two years of graduate study of the subject of optics and optometry.

I think it is clear from reading the two provisions together that the use of the title "doctor" is prohibited in the practice of optometry except where the degree has been granted in this State in accordance with section 7102. Therefore, since the optometrist does not have a degree of "doctor," which has been conferred in New York State, it is my opinion that he would not be authorized to use the title "doctor" in connection with the practice of optometry in New York State.

*Dated August 21, 1951*

*Assistant Commissioner for Professional Education  
State Education Department*

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**TEACHERS (Salary) (Salary, Deductions from).**

**No. 28**

I have your recent letter in which you state that in the past years, the Board of Education of the Avon Central School has paid its teachers twice a month during the ten school months. You further state that each teacher receives  $\frac{1}{24}$  of his yearly salary on each payment date and that on the last payment in June each teacher receives five such payments.

Teachers in tenure districts are employed twelve months of each year. A teacher is paid an annual salary for each such twelve months' service. The Education Law provides that each teacher is entitled to be paid at least as often as once at the end of each calendar month. Each teacher then must be paid at least  $\frac{1}{12}$  of the annual salary at the end of each calendar month.

Due to the constitutional prohibition, no board of education may pay a teacher in advance for services which have not been rendered. In your case, if the Board of Education appoints teachers effective July 1st, the teachers are entitled to be paid

$\frac{1}{12}$  of the annual salary at the end of July and at the end of each succeeding month. If the Board of Education appoints the teachers effective July 1st and the teachers acquiesce, the Board could withhold the first payment of salary until the end of September and then pay the teacher  $\frac{3}{12}$  of the annual salary at the end of the succeeding June. The  $\frac{3}{12}$ , of course, would be for the month of June and for the months of July and August of the preceding year.

You also state in your letter that the Board of Education pays teachers' dues to certain organizations and then during the balance of the year deducts a proportionate amount from each teacher's pay upon each payment date.

If the Board of Education appoints teachers on July 1st and makes the first payment of salary at the end of July and at the end of each succeeding month, the Board of Education would not be authorized to advance the amount of dues payable due to the fact that it would constitute an advance payment for services not yet rendered. If, however, with the consent of the teachers, the Board appoints its teachers effective July 1st and does not make any salary payment until the end of September and then pays only  $\frac{1}{12}$ th of the annual salary at the end of September, the Board could pay the dues from the teachers' salary withheld for the months of July and August.

It is not legal for a board of education to pay a teacher on a ten months' basis in tenure districts. If the Board of Education appoints teachers effective July 1st, your present manner of paying the  $\frac{5}{24}$  of the annual salary at the end of June is perfectly proper as long as the teachers agree to such manner of payment. If this manner of making payment is made, then, of course, the Board may continue to pay the teachers' dues at any time so long as the Board has sufficient funds standing to the credit of the teacher which have not yet been paid the teacher.

*Dated August 28, 1951*

*Supervising Principal  
Avon Central School*

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**BOARD OF EDUCATION (Minutes of Meetings).**

**No. 29**

The minutes of the meetings of a board of education are public records, and any qualified voter has a right to examine such minutes during the reasonable hours of any business day, provided the person wishing to see the minutes is a qualified

voter and presents himself at a reasonable hour during any business day.

I do not believe that such a person could be denied the right to examine such minutes.

*Dated August 29, 1951*

*District Superintendent of Schools, Chenango 2*

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**HEALTH AND WELFARE SERVICE (Duty of Board of Education To Furnish)—BOARD OF EDUCATION (Powers and Duties)—EDUCATION LAW, Sec. 912.**

**No. 30**

I have your letter of September 7, 1951, in which you request my opinion as to whether your board of education must provide dental hygiene teacher service to a parochial school located within your school district.

As you know, the statute authorizes and requires a school to provide *health* service for children who attend private and parochial schools when requested by the school authorities operating such schools (see section 912, Education Law). A differentiation is made between instructional service and health service, the former not being included. A dental hygienist performs, as part of her duties, health service and under those circumstances and the statute aforesaid a board of education would undoubtedly be expected to provide health service through a dental hygiene teacher upon request. In your instance it may make it necessary for the board to employ an additional teacher in the light of the load which you mention. I presume that arrangements can be made with the petitioning authorities in order that the timing can be worked out. Of course, the dental hygiene teacher would not be authorized to perform any teaching service for private or parochial school children.

*Dated September 11, 1951*

*Superintendent of Schools*

*Rockville Centre, N.Y.*

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**BOARD OF EDUCATION (Powers and Duties)—PUPIL (Injury to)—NEGLIGENCE—TRANSPORTATION—EDUCATION LAW, Sec. 1709.**

**No. 31**

I have your recent letter in which you request an opinion in relation to the responsibility of school districts for pupils transported to and from school but who remain in school during the noon hour.

Generally speaking, school authorities are responsible for the safety of children during the noon hour period when they customarily remain at school and eat lunches in the school cafeteria or elsewhere in the school building. It would be my view that the board has a duty to provide adequate supervision during the noon hour and to make the necessary rules and regulations in regard to conduct of pupils during this period.

In connection with the duty of a board of education to promulgate necessary rules and regulations, I wish to call your attention to a recent case entitled *Matter of Selleck v. Board of Education*, 276 App. Div. 263 (1949), leave to appeal denied 300 N.Y. 764. In this case a child while upon the school grounds awaiting the arrival of the school bus after the close of school was struck and severely injured by another pupil riding a bicycle upon the school grounds. The court held that the Board of Education had a duty to provide adequate supervision and that the failure of the Board of Education to promulgate rules and regulations concerning the order and discipline of the school was sufficient to enable a jury to find that the supervision provided was entirely inadequate. I do not believe that there is any difference whether the time involved is a noon hour or a period before the opening of school or after the closing of school while the children are under the control of the school authorities.

It would be my view further that if such children are to be permitted to leave the school grounds during the noon hour, it should only be done upon the written request of the parents. The reason for this would be that a parent relinquishes custody of his child for educational purposes when he boards the school bus and as a general proposition would have a right to rely upon proper supervision being maintained until custody and control of the child is returned to him at the time the child leaves the school bus in the afternoon.

An entirely different situation arises when children customarily walk to school and return home to lunch and return to school again in the afternoon. Under those conditions, they are under the control of the school authorities only while on the school grounds.

*Dated September 20, 1951*

*Supervising Principal*

*Jefferson Central School*



**SCHOOL BUILDINGS (Purchase) (Leasing)—BOARD OF EDUCATION (Powers and Duties) — DISTRICT MEETING (Powers)—DISTRICT MONEYS (Expenditure).**

**No. 32**

I have your recent letter in which you request my opinion whether a board of education of a central school district would have authority to purchase a garage for school buses without the voters of the district granting authority therefor. You further request my opinion as to whether the board of education of a central school district might enter into a lease for rental of such a garage and have the rental payments applied toward the purchase price.

The board of education of a central school district is, of course, a continuing board, and it would be my opinion that such board would have authority to enter into a lease for a garage for school buses for a reasonable period not limited to one year.

However, in order to purchase real property, the board would need to have a vote of the district. It would not be legal, without such a vote, for a board of education to exercise an option to purchase real property which might be included in a lease providing that the rental or some portion thereof is to be applied toward the purchase price. If the rental is reasonable, the fact that the option is included would not prevent the board from entering into the lease, but the district meeting would need to authorize the purchase before the board would be empowered to act under the option.

*Dated September 20, 1951*  
*Supervising Principal*  
*Earlville Central School*

**TEACHERS (Salary, 30 Hours Differential)—EDUCATION LAW, Sec. 3103.**

**No. 33**

I have your recent letter in which you state that a teacher on your staff has completed 30 hours of credit and is applying for the \$200 salary differential. You request my opinion whether to credit two courses in which the teacher received a grade of D in view of the fact that the college requires that a B average be maintained for graduate work which is to be credited toward a master's degree.

In view of the fact that the statute provides for the payment of the differential to teachers who have completed 30 hours of approved study beyond the baccalaureate degree, I would think

that the board of education would be authorized to credit these courses for that purpose if the college transcript shows that the courses were satisfactorily completed. As a matter of fact, there might be instances where under such circumstances a board would be required to approve such courses.

The fact that the college requires a higher standard for the granting of a master's degree is not material since the statute does not require the degree.

*Dated September 21, 1951*  
*Supervising Principal*  
*Cairo Central School*

**CERTIFICATE (Health)—PHYSICAL EXAMINATION (Pupil)—EDUCATION LAW, Sec. 903.**

**No. 34**

The provisions of section 903 of the Education Law require that all children attending public school present a health certificate from a physician indicating that they are free from disease, or if they do not do so, to subject themselves to physical examination by the school physician.

This statute is concerned not only with the individual but with all the other pupils in the school. You can well understand that one pupil could spread contagious disease to others. It is for this reason that there is no exception to the statute, nor is there anything unconstitutional about the provisions of such statute. Similar to the requirement in respect to vaccination, this requirement is a public health measure and is applicable to all.

*Dated October 5, 1951*  
*Mrs. John W. Clark*

**EDUCATIONAL CORPORATION (Consent to Incorporation) (Incorporation of)—EDUCATION LAW, Sec. 216.**

**No. 35**

In order that a corporation containing educational provisions be incorporated by the Department of State, consent to such incorporation must be obtained from the Commissioner of Education, as you indicate in your letter. This consent is in the nature of a waiver of the incorporation by the Board of Regents and is not in any sense an approval of the project. The Department of State exercises no supervision over such corporations.



On the other hand, the Regents under the statute are charged with the obligation to incorporate all schools of learning as such and consequently such schools need to be incorporated by the Regents under the provisions of the Education Law. I am referring here to elementary schools, high schools, colleges, universities etc. Schools incorporated by the Regents are, of course, subject to their visitation, are expected to maintain satisfactory standards etc. Consent to incorporation under other laws will not be accorded to schools in this category.

*Dated October 5, 1951*  
*Solinger & Solinger, Esqs.*

**BOARD OF EDUCATION (Employment of Attorney) (Employment of Physician) (Powers and Duties)—ATTORNEY (Fee for Services)—PHYSICIAN (Fee for Services).**

No. 36

It would be impossible for the State to recommend any fee for professional service whether it be legal, medical or otherwise. The amount of a fee charged by an attorney or physician is dependent, of course, upon the lawyer's or doctor's concept of the value of his services. Boards of education retaining counsel are, therefore, completely free to enter into any arrangement the boards deem reasonable in retaining such professional service. The fees to be charged depend, as attorneys will advise, upon the work to be performed. It is not unlikely that attorneys will vary in fixing their fees for the same service. Sometimes the reputation of the lawyer or the doctor has in itself a bearing upon the amount which will be charged. The arrangement as to whether the fee of the attorney shall also include the fees charged by the bonding attorneys is a matter of arrangement. There is no reason why the board of education may not agree to recompense its attorney for such fees, or it may pay the bonding attorneys directly.

*Dated October 5, 1951*  
*Reid A. Curtis, Esq.*

**TEACHERS (Salary)—BOARD OF EDUCATION (Powers and Duties)—EDUCATION LAW, Secs. 3015, 3102 et seq.**

No. 37

The custom of paying teachers annual salaries in ten instalments seems to be a carry-over from the time when teachers were employed under contract and served from about September 1st to June 30th. With the enactment of the tenure statutes

the service of a teacher became continuous starting on the date of appointment. That is to say, a teacher appointed on September 1, 1948, for a probationary period of three years would serve a continuous appointment until the expiration of that probationary period unless the service was terminated during such time by affirmative action of the board of education upon the recommendation of the superintendent. When that teacher was appointed on tenure, as may have occurred on September 1, 1951, the teacher would then serve continuously until said teacher resigned, retired or was discharged for cause.

Section 3015 of the Education Law provides that the salary of a teacher employed in a public school shall be due and payable at least as often as at the end of each calendar month of the term of employment. Therefore, the teacher is entitled to  $\frac{1}{12}$  of the annual salary at least as often as at the end of each calendar month. Accordingly, if the employment date was September 1st and the teacher served until January 1st and resigned, said teacher would have received  $\frac{4}{12}$  of the annual salary. Having served only four months, this teacher would have received all salary earned.

In conformity with the above, it appears that a school district which appoints a teacher on September 1st and pays such teacher  $\frac{1}{10}$  of the annual salary at the end of each calendar month up to June 30th is, in effect, paying in advance to a certain extent. Advance payments are, of course, illegal. On the other hand, if the appointment date were July 1st, it would seem that the district is, in effect, withholding salary from the teacher which is in conflict with section 3015, and if a teacher complained, the Commissioner would have to hold that such teacher is entitled to be paid at least once a month.

I think the above makes it quite clear that a board of education has a right in May or June to appoint teachers as of the following September 1st and to begin payment of salary at the end of the first month of service, viz., September 30th, but in my opinion the payment should be  $\frac{1}{12}$  of the annual salary.

I would feel the same in relation to appointments made as of any other date during the year since the service, as I have indicated above, is continuous and the teacher simply continues to earn  $\frac{1}{12}$  of her annual salary for each month of service.

*Dated October 8, 1951*  
*Superintendent of Schools*  
*New Rochelle, N.Y.*

**BOARD OF EDUCATION (Powers and Duties)—RETIREMENT SYSTEM (Teachers) (Nonteaching Employees).**

No. 38

This acknowledges the receipt of your letter in which you request my opinion as to the legal right of a school district to set up a retirement system.

Over the years we have received many requests from school districts to ascertain if the right exists to set up a retirement system. It has always been our view that a school district may not do so. A school district is a governmental agency and there exists no prescribed power in this respect so to act. This is particularly true in view of the fact that there already exists two retirement systems, one for the teachers and the other for the nonteachers. There is no problem in respect to the Teachers' Retirement System because all teachers must join. There is, however, no obligation on the part of a school district to join the State Employees' Retirement System, which is the one available for the nonteaching group. However, if the board wishes to provide retirement for nonteaching employees it has full power to join the State Employees' Retirement System and I think this is the only way such a result can be accomplished. In other words, I do not believe a school district has the right to set up a special retirement system of its own through private insurance companies.

*Dated October 9, 1951*

*Clerk*

*Bemus Point Central School*

**BOARD OF EDUCATION (Powers and Duties)—BUDGET (Ordinary Contingent Expenses)—DISTRICT MONEYS (Expenditures) — SCHOOL BUILDINGS (Repairs) — EDUCATION LAW, Sec. 1718.**

No. 39

This acknowledges the receipt of your recent letter in which you ask concerning the legality of certain items of expense which the Board of Education has found necessary to add to the appropriations in the budget approved May 1, 1951. As I have indicated orally, a board of education of a central school district has the obligation to operate the schools under its jurisdiction and for that purpose may expend the moneys necessary so to do. The only question arises as to what are ordinary con-

tingent expenses within the terms of section 1718 of the Education Law which provides:

If the inhabitants shall neglect or refuse to vote the sum estimated necessary for teachers' salaries, after applying thereto the public school moneys, and other moneys received or to be received for that purpose, or if they shall neglect or refuse to vote the sum estimated necessary for ordinary contingent expenses, the board of education may levy a tax for the same, in like manner as if the same had been voted by the inhabitants.

A board of education of a central school district has the right to determine the number of teachers needed, dependent upon the number of students, courses involved and the facilities available.

You stated that an 'additional teacher' was needed in the Latham kindergarten. Under the circumstances it seems to me that your Board had full power to add the necessary sum to the budget to employ such a teacher.

It is my understanding that the amount needed for water rent was underestimated in preparing the budget. Water is, of course, a necessity and your Board would be obligated to defray the cost thereof even though it exceeded the amount estimated in the budget. The same would be true with telephone expense.

You state that emergency repairs have to be effected upon the roof of the Goodrich School and upon the coping around the roof of the Loudonville School. Emergency repairs, in my opinion, would be ordinary contingent expense and the Board is justified in raising moneys to pay for such repairs.

Similarly, it is my understanding that the Board had to rent additional facilities and that the amount of such rental exceeded the budget estimate. The Board has the right to raise the moneys to pay such rental.

Ordinarily, a board does not have the right to expend additional money in excess of the budget for capital outlay. However, if the Board feels a kindergarten is necessary, it would seem to me that the Board could spend the necessary minimum amount needed to make such kindergarten available.

I understand that toilet facilities in the Latham and Newtonville Schools were inadequate and that additional funds had to be made available to rectify the situation.

I understand that your Board would have liked to have added

other items but the aforesaid outline as indicated would seem to cover additional expenditures quite within its prerogatives.

*Dated October 17, 1951*  
*Supervising Principal*  
*North Colonie Central School*

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**BOARD OF EDUCATION (Powers and Duties)—SCHOOL BUILDINGS (Use of)—PUPIL (Jurisdiction over) (Discipline) (Fraternalities and Sororities).**

No. 40

There is no ruling or regulation in respect to the existence of fraternities or sororities in public schools. In this State, boards of education have the power to regulate the conduct of children while in attendance at school. Boards of education do not have jurisdiction, however, to determine to what organizations pupils may belong or into what activities such pupils may enter when they are not under the jurisdiction of the school authorities. The only reservation to this is that a pupil does not have the right to belong to an organization claiming to be connected in any way with the school system without being subject to the jurisdiction of the school authorities.

*Dated October 29, 1951*  
*Reardon & Ball, Esqs.*

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**TEACHERS (Tenure and Dismissal) (Appointment) (Transfer) —EDUCATION LAW, Secs. 3012, 3013, 2509, 2573.**

No. 41

You request my opinion as to whether the transfer of a teacher from kindergarten to one of the elementary grades would cause such teacher to commence serving a new probationary period.

As you know, teachers acquire tenure as elementary teachers (grades 1 to 8), secondary teachers, or in special tenure areas of which kindergarten is one. Other special tenure areas are physical education, music, art, vocational subjects etc. Where a teacher is on tenure, she cannot be transferred to a different tenure area without her consent. Thus a kindergarten teacher could not be transferred to one of the elementary grades unless she agreed to the transfer. When she is transferred she starts a new probationary period in the elementary area. She does not, however, lose the tenure which she acquired in the kindergarten

area. If for any reason she should not complete her probationary service in the elementary area, or if the position were abolished before or after she acquired tenure there, she would be entitled to be placed upon a preferred eligible list and be reappointed as a kindergarten teacher when a vacancy occurred in that area.

Within the elementary area, which is grades 1 to 8, a board of education has a right to transfer teachers from one grade to another and such transfers do not affect their tenure rights.

*Dated November 19, 1951*  
*District Superintendent of Schools, Suffolk 3*

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**SCHOOL BUILDINGS (Use of) (Veteran Organizations) — BOARD OF EDUCATION (Powers and Duties)—EDUCATION LAW, Sec. 414.**

No. 42

You inquire concerning an application made on behalf of the American Legion to use the school gymnasium. You state that there has been some misunderstanding between you and the Legion because of their insistence that they have the right on request to use the building and have indicated that they do not wish to have the school janitor in attendance.

Under the provisions of subdivision 4 of section 414 of the Education Law the board of education has the legal right to permit the use of the schoolhouse and grounds “\* \* \* for meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose \* \* \*.” The subdivision goes on to prohibit said use if the meeting and the proceeds are for the benefit of some religious or fraternal or exclusive organization. But from this latter category the statute exempts veterans’ organizations and organizations of volunteer firemen. It will be observed that the discretionary power vested in the board of education to grant any use is not impaired by the exception relating to veterans’ organizations and volunteer firemen. The statute merely permits the board, in its discretion, to grant the use of the school facilities to these organizations even though they may be exclusive and even though the proceeds may be devoted exclusively to their use.

The board has the right in granting the use to fix the terms of such use. It may require either organization to defray the costs of lighting, heating, janitor service etc. It may further

impose any condition for the safety or protection of the building or property which it deems desirable. In this instance if it grants the use it may prescribe that the janitor shall be present to insure that its property is properly utilized.

*Dated November 27, 1951*

*Principal*

*Whitesville Central School*

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BOARD OF EDUCATION (Qualification of Members) (Removal of Members)—DISTRICT OFFICERS (Qualifications) (Board of Education)—DISTRICT MEETING (Qualifications of Voters)—EDUCATION LAW, Secs. 2012, 2102.

No. 43

This acknowledges the receipt of your recent letter in which you request my opinion concerning the qualification of a member of a board of education.

It is my understanding that Mr. Buck, one of the members of the Board of Education of Union Free School District No. 9, Town of Oyster Bay, whose sole qualification for holding office is that he has had a child in school, believes that he is no longer qualified because his child completed her high school last June. I call to your attention the wording of section 2012 of the Education Law which provides in part as follows:

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is:

\* \* \*

b. Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting,

\* \* \*

In *Matter of Union Free School District No. 4 of the Town of Hempstead, Nassau County*, 40 State Dept. Rep. 162, it appears that one Bedell was elected a member of a board of education in August of 1929. It further appears that said Bedell's daughter had attended school for eight weeks during the year prior to the election. The term "year" as used in section 203 (now 2012) of the Education Law "must be held to mean the period of 365 days prior to the date of the meeting at which the person offers his vote \* \* \*. Consequently, when a year had elapsed after her last attendance in school, Mr. Bedell was no longer a qualified voter of the district."

Under the circumstances, it would appear that Mr. Buck would be a qualified voter during the 365 days subsequent to the time when his daughter last attended school and would therefore during the same period meet the qualification of section 2102 of the Education Law which provides in part that every school district officer must be a qualified voter of the district.

*Dated November 28, 1951*

*Edward Robinson, Jr., Esq.*

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RETIREMENT SYSTEM—TAXES (Income)—EDUCATION LAW, Sec. 524.

No. 44

You have asked my opinion as to whether the provisions of section 524 of the Education Law prohibit the New York State Teachers Retirement System from making payment upon a levy upon the retirement allowance of a retired member for payment of unpaid federal income taxes.

Section 524 of the Education Law provides:

The right of a teacher to a pension, an annuity, or a retirement allowance, to the return of contributions, any benefit or right accrued or accruing to any person under the provisions of this article, and the moneys in the various funds created hereunder, are hereby exempt from any state or municipal tax, and shall not be subject to execution, garnishment, attachment or any other process whatsoever, and shall be unassignable except as in this article specifically provided.

Section 91 of the Civil Service Law (formerly section 70) contains almost identical provisions concerning the exemption from execution, garnishment, attachment or any other process whatsoever.

Notwithstanding these provisions, in an informal opinion to the Civil Service Employees Retirement System on February 14, 1944, the Attorney General pointed out that the Court of Appeals in *Matter of Rosenberg*, 269 N. Y. 247, stated:

However that may be, it is certain that no policy of this state may interfere with the power of Congress to levy and collect taxes on income. (*Burnet v. Harmel*, 267 U. S. 103, 110; *United States v. Snyder*, 149 U. S. 210, 215.) Cases where State exemptions have been applied to the collection of judgments in favor of the United States have been in

every instance predicated on the statutory adoption of State exemptions. (*Fink v. O'Neil*, 106 U. S. 272; *Custer v. McCutcheon*, 283 U. S. 514)

The Attorney General in reliance upon this case and others cited in his opinion, concluded that, "A levy for unpaid federal income taxes may be made against the retirement allowance of a retired member of the New York State Retirement System."

I am in accord with this informal opinion of the Attorney General and therefore it is my opinion that a levy for unpaid federal income taxes may be made against the retirement allowance of a retired member of the New York State Teachers Retirement System.

*Dated December 14, 1951*

*Executive Secretary*

*New York State Teachers Retirement Board*

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**BOARD OF EDUCATION (Powers and Duties)—PUPIL (Assignment to Class) (Special Classes)—EDUCATION LAW, Sec. 4406.**

No. 45

In your recent letter you ask, "Do the public school authorities of a union free school district possess the legal right to assign children to such so-called 'Special Classes' without first receiving the consent of the parents?"

It is my opinion that a board of education has the power under the provisions of the Education Law to grade children. If it concludes, after proper examination, that a child should be assigned to a special class it has the power so to do. It does not need the consent of parents for such assignment any more than it would need their consent for assignment to, for instance, the fifth grade or the sixth grade.

*Dated December 19, 1951*

*Clerk, Board of Education*

*Port Chester, N. Y.*

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**TUITION (Nonresident Academic)—EDUCATION LAW, Sec. 3202.**

No. 46

We have always advised that whenever a nonresident owns property in a school district, under the provisions of section 3202 of the Education Law, the school district in which the

property is located would need to deduct the amount of tax paid for school purposes from the tuition bill for the education of the children of such nonresident whether such tuition is chargeable to the parent or to the school district in which the parent resides.

*Dated December 19, 1951*

*President, Board of Education*

*City School District of the City of Norwich*

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**TEACHERS (Salary) (Resignation) (Years of Service) —  
CENTRAL SCHOOL DISTRICT (Establishment)—EDUCATION LAW, Sec. 3103.**

No. 47

I have your recent letter in connection with the salary credit allowed teachers at the time of the organization of the Sherrill Central School District.

Teachers employed in the union free school districts of the State have been subject to statutory salary schedules for many years. For districts which employed less than eight teachers prior to 1951, there were no statutory schedules. There still is no salary schedule (only a minimum salary) for districts employing less than three teachers. When a central school district is organized, it succeeds to the obligations of the component districts, one of which is the obligation of those districts in the matter of minimum salary schedules. Teachers previously employed in the common school districts which employed only one or two teachers come under salary schedules for the first time at the time the districts are centralized and, therefore, are not entitled to credit for salary purposes for the time such teachers previously taught in the common school districts.

Teachers previously employed in the union free or city school districts where salary schedules were in effect are, however, entitled to credit for the period during which they were employed under the salary schedules provided the employment was continuous. When a teacher resigns and returns to service, there is no mandate that the district credit the period of prior service for salary purposes.

*Dated January 2, 1952*

*Sarah Kaltenbach*

**BOARD OF EDUCATION (Powers and Duties) — SCHOOL BUILDINGS (Leasing) — ADULT EDUCATION (Place of Instruction).**

No. 48

You have requested my opinion as to the right of a board of education to rent or utilize rooms for the purpose of giving instruction in a Jewish Community Center.

A board of education has the right to rent or utilize rooms as branches for giving instruction. There is no legal reason why a board of education may not itself conduct classes in a Jewish Community Center or a Y. M. C. A. or even perhaps in a parochial school building. The criterion is not the place; the issue is whether the board of education is acting not in aid of a sectarian institution but as an independent agency giving instruction to all pupils. In other words, a board of education could legally obtain from the Jewish Community Center the use of a room and could set up in that room an adult education course. The course would need to be advertised throughout the area in the same way as any other course and any person (including members of the Community Center) could attend.

The course could not, on the other hand, be limited to members of the Community Center. Nor could the course be advertised as something which is being operated or given by the Community Center as an aid to its members.

I appreciate that this relationship, which I am outlining, may be hard to maintain and boards of education would need to take this into consideration in embarking on it. They cannot put themselves in the position of being criticised for giving aid to a sectarian body irrespective of the religious denomination of that body.

*Dated January 3, 1952*

*Assistant Commissioner, Pupil Personnel Services and Adult Education*

*State Education Department*

**BOARD OF EDUCATION (Powers and Duties) — INSURANCE (Property) (Mutual Insurance Companies) — SCHOOL BUILDINGS (Insurance) — EDUCATION LAW, Sec. 1709, subd. 8.**

No. 49

For a great many years the question as to whether a board of education could insure with mutual insurance companies has arisen.

Under the provisions of subdivision 8 of section 1709 of the Education Law the board of education is empowered to insure the schoolhouse furniture, apparatus and library "in some insurance company created by or under the laws of this state, or in some insurance company authorized by law to transact business in this state, and to comply with the conditions of the policy, and raise the sums required for premiums by district tax."

In my opinion the board of education has power under this section to insure in a co-operative insurance company so authorized to do business in this State if the board sees fit so to do. In taking this position the responsibility would be upon the board, of course, as to any possible assessments etc. There is nothing in the law that would make an assessment chargeable against the individual members of the board.

*Dated January 7, 1952*

*Supervising Principal  
Sodus Central School*

**RETIREMENT SYSTEM (Application for Retirement) (Power of Attorney) (Teachers)—EDUCATION LAW, Secs. 510, 511a.**

No. 50

I have your recent letter in which you ask my opinion concerning the ability of an agent to file for superannuation retirement or special service retirement.

Section 511 of the Education Law provides that a member of the State Teachers Retirement System may be retired on account of disability "either upon the application of his employer or upon his own application or that of a person acting in his behalf."

In *Hunn v. New York State Teachers' Retirement System*, 289 N. Y. 171 (1942), the Court of Appeals held that "the statute should not be construed as intended to confer upon any person the right to act for a member when such person has not been otherwise authorized to act in his behalf." It would appear that this authorization would need to be authorization in the nature of a power of attorney containing a grant of power to so act.

Neither section 510 of the Education Law, which governs superannuation retirement, nor section 511-a of the Education Law, which governs special service retirement, provides for

any other person than the member of the system making the necessary application for such retirement.

In view of the above it would be my opinion that a statutory power of attorney executed pursuant to article 13 of the General Business Law would not authorize the attorney in fact to file the necessary application to effect retirement under said sections 510 and 511-a.

It would appear, however, that if a power of attorney specifically granted the attorney in fact the power to file the necessary application to effect retirement under said sections 510 and 511-a, the attorney in fact would then be authorized to file such applications.

*Dated January 7, 1952*

*Executive Secretary*

*New York State Teachers Retirement Board*

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**BOARD OF EDUCATION (Powers and Duties) — STATE AID  
(Days School in Session) (Failure To Maintain School)—  
TEACHERS (Conferences)—EDUCATION LAW, Secs. 1709,  
2509, 3604.**

No. 51

The Education Law provides in section 3604, subdivision 10, that a deficiency not exceeding 6 of the 190 days required for continuous state aid in a school year, caused by a teacher's attendance upon teachers' conferences held by district superintendents of schools within a county *and upon meetings of the New York State Teachers Association*, must be excused by the Commissioner of Education in connection with the apportionment of state aid. The practice based on this statute is a time-honored one.

Furthermore, boards of education have the power to make rules and regulations in regard to the excusing of absences of all teachers and other employees and for the granting of leaves of absence to them either with or without pay (Education Law, section 1709, subdivision 16, and section 2509, subdivision 7). It is, therefore, within the power of boards of education to excuse teachers with or without pay for any purpose which in their discretion is in the best interests of the school. This would include attendance upon New York State Teachers Association meetings.

The attendance of teachers at meetings of organizations other than the New York State Teachers Association would obviously not authorize the Commissioner of Education to pay the district

its full state aid if such attendance would bring the district below 190 days.

*Dated January 7, 1952*

*Executive Assistant to the Commissioner*

*State Education Department*

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**NAME (Assumed Name) — LICENSE (Certified Public Accountant).**

No. 52

I have your recent memorandum in relation to the use of the name "O. L. Walter & Co." by Otto L. Walter, a Certified Public Accountant.

It is my opinion that by the use of the words "& Co." this designation becomes an assumed name and may not legally be used by a certified public accountant practicing individually. In this connection it is noted that it was held in *Matter of Birdwell*, 268 App. Div. 642, that a county clerk properly refused to file a certificate of business under the name of "Russell Birdwell & Associates" on the ground that the certificate was misleading to the public where the individual had no associates.

Attention is called to the provisions of section 924 of the Penal Law which makes the use of the words "& Co." a misdemeanor, except in a case where it is specifically prescribed by statute that a partnership name may be continued in use by a successor, survivor or other person.

*Dated January 10, 1952*

*Assistant Commissioner, Professional Education*

*State Education Department*

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**BOARD OF EDUCATION (Powers and Duties) — INSURANCE  
(Liability)—NEGLIGENCE—PUPIL (Injury to) (Jurisdiction Over) (Discipline)—TEACHERS (License).**

No. 53

I have your recent letter in connection with the use of parents or other adults as chaperons or assistants to the teacher on occasions when school pupils are taken on field trips by school bus.

There is no specific statute or regulation in connection with this matter. I am assuming, of course, that one of the regular teachers of the school would be in charge of the group.

The real problem which arises, however, is in relation to the liability of the school district in the event that an accident



should take place and a claim were made that the district had been negligent. One of the defenses which may be made by a school to an action for negligence is that the district has placed the children under the supervision of trained and competent individuals. A certificated teacher is trained in the handling of children, but the determination in each case as to what constitutes negligence is a question of fact for the jury. We have always felt that a school district would be in a better position in defending such an action when the supervision was by a qualified teacher. As an illustration, I recall a case in which children were left under the supervision of the custodian in the gymnasium and the court held that the school district was negligent. It would be very important, it would seem to me, to ascertain whether the presence of a parent or other adult on the bus would affect the insurance coverage and this matter would need to be taken up with your insurance broker.

*Dated January 11, 1952*  
*Superintendent of Schools*  
*Great Neck, N. Y.*

**CERTIFICATE (Health)—PHYSICAL EXAMINATION (Pupils)  
—PUPIL (Jurisdiction Over).**

No. 54

You have raised the question as to whether or not a parent has the right to withhold his child from all school medical examinations including sight and hearing etc., and to refuse to transmit certificates from the family physician in these respects.

While there are certain rights and privileges, based on religious beliefs and persuasion, guaranteed to citizens of this country by the Constitutions of both the State of New York and of the United States, at the same time you must realize that the police power of the State is of the essence of governmental functions and that this power includes the fullest power in relation to the maintenance of public health. A balance has been found between the rights of a community to maintain all necessary safeguards as to health of the community at large and in the public schools on the one side and the freedom of conscience guaranteed to citizens on the other.

As you know, no constitutional rights in this country are absolute but must be exercised so as not to interfere with other constitutional rights. A further consideration enters this picture in that public education, which also rests on a constitu-

tional mandate, is governed by the Legislature on the basis of section 1 of article XI of the Constitution.

In order to insure the fullest possible benefit of public education for all children, it is obviously necessary to ascertain whether or not pupils have the full facilities of sight and hearing necessary to participate fully in the educational program. The Legislature has made it a duty of the school authorities to make sure that all pupils entrusted to their care are in a position to receive instruction to the fullest extent. Therefore, the law requires you either to submit your children to examination (general, as well as eye and ear) or in the alternative to submit certificates from a physician of your choice to the school district so that it in turn may have the evidence which it is required to have in order discharge its duties.

*Dated January 11, 1952*

*Mrs. R. Muck*

**DISTRICT MEETING (Voting)—BALLOT (Absentee)—BOARD  
OF EDUCATION (Election) — DISTRICT OFFICERS  
(Election).**

No. 55

You have requested my opinion as to availability of an absentee ballot in a school district election.

I wish to advise you that there is no legal way that a voter may vote by absentee ballot at a school district election.

*Dated January 11, 1952*

*H. C. Klein*

**OPTOMETRY (Practice) (Unprofessional Conduct) (Advertising)  
—EDUCATION LAW, Sec. 7108.**

No. 56

This acknowledges the receipt of your request for an opinion concerning section 70 of the Regulations of the Commissioner of Education as it relates to the following:

1. Is the term "50¢ weekly" a violation of the Commissioner's Regulations, when used in connection with optometric practice, either by individual optometrists or commercial establishments employing optometrists?

2. Can the statement "Scientific Examinations," or statements of similar character, indicating superiority, be considered a violation of the Commissioner's Regulations?

3. Can the terms, "Credit extended," "Budget planning," or similar terms, be considered inducements and therefore a violation of the Commissioner's Regulations?

The particular regulations involved are paragraphs "f" and "h" of subdivision 1 of such section which read as follows:

§70 Definitions. 1. Unprofessional conduct, fraud and deceit. Unprofessional conduct, fraud, deceit or misrepresentation in the practice of optometry under sections 7108 and 7111 of the Education Law shall include but shall not be limited to the following:

\* \* \* \* \*

f Advertising of any character which includes or contains any price whatsoever or any reference thereto, or any reference to cost whether related to the examination or to the cost or price of lenses, glasses, frames, mountings or any other optometric services, article or device necessary for the patient

\* \* \* \* \*

h Offering for free examination or other gratuitous services, bonuses, premiums, discounts or any other inducements.

It is my opinion that the use of the term "50¢ weekly" would be in contravention of this regulation. Similarly, it would be my further view that the use of the term "Scientific Examinations" or statements of similar character indicating superiority would be in contravention to the aforesaid regulations. However, if the Commissioner had intended to bring within the purview of the Regulations the terms "Credit extended," "Budget planning" or similar terms, I think the Regulations would have been more specific in that respect. Consequently, I see no objection on the part of optometrists in utilizing these latter terms and such use would not be a violation of the Regulations.

*Dated June 3, 1952*

*Executive Secretary, State Board of Examiners in Optometry  
State Education Department*

**SCHOOL BUILDINGS (Use of) — BOARD OF EDUCATION  
(Powers and Duties)—EDUCATION LAW, Sec. 414—STATE  
DEFENSE EMERGENCY ACT, Sec. 12.**

**No. 57**

You have requested my opinion concerning the use of school buildings as Defense Welfare Centers.

The control and custody of school buildings is vested by law in the local board of education and applications for use of the buildings outside of school hours should be made to such boards.

It is my understanding that the New York State Defense Emergency Law does provide that political subdivisions, which include school districts shall have power to assist in the effectuation of matters undertaken by the Defense Council by permitting use of facilities. We have therefore advised school districts that there is authority to permit the use of school buildings outside of school hours for activities of the local Civil Defense Council. However, it seems advisable that a contract be made between the school district and the defense council with reference to reimbursement of the school district for additional costs of maintenance, providing for additional public liability insurance for the protection of the school district, where required, etc.

*Dated October 16, 1952*

*Alden E. Bevier*

**MEDICINE (Practice of)—DENTISTRY (Practice of) (Fluoridation of Water Supply)—EDUCATION LAW, Secs. 6513, 6612.**

**No. 58**

An opinion is sought as to whether fluoridation of water supplies constitutes the practice of medicine or dentistry, or both. When a municipality engages in this practice is it in violation of the Education Law pertaining to the practice of these professions? My answer to this question would be unequivocally "no." It is my opinion that there would be no difference in the fluoridation of water for the prevention of tooth decay and the chlorination of water for the elimination of contamination. Rather than there being any question of legality involved, it seems to me that a municipality would have the duty to insure the proper condition of water for the safety of its residents.

While I understand that some questions have arisen as to whether fluoridation accomplishes the result intended, nevertheless the attempt on the part of the municipality authorities to accomplish such a result is in my opinion within their line of duty. Certainly this Department, which is responsible for the initiation of procedures looking toward the enforcement of the

medical and dental acts, would not raise any such issue in respect to the municipality carrying on fluoridation procedure.

*Dated December 8, 1952*

*Hon. Herman E. Hilleboe*

*State Commissioner of Health*

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**LIBRARY (Public) (Moneys) (Officers) (Tax) — EDUCATION LAW, Secs. 226, 253, 256, 259, 260.**

**No. 59**

Please be advised that section 259 of the Education Law is the only provision governing the question of custody of funds received by a public library, duly incorporated by the Board of Regents, from any municipality or district supporting such library.

Such section provides as follows: "All moneys received from taxes or other sources for library purposes shall be kept as a separate library fund by the treasurer of the municipality or district making the appropriation and shall be expended only under direction of the library trustees on properly authenticated vouchers. . ."

The words "or other sources" in the above provision must be read with the other provisions of the Education Law referring to public libraries. This includes particularly section 260. This section states that public libraries "shall be managed by trustees who shall have all the powers of trustees of other educational institutions of the university as defined in this chapter; . . ."

Section 226 defines the powers of trustees of institutions and gives such trustees the power to "Appoint and fix the salaries of such officers and employees as they shall deem necessary . . ."

Because of this and other provisions of the Education Law referring to public libraries, and because of the doctrine of "*eiusdem generis*," such words "or other sources" must be read to mean "or other public sources." Hence, a board of trustees of a public library has the power to appoint its own treasurer who, if the trustees so desire, would have the duty of being the custodian of all moneys received from sources other than public, *i.e.*, gifts and legacies from private individuals.

Please be advised further that section 256 of the Education Law provides that any town, county, city, village or school district "may share the cost of maintaining a public library or libraries *as agreed with other municipal or district bodies*; or

may contract with the trustees of a free library registered by the regents, . . . to furnish library privileges to the people of the municipality or district for whose benefit the contract is made, *under such terms and conditions as may be stated in such contract.*" (Emphasis supplied)

Pursuant to section 253 "the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located." Hence, a "free library" as referred to in section 256, would include a public library.

A town, therefore, is authorized by the express provisions of the statute to make a contract with a public library for library services.

This office is not aware of any provision of the Town Law to the contrary.

*Dated, February 5, 1953*

*President, Cobleskill Public Library*

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**LIBRARY (Public) (Charter) (Tax) (Moneys) (Officers) (Establishment of)—EDUCATION LAW, Secs. 216, 226, 255, 259, 260.**

**No. 60**

You have requested my opinion on the question of whether or not a public library established by a school district or municipality and chartered by the Board of Regents is an independent corporation having a legal existence separate and apart from the supporting unit, or whether such a public library constitutes a department or part of the supporting unit.

Section 255 of the Education Law provides a procedure by which a county, city, village, town, school district or other body authorized to levy and collect taxes may individually or jointly establish a public library and may raise money by tax to equip and maintain the same, or to provide a building or rooms therefor. (See also section 79 of the General Municipal Law.)

After such a public library is "established," application must be made to the Regents for incorporation (section 216, Education Law).

Section 216 of the Education Law authorizes the Board of Regents to incorporate libraries, museums, universities, colleges and other institutions. The same section (together with corollary provisions in the Membership Corporations Law and the Stock Corporation Law) prohibits the incorporation under the Stock Corporation Law and Membership Corporations Law

of any institution which might be incorporated by the Board of Regents except with their consent.

Section 260, subdivision 1, provides that the governing body of a public library established under section 255 is a board of trustees "who shall have all the powers of trustees of other educational institutions of the university as defined in this chapter; . . ."

Section 226 of the Education Law lists the general powers of the trustees of every corporation created by the Regents. The powers here listed include those referring to the number of trustees and their quorum, to executive committees, to meetings and seniority, to vacancies and elections, removals of trustees by the Board of Regents, and contain specific powers relating to the holding of property and the control of property, as well as the appointment and salaries of officers and employees, their removals and suspensions, and the power to make bylaws and rules necessary and proper for the purposes of the institution.

Section 14 of the General Corporation Law grants every corporation as such, even though not specified in the law under which it was incorporated, certain powers relating to corporate existence, a seal, acquisition of property, appointment of officers and agents and determination of their compensation, and to the making of bylaws. The grant of power relating to the appointment of officers and agents and their compensation, and the power relating to bylaws, is limited in this section to corporations other than municipal corporations.

Section 3 of the General Corporation Law does not include a public library in the term "municipal corporation," thus clearly indicating a difference in legal powers of municipalities and public libraries.

It is, therefore, quite evident that a public library is a corporate entity and there is certainly nothing about the aforesaid statutes which make such a corporate entity a part of the governmental agency which initiated it. The terms "establish" and "maintain" as used in the statutes are synonymous with the terms "initiate" and "support." The latter term is used interchangeably as a matter of fact in the statutes.

There are, of course, five different ways that a public library is supported: (1) by direct grants from the community; (2) by private gifts; (3) by fines and other incomes of this sort; (4) by endowment and (5) by state aid. It must be remembered that a public library system is, as a matter of fact, part of the

State Education System, for its corporate entity is established as indicated, its employees (librarians) must meet professional standards for employment as established by the Regents; and the purchase of books, the loaning of books, the reference works etc., also must meet similar established standards.

The charter can be revoked and the library dissolved by action of the Regents for cause. The Regents have also power, as occasion arises, to amend the charter and to increase or diminish the powers of the trustees of the corporation. Under the express provisions of section 226 of the Education Law the powers therein contained, accorded to library trustees, can be altered by the charter provisions.

No one of these attributes are attributes of a governmental agency which would support a theory that the public library was part of a governmental agency.

After the governmental agency has started or initiated the library, the mere fact that it continues to raise taxes for its support is incidental. The library would continue irrespective of whether any tax-support is continued by the agency. The support is, as a matter of fact, merely payment to the library corporation for library service and, as such, creates an implied contract. If the public library fails to give the service anticipated by the taxpayers, the support can be withdrawn at any time. In the light of this relationship, there is, of course, no constitutional problem involved as to the relation to the free grant of funds or the loaning of credit.

The three-way relationship between the locality, the corporation and the Regents is one that has not been clearly understood even by our courts; and it is not surprising to find in some cases loose language used indicating the court has merely adopted the parlance of the day in its reference to the libraries.

I have reference in particular to:

*Johnston v. Gordon*, 247 App. Div. 40; and *Craigie v. City of New York*, 114 App. Div. 880.

It must be borne in mind that the bare question which I am here concerned with, as to whether a public library is a part of the local municipal government, was not involved in either of these cases.

In *Johnston v. Gordon (supra)*, while the court casually refers to a library as a "subordinate body" of the district chartered by the Board of Regents, it specifically pointed out that it was not a municipal corporation, and consequently could not

bring a proceeding under the General Municipal Law. Therefore, the case can not be cited as having considered and determined the issues here under discussion.

*Craigie v. City of New York* (*supra*) had up for consideration a special act of the legislature and the court's conclusions were predicated upon the language of that act. It had no application to the present provisions of the Education Law.

While cases outside of New York State holding variously in connection with this matter have been brought to my attention, they, of course, could not be in point for the very reason that no other State has the set-up present in this State where the public library is a corporation established by act of the Board of Regents and functions as such quite independently of the body which initiated it.

While I think the relationship between a public library and its supporting agency is quite different from that of a board of education in a city school district, nevertheless the courts have unanimously held that even in the latter instance while the moneys for the salaries of the employes of the city board of education are derived from city funds, and have been levied and collected by the city authorities, the employes are not city employes and the board of education is not part of the local city government.

*People ex rel. Elkind v. Rosenblum*, 184 Misc. 916; aff'd.

269 App. Div. 859; appeal denied 269 App. Div. 946; appeal denied 295 N. Y., 824; aff'd. 295 N. Y. 929.

*Divisich v. Marshall*, 257 App. Div. 294; aff'd. 281 N. Y. 170.

*Fleishmann v. Graves*, 235 N. Y., 84; *Emerson v. Buck*, 230 N. Y., 380.

*Fuhrmann v. Graves*, 235 N. Y. 77.

*Board of Educ. v. Dibble*, 136 Misc. 171, and many others.

This clearly establishes that there is no validity to the theory that merely because the governmental agency contributes to the support of a body, that fact makes the body a part of the supporting agency.

Having disposed of the negative aspects of this problem, let us now look at it positively.

The Appellate Division in *Brooklyn Public Library v. Craig*, 201 App. Div. 722, states specifically:

"The library is not a branch of the city government, but is a distinct and separate corporation. . ."

The court indicated that it merely received its budgetary contribution from the city, like other educational agencies, such as the various museums of art and of natural history and the College of the City of New York. There certainly has never been any claim that these latter institutions were part of the city government.

Again at a later date in *La Marca v. Brooklyn Public Library*, 256 App. Div. 954, the court reiterates that the library employes were not in the employ of the city, the court there holding that consequently there was no liability on the part of the city for the failure on the part of the library to exercise care for the safety of visitors.

Speaking of the City College of the City of New York, which is a separate corporate entity, in *People ex rel. College of the City of New York v. Hylan*, 116 Misc. 334, the Court said that the City College is a distinct and separate corporation and the trustees of that institution have full charge of its maintenance, operation and control.

In *Kahn v. Blinn*, 60 N. Y. S. 2d 413, the court specifically indicated that subdivisions 3, 5 and 6 of section 226 of the Education Law were applicable to the public library.

The Commissioner of Education in a decision rendered under section 310 of the Education Law, in *Matter of Long Beach Public Library*, 50 State Dept. Repts. 507, held that the Board of Education of Long Beach had no power to audit the library expenditures, because a public library corporation was an entirely separate entity from that of the school district and the Board of Education exercised no control over the Board of Trustees of the library in connection with the latter's expenditures for the operation of the library.

The Attorney General in an Informal Opinion, 1946, page 17, of his published reports, indicated that he did not believe public library trustees may legally invest the funds of the library. I take it that in his opinion he was referring in part to funds furnished the library by public sources. With this view I agree. However, it must, as has been pointed out heretofore, be noted that the funds of the library may come from sources other than tax sources. The statute requires the library trustees to utilize the treasurer of the locality as its treasurer for the purpose of handling tax moneys. However, being a corporate entity, the board of trustees is required to have its own officers, president of its board, secretary and treasurer, and it would need such a treasurer to handle the moneys that the board

received as a corporate entity from gifts, bequests etc. The board of trustees could well utilize the treasurer of the governmental agency, if the latter treasurer were willing to serve, or it could appoint a separate treasurer. The governmental agency would have no control whatsoever over the investment of funds received from sources other than the governmental agency itself. It would be absurd to hold that the board of trustees of the library, being a body corporate established by the Regents, would be prohibited from investing funds donated by private sources in areas available only to governmental agencies, if any.

I have not overlooked the express statutory language (section 259) which directs the treasurer of the municipality to be the custodian of all public funds. The phrase "other sources" of course is limited to public moneys under the doctrine of "eiusdem generis". (See *People v. Cooney*, 194 Misc. 668, 670; *People v. Ahern*, 196 N. Y., 221, 227.)

As a practical proposition, private sources would not put money into a library corporation if there was any thought that the moneys thereafter became part and parcel of the funds of a taxing unit. In many public libraries there are specific gifts for the investment and maintenance of certain rooms or sections of the library. Any such theory, as indicated before, would make such donations impossible.

It is concluded for the reasons herein stated that a public library is not a part of any governmental agency. This opinion reiterates the position of counsels for the Department over many decades.

*Dated February 25, 1953*

*Deputy Commissioner of Education  
State Education Department*

**CERTIFIED PUBLIC ACCOUNTANT (Practice of) (Nonresident)  
—LICENSE (Certified Public Accountant) — EDUCATION  
LAW, Sec. 7408.**

No. 61

You have presented to me a question as to whether or not a certified public accountant working for a firm located in New Jersey (as an illustration) would be prohibited from doing the necessary accounting service in New York State, the firm certifying the account out of its office in New Jersey. As a matter of law, it is quite clear that no one has a legal right to hold himself out in New York State as a certified public accountant unless

he has been duly certified. On the other hand, there is nothing to prevent any person from making an audit or examination of the books of any business and collecting compensation for the same.

Therefore, the fact that some representative from a New Jersey firm comes into New York State and makes an examination of the books of some business establishment does not in itself constitute a violation of any of the provisions of the law with respect to certified public accountants. Nor do I think that there is anything to prevent the New Jersey firm, as a result of such an examination, from certifying its results. The firm holds itself out in the State of New Jersey as certified public accountants. It has not held itself out in New York State in such capacity.

It, of course, would not be legal for a New Jersey firm to open a New York office and attempt to carry on its business and to hold itself out, under such circumstances, as performing service as certified public accountants.

*Dated February 25, 1953*

*R. G. Rankin*

**MEDICAL SERVICE PLANS (Podiatry)—PODIATRY (Corporate Practice of)—EDUCATION LAW, Secs. 6512(1), 7009.**

No. 62

I have your recent letter in connection with the proposal that a group of podiatrists form a group with one or more suppliers of corrective arches and other remedial appliances to furnish complete service, by which I assume is meant the services of the podiatrist plus any necessary appliances, upon payment of a monthly fee by individuals which would entitle them to the services at special rates when the need arises.

You state that the plan would be similar to that of group medical service plans now in existence. You inquire (1) whether such a group would violate existing law and (2) whether the group may operate as an unincorporated association or whether they must incorporate and by what incorporation provisions such group would be governed?

It should first be remembered in this connection that the Education Law prohibits a corporation or association from practicing podiatry (section 7009).

On the basis of the information supplied by your letter it would seem to me that a group plan such as is proposed would



violate these provisions. You are aware of course that the medical service plans are corporations organized under article IX-c of the Insurance Law and that there is a provision in the medical practice act (Education Law, section 6512, subdivision 1 [k]) which permits such corporations to employ physicians. There is no similar provision in the Education Law as it relates to the practice of podiatry.

*Dated January 29, 1952*  
*Albert A. Raphael, Esq.*

**WORKMEN'S COMPENSATION (Civil Defense) (Self-insurer)  
(School District Employees)—SCHOOL DISTRICT EMPLOY-  
EES (Workmen's Compensation).**

**No. 63**

This is in reply to your recent letter relating to the securing of workmen's compensation for school district employees.

School districts may secure workmen's compensation, either in connection with civil defense matters, or otherwise, in one of three ways:

- 1 Through a regular commercial insurance company
- 2 Through the State Insurance Fund
- 3 As self-insurers

It is my understanding that the cost of securing this compensation through the State Insurance Fund is slightly lower than the cost of securing the same through an ordinary commercial policy.

If a school district wishes to become a self-insurer, in accordance with subdivision 4 of section 50 of the Workmen's Compensation Law, it should file a certified copy of the resolution electing to self-insure its compensation liabilities with the Workmen's Compensation Board.

After electing self-insurance, the school district will be required to file with that board annually a report (form SI-10), reporting to such board the amount of compensation payments made during the State fiscal year (April 1st through March 31st). This report must be filed within 30 days of the close of the State's fiscal year.

This report is used in order to determine the school district's share of assessments levied against all carriers and self-insurers under sections 15, subdivision 8; 25-a and 151 of the Workmen's Compensation Law.

Specific questions in this connection should be addressed to the Chief Self Insurance Examiner, Workmen's Compensation Board, 80 Centre Street, New York 13, New York.

*Dated February 5, 1952*  
*Superintendent of Schools*  
*City School District of the City of Rome*

**LIBRARY (Public) (Budget)—CITY SCHOOL DISTRICT (Main-  
tenance of Public Library)—EDUCATION LAW, Secs. 259,  
2503.**

**No. 64**

You have asked my opinion as to the power of the Board of Education of the City School District of the City of Saratoga Springs now to increase the annual appropriation for the maintenance of a public library without a vote of the qualified voters of the City School District of the City of Saratoga.

You state that on October 6, 1945, the voters of the inside tax district of the City of Saratoga Springs passed a resolution authorizing the Board of Education to appropriate annually a sum not exceeding \$15,000 for the maintenance of the public library.

The Education Law provides that where a city contains two or more school districts within its boundaries, the district which has the greatest number of pupils residing within the city limits is deemed to be the city school district. Therefore, in mentioning the voters of the inner tax district of the City of Saratoga Springs you are referring to the voters of the City School District of the City of Saratoga Springs.

Section 259 of the Education Law provides that once a school district, by a vote of the qualified voters, makes an annual appropriation for a school district library, such appropriation becomes an annual appropriation and is levied and collected annually as are other school taxes until changed by further vote of the qualified voters.

Section 2503 of the Education Law provides that the board of education of a city school district of a city with a population of less than 125,000 inhabitants shall have the following powers and duties:

§2503. Powers and duties of board of education

Subject to the provisions of this chapter, the board of education:

\* \* \*



4. b. May maintain public libraries pursuant to section two hundred fifty-five of this chapter, or may contract with any public library or any free association library registered by the regents pursuant to section two hundred fifty-six thereof, provided, however, that no vote of the electors of the city school district shall be required for such maintenance or contract; may organize and maintain public lecture courses; and shall establish and equip such playgrounds, recreation centers and social centers as the board from time to time shall deem proper.

It is my opinion that subdivision 4 b of section 2503 qualifies section 259 and therefore the board of education of a city school district of a city with a population of less than 125,000 would have the power to include in the annual budget of the city school district an annual appropriation to maintain the school district libraries. It is further my opinion that many resolutions in similar situations passed pursuant to section 259 would now, as far as amount is concerned, be no longer conclusive in city school districts of cities with a population of less than 125,000. It will be necessary that in such districts the board of education of the city school district include each year in the annual budget of such district the amount that said board of education wishes to appropriate for the maintenance of the school district library.

I wish to call your attention to the fact that this power of the board of education in such districts relates only to expenditures for the maintenance of a public library and not to expenditures for the establishment of a public library. Section 2503 does not change any of the provisions governing the establishment of public libraries.

*Dated February 27, 1952*

*Director, Division of Library Extension  
State Education Department*

**SCHOOL BUILDINGS (Site)—SCHOOL SITE (Option on)—DISTRICT MONEYS (Expenditure)—BOARD OF EDUCATION (Powers and Duties).**

No. 65

You have requested my opinion on the power of a board of education to secure an option on a proposed school site without a vote of the qualified voters of the district.

As you know, a board of education may not expend money to purchase real property until the voters of the district vote

to authorize the expenditure. In order that a school building proposition may be presented to the voters, it is essential that the voters have some idea as to the probable cost. Furthermore, the prices of new sites have a habit of skyrocketing at the instant voters of a school district express an interest in its purchase. The voters, before they are able to determine intelligently whether or not they wish to purchase the proposed site, should have some assurance that such purchase can be made and have some idea as to the price to be paid.

In view of the above, it would be my opinion that a board of education of a central school district would be authorized to expend moneys of the district to purchase options for a proposed site without a vote of the qualified voters of the district, provided, of course, the amount paid for the option is reasonable. My experience indicates that it is clearly to the advantage of the district that such an option be secured.

*Dated February 28, 1952*

*Charles A. Cusick, Esq.*

**SCHOOL BUILDINGS (Building Quota)—STATE AID (Building Quota) (Building Quota, Date Work Commenced)—EDUCATION LAW, Sec. 806(1).**

No. 66

I have your recent letter in which you request an opinion as to the interpretation of paragraph 1-a of section 1806 of the Education Law which provides, "For the purpose of calculating the building cost, the commissioner shall ascertain the number of pupils enrolled in grades one to twelve inclusive, in the school districts comprising a central school district at the close of the school year next preceding the date the work is commenced." What is meant by "the date the work is commenced"?

It is my view that "the date the work is commenced" means the date when the contractor begins actual work in connection with the building. In my opinion the moving of machinery onto the site and doing rough grading would clearly be the commencing of work. I do not think that the letting of the contract in and of itself is enough to constitute the starting of work on the construction.

*Dated March 3, 1952*

*President, Board of Education  
Chenango Valley Central School*

X  
HEALTH AND WELFARE SERVICE (Dental Treatment) (Medical Treatment) (Local Health Department) — PHYSICAL EXAMINATION (Pupils) — DENTISTRY (Practice of) — MEDICINE (Practice of) — BOARD OF EDUCATION (Ultra Vires Acts) (Delegation of Powers) (Removal of Members) (Powers and Duties) — PUPIL (Jurisdiction over) (Dental Treatment for) (Medical Treatment for) (Interview by Police) — SCHOOL BUILDINGS (Use of) (Use of by Governmental Units) — COMPULSORY EDUCATION LAW (Use of for Non-educational Purposes) — DISTRICT MONEYS (Expenditure) (Illegal Expenditure) — EDUCATION LAW, Sec. 912.

No. 67

The question presented is whether it is legally proper for a board of education to permit the use of a room in the school building and possibly equipment owned by the district by a local health department for the purpose of providing dental treatment to all children.

The problem seems to have many connotations. As you know, boards of education are without power to provide dental treatment. The question here involved then is whether the board can permit its facilities and property to be used by someone else to perform the services which it itself legally may not do.

Under the provisions of the Compulsory Attendance Law we have always held that children are given over to the custody of the school authorities for one purpose only and that is education in all its phases, and that under the terms of that statute boards of education do not have the legal right to impose obligations or even make available to children, irrespective of their value, facilities which the board is not specifically authorized so to do. As an illustration, we hold that the police authorities have no power to interview children in the school building or to use the school facilities in connection with the police department work, and the board has no right to make children available for such purpose. The police authorities must take the matter up directly with the parents. Of course, if a warrant were issued for the arrest of a child or a crime was committed on school property or an order and summons was issued by the Children's Court, the situation would be different.

The Education Law has limited the board of education to the investigation of the medical status of the child in order to be sure that the child is in physical condition to attend school. The board may not practice medicine or dentistry; it may not undertake operations such as adenoids or tonsillectomies; it may not pull teeth or repair teeth. If it discovers anything wrong its duty is to communicate such fact to the parents. Providing

medical or dental relief is therefore *ultra vires*. If it perform *ultra vires* acts the question of legal responsibility should there be any negligence involved would arise. The expenditure of money for the use of its facilities, viz., light, heat, room and repairs etc. is another aspect. The Comptroller is continuously pointing out to boards of education that they have no legal right to expend moneys unless specifically authorized to do so by statute. The Court of Appeals in dealing with the released time case indicated its interest as to whether the district was proceeding *ultra vires* in spending any of its own money to facilitate the excusing of children. If a board spends money without authority, it would subject itself to a possible removal proceeding and the loss of its state aid. There may also be personal liability. The fact that the agency permitted to perform the service has the legal right so to do does not protect the board of education in proceeding *ultra vires*.

There is no statutory power contained in the Education Law authorizing a board to delegate to any other agency any of its powers. The board could not permit some other agency to use its facilities to take over any of its education duties. The board could not even permit another school district to make use of its building, the other school district employing the teachers to give instruction either to the pupils of the school district or its own children. We have had three cases in the last year where this specific conclusion has been drawn by both this office and the State Comptroller. Certainly if the school district can not delegate its powers to another school district it patently could not delegate its duties in respect to medical inspection to either the local health authorities, welfare authorities, Red Cross or medical or dental society etc. Of course, we have a specific statute which authorizes the health departments of the cities of Buffalo, New York and Rochester to assume the health service program for the public schools in these cities. In other places the responsibility for whatever medical inspection program is involved is placed by the Education Law in the hands of the school authorities.

I fully recognize the desirability that the teeth of all children be in good repair; however, this has not been committed to the school authorities as a part of their duties and they are therefore powerless to assume it either directly or through indirect action by providing the facilities and authorizing some other agency to perform the service. The board's obligation certainly

under present statutes is resolved when it calls any unknown condition after investigation to the parents.

*Dated March 7, 1952  
Deputy Commissioner  
State Department of Health*

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**TEACHERS (Itinerant Substitute) (Salary) (Years of Service)—  
EDUCATION LAW, Sec. 3105.**

No. 68

This is in reply to your recent letter concerning the salary of itinerant substitute teachers.

The teachers salary law provides that itinerant substitutes are to be paid 1/200 of the appropriate salary step for each day of service in the district. In determining the appropriate salary step it is necessary to ascertain the number of days of prior teaching service of any kind that each itinerant substitute acquired in the district prior to July 1, 1947, or if the itinerant substitute service was first rendered subsequent to such date the prior service acquired prior to such latter date.

Once this backlog of prior service credit is ascertained, the first year that the teacher renders itinerant substitute service in the district after July 1, 1947, such teacher is entitled to be paid 1/200 of step one for each day of service. At the end of the first year of service the total number of days served are totaled. The teacher may then borrow against the backlog of prior service credit the number of days necessary to bring the days of service in the first year up to 200. Of course, the backlog of prior service credit would need to be sufficient to borrow the number of days required in order to effectuate this move.

The second year that this teacher renders itinerant substitute service to the district, such teacher is entitled to receive 1/200 of the second salary step. This borrowing from the backlog of prior service credit may continue each year, thus advancing the itinerant substitute teacher up the salary schedule each year until the backlog of prior service credit is exhausted or step 6 of the salary schedule is reached.

Of course, an itinerant substitute who has no prior service in the district must render 200 days of itinerant substitute

teaching before such teacher is entitled to be paid according to the second salary step.

*Dated March 28, 1952  
Supervising Principal  
Liberty, N. Y.*

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**RETIREMENT SYSTEM (Teachers) (Military Service)—TEACHERS (Military Duty) (Retirement)—MILITARY LAW, Sec. 243.**

No. 69

I have your recent letter in which you request my opinion as to whether or not persons who have been absent in the military services may continue to participate in the State Teachers Retirement System.

Subdivision 4 of section 243 of the Military Law reads in part as follows:

4. Pensions. Any public employee who is a member of any pension or retirement system may elect, *while on military duty*, to contribute to such pension or retirement system \* \* \* \* and upon making such contribution he shall have the same rights in respect to membership in the retirement system as he would have had if he had been present and continuously engaged in the performance of the duties of his position. (*emphasis supplied*)

Subdivision 1 (b) of section 243 of the Military Law provides that "military duty" shall not include any of the military services entered upon voluntarily on or after January 1, 1947, and before June 25, 1950. From this it would appear that the term "while on military duty" contained in the above-quoted subdivision 4 means all military duty except military duty voluntarily entered into on or after January 1, 1947, and before June 25, 1950.

In view of the above it would be my opinion that any member of the Retirement System who entered military service, except those who voluntarily entered or re-entered service between the above dates, would be considered on a military leave of absence and entitled to participate in the Retirement System by making the necessary contributions thereto. In addition, those persons who are entitled to participate in the Retirement System, except those whose services terminate on the expiration of their

teaching contracts, are entitled to have the employer continue to make the necessary contributions.

*Dated April 15, 1952*

*Executive Secretary*

*New York State Teachers Retirement Board*

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**BOARD OF EDUCATION (Meetings) (Quorum) — GENERAL CONSTRUCTION LAW, Sec. 41.**

No. 70

Section 41 of the General Construction Law provides that when three or more public officers are given any power or authority or charged with any public duty to be exercised by them as a board or similar body, a majority of the whole number of members shall constitute a quorum at a meeting for the purpose of transacting business and taking action, and further that not less than a majority of the whole number of members of such board may perform the duty or exercise the power.

Pursuant to the above provision, where a board of education consists of seven members, it is necessary that four members be present in order to constitute a quorum at any meeting, and in order to take action carrying a resolution, at least four members must vote for such resolution.

In the case of a board of five members, a majority present to constitute a quorum and voting to carry a resolution would be three.

In this connection, it may be well to draw attention to the fact that the chairman of the board of education does not have any less right to vote on any matter coming before the board than any member by reason of being the presiding officer. He should vote at the same time as the other members, however, and not reserve his vote until a tie vote occurs.

*Dated April 25, 1952*

*District Superintendent of Schools, Greene 2*

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**SCHOOL DISTRICT EMPLOYEES (Application of National Labor Relations Act).**

No. 71

You have requested my opinion as to the application of the National Labor Relations Act and the New York State Labor Relations Act to employes of a school district.

I have examined the statutes in connection with this matter and I think you will be interested in noting the provisions of section 152 of Title 29 of the National Labor Relations Act, which reads in part as follows:

152. *Definitions.* When used in this Act—

\* \* \*

(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States \* \* \* or any State or political subdivision thereof \* \* \*. (*emphasis supplied*)

Your attention is further called to section 715 of the Labor Law (New York State Labor Relations Act), which reads in part as follows:

§715. *Application of article*

The provisions of this article *shall not apply* \* \* \* to the employees of the state or of any political or civil subdivision or other agency thereof \* \* \*. (*emphasis supplied*)

Of course, these provisions tie in with the provisions of the so-called Wadlin Act, which would prohibit the employes of a school district from striking under any circumstances.

It would appear, therefore, from the above-quoted provisions that neither the National nor the State Labor Relations Act has any application to the employes of a political subdivision. A school district is a political subdivision. Hence it would not be proper, it seems to me, for your board of education to deal with any group on the basis of such acts. Of course, there is nothing to prevent your board from sitting down with a committee of teachers or, for that matter, with any person, such as an attorney, who might represent them, for the purpose of hearing any complaints or discussing employer-employee matters.

*Dated April 30, 1952*

*President, Board of Education*

*West Seneca Central School District*

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**CONTRACT (Personal Interest of Trustee)—BOARD OF EDUCATION (Employment of Architect) (Powers and Duties)—EDUCATION LAW, Sec. 1617.**

No. 72

You have requested my opinion as to the validity of a contract which has been awarded by a board of education to a firm of architects, an employe of which is also a member of the board of education.

Ordinarily, the provisions of either section 1617 of the Education Law or section 1868 of the Penal Law are not violated merely because a contract is awarded to a firm which has in its employ a member of the board of education. Patently, to require an employe of the telephone company or a public utility company, as examples, to stay off the board of education would be absurd. This Department, since these sections were enacted, has consistently held that they were designed to prohibit a board of education from making a contract out of which a board member may receive actual *pecuniary* benefit. Where an employe of a firm is serving under a stated salary and that salary is not varied due to the award of a contract, clearly the latter consideration is not involved.

The only issue left is whether because of the employe's dual position the contract is awarded to the particular firm instead of to another firm and an indirect interest is created. Whether such an indirect interest exists would be subject to proof. In most instances it might be very difficult to establish. The employment itself is not sufficient to establish it. Furthermore, even though it be established that the employe-board member influenced the award of the contract it would also have to be established that somehow the employe benefited because of the award. If it should appear that the district saved money under the contract, the employe-board member would be justified in urging the board to enter into the contract provided, of course, that he did not benefit personally thereby. If he did, as far as he is concerned, undoubtedly these aforesaid sections would be violated irrespective of whether the district also benefited.

Because of the imponderable factors involved I make only the above comments without ruling on any case without the full facts.

Dated October 8, 1951

Assistant Commissioner, Finance and School Administrative Services

State Education Department

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SCHOOL BUILDINGS (Building Permits) (Approval of Plans) (Zoning)—BOARD OF EDUCATION (Powers and Duties)—STATE REGULATION (Local Regulation Precluded by)—EDUCATION LAW, Secs. 408, 409.

No. 73

It is my understanding that your town board has asked that the board of education obtain a building permit for a proposed

school construction program. This office, as well as the office of the Attorney General and the Department of Audit and Control, has held the opinion for a great many years that it is impossible for a local municipal unit to require building permits or to enforce zoning ordinances in relation to school building programs which represent local exercise of a state function, to wit, that of education.

Section 408 of the Education Law gives the Commissioner of Education the power to regulate all local school building programs in relation to health and safety requirements in reference to proper heating, lighting, ventilation, sanitation and health, fire and accident protection. See also section 409. The Commissioner is required to approve plans and specifications for school buildings in all school districts with a population of less than 70,000. The regulations to which the law refers will be found in article XX (sections 165 and 166 of the Regulations of the Commissioner of Education).

Where the State has thus pre-empted the field of regulation, local municipal units have no power to interfere with such state regulation.

The courts of this and other states have consistently upheld this doctrine (see *Union Free School District No. 14 v. The Village of Hewlett Bay Park*, 198 Misc. 932, aff'd 279 App. Div. 618; see also *Jewish Consumptive Relief Society v. Woodbury*, 230 App. Div. 228; *Concordia Collegiate Institute v. Miller*, 301 N. Y. 189; *Opinion of the Attorney General*, 59 State Dept. Rep. 105; *Board of Education of St Louis v. St Louis*, 267 Mo. 356; *Salt Lake City v. Board of Education*, 52 Utah 540; *Burstyn v. McCaffrey*, 198 Misc. 884; *Johnson v. Maryland*, 254 U. S. 51; *Breen v. Mortgage Comm.*, 285 N. Y. 425; *Sells v. Defense Plant Corporation*, 295 N. Y. 227; *Saranac Land and Timber Co. v. Roberts*, 195 N. Y. 303; *Denton v. State of N. Y.*, 72 App. Div. 248; *Smith v. State*, 227 N. Y. 405).

Dated June 17, 1952

Roswell E. Pfohl

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RETIREMENT SYSTEM (Teachers)—TEACHERS (Death) (Retirement)—EDUCATION LAW, Sec. 512.

No. 74

I have your recent letter in which you request my opinion as to the proper manner of paying the accumulated contribu-

tions of a former member of the New York State Teachers Retirement System.

As I understand the situation, a member of the retirement system on January 15, 1952, by a formal designation, designated a person as beneficiary of her retirement credit. I further note that on February 7, 1952, the member filed an application for refund of her accumulated contributions. A statement of current contributions was requested from her school superintendent, which was received on February 11, 1952, and further correspondence was had with the member concerning this refund, which terminated by the member again requesting the refund of her accumulated contributions on February 23, 1952. A check was issued in payment of this refund payable to the member in the amount of \$3933.20 on February 29, 1952. Thereafter the check was returned and the New York State Teachers Retirement Board notified that the member had died on February 27, 1952.

The question is whether the accumulated contributions are to be paid to the estate of the member or to the designated beneficiary.

In order to resolve this question, it is necessary to determine as of the date of death whether the request for the refund was sufficient to vest title to the money in the decedent.

Section 512 of the Education Law provides that a member who withdraws from service or ceases to be a teacher for any cause other than death or retirement shall be paid on demand the accumulated contributions of such individual's account in the annuity savings fund.

It would appear from this provision that the Retirement Board has no duty but a ministerial one after a demand is properly received for the refund of accumulated contributions. As pointed out in *Matter of Fitzpatrick v. New York State Teachers Retirement Board*, 212 App. Div. 760, there is a distinction between the case where the Retirement Board must take no action calling for discretion and the case where the Retirement Board must act and exercise discretion.

The instant case is certainly one where the Retirement Board may only make payment of the accumulated contributions and can exercise no discretion in such payment. As of February 23, 1952, the Retirement Board could take no action but that of verifying and computing the amount owing to the member. It would be my opinion that the proceeds of the accumulations

belong to the estate of the member and should not be paid to the designated beneficiary.

*Dated June 17, 1952*

*Executive Secretary*

*New York State Teachers Retirement Board*

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**SCHOOL AGE—PUPILS (Age) (Assignment to Class)—BOARD OF EDUCATION (Powers and Duties)—EDUCATION LAW, Secs. 1712, 3202.**

**No. 75**

You have requested my opinion as to the admission age of pupils to the public schools of the State.

Under the provisions of section 3202, subdivision 1, as amended by chapter 192 of the Laws of 1950, any pupil between five and 21 years of age is entitled to a free education in the schools maintained by the district of residence. The law then reads as follows:

Nothing herein contained shall, however, require a board of education to admit a child who becomes five years after the school year has commenced unless his birthday occurs on or before the first of December.

Section 1712 of the Education Law authorizes boards of education, in their discretion, to "maintain kindergartens which shall be free to resident children between the ages of four and six years, provided, however, such board may fix a higher minimum age for admission to such kindergartens."

Reading the above two sections of the law together, you will find that any child who reaches his fifth birthday by December 1st is entitled to attend kindergarten in the home district if the district maintains a kindergarten. Where no kindergarten is so maintained, the pupil would be entitled to admission to first grade at that time.

Section 1709 of the Education Law, subdivision 3, authorizes boards of education "to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant."

Reading this provision together with the above, it appears that a board of education, if it wishes to do so, may admit children of four years and up to kindergarten if kindergarten is maintained. If it has a rule under which the child must be four years and nine months in September in order to be ad-



mitted to kindergarten, such a rule is protected by the first provision of law cited above.

This does not, however, mean that the board of education can establish a rule under which admission to first grade can be denied unless the child is five years and nine months old in September, or admission to second grade, unless the child is six years and nine months old in September etc. The law as quoted above requires that transfer from one class to another must be based on scholarship and not on age. Therefore, if the child has completed a full year of kindergarten and scholastically is ready for the first grade, the child must be admitted to first grade regardless of age. Under such circumstances the board would have no power to make the child repeat kindergarten.

It must be noted, of course, that the question as to readiness for another grade (not based on age but on scholarship) rests in the discretion of the board of education.

*Dated June 17, 1952*  
*Mrs Elaine G. Vix*

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**CITY SCHOOL DISTRICT (Board of Education) — BOARD OF EDUCATION (Powers and Duties) — SCHOOL LUNCH (Operation of Cafeteria) — STATE REGULATION (Local Regulation Precluded by)—EDUCATION LAW, Sec. 2503.**

No. 76

You have requested an opinion from this office in relation to the claim of the city against the City School District of the City of Schenectady for payment of the fees for cafeteria licenses.

As you know, section 2503, subdivision 9-a, of the Education Law authorizes the board of education to operate cafeterias for pupils and teachers. Further, the School Lunch Act (chapter 632, Laws of 1946; chapter 10, Laws of 1947; chapter 511, Laws of 1948) placed the school lunch program under the supervision of the State Education Department. Where the State has thus pre-empted the field of regulation, local municipal units have no power to interfere with such state regulation. The courts of this and other states have consistently upheld this doctrine. (See *Union Free School District Hempstead v. Hewlett Bay Park, et al.*, 198 Misc. 932, aff'd 279 App. Div. 618; see also *Jewish Consumptive Relief Society v. Woodbury*, 230 App. Div. 228; *Concordia Collegiate Institute v. Miller*, 301 N. Y. 189; *Opinion of the Attorney General*, 59 State Dept.

Rep. 105; *Board of Education of St Louis v. St Louis*, 267 Mo. 356; *Salt Lake City v. Board of Education*, 52 Utah 540; *Burstyn v. McCaffrey*, 198 Misc. 884; *Johnson v. Maryland*, 254 U. S. 51; *Breen v. Mortgage Comm.*, 285 N. Y. 425; *Sells v. Defense Plant Corporation*, 295 N. Y. 227; *Saranac Land and Timber Co. v. Roberts*, 195 N. Y. 303; *Denton v. State of N. Y.*, 72 App. Div. 248; *Smith v. State*, 227 N. Y. 405).

Therefore, it is my opinion that the city may not legally require the city school district to obtain a municipal license for school cafeterias.

*Dated August 5, 1952*  
*A. S. Clayman, Esq.*

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**BOUNDARIES (Alteration of) (Independent Superintendencies) —DISTRICT SUPERINTENDENTS—BOARD OF EDUCATION (Powers and Duties)—EDUCATION LAW, Sec. 1507.**

No. 77

You have requested my opinion regarding the power of district superintendents to alter boundaries between two school districts which have become independent superintendencies.

I note that there is a small rectangular portion of Central School District No. 2 of the Town of Ramapo (known locally as Spring Valley) which borders on Union Free School District No. 8 of the Town of Orangetown (known locally as Pearl River) which is geographically located in such a way that it appears more advantageous for the pupils to attend the schools of the Orangetown district than those of the central district.

You state that the boards of education of both districts have passed resolutions approving a change in boundaries so as to transfer this area from Central District No. 2, Ramapo, to Union Free School District No. 8, Orangetown.

Both of these districts, as you state, are independent superintendencies. However, the Pearl River district became a superintendency in 1951 and, as you know, Central School District No. 2, Ramapo, was organized this year as a central district and became a superintendency after it was so organized.

In view of these facts, it is my opinion that the district superintendent or superintendents in whose supervisory districts the said school districts were prior to becoming independent superintendencies retain jurisdiction over those districts under provisions of article 31 of the Education Law to alter boundaries with the consents of the boards of education of the districts affected.

In this connection, I would like to call your attention to the case of *People ex rel. Cherry v. Graves*, 219 App. Div. 563. In that case the court called attention to the fact that when in 1911 the counties of the State were originally divided into supervisory districts, cities, and independent superintendencies then existing were excluded, but no provision was made to exclude from supervisory districts, a school district which thereafter became an independent superintendency. The court said in part:

\* \* \* Immediate supervision of the schools in the union free school district by its own superintendent does not appear to be inconsistent with the continuance of power in the superintendent of the supervisory district to perform his functions prescribed by said section 395 and to alter boundaries or to dissolve and consolidate districts under article 5 [now article 31] of the Education Law, including said section 129 thereof. There is no provision for the release of the taxpayers of such a union free school district from the burden of supporting such district superintendent or from participating in his election after it is permitted to employ its own superintendent of schools. This too is suggestive of the conclusion which we reach that such a union free school district remains within the supervisory district notwithstanding the fact that it employs a superintendent of schools and irrespective of its population. \* \* \*

Under the circumstances it is my view that the district superintendent or superintendents have legal authority to alter boundaries in the case of the two districts about which you write pursuant to section 1507 of the Education Law with the consent of the boards of education of the respective districts.

Dated September 9, 1952

Kennedy, Teale & Kennedy, Esqs.

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**COMPULSORY EDUCATION LAW (Equivalent Instruction) —  
PUPIL (Education by Parent) (Jurisdiction over) (Age) —  
PRIVATE SCHOOLS — BOARD OF EDUCATION (Powers  
and Duties).**

No. 78

The Compulsory Education Law requires that each child of proper age attend the public schools or, in lieu thereof, a school other than the public, which must, however, offer equivalent instruction to that of public schools. The responsibility for the

determination of equivalency rests on each individual board of education.

Hence, when a parent desires to have his child attend no school at all, but desires to educate the same himself at home, the question then arises whether or not such parent is violating the Compulsory Education Law. This, of course, means that the question to be answered in each such case is whether or not, in the opinion of the local board of education or board of trustees, the instruction given by the parent is the equivalent of that offered in the public schools.

In determining this question, the Appellate Division has ruled that the matter of certification as a teacher of the parent in and by itself is not the sole criterion here involved. In a prosecution the court below refused to admit evidence as to the capabilities of the parent to offer equivalent instruction and held that if the parent was not a certificated teacher, that *ipso facto* the instruction offered by him could not be considered to be equivalent. The Appellate Division, however, reversed, holding that certification was only one of the items to be considered, and remanded the case for further trial (*People v. Turner*, 277 App. Div. 317).

The case of *Matter of Richards* (166 Misc. 359; aff'd 255 App. Div. 922) was based on a different statute and, in any event, is an earlier case. It does not, therefore, have any bearing on the above.

Dated September 23, 1952

Assistant Commissioner for Instructional Services  
State Education Department

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**HIGHER EDUCATION—TEACHERS (Higher Education) (Tenure  
and Dismissal) (Membership in Subversive Organizations)—  
EDUCATION LAW, Sec. 3022.**

No. 79

My opinion is sought concerning the effect of chapter 681 of the Laws of 1953, entitled "An Act to amend the education law, in relation to eliminating from institutions of higher education teachers and employees who are members of subversive organizations."

While the title of the act would seem to indicate that the so-called Feinberg Law is extended to all institutions of higher education, an examination of the act itself indicates that such higher institutions are limited to "any college or other institu-

tion of higher education owned and operated by the State, or any subdivision thereof." The law seems clear, therefore, as being only applicable to such institutions. As far as this bill is concerned, therefore, other institutions of higher education do not come within the purview of its terms.

*Dated March 25, 1953*

*Associate Commissioner for Higher Education  
State Education Department*

**NEW YORK CITY—BOARD OF EDUCATION (Powers and Duties)—BOARD OF EXAMINERS (Powers and Duties)—CIVIL SERVICE—ELIGIBLE LIST—EXAMINATION—TEACHERS (Appointment) (Tenure and Dismissal)—EDUCATION LAW, Sec. 2573, subd. 10.**

**No. 80**

The Board of Education and the Board of Examiners of the City School District of the City of New York have submitted this matter to the Department upon an agreed statement of facts for a legal determination.

It appears that the Board of Education has over the years been appointing persons to the following positions without requiring the Board of Examiners to establish an eligible list therefor:

Administrative Assistant in High Schools  
Assistant Administrative Director  
Junior Principal in Elementary Schools  
Junior High School Principal

The Board of Examiners and the Board of Education have treated these positions as though they were in the noncompetitive class of Civil Service, and the former board has certified each candidate before appointment as to qualifications etc.

No question arises as to the qualifications of any of the present incumbents, it being conceded by both parties that such persons are adequately qualified.

The question presented is whether the Board of Examiners is required to establish an eligible list for the positions in question in order that the Board of Education may select one of the first three for appointment therefrom. The particular provision of the statute in point is to be found in subdivision 10 of section 2573 of the Education Law. I quote a part of that subdivision:

10. In a city having a population of one million or more, recommendations for appointment to the teaching and

supervising service, except for the position of superintendent of schools, associate superintendent or assistant superintendent, or director or [of] a special branch, principal of or teacher in a training school, or principal of a high school, shall be from the first three persons on appropriate eligible lists prepared by the board of examiners. \* \* \* \* \*

This statute seems to create two categories, one consisting of all persons who must be appointed from appropriate lists and the other, the specific exceptions. The Board of Education would have the power to make the exceptions noncompetitive or appoint directly without reference to the Board of Examiners. All other persons must be selected in accordance with the mandate contained in the statute.

The only question left, therefore, is as to whether any of the positions above listed come within the exceptions. The first three are clearly not covered. The term "high school principal," however, contains no limitation. It is recognized that there are different kinds of high school principals who have different duties and who undoubtedly may be in different tenure areas. They are nonetheless high school principals. A principal of a vocational high school is in a different category than a principal of an academic high school. Nevertheless they are both principals of high schools. The term "junior high school principal" is a fairly recently coined term giving the incumbent the principalship of the seventh, eighth and ninth grades. The high school principal title could just as well be called senior high school principal, he having jurisdiction over the tenth, eleventh and twelfth grades. The Legislature, through the state aid formula, has placed the children graded seventh through twelfth in the same category as far as the apportionment of state aid is concerned. There is no longer any differential in the statutes setting up salary schedules for teachers of these grades. I regard, as a matter of law, the term "principal of a high school" contained in the aforesaid statute as applicable to all persons who are assigned the principalship of grades 7 through 12, although some may be vocational, some may be academic, some may be junior, some may be senior or there may be other terms utilized. This does not mean, as indicated, that these positions become telescoped for salary or tenure area purposes. Hence, the decision of the Court of Appeals in *Burns v. Board of Education*, 301 N. Y. 584, has no application to the question here at issue. It merely is my conclusion that in

interpreting the aforesaid statute the Board of Education is quite justified in appointing junior high school principals without recourse to lists as certified by the Board of Examiners.

The Board of Education strongly urges, in respect to the other three positions listed, that its act of placing the incumbents therein is an assignment and not an appointment; that it has the right so to do; and that the assignment does not take the individuals out of the positions they were in theretofore, which they continue to hold. The board insists that the assignees serve during the pleasure of the board; that they do not obtain any tenure in such assigned position and that the assignment may be terminated at any time. This, the board insists, takes them out of the category covered by the aforesaid statute requiring their appointment to the position from eligible lists.

In my opinion, the aforesaid statute may not be avoided by terminology. In other words, merely calling the act of the board an assignment rather than an appointment does not, in my opinion, help the situation. I recognize that on occasion where it is not possible for the board to fill a position immediately, it has the legal right without recourse to a list to appoint a person to a position in an "acting" capacity. The person serves in the position only until the board is able to fill the position permanently. However, if positions could be filled on a permanent basis through the expediency of utilizing such an approach, then it would seem to me that the same situation would be applicable to all administrative positions in the New York City school system. The board would be free to fill any position it wished through an assignment, thereby avoiding the necessity of recourse to a list and the necessity of according tenure to the assignee.

Clearly, the avoidance of the aforesaid statute by such a procedure is not contemplated by the provisions of the Education Law.

The three positions under consideration have budgetary titles and have salaries and, except for the position of assistant administrative director, salary schedules. They would constitute in my opinion separate tenure areas. Like any of the teachers in the system who are appointed to new positions, if they have tenure in the positions from which they are promoted, they do not lose that tenure by the promotion. They hold the positions listed upon a permanent basis. While there is some force to the position of the board that these positions are of such a nature that they should be exempt rather than competitive, the remedy

is to add them to the list of exempt positions contained in the above statute. It is my considered opinion, therefore, that the positions of administrative assistant in high schools, assistant administrative director and junior principal in elementary schools come within the terms of such statute and should be filled in accordance with its terms from an eligible list established by the Board of Examiners.

*Dated April 3, 1953*

*Board of Education,*

*City School District of the City of New York*

*Board of Examiners,*

*City School District of the City of New York*

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**TEACHERS (Tenure and Dismissal) (Yearly Teaching Period)  
(Contracts) (Salary) (Appointment)—BOARD OF EDUCATION  
(Powers and Duties)—CONTRACT (Teacher)—EDUCATION LAW, Secs. 2509, 2573, 3012, 3013, 3015.**

No. 81

An opinion is sought concerning the powers of a board of education to require the services of teachers in tenure areas during the summer months.

As you know, many years ago the Commissioner of Education in a formal decision pointed out that a teacher is employed on an annual basis and is consequently employed during July and August as well as during the months when school itself is in session. (*Matter of Kenney*, 41 State Dept. Rep. 137.) That decision pointed out that a medical inspector could be required to give medical examinations needed for vacation work permits after the close of the school session as his employment was on an annual basis. Since that decision, questions have occasionally arisen as to how far a board of education may go in requiring the services of the teaching staff during the summer months. I think the answer hangs in a large measure upon the contract of employment.

I realize no formal written contract with each teacher is entered into. This is because the statute itself (Education Law, sections 2509, 2573, 3012, 3013) sets up the contractual relationship. However, I think it quite proper to assume that unless there has been an agreement to the contrary, when a teacher has agreed to teach an elementary class or a high school class it is anticipated by both parties that the teaching service therein

involved will be carried on during the time specified by the board of education for the regular school session. If a board of education needs the services of a teacher during the summer months in connection with his regular teaching assignment, the board of education, in my opinion, would have the legal right to require them. In other words, if his work is not finished in June and there is some more paper work or tutoring, or otherwise, which is needed *in connection with his regular assignment* or if, prior to the opening of the regular session, it is necessary to have the teacher's presence for conferences, the working out of curriculums or other details, in my opinion the board of education would have the right to insist that he continue his duties during that period. The contractual arrangement between the teacher and the board does not contemplate new assignments during the summer months not agreed upon at the time the teacher and the board entered into the original contractual relationship. This means that a board of education could not require a teacher to teach summer school or to take over the playground or for that matter to perform services in the summer that are not actually needed in conjunction with the work for which the teacher was originally employed. If the board and the teacher wish mutually to enter into a new arrangement for any such work at a stipulated compensation, the parties would, of course, be free to do so. Such service would be additional work for which the teacher could be paid.

The case decided by the Commissioner of Education, as indicated, dealt with the work of a medical inspector and it is quite evident that one of his particular jobs was to give medical examinations to children for vacation work permits. The board naturally could require him to continue that service whether it was needed in the summer or at any other time. Similarly, if it is inherent in the nature of a teaching or supervisory position that part of the services to be performed will be required as, for instance, in the case of some agricultural or vocational teachers, during the summer months, the board can well expect such teacher to give service during that period. The salary schedule for all these positions is on an annual basis and the salary is paid for whatever work the teacher has been employed to do. If it is not necessary that a part of that service be performed during the summer months, then the board of education is not legally justified in requiring the teacher to serve during that period.

Chapter 361 of the Laws of 1953 would not change the legal status above delineated.

*Dated April 10, 1953*

*Dr Frank P. Graves, Counsel*

*New York State Teachers Association*

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**LIBRARY (Public) (Tax) (Construction of Library Building)  
(Approval of Plans)—SCHOOL DISTRICT OBLIGATIONS  
(Expenditure of Proceeds).**

No. 92

My opinion is sought as to the relationship between the board of trustees of a school district public library and the board of education of the school district in connection with the issuance of bonds for the construction of a library building.

In prior opinions (see Opinions Nos. 60, 61) I pointed out that the board of trustees of a library represents a body corporate and is an independent agency established by act of the Regents. The public library corporation receives its support from several sources, one of which is, of course, tax money contained in the budget of the school district.

The construction of a library building, however, it seems to me, is in a different category. The statute authorizes the school district to construct the building and to issue bonds therefor. The bonds are authorized at a school meeting upon the affirmative vote of the voters of the school district. It seems, therefore, clear that the title to the library building is vested in the school district and that it is the obligation of the school board to erect it. However, the law specifies that it is a library building, and consequently it could not be used by the school district for any other purpose. It being a library building, the board of trustees of the library are the ones primarily concerned. After it is constructed, the board of education of the school district must turn over possession and control of the building to the library board, and the latter board would then have a "life" use.

With this in mind, the plans for the building, in my opinion, are subject to the approval of the library board. However, the moneys raised from the bond issue repose in the treasury of the school district and are expended upon vouchers approved by the school board.

If the library board should at any time cease to have use for the library building owned by the school district, it could, by resolution, so notify the school board and then the property, the

title to which is still vested in the school board, would be sold by it pursuant to the procedures required by law for the sale of school district property.

It might be pointed out that somewhat the same situation exists as to real property between certain cities and city school districts. The board of education of such a school district has complete control of school buildings, but the title is in the city, and if the time arrives when the school district no longer needs the property, the city re-enters and disposes of it. While the title to the property is vested in the city in the latter instance, and in the school district with respect to the library building, in neither instance could the city or the school authorities divest the board of education or the library board of the property so long as each wished to use it. The reason for the same, as far as the library is concerned, is because the statute has decreed that the bonds are to be issued and the building erected as a library, and this must continue until the library board decrees otherwise.

*Dated April 13, 1953*  
*President, Board of Trustees*  
*Elmont Public Library*

**BOARD OF EDUCATION (Use of Check-Signing Device)—DISTRICT OFFICERS (Treasurer)—SCHOOL DISTRICT EMPLOYEES (Payment of Salary)—GENERAL CONSTRUCTION LAW, Sec. 46—EDUCATION LAW, Secs. 1723, 2523.**

No. 83

You state that as a member of the board of education you find it necessary to sign many hundred checks every month, and you ask if a mechanical check-signer could be used. You also state that no express authority for the use of such a device appears to be contained in the Education Law.

Section 1723 of the Education Law provides in part as follows:

\* \* \* the board may authorize one voucher-order check to be drawn in the total amount of a duly certified payroll for the salaries of regularly appointed employees and officers legally entitled to be compensated for their services. The proceeds of such voucher-order payroll check shall be credited to a payroll account from which checks shall be signed only by the treasurer of the district and drawn payable to individual employees or officers legally entitled to be compensated for services.

This provision applies, of course, to union free school districts and to central school districts. Under this provision it would not be necessary for you to sign more than one check per pay-period.

In addition, however, section 46 of the General Construction Law defines "signature" as including "any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed upon any instrument or writing, with intent to execute or authenticate such instrument or writing."

In 1938 the Attorney General ruled that this language of the General Construction Law is sufficient authority for the use of mechanical check-signing devices in the case of State Departments and Agencies. (*Op. Att. Gen. 1938, p. 157.*) In 1948 the Attorney General further ruled that the Secretary of State, or an officer of his department, could legally use a stamped or engraved signature unless a specific requirement of law was involved in a specific instance that the handwritten signature be used. (*Op. Att. Gen. 1948, p. 206.* See also *Op. Att. Gen. 1947, p. 126.*)

Section 2523 of the Education Law provides that a board of education of a city school district may authorize by resolution that school district checks may be signed "with the facsimile signature of the treasurer and other district officer whose signature is required, as reproduced by a machine or device commonly known as a check-signer." This provision, however, does not, in my opinion, mean that such a device may be used only because of the express provision of section 2523. The language of the General Construction Law, quoted above, authorizes school boards to use mechanical check-signing devices as long as their use is duly authorized by action of the board of education and as long as the safeguards specified by the manufacturer and inherent in the operation of such devices are properly used.

*Dated September 25, 1952*  
*R. Lewis Townsend, Esq.*

**STATE AID (Change in Fiscal Year) (Deferred City School District)—CITY SCHOOL DISTRICT—FISCAL YEAR—EDUCATION LAW, Secs. 2515, 3609.**

No. 84

You are inquiring as to the time, basis and amount of state aid payments to city school districts of cities of less than 25,000



inhabitants that change from a calendar fiscal year to a fiscal year beginning with July 1st.

Pursuant to subdivision 7 of section 2515 of the Education Law (applicable to these city school districts), the board of education of any school district which has a fiscal year other than one beginning with July 1st, may change to a fiscal year beginning July 1st during a specified period and, in fact, must do so not later than January 1, 1956.

Where the fiscal year of a given school district of this type begins on January 1st, the change-over would be effected by the interposition of a so-called "interim fiscal period" of six months beginning January 1st and ending June 30th.

The key to the answer to this problem is section 3609 of the Education Law. Under subdivision 2 of this provision state aid payments to such city school districts having a fiscal year identical with the calendar year are made by payment of at least one-fourth of the annual apportionment on or before January 15th; one-half thereof on or before April 15th and one-fourth on or before September 15th.

The state aid payments for such a city school district having a fiscal year beginning July 1st must be made in accordance with subdivision 1 of this section. Under this subdivision, an estimated one-fourth of the annual apportionment is payable on or before September 15th; an estimated one-fourth on or before January 15th, and the remaining part on or before April 15th.

State aid payments, of course, are based on the facts shown for a school year which begins July 1st and ends June 30th in all school districts.

It would be my opinion that where a school district changes its fiscal year from January 1st to July 1st, the basis for state aid payments shifts from subdivision 2 of section 3609 to subdivision 1 thereof, as of July 1st of the first fiscal year beginning with such date.

As an example, let me assume that such a city school district shifts its fiscal year in such a manner that the last complete calendar fiscal year is the fiscal year 1951. The period from January 1, 1952, to June 30, 1952, becomes the "interim fiscal period." The first fiscal year beginning with July 1st would be the school year 1952-53. On this assumption the first one-fourth payment, based on the 1950-51 school year, then will be payable on January 15, 1952; the second (one-half) payment, based on the 1950-51 school year will be payable on April 15, 1952;

the final one-fourth payment, based on the 1950-51 school year, will be payable on or before September 15, 1952.

The first one-fourth payment, based on the school year 1951-52 will be made on January 15, 1953. One-half of the apportionments, based on the school year 1951-52, will be made on April 15, 1953. The final one-fourth payment for the school year 1951-52 will be made on September 15, 1953.

At the same time, however, such district, having switched to subdivision 1 of section 3609, will be entitled to payment on September 15, 1953, of the first one-fourth payment for the 1952-53 school year. This means then that on such date such school district would have received one-fourth of the 1951-52 state aid, as well as one-fourth of the 1952-53 state aid. As of that moment, therefore, such formerly "deferred" city school district will be fully "undeferred."

Thereafter state aid payments will continue in the regular manner on January 15, 1954 (one-fourth payment for the school year 1952-53); April 15, 1954 (final one-half payment for the school year 1952-53).

At the time of the enactment of the provision "deferring" state aid payments to certain city school districts, the payment of 40 per cent of a year's apportionment was postponed. When this section was amended in 1949 to read in substance as it does today (subdivisions 1 and 2), such amendment in effect "undeferring" such districts to the extent of 15 per cent of a year's apportionment. The payment of state aid based on the change of fiscal year as indicated above would "undeferr" such districts to the extent of the remaining 25 per cent of a year's apportionment.

*Dated September 25, 1952*

*Chief, Bureau of Apportionment*

*State Education Department*

**TAXES (Assessment, Levy and Collection) (Exempt Property)—  
TAXABLE INHABITANTS—BOARD OF EDUCATION  
(Powers and Duties)—EDUCATION LAW, Secs. 3502, 3508.**

**No. 85**

You have requested my opinion as to the power of a school district in the State of New York to levy a school tax:

1. Upon real property owned by the United States of America and leased by the United States of America to a private individual, association or corporation, or

2. Upon real property owned by a private individual, association or corporation upon which property the United States of America has erected appurtenances, hereditaments or improvements.

At the outset it should be pointed out that a school district in the State of New York is authorized to levy and collect a tax upon real property.

The authority for levying of a school tax only upon real property is contained in subdivision 1 of section 3502 of the Education Law.

The questions will be taken up in order. First, the situation where real property is owned by the United States of America and leased by the United States of America to a private individual, association or corporation.

A reading of subdivisions 1 and 17 of section 4 of the Tax Law and section 3502 of the Education Law, indicates that if the United States of America owns real property and occupies such real property then a school district in the State of New York may not levy a tax against such real property.

By applying the first provision of section 3508 of the Education Law, it would appear that where real property is owned by the United States of America but is occupied by a person working the land under contract for a share of the produce of such land, then such person is deemed to be the possessor of the real property insofar as necessary in order to render such person liable to taxation by a school district. Of course, in this case the tax would not be levied against the United States of America.

The second provision of said section 3508 and subdivision 17 of section 4 of the Tax Law apply to the situation where real property is owned by the United States of America but is occupied by an individual, association or corporation under a contract of purchase. A reading of these two sections indicates that it is only where the real property is occupied by such individual, association or corporation under a contract of purchase that any right of taxation arises. If the occupancy is under merely a lease the constitutional disability indicated in *People ex rel. Donner-Union Coke Corp. v. Burke*, 204 App. Div. 557, aff'd 236 N. Y. 650, may apply to the imposition of a tax on the land.

The law has been settled in New York State for many years that where a vendee is in possession of real property under an executory contract of sale the interest of such vendee in posses-

sion is real property. (*Hathaway v. Payne*, 34 N. Y. 92; *Sewell v. Underhill*, 127 App. Div. 92; aff'd 197 N. Y. 168.)

The reasoning of such cases is that the interest of the parties in the property is changed by the contract of sale and the vendor is deemed in equity to be the trustee for the vendee of the title. In fact, it would appear to be the English rule which was adopted by the courts of this State. (See *Paine v. Meller*, 6 Ves. Jr. 349; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605; *Goldman v. Rosenberg*, 116 N. Y. 78; Op. Dept. of Taxation and Finance, 68 State Dept. Rep. 425.)

Thus, in the State of New York where a vendee is in possession of real property under an executory contract of sale, the title to the fee is vested in the vendor but is vested in such vendor in trust for the vendee. The Attorney General of the State of New York stated that it was a well-settled principle of law in New York State that the vendee in possession of real property under an executory contract of sale was to be regarded as the owner thereof for purposes of taxation. (Op. Att. Gen. 1900, p. 241) The courts, however, in *People ex rel. Donner-Union Coke Corp. v. Burke*, supra, refused to extend such doctrine to property owned by the United States of America because of "embarrassment" to the title of the United States through a tax sale. It was pointed out that at the time the case was decided (1923) there was no statute in New York making provision for taxing an equitable interest in real property. Following such decision the Legislature enacted present subdivision 17 of section 4 of the Tax Law quoted above. The validity of such provision was upheld in *People ex rel. Donner-Hanner Corp. v. Burke*, 128 Misc. 195; aff'd 222 App. Div. 790; aff'd 248 N. Y. 507. The provisions of said subdivision 17 of section 4 of the Tax Law provide that the interest of a vendee in possession of real property, the fee of which is vested in the United States of America, under an executory contract of sale is an equitable interest but such equitable interest is to be taxed as real property. Such section specifically provides that any interest of the United States of America in such real property is not to be taxed pursuant to the provisions of such section. The only tax levied is upon the equitable interest of the vendee. This question has been discussed by the Supreme Court of the United States in *S.R.A. v. Minnesota*, 327 U. S. 558.

An analysis of the aforementioned statutes and cases indicate that a school district in the State of New York may levy

a tax upon an equitable interest in real property where the title of such real property is vested in the United States of America, when such real property is in the possession of a vendee under an executory contract of sale.

The second question is the situation where real property is owned by an individual, association or corporation and the United States of America has erected appurtenances, hereditaments or improvements upon such real property.

Where the fee to real property is vested in an individual, association or corporation subject to taxation in the State of New York such real property could be taxed by a school district for school district purposes. If the United States Government has erected appurtenances, hereditaments or improvements upon such real property it would first be necessary to examine the agreement between the owner of the fee and the United States of America, in order to determine whether there has been a constructive severance of the appurtenances, hereditaments or improvements pursuant to an agreement between the parties. It has been pointed out in *People ex rel. H. R. Day Line v. Franck*, 257 N. Y. 69, that section 2 of the Tax Law provides that buildings are real estate subject to assessment when clear and explicit language is present "indicating with precision" that the owner of the building retains the right of removal and remains the owner of the building. In such cases one person may be taxed as owner of the fee and another as owner of the building.

In no event, however, could a tax be levied against the property owned by the United States of America with the exception discussed in question one.

*Dated August 10, 1953*

*Deputy Commissioner of Education  
State Education Department*

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BOARD OF EDUCATION (Powers and Duties)—FIRE HAZARD  
—BUDGET (Ordinary Contingent Expenses) — SCHOOL  
BUILDINGS (Closing) — SCHOOL DISTRICT OBLIGA-  
TIONS—APPEAL (Aggrieved Party)—LOCAL FINANCE  
LAW, Sec. 104.00—EDUCATION LAW, Secs. 409, 2023—  
COMMISSIONER OF EDUCATION (Regulations, Secs. 167,  
168).

No. 86(118)

The Board of Education of Central School District No. 1 of the Towns of Alden, Marilla, Lancaster and Newstead, Erie

County, Darien, Genesee County, and Bennington, Wyoming County, has presented a petition complaining of the action of the voters of said district at a meeting held May 17, 1954, in failing to approve Proposition No. 2 submitted to the voters at said meeting. The petition is labeled an "Appeal". Under the Rules of Practice in respect to appeals, it becomes the duty of the Board of Education to *defend* the action of a school meeting if such an action is initiated. There is no authority for the Board of Education to initiate the present proceeding. The Board, as a matter of fact, does not claim anything illegal in the procedure or the action of the meeting. On this basis alone no appeal would lie. The Board is concerned because the meeting failed to approve the proposition which it presented. The Commissioner of Education would have no authority to reverse the action of a meeting merely because he or the Board of Education disagrees with the determination of the voters. The Board's remedy is to call a new meeting. Under the circumstances, therefore, the application here presented cannot be considered an appeal.

However, it would appear that what the Board is really interested in is advice as to what action it may now take because of the determination of the voters at this meeting. This Board, therefore, has recourse to a formal opinion of the Counsel to this Department for the answer to such a problem.

Under the provisions of section 409 of the Education Law, all school buildings of school districts other than city school districts of cities having a population of 70,000 or more are required to comply with regulations which the Commissioner of Education may adopt from time to time in relation to proper heating, lighting, ventilation, sanitation and health, fire and accident protection. In conformity to such section, the Board of Regents at its meeting on February 26, 1954 approved sections 167 and 168 of the Regulations of the Commissioner of Education relating to health and safety requirements for existing school buildings.

Under the provisions of said section 167, all school buildings must have at least two means of egress remote from each other leading from each floor of the building. Since the two schools here involved did not comply with this regulation, the Board of Education called a special meeting at which the voters were asked to approve the issuance of bonds for an expenditure of some \$14,000 to effect the structural changes necessary to comply with the Regulations. As indicated, the meeting refused

to approve the proposition. While a substantial majority was obtained it did not quite reach the two-thirds vote required in this district for the approval of such a proposition. The Board, therefore, is confronted with a dilemma. It finds that the building does not comply with the Regulations and the voters have refused to approve the necessary funds to make the school buildings usable.

The legal answer to this problem is not difficult. Where a board of education finds that a building cannot be used as a school building because of the destruction of its heating plant, or the loss of its roof, or for a similar reason, the board has the right to immediately proceed to expend the necessary funds and they become what is known as ordinary contingent expenses. The expenditure of moneys for an ordinary contingent expense is specifically authorized under the provisions of section 2023 of the Education Law.

We have the same situation present in this instance. Under the Regulations of the Commissioner of Education, with which this Board must comply, the Board may not use the building unless it is made safe from a fire hazard standpoint for the school children. Consequently, the expenditure of the money needed to render the building safe becomes an ordinary contingent expense, and the fact that the voters fail to appropriate the money does not prohibit the Board of Education from proceeding with the necessary construction.

It should be understood that this opinion does not pass upon the question as to whether in this instance \$14,000 or a lesser sum is needed to comply with the Regulations of the Commissioner of Education, nor does it determine as a matter of fact that the reasonable solution to the problem is the construction proposed by this Board. Perhaps this building should be closed down completely and the children educated elsewhere under contract. Perhaps the building should be closed and the Board rent other quarters if available. (See Op. Counsel Educ. Dept. 39, 42.) The Board of Education is required, as a matter of law, to comply with the Regulations. If there is no other solution, because of the action of the school meeting, while the Board has no power to issue bonds, it has the power to expend a reasonable amount to render the building safe for the children.

If the Board still believes that this money should be spread over the years, it could well call another school meeting and make the situation plain to the meeting. As a matter of fact, if, instead of issuing bonds, the Board wishes only to utilize

capital notes, and so specifies in the resolution presented, a majority vote would be sufficient. The issuance of bonds in this district in its present financial status appears to require a two-thirds vote under the provisions of section 104.00 of the Local Finance Law.

*Dated August 20, 1954*

*Board of Education, Central School District No. 1, Towns of Alden, etc.*

VACCINATION (Pupil) (Power to Require)—PUPIL (Jurisdiction over)—MEDICINE (Practice of)—HEALTH AND WELFARE SERVICE—SCHOOL BUILDINGS (Use of)—BOARD OF EDUCATION (Powers and Duties).

No. 87(119)

My opinion has been requested as to the power of a board of education to make school facilities available to public health authorities for use in a program of administering the Salk vaccine, as a potential preventative for polio, to school children.

It is my understanding that a very substantial sum of money has been made available by the National Foundation for Infantile Paralysis for the widespread use of the Salk vaccine as a potential preventative for polio. The New York State Department of Health is cooperating in the program.

It is my further understanding that it has been suggested by the State Health Department that the available vaccine be utilized in connection with children in the first, second and third grades in certain schools primarily because there has to be some limitation as to the use because of limited supply. Since it is desirable that there be a controlled area in order that results of the program can be ascertained and checked, it is my further understanding that of the controlled group one-half of the children will be given an injection of polio vaccine and the other half will receive an injection of another solution which is known to have no effect. Like the State Department of Health, it would seem similarly desirable that the State Department of Education and the school authorities cooperate to the fullest extent. This program is so far reaching and its potential success so important to the children of the State that the State Department of Education, as well as the school authorities, would be remiss in not cooperating to the fullest extent with the Foundation and the State Department of Health.

Of course, there are legal amenities which must be observed. School authorities would clearly not have the legal right to

mandate the use of the vaccine or the other solution. Nor would they have the legal right to subject any pupil to it without parental request. Furthermore, it must always be kept in mind that the school authorities are not prescribing the relief and therefore are not practicing medicine. The relief is prescribed by considered medical opinion and the role of the school authorities is to make available facilities and personnel to put the prescription into effect.

I have examined the form of request which the parents will sign, giving permission for the participation of a child in this program. Such request clearly states that the child will receive either an injection of polio vaccine or an injection of a solution known to have no effect, which fact will be unknown, not only to the doctor administering the injection, but also to the parent. Consequently, if the parent requests the public health authorities to give the injection, the parent well knows that the solution to be utilized may be either the polio vaccine or the other solution.

I see no legal objection to each board of education making available to public health authorities and private physicians on their request the necessary floor space and other medical facilities and authorizing the school nurse or physician to assist in the vaccination process when requested by such public health authorities, without charge to those children whose parents have requested said public health authorities so to do. In my opinion, however, the board of education should have in its own files at least a duplicate original of the parental request. I see no objection, if the public health authorities also request it, to the school authorities distributing and collecting the parental request forms furnished by the public health authorities.

*Dated January 27, 1954*

*Granville W. Larimore, M.D.*

*Deputy Commissioner, State Department of Health*

TEACHERS (Salary) (Salary Payments) (Salary, deductions from) (Appointment)—EDUCATION LAW, Sec. 3015.

No. 88(132)

This is in reply to your inquiry relating to teachers' salaries. A tenure teacher is employed 365 days of the year and earns her annual salary during such 365-day period. A teacher earns 1/12 of her annual salary each month of the year, and conse-

quently if a teacher's annual salary is \$3600 such teacher earns \$300 each month.

By applying the provisions of section 3015 of the Education Law, if a teacher were employed by a school district on July 1 at an annual salary of \$3600 the board of education must pay this teacher such annual salary for the period from July 1 to the ensuing June 30 in not less than ten payments. If the board is paying on a 12-month basis, it would pay such teacher \$300 at the end of July, at the end of August and at the end of each ensuing month through June. If, however, the board were on a 10-month payment plan, the board would not pay such teacher the \$300 she earned for the month of July nor the \$300 for the month of August, and at the end of September would pay such teacher 1/10 of the annual salary, or \$360. This \$360 would be made up of the \$300 which such teacher earned for the month of September, as well as \$60 from the accumulated two months' pay (\$600) which the board withheld for the preceding July and August. This process would continue until the teacher received the final tenth payment at the end of the following June. This method can only be used, however, when a teacher is in the employ of a district on July 1.

The law specifically provides that if a teacher is appointed effective as of any other date, such as September 1, the salary that the board of education agrees to pay such teacher for the balance of the school year is to be paid at the end of each month through the following June 30.

In this instance, we shall assume that the board of education appointed the teacher effective September 1 at an annual salary of \$3600. The board of education, since the teacher earns her annual salary over a 12-month period, has thus agreed to pay the teacher in question the sum of \$3600 for the period of September 1 to the ensuing August 31. Since the teacher earns 1/12 of this amount each month for the period of September 1 to June 30, the balance of the school year, it is clear that the board intends to pay such teacher the sum of \$3000 for such balance of the school year.

If, however, the board of education agrees to pay the teacher \$3600 for the balance of the school year, i.e., September 1 through June 30, such board would need to pay the teacher in question \$360 a month at the end of September, at the end of October and at the end of each month through June, and in addition would need to pay such teacher a salary for the ensuing July and August, or \$360 for the ensuing July and \$360 for

the ensuing August, unless such rate of pay were changed effective July 1.

Consequently, for teachers who are in the employ of the district on July 1 you may, as heretofore pointed out, pay them their annual salary in ten installments at the end of September, October, etc., through June.

Where a teacher, however, is absent for a day during the month and has no right to a leave with pay under applicable Bylaws, the board of education has discretion as to the handling of the salary problem. The Commissioner of Education has ruled that the per diem of a teacher is obtained by dividing the salary for the month, i.e.,  $1/12$  of the annual salary, by the number of days in the month. The teacher must be paid this salary for each day worked, and consequently if a teacher were absent without some reason and you wish to make a salary deduction, say for example one day in the month of November, you would need to pay such teacher  $29/30$  of  $1/12$  of the annual salary. You could then deduct up to  $1/30$  of such  $1/12$  of the annual salary, but could not deduct more than such amount.

Dated November 15, 1954  
G. Welty Kadel

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**BOARD OF EDUCATION (Powers and Duties) (Employment of Teacher's Aides) — NEGLIGENCE — TEACHERS (Certification).**

No. 89(140)

We have had a considerable amount of correspondence from different parts of the State concerning the legality of employment of "teacher's aides" (not licensed teachers) in public schools and there is no easy answer to it except in generalities. As you know, a board of education may not employ any person who does not have a teaching license to teach. If the service is not teaching, then the board is privileged to employ any person it wishes to accomplish whatever service needs to be done. Each particular problem will therefore have to be solved with this in mind.

You ask about a situation in the cafeteria. If the service to be performed is merely custodial, that is, seeing that the children behave themselves, then any person could be retained to perform such service. If the person is expected to teach in the sense of instruction as to what food to select, etc., then you

would need a licensed teacher. The same differentiation would need to be kept in mind in respect to any other similar problems.

For instance, even in a study hall, I presume that if the person is there only to keep order, to answer no questions and to perform no teaching service, any person could be employed to do so.

Having said all this, there is an entirely different phase to this problem which you ought to have in mind. That has to do with the problem of negligence. You understand that every time a school district finds itself in a law suit because of negligence, the first question which must be answered is the competency of the person who had charge of the children at the time the accident occurred. If a person holds a teaching license, such license is *prima facie* evidence of competency. The question of adequacy of the supervision under the particular circumstances is always an issue even though the supervision was provided through duly licensed personnel, but my comments on the question of whether the employee is a licensed teacher should not be taken as having any application to that issue.

We had a most interesting case where a child was injured in the gymnasium during a period of time that a janitor had charge. (I presume that his status generally would be that of the cafeteria worker or the study hall non-licensed teacher aforesaid.) The child was injured tumbling on one of the mats and the Court found negligence because of improper supervision. The Court felt, apparently, that if children are to be allowed to use mats a licensed teacher should be in charge. So this problem is not at all easy. A board takes certain chances in any case where it employs non-licensed personnel, and I certainly would advise that if this is done, that the Board check with its insurance carriers to make sure that whatever else is involved, it is at least protected by insurance.

Dated April 4, 1956  
Dr. J. E. Scott  
Superintendent of Schools  
Peekskill, New York

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**TEACHERS (Employment) (Hours of Service) (Duties)—BOARD OF EDUCATION (Powers and Duties).**

No. 90

This will acknowledge your recent request for an expression of opinion on the problem of free time for teachers at or near



the noon hour. You indicate that in a number of districts teachers are required to remain on duty continuously throughout the full school day, including the lunch hour, when, I presume, they are engaged in supervision of children.

As has been pointed out in previous decisions of the Commissioner, under the provisions of the Education Law boards of education have full power to create positions and fix the duties of the incumbents as well as the power to establish regulations and bylaws for the general management, operation, control, maintenance and discipline of the schools under their jurisdiction. Therefore, the Board may fix the hours of attendance for school children and the hours of service of its teachers. While it is recognized the hours of service for teachers will necessarily include more than the hours of classroom instruction, nevertheless, a board must act in a reasonable manner. In my view it is unreasonable except in an emergency to require a teacher to remain constantly in charge of supervision of a group of children from the time school opens in the morning until school closes in the afternoon. This is not to say that there is no need of supervision during the noon hour because, of course, the school authorities are responsible for supervision of children at all times when they are under the control of school authorities. However, I am of the opinion that the Board in the reasonable exercise of this discretionary power will need in the ordinary case to so arrange the program that classroom teachers may have at least thirty minutes sometimes in the proximity of the noon hour as a free period without being required to perform supervisory duties.

*Dated May 9, 1957*

*Executive Secretary*

*New York State Teachers Association*

**PUPIL (Jurisdiction over) — COURTS — SCHOOL BUILDINGS**  
(Commission of Crime in) (Use of) — **BOARD OF EDUCATION**  
(Powers and Duties) — **PENAL LAW, Sec. 490.**

No. 91

To sum up our position, it has been our thought basically that the school and all its officers and employees stand in *loco parentis* only for the purpose of educating the child. The Education Law does not give the school any authority beyond that.

Hence, it is our opinion that law enforcement officers of any kind may not remove a child from a school building while the

child is properly in attendance without permission of the child's parents for questioning. I do not believe that there would be any difference whether the child is below or above sixteen years of age.

It is likewise our opinion that law enforcement officers do not have the legal right to interrogate a pupil in the school without permission of the parents. Nor, of course, would any officer or employee of the school have the right to authorize this, since the custody of the child by the school is limited to educational purposes.

A different situation, of course, exists where the enforcement officer has a warrant for the arrest of a child, where the officer has an order signed by the Judge of the Children's Court commanding that the child be brought before him, or where the Court is closed for the day that he be taken to a proper place pending his production in Court. Under the Children's Court Act this order would need to be signed by the Judge personally. Likewise, where a crime has been committed on school premises, enforcement officers would have the right to question all pupils in the school without parental consent.

Section 490 of the Penal Law does not grant the authority claimed in your earlier letter. That section is confined in the first place to arrests for the purpose of bringing the child "before a court or magistrate having jurisdiction" and, secondly, is limited to a certain specific offense relating to illegal employment of a child and other specifically listed matters.

It has, of course, always been our recommendation to the schools to cooperate as far as possible with the enforcement officers. It certainly would behoove a principal in such cases immediately to contact the parent or guardian and to try and arrange for the presence of the parent if at all possible, or to attain the consent of the parent.

*Dated June 17, 1959*

*Coordinator of Research*

*Board of Education*

*City School District of City of Buffalo*

**RECORDS — PUPIL (Records) — LIBEL (Civil) (Criminal) (Privilege) — GENERAL CONSTRUCTION LAW, Sec. 37-a —**  
**PENAL LAW, Secs. 1340, 1342, 1343.**

No. 92

This is in conformance with your request for an opinion concerning the possibility of libel suits against school person-

nel, by parents having been given access to pupil records in accordance with the recent judicial decision in the *Thibadeau* case.

The basic consideration in this area is that educators have a grave professional and moral responsibility not to needlessly defame and injure the reputation of others, be they pupils or their parents.

Section 37-a of the General Construction Law provides that the term "personal injury" includes libel and slander, along with assault, battery, false imprisonment, malicious prosecution or other actionable injury to a person.

There are two categories of libel; the first being known as criminal libel is governed by the provisions of the Penal Law and the Code of Criminal Procedure, involving fines as well as imprisonment in case of conviction.

The other kind is a civil tort actionable through civil suits for damages.

### 1. Criminal Libel

Section 8 of Article I of the State Constitution reads as follows:

"§8. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

Section 1340 of the Penal Law defines libel as a malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person or the memory of any person deceased to hatred, contempt, ridicule or obloquy, or which causes or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons in his or their business or occupation.

The first paragraph of section 1342 of the Penal Law provides that a publication having the tendency or effect mentioned in section 1340 is to be deemed malicious, unless justification or excuse therefor is shown.

Penal Law, section 1343 defines the publication of a libel as follows:

"To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself."

However, Penal Law, section 1342, reads in pertinent part as follows:

"*The publication [of a libel] is justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends.*" (Emphasis supplied)

Consequently, it is my opinion that a carefully worded professional opinion, rendered in line of duty by a physician, psychiatrist, psychologist, guidance counselor, principal or teacher, does not constitute criminal libel, if it is reasonably related to the educative process and if it accurately reflects true facts.

### 2. Civil Libel

As indicated above, under the General Construction Law, libel is a type of personal injury for which action may be brought in damages.

The rule stated in *Mencher v. Chesley*, 297 N. Y. 94,100, that "A writing is defamatory—that is, actionable without allegation or proof of special damage—if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him", has been reaffirmed by the Court of Appeals in *Nichols v. Item Publishers*, 309 N. Y., 596.

Another well-established definition of libel is found in *Sydney v. Macfadden Newspaper Publishing Corporation*, 242 N. Y. 208:

"Any written or printed article is libelous or actionable without alleging special damages if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society."

Under the applicable common law rules, certain communications are "absolutely privileged", such as statements made by Judges in connection with judicial proceedings, or by legislators during legislative sessions. In cases of absolute privilege the

truth of the statement becomes immaterial as does the question of good faith on the part of the person making the statement. In my opinion it is extremely doubtful that the communications here under consideration fall into this category.

They do, however, fall into the category of "qualified privilege", sometimes also referred to as "conditional privilege".

The qualified privilege attaches to communications which are necessary in line of duty and which are made in furtherance of, and for the protection of, a legitimate interest in which society has a stake, such as here, the promotion of the best educational results for the pupil about whom the report or record is made.

"This privilege attaches when the statement is made by a defendant who has an interest or a duty in connection with the matter involved in the inquiry." (*Loewinthan v. LeVine*, 270 App. Div. 512.)

The communication must, of course, be made to a person having a corresponding interest or duty (*Byam v. Collins*, 111 N. Y. 143, 150).

In order to succeed in a civil action for damages based on libel, the plaintiff would need to prove malice.

"Malice, however, does not mean alone personal ill-will. It may also mean such a wanton and reckless disregard of the rights of another as is ill-will's equivalent. This means more than mere negligence or want of sound judgment. (*Hesketh v. Brindle*, 4 Times L. R. 199.) It means more than hasty or mistaken action. (*Hemmens v. Nelson*, 138 N. Y. 517.) If the defendant made the statements in good faith, believing them to be true, he will be protected, even if a man of wider reasoning powers or greater skill in sifting evidence would have hesitated. (*Clark v. Molyneux*, 3 Q.B. Div. 237.) So if he fairly and in good faith relies on hearsay (*Lister v. Perryman*, L. R. 4 H. L. 538), which often may reasonably induce action or belief. If, however, the defendant knows the statement he makes is false, we need go no further. Again rumor may be so tenuous that the trier of fact might well decide that the statement of the defendant as to his belief in it and as to his good faith is discredited. Especially so if he reports it not as a rumor but as a statement of fact for which he vouches. 'Mere reckless statements, or statements based on nothing in the way of information, are not protected.' (*Joseph v. Baars*, 142 Wis. 390.) Nor are statements made 'with knowledge that they were untrue, or without caring whether they are true or false' (*Clark v. Molyneux*, 3 Q. B. Div. 237); or if one states 'as true what he did not know to be true, recklessly, not taking the trouble to ascertain whether it was true or not and did this by reason of his

objection' to certain places of amusement. (*Royal Aquarium v. Parkinson*, [1892] 1 Q. B. 431, 455.)" (*Pecue v. West*, 233 N. Y. 316)

In *Forsythe v. Durham*, 270 N. Y. 141, the Court of Appeals stated, *Per Curiam*:

"In this action for slander defendant is principal of a high school and plaintiff was a student therein. Defendant's duty required him to communicate to the Board of Education the fact that rumors concerning plaintiff were circulated among the students and teachers. In so acting he was protected by a qualified privilege and is free from liability unless his conduct resulted from malice. That there was no actual malice is conceded. There is no evidence that defendant acted with a wanton and reckless disregard of plaintiff's rights or otherwise than in good faith."

It is, therefore, my opinion that a carefully worded professional opinion rendered in line of duty by a physician, psychiatrist, psychologist, guidance counselor, principal or teacher, which is reasonably related to the educative process, made in good faith and with diligent regard for the rights of the person or persons involved, is protected by a qualified privilege against civil actions for damages based on libel.

Consequently, it would seem to me that such a lawsuit based on such a professional opinion against such persons would not be successful.

Dated November 17, 1960

Dr. James E. Allen, Jr.

Commissioner of Education of the State of New York

BUDGET (Ordinary Contingent Expense)—BOARD OF EDUCATION (Powers and Duties)—TEACHERS (Salaries)—COMMISSIONER OF EDUCATION (Powers)—EDUCATION LAW, Secs. 701, 703, 1618, 1718, 2022, 2023, 2024—TAXES (Assessment, Levy and Collection).

No. 93

Numerous requests have been received by the Department for interpretations and opinions relative to the meaning of "ordinary contingent expenses" referred to in sections 2022, 2023 and 2024 of the State Education Law. It has become clear that a letter of clarification is needed. The purpose of this letter is to provide such clarification.

In discussing ordinary contingent expenses it is important to bear in mind the sections of the law which deal directly

with the authority of boards of education in districts where school budgets have been rejected by the voters. The two most pertinent sections read as follows:

§2023. *Levy of tax for certain purposes without vote*

If the qualified voters shall neglect or refuse to vote the sum estimated necessary for teachers' salaries, after applying thereto the public school moneys, and other moneys received or to be received for that purpose, or if they shall neglect or refuse to vote the sum estimated necessary for ordinary contingent expenses, the sole trustee, board of trustees, or board of education may levy a tax for the same, in like manner, as if the same had been voted by the qualified voters.

§2024. *Reference to commissioner of education*

If any question shall arise as to what are ordinary contingent expenses the same may be referred to the commissioner of education, by a statement in writing, signed by one or more of each of the opposing parties upon the question, and the decision of the commissioner shall be conclusive.

When the voters of a school district have neglected or refused to appropriate moneys necessary for teachers' salaries or for ordinary contingent expenses, a board of education, under the terms of section 2023, is empowered to proceed to levy a tax for these items in like manner as if they had been voted. A board of education is the head of a corporation, viz., the school district, and generally speaking has the power to administer the affairs of the school district as its corporate head. However, since a school district is a public agency, the one clear area where the board must be completely circumspect is that relating to the expenditure of money. In this area the statute is very strict.

In accordance with section 1718 of the State Education Law, a board of education may not legally spend money unless it has been appropriated. To do so could subject a board to charges of misfeasance in office and, in some circumstances, board members might even be guilty of a misdemeanor. Section 2023, quoted above, specifically establishes the areas wherein a board has the right to raise money even though the voters have not given their approval. Therefore, when a board of education finds itself without a budget, or when a budget has been adopted but sufficient funds are not available to cover teachers' salaries and ordinary contingent expenses, the board has the right to

proceed to secure the necessary moneys. This is made the responsibility of the board by statute.

After determining teachers' salaries necessary to hold and recruit competent teachers, the board is faced with the necessity of making legal determinations concerning ordinary contingent expenses, determinations which will stand up in court or on appeal to the Commissioner of Education as to the items falling within this category. The statute clearly indicates that the board of education, in the first instance, must determine whether or not an expenditure is an ordinary contingent expense. The intent of the statute is, of course, to enable a board to provide the minimum requirements legally necessary for operating and maintaining schools so that no child is denied an education by the refusal or failure of the people to act. If there is a dispute over the board's decision as to what constitutes these minimum requirements (ordinary contingent expenses), the statute authorizes the Commissioner of Education to settle the matter upon formal appeal.

From time to time boards of education and school officials, prior to making final determinations, have sought guidance from the State Education Department as to whether or not certain items of expenditure legally come under the heading of ordinary contingent expenses. Counsel to the Department has rendered a number of opinions in this connection. Recently the Commissioner of Education has requested me to collate and list these opinions so that they may be available for the guidance of any board of education. Before listing them, it should be emphasized that Counsel's approach to this problem must, of necessity, be from the standpoint of construction of the statutes. Where the statute specifically requires a vote, then obviously section 2023 does not make the item an ordinary contingent expense. Where the statute is silent, then it must be determined whether the school can legally function without the expenditure. In making this latter decision, the question as to whether the expenditure is desirable educationally is not involved. Once the board has made a decision as to whether or not an expenditure is an ordinary contingent expense, then it has wide discretion in determining whether to spend the same and in the amount.

In determining the amount of a contingent expense, a board needs to keep in mind that each appropriation is for the budget year only. Therefore, the amount should reflect the best estimate of the need for a particular service or item sufficient to

maintain school for that year. For example, if a district has its fuel tanks full on July 1, it would not need to appropriate as much for fuel as the district which begins the school year with empty fuel tanks, and in neither case should there be any provision for stockpiling for the following school year.

I. Examples of items which have been determined to *constitute ordinary contingent expenses* are listed below by budget category. It is not intended that this be a complete list, but it is hoped that it will provide a useful guide.

1. General Control.

- a. Reasonable and necessary travel expenses of board members and employees on official district business.
- b. Expenses in connection with activities of the New York State School Boards Association. These are provided for in section 1618 of the State Education Law. (See also 5c below.)
- c. The amount necessary to defray the reasonable value of necessary legal services.
- d. District's proportionate share of administrative costs relative to a Board of Cooperative Educational Services.

2. Instructional Services.

- a. Instructional supplies for teacher use. This includes such items whether used for the regular program, or for adult education or summer school. Not included are such items as pencils and workbooks for individual pupil use.
- b. District's proportionate share of instructional services relative to a Board of Cooperative Educational Services.

NOTE: All teachers' salaries are, like ordinary contingent expenses, subject to the sole control of the board of education, inclusive of salaries of adult education and summer school teachers.

3. Operation of Plant.

- a. Minimum salaries for a minimum number of non-teaching employees. This not only applies to custodial and maintenance personnel but also to all other nonteachers such as the business manager and clerical personnel. Salary increases or increments may not be provided for these employees unless it is impossible to assure qualified personnel for the minimum service, in which case these employees may be paid necessary amounts.
- b. Fuel.

- c. Water.
- d. Light and power.
- e. Telephone.
- f. Use of school buildings in connection with the Teachers' Association zone meetings and conferences and in connection with local PTA chapter meetings devoted to school-sponsored activities. These do not include programs of entertainment or of a social nature.

4. Maintenance of Plant.

- a. Emergency repairs.
- b. Maintenance of necessary sanitary facilities.
- c. Necessary expenditures for complying with regulations of the Commissioner of Education pertaining to such items as fire alarm systems and fire escapes.

5. Fixed Charges.

- a. District's contribution to retirement systems, social security and health insurance as authorized by statute.
- b. Rental of essential classroom facilities.
- c. Membership in the New York State School Boards Association. (Section 1618 of the State Education Law)

6. Debt Service.

- a. Principal and interest payments on outstanding obligations.

7. Capital Outlay.

- a. Expenses for capital outlay are not ordinary contingent expenses. However, certain expenses, such as for emergency repairs, or to equip a classroom or classrooms where essential to house students, would be deemed ordinary contingent expenses. This does not include replacement of equipment, however.

8. Transportation of Pupils.

- a. See Opinion No. 94.

II. Below is a list of items by budget category which have been determined as *not constituting ordinary contingent expenses*. This again is not a complete list, but it should serve as a guide:

1. General Control.

- a. Fee for evaluation of school system by the Middle States Association of Colleges and Secondary Schools.

- b. Fees for surveying school system by various individuals, groups, or organizations.
  - c. Rental of IBM equipment under a new contract.
2. Instructional Services.
- a. Free textbooks. Section 703 of the State Education Law provides these may be furnished only when authorized by the voters. However, under section 701 textbooks may be rented or sold to pupils in accordance with rules or regulations established by the board of education. If free textbooks have been provided in the past, new textbooks may be acquired to supplement the stock on hand. In such case a rental charge must be made for all books both new and old.
  - b. Student workbooks.
  - c. Pupil instructional supplies such as pencils, paper and art even though uniformity is educationally desirable.
  - d. Conference expenses of teachers and administrators, except for teachers' conferences called by superintendents and State School Boards Association, as authorized by board of education.
3. Operation of Plant.
- a. Use of school buildings by outside organizations. (See exception under ordinary contingent expenses for Teachers' Association and local PTA's.)
4. Auxiliary Agencies.
- a. Transportation and maintenance of interscholastic athletic teams.
  - b. Pupil uniforms whether for athletic activities or otherwise.
  - c. Cafeteria and school lunch operation, whether or not it is considered self-supporting. This means termination of the milk program and of the contract with the Education Department in connection with surplus foods. Surplus foods on hand will need to be returned but expense of returning such surplus foods is an ordinary contingent expense.

In conclusion it should be pointed out that even the statute itself does not give an exclusive remedy by submission to the Commissioner of Education because the statute says that the matter *may* be referred to the Commissioner, but there is no legal reason why the matter may not be subject to Court review in the first instance. Furthermore, there is, of course, the possibility that if a board's item of expense is illegal, board members may become personally liable for the amount so spent.

Again, it should be emphasized that the determination of what constitutes an ordinary contingent expense rests with the board of education except for those items which, by statute, specifically require the vote of the people. If the board's determination is challenged, an appeal may be made to the Commissioner (or to the Courts) for final determination. In the meantime, upon request, my office will continue to render opinions concerning the question as to whether or not specific items are or are not ordinary contingent expenses, so as to guide boards of education in making their determinations.

*Dated April 1961*

*City, Village and District Superintendents  
of Schools and Supervising Principals*

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TRANSPORTATION (Distance) (Route) (Public) (Nonpublic)  
(Distance)—BOARD OF EDUCATION (Powers and Duties)  
(Notice to)—BUDGET (Ordinary Contingent Expense).

No. 94

A number of questions have been presented concerning the effect of Chapter 1074 of the Laws of 1960, concerning transportation.

This statute has now been further amended by Chapter 959 of the Laws of 1961. As so amended, effective September 1, 1961, the statute now includes the following provisions:

1. Distances from home to school for the purpose of determining eligibility for transportation must be measured by the nearest available highway from home to school.

2. The cost of providing transportation for distances more than two miles, or three miles as the case may be, and less than ten miles must be considered an ordinary contingent expense of the district. (See also #6, below)

3. Door-to-door transportation is not required. Of course, transportation must be adequate and reasonable in relation to the age of the pupil and type of transportation facilities provided.

4. In the case of pupils attending parochial schools, transportation is required only to the nearest available parochial school of the denomination. In a case where transportation is requested to a parochial school outside the district, the parent making such request must show that any parochial school located in the district is not "available", viz. is filled to capacity with residents of the district.



5. Transportation for distances *less than two miles* in the case of children in grades kindergarten through 8 or *less than three miles* in the case of pupils in grades 9 through 12, and for *greater distances than ten miles* may be provided, and if provided must be offered equally to all children in like circumstances residing in the district.

a. This means that where school districts are providing transportation for public school pupils attending school *within the district* for distances which are shorter or longer, as the case may be, than those mandated such school district will need to provide transportation for pupils who are attending nonpublic school *in the district* and who reside comparable distances from such school.

b. The statute mandates further that where school districts are providing transportation for public school pupils attending school *outside the district* for shorter or longer distances than those required, it will need to provide transportation for nonpublic school pupils attending school *outside the district* where the distances from home to school are comparable.

6. The statute provides for a written notice to be given to the school trustees or board of education by the parent of a pupil for whom transportation is desired, not later than April 1 preceding the beginning of the next school year, except where families move into the district later than April 1, in which case the request should be made within thirty days after establishing residence in the district, but in no event later than August 1.

a. For the school year 1961-62 there is a special provision permitting the notice to be given on or before August 1.

b. Requests should contain detailed information concerning the age and grade of the pupil and the school attended. If made by a representative of the parent, written authorization of the parent must accompany the request.

c. It is recognized that most school districts presently provide transportation. Where a transportation appropriation is included in the budget, irrespective of whether notice is given by the parents prior to the specified dates, if such appropriation is rejected by the voters, transportation for distances between two and ten miles for elementary pupils and between three and ten miles for high school pupils, if it was included in the budget, must nevertheless be provided and the expenditure therefor is provided by this statute to be an ordinary contingent expense.

7. There is a right of appeal by the parent or his authorized representative from the action of the board of educa-

tion in failing to provide transportation authorized or required by the statute.

If such appeal from the failure of the district to provide transportation is brought by a representative of the parent or guardian there must be appended to his appeal the written authorization of the parent to represent him on the appeal. Full particulars must be given with respect to the transportation desired, the names and ages of the children for whom it is to be provided, the schools they attend and the distances from home to school by the nearest available highway route.

8. City school districts, except those which are central school districts or enlarged city school districts, are not required to provide transportation by this statute. In enlarged city school districts transportation is required only for pupils residing in the outside area or areas. However, city school districts may provide transportation in which case it must be provided to the same extent for both public and nonpublic school pupils.

*Dated April 28, 1961*

*City, Village and District Superintendents  
of Schools and Supervising Principals*

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TEACHERS (Salary) (Salary Schedule) (Salary Payments)  
(Salary, 30 Hours Differential) (Salary, 60 Hours Differential)  
(Certificates).

No. 95

The 1961 Legislature has revised the provisions of the Education Law in relation to teachers' salaries (Laws of 1961, Chapter 813).

In considering this new legislation, it must be borne in mind that the statute specifically provides that a school district must pay a teacher employed in the district on July 1, 1961 at all times a salary which is not less than the amount such teacher would have been entitled to under the laws in effect prior to July 1, 1961. It is pointed out that whatever schedule is in force on June 30, 1961 will determine such amount.

1. In General.

(a) Mandated salary schedules for teachers.

This act will take effect July 1, 1961. On and after that date in school districts employing fewer than eight teachers, the annual salary for teachers may not be less than \$4200.

In school districts employing eight or more teachers boards of education are required to adopt salary schedules

and compensate teachers in accordance therewith. Step 1 of the salary schedule may not be less than \$4200, the fifth step not less than \$5000 and the eleventh step not less than \$6200. The statute also provides that boards may adopt a higher schedule than the schedule prescribed by the statute by providing for higher salaries, greater increments, additional increments or more frequent increments. At least ten annual increments are required at not less than \$200 each.

Advancement on the schedule is automatic, provided a teacher has permanent certification. Under the statute, a teacher must be placed on the step corresponding to such teacher's years of service in the school district, including the school year 1961-62, plus any transfer credits which the board of education has heretofore granted such teacher. The fact, however, that a teacher is on a given step does not necessarily require that such teacher will receive the amount of salary specified by such step. The law provides that in the process of transition to the new schedule no school district can be required to grant a teacher a salary increase in excess of \$400 a year. (The \$300 salary differential payment if required is not included in the \$400 figure.) Each teacher, however, must receive at least a minimum salary of \$4200 a year regardless of the amount of increase required.

It must, however, be borne in mind that the statutory provisions in respect to salary schedules and the payment of teachers thereunder are in derogation of the common law right of a board to fix and determine the salary of any and all of its employees. Because of this there must be a strict construction of the statutory provisions. After the board has clearly complied with the minimum requirements of the statute both as to salary and amounts and number of increments, the board can set forth such amounts of salary and number and conditions of granting of increments as it determines in its discretion. It can single out one teacher and grant such teacher increases which do not necessarily have to be granted to other teachers. The board can determine the amounts of increments on steps above Step 11 and it can determine the conditions under which the increments are granted. Once a board adopts a salary schedule which contains conditions over and above the minimums, the schedule is enforceable as long as the board continues such schedule in force.

It will be observed that the statute now requires ten increments and specifies that no increment shall be less than \$200. When the original salary schedule law was enacted in 1923 a similar provision was contained, viz., the amount of the increment was specified as well as the number of increments. The same interpretation must,

therefore, be given to this statute which reinstates similar provisions.

There is nothing to prevent a board of education from adopting a salary schedule higher than the State minimum, but the schedule must contain at least ten increments and the amount of the increment must be at least \$200. Of course, the board, as indicated, could have more than ten increments and could have increments of more than \$200.

(b) Transfer credits.

If a teacher when employed is granted transfer credits he is placed at the step on the salary schedule in accordance therewith. He is entitled to annual increments thereafter.

(c) Assignment to higher step without transfer credits.

There is nothing to prevent a board of education from assigning a teacher to a step higher than the minimum even though no transfer credits are involved. Under such circumstances the board has the legal right to hold the teacher at the step thus assigned until his years of service catch up with the step.

(d) Reduction of salary schedule and salaries.

A board having adopted a schedule higher than the State minimum can always reduce such schedule toward or to the State minimum. A teacher would be placed upon the new schedule at the same step that the teacher is on under the old schedule. This could result in a reduction in salary. However, no teacher's salary can be reduced below that to which he was entitled on June 30, 1961, which, as indicated heretofore, is "frozen" for that purpose by this act. Nor could a board of education reduce the salary of a teacher below the amount he was given at the time he entered service for the district. The reason for the latter is that the salary thus given him is the inducement for him to accept the position which he might not have accepted otherwise. Once he accepts the position, however, he does so knowing full well that if the salary schedule then in effect is higher than the State minimum it can always be reduced. This latter means that he could then be held at the amount of money he was given at the time he entered service until his years of service catch up under the newly adopted schedule.

(e) Definition of teacher.

The mandated minimum salary applies to all teachers in all districts. The term "teacher" continues to include all members of the teaching and supervisory staff. This means that salary schedules for supervisors, principals, superintendents of schools etc. may not be less than the statutory schedules. There is no statute which requires a district to adopt a separate salary schedule for principals.

(f) Salaries for nonteaching employees.

Trustees and boards of education are required to adopt bylaws fixing salaries for all nonteaching employees as heretofore. This includes janitors, bus drivers, etc. No minimum salaries and no increments are specified by statute in connection with salaries of nonteaching employees, except in the case of employees of the Board of Education of New York City. There is nothing, however, to prevent a board of education from adopting schedules for such employees.

2. Filing.

The statute requires that each district employing eight or more teachers adopt bylaws fixing salary schedules for all full-time teachers and to file the same with the Commissioner of Education within 30 days after adoption thereof and not later than October 1, 1961. Such schedules are binding upon the district while in force, and if a board of education adopts a higher schedule it may always amend such schedule up or down and pay teachers accordingly, provided the provisions of the schedule are not less than those required by law. Any amendment must be filed within 30 days after adoption.

3. Salary Differential for Additional Preparation.

(a) Any teacher who has completed a fifth year of preparation, i.e., 30 semester hours of approved study beyond the baccalaureate degree (completed subsequent to the completion of the preparation necessary for a baccalaureate degree), immediately upon notifying the school authorities of such qualifications, is to be paid a differential of \$300 per annum above the salary schedule adopted by the board for those teachers who have the baccalaureate degree.

(b) Any teacher who has completed a sixth year of preparation, i.e., 30 semester hours of approved study beyond and subsequent to the fifth year of preparation (completed subsequent to the completion of the fifth year of preparation), immediately upon notification to the school authorities of such qualifications, is to be paid an additional differential of \$300 per annum above the salary schedule adopted by the board for those teachers who have completed a fifth year of preparation.

(c) The board of education of each district is the body which must approve the study for the payment of the salary differential. While the board has complete discretion in this matter, the board, however, would be required to approve study beyond

the baccalaureate degree or beyond and subsequent to the fifth year of preparation, provided that the 30 hours of approved study beyond the baccalaureate degree are hours of study which are taken in point of time after the baccalaureate degree has been earned or the 30 hours of approved study beyond and subsequent to the fifth year of preparation are hours of study which are taken and completed subsequent to the completion of the fifth year of preparation. In both cases the hours must be creditable toward a baccalaureate degree or a degree other than the degree held by the teacher, must be taken in a recognized educational institution and must be in the general field of the teacher's work or in the general field of education.

(d) Certificates which are permanent.

The statute provides that unless a teacher has permanent certification such teacher is not required to receive any increments in excess of \$4200. As to teachers employed in the City School District of the City of New York, and the City School District of the City of Buffalo, the school authorities of such school districts will need to be consulted as to which certificates or licenses issued by such school districts are deemed permanent within the meaning of the statute.

This means that a teacher is not required to receive more than \$4200 or \$4500, respectively, unless such teacher has permanent certification in the subject or subjects in which such teacher is teaching. Permanent certificates are certificates having validity for life and certificates issued under present regulations entitled "Permanent." A list of certificates which are now considered permanent follows:

LIFE CERTIFICATES

College Graduate Life	Permanent Special
College Graduate	Permanent Trade School
Permanent	Normal Certificate
Permanent Secondary	Permanent School Nurse
Permanent Endorsement	Permanent Dental
of a State Certificate or	Hygienist
of State Credentials	Permanent Medical
Normal Diploma (2- or 3-	Supervisor
year)	Permanent School
Endorsement of Normal	Librarian
School	Permanent Elementary
Permanent Equivalent	School Principal
Permanent Professional	Permanent Elementary
Elementary	School Principal under
Permanent Professional	Waiver
Elementary under	Permanent Secondary
Waiver	School Principal

Permanent Secondary  
School Principal under  
Waiver  
Permanent School  
Psychologist

Permanent Guidance  
Permanent Vocational  
Vocational Life

PERMANENT UNDER PRESENT REGULATIONS\*

Permanent Academic  
Permanent Common  
Branch Subjects  
Permanent Physically  
Handicapped  
Permanent Speech and  
Hearing Handicapped  
Permanent Special  
Permanent Art  
Permanent Industrial  
Arts  
Permanent Shop Subjects  
—Trades  
Permanent Technical and  
Related Technical  
Permanent Related Trade  
Permanent Supervisor,  
Elementary  
Permanent Supervisor,  
Secondary  
Permanent Supervisor,  
Vocational  
Permanent Supervisor,  
Industrial Arts

Permanent Supervisor,  
Shop Subjects—Trades  
Permanent Director's  
Certificate  
Permanent Principal,  
Elementary  
Permanent Principal,  
Secondary  
Permanent Principal,  
Vocational  
Permanent Principal,  
Technical  
Permanent Attendance  
Teacher  
Permanent Dental  
Hygienist  
Permanent Guidance  
Permanent Medical  
Supervisor  
Permanent School  
Nurse-Teacher  
Permanent School  
Psychologist

(e) Teachers not having permanent certification.

The statute provides that unless a teacher holds a permanent certification such teacher is not required to receive any increment above \$4200 a year. Once a teacher receives permanent certification, however, such teacher is immediately entitled to be paid in accordance with the salary schedule adopted by the board of education as if such teacher had acquired such permanent certification as of July 1, 1961. Thus, where a teacher acquires permanent certification after the effective date of this act, the teacher is to be immediately transferred and paid according to the salary schedule adopted by the board of education at the amount which would be the amount which such teacher would have been receiving had such teacher acquired permanent certification on or before July 1, 1961. Of course, where a teacher is appointed after July 1, 1961, the teacher

\* Certain of these certificates are not mandated until September 1, 1962, but such certificates may be issued if the requirements have been met.

would be entitled only to be paid according to the years of service in the district, together with transfer credit granted such teacher.

4. Determination of Minimum Salaries for School Year 1961-62.

Where teachers are employed during the months of July and August 1961, it will be necessary that the board of education pay such teachers 1/10 of the salary such teachers will be entitled to receive under the provisions of the new law. The transition to the new schedules takes place on September 1, 1961, but where the teacher rendered services during the preceding July and August, while the transition will not take place until the September date, the teacher will be entitled to be paid for the services during July and August at the appropriate salary required by the new statute.

In districts employing fewer than eight teachers, the law specifies that each teacher must be paid not less than \$4200 a year.

In districts employing eight or more teachers, the statute requires that any teacher employed by these school districts after July 1, 1961, must be paid according to the new salary schedules adopted by the boards of education. The board of education may in its discretion recognize prior teaching experience outside the district, but the board of education is under no legal compulsion to do so. It should be pointed out that where the board of education does grant prior teaching experience, such "transfer credit" becomes a part of the teacher's years of service in the district and such grant may not thereafter be rescinded. The mere fact, however, that a teacher is employed at a salary in excess of that which is mandated by law will not establish that such teacher has been granted "transfer credit" within the meaning of the statute.

5. Statutory Schedule.

Step	Baccalaureate degree or less	Fifth year of preparation	Sixth year of preparation
1	\$4200	\$4500	\$4800
2	4400	4700	5000
3	4600	4900	5200
4	4800	5100	5400
5	5000	5300	5600
6	5200	5500	5800
7	5400	5700	6000
8	5600	5900	6200
9	5800	6100	6400
10	6000	6300	6600
11	6200	6500	6800

The above is the minimum schedule which may be utilized in ascertaining the minimum salary of each teacher.

6. Transition.

In the case of each teacher employed on or before July 1, 1961, who continues in the employ of the same district after July 1, 1961, the statute requires that the teacher's salary for the period September 1, 1961, to June 30, 1962, must be not less than the amount determined in accordance with the following procedure:

(a) Ascertain salary of teacher under salary schedule in effect June 30, 1961.

(b) Ascertain the teacher's years of service in the school district including the school year 1961-62, together with any transfer credits which may have heretofore been granted such teacher.

(c) Place the teacher on the step of the new schedule corresponding to the years of service computed in (b).

(d) The teacher is entitled to receive in salary a minimum of either

(1) \$4200, or \$4500 in the case of a teacher having a fifth year of preparation and \$4800 in the case of a teacher having a sixth year of preparation; or

(2) salary of step determined in (c) above, or if such salary would result in an increase of more than \$400, a minimum increase of \$400 over amount set forth in (a) above; or

(3) salary set forth in (a) above, whichever of these three amounts is greater.

(e) The salary thus arrived at represents the salary for such teacher beginning September 1, 1961.

(f) In no event may a teacher in the employ of any school district on July 1, 1961, be paid less than the salary to which such teacher would have been entitled under the applicable salary schedule on June 30, 1961.

(g) The teacher's salary is to be increased \$400, or part thereof, on September 1 of each succeeding year until the teacher is paid the salary required by such teacher's years of service.

*Dated May 3, 1961*

*City and Village Superintendents of Schools  
District Superintendents of Schools  
Supervising Principals*

**CITY SCHOOL DISTRICT — BALLOT (Blank, Spoiled, Void) —  
ELECTION LAW, Secs. 100, 105, 106—EDUCATION LAW,  
Secs. 2034, 2038, 2608.**

**No. 96**

This is to confirm our recent conversation in relation to the question as to whether or not check marks are acceptable at city school district elections, in city school districts of less than 125,000 inhabitants.

As indicated, section 2034, subdivision 2, paragraph d, of the Education Law requires cross X marks for school district meetings and elections. Under this provision check marks are not acceptable.

Section 2038 provides that the provisions of that article are applicable to city school districts of this type, except as otherwise provided in Article 53 of the Education Law.

The pertinent provision of Article 53 is section 2608 which states that the *form* of the ballots in question "shall conform substantially to the form of ballots used at general elections as prescribed in the election law". (Emphasis supplied)

Chapter 600 of the Laws of 1960 amended sections 105 and 106 of the Election Law so as to authorize the use of check marks for both election and proposition purposes.

Of interest here also is Election Law, section 100, which provides that the form of ballots used for the election of school district officers only, in effect, is not to be governed by the Election Law, in that "any form of ballot which may be adopted and used shall be legal".

There is, of course, a decided difference between the form of a ballot and the manner of marking the same. As to the latter, subdivision 4 of section 2608 merely states: "Such ballots shall have printed thereon instructions as to the marking of the ballots."

In view of all these provisions, it is my opinion that the use of check marks in city school districts of this type is not a proper manner of marking and, therefore, renders the ballot void, in accordance with Education Law, section 2034.

General confirmation of the underlying principles may also be found in the *Savage* case (13 Misc. 2d, 489; 8 AD 2d 650, 911; 7 NY 2d 706) in which petitioner claimed that the Election Law was paramount in various aspects of city school district elections of this type. It was the Department's position throughout that the Education Law contains a complete procedure for such city school district elections and that, consequently, reference to the Election Law would make Election

Law sections applicable only where specifically so stated in the Education Law and within the limits of such references (such as, for instance, the question of the form of a ballot referred to above). The Courts, however, sustained our position throughout.

*Dated May 19, 1961*  
*Mr. Sidney L. MacArthur*  
*Superintendent of Schools*  
*Park Street*  
*Hornell, N. Y.*

**CITY (Incorporation) — CITY SCHOOL DISTRICT (Establishment) (Debt Limit) (Tax Limit) (Bonds)—DEBT LIMIT—TAX LIMIT—BONDS—EDUCATION LAW, Secs. 2501, 2601, 2701—LOCAL FINANCE LAW, Secs. 2.00, 11.00, 104.00.**

No. 97

You are inquiring as to the possible results and procedures relating to your school district if, as and when the incorporated village of Newark should become incorporated as a city.

The most important and possibly quite serious result of such incorporation would be that, upon its effective date, your school district would immediately become subject to the constitutional tax and debt limitation of Constitution Article VIII, sections 4, 10 and 11. Presently, the district is not subject to any kind of tax limitation and is subject only to a statutory debt limitation found in Local Finance Law, section 104.00, paragraph d. This statutory limitation prohibits the issuance of bonds or bond anticipation notes which exceed 10% of the current true value, after deducting central school district building quota. The constitutional tax limit prohibits any district which has part of its territory located within a city of less than 125,000 (and presumably the City of Newark would be in that category) from raising a tax for current expenditures in excess of 1.25% of the five-year average of true value of taxable property of the district. This percentage does not, of course, include debt service, and there may be excluded from such percentage any item for which a direct budgetary appropriation is made for all or any part of the cost of an object or purpose for which a period of probable usefulness is contained in section 11.00 of the Local Finance Law. The appropriate provisions in this respect are Article VIII, sections 10 and 11 (b).

The constitutional debt limitation is 5% of the five-year average of true value of taxable property of the district. This

includes not only bonds and bond anticipation notes but also capital notes. This debt limit may be exceeded for a specific object or purpose, with the consent of 60% of the qualified voters present and voting at a school district meeting and with the consent of the Board of Regents of The University of the State of New York and of the State Comptroller.

The tax limitation referred to, instead of being at the rate of  $1\frac{1}{4}\%$ , may also be  $1\frac{1}{2}\%$ , or  $1\frac{3}{4}\%$ , or even 2%, depending upon the relation between the taxes subject to the limitation levied for such school district for the fiscal year during which the city becomes incorporated and the full valuation of taxable real estate of the district determined from the assessment rolls upon which the apportionment and levy of school taxes were respectively based at that time. The percentage will be the next higher of the percentages referred to above, beyond the ratio so ascertained. The maximum tax limitation, in any event, would be 2%.

It is my understanding that only a fairly small number of the 56 city school districts presently in this category (of cities of less than 125,000 inhabitants) is presently in the 2% bracket, while most of them, in about even percentages, are in the three lower categories. For the ascertainment of the initial tax limitation of your district in such case, see Education Law sections 2701, et seq. (Article 54).

The implementation of the debt limitation provision of the Constitution is found in Local Finance Law, section 104.00, paragraphs b and c, and section 2.00, paragraph 7-a.

During my tenure of office there have been only three cities incorporated (Long Beach, 1922; Peekskill, 1940 and Rye, 1942). There have been some others where incorporation has been discussed from time to time, without any action being taken. In this category are Ossining, the Tarrytowns and, currently under discussion, Mamaroneck. I understand that in at least some of these the results of such incorporation upon the school system have been decisive factors. Unless the district has an unusually high amount of valuation, I presume that the tax limitation might be a great deterrent, considering that no such limitation applies to central school districts. Likewise, the partial statutory debt limit of 10% might become quite restrictive at 5%, with its broad application.

If no special legislation is enacted in relation to your school district, Articles 51 and 53 of the Education Law would also become applicable to your district, as well as those provisions



of Article 13 of the Real Property Tax Law which apply to city school districts of cities of less than 125,000 inhabitants.

Since your district is a central school district, you would need to refer also to subdivision 1 of section 1804. Under this provision, which I believe would become applicable by implication, the district would be a city school district and would be subject to the provisions of Article 51 of the Education Law and to those provisions of Article 37 thereof "which are not inconsistent with the provisions of article fifty-one." This would mean that, for State aid purposes only, your district would remain a central school district, but would otherwise become a city school district. The election procedures of the new city school district would be those contained in section 2601 of the Education Law. You are also referred particularly, in relation to tax collection procedures, to Education Law, section 2506.

*Dated June 5, 1961*

*Mr. Norman R. Kelley*

*Superintendent of Schools*

*625 Pierson Avenue*

*Newark, New York*

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HEALTH AND WELFARE SERVICE—DENTISTRY (Practice of)  
—MEDICINE (Practice of) — BOARD OF EDUCATION  
(Powers and Duties)—PUPIL (Jurisdiction over)—EDUCA-  
TION LAW, Secs. 901-908, 910.

No. 98

July 1, 1961

SUBJECT: Responsibility of School Authorities for Financing  
Medical and Dental Care for School Children

The Department is receiving inquiries with respect to the responsibility of school authorities for financing medical and dental care for school children. A brief review of the general subject may be helpful.

As you know, under the provisions of the Compulsory Attendance Law children are given over to the custody of the school authorities for one purpose only, and that is education in all its phases. Under the terms of the statute, boards of education do not have the legal right to make available to children, irrespective of their value, facilities or services which the board is not authorized to provide. The Education Law has limited the board of education to inspection, namely, the examination of the physical condition of the child in order to be sure that

the child is in proper physical condition to attend school (Education Law, sections 901-908, 910).

If, in the course of medical inspection, the child is found to need treatment, medical or dental, it is the duty of the school authorities to communicate that fact to the parents. If the parent is unable to provide the needed care or treatment, the school authorities may assist by advising how the matter may be handled through the appropriate welfare channels.

In addition, comment should probably be made on the proposals which are occasionally made in certain localities for the board of education to supply medical and dental care on a clinic basis. Boards of education are corporate bodies and may not legally practice either medicine or dentistry. When a board of education undertakes to provide medical or dental care and charge the children for such care, it is not only acting without legal authority, as indicated above, but it is also, in effect, practicing medicine or dentistry which is in violation of the sections of the Education Law regulating the practice of such professions.

*Dated July 1, 1961*

*School Administrators and Their Health Service Staffs*

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TAXES (Assessment, Levy and Collection) (Exempt) (Property)  
(Equalization) — CENTRAL HIGH SCHOOL DISTRICT—  
EDUCATION LAW, Sec. 1908, TAX LAW, Sec. 4, subd. 21.

No. 99

This is to acknowledge your recent letter in which you ask about the effect on the apportionment of expenses under section 1908 of the Education Law, of Chapter 824 of the Laws of 1954, amending section 4, subdivision 21 of the Tax Law.

As you pointed out in your letter, our law provides for the apportionment of the amount to be raised based on the ratio that the assessed valuation in a component district bears to the total assessed valuation of all component districts in the central high school district. Subdivision 21 of section 4 of the Tax Law, as added by the 1954 law, provides in the second paragraph of paragraph (b) that the tax levied in the case of the Railroad Redevelopment Corporation where a new district has been formed shall not exceed the amount which could have been levied in the absence of such creation. The law also limits the amount of tax on the separately assessed parcels of such corporation, when it qualifies, to the amount of taxes determined

to be payable for the last fiscal year in which the corporation first qualified as a Railroad Redevelopment Corporation. It also provides that after qualification by the corporation, the amount of tax is not to exceed the amount for the fiscal year in which the corporation first acquired the property which is being separately assessed.

The method of computing the assessed valuation of these parcels is set forth in the fifth paragraph following the paragraph lettered "(b)", which provides for a reduction by multiplying the assessed value made under paragraphs (a) and (b) by the ratio which the limited amount of taxes levied thereon bears to the amount which could have been levied except for the chapter involved.

It would thus appear that in order for the central high school district to calculate the amount to be assessed to each component district, it would first be necessary to ascertain the assessed value of all taxable real property in the district, except for property owned by the Long Island Redevelopment Corporation.

To that would need to be added the property assessed in the name of the Long Island Railroad Redevelopment Corporation as computed on the following basis:

1. You ascertain the total assessed valuation of the Long Island Railroad property in the district.
2. You ascertain the amount of tax which the school district may levy upon such railroad property in the district in accordance with subdivision 21 of section 4 of the Tax Law as amended by Chapter 824, Laws of 1954.
3. You ascertain what the school tax would have been on such railroad property in the district except for the provisions of said subdivision 21, i.e., the tax which would result from applying the regular school tax rate to the assessed value ascertained under "1." above.
4. You divide the tax dollar amount of "2." above by the tax dollar amount of "3." above, and multiply the result of this division by the assessed dollar value of "1." above.
5. You add the result of this, which is the amount of the assessed valuation of railroad property in the district, to the amount of all the other assessed value of taxable real property in the district.

Thereafter, having done the above computation for each component district of the central high school district, you ascertain

the ratio of the assessed value of each component district, computed as indicated above, to the total assessed value of the high school district computed in a similar fashion. This then will be the ratio of the apportionment of expenses in accordance with section 1908 of the Education Law to each component district of the central high school district.

*Dated October 15, 1958*  
*Harvey F. George, Esq.*  
*308 Front Street*  
*Hempstead, N. Y.*

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