

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.

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.

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

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

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

**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.

**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

**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.

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

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

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.