

## FORMAL OPINIONS OF COUNSEL

### EDUCATIONAL CORPORATION—EDUCATION LAW, §236 (7)

No. 100

Re: 3300

I write in response to the Commission's letter of January 15, 1963, which requests the comments of The University of the State of New York concerning the effect of section 236(7) of the New York Education Law on the power of licensees of broadcast stations to present "political broadcasting" when such licensees are chartered by the New York State Board of Regents.

My response to the Commission's letter has been greatly facilitated by a conference which was held with responsible members of the Commission's staff, during which the problems to which the Commission's letter was addressed were greatly clarified. I very much appreciate the opportunity which was afforded me to discuss these problems in person.

My opinion, as Counsel to The University of the State of New York, is that section 236(7) of the New York Education Law in fact prohibits the use of educational broadcast stations merely by persons advocating their own election or the election of other individuals to political office. The statutory provision does not in any way prohibit the discussion of the issues present in a political campaign, provided, of course, that the discussion is not related to the desirability of electing a particular candidate. Moreover, nothing in the statute prevents the discussion of pending legislation or legislative proposals so long as that discussion is educational in content and does not advocate either the adoption or rejection of that legislation. In essence, the statute limits broadcasting in the political field to such broadcasts as are educational rather than political in character. They may not be political in the sense that the election or success of a person or party is advocated.

As I indicated in my conference with the Commission's staff, section 236(7) represents a fundamental statutory policy of the State of New York, which was adopted to

insure the separation of the educational system from politics. As the Commission may be aware, this concept pervades all legislation in this area in the State of New York. The members of the Board of Regents are selected by joint action of the Assembly and the Senate of the State of New York. They are not appointed by the Governor. The Regents are not responsible either to the Governor or to any political body. A fourteen-year term is provided for members of the Board of Regents, deliberately in order that politics not become inbred in the educational system.

The statutory provision discussed above was not adopted in order to prohibit the use of educational broadcasting facilities for the discussion of all political matters, including those involving fundamental issues of state policy. I was involved in the drafting of this statute and I am certain that the legislative intention was completely to the contrary. The language of section 236(7) was intended, as I have indicated, merely to prevent the misuse of educational facilities for partisan political purposes, and for this reason the word "partisan" was written specifically into the statute. The statute in no way inhibits educational broadcast stations from fulfilling their educational and public service responsibilities in the broadcasting of political material which is truly educational, rather than partisan, in content.

*Dated March 7, 1963*

*Mr. Ben F. Waple, Acting Secretary  
Federal Communications Commission  
Washington 25, D. C.*

**RETIREMENT SYSTEM (power to invest funds)—BANKS  
(depository)—BANKING LAW, §237, subd. 4**

**No. 101**

The New York State Teachers Retirement Board requested that I render an opinion concerning its powers to deposit funds in savings banks in this State and elsewhere. There are many facets to this problem, and I have tried to explore those which seem to be immediately in point.

In the first place, the Retirement Board, as the Board well knows, is restricted to making investments "only in securities in which the trustees of a savings bank may invest the moneys deposited therein as provided by law." Addi-

tional powers relate to the purchase of common stock to which reference herein is not needed because it has no bearing on this problem.

On the other hand, savings banks are governed by statute and may only accept funds as provided therein. After having read the various statutes, I sought an opinion from the Counsel to the Banking Department concerning the problem, and I am enclosing a copy of his answer\* for your file.

Subdivision 4 of section 237 of the Banking Law provides as follows:

"No savings bank shall accept any deposit for credit to any municipal corporation or for credit to any partnership, corporation, association or other organization for profit."

It will be noted that the opinion of the Banking Department eliminates the Retirement System as being governed by this subdivision. This means, of course, that as far as the Banking Law is concerned, the Retirement Board may deposit its funds in a savings bank in the State of New York.

The savings banks are restricted by their statute to the acceptance of no more than \$15,000 of any one depositor with certain exceptions which would not apply here. For instance, this does not apply to a bona fide charitable or religious association, corporation or organization, and, of course, the Retirement Board does not fall in this category.

It is, therefore, my opinion that the Retirement Board may legally deposit funds in savings banks in the State of New York but that any one savings bank cannot accept a deposit of more than \$15,000.

I am advised that the savings banks have established a corporate entity located in the city of New York, which is empowered to accept moneys in unlimited amounts. This corporate entity then proceeds to spread this money out throughout the State in various savings banks, placing not more than \$15,000 in any one bank. The depositor deals only with this corporate entity and makes deposits therein exactly as though it were depositing moneys in a single savings bank. The deposits and withdrawals are made under the same procedure. The corporation looks after the

\* Not printed herein.

deposit of the money and the withdrawing of the money, but the depositor presents only its single check and receives its money back in a single check when and if the money is to be withdrawn. Of course, the rate of interest to be received is dependent upon what the savings banks are paying at the time. Most savings banks in this State, as I understand it, are paying but three and three-quarters percent on the first year's deposit and four percent thereafter so that if the Retirement Board wishes to invest a million dollars in the savings banks of the State, it could do so through this procedure but its rate of return for the first year would be but three and three-quarters percent at this time. Its money, of course, is insured by each individual bank.

It would not be practical for me to attempt to give an opinion concerning the laws of each state outside of the State of New York. However, as far as the Retirement System is concerned, I think that if a bank, under the laws of the jurisdiction in which the bank is located, could accept a substantial amount of money and if the laws of the jurisdiction would not prohibit the bank from accepting a deposit from a corporation such as the New York State Teachers Retirement System, I see no legal reason to prevent the Retirement Board from depositing such money therein. I take it, unless there were some similar type of arrangement as I have outlined in New York State, there would be no insurance protection over \$15,000.

*Dated April 1, 1963*

*Mr. C. B. Murray*

*Executive Secretary*

*New York State Teachers Retirement Board*

*143 Washington Avenue*

*Albany, New York*

**BOARD OF EDUCATION (powers and duties)—TEACHERS  
(salary, deductions from)—CONSTITUTION, STATE OF  
NEW YORK, art. 7, subd. 8, and art. 8, subd. 1—TAX  
SHELTERED ANNUITIES**

**No. 102**

My opinion has been requested as to the power of school authorities in the State of New York to participate in a program commonly known as the purchase of "Tax Sheltered Annuities".

The Federal Act (U.S.C.A. §403(b)) provides that if an annuity is purchased "for an employee \* \* \* who performs services for an educational institution \* \* \* by an employer which is a State, a political subdivision of a State, or as agency or instrumentality of any one or more of the foregoing," if (1) such annuity is not subject to U.S.C.A. §403 (a), and (2) if the employees' rights under the contract are nonforfeitable, except for failure to pay future premiums, then the amounts contributed by the employer for such annuity contract after such rights become nonforfeitable shall be excluded from gross income of the employees for the taxable year to the extent the aggregate of such amounts does not exceed the exclusion allowance for such taxable year.

As I understand the Tax Sheltered Annuity Program, a teacher and the board of education will agree to participate in such a program and the board of education each year will pay an amount of money to an insurance company as premium for an annuity payable to the teacher, and if various requirements of the Federal Act are met, the amount of money paid by the board of education to the insurance company will not need to be included as income for Federal income tax purposes.

The problem revolves around the question as to whether the moneys utilized by the board to pay for the annuity is a part of the salary being paid to the teacher. If a teacher is being paid \$10,000 and she agrees with the board that the board will utilize \$1,000 to purchase an annuity, is the latter \$1,000 a part of the teacher's salary? It is my construction that this money must be considered part of the salary of the teacher and that she is being paid \$10,000 and not \$9,000. It is obvious that various things flow from this construction. For instance, the board would need to deduct from the \$10,000 instead of the \$9,000 for retirement purposes if this is part of the salary.

My legal position is that this must be considered part of the teacher's salary in order that the Constitution and laws of this State be adhered to. If it were not part of the teacher's salary and, consequently, "not earned by the teacher", then it would be an unconstitutional gift of money to a private person for service not performed (see subdivision 8 of article 7 of the Constitution, as well as subdivision 1 of article 8). Moreover, in those districts which

have a salary schedule the top figure would need to be utilized in determining whether the laws relative to salary payments under a schedule are being complied with. It is conceivable that if a district "reduced the salary of an employee below the minimum required by statute" the board would be violating the law, and the salary schedule law also makes it clear that the amount of compensation to be received by a teacher based upon the total amount is to be paid for services rendered during the period from September 1 through June 30.

When one analyzes all of these provisions of the Constitution and of the statute, it is obvious (1) that it is unconstitutional to give money to a teacher, (2) that all moneys paid by the board of education must be deemed salary to the teacher, (3) that a teacher's salary must meet the minimum mandated salary schedule for the 10-month period from September 1 through June 30, (4) that a deduction from each teacher's salary must be made for payment to the New York State Teachers Retirement System and (5) the board of education must pay the employer's contribution to the New York State Teachers Retirement System based upon the total salaries paid the teachers.

In relation to the second problem, I think it should be first pointed out that no school official would have any power or authority whatsoever to deduct any amount of money from the teacher's salary without the approval and consent of the individual teacher involved. I might further add that no school official is under any duty or obligation to make any deduction from a teacher's salary for the purpose of purchasing an annuity. However, I have heretofore held that it is legally permissible for a board of education with the consent of the individual teacher concerned to make a deduction from the teacher's salary for Blue Cross and Blue Shield insurance premiums, for payment of premiums for life insurance policies, for payment of dues to teacher organizations and payments to credit unions, etc. The deduction for the purpose of purchasing an annuity, in my opinion, is no different from those above.

It, therefore, would be my opinion that it would be within the power, with the consent of the teacher, for school officials to deduct a sum of money from the amount of salary payable to the teacher and to take such money and purchase an annuity payable to the teacher.

My formal opinion, therefore, is that a board of education has the power to undertake a Tax Sheltered Annuity Program for its employees within the areas above noted. It must be kept in mind, however, that my office does not construe Federal statutes. Consequently, if Federal construction of their statutes makes it impossible or impractical to proceed within the limitations heretofore noted, then my opinion would have to be that the board would have no legal power to invest teachers' moneys in tax sheltered annuities.

*Dated April 4, 1963*

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

---

**MEDICINE (practice of)—PSYCHOTHERAPY—EDUCATION  
LAW, §6501, subd. 4**

**No. 103**

I have your recent letter with respect to the practice of psychotherapy.

As you know, the practice of medicine is defined by statute. While the statute covering the practice of psychology does not contain a specific definition, the use of the title "psychologist", and of descriptive words containing derivations containing the word "psychology", is limited to persons who hold certificates.

By regulation, the Commissioner has defined the practice of psychology and I am enclosing, for your information, a copy of the handbook which contains this definition. I am also enclosing a copy of my opinion with specific reference to the use of the title "psychotherapist".

One of the difficulties is that the terms used by different individuals mean different things and, as I pointed out, the term "psychotherapy", as such, is not protected by statute.

To sum it up briefly, my conclusion was that the psychologist or any person other than a physician, is not prevented from using the title "psychotherapist" or the term "psychotherapy" in describing his work. However, in doing this, such persons cannot legally practice medicine and will need to take the responsibility for determining whether what they do under this title falls within the scope of the

practice of medicine as defined in the Education Law as follows:

“§6501. Definitions.

As used in this article:

\* \* \* \* \*

4. The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition.

\* \* \* \* \*

*Dated April 12, 1963*

*To: Executive Secretary for Medical Information, The New York Academy of Medicine*

**MEDICINE (practice of)—LICENSE (nurse)**

**No. 104**

We are writing in answer to your inquiry of April 10th regarding administration of intravenous therapy.

I am enclosing a copy of the Attorney-General's opinion\* of February 28, 1961. You will note that this opinion states that “intravenous procedures limited to those regarding venipuncture by needle reasonably can be considered to be encompassed within the statutory language . . . .” which authorizes the “carrying out of treatments and medications (by the registered professional nurse) as prescribed by a licensed physician.” The Attorney-General points out however that registered professional nurses are not necessarily in possession of the skills required to perform intravenous procedures and that appropriate and adequate training may be required for registered professional nurses who are expected to carry out these procedures. We should point out that although the procedure is now being taught to registered professional nurse students, this was not the case prior to the Attorney-General's decision.

It is my view that the registered professional nurse who has been taught the skills required to perform intravenous

\* Not printed herein.

therapy may do so (including starting the solution) upon the written order of a licensed physician.

As to the type of solutions which the registered professional nurse when adequately trained in the procedure may give this is a medical judgment which will need to be determined by the medical authorities of a hospital in conjunction with the hospital administrative and nursing service directors. The professional persons in this field in the Department feel that when potent drugs are administered and the rate of administration of the drug must be adjusted in relation to changes in the patient's blood pressure, safeguards should be set up, through written orders by the physician, which clearly state all the information needed to guide the procedure. In other words, the registered professional nurse should be asked to administer such drugs by the intravenous route, only under conditions which protect the patient and relieve the registered professional nurse from making independent judgments which may be beyond the range of knowledge expected of a member of her profession.

*Dated April 22, 1963*

*George P. N. Boobukos, M.D.  
96 Court Street  
Plattsburgh, New York*

**SCHOLARSHIP—EDUCATION LAW, §3710, subd. 2**

**No. 105**

This is in reply to your recent memorandum in which you ask my opinion as to whether, now that the contract colleges at Cornell are going to charge tuition, students in attendance therein may be deemed eligible for Regents scholarships in Cornell University.

An examination of subdivision 2 of section 3710 of the Education Law would indicate that in enacting the legislation the Legislature provided that each scholarship will entitle the recipient “to a credit against tuition in any one of the tuition-paying divisions of Cornell University”. It would appear that the Legislature thus has been very explicit in stating what colleges are involved. Certainly the contract colleges are now “tuition-paying divisions of Cornell University”, and therefore, it would follow that

under the precise reading of the statute students in attendance at contract colleges would be eligible for a Regents scholarship in Cornell University.

*Dated April 15, 1963*

*To: Dr. Sherman N. Tinkelman*

**DENTISTRY (practice of)—REGULATIONS OF COMMISSIONER, §44, subd. 2-a**

**No. 106**

I have your letter in relation to the matter of fee-splitting.

As I understand the problem passed by Dr. Pautler, it concerns an arrangement whereby a dentist employs another dentist in his office on a salary basis but the salary is computed by taking a percentage of the total fees of the office.

Particularly, the inquiry has reference to whether such an arrangement violates section 44, subdivision 2-a of the Regulations of the Commissioner of Education which prohibits, as unprofessional conduct,

“directly or indirectly in any manner or by any means splitting any fee or any charge with any person or persons, or participating therein.”

In my view, the payment of a salary by one dentist to another dentist who is his employee does not violate this rule even though the salary may be computed in relation to the total fees collected by the office.

*Dated April 16, 1963*

*Dr. Percy T. Phillips, Secretary*

*The Dental Society of the State of New York*

*30 East 42d Street*

*New York 17, N. Y.*

**PHYSICAL EXAMINATION (pupils)—EDUCATION LAW, §§906, 3208 and 3202—REGULATIONS OF COMMISSIONER, §230—PUPIL (jurisdiction over)**

**No. 107**

I have your recent letter addressed to Miss Tipple of the Bureau of Health Services.

It is noted that the Commissioner of Health in Cattaraugus County has adopted a provision as part of its Sanitary

Code which requires immunization of children against smallpox, diphtheria, whooping cough and poliomyelitis prior to admission to public or private schools.

So far as public schools are concerned, the Education Law provides that the local board of education shall have jurisdiction over admission of pupils to school (section 1703 subdivision 3).

Section 3208 provides in part:

“2. A minor whose mental or physical condition is such that his attendance upon instruction under the provisions of part one of this article would endanger the health or safety of himself or of other minors, or who is feeble-minded to the extent that he is unable to benefit from instruction, shall not be permitted to attend.

\* \* \* \* \*

“5. The determination of a minor's mental or physical condition under the provisions of part one of this article shall be based upon actual examination of the minor made by a person or persons qualified by appropriate training and experience, in accordance with regulations of the state education department. \* \* \* \* \*

Section 3202 provides that pupils who are over five years of age by December 1 are entitled to attend school.

The Commissioner has adopted regulations (section 230 et seq.) governing exclusions for physical disability. It is my view, therefore, that in the case of public schools the local board of education is the body which must determine whether a pupil is in proper physical condition to attend school.

Although I am heartily in accord with attempting to encourage the immunization of children from the diseases mentioned, as a matter of law, I am of the opinion that the provisions of the local Sanitary Code do not supersede the provisions of the Education Law relative to admission of pupils. In enacting the Education Law, the State has legislated in this field and thus pre-empted it, excluding local legislation.

Incidentally, the Education Law, as you will recall, provides for appropriate local board action in the event of epidemics (section 906).

*Dated May 7, 1963*

*Mr. George C. Crawford*

*Supervising Principal*

*Delevan-Machias Central School*

*Delevan, New York*

**PUPIL (special classes) (physically handicapped) (mentally retarded) (emotionally disturbed)—TRANSPORTATION (physically handicapped) (mentally retarded) (emotionally disturbed) (public) (nonpublic)—STATE AID (physically handicapped) (transportation)—EDUCATION LAW, §4401, subd. 1; §1709, subd. 24; §1604, subd. 20; §2503, subd. 11; §2554, subd. 18; §4404, subd. 2; §4404; §4406, subds. 1 and 2; §4409; §3602, subd. 7; REGULATIONS OF COMMISSIONER, §§185, 186**

**No. 108**

The following is a brief outline of the responsibilities of school districts for special educational requirements of handicapped children.

This general outline relating to handicapped children includes:

- I. PHYSICALLY HANDICAPPED (§4401, subd. 1)\*
- II. MENTALLY RETARDED (§4401, subd. 2)
- III. EMOTIONALLY DISTURBED (§4409, subd. 1)
- IV. STATE AID
  - I. PHYSICALLY HANDICAPPED (§4404; §1709, subd. 24; §1604, subd. 20; §2503, subd. 11; §2554, subd. 18)
    - A. Mandate for
      - 1. Special classes
      - 2. Home teaching
      - 3. TransportationAs determined by need of individual child (§4404, subd. 2)
    - B. If there are more than ten physically handicapped children who can be accommodated in a single special class, then district must maintain

special class; if less, district may contract with another school district, board of cooperative educational services or county vocational education and extension board (§4402, subd. 2).

- C. The district may also contract in proper cases with cooperative board or county vocational board for service of special teachers to assist regular classroom teachers in working with handicapped children (§4402, subd. 2).
- D. Transportation
  - 1. Transportation mandatory if needed for child attending special class for distance not exceeding twenty miles.
  - 2. If transportation is not provided for in budget, however, only remedy of parent is appeal, if distance is less than two miles for elementary pupils or less than three miles for secondary pupils or more than 10 miles for any pupils.
  - 3. In case of child attending nonpublic school not having special class facility adapted for needs of physically handicapped child, maximum distance follows the general rule of ten miles because the twenty-mile transportation allowance is based on scarcity of special facilities and where there are no special facilities it does not apply.

## II. MENTALLY RETARDED

Two kinds of special classes

Retarded ("educable") 50-75 I.Q. Mandated (§4404 and other sections cited under I above)

Severely retarded below 50 I.Q. ("trainable") Mandated (§4406)

- A. For retarded (50-75) (see also Regulations of Commissioner of Education, §185)

Special class mandated under similar conditions as for physically handicapped when ten children who can be served in single special class (4-year age span permitted in one class under regulations) or district must contract with another school district or cooperative board or county vocational board under appropriate regulations.

  - 1. If less than ten such children and district does not maintain special class then *must* contract with another school district or cooperative board or county vocational board.

\* All references are to Education Law.

2. Transportation mandatory up to twenty miles if needed by reason of condition of child and distance, etc.
3. Home teaching not mandated in any case for mentally retarded child.

B. For severely retarded (§4401, §4406, and other sections noted under I; Regulations, §186)

1. Special classes for below 50 I.Q. were mandated September 1, 1961 in all districts where there are eight or more such children. Other districts must contract for the instruction of these pupils (other school districts, cooperative board, county vocational board). (§4406, subd. 1)
2. If district has eight or more, but less than twenty such children, district may, with approval of Commissioner of Education, contract with another district or cooperative board or county vocational board for such classes (§4406, subd. 2)
3. Transportation required up to twenty miles, if needed by reason of condition of child and distance, etc.

### III. EMOTIONALLY DISTURBED (§4409)

- A. Authorizes school board to provide such services as are approved by Commissioner for pupils for whom the district has a certificate of psychiatrist and psychologist or approved clinic that the child is not capable of benefiting through ordinary classroom instruction, but may be expected to profit from a special educational service or program.
- B. Transportation may be provided when needed to permit pupil to take advantage of services offered by public school authorities, or when authorized by the voters to the school the child legally attends.

### IV. STATE AID

A. General provisions

1. Although various special provisions relating to State Aid for handicapped children may still be found in the Education Law, such separate aids were abolished, except as to districts employing fewer than eight teachers, by chapter 657 of the Laws of 1962 and any aid for these services is now received under §3602.

B. Transportation

1. Under §3602, subd. 7, transportation required or authorized pursuant to article 89 of the Education Law, is an approved expense.

*Dated May 8, 1963*

*To: City, Village and District Superintendents of Schools*

**BOARD OF EDUCATION (powers and duties) (bylaws)—  
TUITION (nonresident academic)—TEACHERS (contract)**

**No. 109**

This is in reply to your recent letter.

I note in your letter you request an opinion as to the authority of a board of education to provide that children of faculty members who do not reside in the district may be accepted as pupils without payment of tuition.

I know of no provision which would require a board of education to charge tuition for a pupil, but if it charges tuition for some pupils it must treat all who are similarly situated in the same manner. This, however, in my opinion, would not prevent the board of education from adopting a policy which would provide that the children of employees would be accepted as nonresident pupils without the payment of tuition as a condition of employment.

*Dated May 16, 1963*

*Mr. C. M. Green*

*Superintendent of Schools*

*East Aurora Public Schools*

*East Aurora, New York*

**CONTRACT (purchase)—BIDS (noncompetitive) (purchase contracts) (supplies)—STATE FINANCE LAW, §175-b—  
GENERAL MUNICIPAL LAW, §103**

**No. 110**

This will acknowledge your recent letter with respect to section 175-b of the State Finance Law.

Subdivision 1 of that section provides that all brooms, mops and other suitable products procured by or for the State or any governmental agency or political subdivision thereof shall be procured in accordance with applicable specifications of the purchasing authority from charitable nonprofit making agencies for the blind, organized under the laws of this State and manufacturing such products



within the State with the approval of the Commissioner of General Services.

Subdivision 3 of that section further provides that these provisions shall supersede inconsistent provisions of any other general, special or local law or the provisions of any charter.

I am advised that Industries for the Blind of New York State, Inc., is the only agency approved by the Office of General Services under the aforesaid provision of the State Finance Law. The effect of the above-mentioned provision, therefore, is to require that the products of the Industries for the Blind of New York State, Inc., which meet the requirements of a school district must be purchased from Industries for the Blind.

By reason of the provisions of subdivision 3 of the aforesaid section 175-b, such purchasing is not subject to competitive bidding under the provisions of section 103 of the General Municipal Law.

*Dated May 8, 1963*

*Mr. Jean C. Goehrig, Business Manager  
Industries for the Blind of New York State, Inc.  
288 Old Country Road  
Mineola, New York*

**OPTOMETRY (corporate practice of)—ADVERTISING—  
REGULATIONS OF COMMISSIONER, §§70, 76**

**No. 111**

The Regulations of the Commissioner, section 70, define as unprofessional conduct in the practice of optometry, among other things, 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.

“g. Advertising by means of large display, glaring, illuminated or flickering signs or by means of any sign containing as a part thereof the representation of the human eye or any portion of the human head or the representation of spectacles, eyeglasses, frames or mountings. A large display sign shall mean a sign containing letters exceeding six inches in height on the

first or ground floor and eight inches in height on the second floor or above and exceeding one foot by three feet overall. The use by an optometrist of more than five signs shall also be deemed a large display. An illuminated sign shall mean a sign lighted or self-luminous by any means whatever, or giving the outward appearance of same. Nothing herein contained shall be deemed to prevent the illumination of a sign setting forth the name of the practitioner and the word “optometrist” provided that the illumination is not colored and such sign does not otherwise conflict with this regulation.

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

“i. Advertising by displaying any spectacles, eyeglasses or spectacle frames or mountings, goggles, sunglasses, lenses, prisms, spectacle or eyeglass cases, ophthalmic materials, optometric instruments, diagnostic devices, optical tools or machinery, or any merchandise, material or advertising in office windows or reception rooms or in display cases outside of the office, whenever the display of such merchandise, material or advertising would make it visible from the street or the public corridor of a building.

“j. The practicing or offering to practice optometry under any name other than that under which he has been licensed by the Department.

“k. Advertising, either directly or indirectly, the performance of optometric services or any part thereof, including the furnishing of ophthalmic or optical material, except that if an optometrist opens an office or removes from an old to a new office, such information may be contained in a letter and may be published in a newspaper in a box not larger than four inches in width and two inches in height, the information therein in either case, to be limited to the statement of opening or removal of office, the name, professional degree, address, telephone number, office hours and not more than one specialty, which advertisement may be published for a total period of not more than two weeks.

“l. Aiding or abetting, either directly or indirectly, in the conduct or advertising of any employer, firm or associate if such conduct or advertising conflicts with the foregoing regulations; or continuing the practice of optometry with any such employer, firm or associate

after the optometrist has received written notice from the Board of Examiners or from the Department of such conduct or advertising by the employer, firm or associate."

Paragraph f and former paragraph i (now paragraph l of the Regulations) were the subject of litigation some years ago and the validity of these rules were sustained by the Appellate Division, Third Department, *Finlay-Straus v. University*, 270 App. Div. 1060. The validity of paragraph g was upheld by the Court of Appeals in *Strauss v. University*, 2 N. Y. 2d 464, appeal dismissed 355 U. S. 394, rehearing denied 355, U. S. 968.

A number of questions have been posed concerning the application of these Regulations to certain specific situations involving corporations which employ optometrists. The right of a corporation to practice optometry has been the subject of considerable litigation.

The latest authoritative decision in this area is that of the *People v. Sterling Optical Co.*, 26 Misc. 2d 14 A. D. 2d 833, 11 N. Y. 2d 970. It is difficult to discover, from an examination of the case, whether the Court expressly holds that a corporation has the right to practice optometry, but it is apparent that because the statute gives the right to deal in optical merchandise, the corporation has the right to employ optometrists and opticians. The questions then relate primarily to the powers of corporations when they are employing optometrists which the courts have stated they have the right to do. The specific questions arise concerning the application of the Regulations above referred to which are, in essence, regulations governing advertising, to the corporations which employ optometrists.

Irrespective of whether the corporations have the right to practice optometry as such, when they employ optometrists to perform acts which constitute the practice of optometry, the Regulations do apply to such practice.

If there are to be any signs "advertising the practice of optometry" as far as the optometrist is concerned, these signs must conform to the rules above enumerated. The optometrist may not continue employment, reaping the benefit of signs, on the claim that they do not belong to him, but are signs of his employer. The rule, of course, places responsibility on the optometrist if he attempts to use this subterfuge.

In July 19, 1960 I wrote you concerning signs maintained by Sterling Optical Co. at locations in New York City and Hempstead as follows:

"The question that you propound to me is whether this corporation has a legal right to utilize its name in a display sign over its place of business, the sign to be larger than the minimum specified by the Commissioner of Education in article VIII of his Rules and Regulations applying to optometry.

"According to the facts presented, the corporation carries on several lines of business. It sells as merchandise binoculars, hearing aids, sunglasses, etc., and employs several ophthalmic dispensers whose responsibility it is to accept prescriptions and fill them. It also employs several optometrists.

"Under the present situation, optometrists are proscribed from violating the aforesaid rule in respect to signs and they may not accept employment from any organization which violates such rule. However, the position that I have taken in the past is that the sign, if it is to be considered in respect to optometry, must on its face have some reference to optometry.

"The term 'Sterling Optical Company' does not, in my opinion, indicate on its face that it is advertising the practice of optometry. There are no rules, at present, in respect to signs dealing with ophthalmic dispensing and, while it is to be anticipated that some day such rule shall be adopted, they have not been so adopted as yet.\* Under these circumstances, I am not prepared to hold that such a sign which contains merely the name of the corporation is to be construed as violating the optometry rules."

There is nothing in the later rules which would change the application of the sign rule as stated at that time.

If the corporation provides space to an independent practitioner who is an optometrist, then the rules with respect to signs would be only applicable within the area of space allotted to such independent practitioner. Any sign outside the area indicating that the practice is being carried on, would be the optometrist's sign and hence would have

\*See section 76, subdivision 1-c of the Regulations of the Commissioner, adopted September 30, 1960.

to conform with the Regulations in respect to size and number of signs (paragraph g).

Under the holding in the *Finlay-Straus* case, the corporation cannot advertise fixed prices where it is employing an optometrist.

The problem with respect to displays of glasses (paragraph i), insofar as it relates to corporations and to optometrists, I do not cover here because of the pendency of the matter of *Corn v. University* in the courts at the present time.

However, the part of the rule which has to do with the advertising of professional services is something different (paragraph k).

If it is a fact that the corporation has a right to practice optometry, then it is apparent that the Regulations apply completely. If, on the other hand, the corporation does not have the right to practice optometry but it hires optometrists to practice, it cannot do anything more than the optometrists can do in order to carry on the professional practice of optometry. In either event, it is apparent that a corporation may not advertise the practice of optometry. If it does so, the employed optometrist will have to carry the responsibility of its doing so. If it were otherwise, optometrists would be able, by forming corporations, to avoid professional responsibilities.

This means that corporations employing optometrists cannot, under the Regulations, advertise in newspapers or other media such phrases as "eye glasses", "eyes examined", "contact lenses" or any other reference to ophthalmic or optical material or optometric services.

I have also been asked concerning the propriety of the listing of corporations under the designation "optometrist" in the classified telephone directory. Since the corporation is not literally an optometrist, in my view, it is not proper for corporations to be so listed. There would be no objection to a listing of "optical corporations employing optometrists".

*Dated May 27, 1963*

*Charles J. Meyers, Esq.*

*Freedman, Loewenstein & Meyers*  
*10 East 40th Street*  
*New York 16, New York*

**BOARD OF COOPERATIVE EDUCATIONAL SERVICES—  
EDUCATION LAW, §1958, subd. 6—CORPORATIONS**

**No. 112**

You have inquired concerning the right of the Board of Cooperative Educational Services to own real property.

Section 1958 of the Education Law provides, in part:

"6. The board of cooperative educational services is hereby created a body corporate. All property which is now vested in, or shall hereafter be transferred to the board of cooperative educational services, shall be held by them as a corporation."

Thus the statute specifically provides for the ownership of real property by such board. Furthermore, section 14 of the General Corporation Law provides, in part:

"Every corporation as such has power, though not specified in the law under which it is incorporated:

\* \* \* \* \*

"3. To acquire property for the corporate purposes by grant, gift, purchase, devise, or bequest, and to hold and to dispose of the same, subject to such limitations as may be prescribed by law."

I have, therefore, stated to those boards and their representatives who have made inquiry of me on this subject, that the board has power to purchase real property as well as to acquire the same by gift and that it may legally utilize its funds for such purpose.

It has also been indicated that question has been raised concerning expenditures by such boards for alteration and equipment of property leased by the board for the purpose of making such premises suitable for the educational work to be carried on by the board in such premises. In my view there is authority in the statute for necessary expenditures for such purpose and if such expenditures are approved by the Department, the board is entitled to have them included in the computation of State aid for the approved programs conducted in said premises.

*Dated May 29, 1963*

*William D. Sporborg, Esq.*  
*Sporborg & Connolly*  
*Port Chester, New York*

**MEDICINE (practice of)—EDUCATION LAW, §6501, subd. 4**  
**—LICENSE (nurse) (medicine, osteopathy, physiotherapy)**

**No. 113**

I have your memorandum with respect to the performance of intravenous procedures.

As I understand the question presented, it is whether the performance of intravenous procedures in hospitals may be assigned by physicians to technicians who are not nurses and are not licensed to practice medicine. It appears very clear to me that the procedure of piercing a vein by needle for the purpose of the various intravenous procedures falls within the scope of the practice of medicine. Such practice is defined in section 6501, subdivision 4 of the Education Law, as follows:

"4. The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

Therefore, in my opinion, such procedures may not legally be performed by unlicensed persons irrespective of the fact that such persons are generally under the supervision of physicians.

Reference is made to the opinion of the Attorney General, dated February 28, 1961 and rendered to the Commissioner of Health, in which the matter of administration of intravenous injections by registered professional nurses was discussed at length and in which it was concluded that since a registered professional nurse is authorized by statute to "carry out treatments and medications as prescribed by a licensed physician" and "to perform such duties as are required in the particular case of a patient and in carrying out medical orders as prescribed by a licensed physician", intravenous procedures limited to those involving vena

puncture by needle reasonably can be considered to be encompassed within such statutory language.

*Dated May 24, 1963*

*To: Miss Emily Creevey*

*From: Charles A. Brind*

**ENGINEERING (corporate practice of)—EDUCATION LAW, §7209, subd. 1—LICENSE (engineering and land surveying)**

**No. 114**

This will acknowledge your recent letter in relation to the activities of the Mechanical Technology Incorporated so far as it may concern the provisions of the Education Law with respect to the practicing of engineering.

It is noted that the purposes of the corporation as set forth in the certificate of incorporation are as follows:

"To engage in research, development and MANUFACTURING inclusive of but not limited to Mechanical and Material Development and in the sphere of MANUFACTURING inclusive of but not limited to bearings, dampers, shock mounts, seals, couplings, transmissions, etc."

The questions, of course, have to do with the problem of whether the corporation practices engineering and if so, whether such practice violates any aspect of the Education Law with respect to the practice of professional engineering. As you know, section 7209 of the Education Law, provides, in pertinent part, as follows:

"1. No corporation shall be granted a license under this article, and no corporation shall practice or offer to practice professional engineering or land surveying in this state except as hereinafter in this section provided, \* \* \* \* \*. Nothing in this article shall be construed to apply to the preparation or execution of designs, drawings, plans or specifications for the construction or installation of machinery, or apparatus constructed or installed by the corporation, \* \* \* \* \* preparing such designs, drawings, plans or specifications if the supervision of the preparation of any such designs, drawings, plans or specifications, construction or installation shall be under the general direction of a licensed engineer, \* \* \* \* \*"

It seems clear from the description of the purposes of the corporation that in the development and research, the practice of engineering as defined in the Education Law would be involved. However, it is noted that the principal aim and objective of the corporation is to engage in manufacturing.

Further, it appears that in the period of a little more than a year during which the company has been in business, machinery and equipment has been acquired and that another structure is now being planned with full manufacturing capabilities. Presently, in the various projects which have been undertaken, the stage has been reached where prototypes of various items are nearing completion or are completed and it is anticipated that in the near future the corporation will be bidding on supplying quantity items.

It is further pointed out that the activities in research and development of the prototype unit are under the general direction of licensed engineers and that the object of the development of the prototype unit is to provide the basis for quantity manufacture or production.

I am of the view that the exception above quoted permits this activity by a corporation manufacturing or installing machinery or apparatus. However, the statute clearly does not authorize the furnishing of engineering services by a corporation where the sole function is to provide the engineering and design service without construction or installing the apparatus.

*Dated June 5, 1963*

*Vorton B. Boghosian, Esq.*

*Mechanical Technology Incorporated*

*96B Albany-Shaker Road*

*Latham, New York*

**TUITION (physically handicapped) (mentally retarded)—  
PUPIL (special class)**

**No. 115**

My opinion has been sought with respect to the computation of nonresident tuition charges by school districts providing special classes for physically handicapped and mentally retarded children.

In Matter of Common School District No. 2 of the town of Geneva and other school districts (Decision No. 7109, dated September 21, 1962, 2 Ed. Dept. Rep. 319), the

Commissioner determined the general method of computing allowable nonresident tuition for pupils in a case involving such computation for kindergarten, elementary and secondary pupils.

In connection with the present inquiry, it is pointed out that the cost of providing special class instruction is necessarily higher because of the small size of classes, additional equipment required and other facts, than the cost of instruction of pupils in regular classes. It has been further stated that the computation of the cost in accordance with the formula, set forth in Decision No. 7109\*, where all costs including those for providing special class instruction are lumped together, leads to a result whereby the school district providing the special class instruction is not fully reimbursed for such added cost.

Upon review of the matter, it is my opinion that where the costs involved in the provision of special class instruction for physically handicapped and mentally retarded children can be identified, such actual costs may be used in computing the cost of instruction of such children separately.

It will be recalled that the cost of instruction for kindergarten, elementary and secondary pupils may be computed in the same way where actual costs are available (Step 2 of the formula). Having ascertained the actual cost of instruction for physically handicapped or mentally retarded children as above indicated, the allowable nonresident tuition should then be computed by applying the remaining steps of the formula (Step 3 through 7) as set forth in said Decision No. 7109\*.

*Dated June 14, 1963*

*To: City, Village and District Superintendents of Schools*

**TUITION (nonresident academic) (contracts)—EDUCATION  
LAW, §3202, subds. 2 and 4**

**No. 116**

You are inquiring as to the obligations of certain school districts and welfare districts for the payment of tuition for students living in certain institutions for the care, custody and treatment of children, under Education Law, section 3202, subdivision 4.

\* 2 Ed. Dept. Rep. 319.

At the outset I should like to correct the statement contained in the letter attached to your communication, which allegedly quotes the Education Law. The quote set forth there is of an opinion rendered by the State Comptroller.

The difficulty with the opinion of the State Comptroller, which appears on page 410 of volume 4 of the Comptroller's Opinions, is that it does not take cognizance of the fact that the provision in question must be read together with subdivision 2 of section 3202, which authorizes a board of education to accept nonresident students " \* \* \* upon the consent of the \* \* \* board of education, upon terms prescribed by such \* \* \* board."

Subdivision 4 of section 3202 authorizes, but does not require, that a contract be made between the institution in question and the board of education of the district where the institution is located.

It has always been the opinion of this office that payment must be made directly by the welfare district to the school district educating the children, or by the school district responsible under this subdivision to the school district actually educating the children.

The basic provisions of subdivision 4 are:

1. That the board of education must receive such children at a compensation to be fixed by the board of education, unless the board can prove to the satisfaction of the Commissioner of Education that there are valid and sufficient reasons for refusal to receive such children;

2. That, in the case of welfare children, the tuition must be paid by the welfare district; and

3. That, in the case of children other than welfare children, the school district last responsible for the education of these children before their admission into the institution must pay such tuition.

Based on all these various aspects of the statute, the board of education has the right and, in fact, the duty to charge either the welfare district or the other school district directly for the tuition in question, unless a contract has been voluntarily entered into between the school district educating the children and the institution caring for them.

It is to be noted that the statute says "may contract". The contract is not a requirement and, of course, depends

on the wishes of both the institution and the district educating the children to enter into such a contract. If such a contract is entered into, the manner of payment may therein be regulated. Where, however, no such contract is entered into voluntarily, payment must be made directly as indicated above.

There have been numerous decisions of the Commissioner of Education ordering school districts to make such direct payment to the district educating the children under subdivision 4 of section 3202. Likewise, the Supreme Court, in the case of *Dumpson v. Board of Education of City of New Rochelle*, 214 N. Y. S. 2d 196, ordered direct payment to a school district by the appropriate welfare district on the basis of this subdivision.

Consequently, it is my opinion that if students from the Greer School are sent to the schools of your district, who are welfare children, i.e., whose food and clothing is defrayed from welfare funds, that the tuition charges can and should be made directly against the welfare district, unless your district voluntarily has entered into a contract with the Greer School and unless such contract provides otherwise.

*Dated June 20, 1963*

*Mr. Glenn E. Manning*

*District Principal*

*The Millbrook Central School*

*Millbrook, New York*

#### PHYSICAL EDUCATION—REGULATIONS OF THE COMMISSIONER, §158

No. 117

This is intended as a general interpretation of the recent amendment to section 158 of the Regulations of the Commissioner, popularly referred to as the eight semester rule and as an answer to your questions concerning the application of this rule.

The rule took effect immediately upon its adoption by the Board of Regents. It applies to students already in school and may in some cases have had the effect of making eligible for participation, students whose eligibility had expired under the previous rule.

Under the amended rule a student's eligibility is limited to any eight semesters after his entry in the ninth grade prior to graduation and during which he is between his fourteenth and nineteenth birthday, with the exception that if he attains the age of nineteen on or after September first he may continue to participate during that school year in all sports.

A semester counts under the new rule only if the student goes out for a sport and is a member of the squad eligible to participate in an interschool game. This means that a student who does not go out for interschool athletics does not lose a semester of eligibility. It means that a student who tries for a team but is cut before the first interschool game does not lose a semester of eligibility. However, any student who is on a team and eligible to participate in an actual interschool game thereby uses a semester of eligibility under this rule.

A semester is a school term. If a sport extends over two terms a participating student thereby uses two semesters of eligibility. Competition in out-of-state or out-of-county schools counts in the same manner as competition within the State. There is nothing in the rule which allows for exceptions to the application of this rule in individual cases.

*Dated June 21, 1963*

*Mr. Robert L. Carr*

*Bureau of Physical Education and Recreation*

---

**DECISIONS OF  
THE REGENTS MOTION PICTURE COMMITTEE**