

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

No. 25

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

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

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

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

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

No. 26

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

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

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

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

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

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

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

No. 27

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

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

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

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

*Dated August 21, 1951*

*Assistant Commissioner for Professional Education  
State Education Department*

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

**No. 28**

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

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

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

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

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

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

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

*Dated August 28, 1951*

*Supervising Principal  
Avon Central School*

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

**No. 29**

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

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

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

*Dated August 29, 1951*

*District Superintendent of Schools, Chenango 2*

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

**No. 30**

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

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

*Dated September 11, 1951*

*Superintendent of Schools*

*Rockville Centre, N.Y.*

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

**No. 31**

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

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

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

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

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

*Dated September 20, 1951*

*Supervising Principal*

*Jefferson Central School*

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

**No. 32**

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

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

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

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

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

**No. 33**

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

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

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

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

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

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

**No. 34**

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

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

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

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

**No. 35**

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

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

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

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

No. 36

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

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

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

No. 37

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

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

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

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

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

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

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

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

No. 38

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

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

*Dated October 9, 1951*

*Clerk*

*Bemus Point Central School*

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

No. 39

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

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

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

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

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

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

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

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

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

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

I understand that your Board would have liked to have added



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

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

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

No. 40

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

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

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

No. 41

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

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

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

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

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

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

No. 42

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

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

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

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

*Dated November 27, 1951*

*Principal*

*Whitesville Central School*

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

No. 43

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

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

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

\* \* \*

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

\* \* \*

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

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

*Dated November 28, 1951*

*Edward Robinson, Jr., Esq.*

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

No. 44

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

Section 524 of the Education Law provides:

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

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

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

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



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

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

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

*Dated December 14, 1951*

*Executive Secretary*

*New York State Teachers Retirement Board*

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

No. 45

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

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

*Dated December 19, 1951*

*Clerk, Board of Education*

*Port Chester, N. Y.*

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

No. 46

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

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

*Dated December 19, 1951*

*President, Board of Education*

*City School District of the City of Norwich*

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

No. 47

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

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

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

*Dated January 2, 1952*

*Sarah Kaltenbach*

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

No. 48

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

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

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

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

*Dated January 3, 1952*

*Assistant Commissioner, Pupil Personnel Services and Adult Education*

*State Education Department*

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

No. 49

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

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

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

*Dated January 7, 1952*

*Supervising Principal  
Sodus Central School*

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

No. 50

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

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

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

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

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

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

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

*Dated January 7, 1952*

*Executive Secretary*

*New York State Teachers Retirement Board*

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

No. 51

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

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

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

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

*Dated January 7, 1952*

*Executive Assistant to the Commissioner*

*State Education Department*

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

No. 52

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

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

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

*Dated January 10, 1952*

*Assistant Commissioner, Professional Education*

*State Education Department*

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

No. 53

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

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

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

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

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

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

No. 54

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

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

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

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

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

*Dated January 11, 1952*  
*Mrs. R. Muck*

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

No. 55

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

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

*Dated January 11, 1952*  
*H. C. Klein*

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

No. 56

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

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

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

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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

*Dated June 3, 1952*

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

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

**No. 57**

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

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

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

*Dated October 16, 1952*

*Alden E. Bevier*

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

**No. 58**

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

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

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

*Dated December 8, 1952*

*Hon. Herman E. Hilleboe*

*State Commissioner of Health*

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

**No. 59**

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

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

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

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

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

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

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

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

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

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

*Dated, February 5, 1953*

*President, Cobleskill Public Library*

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

**No. 60**

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

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

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

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