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

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

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

No. 60

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I have reference in particular to:

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

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

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

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

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

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

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

People ex rel. Elkind v. *Rosenblum,* 184 Misc. 916; aff'd. 269 App. Div. 859; appeal denied 269 App. Div. 946; appeal denied 295 N. Y., 824; aff'd. 295 N. Y. 929.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated February 25, 1953
Deputy Commissioner of Education
State Education Department

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

No. 61

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

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

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

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

Dated February 25, 1953
R. G. Rankin

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

No. 62

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

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

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

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

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

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

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

No. 63

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

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

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

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

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

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

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

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

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

LIBRARY (Public) (Budget)—CITY SCHOOL DISTRICT (Maintenance of Public Library)—EDUCATION LAW, Secs. 259, 2503.

No. 64

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

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

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

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

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

§2503. Powers and duties of board of education

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

* * *

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

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

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

Dated February 27, 1952
Director, Division of Library Extension
State Education Department

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

No. 65

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

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

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

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

Dated February 28, 1952
Charles A. Cusick, Esq.

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

No. 66

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

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

Dated March 3, 1952
President, Board of Education
Chenango Valley Central School

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

No. 67

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

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

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

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

medical or dental relief is therefore *ultra vires*. If it perfor *ultra vires* acts the question of legal responsibility should th be any negligence involved would arise. The expenditure money for the use of its facilities, viz., light, heat, room spa repairs etc. is another aspect. The Comptroller is continuou pointing out to boards of education that they have no legal rig to expend moneys unless specifically authorized to do so statute. The Court of Appeals in dealing with the released ti case indicated its interest as to whether the district was p ceeding *ultra vires* in spending any of its own money to faci tate the excusing of children. If a board spends money withc authority, it would subject itself to a possible removal proce ing and the loss of its state aid. There may also be perso liability. The fact that the agency permitted to perform t service has the legal right so to do does not protect the boa of education in proceeding *ultra vires*.

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

I fully recognize the desirability that the teeth of all childr be in good repair; however, this has not been committed to t school authorities as a part of their duties and they are ther fore powerless to assume it either directly or through indire tion by providing the facilities and authorizing some oth agency to perform the service. The board's obligation certain

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

Dated March 7, 1952
Deputy Commissioner
State Department of Health

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

No. 68

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

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

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

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

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

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

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

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

No. 69

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

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

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

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

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

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

Dated April 15, 1952
Executive Secretary
New York State Teachers Retirement Board

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

No. 70

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

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

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

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

Dated April 25, 1952
District Superintendent of Schools, Greene 2

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

No. 71

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

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

> 152. *Definitions.* When used in this Act—
> * * *
> (2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States * * * or any State or political subdivision thereof * * *. (*emphasis supplied*)

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

> §715. *Application of article*
> The provisions of this article *shall not apply* * * * to the employees of the state or of any political or civil subdivision or other agency thereof * * *. (*emphasis supplied*)

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

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

Dated April 30, 1952
President, Board of Education
West Seneca Central School District

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

No. 72

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

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

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

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

Dated October 8, 1951
Assistant Commissioner, Finance and School Administrative Services
State Education Department

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

No. 73

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

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

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

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

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

Dated June 17, 1952
Roswell E. Pfohl

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

No. 74

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

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

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

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

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

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

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

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

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

Dated June 17, 1952
Executive Secretary
New York State Teachers Retirement Board

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

No. 75

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

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

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

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

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

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

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

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

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

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

Dated June 17, 1952
Mrs Elaine G. Vix

CITY SCHOOL DISTRICT (Board of Education) — BOARD OF EDUCATION (Powers and Duties) — SCHOOL LUNCH (Operation of Cafeteria) — STATE REGULATION (Local Regulation Precluded by)—EDUCATION LAW, Sec. 2503.
No. 76

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

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

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

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

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

BOUNDARIES (Alteration of) (Independent Superintendencies) —DISTRICT SUPERINTENDENTS—BOARD OF EDUCATION (Powers and Duties)—EDUCATION LAW, Sec. 1507.
No. 77

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

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

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

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

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

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

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

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

Dated September 9, 1952
Kennedy, Teale & Kennedy, Esqs.

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

No. 78

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

determination of equivalency rests on each individual board of education.

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

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

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

Dated September 23, 1952
Assistant Commissioner for Instructional Services
State Education Department

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

No. 79

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

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

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

Dated March 25, 1953
Associate Commissioner for Higher Education
State Education Department

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

No. 80

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

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

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

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

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

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

> 10. In a city having a population of one million or more, recommendations for appointment to the teaching and supervising service, except for the position of superintendent of schools, associate superintendent or assistant superintendent, or director or [of] a special branch, principal of or teacher in a training school, or principal of a high school, shall be from the first three persons on appropriate eligible lists prepared by the board of examiners. * * * * * *

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

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

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

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

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

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

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

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

Dated April 3, 1953
Board of Education,
City School District of the City of New York
Board of Examiners,
City School District of the City of New York

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

No. 81

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

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

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