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

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

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

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

Dated April 10, 1953
Dr Frank P. Graves, Counsel
New York State Teachers Association

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

No. 82

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

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

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

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

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

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

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

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

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

No. 83

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

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

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

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

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

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

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

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

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

No. 84

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated September 25, 1952
Chief, Bureau of Apportionment
State Education Department

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

No. 85

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

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

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

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

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

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

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

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

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

The law has been settled in New York State for many years that where a vendee is in possession of real property under an executory contract of sale the interest of such vendee in possession is real property. (*Hathaway* v. *Payne,* 34 N. Y. 92; *Sewell* v. *Underhill,* 127 App. Div. 92; aff'd 197 N. Y. 168.)

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

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

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

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

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

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

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

Dated August 10, 1953
Deputy Commissioner of Education
State Education Department

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

No. 86(118)

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

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

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

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

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

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

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

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

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

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

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

Dated August 20, 1954
Board of Education, Central School District No. 1, Towns of Alden, etc.

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

No. 87(119)

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

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

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

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

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

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

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

Dated January 27, 1954
Granville W. Larimore, M.D.
Deputy Commissioner, State Department of Health

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

No. 88(132)

This is in reply to your inquiry relating to teachers' salaries.

A tenure teacher is employed 365 days of the year and earns her annual salary during such 365-day period. A teacher earns 1/12 of her annual salary each month of the year, and consequently if a teacher's annual salary is $3600 such teacher earns $300 each month.

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

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

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

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

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

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

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

Dated November 15, 1954
G. Welty Kadel

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

No. 89(140)

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

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

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

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

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

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

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

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

No. 90

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

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

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

Dated May 9, 1957
Executive Secretary
New York State Teachers Association

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

No. 91

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

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

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

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

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

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

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

Dated June 17, 1959
Coordinator of Research
Board of Education
City School District of City of Buffalo

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

No. 92

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

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

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

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

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

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

1. *Criminal Libel*

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

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

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

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

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

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

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

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

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

2. *Civil Libel*

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

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

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

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

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

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

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

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

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

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

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

> "Malice, however, does not mean alone personal ill-will. It may also mean such a wanton and reckless disregard of the rights of another as is ill-will's equivalent. This means more than mere negligence or want of sound judgment. (*Hesketh v. Brindle,* 4 Times L. R. 199.) It means more than hasty or mistaken action. (*Hemmens v. Nelson,* 138 N. Y. 517.) If the defendant made the statements in good faith, believing them to be true, he will be protected, even if a man of wider reasoning powers or greater skill in sifting evidence would have hesitated. (*Clark v. Molyneux,* 3 Q.B. Div. 237.) So if he fairly and in good faith relies on hearsay (*Lister v. Perryman,* L. R. 4 H. L. 538), which often may reasonably induce action or belief. If, however, the defendant knows the statement he makes is false, we need go no further. Again rumor may be so tenuous that the trier of fact might well decide that the statement of the defendant as to his belief in it and as to his good faith is discredited. Especially so if he reports it not as a rumor but as a statement of fact for which he vouches. 'Mere reckless statements, or statements based on nothing in the way of information, are not protected.' (*Joseph v. Baars,* 142 Wis. 390.) Nor are statements made 'with knowledge that they were untrue, or without caring whether they are true or false' (*Clark v. Molyneux,* 3 Q. B. Div. 237); or if one states 'as true what he did not know to be true, recklessly, not taking the trouble to ascertain whether it was true or not and did this by reason of his objection' to certain places of amusement. (*Royal Aquarium v. Parkinson,* [1892] 1 Q. B. 431, 455.)" (*Pecue v. West,* 233 N. Y. 316)

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

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

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

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

Dated November 17, 1960
Dr. James E. Allen, Jr.
Commissioner of Education of the State of New York

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

No. 93

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

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

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

> §2023. *Levy of tax for certain purposes without vote*
>
> If the qualified voters shall neglect or refuse to vote the sum estimated necessary for teachers' salaries, after applying thereto the public school moneys, and other moneys received or to be received for that purpose, or if they shall neglect or refuse to vote the sum estimated necessary for ordinary contingent expenses, the sole trustee, board of trustees, or board of education may levy a tax for the same, in like manner, as if the same had been voted by the qualified voters.
>
> §2024. *Reference to commissioner of education*
>
> If any question shall arise as to what are ordinary contingent expenses the same may be referred to the commissioner of education, by a statement in writing, signed by one or more of each of the opposing parties upon the question, and the decision of the commissioner shall be conclusive.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Debt Service.
   a. Principal and interest payments on outstanding obligations.

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

8. Transportation of Pupils.
   a. See Opinion No. 94.

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

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

b. Fees for surveying school system by various individuals, groups, or organizations.
c. Rental of IBM equipment under a new contract.

2. Instructional Services.
   a. Free textbooks. Section 703 of the State Education Law provides these may be furnished only when authorized by the voters. However, under section 701 textbooks may be rented or sold to pupils in accordance with rules or regulations established by the board of education. If free textbooks have been provided in the past, new textbooks may be acquired to supplement the stock on hand. In such case a rental charge must be made for all books both new and old.
   b. Student workbooks.
   c. Pupil instructional supplies such as pencils, paper and art even though uniformity is educationally desirable.
   d. Conference expenses of teachers and administrators, except for teachers' conferences called by superintendents and State School Boards Association, as authorized by board of education.

3. Operation of Plant.
   a. Use of school buildings by outside organizations. (See exception under ordinary contingent expenses for Teachers' Association and local PTA's.)

4. Auxiliary Agencies.
   a. Transportation and maintenance of interscholastic athletic teams.
   b. Pupil uniforms whether for athletic activities or otherwise.
   c. Cafeteria and school lunch operation, whether or not it is considered self-supporting. This means termination of the milk program and of the contract with the Education Department in connection with surplus foods. Surplus foods on hand will need to be returned but expense of returning such surplus foods is an ordinary contingent expense.

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

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

Dated April 1961
City, Village and District Superintendents
of Schools and Supervising Principals

TRANSPORTATION (Distance) (Route) (Public) (Nonpublic) (Distance)—BOARD OF EDUCATION (Powers and Duties) (Notice to)—BUDGET (Ordinary Contingent Expense).
No. 94

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

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

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

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

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

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