University of New Mexico

UNM Digital Repository

Teacher Education, Educational Leadership & Policy ETDs

Education ETDs

5-25-1950

A Digest of Opinions of Attorneys-General on Education in New Mexico 1898-1948

Vondolee S. Page

Follow this and additional works at: https://digitalrepository.unm.edu/educ_teelp_etds

Part of the Educational Administration and Supervision Commons, Educational Leadership Commons, and the Teacher Education and Professional Development Commons

Recommended Citation

Page, Vondolee S.. "A Digest of Opinions of Attorneys-General on Education in New Mexico 1898-1948." (1950). https://digitalrepository.unm.edu/educ_teelp_etds/184

This Thesis is brought to you for free and open access by the Education ETDs at UNM Digital Repository. It has been accepted for inclusion in Teacher Education, Educational Leadership & Policy ETDs by an authorized administrator of UNM Digital Repository. For more information, please contact disc@unm.edu.

UNIVERSITY OF NEW MEXICO-UNIVERSITY LIBRARIES
A14429 088191

PAGE

ATTORNEYS-
GENERAL
ON EDUCATION
IN NEW MEXICO

378.789
Un 3 Opa
1950
cop. 2

THE LIBRARY
UNIVERSITY OF NEW MEXICO

Call No.
378.789
Un3Opa
1950
cop.2

Accession
Number
155436

DATE DUE

JUL 23 '72

JUL 1 1972

APR 02 '78

DEC 11 '87

RECD UNM DEC 17 '87

JUN - 4 '88

RECD UNM MAY 16 '88

GAYLORD

PRINTED IN U.S.A.

UNIVERSITY OF NEW MEXICO LIBRARY

MANUSCRIPT THESES

Unpublished theses submitted for the Master's and Doctor's degrees and deposited in the University of New Mexico Library are open for inspection, but are to be used only with due regard to the rights of the authors. Bibliographical references may be noted, but passages may be copied only with the permission of the authors, and proper credit must be given in subsequent written or published work. Extensive copying or publication of the thesis in whole or in part requires also the consent of the Dean of the Graduate School of the University of New Mexico.

This thesis by ..Vondolee S. Page..... has been used by the following persons, whose signatures attest their acceptance of the above restrictions.

A Library which borrows this thesis for use by its patrons is expected to secure the signature of each user.

NAME AND ADDRESS DATE

....Charles L. Briggs. P.O. Box 82 Cordova, NM ..7/3/74.....

A DIGEST OF OPINIONS OF ATTORNEYS-GENERAL ON EDUCATION IN NEW MEXICO 1898-1948

By

Vondolee S. Page

A Thesis

Presented in Partial Fulfillment of the

Requirements for the Degree of

Master of Arts in Education

University of New Mexico

1950

This thesis, directed and approved by the candidate's committee, has been accepted by the Graduate Committee of the University of New Mexico in partial fulfillment of the requirements for the degree of

MASTER OF ARTS

E H Castetter

DEAN

May 25, 1950

DATE

A DIGEST OF OPINIONS OF ATTORNEYS-GENERAL
ON EDUCATION IN NEW MEXICO
1898-1948

by

Vondolee S. Page

Thesis committee

E. H. Tireey

CHAIRMAN

Charles Judah

Harold O. Fried

378.789
Um 30pa
1950
Cop. 2

TABLE OF CONTENTS

CHAPTER		PAGE
I.	THE PROBLEM AND HISTORY OF THE STUDY	1
	The problem	2
	Statement of the problem	2
	Delimitations of the study	3
	Importance of the study.	3
	Sources of data	3
	Method of procedure	4
	Survey of materials	4
	Organization of remainder of the thesis . .	4
II.	DISTRICT ORGANIZATION AND CONTROL	6
	Consolidation	6
	Consolidation procedure	6
	Consolidation of rural districts, method of procedure	6
	Procedure for consolidation	7
	As to the consolidation of school district No. 3 of Curry County with the school district of the city of Clovis	9
	Consolidation, when can school district be consolidated	10
	Consolidation of district	10
	Consolidation	10

155486

CHAPTER PAGE

Consolidation of Districts, number of directors 11
When is consolidation complete? 12
Dissolving consolidated school districts . 13
Dissolution of district 14
Electors qualified to vote in newly consolidated school district 14
Elections, who can vote on consolidation . 15
Consolidation, who can sign a petition for? How often can consolidation take place? 15
Consolidations, and vote on 16
Consolidation, majority vote 17
Election of school officials 17
1898-1900 17
School Directors--election and appointment of--Taos Co. 17
Election--school district--legality of . . 18
School district--collection poll tax--eligible voter at 18
City board of education election 19
School board elections and election of teachers 20

CHAPTER PAGE

Qualification electors at school district elections 21
Election of directors not general election 21
Elections, qualifications for voting . . . 22
School election 22
Elections 22
Election of members of municipal boards . 22
Election resulting in a tie 24
Election officials not to be on school board 24
Intent of residence for voters in school election 24
Voters on consolidation 25
Elections, board to print ballots on bond elections 25
Elections, called by county board of education for independent school board members 25
Elections, judges appointed without regard to political affiliation 26
Election of municipal school candidates . 26
Election: Candidates, names were placed . 27
Registration of voters 27

CHAPTER PAGE

Elections for establishing schools 27
County high school election 27
Procedure for holding election for establishment of county high schools 28
Procedure for holding election for establishment of county high schools . . 29
Procedure at election for establishment of county high schools 30
As to the holding of a county high school election within two months preceding any other election 31
High school election cannot be held on same day as general election 31
School elections, Australian ballot not used at school elections 32
Ballots for election for establishment of county high school 32
Union high school district, how formed, 120-1002, 1003, Code 1929 33
Elections, right of women to vote 33
Time for holding election of board of education in cities and right of women to vote at such election 34

CHAPTER PAGE

Women may vote at election on bond issue for a school building 34
No registration required at county high school elections and women may vote at such elections 35
Women may vote at school bond elections . 36
Qulaification of voters 37
Women not qualified to vote at general election for state or county superintendent of schools 38
Women not "Legal Electors" within meaning of law relating to establishment of new school districts 38
Women not permitted to vote for County superintendent of schools 38
Wife having interest in community property may vote in board election 39
Creating and changing school districts . . . 40
School districts, changing old, establishment of new 40
Surveying the district 41
Division of school district and property . 41
Change in district boundaries 42

CHAPTER PAGE

How adjoining territory may be annexed by a town for school purposes 43
Definition of a school district 44
Creation of new school district 44
Establishment of public school within Indian reservation 45
Change of boundary lines of school district 46
School districts, division of 46
Establishment of school districts upon Indian and Military reservations . . . 46
Municipal districts 47
On the creation of a municipal school district the directors of the rural district do not hold over, but an entire municipal board must be elected 47
Incorporation of town 48
Whether a district is municipal or rural . 48
Consolidation, municipal and rural districts, procedure 49
Formation of Union high school 50
District, creation of municipal school district 51

CHAPTER PAGE

Changes of district boundaries as affecting pre-existing assets and liabilities 51

New school district--funds--failure to hold school--penalty 51

School district--division of--funds of . . 52

New school district--division of funds and equipment 52

School district divided to become part of two others--division of assets and liabilities 53

Division of property on creation of new district 53

Apportionment of county high school funds between Socorro and Magdalena in Socorro County 54

Liability of territory annexed to a city for school purposes for indebtedness of district from which it has been taken . . 54

Disposition bonded indebtedness in school district consolidated in contiguous counties 55

Expenses transportation pupils in newly consolidated school districts 55

CHAPTER PAGE

Levy of tax upon consolidated school district for payment bonds of original district 55

Distribution school funds to districts consolidated with districts of other counties 56

Effect of consolidation on limitation of indebtedness 57

Schools, bond issue on consolidation . . . 57

Indebtedness--of two districts forming a union high school not affected by combining 58

III. SCHOOL BOARD PROCEDURE AND RECORDS 59

Official oaths of school directors 59

Illegal acts of school directors and members County Board of Education . . . 59

Boards of education must act as a corporate body and not individually 60

Publication of expenses 60

Payment of member per diem 61

Signing of school warrants 62

Municipal board has power to discharge secretary 63

CHAPTER PAGE

IV. SCHOOL OFFICERS 64

Eligibility and election of officers 64

As to election of members of boards of education 64

Validity of ballots used in the election board of education for city of Clovis . 64

Election of board of education in town or village 65

Validity of school election held by only one director, and as to resignation of director 65

These two opinion were given in reference to the election and method of election and balloting for members of the school board 66

Procedure in case of tie vote for school directors 67

Election of board 67

Schools, residence qualification of director 67

Schools, qualification of director 68

Schools, discussion of citizenship of member of board of school directors . . 68

CHAPTER PAGE

Residence qualification of director . . . 69
School board members, residence requirements 70
Tenure of office of director in Union High School board. 71
Vacancies on boards of education 71
Municipal school board vacancies, when filled by the State Board of Education . 71
Board member, when office becomes vacant . 72
Removal of school director from county . . 72
Vacancy in town board of education created by resignation 73
Vancancies in board of education 73
Incompatible offices 74
Member of board of education should not write insurance upon school buildings . 74
Board member as member of legislature . . 74
A person identified in an official capacity with the public schools cannot be a party to a contract in connectionwith the operation of schools 75
Interest of wife, who is a school officer, in a school contract entered into by her husband 76

CHAPTER PAGE

Member of legislature eligible to election as school director 76
Same person cannot hold office District Attorney, City Attorney and member Board of Education 77
Offices Justice of Peace and School Director may not be held by same person . . . 77
Same person may hold office of member board of education and of board of trustees of village 78
Member of school board may not receive pay as janitor 78
Board of education, incompatibility with budget commission 79
Board of education--sales by members to board 79
School board, employment of member as janitor 79
Legality of repair and maintenance man holding office of county budget commissioner 80
Board membership 80
Schools, sale of property 80

CHAPTER PAGE

Whether a town treasurer is ex-officio treasurer of school district 81
Tenure of school board member 81
Boards of education, selection of officers 81
School board, staggered terms, how filled 82
Board membership of a Union Hight School . 82
School boards, removal for failure to publish expenses 82
Right of board member to resume office on return from army 84

V. LEGAL AUTHORITY OF BOARDS OF EDUCATION 86
Authority to insure school property and teachers 86
Employment of 1st, 2nd, and 3rd grade teachers 86
Insurance in a mutual fire insurance company 86
School buses, insurance for 87
Insurance, inter-insurance reciprocal or mutual, right of board to purchase depends on nature of particular plan . . . 87
Insuring employees of school 88
Insurance policies 89

CHAPTER PAGE

School insurance--amount to carry 89
Authority to prescribe textbooks 90
Textbooks prescribed by state board without discrimination. Textbooks not to be changed if prescribed 90
Authority to employ legal counsel 90
District attorney is not law adviser of school boards, but is adviser of County Superintendent 90
Schools may employ attorney 91
Attorney may be employed by municipal board of education 91
Payment of attorney's fees . . . from direct charge or maintenance funds . . . 91
Authority to employ architect and school business manager 92
Architect, school board may hire 92
Boards, no school business managers allowed 92
VI. SCHOOL BOARDS 93
Organization of the school board 93
What constitutes a quorum? 93
Teacher certificates, requirements 94
What constitutes quorum of school board? . 94

CHAPTER PAGE

Boards, transaction of official business . 95
Liability of school boards 95
Municipal boards of education not liable for damages. Municipal boards not authorized to secure liability insurance . . . 95
Board of education--liability for injuries to children 96
Liability for negligence 96
Liabilities for injuries received by pupil on school grounds 97
VII. CONTRACTUAL AUTHORITY AND LIABILITY OF SCHOOL BOARDS.. 100
School boards--powers of 100
School teachers--salary of when closed by board of health 100
Contract with school teacher who is a relative of one of the school directors is not valid 100
Contract with teacher who is a wife of a board member is void 101
Salaries of teachers and contracts for transportation of pupils in municipal districts 101
Contracts 102

CHAPTER PAGE

Teachers' rights under contract 102
Power of county board to select teacher for term extending beyond its own 102
Duty of board to let transportation contract to lowest bidder 104
Contracts for five years legal 105
Contract of superintendent for three years valid 105
Teachers, increase or decrease number according to school attendance 106
Teachers, increase or decrease according to average daily attendance. 106
Teachers--salary contract when school is abandoned 106
Teacher--form of contracts 107
School superintendent--new contract before expiration of old 107
Teacher--failure to sign contract 107
School boards--execution of contracts . . . 107
Reduction of budgets and teachers due to falling off of total enrollment 108
School boards--agreements to carry out school lunch program 108

CHAPTER PAGE

VIII. THE SCHOOL MONEY 112

Early opinions--school taxes 112

Taxes--levy of, for school puroses 112

Taxes--levy for school purposes--powers of county commissioners 112

School warrant--payment of, out of general school fund 113

School buildings--issue of bonds for enlarging--authority of school board to issue a ten mill levy 113

Levying of tax for school purposes--Donna Ana County 114

School directors--extension of levy made by 114

Taxpayers support schools for all people . 115

The poll tax 115

School directors--duties--poll tax 115

Man under twenty-one on first Monday in February not liable to poll tax 115

Subject to payment of poll tax, who is . . 116

Special expenditures 117

Survey of school districts, and surveyors' compensation therefor 117

CHAPTER PAGE

Compensation of county surveyor for surveying a school district 117

Expenses of public meetings held in a school house cannot be paid out of school funds 118

County treasurer has no right to deduct eight per cent from fees received from school teachers who attend county institutes 118

Expenditure school funds for purchase of automobile for county school superintendent 119

School districts can pay expenses of a teacher while attending meetings of the New Mexico Educational Association . . . 119

Payment of expense of school teacher in attending the State Association meeting 120

Persons attending summer school cannot be given credit for railroad fare if they travel by automobile 120

Expenses of teachers attending NM Educational Association meeting 121

CHAPTER PAGE

Payment transportation of teachers attending summer normal school 122
County superintendents of schools may not receive pay for teaching in summer schools 122
County superintendent, visitation expense 123
Custody of funds 123
Chapter 97, Laws of 1907, does not repeal section 1571, Compiled Laws, but leaves school moneys in towns under control of school board 123
Schools, County treasurer's report 125
Common school income fund 125
Depositories in municipal districts . . . 125
State treasurer may deposit money in banks until legislature can act 126
Custody of school money cannot be transferred from county treasurer to school districts 126
School taxes 127
Specific information as to whether county commissioners of Sierra County have lawful authority to order a change or abate-

CHAPTER PAGE

ment of taxes levied in 1908 for school district purposes regularly spread upon the tax lists of the county 127

It is not clear that section 25, chapter 97 of the laws of 1907, fixes a maximum limit of special school district levies at 15 mills, but the limit may be 20 mills. In any event, under chapter 74, laws 1905 and section 1587, compiled laws of 1897, another tax may be levied to pay interest on bonds 128

Only property in school district subject to district levy 129

A special school district tax cannot exceed 15 mills 129

Whole county subject to tax levy for county high school fund 130

As to making of tax levy for school purposes in the town of Gallup 130

Levy by school districts of 18 mills as special school tax under Chapter 79, section 5, laws of 1915 131

CHAPTER PAGE

Tax levies for purposes of grounds and erection of school buildings thereon . . 132
$200 exemption where taxpayer has property in two school districts 133
Levies for county high school 133
Payment interest on school bonds out of tax collections 134
Warrants subject to taxes due by payee . . 134
Is five mill levy mandatory for maintenance 134
School funds 135
Escheated property 135
Method to be pursued in drawing money from State Reserve Fund 136
Money received from the United States on account of National Forest should go to state current school fund 136
State superintendent may not receive moneys from the rental sale or lease of common school lands 137
Fines collected for violation of game law to go to current school fund of state. Section 49 and 50 of chapter 85 of laws

CHAPTER PAGE

of 1912 in regard to fines held to be unconstitutional 137
Relative to pay for equipment of county high school, whether payable out of high school fund or from district fund . 138
Surplus in general county fund of not less than $200 may be expended for school building 139
Law providing for payment school warrants amends Bateman Act 139
Authority of county boards of education to borrow money 139
Disposition school funds received from state lands, application of Bateman Act to expenditure school funds 140
Issuance of school warrants to pay interest at rate of ten per cent upon other warrants 140
Sale of school bonds Harding County . . . 141
Certificates of maintenance 141
Expenditures to be proper. 142
Schools--transfer of funds 142
Transportation, direct charge fund 142

CHAPTER PAGE

School boards to approve budgets 142
Direct charge fund--per capita of pupils in one district attending school in another 143
Certificate of indebtedness validity . . . 143
School boards--investment of funds in war bonds 144
Purposes for which transfers from maintenance budget may be made. Deeds to land given for school use only 144
Authority of county school boards to budget and pay to city public library money for books 148
Building funds 148
State sales tax 149
Exempt from sales tax 149
Paving assessments on school property not subject to twenty-mill limitation . . . 149
Special levies on school property for paying pavement assessments 151
School tax--2% sales tax 151
Schools exempt from sales tax 152
Schools exempt from payment of state sales and use tax 152

CHAPTER

CHAPTER PAGE

Special claims on school money 153
Salaries of first, second and third grade teachers in public schools 153
Pupils to be counted for purposes of apportionment of high school fund . . . 154
Sums to be paid by the various counties as part of the compensation of the state dir director of industrial education 154
Annual salaries of county officers begin on January 1 155
Limitations of salaries of teachers found in section 5, chapter 79, laws of 1915, applicable only to rural school districts 155
Secretary of county board--County Clerk receives no extra salary 156

IX. THE SCHOOL DEBT 157
Bond elections 157
Legal taxpayer--definition of 157
"Legal taxpayer"--"majority vote"--construction 157
Qualification of voters under section 1584 of compiled laws of 1897 157
Bond elections in Silver City to be held under city ordinances 158

CHAPTER PAGE

As to objections to bond issue of board of education in Las Cruces 159
Requirements of a municipal school bond election 160
Bond elections 161
School bond election 161
School bonds, petition for 161
Bond elections, forms 162
Bond voting 162
Bond issue, property qualifications for voting 162
Bond election--variance between petition and published notice 162
Bond elections, who may vote 163
Elections, qualifications of voters in bond election 164
Sale of bonds 164
Money derived from sale of bonds must be expended for the purpose for which the bonds were voted 164
Bonds 165
Sale of bonds 165
Bonds 165

CHAPTER PAGE

Sale of bonds when mature 165
School bonds 166
Bond issue 166
School bonds, how sold 166
School bonds, no commission 166
School bonds, notice of sale, publication 166
Bonds, payment of, how drawn 167
How proceeds of bond issue may be spent . . 167
Bond issue not used to purchase furniture . 167
Judgment against school district cannot be paid from proceeds of bond issue 167
Power of municipal boards of education to issue bonds 168
Use of moneys from bond sales for current expenses 168
Bonds and transportation of pupils 169
Schools, borrowing money for school purposes 169
Board of education, approval of bond issues 170
School districts, bonded indebtedness assessment to be used 170

CHAPTER PAGE

Premiums on bonds, how paid, school officials 171
Bond issue--cannot deduct paid off value from total bond issue to establish new legal limit 172
Paying premium to repurchase bonds 172
Bond issue for improvement of old school . 173
Power of school district to join with municipality in issuing bonds for playgrounds 174
School district warrants 174
County superintendent of schools--approval of warrants issued by school directors . 174
Annual levy--special levy--powers of school board 175
In rural districts $90 a month must pay salary of first grade teacher and other current expenses 175
As to when road and poll taxes become delinquent 176
Eighteen mill limit for special school tax not altered by chapter 54, laws of 1915, providing for a full instead of a one-third assessment 176

CHAPTER PAGE

Unpaid teachers' warrants draw 6% interest and a larger amount cannot be contracted for 177
Authority county boards of education to borrow money to pay warrants to school teachers 178
Issuance of certificates of indebtedness by county boards of education 178
Budgets emergency fund in budget 179
Certificates of indebtedness to teachers . 179
Certificates of indebtedness valid 179
School districts certificates of indebtedness 180
Issuance of certificates of indebtedness by municipal school board 180
Tax levy, expenditures under State Tax Commission 181
School warrants, manner of drawing 181
Emergency building and repair fund may not be used for purchase of land 182
X. ACQUISTITION AND USE OF SCHOOL PROPERTY . . . 183
Titles to property and bids on contracts . . 183
No bids required for building contracts . 183

CHAPTER PAGE

School directors should not reject the lowest bid for building a school house without some substantial reason 183
Obligatory upon city school authorities to provide a proper building for county high school 184
School district should take title to property in fee simple 184
Bids for construction of school building . 185
Borrowing of money to complete construction of school building 186
Cost of construction of county high school must be borne by school district 186
School land, title in state when vests . . 186
Right to purchase and lease buildings . . . 187
Right to reject bids for bond issue; right to sell to treasurer after advertising for bids 189
Advertisement for bids for construction of building 190
Maintenance and operation of schools 191
Proceeds of bonds to build school houses may be used to purchase ground 191

CHAPTER PAGE

Maintenance and operation of county high school.. 192
County boards of education are now authorized to change districts and to select location of school houses 193
Authority board of education to expend school funds for repair buildings used for schools 193
Boards of education, bids on contracts over $500.00 194
Whether or not may purchase printing from non-resident 194
School boards--issuing bonds for repair of school building prohibited 195
Control and use of school property 196
Holding of dances in public school houses 196
Power of district to procure loan under PWA or to lease building from government 196
Authority to permit use of buildings . . . 201
School boards may lease school building for public dances 202
Disposal of school property 203
School board--powers to sell present school house, etc. 203

CHAPTER PAGE

Sale of school lands, as to land sold by Commissioner of Public Lands to town of Portales for school purposes 203
Schools, disposal of property 204
Condemnation proceedings 204
Sale of lots or property 204
Sale of school property 205
XI. THE TEACHER 206
Teacher certification 206
Teacher's certificate--renewal of 206
Certificate by examination 206
Issuance of teachers' certificates, examinations and qualifications of teachers absolutely under control of State Board of Education 207
Issuance of teachers' certificates by State Board of Education 207
Certification of school teachers in municipal school districts 207
Teacher's certificate, when valid 208
Administration certificates 208
Teacher contract, changes made to conform with chapter 60, laws of 1943 208

CHAPTER PAGE

Teacher employment 209
Teachers are employees, not officers . . . 209
Election of school directors. Employment sons of directors as teachers 209
Teachers within meaning of law--number allowed 210
Teacher as relative of board member . . . 211
Employment of rural school supervisor and extra clerical help not permissable . . 211
Teachers, employment of in school boards--rural vs. county boards 211
Board of education, to employ teachers . . 212
Board of education, assignment of teachers; board member as janitor 212
Teacher in rural school may be member of municipal board 213
Rural school supervisor, appointment and qualifications 213
Political activity of employees may be regulated by school board 214
Teachers, married women may be barred by board, Board may pass rules as to employment 214

CHAPTER PAGE

Employment of rural school supervisor . . 215
Teacher--reassignment of employed teacher 215
Teacher salaries 216
School directors--powers of, to draw teachers' warrants 216
School teacher's salary--when payment can be made 216
Extra holidays--pay 216
Schools, closing of for lack of funds--bills and teacher salaries 217
Teachers' salaries 218
Teachers' summer salary, prorated on time taught 218
Teacher bonus--payment of bonus or increase in salary 218
Teacher contracts, payment of salary on 12 months basis 219
Teacher controls 219
Teacher--probationary period 219
Teacher tenure--service required for permanent tenure 220
Teacher may be member of legislature . . . 220
Teacher--may serve on city council 220

CHAPTER PAGE

School teachers selling life insurance . . 220
Teachers selling supplies to schools and pupils 221
Vaccination of teachers not compulsory . . 222
Teachers--certification of freedom from veneral disease and tuberculosis 222
Dismissal teachers 223
Removal of teacher for lack of preparation for teaching 223
Boards of education to remove teachers . . 223
Manner of serverance; raise in salary where tenure sole contract 224
Right of soldier holding temporary certificate to re-employment 228
Teacher pensions 229
Effect of sick leave of absence on pension 230
Teacher's pension, minimum pay 230
Effect of leave of absence in army or pension 230
Teacher: Unpaid pension payable to estate at death 231
Teacher retirement 231
Teachers, disabilities and retirement . . 231

CHAPTER PAGE

School teachers selling title insurance . . 220

Teachers selling supplies to schools and pupils 221

Vaccination of teachers not compulsory . . 222

Teachers--certification of freedom from venereal diseases and tuberculosis 222

Dismissal teachers 223

Removal of teacher for lack of preparation for teaching 223

Boards of education to remove teachers . . 224

Manner of service; rules in salary where tenure sole contract 224

Rights of soldier; military temporarily certificate to re-employment 228

Teacher penalties 229

Effect of sick leave of absence on penalties 230

Teacher's penalty, minimum pay 230

Effect of leave of absence in case of pension 230

Teacher: Unpaid pension payable to estate at death 231

Teacher retirement 232

Teachers, disability and retirement . . 231

CHAPTER PAGE

Teacher with twenty years experience but under age 60 cannot be retired 232
Retirement plan, proportions for years of service rendered 232
Teacher retirement--employment of retired teachers 232
Retirement of employees 233
Teacher retirement--retirement service outside of state 234
Teacher retirement--consecutive service necessary for retirement 234
Teacher retirement--re-employment of retired teachers 235
Teachers--employment of retired teachers . 235
Service for disability retirement 235
Retirement--disability pensions for board members; member former teacher 235
Age necessary for retirement 236
Teacher retirement--right of teacher previously retired 237
Full time employee defined 240
Drawing warrants for salaries of teacher retirement 242

CHAPTER PAGE

Computing out of state service 243
Salary for retirement as basis for adjustment 245
Length of service--last five years defined 247
Retirement of teachers at state institutions 248
Credit allowed for out of state service . 249
Application to full-time and part-time employees 250
Retirement of teacher drawing federal compensation for injuries 253
XII. SCHOOL ATTENDANCE 255
Compulsory attendance 255
Enforcement of law requiring school attendance 255
Law prohibiting selling tobacco to minors; age of pupils subject to compulsory school law, and length of required school attendance 255
Schools, age of children 256
Attendance, age requirements 257
Schools not required to accept child six years old 257

CHAPTER PAGE

Married children attending school 258
Compulsory attendance law applies to married children under 17. Local boards may decide who attends school after age 16 is passed 258
Married persons, when excluded from school 259
Married minor is permitted to attend school 259
Right of attendance as affected by residence 260
School directors may admit non-resident pupils to their school upon payment of tuition fee 260
Parent not reimbursed for pupils expense . 260
Tuition for foreign pupils 260
Tuition, when charged 261
Tuition, who collects 261
Children attending school out of district. 261
Assessment for pupils of another district 262
Admission of non-resident students 263
Race segregation in the public schools . . . 263
Exclusion of children belonging to colored race from public schools 263
Compulsory attendance as applied to Pueblo Indians 264

CHAPTER PAGE

Exclusion of negro children 264
Indian children in schools 264
Transportation of pupils to and from school 265
Use of public school trucks to transport pupils of private schools 265
Transportation of children not within motor carriers act 265
School busses--exempt from registration fee 266
Minor can drive a school bus
Board members not responsible for accident unless negligence can be proved
County board may pay for transportation of children living in a National Park . . . 266
School board member cannot operate school bus route 267
Transportation contracts, approval of . . 268
Bus drivers, local board determines salaries 268
Transportation, state and county boards responsible for routes 268
School bus drivers--qualifications 269
School bus drivers--right of retirement . 269

CHAPTER PAGE

Driver education and training courses . . 272
Average daily attendance requirements . . . 274
Special subjects and daily attendance . . 274
School boards, may designate district children to attend 275
Schools average attendance to maintain . . 276
Method of computing average daily attendance 277
Number of pupils necessary for schools . . 278
XIII. THE COUNTY SUPERINTENDENT 280
The duties and powers of the office 280
Powers of county superintendents of schools 280
County school superintendent Eddy Co.--increased salary 280
School boards--powers; County superintendents--powers 280
County school supt.--approval of school warrants by 281
County superintendent--can he legally teach school and draw public moneys for same 281
County school superintendent eligibility of female to hold office 281

CHAPTER PAGE

May county superintendent conduct county institutes 282
County superintendent to appoint director if no election held 282
County superintendents, qualifications . 282
County school superintendents, qualifications 284
County school superintendent can continue to receive salary under the territorial law 284
Salaries of county officers 285
Vacancy in county superintendent's office 285
Disposition of fines and election of county superintendent 285
County school superintendent has no control over schools in incorporated towns 286
County superintendent may vote as member of governing board of county high school 286
Failure of county superintendent of schools take action against directors who fail to hold election 287
Legal qualifications of county school superintendents 287

CHAPTER PAGE

Increase of school districts automatically increases the county superintendent's salary 288
Duties of county superintendent of schools 288
Allowances to county school superintendents 289
County superintendent to be elected . . . 289
County superintendent's salary provided by Act of 1923 289
County superintendent's salary during a certain period 290
XIV. RULES AND REGULATIONS OF BOARDS OF EDUCATION . 291
Religion in the public schools 291
Convent sisters--teaching public schools--proviso 291
Use of public moneys in aid of denominational and charitable institutions 291
Reading Bible at school assemblies 292
Transportation, when refused, parochial issue involved 292
Religious sisters, when may be employed . 293
School property, use by parochials 293
Religion--children, saluting flag 294

CHAPTER PAGE

Religion, released time for instruction . 294
Legality of prayer in schools 294
Employment of sectarian teachers 296
Legality of religious instruction on premises 298
Authority of teachers over pupils 299
Control to be exercised by teacher over pupils outside of school hours, and right to inflict corporal punishment 299
Authority of school teachers to inflict corporal punishment upon pupils 300
Jurisdiction school authorities over children after school hours. Date which school bonds should bear. Use of credited school funds for building school buildings 301
Teacher responsible for discipline 301
Recourse for hazing 302
Truant officers, whence is authority derived? 302
Health regulations and control 302
Vaccination 302
Chiropractor cannot prevent vaccination of school child 303

CHAPTER PAGE

Expense of medical examination 303
Extent of health department jurisdiction over school and municipal personnel . . 304
XV. MISCELLANEOUS OPINIONS 306
Summer schools and institutes 306
Chapter 121, laws of 1909, held to apply to summer schools as well as county institutes 306
Appropriation bill of 1909 authorized payment of railroad fare of students to certain summer schools 306
Summer institutes, pay 307
Institute instructors, pay 309
Laundry bills not included in $20.00 per month allowed for expenses of student teachers 309
Inspirational institute attendance in lieu of summer or county institute attendance 310
School books 310
Designation of text books by state board of education 310
Department of education; use of rural aid fund for library books 311

CHAPTER PAGE

Text books, changes in, how made, when . . 312
The school census 312
Indian children--enumeration of 312
Census, who is responsible for 312
School census, how and by whom taken . . . 313
Census to include those who will be five years of age beginning school year . . . 314
Survey of school districts 314
When charges of $50.00 may be increased for survey of a school district 314
The cost of survey of a school district limited to $50.00 payable out of general county fund, but additional payment for expenses may be made by school district 315
Indigent student aid 315
As to power of school directors to furnish clothes and shoes to pupils and failure to hold school election 315
Indigent student appropriation not repealed 316
Distance of saloon from school 317
No law regarding the distance that a saloon must be from a school building . 317

CHAPTER PAGE

Labor permits to school child 317
Labor permits, who responsible 317
School holidays 318
A public school shall not be conducted on Saturday 318
Legal holidays 319

CHAPTER I

THE PROBLEM AND HISTORY OF THE STUDY

When the Constitution was written the problem of education was left to the individual states. The Tenth Amendment reserves to the states those powers not granted to the federal government. Thus, the attorneys-general have been called upon repeatedly to render opinions as to the intent, purpose, and application of state law governing our public schools.

Whatever vagaries may have been exhibited by educational reformers or others, the attorneys-general and the courts have been forced by necessity to formulate a theory of education based upon what they deem to be fundamental principles of public policy. In legal theory the public school is a state institution. Power to maintain a system of public schools is an attribute of government in much the same sense as is the police power, or the power to administer justice, or to maintain military forces, or to tax.

It cannot be said of the attorneys-general that they have made the school system what it is. They have merely been a reflector of a changing and developing public opinion. In a governmental set up, as exists in America, the attorney-general by virtue of his position and author-

ity has been a directing force in the development of state school system.

I. THE PROBLEM

Statement of the problem. The history of the public schools of New Mexico like those of the nation can, to an extent, be traced through the opinions offered by the attorneys-general. A total of 710 opinions have been written concerning the public schools and education since the first report of the attorney-general in 1898. No segmentation and study of only those opinions directly affecting the schools and education has ever been made. In this paper a digest of 562 opinions has been made, those opinions omitted being repetitive of questions already discussed.

It is the purpose of this study (1) to review all the opinions offered by the attorneys-general which have a direct relation to the public common schools of the state; (2) to note all opinions which have been later tested in the courts and the number sustained or denied by the court; (3) to discover the type of legal question concerning the schools of the state on which he is most frequently asked for an opinion; (4) to note whether the question on which the opinion is requested is one of statutory law or common

ity has been a directing force in the development of state school system.

I. THE PROBLEM

Statement of the problem. The history of the public schools of New Mexico like those of the nation can, to an extent, be traced through the opinions offered by the attorneys-general. A total of 710 opinions have been written concerning the public schools and education since the first report of the attorney-general in 1898. No compilation and study of only these opinions directly affecting the schools and education has ever been made. In this paper a digest of 582 opinions has been made. Those opinions omitted being repetitive of questions already discussed.

It is the purpose of this study (1) to review all the opinions offered by the attorneys-general which have a direct relation to the public common schools of the state; (2) to note all opinions which have been later tested in the courts and the number sustained or denied by the court; (3) to discover the type of legal question concerning the schools of the state on which he is most frequently asked for an opinion; (4) to note whether the question on which the opinion is requested is one of statutory law or common

law; and (5) to point out those opinions which have had a very definite influence in the later development of our public school system.

Delimitations of the study. This study will cover only the opinions of the attorneys-general in New Mexico. Only those opinions relating to the state institutions of higher learning and the public schools will be reviewed. The study covers a period of fifty years, from 1898 to 1948 inclusive.

Importance of the study. In this study opinions of the attorneys-general relating to schools and education will for the first time be grouped together and classified according to subject. The extent to which the party requesting opinions may depend on the attorney-general will also be shown by determining the percentage of time his opinion has been upheld in court. The study will give, to those interested in this phase of education, a concise picture of past school and educational legal problems in New Mexico.

II. SOURCES OF DATA

The data for this thesis were secured from the annual reports of the Attorney-general of New Mexico, the

New Mexico Court Reporter, and the Reports of the Supreme Court of New Mexico from 1898 to 1948 inclusive.

III. METHOD OF PROCEDURE

Survey of materials. A survey of the secondary material in the field of legal problems concerning education was made to determine what had already been done in the field. Several studies were found dealing with the supreme court and special legal aspects of education in both New Mexico and other states, but nothing was found which dealt with that part which the attorneys-general have had in determining the public school policy.

A careful study of all the opinions of the attorneys-general concerning education was made. These were then summarized and an analysis made.

IV. ORGANIZATION OF REMAINDER OF THE THESIS

The remainder of the thesis is divided into fourteen chapters which are Chapter II to Chapter XV inclusive. For a complete outline of each chapter, see the Table of Contents, which is very complete.

In each chapter opinions are discussed by subject matter in chronological sequence. The chronological

New Mexico Court Reporter, and the Reports of the Supreme Court of New Mexico from 1890 to 1948 inclusive.

II. Survey of Decisions

Survey of materials. A survey of the statutory material in the field of legal procedure concerning education was made to determine what had already been done in the field. Several studies were found dealing with the supreme court and various local aspects of education in both New Mexico and other states, but nothing was found which dealt with the specific topic of the effect of general law had in determining the results noted below.

A careful study of all the opinions of the supreme court dealing with education was made. These were then summarized and an analysis made.

IV. Organization of Material

The presentation of the thesis is divided into seven chapters which are followed by a bibliography, and a complete outline of each chapter, and the table of contents, which is very complete.

In each chapter opinions are discussed by subject matter in chronological sequence. The conclusions

sequence. The chronological arrangement is used because laws change, and thus opinions concerning the law change. Hence, the last dated opinions refer to the more recent questions and laws now in effect.

Outdated opinions are included merely as an historical background of the state educational system.

Each opinion is preceded by the title of the subject concerned, the number of the opinion, the date that it was rendered, and the name of the attorney-general offering the opinion.

CHAPTER II

DISTRICT ORGANIZATION AND CONTROL

1. Consolidation

A. Consolidation procedure.

February 1935 No. 913 Frank H. Patton, Attorney General

. . . We have your letter of Feb. 23 making inquiry as to certain matters in connection with consolidation of two Municipal Districts which you represent.

. . . Your first question as to how the fifty per-cent of the qualified electors shall be estimated is not covered by the statute, and we believe that your suggestion as made in your letter is the most feasible one to follow; that is, to take the number shown on the last general election or last election where registration was required . . .

. . . It is our opinion that your assumption as stated in your question number two is correct, and that the whole matter of consolidation of the two municipal school districts should be handled jointly by the two municipal boards of education. This is specifically provided for in Chapter 22 of the Laws of 1933 in part, and is further provided for by Section 10, Chapter 119 of the Laws of 1931, amending Section 120-906 of the 1929 Code . . .

. . . Your third question as to the effect of the consolidation upon bonds previously voted by one of the consolidating school districts raises some questions as to the practical effect of the consolidation. It is our opinion that as a matter of law these bonds will not be affected . . .

B. Consolidation of rural districts, method of procedure.

1941 No. 3742 Edward P. Chase, Attorney General

Can consolidation be effected without an election?

Section 3, Chapter 98, Session Laws of 1935, sets up the procedure to be followed by rurual districts that wish to consolidate. The very reason that this law was enacted was to insure the qualified voters of the rural districts to have a voice in the consolidation . . .

C. Procedure for consolidation.

June 20, 1946 No. 4912 Robert W. Ward, Asst. Atty. Gen.

You have asked our opinion on the following question: Has the State Board of Education power to order the consolidation of two school districts when schools have been conducted in each district during the preceding year?

Sec. 55-1903 of the 1941 Compilation is as follows:

"Whenever any county board of education shall determine by resolution that substantial economies can be effected and standards of education improved by the consolidation of any two (2) or more rural school districts within the county and shall furnish a copy of such resolution to the state board of education, the state board of education may order the consolidation of such districts; and likewise, when the state board of education shall determine and make definite findings at the conclusion of any survey made under the provisions of this act (Secs. 55-1901 to 55-1904) that substantial economies can be effected and the educational standards raised by the consolidation of any two (2) or more school districts, said board may order the consolidation of such districts. Emphasis ours.

Sec. 55-1904 first provides for the consolidation of school districts where no school was conducted during the previous year; and then provides as follows:

. . . in all other cases where consolidations are ordered by the state board of education, the state board of education shall determine after such hearing as may be prescribed by the state board, the district or districts to which such consolidated areas are to be annexed and the boundaries of the consolidated districts. . .

In view of the foregoing, it is my opinion that the County Board of Education may recommend the consolidation of two school districts.

As an alternative procedure, the State Board of Education is vested with the discretion to order the consolidation of two school districts. However, certain conditions precedent must be made before the State Board of Education can order such consolidation: (1) The State Board of Education must find that substantial economies can be effected and that the educational standards will be raised by the consolidation of the school districts; (2) These findings can be made only after the survey provided for by Sec. 55-1901, as amended by Chap. 38, Laws of 1945, since such findings are required to be made "at the conclusion of any survey, etc."

Having ordered the consolidation of a particular district or districts, the State Board of Education may then determine the district to which such consolidated areas are to be annexed, after conducting such hearing as the State Board may prescribe.

I want to call your attention to the fact that what has been said above applies only in the event schools have been conducted in the district to be consolidated, a different procedure being provided in the event that no school has been conducted in a particular district due to the transportation of pupils.

You also ask our opinion as to whether a consolidation, such as outlined above, would be valid even though the survey provided by Sec. 55-1901, as ammended, was not conducted until after April 1st of any year.

While this section provides for a survey to be made each year prior to April 1st, it does not appear to me that this provision is mandatory since it could not have been contemplated by the Legislature that the State Board of Education caused the survey to be made each year in each school district in the state.

Further, under the provision for consolidation, no time is specified for effecting the consolidation, the only requirement being that it be based upon a survey.

Therefore, it is my opinion that if the survey is actually conducted and the consolidation based upon the facts disclosed by such survey, the same would be valid.

I am not, however, at this time deciding when the consolidation would be effective for budgetory tax and other purposes. There is no doubt that because of these factors the Legislature provided for the survey to be held prior to April 1st.

D. As to the consolidation of school district No. 3 of Curry County with the school district of the city of Clovis.

October 5, 1914 No. 1350 Frank W. Clancy, Attorney General

Petitions signed by 48 persons as residents and free holders of School District No. 3 of Curry County, protesting against recent action in consolidating said district with the Clovis District, petitioning board having authority to restore said district to status enjoyed by it prior to said consolidation. Petition solicited for consolidation of Liberty school with Clovis school not understood by residents of Liberty district, and what necessary action should be taken to get school district as it formerly was.

There must be some way of undoing objectionable action, unless consolidation has been allowed to continue for such length of time that injustice would result to city schools if existing status were changed. My suggestion would be that you first make application to city Board of Education by petition signed by majority of electors of former district, setting out that the first petition had been signed under misapprehension, and praying that Board rescind its order attaching your district to the city for school purposes. If the order is rescinded, you can then take up your former school district existence and be recognized by county superintendent. At the same time petition addressed to county superintendent of schools asking him to recreate your district or establish it as same district, setting forth all facts as above set forth. He may not have jurisdiction, but if the matter should get into the

district court, you would be in a position to show that you have made attempt and exhausted statutory remedies.

If you should fail to get the order rescinded, you would be compelled to resort to the district court by way of a suit against the City Board of Education to attempt to compel the rescinding of the order and the reestablishment of your school district. Such a suit would be based upon the well-known grounds of equitable jurisdiction which require relief to be given in cases of fraud or mistake, etc.

E. Consolidation, when can school districts be consolidated:

June 25, 1926 No. 3897 Robert C. Dow, Asst. Atty. Gen.

Consolidation of school districts in Colfax County, N. M.

Chap. 148 Laws of 1923.

The statute means a majority of the votes cast at the election and not a majority of the qualified electors who reside in such districts; it will be necessary, however, that each of the two districts have a majority of votes in favor of the consolidation, and should one district fail to have such a majority then such districts could not be consolidated.

F. Consolidation of district.

September, 1941 No. 3893 Edward P. Chase, Attorney General

This is a long opinion giving answers to questions put by Mr. H. Vearle Payne regarding the taxing and bonds of six districts in Socorro County which consolidated.

G. Consolidation.

February 8, 1943 No. 4226 Robert W. Ward, Asst. Atty. Gen.

You enclose Joint Resolution whereby School Dist. No. 32 of Santa Fe County, and School Dist. No. 8 of Torrance County were consolidated, asking if this consolidation is legal, since it was done by a Resolution dated August 3, 1920, there having been no election.

Chapter 14 of Laws of 1919 provides that "upon the joint action of two or more county boards of education having jurisdiction contiguous rural territory, situate and lying in a compact body in two or more counties, may be consolidated into a school district by a vote of a majority of each of said boards at a joint meeting thereof. The said vote shall thereupon be certified to the respective County Clerks of said counties, and to the Superintendent of Public Instruction. Favorable vote shall constitute the act of consolidation."

The act then provides that the county with the largest number of pupils shall be the dominant county; that the board of said county shall administer the district with control over the finances of said district; that the pro rata share of the school fund be transferred by the servient county to the dominant county; that elections and bond issue elections be held by the dominant county with the provision that the residents of the district in the servient county be permitted to vote; and that a pro rata share of the taxes collected by the servient county must be paid to the dominant county.

Since this consolidation proceedings, as shown by the resolution was affected during the time the above quoted statute was in force, and since it appears that the provisions of this statute were complied with, it is my opinion that School District No. 32 of Santa Fe County and School District No. 8 of Torrance County were legally consolidated.

This statute was repealed by Chapter 148 of the Laws of 1923.

H. Consolidation of Districts, number of directors.

December 30, 1943 No. 4431 C. C. McCulloh
Asst. Atty. Gen.

Opinion relative to consolidation of certain school districts in Taos county, N. M. and the number of directors which may be elected to such consolidated district.

Several rural school districts were legally consolidated pursuant to provision of Sec. 55-1901 and 55-1903 of the N.M. 1941 Compilation, but a centrally located school building has not been built, and as a result, there are approximately 2 schools within one consolidated district, and you are wondering whether a Director to represent each school could not be elected.

After consolidation has legally been effected, former school districts involved cease to exist, except, possibly, for debt service. New consolidated district becomes the only existing rural school district for the territory involved, and the general law applicable to election of rural school directors would apply. -Sec. 55-809 of NM 1941 Compilation provides for a Board of School Directors for rural school districts of three persons.

I. When is consolidation complete?

Feb. 24, 1947 No. 4988 C. C. McCulloh, Attorney General

In your letter dated February 20, 1947 you refer to Section 55-1902 of the 1941 Compilation, and inquire whether a school district, in which no school has been conducted for the last two years and the children have been transported to an adjoining district, is to be considered as consolidated; or whether the State Board of Education must declare such a consolidation, in which case the same would not become effective for tax purposes until January 1st of the following year.

Section 55-1902 of the 1941 Compilation provides as follows:

"In all school districts where no schools were conducted for the fiscal year 1940-41, and in all school districts where no schools will be conducted for any subsequent year on account of the transportation of

such pupils to other schools as provided in the preceding section, such districts are hereby consolidated with contiguous districts."

Section 55-1904 of the 1941 Compilation provides, in part, as follows:

"Where school districts are consolidated by virtue of the provisions in Section 55-1902 hereof, the county board of education shall determine by resolution the district or districts to which such consolidated areas are to be annexed and the boundaries of the consolidated districts and shall furnish the state board of education with a certified copy of such consolidation for its approval. * * *"

It is apparent that the consolidation is not complete until the county board by resolution has determined in which district the consolidated area applied, and the boundaries of the consolidated district, and until such consolidation is approved by the State Board of Education.

Section 55-1904 also provides that all consolidations made hereunder shall be for taxation purposes as of January 1st following such consolidations.

In view of this provision, although bonds might be voted prior to January 1st, they could not be issued and sold until after the district is in a position to levy taxes for the payment thereof.

J. Dissolving consolidated school districts.

May 1, 1922 No. 3409

Section 7 of Chapter 105 of the Laws of 1917 prescribes the procedure to be adopted for the change, abolishing, altering and consolidation of rural school districts.

***The consolidation of school districts which lie contiguous but in different counties is provided for by Chapter 14, Laws 1919. If this latter act can be said to be supplemental to Section 7, Chapter 105, Laws 1917, then it would follow that county boards of education would have authority to divide school districts previously

consolidated under the provisions of Chapter 14, Laws 1919.

***I would therefore suggest, in order that you may secure a final determination of the question, that you have a suit filed in the district court of your county, requesting authority to separate the two districts and have someone represent the opposition to the division and in this manner secure a judicial decision which would be binding.

K. Dissolution of district.

March 15, 1938 No. 1909 Frank H. Patton, Attorney General

Under present status of law after schools have once been consolidated, there is no statutory method by which they may revert to former status of ordinary rural school districts.

L. Electors qualified to vote in newly consolidated school district.

March 30, 1921 No. 2877

Consolidation of school districts in two or more counties is authorized by the provisions of Chapter 14, Laws 1919. It is provided in that act that the county which, at the time of consolidation, has the larger or largest number of children of school age residing within the consolidated district as shown by the last official school census preceding such consolidation, shall be known as the dominant county, and that the Board of Education of the dominant county, shall constitute the governing body of such consolidated district.

The law further provides that upon consolidation, the school directors of the former school district of the dominant county shall become the directors of the consolidated district until the next regular election of school directors and shall have all the rights, powers and duties specified by law for other school directors.

M. Elections, who can vote on consolidation.

January 27, 1931 No. 30

"1. Would it be legal for persons not registered, who are otherwise qualified voters, to vote on either consolidation of schools, or bond issue?

2. Would it be legal for persons who are not tax-payers, otherwise qualified by virtue of residence, and naturalized citizens to vote on either consolidation of schools, or bond issue?"

In my opinion your first question should be answered in the affirmative.

It is my opinion that your second question should also be answered in the affirmative. Section 41-210 sets out the necessary qualifications for voters and does not provide that a person must be a tax-payer in order to vote. There being no statute requiring special qualifications for persons voting at bond elections or upon consolidation of schools, it would follow that any voter who is otherwise qualified may vote at such elections, regardless of whether or not he is a tax-payer.

N. Consolidation, who can sign a petition for? How often can consolidation take place?

January, 1936 No. 1261 Frank H. Patton, Attorney General

. . . This will acknowledge receipt of your letter asking our opinion regarding the two following questions:

1. Who is legally qualified to sign the petition asking that an election be called for the purpose of consolidating two or more rural school districts?

2. Can an election for consolidating two or more rural schools to form a Union High School, be called within two years after a consolidation embracing two rural schools which formed one of the larger high schools to be included in the Union High School?

Section 6, Chapter 119, Laws of 1931, which amends Section 120-805 of the 1929 Compilation, specifically provides that the petition, requesting that an election be called for the purpose of consolidating two or more rural school districts, must bear the signatures of at least 50% of the qualified electors of each district.

As to your second question, the aforesaid Chapter 119 provides;

. . . but an election on the question of consolidation or change, shall not take place in the same combination of districts oftener than once in two years . . .

Therefore, it is our opinion that the said second question presented to us must be answered in the negative.

O. Consolidations, and vote on.

March 30, 1937 No. 1576 Frank H. Patton, By Fernandez

Sec. 906, Chap. 120 of NM Statutes 1929 Compilation has been reenacted as Chap. 22, of Laws of 1933. Restrictions as to area of district and territory to be annexed were omitted. Extent of territory no legal impediment to consolidation of Dist. 14 and 2 of San Juan County.

Consolidation shall be ordered jointly by municipal and county boards of education, and procedure shall be like case of rural school districts, and if a "majority of votes cast" in favor of consolidation, it shall be made upon order of the State Board of Edu.

Procedure in consolidation of rural districts is set forth in Sec. 3 of Chap. 98 of Laws of 1935. Duties imposed on county boards of education by this chapter shall be performed jointly by the county and municipal boards.

Petition for consolidation must be filed with county board of edu. prior to first day of April and shall contain signatures of 50% of qualified electors of each district. Notice to State Board and calling of election.

Election shall be called, conducted, canvassed and proclaimed in same manner as provided for bond elections by the act of which this law was a part.-Chap. 148 of 1923.

P. Consolidation, majority vote.

June 25, 1937 No. 1686 Frank H. Patton, Attorney General

In case of consolidation of school districts a majority of all votes cast at election for such consolidation sufficiently determines the outcome of the election.

2. Election of School Officials.

A. 1898-1900

Dec. 26, 1898 Report of Edward L. Barlett, Solicitor General, Territory of N. M.

"The school law in regard to the election of school directors, section 1532, should be amended so as to compel the old boards of directors to call the election as provided by law, and their failure so to do should be punished by removal from office and a heavy fine, to go to the school district. The directors have been taking advantage of the laxity of the law to keep themselves in office indefinitely by failing to call the election, to the great detriment of the school. Also, there should be adequate provision made for the canvassing of the votes at this election and giving proper certificates of election."

B. School Directors--election and appointment of--Taos Co.

1905-6 No. 264 W. C. Reid, Attorney General

Opinion to Supt. Public Instruction on questions relating to election and appointment of school directors in District No. 15, Taos County.

HELD: Election held June, 1905, legal and valid election. Directors elected on that day are the legal officers.

C. Election--school district--legality of.

1905-6 No. 279 W. C. Reid
Attorney General

Opinion to Hon. Hiram Hadley, on legality of election held in school district No. 28, Espanola, on first Monday June 1905.

HELD: Election illegal. Election held at two different places in one district, at neither of which were poll books, or at which the school directors, the legal judges, did not participate. Vacancies should be filled by apportionment by superintendent of schools.

D. School district--collection poll tax--eligible voter at.

1905-6 No. 358 W. C. Reid
Attorney General

Opinion to M. A. Depuy, on construction of the words "able-bodied." as used in Sec. 1 49 C. L. '97. etc.

HELD: Term "able-bodied" imports an absence of those palpable and visible defects which evidently incapacitate a person from performing ordinary manual labor. 2. Where new districts are formed, those living in new district pay poll tax to new district. If they have already paid for this year old district should turn tax over to new district. 3. Duty of school district clerk to bring suit for collection of poll tax. If he does not do so he may be compelled by law to do so. 4. In event suit is brought and district loses case, district would have to pay costs out of district funds. 5. Legal voters, residing and paying taxes in said district shall be qualified to vote at said election. Those residing in district not having taxable property must pay poll tax to entitle them to vote.

E. City Board of Education Election

April 17, 1910

Frank W. Clancy
Attorney General

Mr. Harry S. Bowman

Statutes on the subject of city elections are certainly in a confused and perplexing condition but it seems to me that the rule applicable to the filling of vacancies in the city council, about which I wrote you on the 20th of March, may not applicable to vacancies in the city boards of education. As I wrote to you about vacancies in the council, in order to reconcile the varying legislation we must hold that the statutes of 1903, Chapters 9 and 93, by necessary implication modify the statue of 1893 which provided that vacancies in the city council should be filled by appointment of the council, the person so appointed to hold his office until the election and qualification of his successor at the next succeeding annual election, so that the person appointed by the council to fill such a vacancy should hold until the next election for municipal officers when his successor could properly be elected which would only be at the end of the unexpired term as to which the vacancy exists. I took this view because the act of 1893 provided for the election and qualification of the successor at the next succeeding annual election but the later statutes had made elections biennial instead of annual.

There is a substantial difference between the act of 1893 as to vacancies in the city council and the act of 1891, which appears as sex. 1568 of the Compiled Laws, concerning vacancies in the board of education. Sec. 1568 provides specifically for elections "to fill unexpired term." The law at that time provided for the election regularly of one member of the board of education from each ward who should hold his office for a term of two years. Sec. 1568 provided, as above stated, for elections to fill unexpired terms if there was an unexpired term of as much as one year, and prescribed the form of ballots. I am unable to see reason why this specific legislation should not be still in force as to filling unexpired terms in the board of education at the next succeeding regular election, and this would seem to be applicable to the condition of affairs in your city and

indicates that there was a vacancy which might have been filled at the last election upon ballots in the form prescribed by sec. 1568. If any votes were cast in that form for a candidate and were counted and properly certificated by the officers of election, he would seem to be entitled to the office. Unless the votes were cast in that form and the returns certified the same way as required by sex. 1568 of the statutes, there would seem no evidence of any election to fill the unexpired term and under sec. 3 of Chap. 36 of the Laws of 1909, pg. 4, it might be held that a vacancy exists because no successor has been chosen as provided by law. In that case the board of education would have power to fill the vacancy by another appointment.

I do not think the facts that the person voted for was not a candidate, or that his candidacy had not been announced and his certificate of candidacy had not been filed with the probate court, has any effect upon the question to be considered. I am clearly of opinion that there is nothing to require the filing of certificates of candidacy for municipal offices with the probate clerk, as that requirement refers only to general elections, the certification, printing and distribution of tickets for which are under the control of the chairmen of the county committees. I wrote you on this subject on the 9th last.

FRANK W. CLANCY, ATTY GENL.

F. School board elections and election of teachers.

1913 No. 985 Frank W. Clancy
Attorney General

Election of Board of Education must be called in same manner as elections of city officers.

. . . you ask . . . "my opinion as to whether it is the duty of the majoy and council, or of the board of education in cities, to call the school election under Chapter 43 of the laws of 1912.

. . . It appears to me that the city council is the only authority for ordering, or calling any city election, and I am unable to find anywhere any such author-

it in the board of education.

You also ask my opinion as to whether or not the present board can legally employ teachers for the next school year and enter into binding contracts with them. I can see no reason why the present board of education should not be considered as having all of the powers of any board and, indeed, there is no dissolution or change of the board by reason of new members being elected. The board continues, although its personnel may be changed.

G. Qualification electors at school district elections.

April 2, 1921 No. 2887

You ask if a person may vote in a district other than that inwhich he resides because of his having formerly been in the service of the United States as a soldier.

The qualifications for voters at all elections are prescribed by Sec. 1 of Art. 7 of the Constitution. That section provides that

"Every male citizen of the United States who is over the age of 21 years and has resided in New Mexico 12 months, in the county 90 days and in the precinct in which he offers to vote 30 days next preceding the election, shall be qualified to vote at all elections for public officers.

H. Election of directors not general election.

March 20, 1924 No. 3760 Milton J. Helmick
Attorney General

Such elections are not general elections - Held in April, and Constitution, Art. 20, sec. 6 provided general elections held tuesday after first monday in Nov. of each even numbered year, so there is no general election held in NM except the Nov. election.

I. Elections, qualifications for voting.

Feb. 16, 1929 Page 160 M. A. Otero, Jr.
Attorney General

It is not necessary for everyone voting in school elections to have registered in previous elections.

An elector does not have to have been a tax payer in order to vote in one of these elections; the law says he shall be a qualified elector same as in any other kind of election.

Man's son who is of age and claims father's home as residence, away working most of the time, is eligible for voting. The question of his residence is entirely what he claims it to be.

J. School Election.

March 21, 1929 Page 183 M. A. Otero, Jr.
Attorney General

Qualified elector may vote at school election without registering.

K. Elections

Apr. 2, 1929 Page 183 Miller

An election not held on day prescribed by statute or notice required by statute given, election is void.

L. Election of members of municipal boards.

January 27, 1933 No. 556 E. K. Neumann,
Attorney General

Referring to your letter of January 26, 1933, to which was attached a copy of the telegram from Mr. Grady Thompson, relating to school elections. You request an opinion upon the questions therein raised, as well as an opinion upon Senate Bill No. 14, as to the time it becomes effective and whether it controls the

I.

1933 municipal school board elections.

Mr. Thompson's telegram is as follows:

"All present members of Hobbs Board were appointed and their terms expire. Get opinion from Attorney General as to number we should elect and their term of office and wire us collect."

Senate Bill No. 14 is now the law and controls the 1933 municipal school board elections, same carrying the emergency clause.

No fear need be had, if prompt action is taken, that the time to call such school elections is insufficient. The law controlling such matters is found in Section 90-608, controlling the calling of municipal elections, the pertinent part being, as follows:

"xxx, and all elections for municipal officers shall in all respects be held and conducted in the manner prescribed by law in cases of county elections. Provided, however, that the proclamation for all municipal elections shall be signed by the major and attested by the clerk of such municipal corporation, and such proclamation shall be published once a week for two successive weeks, the last insertion thereof to be at least one day before the date of said election."

Consequently, I feel that the proclamation may be published as late as February 6th and 13th. Care, however, must be taken to consider the date or day of week the newspapers are published in each municipality.

As to the Hobbs question. If all the directors are appointed, their terms expire, so that either two or three, as the case may be, must be elected for the unexpired terms of those whose places they fill. The other two or three, as the case may be, must be elected for a new term. If two are to be elected for new terms, both shall be for a term of six years, but if three are elected, one shall be elected for a term of four years.

Trusting, that I have made myself clear, I am,

M. Election resulting in a tie.

April 11, 1933 No. 572 E. K. Neumann, Attorney General

This is in reply to your letter of April 8, 1933 in which you state that the election for school director in school district No. 1 resulted in a tie.

In such case there is no election. 20 C. J. 208. Under the provisions of Section 96-107 and 120-815 of the 1929 Code, I am of the opinion that a vacancy will exist upon the termination of the term of office of the retiring school director, and the county Board of Education may fill such vacancy by appointment.

N. Election officials not to be on school board.

October, 1936 No. 1454 Frank H. Patton, Attorney General

Your question is whether or not a member of rural school board may serve as a judge or clerk of election. Section 41-316 of the 1929 Code, as amended by section 32 of Chapter 147, Laws of 1935, prohibits any member of any board of education from acting as any of the election officials mentioned in said law. We believe that this includes members of rural boards of education. . . .

O. Intent of residence for voters in school election.

Feb. 8, 1937 No. 1523 Frank H. Patton, Attorney General

Temporary absence from county which elector intended to return did not destroy residence. If person leaves county intending to return, residence is largely matter of whether person really intended to return or not. Can give no real opinion.

P. Voters on consolidation.

May 4, 1937 No. 1629 Frank H. Patton, Attorney General

Voter, if otherwise qualified need not be property owner to be entitled to vote in an election to consolidate a rural school district and a municpal school district.

G. Elections, board to print ballots on bond elections.

Feb. 18, 1939 No. 3029 Filo M. Sedillo, Attorney General

Election for consolidation of school districts.

Chapter 120, Sec. 805 of 1938 Supplement provides manner in which rural school districts may be changed or consolidated after petition is filed with county board of education, and states "within 20 days after receipt of written approval of state board of education, county board may call election at such place in each district of proposed consolidated district as it may determine, such election to be held under direction of county board of education.

Ruling of this office that authority calling election charged with expense of printing ballots and publication of notices.

Called, conducted and canvassed in substantially same manner as provided in Chap. 20-804 of 1938 NM Supplement for bond elections.

R. Elections, called by county Board of Education for independent school board members.

January 18, 1940 No. 3396 Filo M. Sedillo, Attorney General

County Board Education calling election.

Procedure for Election Board Members Independent Districts-called, held, conducted and canvassed by

County Board of Education (Sec. 3 of 182 of Session Laws of 1939 amending Sec. 3 of Chap. 71 of 1935 Session Laws.)

S. Elections, judges appointed without regard to political affiliation.

Feb. 15, 1940 No. 3429 Filo M. Sedillo, Attorney General

County Board of Education can appoint and certify any six persons to serve as election judges and alternates for election to elect School Directors regardless of their political affiliations.

T. Election of municipal school candidates.

Jan. 30, 1943 No. 4220 Edward P. Chase, Attorney General

Re: Sec. 55-905, 14-1303, 56-301, 56-802, 56-908, 56-720 of 1941 Compilation.

55-905 - municipal school elections shall be called, conducted, returned and canvassed by municipal board as in case of officers in incorporated cities, towns and villages, except that no registration is required.

14-1303 - all elections for municipal officers by held and conducted as prescribed by law in county elections, provided that proclamation for municipal elections signed by Mayor attested by Clerk, published once a week for two consecutive weeks, last insertion made least one day before date of election.

56-301 - Board of C. commissioners at least 15 days before election proclamation and publication, proclamation published two times prior to date of election in legal newspaper - publication being not more than seven days preceding election - notice of election, objects thereof, offices to be voted for, names of candidates as certified.

Candidates file declarations - not necessary - person who received highest number of votes would be duly elected officer, no matter when or how succeeded in

getting name placed on ballot. Sec. 56-301 and 56-302 no applications to municipal board elections1

U. Election: Candidates, names where placed.

Feb. 2, 1943 No. 4222 Edw. P. Chase, Attorney General

Democratic party in Santa Rosa can nominate such persons for membership on Municipal school board under rules and regulations as it may adopt to run on democratic ticket under democratic emblem; no other persons unless authorized by Democratic party have right to have names placed under Democratic emplem.

V. Registration of voters.

February 9, 1945 No. 4652 Harry L. Bigbee Asst. Atty. Genl.

You have requested an opinion of this office concerning whether registration is required for persons voting in a city school election. This is to advise you we have carefully examined the statutes and find there is no requirement for registration in order to vote in such election.

Of course, all persons offering to vote must be legal residents of the city wherein they offer to vote and cannot be legal residents of any other portion of the State.

3. Elections for Establishing Schools.

A. County High School election.

1913 No. 1024 Frank W. Clancy, Attorney General.

Returns of election for establishing county high school should be canvassed by Board of County Commissioners.

. . . The election in question must have been called and held under the provision of Chapter 57 of the Laws of 1912, Section 1 of which says that the election "shall in all matters not herein provided for be called, conducted and the returns made and canvassed as now provided by law for the election of county officers."

. . . The returns of the election, about which you write, should be made by the Board of County Commissioners and canvassed by that board. . .

The confusion or uncertainty must have arisen from the fact that, under the Enabling Act and the Constitution, the returns of the first state election, including county officers, were sent to the office of the Secretary and canvassed by the state Canvassing Board. These provisions, however, related only to that first election, leaving in force the territorial statute as to the returns of the election of county officers.

B. Procedure for holding election for establishment of county high schools.

March 17, 1914 No. 1189 Frank W. Clancy, Attorney General

The law on elections for the establishment of county high schools is to be found in Chapter 57 of the Laws of 1912 and Chap. 20 of the Laws of 1913. The first act in 1912 provided for the establishment of county high schools only in counties having a population of 5000 or more, as shown by the last Federal census, but the act of 1913 amended this so as to leave out the restriction as to population.

Sec. 7 of the act of 1912 contained a proviso that only one county high school should be established in any county in any one year, but this also was amended so as to leave out that restriction.

Sec. 2 of the act. of 1912 is the one shich provides how the question shall be raised and how it shall be decided. It requires a petition to the county commissioners signed by not less than one-fifth of the electors of the county, including women, qualified to vote, asking the board that an election be called to

determine the question of establishing a county high school at a place named in the petition. Upon the presentation of such a petition it is the duty of the board of county commissioners to call an election to be held not less than thirty days thereafter. It would not, under these provisions, be possible to hold an election for two places, but there must be an election for each place named in each petition presented.

If county cannot afford to maintain two county high schools, I suppose the result would be that at the first election as to one place, all those who favored the other place would vote against the establishment of the high school at the first election and when the second election arrived, all of those who favored the place voted upon at the first election would vote against the second one. I do not see any way for you to avoid a fight, unless you agree that there should be two high schools. The statutes provide for a special additional levy to maintain the county high schools not to exceed two mills on the dollar. You can readily make an estimate as to whether two mills on the dollar would be sufficient to maintain two such schools in your county.

C. Procedure for holding election for establishment of county high schools.

April 14, 1914 No. 1190 Frank W. Clancy, Attorney General

On March 17 I wrote you in response to your request for information and opinion about elections for the establishment of county high schools, and I said that under the provisions of the law, it would not be possible to hold an election for two places, but that there must be an election for each place named in each petition presented. I indicated, perhaps not very clearly, that if there were two places for which petitions had been presented, the elections would have to be held on different days, but it has since presented itself to my mind that, without any violation of the requirements of the law, the county commissioners might order the two elections, one to be held for each of the two places proposed, on the same day and at the same polling place and with the same officers of election, care being

taken to have the record show that there were two elections and not one. This would require the keeping of two sets of poll books and the making of two separate and distinct returns, and at each polling place, there should be two ballot boxes. By this means the extra expense to the county of an additional election would, in a great part, be avoided and in a county like yours this would be an object of great importance.

D. Procedure at election for establishment of county high schools.

April 25, 1914 No. 1204 Frank W. Clancy, Attorney General

Regarding law governing establishment of high schools:

Under high school act in Chap. 57 of the Laws of 1912 only one county high school could be established in any county of the state during one year, but act was amended by legislature in 1913 in Chap. 20 of that year so that more than one high school might be established and designated as a county high school in any year.

Under provisions of the act of 1912, there must be a separate election on each petition, although, as a saving of expense it might be possible to have all three elections in one day and conducted by the same set of judges and clerks. Separate poll books for each of the three elections and a separate ballot box for each, and the returns made separately for each. Each election concerns only itself, and majority of votes cast favoring establishment of high school requires the board of county commissioners to establish the same. If three elections favor three high schools, separate schools will have to be built.

E. Procedure at election for establishment of county high schools.

April 27, 1914 No. 1205 Frank W. Clancy, Attorney General

Board must satisfy itself as best it can whether electors to the required number of one-fifth have signed

petition for establishment of county high school. Board would appear to be compelled to estimate qualified female voters from best information obtainable.

F. As to the holding of a county high school election within two months preceding any other election.

May 7, 1914 No. 1224 Frank W. Clancy
Attorney General

Re: County commissioners have refused to act upon a petition for a high school election because they have already ordered election for a portion of the county, including seven school districts, under Chap. 78 of the Laws of 1913, which provides for a local option election in the district of a county upon a petition signed by 25% of the qualified electors resident within the proposed district, and it must be, as you suggest, that the delay in acting is on account of the provision of Sec. 3 of Chap. 78 which provides that such local option election cannot be held within two months preceding any other election, and the election already ordered is for the 25th of the present month. The act under which the high school election is to be called is Chap. 57 of the Laws of 1912, and sec. 2 of that act provides that it is the duty of the board of county commissioners, upon presentation of a proper petition, to call the election "not less than 30 days following the meeting of said board at which such petition is received." No limit as to how long, after the petition is received, that the election must be held, and if the holding of the local option election on May 25 would make it impossible to hold any other election until 2 months thereafter, still the county commissioners might call the election now for for the latter part of July, and perhaps that would be a safe course for them to take.

My opinion is that it could not have been the intention of the legislature to prohibit the holding of a local option election less than two months preceding some other special election.

G. High school election cannot be held on same day as general election.

August 31, 1914 No. 1305 Frank W. Clancy,
Attorney General

Sec. 1 of Art. VII of the Constitution reads: "All school elections shall be held at different times from other elections, so high school election cannot be held at some time as general election of Nov. 3.

H. School Elections, Australian Ballot not used at school elections.

Feb. 5, 1918 No. 2084 Milton J. Helmick, Attorney General

Mr. Wagner Wagner had requested information whether or not the new election law applied to school elections.

Chapter 89 of the Laws of 1917 had provided for use of the Australian ballot. However, it was exceedingly indefinite in regard to school elections.

After discussing the inadequacies of the law and some of the conflicts, the Attorney General ruled as follows:

"It is, therefore, my opinion that Australian ballots, such as are provided by the new law, are not applicable to school elections, and that the old law will prevail in that respect."

I. Ballots for election for establishment of county high school.

April 26, 1922 No. 3389

In reply to your letter of the 20th instant, asking if, under the provisions of Section 4964, Code 1915, the names of more than one town may be placed upon the ballots in an election to be held for the purpose of determining whether or not a county high school shall be established, and if not, where petitions are presented for the establishment of a high school at two or more different places, which petition shall be acted upon first, I wish to advise you:

Section 4964 provides for the filing of a petition with the Board of County Commissioners requesting that an election be called to determine the question of establishing a county high school at a place named in said petition, and the section further provides that the ballot shall read as follows: "For a county high school at . . ." and "Against a county high school at . . ."

From the foregoing it is perfectly apparent that the name of only one locality may be placed upon the ballot to determine whether or not a county high school shall be established.

J. Union High School district, how formed, 120-1002, 1003, Code 1929.

Feb. 24, 1930 Page 159 Miller
Asst. Atty. Gen.

Before county commissioners may call election for district union high school purposes, two petitions must be presented, one of governing authorities of each school district and another of electors in each district to the number of 15% of total votes cast therein for governor at last preceding general election.

No way to compel board of directors to sign such petition nor is there any way to compel electors in district to sign. Unless you can persuade necessary boards as well as electors to sign, the board of c. c. may not call an election.

4. Elections, Right of Women to Vote.

Because of the number of opinions regarding the right of women to vote in school elections they have been grouped under one heading. Since the adoption of woman sufferage all opinions are obsolete, but historically are still worthy of note. Opinion No. 715 of January 20, 1934, is still in effect.

A. Time for holding election of Board of Education in cities and right of women to vote at such election.

1912 No. 879½ Frank W. Clancy, Attorney General

. . . The statutes of 1903 clearly authorize the election of one-half of the Board of Education in a city at the same time as the general biennial city election . . . I believe there can be no doubt that the election of members of a City Board of Education must be considered as a school election within the meaning of Article VII of the Constitution . . .

You further inquire as to whether women should be registered as voters, and will have the right to vote at a special election called for submitting to the voters the question of the issuing of school bonds, and also at the election of members of the Board of Education . . . it is plain that the Constitution gives women the right to vote at such elections . . . as to school bond elections the question is not so clear. The Constitution declares that women shall be qualified electors at school elections, and there is some room to argue that the intention was to specify only elections of directors or school officers . . .

I am of the opinion that women have the right to vote upon the question of such a bond issue.

B. Women may vote at election on bond issue for a school building.

1913 No. 1074 Frank W. Clancy, Attorney General

Under Section one of Article VII of the constitution women possessing the qualifications prescribed for male electors are qualified electors at all school elections. I think there can be no reasonable doubt that the comprehensive phrase "school elections" includes every election where any question is submitted to a vote which relates to, or affects the schools, whether it be an election of school officers, an election as to the imposition of special taxes, and election as to the issue of bonds, or an election as to the establishment of a county high

school. These elections are all provided for in different statutes and must be considered as school elections.

C. No registration required at county high school elections and women may vote at such elections.

April 24, 1914 No. 1201 Frank W. Clancy, Attorney General

Question: whether or not registration is necessary in an election for a county high school.

Sec. 2 of Chap. 57 of the laws of 1912 make it the duty of the board of county commissioners, upon the presentation of a proper petition to call an election to determine the question of establishing a county high school not less than thirty days following the meeting of the board at which the petition is received, and it further provides that: "Said election shall, in all matters not herein provided for, be called, conducted, and the returns made and canvassed as now provided by law for the election of county officers.

It seems clear that the answer to your question is to be found in the interpretation or meaning placed upon the word "conduct." Previous to all elections for county officers registration is required as provided in Sec. 1702 of the Compiled Laws of 1897.

Making of a registration is not embraced within ordinary meaning of the word "conduct" when applied to the election. An election is conducted by the officers, judges and clerks, appointed for that purpose by the board of county commissioners, but as a foundation for the conduct of the election the registration is required,,and the furnishing of the registration lists to the election officers. The law makes it unlawful for any person to vote unless his name shall have been registered as a voter, although he may, if not registered, be allowed to vote by tendering an affidavit as to his qualifications sworn to by himself and by two qualified voters of the precinct, as provided by Chapl 64 of the laws of 1903. This makes it one of the duties of the judges of election not to permit an unregistered person to vote unless he presents the affidavit required

by the statue of 1903, and it might be said that the discharging of this duty is a part of the conduct of election. I think this is a strained and unreasonable construction of the word "conduct" by which we would compel the performance of acts prior to the actual holding and conducting of the election.

In such investigation as we have had time to make we have not found any reported case which is quite like that which is here presented, but we have found cases where, either regarding special elections or elections on special subjects, the courts have been asked to hold that general registration laws so broadly worded as appear to be applicable to all elections, must be followed. Some legislation evinces a legislative intent that there should be no registration. My opinion is that in the county high school act there is to be found an indication that the legislature did not contemplate that there should be a registration of voters. The election may be called by the county commissioners to be held only thirty days after the meeting of the board at which the petition is received. The registration statute requires the boards of county commissioners to appoint boards of registration in the several precincts sixty days before any general election. It must be that when the legislature provided for an election which might be held within thirty days, there could not have been in mind the operation of a registration law which required action to be taken sixty days before the election. I am of opinion that no registration of voters is required.

Women can vote at such an election; sec. 1 of Art. VII of the Constitution distinctly declares that women possessing the residence qualification prescribed for male electors shall be qualified electors at all school elections, and certainly the determination of the question of the establishment of a high school by a vote of electors is a school election within any proper definition of that term. The petition is to be signed by one-fifth of the electors of the county, including women qualified as provided in the Constitution.

D. Women may vote at school bond elections.

June 12, 1915 F. W. Clancy,
Attorney General

Your letter of the 11th Inst. asking who are entitled to vote at bond issues in rurual schools, calling attention to wording of a part of Sec. 1 of Article VII of the Constitution which makes women qualified electors "at all such school elections." Whether word "such" refers to school elections for directors or comprehends bond elections.

In a letter to city atty of Roswell, stated that while there might be some room to argue that the intention of the constitution was to specify only elections of school directors or school officers, yet I believed that that would be an unwarrantably narrow and unreasonable construction, and that by "school elections," the constitution intended to cover all local elections as to the management, control and administration of public schools and that certainly nothing could be more important to such administration of schools than the issuance of bonds by which funds might be provided for the benefit of the schools.

E. Qualification of voters

May 22, 1916 No. 1809 F. W. Clancy,
Attorney General

Qualification of voters at a municipal school bond election, and right to charge for tuition of non-resident pupils.

You say that the question of property ownership and the right of women to vote are questions as to which you desire an opinion.

The only existing definition of qualified electors is to be found in Sec. 1 of Article VII of the Constitution.

As to the right of women to vote, the last clause of the quotation from Sec. 1 of Article VII of the Constitution is a sufficient answer, and there can be no reasonable doubt that a school bond election falls within the description of "school elections."

F. Women not qualified to vote at general election for state or county superintendent of schools.

Aug. 2, 1916 No. 1856 H. S. Clancy, Asst. Atty. Gen.

By Sec. 1 of Article VII of the Constitution of N.M. all school elections shall be held at different times from other elections, and women possessing the qualifications prescribed for male electors are qualified to vote at all such school elections. The election to be held next November is not a school election, but a general election, and therefore women are not qualified to vote at such an election for state or county superintendent of schools.

G. Women are not "Legal Electors" within meaning of law relating to establishment of new school districts.

Jan. 25, 1917 Milton J. Helmick, Attorney General

The Attorney-General points out in a rather lengthy opinion that the creation of a new school district is not an election but rather a petition.

"Section 4820 says, whenever it is desired that a new district shall be formed, a petition and statement of fact signed by a majority of legal electors residing within the proposed district shall be presented to the County Superintendent of Schools, etc., etc." It does seem to me that the term "election" can be said to include the signing of a petition even tho the petition may be concerned with school affairs. It is my opinion that women are not qualified to sign the petition mentioned in said section.

H. Women not permitted to vote for County Superintendent of Schools.

July 26, 1918 Milton J. Helmick, Attorney General

I am just in receipt of your letter of the 24th, wherein you ask whether women are entitled to cast their votes in the coming election for candidates running for the office of Superintendent of Schools. You state that this important question is being raised, owing to the fact that women being entitled to vote for school directors, logically would also have the right to vote for school superintendent.

I regret very much to say that in my opinion, there can be no doubt that women are not entitled to vote for county superintendents, or state superintendent of schools, at the coming election. The framers of the Constitution provided that women might vote at school elections, but this meagre sufferage is all that has ever been extended to the women of the State. The Constitution of New Mexico, in Section 1, Article VII, reads in part as follows:

"All school elections shall be held at different times from other elections. Women possessing the qualifications prescribed in this section for male electors shall be qualified electors at all such elections.

. . . The election to be held in November, is of course, a general election and not a school election, and hence, no woman will be qualified to vote . . .

I. Wife having interest in community property may vote in board election.

Jan. 20, 1934 No. 715 E. K. Neumann, Attorney General

With reference to your letter of January 18, 1934

Section 11 of Article 9 of the State Constitution, as amended, provides in part, relating to the borrowing ability of a school district, "and in such cases only when the proposition to create the debt shall have been submitted to a vote of such qualified electors of the districts as are owners of real estate within such school district * * *."

Your question is: Are both husband and wife eligible to vote in such an election, or is the vote limited to the one in whose name the property is registered?

A similar question was raised some years ago with reference to Section 12 of Article 9 of the Constitution. This latter section relates to the debt contracting power of municipalities, and the language used therein is as follows: "No such debt shall be created unless the question . . . shall . . . have been submitted to a vote of such qualified electors thereof as have paid a property tax therein during the preceding year."

In the case of Baca vs. Village of Belen, 30 N.M. 541, our Supreme Court held that married women, owning community property on which husband paid tax, were qualified to vote on question of issuance of bonds.

The Court, in arriving at its conclusion, quotes from Beals vs. Ares, 25 N.M. 459, as follows:

"From the foregoing, the following proposition may be accepted as settled: (1) That under the law in this jurisdiction, the wife's interest in the community property is equal with that of the husband; . . . his interest in the property . . . is not superior to that of his wife."

We believe the principle the same in both cases and the reasoning of the Court can readily and correctly be applied to your question. We conclude, therefore, that when a husband and wife own community property, both are entitled to vote upon any question submitted by amended Section 11 of Article 9 of our Constitution.

5. Creating and Changing School Districts.

A. School Districts, changing old, establishment of new.

1905-6 No. 253 W. C. Reid
Attorney General

OPINION to Supt. Pub. Instruction on question of

authority of county school supt. to change school districts and establish new districts.

HELD: County Supt. has power. Proviso.

B. Surveying the district.

August 12, 1909 Page 62 Frank W. Clancy, Attorney General

I believe that under sec. 23 of Chap. 97 of the laws of 1907, taken in connection with sec. 1545 of the compiled laws of 1897, the boundary lines and corners of school districts must be located by the county surveyor and that it would not be safe to have such a location made by any other surveyor. In any case where the county surveyor refuses to qualify, the board of county commissioners has power to fill the vacancy in the office by appointment. If the county surveyor refuses to perform the duty imposed upon him by law as to the making of these surveys, proceedings should be begun against him under the second subdivision of sec. 2 of chap. 36 of the laws of 1909 to secure his removal from office. The County superintendent would seem to be the proper person to make complaint and he can properly call upon the district attorney to act in the matter.

C. Division of school district and property.

Oct. 9, 1909 Page 82 Frank W. Clancy, Attorney General

Such a condition as the one you describe, of the division of a school district by the creation of a new county, does not appear to have been provided for by any statute. Sec. 22 of Chap. 97 of the Laws of 1907 treats of the creation and alteration of school districts, leaving those subjects in the charge of the county supt. One paragraph reads as follows:

After paying all indebtedness of the old district is chargeable to the common school fund, if any balance remains the county superintendent shall divide the said balance between the old district and the new in pro-

portion to the number of children of school age in each. All other resources such as school houses, proceeds from sales of bonds; also all similar indebtedness shall be divided between the old and the new districts in proportion to taxable property, according to assessed value, in each. In making such adjustment, the superintendent, in cooperation with the board of county commissioners, of the county in which such districts are situated, is hereby authorized to use such plans, or means, as will best subserve the mutual interests of the two districts, and their decision shall be final, subject to the right of appeal to the courts.

While this provision of the statute is not directly applicable to your difficulties, yet I think it indicates what would be the fair method of dividing any school property between your district and a new one in Curry county, if any has been there organized. I think that the legal title to your school house is in your district of Roosevelt county, and that you would be justified in moving the school house into your district, if it is a moveable building as your letter indicates, and this would be especially true if the half of the old district now in Curry county has not been organized as a district in this county. In the absence of any statutory provision, the school property after the Board has approved the assessment roll, as required should pay a fair proportion of the value to the other district. It is quite clear that if all the people of a school district unite in building a school house, and then the legislature cuts the district in two, the people in each half are equally entitled to a share of the school property, and I have no doubt that the courts would so hold if the matter came up for decision. It would be much better to settle the matter amicably outside of court.

D. Change in district boundaries.

April 20, 1910 page 128 Frank W. Clancy, Attorney General

With regard to the construction of the pgh of sec. 22 of Chapter 97 of the Laws of 1907, which appears on p. 213 of your compilation of the school laws and which

provides for the attaching of territory to a district by a change of boundary lines, like you, I am of opinion that the separate petitions to be presented must be signed by a majority of the electors residing in the district to which it is proposed to attach territory and by a majority of the electors residing in the territory so to be attached, and not by a majority of the electors of the whole district from which the territory is to be taken. I think this will be perfectly plain when we consider that the first part of the paragraph in question providing for the consolidation of school districts, requires "separate petitions signed by a majority of electors residing in the respective districts affected;" while the other clause uses different language and speaks of "the presentation of separate petitions signed by the majority of the electors residing in the respective territories affected."

E. How adjoining territory may be annexed by a town for school purposes.

1913 No. 1089 Frank W. Clancy, Attorney General

. . . It is now asked whether it may not be possible to annex the desired territory to the town of Gallup for school purposes under Section 1563 of the Compiled Laws of 1897 . . .

I am of the opinion that said Section 1563 of the Compiled Laws is still in force unaffected by Section 22 of Chapter 97 of the Laws of 1907, and is the only one under which territory may be annexed to an incorporated city or town for school purposes. Said section 22 of the act of 1907 cannot be considered as referring to anything except school districts, the creation, alteration and organization of which are committed to the county Superintendent. That officer has no control over the formation of a school district of an incorporated city or town which is co-incident with the municipal limits.

F. Definition of a school district.

June 23, 1914 No. 1254 Frank W. Clancy, Attorney General

By Sec. 22 of Chap. 97 of the Laws of 1907 it is provided that in the adjustment of property, money and indebtedness upon the creation of a new school district. "The superintendent, in cooperation with the board of county commissioners, of the county in which such districts are situated," is authorized to use such means as will best serve the mutual interest of the two districts and his decision shall be final, subject to appeal of the courts. That statute did not contemplate any such condition as one arising from a division of a district by the creation of a new county, but would furnish a guide to the best method of procedure and this would seem to require the united action of the superintendents and boards of county commissioners of both counties. If a harmonious and amicable adjustment can thus be made, there would never by any question raised by anyone, although there may be a doubt as to the strict legality of such an arrangement in the absence of any statute authorizing it. Each district could certainly appeal to the courts and possibly the most satisfactory and definite manner of settling the matter would be to bring the question before the District Court by way of a friendly suit in equity in which the several districts should be made parties and get a decree settling all possible questions upon equitable principles. You could, for one of the districts, prepare a complaint making the other defendants and setting up all the facts and could prepare an answer admitting the correctness of the allegations of the complaint and have that answer signed by the directors of the other district and upon those facts the court could make its decree.

G. Creation of new school districts.

Sept. 1, 1914 No. 1308 Frank W. Clancy, Attorney General

Re: Suit to be brought to mandamus the county school superintendent to create a new school district

under Sec. 22 of Chap. 97 of the Laws of 1907, as to whether law is mandatory or not, or is a matter of discretion with superintendent.

In 4th paragraph of statute, it declares that upon receipt of petition and statement the county superintendent shall create a new district. The superintendent, before acting, must decide whether petition and statement conform to requirements of first paragraph of section, and whether there are at least 25 children of school age in proposed new district as required by paragraph 3 of section. Provision about an appeal in last paragraph of section leaves whole subject to the discretion of superintendent. The statute says that the decision of board of county commissioners upon the appeal shall be final, but in view of Sec. 13 of Article VI of the Constitution, the action of the county commissioners cannot be considered as final. That section provides that the district court shall have "appellate jurisdiction of all cases originating in inferior law courts and tribunals in their respective districts, and supervisory control over the same."

H. Establishment of public school within Indian Reservation.

Mar. 2, 1915 No. 1452 F. W. Clancy, Attorney General

Whether or not public school district can be organized in Indian Reservation, as to which you say in view of fact that federal govt. is supposed to control such reservation, your first impression is that a public school district could not be so organized.

My opinion is that county superintendent would not have authority to establish school district within an Indian Reservation or to collect any poll tax from persons living on such reservation, the reservation being under exclusive control of the U.S. people who live there are not in a strict sense of the law residents of the state, as the land embraced within a reservation is not, properly speaking, a part of the state.

I. Change of Boundary lines of school district.

March 31, 1915 No. 1488 H. S. Clancy, Asst. Atty. Gen.

Under Sec. 25, Chap. 97, Laws of 1907, it is provided that any change of boundary lines may be made by the county superintendent but only upon petition of a majority of the qualified voters in the various territories affected. If there are no residents in those portions of dists. 7 and 26 which are to be attached to dist. 28, I am unable to see how the county superintendent can arbitrarily change the boundary lines of the dists. referred to, if the facts are as stated in Mr. Faircloth's communication.

J. School districts, division of.

April 4, 1925 No. 3815 James N. Bujac, Asst. Atty. Genn

There is a prohibition in Sec. 806 against a consolidation which would make any boundary more than ten miles but this prohibition appears to apply only to consolidation and not to division of districts. Law does not seem to cover the proposition of division of districts.

K. Establishment of school districts upon Indian and Military Reservations.

July 17, 1949 No. 2017

The question of whether or not a public school could be maintained on Indian or military reservations is discussed in a very lengthy opinion.

The question involved concerned the payment of the salary of the county superintendent. . . By the provisions of Section 2, Chapter 12, Laws of 1915, at page 25, same being the County Salary Act, the Superintendent of schools in counties of the second class shall receive a salary of $1800. However, the follow-

ing provision appears in the same section, at page 27: "And provided, further, in counties in which there are less than eleven school districts, the preceding year, the salary of the county superintendents of schools shall be seven hundred and fifty dollars, anything hereinbefore contained to the contrary notwithstanding."

In your letter, you state that there are thirteen districts in the county, two of which are on the Fort Wingate military reservation, and one in a Government building at the Government Indian School at Crown Point. You inquire whether or not public schools may be lawfully maintained upon this military reservation and at Crown Point.

. . . Because of the provisions of the Enabling Act and of the Constitution, I entertain very serious doubts as to the right to establish or maintain public schools upon Indian lands. As I have before stated, however, the solution is not necessary in determining the amount of salary to which your County School Superintendent is entitled for, exclusive of this school at Crown Point, in my opinion, you have twelve school districts in your county.

6. Municipal Districts.

A. On the creation of a municipal school district the directors of the rural district do not hold over, but an entire municipal board must be elected.

Where a new municipal district elects only two members to the board such persons are de facto members and may fill the remaining vacancies.

When the Village of Lordsburg was incorporated on April 3, 1916, the municipal school district was created from several rural districts. Only one board member was elected. Some of the rural directors wished to hold over. The rural district went out of existence on creation of the municipal district and the rural members of the board

no longer had any office.

April 19, 1917 No. 1982 Milton J. Helmick, Attorney General

Attorney-General Helmick wirtes a long opinion telling the municipal district how to untangle its school board problem and when to hold its next election, how many directors to elect and for what length of term.

B. Incorporation of town.

April 14, 1930 Page 193 (No Signature)

A rural school district does not become a municipal district by the mere incorporating of a town or village in that district but remains a rural district under control of county board until State Superintendent certifies the district to be a municipal district. County board loses control when district certified as a municipal district and has no authority to appoint new board. Board of directors also without authority after State Sup. certifies the existence of municipal district.

C. Whether a district is municipal or rural.

August 9, 1934 No. 801 E. K. Neumann, Attorney General

We have your letter of August 7, 1934 in which you ask the following questions:

"Is it necessary for the Board of Education of a Municipal School District to publish notice of receiving bids for transportation contracts in a newspaper of general circulation in the County, once each week for four weeks, as is provided in Section 120-804, Code 1929?"

"Also:

"If the average daily attendance in a heretofore municipal district was less than 100 during the last school year, but no certificate to that effect has been filed with the County Board of Education as provided by section 120-817, Code, is that District, at law, a municipal or rural school from the standpoint of regulatory laws in connection with its administration."

Section 120-804 of the 1929 Code as amended by Section 5, Chapter 119, Laws of 1931 provides that "contracts involving the expenditure of $500.00 or more shall be in writing and upon sealed competitive bids, after notices and advertisement of such bids shall have been published once a week for four consecutive weeks in some legal newspaper of general circulation in the county." My interpretation of this statute is that the notice must be to the effect that bids will be received upon a certain proposed contract and not necessarily that bids have been received. It seems to me that the purpose of the statute is to give an opportunity to anyone interested to bid upon the proposed contract. In my opinion such notice and advertisement is necessary before bids can legally be accepted.

As to Section 120-817 of the 1929 Code, it appears to me that the certificate of the county school superintendent to the effect that the average daily attendance for the last two preceding school terms has been less than 100 in a certain school district, is a condition precedent to its being classed and governed as a rural district. Consequently, in the case you mention, it is my opinion that the district is still a municipal district.

D. Consolidation, municipal and rural districts, procedure..

January, 1935 No. 853 Frank H. Patton, Attorney General

I received your letter of Jan. 5th inquiring as to the proper procedure to follow in a consolidation of your Municipal school district with an adjoining rural school district.

. . . "Changes or consolidations shall be ordered jointly by the municipal and county boards of education where such changes or consolidations affect both municipal and rural districts . . . Petitions for changes and consolidation shall be filed and elections held in substantially the same manner as in the case of rural school districts except that if a majority of the votes cast at such election shall be in favor of consolidation or change, it shall be made upon order of the State Board of Education." Also see Section 120-805 of the New Mexico Statutes, 1929 Compilation, as amended by Chapter 119, Section 6 of the Laws of 1931.

E. Formation of Union high school.

January 21, 1937 No. 1508 R. E. Manson
Asst. Atty. Gen.

Union High School District Procedure.

Four school districts in Chavez county with Hope Municipal School District in Eddy County and form a Union High School. Doubt if this could be done because of the fact that some of school districts are in one county and remaining municipal district is in another. Sec. 20-808 NM Code annotated 1929 Compilation providing for consolidation of rural school districts which may be in two counties does not apply to Union High School Districts.

Sec. 120-1002 N. M. Code 1929, does provide that "two or more contiguous school districts" may unite for purpose of forming a Union High School. There is no provision in this section or any of the relative sections nor in Chap. 119, Laws of 1931 amendatory thereof, which provide for custody and payment of funds derived from taxation by Union High School Districts where proposed Union High School District might be comprised of districts situated in different counties.

Take matter up with representative or senator for district and ask him to introduce appropriate legislation permitting such procedure.

F. District, creation of municipal school district.

1941 No. 3738 Edward P. Chase, Attorney General

. . . You state in substance that the municipality of Taos, being School District No. 1, contemplates extending its boundries, and in doing so a part of the territory to be annexed to the said municipality will be in School District No. 39. Under the above statement of facts, you desire to know whether or not the territory so annexed to the municipality of Taos would become a part of Municipal School District No. 1 or remain as a part of School District No. 39.

Section 120-901 of the New Mexico Statutes annotated 1929 . . . In 1935, construing the above section addressed to Mr. Wesley Freeburg, superintendent of the Taos Public Schools, this office held that when the Village of Taos originally incorporated, so much of the school district as was included within the incorporated limits of said municipality, automatically became a municipal district . . .

See opinion Nos. 936 and 3423.

7. Changes of District Boundaries as Affecting Pre-existing Assets and Liabilities.

A. New school district--funds--failure to hold school--penalty.

1905-06 No. 257 W. C. Reid Attorney General

OPINION to Supt. Pub. Instruction defining position of newly formed school district with relation to receiving school funds; on status of district which fails to hold school at least three months in each year, and on question of removal of directors so failing to perform their duty.

HELD: Co. Supt. must apportion its share to new district before it can come into possession of such funds. Where school is not held in any district for at least three months in one year unused funds revert

to general school fund to be used in next apportionment. Director can be removed for failing to do duty; also punished by fine and imprisonment.

B. School district--division of--funds of.

1905-06 No. 275 W. C. Reid
Attorney General

OPINION to Supt. Pub. Instruction on provisions of law touching the division of school funds of a district when such district is divided.

HELD: Such funds should be divided or apportioned by county superintendent in proportion to the school children residing in each district.

C. New school district--division of funds and equipment.

1905-06 No. 345 W. C. Reid
Attorney General

OPINION to Supt. Pub. Instruction on questions touching status of School District 16, Otero Co., with relation to newly incorporated town of Orogrande, and as to whether newly incorporated town created a separate and distinct school district, etc.

HELD: Upon incorporation of a portion of school district as town that portion lying within limits of the town shall henceforth be separate school district, provided remainder of district contains 50 school children. If it does not then entire district would come under supervision of Board of Education of the town as provided by Sec. 1 63 C. L. '97. If bonds have not been voted then it is duty of directors of old district and Board of Education of town to make equitable division of both assets and liabilities. 2. New district of Orogrande may create indebtedness by voting bonds for new school house up to 4 per cent of assessed value of property of town; that is with debt it now has by assuming its portion of debt of old district, it may increase debt until it reached above limitation.

D. School district divided to become part of two others--division of assets and liabilities.

OPINION to Supt. Pub. Instruction on division of assets and liabilities of district that has been divided so as to become part of two other districts.

HELD: Debts should be divided in proportion to assessed value of taxable property in the portions so annexed. School directors of several districts should meet and determine among themselves respective liability that each should assume in proportion to the public property so received or in proportion to the assessed value of taxable property that each received and should they fail to so do a court of equity would make the division.

E. Division of property on creation of new district.

August 13, 1909 Page 67 Frank W. Clancy, Attorney General

On subject of division of property and indebtedness under Sec. 22 of Chap. 97 of the laws of 1907 of a school district when a new district is created.

Your recommendation as to the action by the school directors of the new district in passing a formal resolution assuming its portion of the bonds of the original district, to be filed in the office of the county superintendent and the county treasurer, appears to be a valuable one, although not positively required by any statutory provision. It would make a record definite and clear in the county offices as to the division of the indebtedness under said sec. 22. That division of the indebtedness appears to be committed to the superintendent and the boards of county commissioners, and some record should be made of their proceedings in making the division, and I suggest that in addition to what you recommend in your letter, that those proceedings should appear on the record of the county commissioners, copies thereof being also filed in the offices of the superintendent and treasurer.

F. Apportionment of county high school funds between Socorro and Magdalena in Socorro County.

August 29, 1914 No. 1307 Frank W. Clancy, Attorney General

Chap. 20 of Laws of 1913 makes provision for apportionment of money to new high school when an additional one is established, "provided, further that when an additional high school shall be established, it shall receive, during the first school year, not to exceed one-third of the moneys in the county high school fund." Under Sec. 1 of Chap. 20 of Laws of 1913 amends Sec. 7 of Chap. 57 of Act. of 1912, so as to require county treasurer, when he has collected tax, to place same to the credit of the district where any such county high school is situated. When November tax collections, approximately one-half of the whole for the year, were made last year, there was but one high school in your county, and that money should go to the credit of Socorro. The high school tax collected after your school was established in February, is subject to the provision about an additional high school, and your school would be entitled to a share of it, not exceeding one-third.

G. Liability of territory annexed to a city for school purposes for indebtedness of district from which it has been taken.

June 8, 1916 No. 1818 F. W. Clancy, Attorney General

Whether when territory is annexed to an incorporated city or town for school purposes, such annexation relieves the territory annexed of liability for the indebtedness of the school district from which it has been taken, and if so, whether such annexed territory loses its interest in the assets of the original school district.

The answer may be found in the general rule to which I have already referred as being set out in Dillon on Municipal Corporations, and the district from which the territory had been taken will remain liable for all indebtedness and the annexed territory would go free,

therefrom . . . It follows that the annexed territory must lose its interests in the resources of the original school district, except so far, in the present case, as it retains an interest in the trust estate created by the Act of Congress.

H. Disposition bonded indebtedness in school district consolidated in contiguous counties.

April 2, 1921 No. 2886

In reply to an oral request from Mr. Douglas for an opinion regarding the disposition to be made of the bonds of school districts in contiguous counties when such districts have been consolidated into one district, I would say:

The provisions for the consolidation of rural school districts, where the districts are situated in two or more counties, are contained in Chapter 14, Laws 1919.

. . . I am of the opinion that the consolidated district does not assume the bonded indebtedness of the former fractions that make up the new district.

I. Expenses transportation pupils in newly consolidated school districts.

July 9, 1921 No. 3034

You ask if School District 43, which is a rural district, is consolidated with School District 33, which is a municipal district, who should pay the expense of transportation.

All expenses of all kinds incurred by a consolidated district must be paid by that district. The expenses cannot be divided unless one district agrees voluntarily to assume a larger part of such expenses than the other district.

J. Levy of tax upon consolidated school district for payment bonds of original district.

June 9, 1922 No. 3477

. . . asking if area added to a bonded school district is subject to tax assessment for the payment of interest and to create a sinking fund to cover the payment of such bonded indebtedness in the original district, I wish to advise:

The general rule is that where boundaries of school districts are changed in the absence of a statutory provision for the division of the property and the apportionment of debts, the property is left where it is found and the debt remains upon the original debtor. 24 R. C. L. page 566, sec. 10.

K. Distribution school funds to districts consolidated with districts of other counties.

November 17, 1922 No. 3628

In reply to your letter of the 15th instant, asking how much money you shall instruct the county treasurer to set aside to Curry County for sixteen sections that have been consolidated with Curry County, I wish to advise:

. . . the provisions for the apportionment of funds to the consolidated district is governed by the provisions of Section 11, Chapter 105, Laws 1917, and Section 2, Chapter 14, Laws 1919.

The two sections provide that the apportionment shall be based upon the number of school children residing in the district over five and under twenty-one years of age as the same shall appear from the last annual report of the clerk of the said school district. The funds to be contributed to the consolidated district shall be based upon the said number of school children in the fraction of the said consolidated district that lied in Quay County. The apportionment should be made the same as if such fraction in Quay County were a separate school district therein.

L. Effect of consolidation on limitation of indebtedness.

Jan. 13, 1930 Page 165 E. C. Warfel, Asst. Atty. Gen.

Authority of consolidated Dist. No. 34 to issue additional bonds: Sec. 120-805 of 1929, provides for consolidation, and county board reapportions resources, debits and credits of affected districts as it shall seem proper, subject to review by state board of education upon application of board or school directors or taxpayers aggrieved.

"No bonds shall be issued in any school district which with existing indebtedness exeeds six per cent of assessed valuation of taxable property therein, as such valuation is shown by last preceding general assessment.

M. Schools, bond issue on consolidation.

March 28, 1931 No. 103

We have your letter of March 24th regarding the proposed bond issue of School District No. 9 in the County of Bernalillo. As we understand, this district has voted to divide and it is assumed that the regular statutory proceedings were followed in this respect.

You wish to know if at this time such district has the right and power to float a bond issue for building purposes.

Section 120-805 of the New Mexico Statutes. Annotated, 1929 Compilation, sets forth the procedure to be followed in connection with changes and consolidations of school districts and further provides that the order of consolidation or change shall not be effective until July 2nd next following the making of such order.

"That for the purpose of voting bonds for the purchase of grounds and erection and furnishing of school buildings, such consolidation shall be complete from the time such order is signed by the county board of education as aforesaid, etc."

This section then validates school bond elections heretofore held between the time of signing the order and July 2nd and further provides that all bonds by authority of such elections are hereby validated, ratified and confirmed.

N. Indebtedness--of two districts forming a Union High School not affected by combining.

February, 1935 No. 880 Frank H. Patton, Attorney General

In answer to your inquiry to this office under the date of January 29th, with respect to the existing indebtedness of school districts, which combine to form a union high school district, you are advised that the union of the districts is for high school purposes only.

The bonded indebtedness of each district will remain as the debt of that district only and the other districts coming into the union high school consolidation will not be responsible for any portion of the existing indebtedness of another district.

CHAPTER III

SCHOOL BOARD PROCEDURE AND RECORDS

A. Official oaths of school directors.

May 19, 1921 No. 2977 Harry S. Bowman
Attorney General

In reply to the question as to the right of a school director to serve as such who has taken his oath of office before a notary public, I would say that in my opinion the provision of section 4852, Code 1915, requiring that such oath shall be administered by the director serving, etc., is directory and not mandatory, and the "shall" may be read as "may" and that therefore a person qualifying by taking oath before a notary public would be legally qualified to serve as such school director.

B. Illegal acts of school directors and members County Board of Education.

June 10, 1922 No. 3481 Harry S. Bowman,
Attorney General

In reply to your letter of the 7th instant, submitting two inquiries regarding alleged illegal acts upon the part of school officials, I wish to advise:

You state that a clerk of one of the school districts has been collecting tuition from pupils who reside outside of the district and has been accounting to the district for only a small part of such collections. You state that you have written him demanding an accounting, but that he has failed to reply and ask if he may be removed from the Board and how you should proceed.

The matter should be submitted to the District Attorney for presentation to the next Grand Jury and a complaint should be filed against the offender in a justice of the peace court for embezzlement of public funds.

. . . You state that one of the members of your county Board of Education is handling the material for one of your new school buildings and ask if this is not illegal

and if so if the member cannot be removed from the board, and if he can how to proceed.

Section 4917 prescribes that persons identified in an official capacity with the pubulic schools, or with the higher educational institutions, are prohibited from being a party, directly or indirectly, to any contract, or interested in any contract in connection with the operation or maintenance of the schools or educational institutions; that any contract in which they are so interested shall be void and the members of any educational board voting for the same shall be guilty of a misdemeanor and liable to punishment accordingly.

C. Boards of Education must act as a corporate body and not individually.

August 28, 1922 No. 3557 Harry S. Bowman, Attorney General

In reply to your letter of the 22nd instant asking if the President and Vice President of a School Board have authority to place an order for school furniture without the knowledge of the other members of the Board, I wish to say:

No corporate entity, it matters not whether it be municipal or otherwise, has authority to act except through the instrumentalities provided by law. The municipal Board of Education, unless it has properly authorized certain officers to act as purchasing agents and subsequently ratifies the acts of such agents in making the purchases, is not bound by the action of individuals in placing orders for supplies.

In my opinion the Board cannot be held liable for the purchase of school furniture as outlined in your letter under the circumstances therein stated.

D. Publication of expenses:

March 31, 1943 No. 4261 C. C. McCullough, Asst. Atty. Gen.

Sections 10-505 and 10-506 of the NM 1941 Compilation provide that County and Municipal Boards and Boards of

Education in this state shall prepare a monthly summary of minutes, showing all business transacted, the source and amount of all monies received, and a detailed statement of expenditures, list of all warrants issued, to whom issued, and the amount and purpose thereof. Such summary shall be filed with clerk of each board and be a public record, copy therefore being mailed to each legal newspaper published in the county.

Sec. 10-507 of the NM 1941 Compilation touches particularly on your question, as follows: "On or before the 10th day of each month . . . a full and complete list of expenditures made during the preceding calandar month, and shall give the names of all persons, firms, corporations, associations or partnerships to which disbursements were made." If several disbursements are made to the same person or firm during the month they could all be grouped under the one name in preparing this list, and would not have to be set out separately in accordance with each separate warrant issued to the same person, as would be required in making the list and summary of the minutes above mentioned."

E. Payment of member per diem.

August 22, 1945 No. 136 Thos. C. McCarty, Asst. Atty. Gen.

Replying to your request of August 20, 1945, for an opinion upon the following question. Under our present law, is it possible for us to pay board members a per diem fee for services rendered at called meetings?

Section 55-2303 of the N. M. 1941 compilation provides, in part, as follows:

"Such board shall serve without compensation or salary except that they may be refunded actual cash expended by them in necessarily attending the meetings of such board."

A bill was introduced in the Senate at the 1945 session of the Legislature, which provided for a $10.00 per diem for services rendered by members of the Board of Regents. This bill passed the Senate, but was not called for a vote in the House, and therefore did not

become a law. It is, therefore, my opinion that it would not be "possible" to pay the board members a per diem fee for services rendered.

F. Signing of school warrants.

August 22, 1945 No. 137 C. C. McCulloh, Attorney General

In your letter dated August 21, 1945, you state that at a meeting of a certain County Board of Education the Board organized and elected a Chairman and Vice-Chairman, and thereupon the minutes show that the Board delegated to the Vice-Chairman all of the powers of the Chairman, except that of presiding at the Board meetings when the Chairman was present, for the reason that the Vice-Chairman lived conveniently near the County seat, and would be in a position to sign school warrants without the necessity of a special trip to the County seat by the Chairman. The minutes also provided that the Vice-Chairman shall be placed under the same bond as the Chairman. You inquire whether the Board may delegate such powers to the Vice-Chairman.

I am enclosing a copy of Opinion No. 4050, to the effect that there is no statutory manner provided for signing and countersigning school warrants, but that the only requirement is that such warrants or vouchers be issued by order of the Board of Education. Since the Board of Education cannot approve expenditures and order warrants drawn to pay therefor, except when the Board is convened in a meeting, it would not be proper or legal for the Chairman, Vice-Chairman, or any other individual member of a Board, to sign and issue warrants for expenditures not approved by the Board. See Landers vs. Board of Education of Town of Hot Springs, 45 N. M. 446.

Section 55-804 of the N. M. 1941 Compilation requires a bond from the Chairman in the sum of $3,000.00, conditioned upon the faithful performance of his duties, and the proper and legal drawing of all school vouchers and warrants, and disbursements of school funds. The Chairman is the only member of the Board, aside from the Superintendent, required by statute to be bonded, and the Chairman is therefore primarily liable for

proper disbursement of school funds. If the School Board desires to delegate authority to sign warrants to the Vice-Chairman, the bond of the Vice-Chairman should probably run to the Chairman, for his protection, because of his primary liability under the law.

At a Board meeting, in the absence of the Chairman, the Vice-Chairman would have all the powers of the Chairman, including the power to sign warrants. Since a Board meeting is a necessary requirement in order to approve expenditures, I fail to see how this delegation of authority to the Vice-Chairman will result in any material benefit to the school system. However, in view of the lack of any statutory prohibition, and under the limitations above set forth, I believe that the delegation of such power to the Vice-Chairman is valid.

G. Municipal board has power to discharge secretary.

May 11, 1926 No. 3886 Robert W. Dow, Asst. Atty. Gen.

A member of a municipal school board may not be discharged as such member for reason that he is elected for specific term in conformity with state law, but secretary of board is elected, or employed, by board itself, and the law does not specify any certain length of time for such secretary to hold office. I see no reason why the Board would not have full power and authority to select secretary, and they would also have power and authority to discharge such secretary if for any reason his work is not satisfactory to the Board.

CHAPTER IV

SCHOOL OFFICERS

1. Eligibility and Election of Officers

A. As to election of members of Boards of Education.

January 9, 1915 No. 1417 F. W. Clancy, Attorney General

You say that next election is approaching to fill vacancies caused by terms expiring of two members of your board who were elected for a two-year term in 1913, and that the query is as to whether the two to be elected in April are to be elected for a two or four year term.

Legislative intention was not to have all members of the Board of Education elected at any one time after election in 1913, but I fear that intention is not clearly expressed in act.

We ought to have additional legislation to make this clear, but if we do not get any, my opinion is that you should elect two members in April to hold office for four years and in 1917 there should be elected three members to hold office for four years from that time.

B. Validity of ballots used in the election of Board of Education for city of Clovis.

April 10, 1915 No. 1495 H. S. Bowman Asst. Att. Gen.

Your request for an opinion from this office in regard to the validity of certain ballots used in election of Board of Education for city of Clovis, and other matters mentioned in letter of C. Superintendent of Curry County, L. C. Mersfelder, directed to your office, I do not consider it advisable at this time to render an opinion upon these matters.

I might suggest that there is some question as to the validity of any of the ballots printed according

CHAPTER IV

SCHOOL OFFICERS

I. Eligibility and Election of Officers

A. As to election of members of Boards of Education.

January 9, 1915 No. 1417 P. W. Clancy,
Attorney General

You may vote at an election in addition to fill vacancies caused by terms expiring of two members of your board who were elected for a two-year term in 1913, and that the query is as to whether the two to be elected in April are to be elected for a two or four year term.

Legislative intention was not to have all members of the Board of Education elected at any one time after election in 1913, but I fear that intention is not clearly expressed in act.

We ought to have additional legislation to make this clear, but if we do not say, my opinion is that you should elect two members in April to hold office for four years and in 1917 there should be elected three members to hold office for four years from that time.

B. Validity of ballots used in the election of Board of Education for city of Clovis.

April 10, 1915 No. 1495 E. S. Bowman
Asst. Att. Gen.

Your request for an opinion from this office in regard to the validity of certain ballots used in election of Board of Education for city of Clovis, and other matters mentioned in letter of C. Superintendent of Curry County, L. C. Hazelader, directed to your office, I do not consider it advisable at this time to render an opinion upon these matters.

I might suggest that there is some question as to the validity of any of the ballots printed according

to forms submitted, as neither one of them designate the office to be filled. The so-called citizen's ticket shows names of twelve candidates, while the maximum number of offices to be filled in only five.

C. Election of Board of Education in town or village.

October 30, 1915 No. 1665 F. W. Clancy
Attorney General

Mr. Bickley says that one of his school districts has just been made a municipal district, and he desires to be advised as to how the two other members of the school board are to be selected. I am satisfied from what Mr. Asplund has told me, and from my own examination, that the there is no legislation to provide for such a contingency.

I am of opinion as a matter of necessity that the suggestion which you have made is the only practical one, and that is, in substance, that the three existing school directors must assume to be the Board of Education for the new municipality, and, under Sec. 4880 of the Codification, which gives such a board power to fill any vacancy which may occur therein, proceed to select two other members so as to complete their number.

D. Validity of school election held by only one director, and as to resignation of director.

April 10, 1916 No. 1777 F. W. Clancy,
Attorney General

In a school district the notices for the annual election of a school director were posted as required by Sec. 4852 of Codification, to be held on the first Monday of April, 1916. On day of election, which is the day fixed by the statute itself, it appears that one of the three directors was absent from the state, one director declared he had resigned and would not therefore participate in holding of the election, so that there was but one director present, who proceeded to hold election, and who as I assume certified the result of the election to County School Superintendent as statute requires. The County Superintendent had stated that he has received no resignation from the director who said that he had resigned.

I will say that there can be no possible doubt of the wrongfulness of any conduct which prevents or tends to prevent the people from holding an election fixed and required by law.

Before coming to that, however, I must first call attention to the fact that a man cannot rid himself of a public office by simply declaring that he resigns, or by offering a resignation.

Assuming that the election was fairly conducted and that every voter had an opportunity to vote, and that the result has been correctly certified to the County Superintendent, even though it may have been by only one director, the application of the doctrine above set forth necessarily leads us to the conclusion that the election was valid, and that the director elected thereat must be held entitled to the office.

E. These two opinions were given in reference to the election and method of election and balloting for members of the school board.

The substance of the first opinion is as follows:

April 10, 1917 No. 1973 Milton J. Helmick, Attorney General

"In a school election, where a vacancy is to be filled, the ballots should specify the candidates for such unexpired term. A candidate who received a majority for an unexpired term is elected over a candidate who received more votes for a full and unexpired term together."

In the second opinion a sample ballot is set up for guidance in the election and the following opinion given:

April 13, 1917 No. 1976 Milton J. Helmick, Attorney General

"In a school election, ballots must designate candidates for the full term and for any unexpired term, and ballots which contain no such designation are invalid and canot be counted."

F. Procedure in case of tie vote for school directors.

April 14, 1922 No. 3379 Harry S. Bowman, Attorney General

Referring to the attached letter from Mr. Canuto Trujillo under date of April 9th, requesting an opinion regarding the procedure to be followed in a case where there is a tie vote for the office of school director, I wish to advise you as follows:

The only provision in our statutes which governs the procedure to be followed in a case where there is a tie vote is Section 2045, Code 1915, and this act refers only to tie votes in offices of probate judge, sheriff, justice of the peace or constable, and, therefore, cannot apply.

Where there is a tie vote in an election there is no election, and unless the statute provides for a method of determining who is elected or authorizes another election, the incumbent holds over until the election in the regular order as provided by law. This would be the procedure in the case mentioned in Mr. Trujillo's letter.

G. Election of Board.

January 31, 1929 Page 195 M. A. Otero, Jr.,

Who pays for local school election--as this is an expense of the school district, it would seem that the school district itself would have to pay for it.

H. Schools, Residence qualification of director.

August 5, 1909 Page 62 Frank W. Clancy, Attorney General

There is no general law requireing as a qualification for office, that a school director must reside within the district where he is serving.

I. Schools, qualification of director.

March 24, 1910 Page 116 Frank W. Clancy, Attorney General

You are correct in statement that only positive qualification of a school director is the one to be found in Sec. 857 of the Compiled laws, which declares that no person who cannot read and write sufficiently well to keep his own record in either the English or Spanish language, shall be eleigible to hold the office of school director. Such other statutory provisions as there may be are in the nature of disqualifications, such as you will find in Sec. 1647 of the Compiled Laws as amended by Chapter 134 of the Laws of 1909.

As to the question of the qualification of a woman to hold the office as school director, I invite your attention to the opinion of this office, given by my immediate predecessor under date of March 27, 1908, addressed to the Governor, in which, after careful consideration is reached that a woman can hold the office of County School Superintendent; I concur fully, and the views given are equally applicable to the office of school director.

NOTE: See Sec. 2, Article VII of the Constitution as to qualifications to hold office.

J. Schools, discussion of citizenship of member of board of school directors.

April 15, 1914 No. 1192 Ira L. Grimshaw, Asst. Atty. Gen.

Your letter asking our opinion as to whether or not Mr. J. E. Owens is entitled to hold the position of school director because of facts affecting his citizenship. Mr. Owens came to this country quite young, in company of his father, also an alien; when younger Owens was fifteen his father declared intention of becoming citizen and was naturalized when son obtained his majority, and that the younger Owens was never naturalized.

Sec. 2172 of the Revised Statutes of the U. S., in effect, provides that children of persons becoming

naturalized, if under the age of twenty-one years at the time of such naturalization and dwelling within the U. S. shall be considered citizens.

So far as we are able to ascertain, this is the only provision of law under which Mr. Owens could claim to exercise the rights of citizenship. It would seem that Mr. Owens is not a citizen of the U. S., a conclusion reinforced by a law laid down by the Supreme Court of the U. S. in cases that the method and procedure of naturalization prescribed by the Congress of the U. S. are exclusive.

Case of Boyd vs. Thayer, quoted. Opinion that if child is under age at declaration of intention, and father naturalized before child is twenty-one, child is citizen. Boyd case - father naturalized when younger Boyd was fifty-six. Declared citizen under "collective naturalization" - annexation of public domain under certain laws and circumstances, and because the declaration of intention of the father was made while Boyd was under age, and that he believed for years he was a citizen, and held many public offices.

It appears to the writer that Mr. Owens acquired no rights of citizenship by the naturalization of his father, and to all intents and purposes is an alien of the U. S.

Notwithstanding this conclusion reached by us, neither your department nor Mr Owens ought to anticipate any trouble. We do not understand that there is any effort being made to expel or oust Mr. Owens from office. This can be accomplished only by quo warranto. The consent of this office must first be obtained before a suit could and would be entertained in the courts.

K. Residence qualification of director.

Statute requiring member of Boards of Education to reside at least two years in the district is violative of Section 2, Article 7, of the Constitution, and is therefore void.

September 11, 1917 No. 2051 Carl A. Hatch,
Attorney General

We have your letter of the 3rd, and note your request for advice as to the construction of Section 73, of the School Laws, the same being Section 4879, the 1915 Codification. In reply thereto, we advise as follows:

Section 4879 among other things provides: "Each member of the Board of Education shall be a qualified elector of the State of New Mexico, and shall have resided in the district at least two years next preceding the election, and shall be a tax payer."

Section 2, Art. 7 of the Constitution contains this language: "Every male citizen of the United States who is a legal resident of the State, and is a qualified elector therein, shall be qualified to hold any public office in the state, except as otherwise provided in this Constitution."

If a member of the Board of Education is a public officer within the purview of this constitutional provision, then Section 4879 of the Statutes, is in direct conflict therewith, and, necessarily, the statutory provision so far as conflicting with the Constitution, is void.

L. School Board members, residence requirements.

March 18, 1932 No. 419 E. K. Neumann
Attorney General

Your letter of the 16th instant asks if in elections of members of local boards of education, it is possible for persons to be elected to such boards who are patrons of the school, but who reside outside the school district in which the election is held, and, if such can be done, can patrons of the school, but who reside outside the district, vote in such elections.

Patrons of a rural school district, in our opinion, are not entitled to vote in a school election held in the district of which they are patrons but of which district they are not residents. Our reason for this conclusion is based primarily upon Section 120-813 of the 1929 Code which, relating to elections for directors of rural school districts, in part is as follows:

"* * * Only legal voters residing in said district shall be qualified to vote at said election; * * *"

Strengthening our conclusion further in the case of Klutts Vs. Jones, 20 N. M. 230, it was said by Chief Justice Roberts, speaking for our Supreme Court, "Appelle admits that a person, to be a qualified voter at a school election, must be a resident of the school district at the time he offers to vote at an election held therein. That this is true is indisputable."

M. Tenure of office of director in Union High School Board.

April 29, 1930 No. 158 J. A. Miller, Asst. Atty. Gen.

Member of board of directors of district of union high school shall hold office as union high school board member so long as he shall remain a member of the board of directors of district.

Local board of directors can continue a member of cancel office at will.

Member at large - appointed by combined members of boards of all districts included in union district, if they fail to agree, such member shall be any qualified elector resident within the union high school district, not necessarily a member of the board of directors of any of the districts.

2. Vacancies on Boards of Education.

A. Municipal School Board vacancies, when filled by the State Board of Education.

July 12, 1939 No. 3208 F. M. Sedillo, Attorney General

Sec. 5 of Chap. 204, N. M. Session Laws of 1937: "In event of resignation of majority of members of any municipal Board of Education such vacancies shall be filled by appointment by the State Board of Education."

B. Board member, when office becomes vacant.

1941 No. 3712 Edward F. Chase, Attorney General

I should like to have an opinion regarding the legality of a school board member's continuing to serve and vote in board meetings in the district in which he was elected when he has since that time moved to another town in another district.

Assuming that the party about which you speak in your letter has lost his residence in said District and permanently removed himself therefrom, in view of the foregoing statutes and rulings by our Supreme Court, it is my opinion that said school board member may legally continue to serve as a member of the board until his successor in office by proper appointive or elective power had duly qualified for office.

According to our Constitution . . . every officer holds until his successor qualifies, except when he is removed. . .

C. Removal of school director from county.

September 19, 1922 No. 3589 A. M. Edwards Asst. Atty. Gen.

I have your letter of September 18th, in which you state that one of the school directors for District No. 29 of Sandoval County, who has resided at Jemez Springs, moved to Albuquerque last March, and you desire to know whether he can still serve as school director of District No. 29.

Under Sub-section 6 of Section 3956 of the 1915 Constitution, absence from the county for six consecutive months by a school director, vacates his office. If the director whom you mention has left Sandoval County for six consecutive months, his office is vacant, and the vacancy can be filled in the manner provided by law.

D. April 13, 1916 No. 1781 F. W. Clancy, Attorney General,

No vacancy occurs in district school board unless member moves out of county.

Question of whether a person can serve as a member of school board of a district, even though he has moved out of the district for which he had been elected during his term, provided he does not move out of the county.

Removal from such sub-division cannot be allowed to have the effect of creating any vacancy in the office. We have statutory provisions as to how an office may become vacant, which you will find in Sec. 3956 of the Codification, and by the fifth sub-division of that section it is provided that an office becomes vacant when the officer removes from the county in which he is elected.

E. Vacancy in town Board of Education created by resignation.

April 12, 1915 No. 1497 H. S. Clancy, Asst. Atty. Gen.

Opinion of this office in regard to identity of appointing power to fill vacancies in case of resignation from town board of education elected under provisions of Chap. 67 of Laws of 1913.

Town board elected under provisions of laws of 1913 has full power to fill any vacancy in its body occasioned by resignation.

F. Vacancies in Board of Education.

March 5, 1915 No. 1459 F. W. Clancy, Attorney General

Mr. J. J. Jaffa was elected in 1913 to four-year term on Board of Education for District 1, including Roswell; shortly after election he resigned, and board appointed Mr. Nicholas to fill vacancy, and the ques-

tion is whether you shall elect someone to fill out two years that Mr. Jaffa would have been entitled to serve, or does Mr. Nicholas hold over until Mr. Jaffa's term would have expired?

My conclusion is that at the approaching election this Spring, you should elect not only successors to the two members who were elected in 1913 for two years, but also a member to fill the unexpired term of Mr. Jaffa.

3. Incompatible Offices.

A. Member of Board of Education should not write insurance upon school buildings.

1913 No. 1071 Frank W. Clancy, Attorney General

. . . Two matters are presented for consideration, one of which is as to whether a member of the board is prohibited from writing insurance on school buildings, and the other as to whether a member may sell school supplies, such as chalk, erasers, blackborads, etc. to the board.

. . . The statute . . . prohibits members of Boards of Education and school directors "from acting as the agent for any person or firm engaged in the selling of school furniture, apparatus, etc., or to receive any commission attending the use of such . . . for use in their respective districts.

The intention of the legislature was, undoubtedly, to prevent any member of the Board of Education, or school director, making use of his position for his own personal benefit, . . .

B. Board member as member of Legislature.

1913 No. 1143 Frank W. Clancy, Attorney General

Membership on county school board must be considered as a civil office.

"No member of the lesislature shall, during the term for which he was elected, be appointed to any civil office in the state."

This is all that there is on the subject of your question. If a member of the legislature should actually serve on a city school board, I am of opinion that the validity of his official acts would not be questioned and, in all probability, no one would raise the question of his disqualification to serve in that capacity. Membership on a city school board must be considered as a civil office.

C. A person identified in an official capacity with the public schools cannot be a party to a contract in connection with the operation of schools.

November 26, 1915 No. 1688 F. W. Clancy, Attorney General

Your letter of 24th in which you ask whether the fact that the wife of a successful bidder for the construction of a school building is the clerk of the school board which is to let the contract, would bring the transaction within the prohibitions contained in Sec. 7, of Chap. 70 of Laws of 1913, which reappears as Sec. 4917 of the new codification, so that any contract made with that be void.

The portion of that section which the objecting party whose bid appears to have been almost $600 higher, must rely on is as follows, omitting some words which would have no relation to this particular case:

"and all persons identified in an official capacity with the public schools . . . supported in whole or in part by the public funds of this State, are prohibited from being a party directly or indirectly to any contract or interest in any contract, in connection with the operation and maintenance of such public schools . . . and any contract inwhich they are so interested shall be void, and the members of any educational board voting for the same shall be guilty of a misdemeanor and liable to punishment accordingly."

"No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state."

This is all that there is on the subject of your question. If a member of the legislature should actually serve on a city school board, I am of opinion that the validity of his official acts would not be questioned and, in all probability, no one would raise the question of his disqualification to serve in that capacity. Membership on a city school board must be considered as a civil office.

C. A person identified in an official capacity with the public schools cannot be a party to a contract in connection with the operation of schools.

November 25, 1915 No. 10688 F. K. Olaney,
Attorney General

Your letter of 24th in which you ask whether the fact that the wife of a prosecuting official for the construction of a school building is the clerk of the school board which is to let the contract, would bring the transaction within the prohibitions contained in Sec. 7, of Chap. 70 of Laws of 1913, which reappears as Sec. 1917 of the new codification, so that any contract made with that be void.

The portion of that section which the objecting party whose bid appears to have been almost 5000 higher, must rely on is as follows, omitting some words which would have no relation to this particular case:

"and all persons identified in an official capacity with the public schools . . . supported in whole or in part by the public funds of this State, are prohibited from being a party directly or indirectly to any contract or interest in any contract, in connection with the operation and maintenance of such public schools . . . and any contract knowingly they are so interested shall be void, and the members of any educational board voting for the same shall be guilty of a misdemeanor and liable to punishment accordingly."

The attempt must be to claim that the wife is "interested" in the contract on account of her being the wife of the successful bidder. If that is the grounds of objection, I am of opinion that there is nothing to it. The statute means a pecuniary interest in the contract, and the mere fact of marriage does not necessarily involve any pecuniary interest of either of the married persons in contracts made by the other.

D. Interest of wife, who is a school officer, in a school contract entered into by her husband.

December 14, 1915 No. 1696 Frank W. Clancy, Attorney General

I would like very much if you would make a test case of this schoolhouse contract and obtain a decision of courts on the subject, as I can see that you will never feel satisfied unless there were made a judicial decision.

Your further question as to stockholders in your company being eligible to serve on school boards, their interest in the company however small it may be, would be of a pecuniary character and from that point of view would fall within the prohibition of the statute, although it may be ture, as you say, that their relations are not as close with the company as they would be with their husbands. The closeness of the relations between persons is not involved in the consideration of this question. The relations between intimate friends may be of the closest character, and yet the mere fact that one of them is a member of the board would not make him fall within the prohibition of the statute.

E. Member of Legislature eligible to election as school director.

April 8, 1916 No. 1776 H. S. Clancy, Asst. Atty. Gen.

You ask for opinion of this office as to whether a member of the legislature of New Mexico is eligible to election as a school director and can hold that office at the present time.

Opinion that there is a difference between work "appointed" and the word "elected," insofar as they are to be considered in a case like this, and this view is well supported by decisions of different courts of this country and is considered in the case of Territory vs. Armijo, 14 N. M. p. 205.

F. Same person cannot hold office District Attorney, City Attorney and member Board of Education.

January 22, 1921 No. 2270-A Harry S. Bowman, Attorney General

You, therefore, as District Attorney, would be placed in the position of prosecuting the members of the Town Board to which you are legal adviser, or of the Board of Education of which you are a member. For this reason the duties of the two offices are incompatible and should not be held by the same person.

The incompatibility goes further, for it would be your duty as District Attorney to prosecute the members of either one of the said boards for any violation of the statutes involving their official duty.

G. Offices Justice of Peace and School Director may not be held by same person.

January 24, 1921 No. 2796 Harry S. Edwman, Attorney General

Your letter of the 17th instant addressed to the Secretary of State asking if the statutes provide for one person holding the office of Justice of the Peace and School Director at the same time, has been referred to this office for reply.

There is nothing in the statutes of this state which either specifically permits or prohibits the holding of these two offices by one person.

We are of the opinion, however, that the duties of the two offices are incompatible and, therefore, that one person could not perform the duties of both without conflict.

H. Same person may hold office of member Board of Education and of Board of Trustees of village.

April 17, 1922 No. 3381 Harry S. Bowman, Attorney General

Complying with your oral request for an opinion regarding the holding of the office of a member of the Board of Education of a municipal school district and the office of a member of the Board of Trustees of an incorporated village by the same person, I wish to advise:

. . . You will note that there is no prohibition against a member of a Board of Education being a member of the village trustees nor is there any prohibition against a member of the village trustees being a member of the Board of Education.

. . . I am therefore of the opinion that there is no statutory objection to the holding of the said two offices by the same person in the village of Belen.

I. Member of School Board may not receive pay as janitor.

May 24, 1922 No. 3446 Harry S. Bowman, Attorney General

In reply to your letter of the 21st instant, asking if a member of the school board of the district may also serve as janitor of a school in the said district and draw a salary for such services, I wish to advise you:

It has been repeatedly held by my predecessors ir this office and by myself that members of school boards and Boards of Education may not be interested in any contract in connection with the operation or maintenance of a public school in their district, and that any contract in which any member of such a board is so interested shall be void and the members of such board voting for the same shall be guilty of a misdemeanor and liable to punishment accordingly.

(This holding is based upon the provisions of Section 4917, Code 1915, as amended by Section 32, Chapter 105, Laws 1917).

H. Same person may hold offices of member Board of Education and of Board of Trustees of village.

April 17, 1922 No. 9381 Henry S. Bowman,
Attorney General

Complying with your oral request for an opinion regarding the holding of the offices of a member of the Board of Education of a municipal school district and the office of a member of the Board of Trustees of an incorporated village by the same person, I wish to advise:

. . . You will note that there is no prohibition against a member of a Board of Education being a member of the village trustees nor is there any prohibition against a member of the village trustees being a member of the Board of Education.

. . . I am therefore of the opinion that there is no statutory objection to the holding of the said two offices by the same person in the village of Selen.

I. Member of School Board may not receive pay as janitor.

May 24, 1922 No. 9465 Henry S. Bowman,
Attorney General

In reply to your letter of the 21st instant, asking if a member of the school board of the district may also serve as janitor of a school in the said district and draw a salary for such services, I wish to advise you:

It has been repeatedly held by my predecessors in this office and by myself that members of school boards and Boards of Education may not be interested in any contract in connection with the construction or maintenance of a public school in their district, and that any contract in which any member of such board is so interested shall be void and the members of such board voting for the same shall be guilty of a misdemeanor and liable to punishment accordingly.

(This holding is based upon the provisions of Section 4017, Code 1913, as amended by Section 37, Chapter 105, Laws 1917).

J. Board of Education, Incompatibility with budget commission.

April 15, 1932 No. 437 E. K. Neumann, Attorney General

"Can a person who is receiving payment for his services as president of a County Board of Education receive at the same time payment as a Budget Commissioner?"

If a person may at the same time legally hold the office of member of the County Board of Education and of School Budget Commissioner, he would, in my opinion, be entitled to draw pay for both offices. However, he cannot hold both of these offices, if theyare incompatible. (See 97-107, 1929 Code.)

Consequently, it is my opinion that the two offices are incompatible, and that your question should be answered in the negative.

K. Board of Education--Sales bymmebers to Board.

April 21, 1943 No. 4272 Edward P. Chase, Attorney General

Under Sec. 120-1415 of 1929 Compilation and Chapter 233 of Laws of 1939, Secs. 6-401 to 407, of 1941 Compilation, no member of Board of Education may sell anything to Board of Education while a member.

L. School Board, Employment of member as janitor.

August 9, 1943 No. 4361 Edward P. Chase, Attorney General

If person is member of municipal school board, he has charge of hiring employees for such school and cannot be a janitor without accepting employment incompatible with that of school board member, which is one way by which office becomes vacant under Sec. 10-301, Subsec. 8 of 1941 Compilation.

If member of rural school board, such board has no

authority to hire employees, but such authority is vested in County Board of Education. Such member can be employed as janitor by Board (County) in rural school of district where he is board member.

M. Legality of repair and maintenance man holding office of county budget commissioner.

Nov. 21, 1947 No. 5105 C. C. McCulloh, Attorney General

In your letter dated November 18, 1947, you have referred to us an inquiry from a school board employee known as a Repair and Maintenance Man, concerning the legality of such employee holding the office of County Budget Commissioner.

Section 55-601 of the 1941 Compilation requires that the School Budget Commissioner in the county be a resident taxpayer and a member of one of the two dominant political parties. If the employment under the local school board is not incompatible with the office of School Budget Commissioner, then there is no reason why one person could not hold both offices. Since a mere employee of a school board is not charged with the supervision and expenditure of funds budgeted for the school board, I am of the opinion that the two positions or offices are not incompatible, and that the employee could legally hold the office of School Budget Commissioner.

4. Board Membership.

A. Schools, sale of property.

August 13, 1909 Page 66 Frank W. Clancy, Attorney General

Sec. 1592 of the Compiled Laws of 1897 prohibits school directors from selling school district property "except upon the petition of a majority of the qualified electors of any school district desiring such transfer." This sec. in force without any change or amendment.

B. Whether a town treasurer is ex-officio treasurer of school district.

May 8, 1915 No. 1519 F. W. Clancy, Attorney General

Whether or not town treasurer is ex-officio treasurer of Portales municipal school district under Sec. 7 of House Bill No. 232, approved March 16, 1915, or whether a treasurer should be selected by school board.

Sec. 7 says, "The proceeds of such special school tax for such municipal districts shall be paid to the respective treasurers thereof."

While the law refers to reasurers of municipal school districts I take it that this must be construed to mean the treasurers of cities or towns who are ex-officio treasurers of the boards of education.

C. Tenure of School Board member.

April 21, 1930 Page 198 J. A. Miller, Asst. Atty. Gen.

A delegated member of Union high school board will continue in office until board of directors delegating him shall see fit to cancel such appointment and appoint another.

D. Boards of Education, selection of officers.

February 26, 1931 No. 70 E. K. Neumann, Attorney General

This is in reply to your letter of February 25, 1931, in which you ask if it is necessary, upon the induction of new members of a municipal board of education into office, to reorganize the board for the purpose of electing officers.

It would seem to me that the legislature intended that the choice of officers should be made from all of the members of the board and that new members should have a voice in selecting the officers by whom they are

to be governed. Since the membership of the board has changed, my opinion is that the board should be reorganized and new officers chosen from its present membership. Of course, there is nothing to prevent the re-election of existing officers if the new board sees fit to do so.

E. School Board, staggered terms, how filled.

January 24, 1939 No. 3005 Filo M. Sedillo, Attorney General

Two members elected to Mun. board of education in 1933, two in 1935. Two in 1933 were elected for 6 years. 1935 were elected for 6 years, and in 1935 fifth members should have been elected for a two year term, thus in 1937 a member should have been elected for a six year term. Two members who were elected in 1933, terms will expire this year and two members elected in their place for 6 year terms. However, if elections didn't take place in accordance with 120-903, Chap. 120, NM Supplement 1938, when all five members shall be elected at this coming election. 2, for six year terms, 2 for 4 year terms and 1 for 2 year terms, last three members being elected to fill unexpired terms, six a full term of school board member is six years.

F. Board membership of a Union High School.

May 20, 1939 No. 3144 Filo M. Sedillo, Attorney General

Boards of Union High Schools.
Member at large need not be a member of one of the boards which comprise the union high school district.

G. School Boards, Removal for failure to publish expenses.

June 14, 1946 No. 4909 C. C. McCulloh, Attorney General

In your letter dated June 13, 1946, you refer to removal proceedings against a certain Board of Education, which was later dismissed, and inquire whether the cost

of suit and attorney's fees in connection with the action may be paid by the School Board out of school funds.

Although I have not seen the pleadings in the removal proceedings, I assume that the same were brought under the provisions of Section 10-508 of the N. M. 1941 Compilation, which provides as follows:

"The failure of any board of commission to comply with the provisions of this act (Secs. 10-505--10-508) shall be ground for the removal from office of any member of any such board or commission who shall have participated in such failure, and neglect on the part of any such member to comply with the provisions of this act (Secs. 10-505--10-508) shall be ground for removal as well as wilful violation of the provisions hereof."

The question does not involve the right of a municipal board to employ an attorney to represent the board when such legal counsel is considered necessary. This office has previously held that the employment of an attorney by such a board, when necessary, can legally be done. Se Opinion No. 12, dated January 15, 1931.

In the case entitled State v. Medler, 17 N. M. 644, the Supreme Court held that removal proceedings, under the general law, constituted a civil action, rather than a criminal action, and quoted with approval an excerpt from an Oklahoma case, holding that removal proceedings are in the same classification as quo warranto proceedings, which are civil actions.

However, in such proceedings, the action is against the person individually, rather than in his official capacity, and in view of the language in Section 10-508, it would seem that the removal proceedings are also against the individual members of the board personally, rather than in their official capacity, and is not an action against the board itself.

It is therefore my opinion that the Board cannot, legally pay out of school funds, costs of such a suit and attorney's fees in connection with defending individual members against the charges. I believe the same rule would apply as would apply in case of criminal charges brought against an individual board member.

H. Right of Board Member to resume office on return from Army.

February 26, 1946 No. 4865 Robert W. Ward, Asst. Atty. Gen.

We are in receipt of your letter of February 25, 1946 and the enclosed letter of the Superintendent of Santa Rosa city schools. You ask us to give our opinion on the two questions propounded in the Superintendent's letter. These questions are as follows:

"1. A duly elected member of the municipal school board was called to active duty in the armed services and in his absence the remaining members of the board selected a man to take his place. When the man returns from the services does he automatically resume his place on the board and the member appointed in his place drop off the board? If the elected member wished the appointed one to serve out his term will it be necessary for him to submit his resignation from the board?"

"2. Does the President of a municipal Board of Education have a vote on all matters or is he allowed to vote only in case of a tie?"

In answer to the first question, your attention is directed to Chapter 123 of the Laws of 1943 which provides in part as follows:

"Section 4. The officer, agent, employee, board of other agency of the State, or of its departments, agencies, counties, municipalities or political subdivisions, who is by law authorized to fill ordinary vacancies in the public office or employment so permanently abandoned, as provided in section 3 hereof, is hereby authorized, empowered and directed to appoint to such public office or employment some qualified person who shall thereafter receive the salary and perform the duties thereof until the expiration of the term of the former incumbent or until his successor shall have been elected, appointed or otherwise chosen and qualified or until the former incumbent shall have been relieved from active duty in the armed services and shall have resumed the personal discharge of the duties of such public office or employment."

You will note from this section that the reinstatement is not automatic and that the appointed officer holds until the incumbent shall have resumed personal discharge of the duties.

It is, therefore, my opinion that when the incumbent returns from service he does not automatically resume his place on the board. It is further my opinion that it is not necessary for him to submit his resignation from the board in order to permit the appointed member of the board to serve. All that is necessary is that he fail to resume personal discharge of the duties.

In answer to the second question, your attention is directed to Section 55-906 of the 1941 Compilation which provides that a president etc. . . shall be elected from the members of the board. As the president is a member of the board and as there is no statute governing the voting by municipal boards of education, it is my opinion that under parliamentary procedure the president as a member of the board is entitled to vote on all matters, whether there be a tie or not. See 46 C. J. 1382.

CHAPTER V

LEGAL AUTHORITY OF BOARDS OF EDUCATION

1. Authority to Insure School Propety and Teachers.

A. Employment of 1st, 2nd and 3rd grade teachers.

November 16, 1916 No. 1900 F. W. Clancy, Attorney General

County superintendents have held that holders of lower graded certificates cannot be allowed to teach even if it should be impossible to secure the services of a first grade teacher.

I cannot discover that there is any violation of the school laws in employing a second-grade teacher instead of a first grade teacher, nor can it be said with certainty that every first grade teacher is better qualified to give instruction than every second grade teacher.

B. Insurance in a mutual fire insurance company.

July, 1936 No. 1407 Frank H. Patton, Attorney General

We have your letter of July 13th asking for an opinion from this office on the following questions;

1. "Is it legal according to our insurance laws for a public school district to insure in a mutual fire insurance company providing for contingent liability equal to and in addition to the amount of the annual premium?

2. "Does the insuring with Mutuals violate the constitutional provisions prohibiting the State or any political sub-divisions thereof from lending, giving credit, or making donations to individuals or subscribing to the capital stock of associations or corporations, where it was not shown that ultimate liability was disproportionate to premims on other types of policies?"

. . . As to the first, we find no provision of the statutes which would prohibit a public school district

insuring its buildings in a mutual fire insurance company and assuming contingent liability, provided that the limit of the contingent liability is definite by the contract of insurance.

. . . As to the second question this office has, held that a public body might insure in a mutual fire insurance company, provided that the contingent liability is limited to a definite amount by the contract insurance and that such action would not be in violation of Article 9, Section 14 of the New Mexico Constitution.

NOTE: See Opinion 3880, 1926. Liability insurance not needed because boards not liable.

C. School buses, insurance for.

Nov. 13, 1931 No. 306 Frank H. Patton, Asst. Atty. Gen.

We have your letter of November 9th, in which you inquire if the law requires insurance policies to be taken out by drivers of school busses.

Section 11-1042 provides exemption under paragraph "a" as follows:

"Motor vehicles used exclusively to convey passengers to and from schools, churches, or religious services of any kind or to or from picnics."

It is therefore my opinion that a driver of a school bus is not required to carry insurance if his vehicle is used exclusively as in this section provided.

We may suggest, however, as a matter of policy and protection to all concerned, that such drivers should carry insurance.

D. Insurance, inter-insurance reciprocal or mutual, right of Board to purchase depends on nature of particular plan.

October 6, 1939 No. 3296 Filo M. Sedillo, Attorney General

Under Art. IX, Sec. 14 of Constitution:

If liability of board under policy is ascertainable on face, board may properly insure its property thereunder.

E. Insuring employees of school.

April 28, 1943 No. 4286 C. C. McCulloh, 1st Asst. Atty. Gen.

Re: Sec. 10-416 of the 1941 Compilation, you inquire whether under this law County and Municipal Boards of Education can insure their employees, and pay, not to exceed, 20% of the cost of such insurance, and whether the insurance authorized under this law must be group insurance, or whether it could be ordinary life or 20 pay life insurance. This sec. provides as follows: "All state depts. and institutions and all political subdivisons of the st. of N. M. are hereby authorized to cooperate in providing group or other forms of insurance for the benefit of eligible employees of the respective departments, institutions and subdivisions: provided that the contributions of the state of N. M. or any of its departments or the political subdivisions of the state shall not exceed 20 per cent of the cost of such ins."

A School District, a political subdivision, and if insurance obtained by County or Municipal Board of Education cost thereof would have to be paid out of the Direct Charge Fund of each School District, in which there might be employees who decide to participate in the insurance, unless there is a cash balance on hand not needed for other purposes in the Maintenance Budget, in which event, the 20% contributed by the School District could be paid from such cash balance.

The act uses the language "Group or other forms of insurance."

The law is not compulsory upon anyone and before any form of insurance is obtained for the benefit of employees in the respective School Districts the Governing Board must decide to participate in insurance program, there must be funds available in the Direct Charge Fund,

and the individual employee must decide to participate therein and be willing to pay the 80% of the premium required under the act.

F. Insurance policies.

Sept. 23, 1944 No. 4585 C. C. McCulloh, Asst. Atty. Gen.

City Schools of Carlsbad may not contribute to a policy under which school would contribute to premimm covering dependents of teachers.

G. School Insurance--Amount to carry.

April 13, 1945 No. 4687 Robert W. Ward, Asst. Atty. Gen.

We are in receipt of your letter of March 27, 1945 in which you ask whether it is necessary for the board of regents of the School for the Deaf to carry insurance for 75% of the value of the buildings of such school.

Your attention is called to Section 6-201 of the New Mexico 1941 Compilation which provides in part as follows:

"All officers and boards charged with the custody and control of public buildings belonging to the state shall keep the same insured for the benefit of the state against loss or damage by fire at least to the amount of three-fourths of the estimated value of the buildings at the time the insurance is applied for."

Section 6-202 makes it a criminal offese for any officer or member of any board to fail to carry out the above quoted provision.

In view of the foregoing, it is my opinion that you have no discretion but to insure the buildings of the Deaf School to at least three-fourths of their estimated value.

2. Authority to Prescribe Textbooks.

A. Textbooks prescribed by State Board without discrimination. Textbooks not to be changed if prescribed.

August 28, 1924 No. 3781 Milton J. Helmick, Attorney General

. . . It was the intent of former state board of education to prescribe one set of required readers for the schools which can not be changed for six years beginning June 16, 1921. The State Board of Education has no authority to create any preference between various readers which may be used to supplement the required readers.

3. Authority to Employ Legal Counsel

A. District Attorney is not law adviser of school boards, but is adviser of County Superintendent.

May 21, 1909 Page 45 Frank W. Clancy, Attorney General

I do not find in the new law anything which makes the district attorney the official law officer of the school boards, nor is there, so far as I know, any earlier statute which makes him their legal adviser. If there were, I incline to the opinion that the new general law would not operate to repeal the earlier one especially applicable to school boards.

Like you, while I was district attorney, I did give advice to school directors on a variety of subjects, without any compensation therefore, merely as a matter of public interest.

The law commits the general charge of all public schools, outside of municipal corporations, to the county superintendent, and in matters connected with the administration of the school districts, the county superintendent is the officer to whom the local boards should apply for instructions, and in nearly all such matters he will be able properly to direct them. In case of any doubt or uncertainty on his part as to any

particular subject, he can apply to the district attorney for advice, which the law makes it the duty of the district attorney to give.

B. Schools may employ attorney.

January 15, 1931 No. 12 Quincy D. Adams
Asst. Atty. Gen.

This is in answer to your letter of January 13, 1931, asking for an opinion as to whether or not the School Board has authority to employ an attorney to prepare the the necessaryppapers for the issuance of school bonds, and to pay the Attorney for his services in this connection.

"Broadly speaking, a school district having the power to sue and be sued may employ an attorney if the employment is necessary for the protection of public interests committed to it. The power to employ includes the power to compensate."

C. Attorney may be employed by Municipal Board of Education.

June 9, 1924 No. 3766 Milton J. Helmick,
Attorney General

Municipal boards of education in NM may properly retain an attorney and pay him from school fund.

D. Payment of attorney's fees . . . from direct charge or maintenance funds.

July 3, 1946 No. 4921 C. C. McCulloh,
Attorney General

In your letter dated July 2, 1946, you inquire whether attorney's fees should be paid out of the Direct Charge or the Maintenance Fund, by a Board of Education against whom a suit has been filed, and which makes it necessary to employ the services of such an attorney.

In the case of Neal v. Board of Education, 40 N. M. 13, the Board employed the services of an attorney to represent it in a pending suit, and thereafter the attorney brought a suit for his fees against the Board. One of the questions raised was whether the attorney's fees should be paid out of the Direct Charge Fund, rather than from the Maintenance Fund.

The Supreme Court held that such expenditures are a part of the administrative expense, and should be so budgeted. Since the administrative expense is a part of the maintenance fund, it is apparent that attorney's fees may be paid from such fund.

4. Authority to Employ Architect and School Business Manager.

A. Architect, School Board may hire.

October 2, 1939 No. 3293 Filo M. Sedillo, Attorney General

Hiring of Architect

Does not come under Public Purchase Act (Chapt. 233, NM Session Laws of 1939--labor does not include services of architect.

B. Boards, no school business managers allowed.

1941 No. 3868 Edward P. Chase, Attorney General

. . . request this office for an opinion as to whether or not school boards may employ a business manager and, if they may, whether the appointee may be a member of the board.

After pointing out that none of the school laws make mention of a business manager or is there an item set up in the budgets from which to pay a business manager the attorney general concludes:

In view of the foregoing we are of the opinion that school boards may not employ a business manager.

CHAPTER VI

SCHOOL BOARDS

1. Organization of the School Board.

A. What constitutes a quorum?

April 18, 1933 No. 578 E. K. Neumann, Attorney General

Your questions contained in your letter of April 7, 1933 are as follows:

Q. In a board meeting at which only four members are present, does it require a majority of those voting to carry a measure, or does it require three favorable votes?

A. It is conceded to be true that a majority of a board can transact business, a quorum thereby being present. In absence of statute, a majority of a board constitute a quorum. Consequently, if a majority of those present and voting vote upon a particular measure, a quorum being present, though some not voting, such measure is adopted or rejected as the case may be and action can be validly taken thereon. To answer your specific question, I am of the opinion that three votes are not necessary to carry a measure unless all present vote upon the particular measure.

Q. In same case, does the presiding officer, a member of the group, vote to make a tie, when voting is by ballot, or does he vote only in case of a tie?

A. A presiding officer, a member of the group, is entitled to vote upon all questions before the board. In case vote is by ballot, the presiding officer must vote prior to time ballots are counted or commenced to be counted. In all other cases he may vote where the vote would change the result, that is, he may vote with the minority to make the vote a tie or less than a two-thirds or other like majority, thereby defeating the measure. He cannot, however, vote twice.

Q. In case of no law governing a procedure, does custom prevail? Is Roberts Rules of Order authority

in this case?

A. In case of no law (statutory or constitutional) governing procedure, custom will not prevail, for the courts, in most cases, have laid down rules upon most all subjects, so that general laws control in given cases. Roberts Rules of Order usually control in these cases, for that work is a well worked out digest of laws,relating to such subjects. This work may generally be safely followed.

B. Teacher Certificates, requirements.

April 18, 1933 No. 579 E. K. Neumann, Attorney General

In response to your request for an interpretation of House Bill No. 81, as passed by the recent Legislature.

House Bill No. 81 provides that no certificate shall be issued by the State Board of Education to teach in the public schools of this state, unless the applicant shall have been a resident in good faith in this state for at least a year and shall have had at least six semester or nine term hours of work in an institution of higher learning in this state.

The law is direct, specific, and, I believe, mandatory and cannot be departed from in ordinary cases.

I cannot conceive, however, that such law is so inflexible that its terms would close any school or deprive any school of a teacher of certain subjects, where it is impossible to find teachers with sufficient qualifications for such school or subject. No court, in my estimation, would permit any law to operate to that end in such exceptional circumstances.

C. What constitutes quorum of school board?

May 25, 1934 No. 766 E. K. Neumann, Attorney General

This is in reply to your letter of May 25, 1934. You ask the following questions:

"Can a legal and official meeting of a school board be held by two members of a three-member school board. Would the acts of the two members be offical and legal?"

In my opinion two members of the board, being a majority thereof, would constitute a quorum and could legally transact business at any legally called meeting of the board.

D. Boards, transaction of official business.

Nov. 10, 1942 No. 4181 Edward P. Chase, Attorney General

Question of whether or not the Grants Union High School board is legally constituted and, if not, what steps should be taken to correct this situation.

A long explanation of who will be on boards after the establishing of a Union High School.

The opinion also states . . . Unless otherwise provided by statute a majority of the members constitute a quorum, and fewer than a majority of the members of a board are without power to transact any official business.

2. Liability of School Boards.

A. Municipal boards of education not liable for damages. Municipal boards not authorized to secure liability insurance.

March 10, 1926 No. 3880 James N. Bujac, Asst. Atty. Gen.

In case of damage suit arising through an accident in operation of transportation trucks owned by Municipal School Board:

"No statute to the contrary, municipal boards of education are not liable for their negligence or negligent acts of their employees, while engaged in the exercise of governmental functions imposed by law. Since there

is no liability attaching to said boards, I do not deem it necessary nor proper for said boards to secure liability insurance on their transportation trucks."

B. Board of education--liability for injuries to children.

March 19, 1931 No. 90 Quincy D. Adams, Asst. Atty. Gen.

This is in reply to your letter of March 16, 1931, in which you ask what is the extent of the liability of the members of the County Board of Education and of bus drivers for accidents and injuries to children while riding in the conveyance maintained by the county for school transportation purposes.

"The liability of an employer for the acts and contracts of one employed to work for his interest often turn on the distinction between agent or servant on the one hand, and independent contractor on the other. For the acts of the agent or servant within the scope of his employment the employer is in general liable; for the acts of the independent contractor he is not, . . ."

The bus driver or his employer would, no doubt, be liable for accidents and injuries caused by the negligent operations of the bus. However, where the bus driver or his employer is an independent contractor the county Board of Education would not in my opinion be liable.

C. Liability for negligence.

November 15, 1943 No. 4408 E. P. Chase, Attorney General

Question 1: If bleachers collapse under crowd at football game, is Board of Education liable for suit by injured person?

Under 56 C. J. 777, "School organizations are subdivisions of state and are not subject to an action unless permitted by statute." Sec. 55-902 of 1941 Compilation provides that Boards of Education of municipalities shall have like powers over schools and dis-

tricts in jurisdiction as possessed by county Boards of Edu. By Sec. 55-801, 1941, county boards have power to sue and be sued. Do not believe this right would authorize suit for a tort arising through negligence. In any event, municipal board not be liable for collapse of bleachers unless it was in some way negligent.

Question 2: Chap. 60 of Laws of 1943, as Sec. 50-1111 of 1943 Com. provides that on closing day of school or before governing board serve written notice upon each teacher or other employee qualified to teach, whether it desires to continue or discontinue employment. "Notice to discontinue service . . . of a teacher properly certified serving a probationary period of two years in particular district shall specify a place and date for hearing." Thus properly certified teacher entitled to notice of hearing after two years service in district only.

Ques. 3: Chapt. 60--If principal or superintendant qualified as teacher, entitled to a notice--and to hearing if actually teaching at time.

D. Liabilities for injuries received by pupil on school grounds.

Nov. 25, 1947 No. 5108 Wm. R. Federici, Asst. Atty. Gen.

This will acknowledge receipt of your letter of November 21, 1947 in which you request the opinion of this office on whether a municipal school board of education is liable in tort for injuries received by a pupil while on the school playgrounds.

The particular facts involved here appear to be that the pupil broke his arm when a chain on one of the swings on the school grounds broke, and this happened during a rest period while teachers were on duty.

Section 55-902, N. M. 1941 Compilation, provides that municipal schools shall be governed by a board of education which shall have like powers over schools within their jurisdiction as those possessed by county boards of education over their respective schools.

Section 55-806-a (Supplement to the 1941 Comp.) sets out the powers of the county boards of education, and then provides, among other matters, that said board shall have the right to sue and be sued.

The only question to be determined is whether or not Section 55-806-a, which provides that the school board may "be sued," includes an action in tort for personal injuries sustained by a pupil while on the school grounds.

It appears that authorities on this question hold to the view that the school board is not liable to such action.

The general rule is set out in 47 Am. Jur. p. 335, Sec. 57, as follows:

"Contrary to what appears to be the English rule, the general rule in this country, in the absence of a statute imposing liability, is that . . . a school board is not liable for injuries to pupils of public schools suffered in connection with their attendance thereat."

"Application of the general rule of non-liability has involved injuries to pupils arising from the dangerous condition or improper construction of building, failure to repair, dangerous condition of school grounds, unsuitable, defective, or dangerous appliances, unsafe transportation, and the negligent acts of officers, servants, or agents."

"And a statute providing that a school corporation may sue and be sued does not change the general rule of nonliability."

In the case of Perkins v. Trask, 95 Mont. 1, 23 P. 2nd 982, an action for damages was brought against the Board of Trustees of a school district for death of a pupil who drown in a swimming pool maintained and operated by the school for the general use of the pupils.

The Supreme Court of Montana held that although there was a statute declaring the school district a body corporate which may be sued, yet this did not authorize a tort action against the school district.

. . . . . .

In view of the above, I am of the opinion that a municipal school board would not be liable in a tort action for injuries sustained by a pupil while on the school playgrounds.

I call your attention to the fact that a similar legal question will be before the Supreme Court of New Mexico in the very near future, and we will be bound by whatever result is reached in that case.

CHAPTER VII

CONTRACTUAL AUTHORITY AND LIABILITY OF SCHOOL BOARDS

A. School boards--powers of.

1905-6 No. 271 W. C. Reid
Attorney General

OPINION to Prof. Hiram Hadley, Supt. Pub. Instruction, on question of authority of retiring members of school boards to elect teachers for ensuing year, they to serve under new board.

HELD: Retiring board has no such power. New board has absolute right to act.

B. School teachers--salary of when closed by Board of Health.

1905-6 No. 305 W. C. Reid
Attorney General

OPINION to Supt. Pub. Instruction touching question regarding payment of school teachers, where school has been closed by board of directors, on order of Board of Health.

HELD: "Burning down of school house, contagious disease breaking out among pupils, are grounds for closing school by directors, and teacher cannot recover compensation for services not rendered during such misfortunes.

C. Contract with school teacher who is a relative of one of the school directors is not valid.

June 12, 1914 No. 1244 Frank W. Clancy,
Attorney General

The fact that the teacher employed is a relative of one of the school directors is not in itself enough to invalidate the contract. Something more than that would be necessary to make the contract invalid.

D. Contract with teacher who is a wife of a board member is void.

June 4, 1917 No. 2000 Harry L. Patton, Attorney General

I am in receipt of your letter inquiring as to the validity of contract entered into by members of the board of education, wherein they employ the wife of one of the members of board as a teacher . . . Section 4917, Code 1915, as amended by Section 32, Chapter 105, Laws of 1917, reads, in part, as follows: "All persons identified in an official capacity with the public school or with the higher educational institutions supported in whole or in part by the public funds of this state are prohibited from being a party directly or indirectly to any contract, or interested in any contract, in connection with the operation or maintenance of any such public school or higher educational institution; and any contract in which they are so interested shall be void, and the members of any educational board voting for the same shall be guilty of a misdemeanor and liable to punishment accordingly."

You further ask whether or not a contract for the sale of building site tetween the Board of Education and the Fort Sumner Townsite Company would be valid in a case in which one of the members of the Townsite Company is a member of the Board of Education. In my opinion, the sale of a lot to the Board of Education for school purposes would be "in connection with the operation and maintenance" of the school and is prohibited under our statute.

E. Salaries of teachers and contracts for transportation of pupils in municipal districts.

October 5, 1922 No. 3597 Harry S. Bowman, Attorney General

You state that your estimates have been reduced by the State Educational Auditor and the State Tax Commission, so that your Board is unable to meet the salaries of teachers as provided for in contracts entered into prior to the submission of the budgets to the Tax Commission.

The State Educational Auditor and the State Tax Commission have authority to change, amend, modify and reduce school budgets, and if in so doing, the salaries provided for in contracts with teachers must be reduced in order to remain within the limits of the budget, then the contracts must be so modified. There is no method by which additional funds may be raised in order to increase the school fund so as to pay teachers the salaries provided for in their contracts with the Board of Education.

The same ruling applies to the contracts for transportation of children to and from the schools.

F. Contracts.

This is a rather long opinion. It defines mostly the board.

March 21, 1929 Page 191 M. A. Otero, Jr., Attorney General

Limitations: board of education in matters of contract has only such powers as have been delegated by legislature and cannot by contract, upon its own initiative, enlarge or diminish such powers.

G. Teachers' rights under contract.

August 12, 1929 Page 167 J. A. Miller Asst. Atty. Gen.

The right of school board to discharge a teacher rests in part upon law and within limitations controlled by provisions of contract such board has made with teacher. Board may not discharge teacher without cause or hearing. Change of plan of board does not constitute cause.

H. Power of county board to select teacher for term extending beyond its own.

April 14, 1933 No. 574 Quincy D. Adams, Asst. Atty. Gen.

This letter has reference to the question presented by Mr. Keith Edwards as to whether or not the County Board of Education now in office can select teachers for the ensuing school year, so as to bind the new County Board of Education which is to be elected under the provisions of House Bill 172, passed by the Eleventh Legislature.

In this connection, I refer you to the following statements of the general law:

"Although it has been held in some cases that the contract of a county board may be valid and binding,, even though performance of some part may be impossible until after the expiration of the term of the majority of the board as it then existed, yet the general rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period, thus tying the hands of the succeeding board and depriving the latter of their proper powers, are void as contrary to public policy, at least in the absence of a showing of necessity of good faith and public interest."

In the absence of a statutory provision limiting, either expressly or by implication, the time for which a contract for employment of a school-teacher may be made to a period within the contracting school board's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office, or for the term of school succeeding the term of office of the board, or of one of its members, provided such contract is made in good faith, without fraud or collusion, and for a reasonable period of time."

Apparently these two statements are somewhat contradictory. Without attempting to reconcile them I shall take the view adopted in 56 C. J. 386. Besides being more in point with the present situation, it appears to me to be based on better reasoning. Our statutes give the County Board of Education the power to employ teachers for rural schools (Ch. 119, Laws of 1931.) There is no limitation placed upon that power either in statutes now in effect or in House Bill 172, which goes into effect on next June 9th.

The citation from 15 C. J. 542 bases the rule on public policy. I cannot see where public policy is served by restricting the power of the present Board to hire teachers for the ensuing year. Upon this point the Supreme Court of Arkansas, in Gates vs. School District, 53 Ark. 468, makes the following statement:

"It is contended that the selection of superintendents during each year should be left to the exclusive control of the board for that year. As a matter of policy, an argument might be made upon either side of that contention. There is nothing in the law to sustain the affirmative. Public interest might suffer from unwise contracts covering an extended term in future; they might suffer equally for want of power to make a contract when a good opportunity offered. But with the question of policy we have no concern, except in so far as it aids in ascertaining legislative intent. There is nothing in the act that implies that the legislature intended either more or less than it said."

I agree with the reasoning of the Arkansas Court, and, therefore, I am of the opinion that the present Board of Education has the power to employ teachers for a term of school succeeding its term of office, providing such contracts are made for a reasonable period of time and in good faith, without fraud or collusion.

I. Duty of board to let transportation contract to lowest bidder.

August 8, 1934 No. 798 Quincy D. Adams, Asst. Atty. Gen.

In your letter of August 6, 1934 you present for the consideration of this office the following proposition:

"Can the Board of Directors of a municipal school district lawfully refuse to let a transportation contract to the lowest responsible bidder? In the instant case a majority of the Board refuses to let contracts to two of the lowest bidders for transportation routes, solely upon the ground that these two low bidders each have other means of making a living, whereas the two

next high bidders would be entirely dependent upon their compensation as school bus drivers. In other words, no objection has been or can be made, either to the financial responsibility of these two low bidders or to their moral or personal qualifications."

Section 5 of Chapter 119, Laws of 1931 is applicable to municipal boards of education. See Chapter 22, Laws of 1933. Under this section contracts involving the expenditure of $500.00 or more must be in writing and upon sealed competitive bids after notice and advertisement, etc. It is my opinion that this statute means that such contract shall be let to the lowest responsible bidder since, as you say, otherwise there would be no particular object in requiring competitive bids. Naturally, the school board would have some discretion in determining who was the lowest responsible bidder, but such discretion should not be abused. The mere fact that the low bidder had other means of making a living would not in my opinion be a valid reason for rejecting his bid.

J. Contracts for five years legal.

April 20, 1939 No. 3110 Filo M. Sedillo, Attorney General

School Laws of NM do not authorize boards of education to contract with superintendents or teachers for a period of 5 years. In Opinion No. 1017, this office ruled: "No specified provision as to the term . . . of the superintendent . . . reasonable length of time, which would include . . . two or three years."

K. Contract of superintendent for three years valid.

Sept. 27, 1939 No. 3290 Filo M. Sedillo, Attorney General

A contract given by High School Board to school superintendent for a period of three years would be a valid contract.

L. Teachers, increase or decrease number according to school attendance.

Oct. 19, 1939 No. 3309 Filo M. Sedillo, Attorney General

Under Sec. 12-Cahp. 119, Session Laws of 1931-provision of No. of teachers employed computed upon average daily attendance.

After school term begun and enrollment warrants additional teachers, no legal objection to increasing number of teachers within limits allowed by the statute.

If enrollment decreases-employing board should be hesitant about decreasing number of teacher, because of possible lawsuit for breach of teachers contract.

M. Teachers, increase or decrease according to average daily attendance.

January 30, 1940 No. 3411 Filo M. Sedillo, Attoremy General

Under Sec. 12, Chap. 119 of Session Laws of 1931--so long as a rural school averages in daily attendance less than 38 pupils and more than 30 pupils, and in which the entire eight elementary grades are taught, two teachers may be allowed.

N. Teachers--salary contract when school is abandoned.

February 17, 1943 No. 4238 E. P. Chase, Attorney General

Shall teachers salary under contract be continued if all pupils cease to attend in district under budget:

Sec. 55-606 provides that no school shall be maintained or budget allowance made unless said school has average daily attendance of at least 8 pupils.

My opinion that teacher signs contract in contemplation of said sec. and contract may be terminated if school is closed without liability to county school board.

O. Teacher--form of contracts.

Sept. 29, 1943 No. 4386 E. P. Chase, Attorney General

Under Chapter 60, Laws of 1943--teachers who are qualified and served 2 years are entitled to be given notice of discharge prior to end of school year, with time and place of hearing fixed, plus a right of appeal. Teachers duly qualified having served less than two years have right to notice, or in default the previous contract will be renewed.

War Emergency teachers below qualifications are excluded from any benefits of act, unless written in contract.

P. School Superintendent--new contract before expiration of old.

July 21, 1944 No. 4547 C. C. McCulloh, Attorney General

Board can enter into new contract with superintendent before expiration of old contract.

Q. Teacher--failure to sign contract.

Sept. 26, 1944 No. 4589 C. C. McCulloh, Attorney General

Teacher who signed notification of re-election at close of school term, received and lost contract, and wrote that she accepted contract and could probably find it. Employment is automatic under provision of Sec. 55-1111 of Supplement to 1941 Compilation. If teacher is offered new contract and refuses it, she shall be discharged. But failure to sign contract because it is lost does not affect employment.

R. School Boards--execution of contracts.

Oct. 10, 1944 No. 4598 C. C. McCulloh, Attorney General

Power to sign valid agreement with War Food Adm. or any contract would have to be derived from proper county or municipal board of education, such boards to execute contracts unless by resolution or other proper means they delegate power to county school superintendent or principals of particular school, under Sec. 55-807 and 55-902, 1941 Compilation, except with respect to independent and union school districts.

S. Reduction of budgets and teachers due to falling off of total enrollment.

October 2, 1944 No. 4594 Harry L. Bigbee, Asst. Atty. Gen.

If the number of pupils permanently falls off during a school year, the number of teachers hired under the year's budget can legally be reduced. Sec. 55-1107 provides that not more than one teacher shall be employed for each 20 pupils in average daily attendance in high schools, and one teacher for 25 pupils in grade and rural schools and 30 pupils in municipal schools. Sec. 55-638 provides for computation of average daily attendance on attendance of the last school year, which is basis for making up budgets. However, Sec. 55-1107 provides that "the above numbers shall be computed upon the basis of average daily attendance. It is our opinion that this average daily attendance refers to the attendance during the current school year.

T. School Boards--agreements to carry out school lunch program.

September 18, 1946 No. 4952 Thos. C. McCarty, Asst. Atty. Gen.

Replying to your request for an opinion on the following question:

Do the provisions of the Constitution of the State of New Mexico prohibit the State Department of Public Welfare from making monetary payments of state funds to non-profit private or sectarian schools?

The payments contemplated would be for reimburse-

ment for the operation of hot school lunches, and would involve federal moneys as well as state funds.

The constitutional provisions relating to this question are as follows: Art. 4, Sec. 31; Art. 9, Sec. 14; Art. 12, Sec. 3.

It is my opinion that the Constitution prohibits the payment of state funds for the above purpose to private or sectarian schools.

It may be noted that the act of Congress, (Public Laws 396, 79th Congress, 2nd session) is non-discriminatory, providing that non-profit, private and sectarian schools may participate independently of state schools and receive the same contribution from the Department of Agriculture as state schools:

"If the State Educational Agency is not permitted by law to disburse the funds under this act to non-profit private schools in the state, the Secretary of Agriculture shall disburse funds directly to the non-profit schools."

September 18, 1946 No. 4953

Thos. C. McCarty,
Asst. Atty. Gen.

Replying to your request for an opinion submitted on the following statement of facts:

The New Mexico Department of Public Welfare, under its authority and powers, (Sec. 73-101--73-124; 73-126--73-133 N. M. S. A. 1941 Compilation, and amendments thereto) has agreed to cooperate with the U. S. Department of Agriculture, Section 1 of the Agreement being as follows:

"1. In order to effectuate the purposes of the National School Lunch Act (Public Law 396, 79th Congress, approved June 4, 1946), hereinafter referred to as 'The Act', this agreement, made and entered into this 5th day of August, 1946, by and between the United States Department of Agriculture, hereinafter referred to as 'The Department', and the Public Welfare Department of the State of New Mexico, hereinafter referred to as 'State Agency';"

Question 1. May the "State Agency" enter into an agreement with non-profit organizations, such as parent teachers association, and service clubs, as sponsors of school lunches, and make monetary reimbursement directly to the authorized officer of the non-profit organization for moneys expended in the operation of a particular school lunch program? or

Question 2. Will it be necessary for the "State Agency" to enter into an agreement with the local school authorities and make reimbursement directly to or under the supervision of such authorities?

OPINION--Question 1.

Art. 4, Sec. 31, Art. 12, Sec. 3 of the Constitution of New Mexico, and Sec. 1, Sec. 9 and Sec. 29 (e) of the Uniform School Lunch Agreement with the "State Agency" of New Mexico prohibit any reimbursement or direct control to such non-profit service clubs or associations,

However, it is my opinion the local school authorities may appoint a non-profit organization, such as a Parent-Teachers' Association, or a non-profit Service Club, to function as an agency under the written consent and control of the local school authorities, receive payments and donations, disburse said payments and donations for and on behalf of said school authorities in carrying out the objects of the National School Lunch Program.

OPINION--Question 2.

An agreement between the local school authorities and the "State Agency" is necessary in order to carry out the agreement with "The Department" (U. S. Department of Agriculture).

"9. The State Agency will enter into a standard form of agreement, approved by the Department, with participating schools, covering the operation of the lunch program in such schools, which agreement shall contain as a minimum all the conditions prescribed in paragraph 16 hereof. The "State Agency" will make no reimbursement in connection with either food or non-food assistance to any school in the absence of such agreement therewith,

nor make such agreement retroactive in effect. (And other related paragraphs)."

CHAPTER VIII

THE SCHOOL MONEY

The only reference made, in the report of the attorney-General of 1900 to education is as follows:

Dec. 27, 1900 — Edward L. Bartlett, Solicitor General

Santa Fe, N. Mex.
Hon. Miguel A. Otero, Governor

"Under the 'Bursum Law' of the last session of the legislature I have prepared forms for refunding bonds for the Territory, the different counties, cities, towns boards of education and school districts . . ."

1. Early Opinions--School Taxes

A. Taxes--levy of, for school purposes.

1905-6 — No. 278 — W. C. Reed, Attorney General

OPINION to Hon. Hiram Hadley, Supt. Pub. Instruction, as to proper construction of Sections 1534 and 1535, C. L. '97.

HELD: Board of Directors may, under Sec. 1534, levy a tax of 5 mills, and 5 mills additional may be added, under amendment of March 16, 1905, upon a majority vote of legal taxpayers, at a regularly called election for that purpose. First 5 mill levy must also be voted on by legal taxpayers. Levy of taxes cannot be legally made after third Monday in July of each year.

B. Taxes--levy for school purposes--powers of county commissioners.

1905-6 — No. 311 — W. C. Reed, Attorney General

OPINION to Hon. Hiram Hadley, Supt. Pub. Instruction on questions pertaining to the levying of taxes for school purposes and powers of county commissioners in connection therewith.

HELD: Levies to pay interest on school boards are not made by Boards of Education of School Directors but by Boards of County Commissioners.

C. School warrant--payment of, out of general school fund.

1905-6 No. 323 W. C. Reed, Attorney General

OPINION to Hon. Hiram Hadley, Supt. Pub. Instruction, on construction of Sec. 99, C. L. '97, and on questions pertaining to the payment of school warrant out of general school fund, etc.

HELD: 1. Funds of one fiscal year cannot be used for payment of indebtedness of another fiscal year. The same rule applies to teachers' salaries. 2. Clerk of school district is compelled to collect poll tax for his district and deliberate failure to so do subjects him to mandamus proceedings to compel him to do his duty. 3. School board not liable for default of county treasurer. If school board issued warrant on treasurer for indebtedness that should have been paid out of fund of another year both school board and treasurer liable to fine and imprisonment, under Sec. 299, C.L. '97, and as accounting by treasurer for moneys paid him with warrant which he paid, but should not have paid would not be proper accounting, he is liable for amount on his bond. 4. Teacher cannot legally quit teaching school during term of contract to attend Institute. Contract to teach being teacher's excuse for non-attendance at Institute County Superintendent and Territorial Board of Education must decide whether such excuse is suffiecient. 5. Where school directors accept services of teacher, rendered in good faith, although not provided with certificate of attendance from normal school, district liable for the pay for such services.

D. School Buildings--issue of bonds for enlarging--authority of school board to issue a ten mill levy.

1905-6 No. 333 W. C. Reed
Attorney General

OPINION to Supt. Pub. Instruction, on questions pertaining to the issue of bonds for the enlarging of buildings, etc.

HELD: School district cannot become indebted in any manner or for any purpose to amount in aggregate exceeding 4 per cent on value of taxable property in district. Town board of education in incorporated town authorized to make levies as follows: 5 mills may be levied by board of education, approved by town trustee; an additional levy of 5 mills may be made by boards of education on majority vote of legal taxpayers of school district at regularly called election for the purpose; 7 1/2 mills may be levied by district board, which levy shall be voted on by qualified voters of district, if concurred in by majority of such voters--to be used as a sinking fund for payment of outstanding bonds and for enlarging school houses, or for building additional school buildings.

E. Levying of tax for school purposes--Dona Ana County.

1905-6 No. 334 W. C. Reed,
Attorney General

OPINION to Supt. Pub. Instruction on questions pertaining to the levying of an additional five mills for school purposes in School District No. 4, Dona Ana County.

HELD: Directors must hold election for additional levy.

F. School directors-extension of levy made by.

1905-6 No. 371 W. C. Reed,
Attorney General

OPINION to Hon. C. V. Safford, Traveling Auditor, on questions pertaining to the extension of levy made by the directors of school district No. 2 of Chaves County.

HELD: Permissible to extend levy on assessment rolls at this time, as law providing time for making levy and certification thereof would be directory and a compliance therewith could be at a time after the time limited by statute. This causes considerable work to be done, as assessment rolls have been completed, and you will have to return assessment roll, that has been filed in your office, to assessor that he may make the extension on both rolls.

G. Taxpayers support schools for all people

August 21, 1924 No. 3779 Melton J. Helmick, Attorney General

In Central School district of Grant County, two school buildings, one at Central and one at Ft. Bayard. Desks and equipment needs at Ft. Bayard may be included in Central district budget, even though taxpayers of town of Central willpay because there are few if any taxpayers in Ft. Bayard. If children were accommodated in town of Central and not at Ft. Bayard for convenience, desks and equipment would still be necessary and taxpayers of Central would have to pay for them at any event.

2. The Poll Tax

A. School directors--duties--poll tax.

1905-6 No. 254 W. C. Reed, Attorney General

OPINION to Supt. Pub. Instruction on question of notifying Boards of School Directors to have posted list of names of persons subject to poll tax, although date set for same has passed.

HELD: Statute must be complied with, irrespective of date.

B. Man under twenty-one on first Monday in February not liable to poll tax.

May 5, 1909 Page 30 Frank W. Clancy
Attorney General

Hon. J. E. Clark, Supt. Public Instruction

While the law is silent as to when the liability to the payment of poll tax accrues, yet, as the lists of persons so liable must be posted on the first Monday in February, I am unable to see how a man who is less than twenty-one years of age on that day, can be, properly included in the lists. He is not liable at that time under the law, and the lists must contain the names only of persons who are liable. Therefore, he could not be compelled to pay until after the next succeeding February.

I know of no provision of law which exempts servants of the U. S. from the payment of poll tax. It is true that a state or territory can levy no tax upon agencies of the U. S., but a poll tax upon a man who is resident within the territory, is not such a tax. If there were any attempt to tax a man, as a railway mail clerk, for instance, by reason of his occupation, such a tax would be invalid.

C. Subject to payment of poll tax, who is.

March 31, 1915 No. 1487 H. S. Clancy,
Asst. Atty. Gen.

1. Law of N. M. provides that a poll tax of one dollar shall be levied upon all able-bodied male persons of the age of 21 years or over, and if, as stated in your question, a man comes to Artesia, rents a house and sends his children to school, he is most certainly subject to poll tax.

It would seem that first demand for payment of poll tax is to be made first Monday in February, and it is my opinion that suit may be brought against delinquents thirty days after that date.

An able-bodied man who as served in US army in Philippine war or any other war and has received an honorable disch. from the service of the US is not excdmpt from the payment of poll tax.

3. Special Expenditures

A. Survey of school districts, and surveyors' compensation therefor.

July 29, 1915 No. 1601 Frank W. Clancy, Attorney General

You ask first, whether it is sufficient in surveying school districts, to mark the corners and describe them by established lines such as section, township or grant line, or must all the lines be actually run out. In cases where it is possible to describe a line by reference to any government survey, I can see no reason for the county surveyor running out all the lines and making an entirely new description from his own notes.

You further ask whether the county surveyor is to be paid for this work at the rate of $10 a day and as to this it is my understanding of the county salaries bill, as Chap. 12 of laws of 1915, that the compensation provided in that act for county officers is exclusive of all other compensation, and that of county surveyors' is fixed at $10 per day.

You also ask whether in the performance of his work the county surveyor must furnish his own transportation or will the county pay him for the use of his own team. I have heretofore advised that the $10 per day should be considered as compensation for the surveyor's services and would not cover necessary expenses, and I can see no difference in his being paid for the use of his own team or for the use of a team which he might hire from someone else.

B. Compensation of county surveyor for surveying a school district.

June 17, 1916 No. 1831 F. W. Clancy, Attorney General

Your letter relative to the survey of a school district made at the direction of the county superintendent, and you ask my opinion on account of a misunderstanding in regard to the compensation for the work. You say that the superintendent tells you that the law

provides that the compensation for this work is confined to $50. Others say that the services of the county surveyor shall be paid for at the rate of $10 per day.

It has been my view that the $10 per day was intended as compensation for the surveyor's services, and that additional expenses for assistants and transportation would be in addition to that amount, but I am informed that the Judge of the Second District at Albuquerque, has taken a different view and has decided that the $10 must cover, not only the compensation of the surveyor, but all other expenses. I hope that the surveyor will appeal the case to the Supreme Court so that we may have a definite adjudication which will be binding all over the state.

C. Expenses of public meetings held in a school house cannot be paid out of school funds.

July 14, 1915 No. 1583 F. W. Clancy, Attorney General

In my opinion your letter states the law, and it seems hardly necessary for me to add anything to it. The question raised by Mr. Poore is, in substance, as to whether school funds may be used to pay the expenses of meetings of different organizations held in the school house. In your letter you call attention to the statute authorizing school directors to open the school house for societies belonging to their district for the purpose of holding business or public meetings, but you also call attention to another statute which may be summarized as limiting the power of school directors to the expenditure of school funds for school purposes only.

D. County treasurer has no right to deduct eight per cent from fees received from school teachers who attend County institutes.

July 3, 1915 No. 1573 F. W. Clancy, Attorney General

It appears from Mr. Montaner's letter that when he paid over to the county treasurer the sume of $258. of fees received from the 86 teachers who attended the

county institute, the treasurer deducted from that amount 8 per cent for the county salaries fund.

Treasurer has no right to make the deduction of eight per cent except from taxes and licenses colledted. The county institute fees cannot be considered as either taxes or licenses, and therefore, the deduction is unauthorized.

E. Expenditure school funds for purchase of automobile for county school superintendent.

January 17, 1922 No. 3229 Harry S. Bowman, Attorney General

Reply to your letter of the 7th instant relative to the right of the County Board of Education to purchase an automobile for the use of the County Superintendent of schools to be used by him in visiting the schools of the county has been delayed, owing to illness and rush of work in the office.

In addition to the above menticned inquiry, you ask if the replacement cost of tires and other parts of the car to keep the same in good running condition would be a proper expenditure by the County Board of Education in the event that the holding should be that the car could be purchased.

. . . If the County Board of Education is satisfied that the purchase of an automobile for the use of the Superintendent for the purposes mentioned, and the upkeep of such automobile, is a proper expenditure of school funds for the proper conduct of the public schools in the district, in view of the decision of the Supreme Court in the case of Nohl vs. Board of Education supra, I am of the opinion that such expenditure would be legally justified.

F. School districts can pay expenses of a teacher while attending meetings of the New Mexico Educational Association.

January 22, 1916 No. 1715 H. S. Clancy, Asst. Atty. Gen.

Your letter of 13th enclosing one from the County Superintendent of Lincoln county addressed to you, in which the question is raised as to whether school districts are justified in paying the expenses of a teacher while attending the meeting of the NM'E. Assn. held at Albuquerque in Nov. last.

Opinion of State Superintendent of Public Instruction, with which this office agrees, is that if there are funds of a school district available, after paying all of the regular expenses for the school year, they may be devoted to the payment of the expenses of a teacher while in attendance at the meeting held in Albuquerque. This opinion is based upon the concluding language in Sec. 3 of Chap. 79 of the Laws of 1915, which authorizes school directors "to defray all other expenses connected with the proper conduct of the public or common schools."

G. Payment of expense of school teacher in attending the State Association meeting.

January 24, 1916 No. 1719 Frank W. Clancy, Attorney General

I have conferred with the Supt. of Pub. Instruction and find that his view, with which I fully concur, is that such a payment is entirely proper under the last clause of the second paragraph of Sec. 3 of Chap. 79 of the Laws of 1915, that being the act commonly known as the County Unit Law.

If the money is not immediately available for the payment, it would still be possible for the warrants to be drawn as it is clear from Sec. 4855 of the new codification that the legislature contemplates the possibility of warrants being drawn and not paid for want of funds, as it is provided that such orders shall draw six per cent interest per annum after presentation to the County Treasurer, and it is the duty of the Treasurer to endorse upon the order the fact that it is not paid for want of funds.

H. Persons attending summer school cannot be given credit for railroad fare if they travel by automobile.

April 27, 1916 No. 1785 F. W. Clancy, Attorney General

Two persons living at a place in Quay County contemplate attending summer school and ask if they can be given credit for their railroad fare if they should come through in a automobile.

Only actual railroad fare can be paid, and my recollection is that one, or both institutions named in the statute, have made rules requiring evidence to be presented of actual payment of railroad fare before any payment is made to the person applying for it.

I. Expenses of teachers attending NM Educational Association meeting.

May 19, 1916 No. 1805 F. W. Clancy, Attorney General

Can a Board of Edu. legally make an allowance in the estimate of expenses for attendance of the city superintendent of schools at the Natl and NM educational associations, and also whether it is within power and duties of boards of edu and directors to allow for expenses, or partial expenses of teachers while attending the NM Edu. Assn.

"Wherever funds of the distfict permit, the expenses of the teacher should be paid wholly or in part from such funds. I recommend the payment of a least the railroad fare. It is a legitimate and proper expenditure--really an investment--as your teachers will thus be able to gain inspiration and practical suggestions for their work in your schools. It is largely due to the fact that so many teachers and school officers have met in these annual gatherings, that NM is making such rapid strides educationally in every part of the State.

I am informed that as a practical matter several county superintendents have attended meetings of the NEA at the public expense, and I believe that some city superintendents also have done so.

J. Payment transportation of teachers attending summer Normal school.

March 16, 1922 No. 3334 Harry S. Bowman, Attorney General

In reply to your letter of the 14th instant, asking if it would be proper under the provisions of Chapter 27, Laws 1919, to pay the transportation of a teacher who attended the normal during the year 1921, having traveled from Espanola to Las Vegas to attend the normal, and traveling from Las Vegas to Rodeo upon the completion of the normal course.

In my opinion the law in question contemplates the payment of the fare from the place of the location of the teacher at the time she makes her trip to the normal and back to the same place.

I do not believe that there is any authority to pay such transportation charges to a place other than that from which the teacher went to the school.

K. County Superintendents of Schools may not receive pay for teaching in summer schools.

February 25, 1921 No. 2841 Harry S. Bowman, Attorney General

We have before us letter from Mr. Geo. M. Brinton, Superintendent of Schools of Eddy county, under date of February 15th, addressed to you asking for an opinion from this office relative to the right of county school superintendents to teach in summer schools or institutes during the summer periods while the schools of the county are not in actual session, and to receive compensation for such teaching.

In our opinion the question is to be determined by the construction of section 6, Chapter 12, Laws 1915, known as the County Salary Law. The above mentioned section reads as follows:

"No county officer shall accept or receive to his own use, or for or on account of any deputy or deputies, clerk or clerks appointed by him or employed in

his office, of, for, or on account of expenses incurred by him or by any such deputy or deputies, clerk or clerks, or for or on account of his office, any salary, compensation, allowance, fees or emoluments in any form whatsoever, other than by this act allowed."

L. County Superintendent, visitation expense.

July 21, 1931 No. 242 Frank H. Patton
Asst. Atty. Gen.

"When the Superintendent of a county is permitted by law a certain sum of money to cover traveling expenses according to the rooms in that county, may that superintendent divide the lump sum into twelve parts and thus receive a specified sum every month regardless of whether any travelling has been done?"

This matter is covered by section 120-407 of the New Mexico Statutes Annotated, Compilation of 1929.

This section, after making provision for the allowance of travelling expenses vased upon the number of rooms, further provides as follows:

"Payment for such expenses shall be by voucher and based upon an affidavit of said superintendent stating in detail the rooms visited by him and the date of each visit, accompanied by a school visitation report in such form as may be prescribed by the educational budget auditor."

4. Custody of Funds.

A. Chapter 97, Laws of 1907, does not repeal section 1571, Compiled Laws, but leaves school moneys in towns under control of school board.

May 27, 1909 Page 53 Frank W. Clancy,
Attorney General

Juridiction over school moneys in incorporated towns Section 20 of Chapter 97 of the Laws of 1907 provides that the county superintendant of schools shall have

jurisdiction over all public schools within his county, except those in cities, and ask whether this provision gives the county superintendent such control over school funds of incorporated towns that the town board of education must obtain the approval of the county superintendent upon warrants drawn against the school fund in the hands of the county reasurer in the manner provided in sec. 9 of Chap. 119 of the Laws of 1903.

Sec. 1571 of the compiled Laws of 1897, to which you call attention, provides in effect the town treas. shall be ex-officio treasurer of the board of education and shall pay out school moneys upon warrants signed by the pres. and clerk of the sch. board.

Sec. 9 of Chap. 119 of the Laws of 1903, in term refers only to districts "outside of incorporated towns and cities," and requires all the warrants presented for signature of the county superintendent to be accompanied with itemized statements of account.

There is no doubt that the act of 1907 puts the schools in incorporated towns under the jurisdiction of the county superintendent, but, it does not follow that because those schools are placed under his jurisdiction, they are to be administered and managed in precisely the same way as schools of districts outside of incorporated cities and towns, especially in the control and disbursement of money. There are many other matters, some of which are enumerated in Sec. 20 of the Act. of 1907, pertaining to the statutory jurisdiction over schools, which have no necessary relation with the financial management, and, as repealed by implication are never favored by courts, it would be going too far to hold that the specific provisions of sec. 1571 of the Compiled Laws are by implication repealed by the general language of Sec. 20 of the Act. of 1907, which puts the schools in incorporated towns in the hands of the county superintendent. It is to be noted that in Sec. 30 of the Act of 1907, 35 sections of the Compiled Laws are specifically repealed, and two other specifically amended, but no ref. is made to sec. 1571. This may be taken as somewhat indicative of the legislative intent, but would not be controlling if there were irreconcilable conflict between Sec. 20 of that Act and said Sec. 1571. These two secs. are not so inconsistent that both may not stand, and therefore we should conclude that Sec. 1571 still remains in force.

B. Schools, County Treasurer's report.

June 15, 1909 Page 55 H. S. Clancy, Asst. Atty. Gen.

Whether this office can find anything in the Laws of New Mexico requiring County Treasurers to make monthly reports to School Directors as to the amount of money received and placed to the credit of the respective School Districts during the month, only legislation in any way bearing upon the subject is Sec. 1548 of the Compiled Laws, as amended by Chapter 119, Laws of 1903, cited by you, which requires that reports as to school money be made to County Superintendents by the Treasurer, quarterly. It is quite evident that it was not the intention of the Legis. to impose upon the Treasurer the duty of notifying each school district as to the amount of money placed to its credit during the month, and you were therefore correct in advising superintendents that they could do no more than request that such reports be made.

C. Common School Income Fund.

October, 1912 No. 947 H. S. Clancy, Asst. Atty. Gen.

Common School income fund should be continued on books of State Treasurer. . .

This is an opinion retracting previous advice to the State Treasurer that she need not keep the account of the common school fund open but that it could be transferred to the current school fund. However, the Attorney-general had overlooked Section 78 of Chapter 82 of the Laws of 1912. This definitely established the Common School Income Fund to which the Commissioner of Public Lands is to deposit moneys derived from the income of school lands.

D. Depositories in municipal districts.

April 9, 1923 No. 3690 John W. Armstrong, Asst. Atty. Gen.

Under Senate Bill No. 112, School Code, and Senate Bill No. 67, Public Monies Act, funds shall first be deposited with County Treasurer, but by him re-deposited with such depositories as municipal boards of finance may designate. City Board of Finance should certify to the County Treasurer name of banks and County Treasurer be required to make deposits accordingly. Board of Finance determines how monies shall be deposited and conclusion be certified to County treasurer.

Law intends that proceeds of all such deposits shall be credited to municipal district and in a separate fund. (District tax proceeds).

E. State Treasurer may deposit money in banks until Legislature can act.

1912 No. 960 Frank W. Clancy, Attorney General

In absence of legislation can money be placed in banks or must it be invested on bonds of the state or territory, or of any county, city, town.

My advice to you as a practical matter is for you to arrange for the deposit of the money . . . and that you continue the present bank deposits made under the law of 1907, until the legislature acts, . . .

F. Custody of school money cannot be transferred from County Treasurer to school districts.

November 5, 1914 No. 1383 Frank W. Clancy, Attorney General

You say you would like to transfer the funds for the maintenance of a school in district No. 12 to your home town, Melrose, because your teachers have to go or send to the county seat every month for their salaries, which is often very inconvenient.

I know of no way by which the custody of school money can be transferred from the county treasurer to school districts. It can be drawn from the county officer only upon regular warrants signed by the district officers and by the county superintendent.

The inconvenience can be so greatly reduced it will not be necessary for teachers to go to the county seat. When they receive their warrants they can send them to the school superintendent for his signature, which could not make more than a couple of days' delay, and when they get back your local bank would certainly then cash them. In a town like Melrose, arrangements could be made with the bank to cash the warrants, and then for the bank to send them to the county superintendent for his signature. I am told by Mr. Asplund, of the Department of Public Instruction, that the banks here have followed that custom and have cashed the school district warrants, and after accumulating a considerable quantity would have the county superintendent sign them all at once.

5. School Taxes.

A. Specific information as to whether County Commissioners of Sierra County have lawful authority to order a change or abatement of taxes levied in 1908 for school district purposes regularly spread upon the tax lists of the county.

June 17, 1909 Page 56 Frank W. Clancy, Attorney General

It is unneccessary to go into any consideration of the merits of the claim that there should be a reduction in the amount of such school taxes because a portion of the territory embraced in one district, has since the levy of the tax, been transferred to another district, because it is specifically provided by sec. 5 of Chap. 22 of the Laws of 1899, that under no circumstances shall the assessed value, or levy or amount be paid as taxes when once fixed by the county board of equalization or by the territorial board of equilization "be altered, reduced, abated, rebated, or in any other manner or by any person or device, be changed by any board, officer or person, except by direction of a competent court in a proper proceeding; and any person or member of any such board violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding $500."

It is clear that the county commissioners have no lawful power to make an order of the kind which Mr. Parker says that the railroad company has asked. If the Company has any right to the reduction it must apply to the district court to obtain it.

B. It is not clear that section 25, Chapter 97 of the Laws of 1907, fixes a maximum limit of special school district levies at 15 mills, but the limit may be 20 mills. In any event, under Chapter 74, Laws 1905 and section 1587, Compiled Laws of 1897, another tax may be levied to pay interest on bonds.

May 1, 1909 Page 35 Frank W. Clancy, Attorney General

I think there is some room to argue, unless the matter has been determined by the courts, that the section authorizes a levy not to exceed five mills, without any vote of the people, and another and distinct levy, greater than five mills, and not exceeding fifteen mills, if approved by vote of the voters of the district. In cities, it does not appear to be necessary to have the higher tax ratified by the voters.

In other words,it is not entirely clear that the tax which is not to exceed fifteen mills, includes the tax which is not to exceed five mills. If this suggestion is well founded, then, under section 25, there can be levied two taxes, one of as much as five mills, and another of as much as fifteen mills, making a total of twenty mills.

Referring to Chapter 74 of the Laws of 1905, which you mention that act authorizes the funding of school indebtedness and the levying of a tax sufficient to pay interest on that class of bonds. There is another class of bonds provided for by section 1584 of the Compiled Laws of 1897, for which under section 1587, the boards of education are authorized to levy a tax sufficient topay the interest. I cannot believe that the legislature, by the act of 1907, took away the power to levy a tax sufficient to raise the interest on both of these classes of bonds. It is true that it might be argued that the legislature intended to require that the tax authorized in 1907, whether it be fifteen

mills or fifteen plus five mills, should cover all interest on bonds as well as all other expenses, but it is not an impossible supposition that such a levy would not be sufficient, and, with that possibility in view, it ought not to be held that the power has been taken away to provide for all such interest, and for sinking funds in addition to ordinary expenses.

C. Only property in school district subject to district levy.

April 22, 1909 Page 22 Frank W. Clancy, Attorney General

Your letter in which you ask whether under section 25 of chapter 97 of the Laws of 1907, sheep owned by the residents of a school district, which are grazing in other portions of the county are subject to the special levy of taxes in the school district in which the owner resides. I would be inclined to the opinion that they are so subject, were it not for the explicit language of the last paragraph of the section referred to which declares that "all property, personal and real, situated in each school district, not otherwise exempt by law, shall be subject to the three mills levy, and also the sinking fund bond levy, and also the levy authorized by the school directors, or boards of education of each district for the purpose of this act and no further." I am compelled therefore to say that only the property situated in the school district is subject to the school district levy.

D. A special school district tax cannot exceed 15 mills.

1912 No. 912 Frank W. Clancy, Attorney General

Some school districts had voted a 20 mill levy which was later limited to 15 mills by state law . . .

"The school directors and the people of school districts, have nothing to do with levying or voting the tax, yet furnishing the commissioners with an advisory estimate. A special school district tax cannot exceed 15 mills."

E. Whole county subject to tax levy for county high school fund.

July 18, 1914 No. 1278 Frank W. Clancy, Attorney General

The whole county is subject to tax levy for county high school fund, as shown in Secs. 6, 7, and 8 of Chap. 57 of the Laws of 1912. Sec. 7 is amended by Chap. 20 of the Laws of 1913, but not so as to affect this question. Secs. 6 and 7 provide for a county levy to be known as the "county high school levy" which shall not exceed 2 mills on the dollar and Sec. 7 provides for the certification of the levy to the county clerk who, in turn certifies the same to the assessor, who must place the levy on the tax rolls and the taxes are to be collected in same manner as other taxes, and when collected are to be placed to the credit of the district, or districts, where the county high school or schools are situated, in a separate fund known as the "county high school fund." The whole county is subject. Only special burden imposed on district is that of bearing cost of site, location of buildings and erection and cost thereof, in accordance with provisions of said Sec. 8. Sec. 9 makes it the duty of the Board of Education or directors of the district where the school is established, as soon as practicable to secure the necessary site and buildings and authority is given to bond the district for that purpose.

F. As to making of tax levy for school purposes in the town of Gallup.

July 30, 1914 No. 1290 Frank W. Clancy, Attorney General

Tax levy for school purposes in town of Gallup.

Review of legislation: Sec. 1577 of Compld. Laws, originally a part of Statute of 1891 provides Board of Education should levy a tax for support of schools of city or town for fiscal year next ensuing not exceeding 5 mills on dollar, which levy should be approved by city council or town trustees and certified to the county clerk to be placed on tax roll of the county.

In 1907, by Sec. 25 of Chap. 97 of Laws of 1907, it was made the duty of boards of education of cities, towns and villages, to make an estimate for a tax levy and they were empowered to levy a tax not to exceed 5 mills, which levy would be certified to the board of county commissioners, and with provisions as to levy of special taxes upon a vote at an election and that levy certified to the board of county commissioners and if the commissioners decided the election to be legal that tax was also to be collected.

Chap. 51 of Laws of 1912, by Sec. 7 makes it the duty of boards of education to make and certify to boards of county commissioners an estimate of the amount of funds necessary for the ensuring year, and by Sec. 8 makes it the duty of the county commissioners to levy a special school tax which, together with other revenues, will be sufficient to produce the amount required for such purposes, but the board is given power to disapprove the estimate and to levy such tax as it may deem proper.

However, Sec. 21 of Chap. 84 of the Laws of 1913 directs the city council or board of trustees to make and order a levy of taxes for all municipal purposes, including support and maintenance of public schools, and certify the same to county commissioners, thus restoring some intervention on the part of the board of trustees of a town between the board of education and the county commissioners. Taking all legislation together, I am of opinion that intention was to leave the fixing of the amount of tax with the board of education, subject to possible revision by county commissioners, and authority of the board of trustees in ordering levy of taxes must be considered as limited by what has been previously done by board of education. This matter should be submitted to district court for definite decision.

G. Levy by school districts of 18 mills as special school tax under Chapter 79, Section 5, Laws of 1915.

June 4, 1915 No. 1542 F. W. Clancy, Attorney General

Very little attention will be paid to limitations in school bill as to taxes, that is, some of the districts

will proceed to levy full 18 mills authorized as special school tax by Sec. 5, commonly known as "County Unit School Bill," express desire that Secretary of Commission should induce Atty. Genl. to write a circular letter to dist attys advising them of limitations so that there will be no illegal school levies.

Enclose herewith, for your information, copy of bulletin issued by State Supt. From that bulletin you will see that the attempt has been made to try to give information to the various local officers which would, if carefully followed, make any excess in the way of levies quite improbable.

H. Tax levies for purposes of grounds and erection of school buildings thereon.

July 5, 1915 No. 1576 F. W. Clancy, Attorney General

You say your b. of edu. desires to purchase school grounds and erect a school building, and that items for these purposes have been included in the budget submitted to the county commissioners, and you desire to know if the county commissioners can make a levy for these items, or must the funds be raised by an issue of bonds, after voting thereon. You further ask, if the commissioners are permitted by law to make such a levy, may board of education draw warrants against the uncollected fund. You further ask whether funds may be transferred from one fund to another, and whether the board of education can draw warrants against uncollected back taxes, applying same to the purchase of school grounds.

It was quite proper to include in the estimates submitted to the board of county commissioners, the sum intended for purchase of land, construction, equipment, repair or leasing of buildings.

I do not understand that any school district can draw warrants against money not yet in the treasury. The treasurer could not possibly pay such warrants, and the statute, Sec. 299 to 305 of the Compiled Laws of 1897, forbids the incurring of any debts during any current year, which at the end of such year, cannot be paid out of the money collected and belonging to that current

will proceed to levy full 18 mills authorized as special school tax by Sec. 3, commonly known as "County Unit School Bill," express desire that Secretary of Commission should induce Atty. Gen. to write a circular letter to that effect advising them of limitations so that there will be no illegal school levies.

Enclose herewith, for your information, copy of bulletin issued by State Dept. From that bulletin you will see that the attempt has been made to try to give information to the various local officers which would, if carefully followed, make any excess in the way of levies quite improbable.

H. Tax levies for purposes of grounds and erection of school buildings thereon.

July 5, 1915 No. 1576 F. W. Dibney,
Attorney General

You say your b. of edu. desires to purchase school grounds and erect a school building, and that items for these purposes have been included in the budget submitted to the county council; and you desire to know if the county commissioners can make a levy for these items, or must the funds be raised by an issue of bonds, after voting thereon. You further say, if the commissioners are permitted by law to make such a levy, may board of education draw warrants against the appropriated fund. You further ask whether funds may be transferred from one fund to another, and whether the board of education can draw warrants against uncollected back taxes, applying same to the purchase of school grounds.

It was quite proper to include in the estimates submitted to the board of county commissioners, the sum intended for purchase of land, construction, equipment, repair or lessins of buildings.

I do not understand that any school district can draw warrants against money not yet in the treasury. The treasurer could not possibly pay such warrants, and the statute, Sec. 299 to 305 of the Compiled Laws of 1897, forbids the incurring of any debts during any current year, which at the end of such year, cannot be paid out of the money collected and belonging to that current

year, and any violation of the provisions of the act is made a misdemeanor punishable by fine or imprisonment, or both.

There does not seem to be any provision made for the supervision of the expenditure of the moneys in a municipal school district by any authority known, nor is it clear that the proceeds of the tax are to be divided into any separate or distinct fund.

I. $200 exemption where taxpayer has property in two school districts.

April 7, 1916 No. 1775 F. W. Clancy
Attorney General

How the $200 exemption should be allowed to a taxpayer who has property in two school districts.

Order that the school districts should each get its proportionate share, it appears to me that the exemption should be divided between the districts and in proportion to the amount of property in each. In the aase supposed, this would make an exemption of $158.33 on the propety in the district where the taxpayer owns $190 of property, and $41.67 in the other district where he owns only $50 of property, thus leaving as taxable in the first district $31.67 and in the other 8.33.

J. Levies for county high schools.

August 26, 1921 No. 3102 A. M. Edwards
Asst. Atty. Gen.

You have asked this office to construe Section 37 of Chapter 105 of the Laws of 1917 with reference to the levy provided in said section for county high schools.

. . . The object of this levy is to provide for the maintenance of county high schools. The funds are to be placed in a separate fund called the "County High School Fund."

We are of the opinion, therefore, that the levy not to exceed two mills for county high school purposes must provide the fund to maintain such county high schools.

K. Payment interest on school bonds out of tax collections.

January 26, 1922 No. 3248 Harry S. Bowman
Attorney General

An examination of the laws authorizing the issuance of bonds reveals that in most cases specific tax levies are provided for the raising of funds to pay interest upon such bonds. In some isolated instances the laws require that interest shall be paid out of any funds on hand at the time that such interest may become due in the event that there are not sufficient moneys in such funds with which to meet interest payments.

L. Warrants subject to taxes due by payee.

December 27, 1939 No. 3364 Filo M. Sedillo,
Attorney General

School Dist. Warrants.

Sec. 141-407 NM Statutes, Annotated, 1929 Compilation requiring printing on face of warrant that same is subject to payment of taxes, etc., due from payee or any assignee, applies only to warrants drawn for the payment of any bills allowed or ordered to be paid by the County Commissioners and by Clerk of District Court for juror and witness payments. Warrants issued by school districts and boards, not allowed and ordered by county commissioners, need not necessarily show on their face subject to payment of taxes . . . but under 141-408 of same Compilation, county treasurer must deduct taxes due the county from any warrant presented to him for payment. This should be printed on Warrants not subject to 141-407.

M. Is five mill levy mandatory for maintenance?

May 17, 1945 No. 4718 Harry L. Bigbee,
Asst. Atty. Gen.

I have your letter of May 9th, 1945 wherein you request an opinion in behalf of the County Commissioners of Dona Ana County concerning whether it is manda-

tory, under our law, that 5 mills be levied for school maintenance.

An examination of our statutes discloses that there is no statutory provision requiring the levying of 5 mills for school maintenance.

The general misapprehension on this matter seems to be derived from a misconception of the provisions of Section 6 of Chapter 125, Laws of 1941 (Sec. 55-636, 1941 Comp.). This act, as originally introduced in H. B. 189, contained a provision which was intended to have the effect ov making mandatory the levying of 5 mills for school maintenance. However, it is pointed out that House Educational Committee Amendment No. 7 to H. B. 189 deleted this provision and therefore this provision was never enacted into law.

6. School Funds

A. Escheated property.

June 2, 1911 Page 189 H. S. Clancy, Asst. Atty. Gen.

Replying to your request for the opinion of this office as to the disposition of the funds now in your hands and which will hereafter come to your hands derived from the sale of the estate of one August Schwartze, located in San Juan County, and which escheated to the Territory, I have to say that by Sec. 1548 C. L. 1897, as amended by Secs. 17 and 19, Chap. 119, Laws of 1903, such moneys should be paid to the county treasurer of San Juan County, to be by him placed to the credit of the general school fund of that county. The course which you have adopted in turning over moneys derived from the sale of this estate to the Territorial Treasurer, taking his receipt therefore, is in my opinion a proper procedure. It becomes the duty of the Territorial Treasurer upon receipt of such moneys, at once to transmit them to the county treasurer of San Juan County, with directions to have same placed to the credit of the general school fund. By adopting this course, we shall have a record of disposition made of these moneys in two territorial offices.

B. Method to be pursued in drawing money from State Reserve Fund.

1912 No. 958 Frank W. Clancy, Attorney General

I have today received your letter of the 16 instant in which you ask my opinion as to the method to be followed in drawing money from the state reserve fund for the benefit of weak school districts otherwise unable to maintain school for the full term of five months. You call attention to the fact that by Section 5 of Chapter 51 of the Laws of 1912 this relief to school districts is subject to the limitation that no school district shall expend for maintaining a school for the full term of five months anything in excess of the sum of three hundred dollars for each school room.

In a general way I think the statute quite clearly points the method ordinarily to be pursued and presents no serious difficulty . . .

Follows a detailed discussion of method of application.

C. Money received ffom the United States on account of National Forest should go to state current school fund.

1913 No. 977 Frank W. Clancy, Attorney General

I have received your letter of even date herewith in which you inform me that you have received from the treasury department of the United States a draft for $37,969.40, with a statement that of the proceeds of this draft $8,350.04 are to be credited or payable to the state for school funds, "being receipts from those sections of land set apart within national forest for school purposes as provided by the enabling act of June 20, 1910. You express doubt as to whether or not the said amount should be handled as part of the permanent school fund of the state under Section 2 of Article XII of the constitution, or be credited to the current school fund of the State under Section 4 of the same article . . .

I can find no authority in Section 2 for putting money which you have received in the permanent school fund, and I am of opinion that it is of such nature that Section 4 requires it should be credited to the current school fund . . .

D. State Superintendent may not receive moneys from the rental sale or lease of common school lands.

1913 No. 1043 Frank W. Clancy, Attorney General

. . . I have made every effort possible to try to convince myself that your department could continue to receive for necessary and important expenses, from the rental, sale or lease of common school lands, moneys heretofore appropriated by the legislature but without success . . . I cannot avoid the conclusion that section 4 of Article XII of the Constitution, to which you call attention, has destroyed any such power in the legislature. That section of the constitution is the one which declares what shall constitute the current school fund of the state, and among the things which constitute that fund are "the rental of all school lands and other lands granted to the state, the disposition of which is not other wise provided for by the terms of the grant or by act of Congress."

It is then further declared that the current school fund, not a part but the whole of it, shall be distributed among the school districts of the state in the proportion that the number of children of school age in each district bears to the total number of such children in the state. This is subject to but one limitation or reservation, and that is for the taking from the current school fund of a sufficient reserve to be distributed among school districts where necessary for the maintaining of a school for the full period of five months in the year . . .

E. Fines collected for violation of game law to go to current school fund of State. Section 49 and 50 of Chapter 85 of Laws of 1912 in regard to fines held to be unconstitutional.

January 9, 1915 No. 1418 F. W. Clancy, Attorney General

Sec. 49 of Chap. 85 of Laws of 1912, an act for protection of game and fish, provides that fines collected for violations of that act shall be sent to state treasurer and by him set aside to the "Game Protection Fund," while Sec. 50 provides 1/2 fines collected shall gotto state treasurer and be credited by him as aforesaid, and other half to persons instituting prosecution. Both sections, as far as relating to disposition of fines, are unconstitutional, being in direct conflict with Sec. 4 of Art. XII of constitution which provides that all fines collected under general laws shall be credited to current school fund of state.

No law which authorizes the paying of one-half of a fine to a person who institutes a prosecution for a violation of the game and fish law, and it is duty of officers who collect such fines to remit the whole amount to state treasurer.

F. Relative to pay for equipment of county high school, whether payable out of high school fund or from district fund.

April 23, 1915 No. 1505 F. W. Clancy, Attorney General

UNDER Sec. 8 it is provided "that the cost of site, location of building and erection and cost thereof for any such county high school shall be entirely borne by the dist. where such high school is established." I am unable to see how the district where the school is established can be subjected to any expense whatever except such as may be covered by the above quoted language, and equipment does not seem to fall within the enumeration of the items specified.

Another point is as to approval of warrants when there are no funds with which to pay the same.

I think it permissible to approve warrants even though the funds may not be on hand to meet them, provided that the warrants so drawn will not run beyond what can be paid from the funds of the current year.

G. Surplus in general county fund of not less than $200 may be expended for school buildings.

October 1, 1915 No. 1644 H. S. Clancy, Asst. Atty. Gen.

Under provisions of Sec. 4896 of Codification of 1915 whenever there is a surplus in the general school fund of a county to the credit of any school district, to an amount not less than $200, such surplus may be expended by the directors for the procuring of a suitable site and the erection thereon of school buildings, or for the repairing of any school buildings.

H. Law providing for payment school warrants amends Bateman Act.

April 30, 1921 No. 2943 A. M. Edwards, Asst. Atty. Gen.

This office is in receipt of your letter of April 26th, asking whether Chapter 46 of the Laws of 1921, being an act to amend section 4855 of the 1915 Codification as amended by section 17 of Chapter 105 of the Laws of 1917, in effect repeals the Bateman Act (sections 1227-30, 1915 Codification), as applied to school warrants.

Insofar as this act permits the issuance of school warrants when funds are not available, it is an amendment of the Bateman Act. The act provides that warrants shall be paid in consecutive oder "when funds are thereafter available" and that no other warrants shall be paid out of "such available fund."

. . . We believe, therefore, that warrants issued and stamped "no funds" are to be paid from any funds accruing to the school fund for the current school year in which the warrants are issued.

I. Authority of county boards of education to borrow money.

November 16, 1921 No. 3185

Complying with your request over the telephone for

a written opinion regarding the right of county boards of education to borrow money for the purpose of paying school indebtedness, I wish to advise you as follows:

Section 1, Chapter 46, Laws 1921, authorizes school boards to issue certificates of indebtedness of the district not in excess of 90 per cent of the annual budget, and provides that school warrants shall draw six per cent interest after having been presented to the county treasurer and not paid for want of funds.

. . . If the school board should determine that it prefers to borrow money and issue one certificate therefore, there can be no objection so long as the limitations prescribed in the act are not exceeded.

J. Disposition school funds received from state lands, application of Bateman Act to expenditure school funds.

November 16, 1921 No. 3186 Harry S. Bowman, Attorney General

. . . at least to my mind, there is no escape from the conclusion that the Bateman Act applies to school expenditures as well as to all others.

Section 1227 refers specifically to "boards of education, boards of trustees and boards of school directors of any school district" and I am not satisfied that any subsequent act has so amended this section as to eliminate from its operation funds raised or collected for school purposes. On the contrary, it appears to me that there appears throughout all of the subsequent legislation governing the subject of the expenditures of school funds a studied effort to not in any way modify the provisions of section 1227 so as to prevent its operation upon school funds.

K. Issuance of school warrants to pay interest at rate of ten per cent upon other warrants.

February 23, 1922 No. 3298

In reply to your letter of the 17th instant asking if it is legal for Boards of Education to issue school

warrants which are cashed by local banks, held by such banks until sufficient taxes are paid to discharge such warrants, and that then the bank computes interest at the rate of 10 per cent per annum upon the warrants, and thereupon, the Board issues new warrants to cover this interest, wish to advise:

In my opinion, this procedure is invalid and in direct violation of Section 4855, Code 1915, as amended by Section 17, Chapter 105, Laws 1917, and Section 1, Chapter 46, Laws 1921, limiting the amount of interest collectible upon school warrants to the sum of 6 per cent per annum.

L. Sale of school bonds Harding County.

June 23, 1922 No. 3492 Harry S. Bowman, Attorney General

In reply to your letter of the 19th instant, requesting advice regarding the matter of the sale of the high school bonds issued by the Village of Roy, and stating that the bonds were sold for 82 cents on the dollar, and that certain officials of the E. P. & S. W. Railroad contend that the sale is illegal, since they were sold for less than 95 cents on the dollar, I wish to say:

Section 22, Chapter 105, Laws 1917, prescribes a method for the issuance and sale of school bonds and prohibits the sale of such bonds for less than 90 per cent of par with accrued interest.

In my opinion, the sale of the bonds at a figure which produces less than 90 per cent of the par value of such securities is invalid and proper steps should be taken by the Board of Education to secure the difference between the price for which the bonds were actually sold and what they would have produced if they had been sold at the minimum figure prescribed by law.

M. Certificates of maintenance.

January 30, 1924 No. 3751 John W. Armstrong, Attorney General

Under 1923 code--school districts may not have outstanding maintenance certificates for any period exceeding 90 days.

N. Expenditures to be proper.

February 21, 1924 No. 3758 John W. Armstrong, Attorney General

School board and County superintendent exceed their authority in excessive payments to teachers under Sec. 4 and 7, Chap. 188, SL 1921; and Sec. 3, Chap. 190, SL. 1921. Authorities may not make expenditures not connected with proper conduct of public schools.

O. Schools--transfer of funds.

January 20, 1931 No. 17 E. K. Newmann, Attorney General

This is in reply to your letter of the 19th instant, wherein you ask whether or not the Comptroller has the right to authorize transfers within the maintenance fund of the various school districts, both independent and otherwise.

In my opinion the Comptroller has no such right. By Section 134-513 of the Code, the Comptroller is given the right to make transfers from one budget item to another upon the request made by the State Tax Commission, approved by the Attorney General, when such request is made by the school, etc., board having control of the expenditure of such money, but such right is limited to such cases where there is no prohibition by existing law.

P. Transportation, direct charge fund.

April 1, 1932 No. 428 E. K. Neumann, Attorney General

Your letter of recent date requesting advice as to the law governing the use by municipal school boards of direct charge funds for transportation of pupils has been received.

Provision is made for this matter in Section 4, Chapter 119 of the Laws of 1931, which is amendatory of Section 120-604 of the 1929 Compilation.

It is provided in this Act that direct district charge funds shall include property insurance, lease of school buildings, erection of school buildings, repair to school buildings and equipment, new equipment, purchase of school grounds, improvement of grounds and buildings, transportation to supplement the transportation allowance from the regular county maintenance fund, and interest on and the sinking funds and district school bonds.

You, of course, know that under this Act transportation of pupils is properly a part of the maintenance fund.

Q. School boards to approve budgets.

April 27, 1932 No. 452 E. K. Neumann, Attorney General

It is the understanding of this office that the State Board of Education desires information and advice in connection with its power and duty to approve budget estimates for high schools in this state.

The regulation in this connection is as follows: "The State Superintendnet of Public Instruction and the State Board of Education shall approve all high schools for the purpose of budget allowance."

A reasonable construction of this rule is simply to the effect that it makes an approval by the State Board of Education and the State Superintendent of Public Instruction of the budget estimate for the high school.

If the high school as a matter of fact is entitled to such existence, then as a matter of law it would be entitled to the necessary budget allowance and it is seriously doubted if an arbitrary refusal to approve the budget allowance would be sustained.

R. Direct charge fund--per capita of pupils in one district attending school in another.

April, 1935 No. 973 Frank H. Patton, Attorney General

In your letter of April 1, 1935, you ask for an interpretation of Chapter 98, Laws of 1935, You refer to that part of the act which provides that:

"In case any district shall send children to another district, it shall budget for in its direct charge fund and pay to the district in which such children actually attend school a sum equal to the direct charge per capita cost of the district so educating such children for each child so attending."

. . . You ask whether or not sinking and interest charges and transportation costs should be included when determining the direct charge per capita cost of the district . . . It is my opinion that your question should be answered in the affirmative.

S. Certificate of indebtedness validity.

December 17, 1937 No. 1842 Frank H. Patton, Attorney General

Permission of authorities of Hobbs Municipal School District to issue certificates for purpose of construction and repair of school building in amount of $47,000 supplemented by PWA grant of $27,000.

Requirement of Chap. 44 of Session Laws of 1931 say that proceeds from tax levy provided by said Chapter is to be expended under direction of State Tax Commission. State Tax Commission has no authority to delegate a matter of this kind to any other body and therefore, of course, could not institute PWA as its agent.

Sec. 120-810 of 1929 Compilation is provision of law authorizing the issuance of certificates of indebtedness and is divided into two parts. First part refers to issuance of certificates of indebtedness for school maintenance expenses not relevant--second portion has application to issuance of certifications, and provides

that particular board of education may borrow on such payments on contracts for such repairs and improvements."

Should this matter go to court this office would raise question of constitutionality of Sec. 120-810.

T. School Boards--investment of funds in war bonds.

Sept. 25, 1943 No. 4384 E. P. Chase, Attorney General

County School Board has no authorization to invest surplus funds. Under 55-622 of 1941 Compilation and 55-614, all school funds are paid to treasurer of county and withdrawn under budget, and surplus funds lie with county treasuer, or subject to his order.

U. Purposes for which transfers from maintenance budget may be made. Deedsto land given for school use only.

January 16, 1946 No. 4838 C. C. McCulloh, Attorney General

I have your letter dated January 14, 1946 in which you state that the Santa Fe Municipal Board of Education has requested you to transfer 1% of its Maintenance Budget to the Direct Charge Account for the purpose of contributing to a program of the Santa Fe Council and Chamber of Commerce, as well as other local city agencies, to bring an expert planner to Santa Fe for the purpose of planning building sites, etc. in the city, which would include school building sites for future building purposes.

You enclose a copy of the request from the School Board which shows that the School Board has agreed to share proportionately with other agencies in paying for bringing in an expert city planner.

It is my understanding that the School Board has an Emergency Fund set up as a part of the administrative budget, and that the transfer desired is to be put, first, into the General Maintenance Fund, and from that into the Emergency Building and Repair Fund.

Sec. 55-629 of the 1945 Supplement to the 1941 Compilation, relative to municipal school districts, provides as follows:

"Where any municipal school district has used all its direct charge funds and has levied the maximum tax levies allowed by law, the state educational budget auditor and the county budget commissioners shall have the power to borrow from the maintenance fund of such municipal school district not to exceed one per cent (1%) of the total maintenance budget of such municipal school district of any one year and set such sum up in a separate fund to be known as the Emergency Building and Repair Fund which shall be used only for emergency building and repair purposes. Provided, however, that said funds shall be used and spent only upon the joint consent and approval of the state budget auditor and the state board of education."

It is apparent that, before a transfer can be made to the Direct Charge Fund from the Maintenance Fund in the amount of 1% of the total maintenance budget for the purpose of emergency building and repair, the school district must have used all of its direct charge fund and have levied the maximum levies allowed by law. In the event that is done and the money is transferred, it is likewise apparent that the sum transferred to the Emergency Building and repair Fund can only be used for emergency building and repair purposes.

This office has previously written two opinions construing Sec. 55-629 (being Nos. 4474 and 4650) in which it has been held that the Emergency Building and Repair Fund cannot be used for the purchase of land upon which to build a school building nor for the purchase of school supplies.

In the case entitled: PEOPLE VS. CHICAGO A. & R. CO., 257 Ill. 208, 100 N. E. 503, it was held that taxes levied for building purposes could only be used to pay for the building of a school-house or to create a fund to meet bonds issued for that purpose.

In PEOPLE VS. CUMMINS, 169 N. E. 188, 337 Ill. 281, it was held that the procuring of furniture, fuel, libraries and apparatus for the school were not for building purposes, unless so declared by the statute.

It is apparent that the Emergency Building and Repair Fund is provided for in order to meet an actual emergency arising in the current fiscal year; and since the statute specifically provides that this fund may be used only for the purpose of building and repairs, I do not believe the fund can legally be used to participate in a long-range planning program, however worthwhile such a program may be as a civic enterprise.

No doubt, the school board could provide for a budget in the next fiscal year to pay for its share of the planning program, if school sites and recreational areas are a part of the entire survey.

January 24, 1946 No. 4840 Robert W. Ward,
Asst. Atty. Gen.

We are in receipt of your letter of January 16, 1946, a letter from the Superintendent of schools of San Juan County, and the original Deed from the Hutchins and the School District. This Deed contains the following clause:

"With reversion to parties of the first part whenever said land shall be used for any other than school purposes."

From the Superintendent's letter it appears that the premises are no longer used for school purposes, but that the building on the premises has been used as a community building and for dances, and that the County Board of Education agreed to deed the land to Mrs. Hutchin. The Deed, in my opinion, with the above quoted clause, created in the School District an estate in fee simple with a condition subsequent. Such conditions are not favored by the law, and would be strictly construed against the grantor. However, if the intention is clear and unambiguous, the Courts will enforce them. 18 C. J. 359.

As I read this clause, the condition is use for other than school purposes. Thus, a mere non-use would not be a breach of the condition, and so would not work a forfeiture. 18 C. J. 371. A mere temporary or occasional use for other than school purposes would not, in my opinion, work a forfeiture. 18 C. J. 371 (n) 15.

In view of the foregoing it is a very close question as to whether or not a forfeiture has, in fact, taken place. If, however, a forfeiture has taken place, some action is necessary upon the part of the grantor to effect a forfeiture, as the title conveyed is not void, but is only voidable by the action of the grantor, who must take advantage of the condition and repossess himself of the estate by actual re-entry, or by some action equivalent thereto, and manifest an intent to terminate the estate. 18 C. J. 381.

It is therefore my opinion that unless a re-entry had taken place, the forfeiture had not become effective, so that the title to the premises remained in the school district.

Turning now to the Deed executed by the County Board of Education, it appears to me that under no circumstances could the deed be affected. If the forfeiture had already taken place, the title reverted to the Hutchins. There was nothing for the deed to operate on, so that it could not add to the estate of the Hutchins. However, if the forfeiture had not taken place, no power existed in the County Board of Education to execute the deed. The only power of the County Board of Education to sell real property belonging to a school district is that provided by Section 55-714 of the 1941 Compilation, which requires the sale to be for cash, with the written consent of the Superintendent of Public Instruction. This apparently was not done.

I realize that what has been said above is technical. However, the subject matter is technical itself. Before the clause creating the condition subsequent becomes effective, the property must be used for something other than school purposes and such use must have been more than incidental or occasional. Further, a re-entry by the previous owner must have been made.

I note, in addition, that 8 persons are named as grantors. For this reason, a deed to Mrs. Hutchin alone would not be justified.

My advice to the School Board would be to have a suit filed if the land is valuable.

V. Authority of county school boards to budget and pay to city public library money for books.

May 14, 1948 No. 5150 Robert W. Ward, Asst. Atty. Gen.

. . . Article 9, Section 14 of the Constitution provides in part as follows:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; . . ."

If the school board gets full value for the money so expended, I see no reason why such an item could not be included in the budget and properly paid. If, however, the school board does not receive benefits commensurate with the money expended, then the payment would be a donation and would violate the Constitution.

W. Building Funds. Las Vegas "Veterans Memorial Public School."

Oct. 27, 1947 No. 5093 C. C. McCulloh, Attorney General

This will acknowledge receipt of your letter of October 17, 1947 reference to Chapter 96, Laws of 1947. You request our opinion on the following two questions:

Question No. 1.--"According to Senate Bill No. 124, is the Las Vegas Town Board of Education correct in assuming that the $30,000 therein mentioned is to be expended or may be expended for the erection of a school building to be named "Veterans Memorial Public School" within the boundaries of the school district now under the jurisdiction of the Town Board of Education?"

Question No. 2.--"After this money, $30,000 is turned over to the Town Board of Education by the Board of Trustees of the Town of Las Vegas (Administering the

land grant known as "The Las Vegas Land Grant"), are they in any way obliged to turn over part of this money or say $20,000 to a Veterans Organization for the erection or building of a Veterans's Club House?"

Chapter 96, Laws of 1947, clearly provides that the Board of Trustees of the Town of Las Vegas is authorized to spend $30,000 toward the cost of constructing a public school building within the exterior boundaries of the Town of Las Vegas. It further provides that the school building shall be named "Veterans Memorial Public School."

No provision is made in the act authorizing or empowering the Board of Education to turn over any amount out of the $30,000 to a Veterans Organization for any purpose.

7. State Sales Tax.

A. Exempt from sales tax.

May 23, 1934 No. 762 E. K. Neumann, Attorney General

With reference to your letter of May 19, 1934, relating to exemptions, under the State Income Tax Law, of such sums of money received by persons in the employ of the State as compensation for such services under the various Federal Relief organizations.

If such compensation is paid out of state funds to others than officers, as defined by this office in previous opinions, such income is taxable, regardless of the fact that it originally came from the Federal Government. If such compensation is paid by Federal check or or directly through the Government as paymaster such amounts would not be taxable.

As I understand the matter the funds are allotted to the state and the state makes all contracts and payments in relation thereto.

B. Paving assessments on school property not subject to twenty-mill limitation.

May 23, 1934 No. 764 E. K. Neumann, Attorney General

Your letter of May 18, 1934 refers to Sections 202 of the Emergency School Tax Act of 1934, wherein it is provided that none of the taxes levied by such act shall apply to sales made to the State of New Mexico or any of its departments or agencies, and you ask: "What are the recognized agencies and departments of the State of New Mexico?"

Of Course, sales, made to the State are exempt and so are sales made to its various departments, such as the Highway Department, the department of the Governor Treasurer and the like, where such sales are paid out of funds from the State Treasury or from other public funds in the hands of Boards, Commissions, ect., where constitutional or legislative permission is given for their spending.

Our courts have held that State Institutions are agencies of the state, so that all state institutions, including educational institutions are to be considered agencies of the state, even if theyare not departments thereof, and sales made to them are exempt from taxation under the act in question.

. . . . . .

In 56 C. J. 193, under the title of "Schools and School Districts," we find the following statement, supported by ample authority:

"A school district, or a district board of education or of school trustees, or other local school organizations, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of public schools."

It would seem therefore that, under the foregoing, municipal corporations, counties and school districts are such departments or agencies of the State of New Mexico as are mentioned in said Section 202, and that sales to same are exempt from the tax imposed by the Emergency School Tax Act of 1934.

. . . . . .

C. Special levies on school property for paying pavement assessments.

May 24, 1934 No. 765 E. K. Neumann, Attorney General

. . . . . .

. . . Under either method of making assessments for paving purposes, it appears to me that a debt is created against the property owner whose property is benefited. Under the 1913 law (the "provisional order" law), it is provided that the cost of such improvement may be assessed against "such property owners or their property." Section 90-1222, 1929 Code. In the case of paving which abuts upon school property, the "property owner" would be the school district and the debt created would be a "public debt."

It should further be noticed that Section 90-1224 of the 1929 Code provides that the lien of any such assessment may be enforced against "counties, school districts and municipal corporations" in the same manner as judgments are enforced.

All of the foregoing leads me to the conclusion that taxes levied for the purpose of paying paving assessments against property owned by a school district are "necessary levies for public debt" and therefore do not come within the 20-mill limitation imposed by Constitutional Amendment No. 4, at page 541, Session Laws of 1933, which was adopted at the special election held on September 19, 1933.

D. School tax--2% sales tax.

May 7, 1934 No. 750 Frank H. Patton, Asst. Atty. Gen.

We have your letter of May 5th, relative to exemptions of tuition charge to students of the new sales tax and regret exceedingly that we misconstrued your former letter and trust that no undue convenience has been suffered by you.

It is our opinion that the university, and other edu-

C. Special levies on school property for paying pavement assessments.

May 24, 1934 No. 765 B. K. Bowman,
Attorney General

. . . . . .

. . . Under either method of making assessments for paving purposes, it appears to me that a debt is created against the property owner whose property is benefited. Under the 1913 law (the "provisional order" law), it is provided that the cost of such improvement may be assessed against "such property owners or their property." Section 90-1222, 1929 Code. In the case of paving which abuts upon school property, the "property owner" would be the school district and the debt created would be a "public debt."

It should further be noticed that Section 90-1224 of the 1929 Code provides that the lien of any such assessment may be enforced against "counties, school districts and municipal corporations" in the same manner as judgments are enforced.

All of the foregoing leads me to the conclusion that taxes levied for the purpose of paying paving assessments against property owned by a school district are "necessary levies for public debt" and therefore do not come within the 20-mill limitation imposed by Constitutional Amendment No. 4, at page 541, Session Laws of 1923, which was adopted at the special election held on September 19, 1923.

D. School tax--2% sales tax.

May 7, 1934 No. 750 Frank H. Patton,
Asst. Atty. Gen.

We have your letter of May 5th, relative to exemptions of tuition charge to students of the new sales tax and desire to acknowledge that we misconstrued your former letter and trust that no undue convenience has been suffered by you.

It is our opinion that the university, and other edu-

cational institutions in this state should not pay the sales tax, for the reason that there is apparently a specific exemption in the law. (Paragraph "g", Section 201).

Under this provision religious institutions, schools and colleges are exempt from the payment of the tax.

E. Schools exempt from sales tax.

May 8, 1934 No. 753 E. K. Neumann, Attorney General

With reference to your letter of May 3, 1934, relating to the School Emergency Tax Act of 1934.

Your institution being an agency of the State, is exempt from paying the tax upon sales made to it, but with reference to sales made by it, in our opinion, it stands as any other business not exempt.

As to your agricultural products, fruits, milk, vegetables, feed, cotton and like materials, where not refined or manufactured into a by-product thereof, as grower, the institution need pay no tax on such sales. This is clearly the intent of Section 212 (B), in our opinion.

As to your school books and supplies if your sales are simply at a cost price, cost plus handling, you are probably exempt under Section 212 (a). If, however, such department is operated for a profit, even though such profits go to the state or the institution, the institution is subject to the tax. There is, as you suggest, no exemption under Section 212 (E). This same rule applies to your student dining room and dormitories, in our opinion.

Under Section 201 (G), however, tuition charges, matriculation and other such fees, and admissions to athletic games or other shows and the like are exempt from the tax under the state act.

F. Schools exempt from payment of state sales and use tax.

May 26, 1947 No. 5033 Robert V. Wollard, Asst. Atty. Gen.

We wish to acknowledge receipt of your inquiry of May 21, 1947, pertaining to what State Taxes, if any, schools are obligated to pay in the purchase of equipment with which to carry on the School Lunch program.

The only state taxes that might be involved are the "Sales" and "Use" taxes.

Section 76-1405 of the 1941 Compilation exempts the State of New Mexico and any of its political subdivisions from the payment of the sales tax on purchases made and sub-section (b) of Section 76-1504 of the 1941 Compilation exempts the State of New Mexico, its departments and institutions and political, educational, charitable or eleemosynary institutions from payment of the "use tax."

The aforementioned exemptions are applicable on the purchase, storage and use of equipment so long as the proper school authorities acquire the equipment and draw vouchers on school funds for the payment of same.

Trusting the aforementioned satisfied your inquiry.

8. Special Claims on School Money.

A. Salaries of first, second and third grade teachers in public schools.

June 16, 1915 No. 1554 F. W. Clancy, Attorney General

Your letter of 14th inst. enclosing another from Mrs. A. E. Smith, school teacher at Elins, N. M. in which she says that it is her understanding that by the new county unit law, which is Chap. 79 of Laws of 1915, a third grade teacher may receive $60 per month, second grade $75 per month, and first grade $90.00 per month, and that the school board makes an estimate of expenses to be allowed over and above the salary of the teacher, and ask my opinion as to correctness of this construction of the statute.

Language of this section fixes a limit for all expenditures per month per school room and that limit must include salary of teacher and all other expenses as well.

B. Pupils to be counted for purposes of apportionment of high school fund.

November 2, 1915 No. 1668 F. W. Clancy, Attorney General

Your letter . . . asking as to the qualification of a pupil to count in the apportionment of funds where there are two county high schools located in the same county, and also whether the superintendent of the district in which the high school is located has authority to hold examinations and promote to the high school pupils who have finished the eighth grade, and further if the pipils so promoted can be counted in the apportionment of the county high school fund provided that they attend the high school more than half the school year.

By Sec. 2 of Chap. 20 of Laws of 1913, which is Sec. 4969 in the new codification, it clearly appears that the pupils who are to be counted for the purpose of apportionment of the high school fund, must be those attending the high school for not less than half of the regular sessions of the preceding school year.

If the school directors of a district where there is a high school and which has not been incorporated as a city, employ a superintendent, it would seem to be an ordinary and proper thing for him to take charge of ascertainment of the qualifications of applying pupils, by examinations if he should see fit to hold such examinations, but this might, to some extent at least, depend upon the scope of authority given to him under his employment by the school directors, as the school directors appear to be the controlling authority.

C. Sums to be paid by the various counties as part of the compensation of the state director of industrial education.

January 25, 1916 No. 1721 Frank W. Clancy, Attorney General

The matter about which you ask is how the sums to be paid by the various counties as part of the compensation of the state director of industrial education shall be apportioned. As you say in your letter, in Sec. 4820 of the new codification, there is a provision that he is to be paid one thousand dollars by the state, to which there shall be added sums paid by the various counties, thirty dollars being chargeable to counties of Class A, $25 to counties of class B, and $20 dollars to counties of classes C, D, and E. That section was originally adopted in 1912.

In my opinion is that the nearest we can come to accomplishing what was intended by the legislature will be to take the last classification made by the traveling auditor, whether in Dec., 1910, or in Dec., 1911, an apportion the various amounts to the different counties in accordance with that classification.

D. Annual salaries of county officers begin on January 1.

April 17, 1916 No. 1782 F. W. Clancy, Attorney General

Question turns upon what is meant by "annual salaries" in Chap. 12 of Laws of 1915. Statute says that the salaries fixed are "the annual salaries of the county officers in the several counties of the state for the terms for which such officers were elected." County officers elected in No. take office at the beginning of Jan. next thereafter, and the annual salary begins at that time. If there is any change in such annual salary, I believe it must take place on Jan. 1.

E. Limitations of salaries of teachers found in Sec. 5, Chap. 79, Laws of 1915, applicable only to rural school districts.

November 16, 1916 No. 1901 F. W. Clancy, Attorney General

You ask two questions, first of which is as to the refusal of a county treasurer to pay any school warrant for the superintendent and principal of the county high school where fifteen teachers are employed for more than

$90 monthly salary, for the reason that the teacher does not hold a higher form of certificate than the state elementary first grade, or even if he did have a higher form of certificate, his salary is limited to $90 per month by the provisions of Sec. 5 of Chap. 79 of the Laws of 1915.

F. Secretary of county board--County Clerk receives no extra salary.

April 17, 1923 No. 3694 Milton J. Helmick, Attorney General

Under School Code (Chap. 148, Laws 1923) the "Clerk" of the County board of education is an appointee of school superintendent and may be paid a salary while the "secretary" of the County Board of Education is the County clerk and no extra compensation can be paid to this officer.

CHAPTER IX

THE SCHOOL DEBT

1. Bond Elections.

A. Legal taxpayer--definition of.

1905-6 No. 303 W. C. Reid, Attorney General

OPINION to Hon. Hiram Hadley, Supt. Public Instruction, on construction of words "legal taxpayer," as set forth in Sec. 1, Chap. 109, Session Laws of 1905.

HELD: One who resides in the school district, who pays taxes as required by law in the district where an election is held for the purpose of levying or voting a school tax, as provided for in Sec. 1, Chap. 109, Laws 1905."

B. "Legal taxpayer"--"Majority vote"--construction.

1905-6 No. 306 W. C. Reid, Attorney General

OPINION to Supt. Pub. Instruction on construction of words "legal taxpayer" and "majority vote" as set forth in Sec. 1, Chap. 109, Session Laws, 1905.

HELD: One who resides in the school district, and who pays taxes as required by law in the district where an election is held for the purpose of levying or voting school tax. One whose legal residence is in school district but who pays no taxes in said district is not a "legal taxpayer," and cannot vote at election called for purposes of levying school tax. Where one is subject to tax and does not pay it, he is not a "legal taxpayer."

C. Qualification of voters under Section 1584 of Compiled Laws of 1897.

April 10, 1909 Page 14 Frank W. Clancy, Attorney General

There is no doubt that at school bond elections in incorporated cities and towns, held under section 1584 of the Compiled Laws of 1897, all qualified voters are entitled to vote, and their qualifications are those prescribed in Section 1703 of the Compiled Laws.

As to whether there should be a registration of voters previous to such an election, I call your attention to the fact that by said section 1585, the election is "to be conducted in all respects as are the elections for city and town officers." This section was a part of an Act of 1891, and at that time the law as to the election of municipal officers was, that such election should be held and conducted in the same manner as county elections, as will be seen by reference to section 2446 of the Compiled Laws. There was not, however, any provision for registration of voters for city elections, but such registration was provided later by the Act of 1893, which appears as section 2443 of the Compiled Laws. At county elections, however, only registered persons were allowed to vote. I believe that in such an election as the one of which you write, no new registration can be be required, as the law makes no provision for such registration, but that all voters living in the town and registered for the last election therein should be allowed to vote.

D. Bond elections in Silver City to be held under city ordinances.

April 19, 1909 Page 21 Frank W. Clancy, Attorney General

It is to be regretted that the statute about school bond elections could not have been made complete in itself, without reference to the manner of conducting other elections as a guide. It is possible that there might be some dispute as to what is meant by the language as to the election being "conducted in all respects as are elections for city or town officers in the same cities or towns." As far as I have been able to make examination, authorities construe such languages as meaning the details of who shall be election officers,

how they shall receive and record the ballots, count the vote and make returns, but when a statute declares, as your city ordinance does, that it shall not be lawful for a person to vote unless his name has been registered, it would seem that that is a part of the conduct of the election. I am unable to get away from this conclusion. It might be contended, under section 2443 of the Compiled Laws, that in other cities, there must be a registration before such a bond election could be held, but this does not apply to Silver City, where the regulations and manner of holding elections for town officers are committed to the town council. This brings up the consideration of who can create any board of registration, and by section 4 of your ordinance No. 33, it is clear that that duty is committed to the town council, and no one else can appoint such a board. That section, however, limits the power of the council to the appointment of aaboard of registrafor a general election of town officers. I cannot find any authority for any one else in Silver City to appoint a board of registration, and yet, under the language of section 1585, it would seem that only voters who have been registered can vote at the school bond elections. In the absence of any provision of statute for the making of a registration for a school bond election, and in the presence of the requirement that only registered voters can vote, it would seem that we are necessarily remitted to the last registration for a town election, to ascertain who are entitled to vote.

In other words, if the position is correct, only registered voters can vote, and the only registration provided by law is the one for genl. town elections, we are thereby referred to the last registration list of that kind, as a guide to the voting.

E. As to objections to bond issue of Board of Education in Las Cruces.

1913 No. 980 Frank W. Clancy, Attorney General

. . . Mr. Coffin is not exactly correct in his statement of the effect of my opinion to Mr. Dow in which I gave him under date of Feb. 12, 1912. I did not say

that a board of education could not elect any officers until the legislature should fix the time of such election on a day different from that of the general elections. I did say that the election of members of such board of education must be considered as a school election within the meaning of Article VII of the constitution, and that to hold such an election at the same time as the general city election would be inconsistent with the constitution . . .

The boards of education are also authorized to issue bonds to raise funds for the purchase of school sites or the erection of suitable buildings or to fund any indebtedness for school purposes of the city or town.

What appears to me the most serious objection in the estimation of Mr. Coffin is that on account of the rate of interest he does not see profit enough in the bonds to justify his taking them up.

F. Requirements of a municipal school bond election.

March 22, 1916 No. 1953 Milton J. Helmick, Attorney General

After some discussion of the legal aspects of the School bond elections in New Mexico the attorney-general answers three questions in the following manner:

"In view of the foregoing your question Numbered 1 will be answered by saying that no registration (of bond electors) is required. Your question numbered 2 is answered by saying the city officials are to conduct the election and not the board of education. I can see no necessity though for the city council to pass a resolution authorizing the issue, although there would be no harm in so doing. Question numbered 3 should be answered by saying that Section 4902, being the only procedure we have owing to the omission from the compilation of the sections regarding municipal bond issues, the procedure outlined in section 4902 should probably be followed.

(The above questions were settled, and the views above expressed were confirmed by the case of the Board of Education of City of Roswell vs. Citizens National Bank, 23 N. M.; 167 Pac., 715).

G. Bond elections.

January 11, 1929 Page 190 J. A. Miller, Asst. Atty. Gen.

If man and wife own automobile as community property and pay tax, they can properly sign petition asking for bond election.

There are no statutory provisions against holding elections on holidays.

Election shall be held in district at designated time not less than thirty or more than 50 days after the time of finding that it should be called, but not on or within five days preceding or succeeding any general election held in the county.

H. School bond election.

February 18, 1929 Page 202 M. A. Otero, Jr. Attorney General

Majority of actual votes cast in favor of bond issue, same can be had.

I. School bonds, petition for.

March 19, 1929 Page 203 J. A. Miller Asst. Atty. Gen.

Petition asking for calling of election must have genuine signatures of qualified electors of district who have paid a property tax the preceding year to the no. of 10% of combined vote case in said district at the last preceding general election for governor.

Women possessing qualifications of electors may be qualified electors at all school elections.

Any qualified voter in district (qualified for voting in general election) may vote in bond issue.

G. Bond elections.

H. School bond election.

I. School bonds, petitions.

J. Bond elections, forms.

April 5, 1929 Page 189 J. A. Miller, Asst. Atty. Gen.

This is a long and involved opinion merely setting forth proceedings as in other former opinions.

For the exact forms for conduct of bond elections see pages 169-182 of Attorney General's Opinions of 1929.

K. Bond voting.

January 23, 1930 Page 199 Warfel, Assr. Atty. Gen.

There could be no consolidated district in legal existence until after election consolidating same, and hence no legal election could be called for voting bonds until such consolidated dist. was legally in existence.

L. Bond issue, property qualifications for voting.

April 14, 1930 Page 196 M. A. Otero, Attorney General

No property qualification is required for voting upon a question of issuing school bonds.

M. Bond election--variance between petition and published notice.

April 23, 1930 Page 159 J. A. Miller, Asst. Atty. Gen.

Petition for election said; "for purpose of erecting and improving the school building." Published notice said: "purpose of improving school building within and for such school district." Actual use: enlarging and improving existing buildings.

If procedure in other respects regular, variances between petition and notices is not such as to vitiate proceedings, nor prevent the approval of transcripts. Bonds would be valid.

N. Bond elections, who may vote.

March 29, 1932 No. 424 E. K. Neumann, Attorney General

Your letter of March 26th, 1932, raises the following questions relating to the qualifications of voters at a school bond election:

1. Can a husband vote when all the property is in his wife's name?

2. Can heirs of an undivided estate vote?

3. Can voters who pay taxes only on personal property vote?

4. Can voters who are exempt from taxes because of military service vote?

Sec. 11 of Article 9 of the State Constitution is, in part, as follows:

"No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to the qualified electors of the district, and approved by a majority of those voting thereon."

It is to be noted that the above provides only that the question be submitted to the qualified electors of the district and nothing is said regarding the necessity of being a taxpayer to vote at such an election. Nothing is found in our statutes which changes the situation.

It is our opinion, therefore, that each of your questions must be answered in the affirmative, providing that the persons mentioned have the qualifications of electors in this state, which qualifications are that such persons must be citizens of the United States, over the age

M. Bond elections, who may vote.

March 29, 1932 No. 434 K. K. Neumann,
Attorney General

Your letter of March 26th, 1932, raises the following questions relating to the qualifications of voters at a school bond election:

1. Can a husband vote when all the property is in his wife's name?

2. Can heirs of an undivided estate vote?

3. Can voters who pay taxes only on personal property vote?

4. Can voters who are exempt from taxes because of military service vote?

Sec. 12 of Article 9 of the State Constitution is, in part, as follows:

"No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to the qualified electors of the district and approved by a majority of those voting thereon."

It is to be noted that the above provides only that the question be submitted to the qualified electors of the district and nothing is said regarding the necessity of being a taxpayer to vote at such an election. Nothing is found in our statutes which changes the situation.

It is our opinion, therefore, that each of your questions must be answered in the affirmative, providing that the persons mentioned have the qualifications of electors in this state, which qualifications are that such person must be citizens of the United States, over the age

of twenty-one years, and who have resided in the State twelve months, in the county ninety days and the precinct in which he offers to vote thirty days next preceeding the election, except idiots, insane persons, persons convicted of a felonious or infamous crime, unless restored to political rights and Indians not taxed.

O. Elections, qualifications of voters in bond election.

February 21, 1940 No. 3434 Filo M. Sedillo, Attorney General

Under Amendment No. 2 amending Sec. 11 of Article IX of NM Constitution in 1938, in a school bond election qualified electors of district shall be owners of real estate within such district. Has to be resident of district and property owner.

Architect selection is personal matter in which certain qualifications required by board. Not necessary to advertise for bids.

2. Sale of Bonds.

A. Money derived from sale of bonds must be expended for the purpose for which the bonds were voted.

May 20, 1916 No. 1807 H. S. Clancy, Asst. Atty. Gen.

You asked for an opinion of this office as to whether any of the proceeds derived from the sale of bonds could be devoted to purchase of land upon which a school house could be erected. This office is of the opinion that the moneys derived from sale of bonds must be expended for the purpose for which the bonds were voted, and for no other.

It is therefore believed that the proceeds derived from the sale of the bonds authorized to be issued by school dist. No. 4 of Otero County cannot be expended for the purchase of a site for a school house but must be, in the lang. of the notice, "used for the building and equipping a school house."

B. Bonds.

April 17, 1929 Page 201 J. A. Miller
Asst. Atty. Gen.

Bonds shall not be issued or sold after July 1 of any calendar year.

C. Sale of bonds.

April 18, 1929 Page 197 M. A. Otero,
Attorney General

County Treasurer shall offer such bonds for sale after publication of notice of time and place of sale. Board of County Commissioners would be Board to award the bonds and not County Board of Edu.

D. Bonds.

April 18, 1929 Page 202 J. A. Miller,
Asst. Atty. Gen.

If bonds issued for purpose of erecting school buildings, money expended in way to come within authority to erect and furnish school buildings, nothing criminal in expending it by selling bonds.

E. Sale of bonds when mature.

May 31, 1929 Page 185 M. A. Otero, Jr.
Attorney General

Bonds must commence to mature not later than third year after date of issue. One advertising is sufficient. Cannot be sold at less than par and accrued interest. Provided that in fixing date of sale of any bonds such date shall be fixed in relation to date of collection of taxes for payment of first installment of interest. No. sale of bonds shall be made under any other circumstances.

F. School bonds.

August 7, 1930 Page 204 J. A. Miller, Asst. Atty Gen.

School bonds may not be issued after July 1 and before January 1 of the succeeding year . . . (Very long opinion.)

G. Bond issue.

March 14, 1929 Page 187 M. A. Oter, Jr., Attorney General

Schools may not issue bonds after July 1 of any year.

Same as other opinions on bonds before this one.

H. School bonds, how sold.

March 10, 1930 J. A. Miller, Asst. Atty. Gen.

Under Chap. 201 of Session Laws of 1929, sec. 3--all bonds must be sold at public sale and no sale of bonds shall be made under any other circumstances.

I. School bonds, no commission.

July 7, 1930 Page 168 J. A. Miller, Asst. Atty. Gen.

No commission allowed for sale of school bonds, and bonds must bring par and accrued interest.

J. School bonds, notice of sale, publication.

April 24, 1931 No. 136 E. K. Neumann, Attorney General

In the matter of the publication of notice of time and place of sale of school bonds issued, we are doubtful that Section 3 of Chapter 201 repeals Section 120-

F. School bonds.

August 7, 1930

School bonds may be issued within only 1 year before January 1 of the 30 year . . . Very long opinion.

G. Bond issue.

March 15, 1930

Same as other opinions on bonds before this.

H. School bonds, how sold.

March 10, 1930

Under Chap. 203 of Session Laws of 1927, many bonds must be sold at public sale. Notice of sale shall be made under the following circumstances.

I. School bonds, re redemption.

May 7, 1930

No comparison allowed to city or school bonds, and bonds must bear 6% and interest thereon.

J. School bonds, terms of, legal decision.

April 24, 1931

In the matter of the validation of bonds in the sum of $ [illegible] for school purposes, we are doubtful that [illegible] of Chapter 3 of Session Laws of 1931.

701 of the 1929 Compilation, in so far as it pertains to notice of sale of bonds, for reason that the 1929 Act provides that such bonds (School bonds or included with in the application of said act) shall be sold, "and a notice calling for bids for the purchase of said bonds shall be published at least once in a newspaper having local circulation and in a recognized financial journal . . ." It is our opinion in all school bond issues the better and safer practice would be to publish the notice of sale for four weeks, on publication for each week. This, however, is a matter for the buyer to consider.

K. Bonds, payment of, how drawn.

1941 No. 3882 Edward P. Chase, Attorney General

It is to be noted that under this section a municipal school district may call optional bonds by consent of the bondholders and if the bondholders consent and are willing to surrender the bonds, it is my opinion that the same may be called at any time without waiting for the interest bearing date where refunding bonds are contemplated.

3. How Proceeds of Bond Issue May be Spent.

A. Bond issue not used to purchase furniture.

August 12, 1909 Page 63 Frank W. Clancy, Attorney General

You are correct in giving the advice that school furniture cannot properly be paid for from the proceeds of the sale of bonds issued under sec. 1541 of the compiled laws of 1897. Proceeds of the sale of any such bonds cannot lawfully be used for any other purpose than those expressed in the statute authorizing the issue of the bonds.

B. Judgment against school district cannot be paid from proceeds of bond issue.

1913 No. 995 Frank W. Clancy, Attorney General

. . . any judgment against the school district cannot be paid from the proceeds of a bond issue, but should be paid from the proceeds of a tax levy for that purpose as provided in Section 13 of Article VIII of the constitution . . .

C. Power of municipal boards of education to issue bonds.

August 5, 1915 No. 1612 F. W. Clancy, Attorney General

Your letter enclosing a memorandum brief on the subject of the power of municipal boards of education in NM to issue bonds as evidence of indebtedness under the power which is clearly given in the codification of 1915, to borrow money, and from a hasty examination of your brief, while it is possible that the courts might consture the statutes differently, yet I am inclined to agree with the conclusion which you reach, although, of course, further and more careful investigation when the occasion arises, may cause me to modify that opinion.

D. Use of moneys from bond sales for current expenses.

February 3, 1921 No. 2815 Harry S. Bowman Attorney General

There is no authority which can be relied upon to authorize the transfer of moneys received from the sale of bonds for the construction of school buildings to any other fund, nor is there any express prohibition against usch a step in our laws.

The general rule which prevails in such cases is that moneys which are received for some particular definite purpose may not be used for any other purpose, but we find those having control of such funds often taking such a course in order to prevent financial difficulties.

E. Bonds and transportation of pupils.

August 3, 1929 Page 199 J. A. Miller, Asst. Atty. Gen.

If County Board of Edu. and Treasurer permanently enjoined by court from proceeding father with the bond issue after voting of bonds and advertising has been done, another election would have to be held before bonds may be issued and sold. Right to issue bonds, a petition in duplicate asking for calling of election between Jan. 15 and May 31, and which sec. ends with proviso that not more than 1 election shall be held in any 2 consecutive years.

No statute requiring schools to transport pupils.

F. Schools, borrowing money for school purposes.

March 5, 1931 No. 81 Frank H. Patton, Asst. Atty. Gen.

1. Can a school district borrow money for the purpose of paying interest on bonds of the district validly issued when the Board of County Commissioners has failed to levy a tax for that purpose as provided in Section 120-718 of the 1929 Code?

2. Can another school district loan money to said district for such purpose out of available moneys in its sinking fund?

In answering the first question reference may be had to the following:

"A school district has no power to borrow money for school purposes unless expressly authorized to do so by statute, or unless such power is necessarily implied from some other power granted or duty imposed." 30 Cyc. 976.

Your second question, in my opinion, should be answered NO. Money deposited as a sinking fund for the payment of bonds is not available for use for any other purpose. Opn. Atty. Gen. No. 2618 (1920).

G. Board of education, approval of bond issues.

April 2, 1931 No. 112 E. K. Neumann, Attorney General

In your letter of April 1st you make inquiry as to the legality of school bond elections held before the meeting of the State Board of Education, and you desire to know what you should do in order to comply with the new provisions of law in connection with school bond elections.

Committee Substitute for Senate Bill No. 75 outlines the duties of the State Board of Education and gives such State Board the power to approve or disapprove any proposal for the issuance of bonds by any school district.

We believe it to be mandatory that the approval of the State Board of Education be had in order to make the bonds valid and binding. This does not mean, however, that such approval must be had before any other proceedings are instituted, and it is our opinion that such approval may be had at any time prior to the actual issuance of the bonds.

H. School districts, bonded indebtedness assessment to be used.

May 2, 1931 No. 140 E. K. Neumann, Attorney General

"No school district shall ever become indebted in an amount exceeding 6 per centum on the assessed valuation of the taxable property within such school district AS SHOWN BY THE PRECEDING GENERAL ASSESSMENT."

In construing this section, we are confronted with the proposition of determining what constitutes the preceding general assessment and it will therefore be necessary to refer to the numerous sections of law regarding assessments and valuations.

. . . it appears to us that a distinction should be drawn between the words "last present assessment" used in our Constitution and the words "preceding assessment."

In this connection, then, we have a present assessment as of January 1, 1931, but this assessment does not become conclusive or final until the various state agencies and taxing officials of this state have had the opportunity to make such changes or corrections as may be necessary and until the proper certifications by the State Tax Commission have been made, and until these matters have been given attention there is in fact no final assessment of the taxable property. This, of course, can only mean that the last general assessment, that is the last final assessment, and the assessment which is conclusive, would be the assessment shown upon the tax rolls for the preceding year. And, it is our opinion, that this is the correct interpretation to be placed upon our Constitutional provisions above quoted.

In conclusion therefore, we are compelled to hold that the assessment to be used for the purpose of determining the amount of bonds to be issued by a school district should be the last final assessment as shown by the tax rolls for the last preceding year, and after having been acted upon by the various taxing boards and officials in this state.

I. Premiums on bonds, how paid, school officials.

January 14, 1932 No. 359 E. K. Neumann, Attorney General

We have your letter of January the 12th, to which was attached the letter of Clementine Ivie, Supt. of Public Instruction Union County, New Mexico, wherein she requests the information as to whether or not the premium on the bond given by her deputy is to be paid by the deputy individually or to be paid from the administrative fund of her office, and states the County Commissioners of that County have ruled that all county deputies must pay the premium on their own bonds.

Under such section (33-3216, 1929 Code), only those county officers required to give bond by law can have the premium paid by the county and it is illegal for the County Commissioners to pay the premium on surety bonds of others.

We are unable to find that the law requires a deputy county school superintendent to give a bond, and consequently if any bond is given it is given for the protection of the county school superintendent against the acts of her deputy and is for the county school superintendent's sole protection. Consequently, the premium thereon must be paid for either by the superintendent or by the deputy appointed.

J. Bond issue--cannot deduct paid off value from total bond issue to establish new legal limit.

January, 1935 No. 866 Frank H. Patton, Attorney General

. ... We are in receipt of your letter of Jan. 19th, making inquiry as to the determination of the indebtedness of a school district for the purpose of issuing additional school district bonds . . .

We do not believe that it would be safe to assume that our Supreme Court would adopt the rule that the taxes already levied for the sinking fund of an existing bond issue can be deducted from the amount of indebtedness, and we do not agree with this rule, even tho supported by several decisions. . .

K. Paying premium to repurchase bonds.

February 2, 1946 No. 4848 C. C. McCulloh Attorney General

In your letter, dated January 28, 1946, you inquire whether a Board of Education can pay a premium for the redemption of school bonds where the bonds are not optional and have not matured. You state that it would save the school district money over a period of years and that funds are available in the Interest and Sinking Fund with which to pay the amount asked by the bondholders.

These bonds, I understand, were issued July 1, 1928 and would come under the provisions of Sec. 55-720 of the 1941 Compilation.

There seems to be no prohibition against paying a premium for the redemption of school bonds under our statutes. A Board of Education could enter into a contract to purchase its own bonds at a premium, under its general powers of contracting, and it is possible that the same result could be achieved by the Board, acting through the County Treasurer and County Board of Finance, whereby the bonds of the district could be purchased with the district funds as an investment under the provisions of Sec. 7-207 of the 1941 Compilation. Such a purchase, as a practical matter, would amount to payment of the bonds. (See 174 Ga. 536, 163 S. E. 485).

It is suggested that the State Comptroller be advised of any purchase of bonds, before maturity, at a premium, in order that he can ascertain whether the premium to be paid is less than the total amount of interest that would be due and payable by the date of maturity of the bonds.

If an overall saving can be effected, it would seem to be a matter of good business judgment to proceed with the purchase.

L. Bond issue for improvement of old school.

April 23, 1946 No. 4892 Robert W. Ward, Asst. Atty Gen.

We are in receipt of your letter of April 20, 1946, in which you ask whether a school district can issue bonds for the purpose of installing heating systems and otherwise improving the facilities in existing structures.

Article 9, Section 11 of the Constitution provides that no school district shall borrow money except for the purpose of erecting and furnishing school buildings or purchasing school grounds.

Section 55-720 of the 1941 Compilation authorizes school districts to issue bonds for the purpose of erecting school buildings and purchase of school grounds.

In view of the fact that no provision is made for modernizing existing school buildings, it is my opinion

that school districts may not issue bonds for such purpose.

M. Power of school district to join with municipality in issuing bonds for playgrounds.

February 11, 1948 No. 5127 C. C. McCulloh, Attorney General

In your letter dated February 9, 1948 you inquire whether a school district has the power to join a municipality in issuing bonds for the acquisition and building of playgrounds and recreational facilities.

Under the State Constitution a school district may only issue bonds for the purchase of lands and the erection and furnishing of school buildings. If the lands to be acquired are to constitute a part of the school grounds, then the school district could legally issue bonds therefor. However, if the playground and recreational facilities are to be entirely separate from the school grounds, then the school district is not authorized to issue bonds either to acquire the land or erect buildings and other recreational facilities.

Section 71-1005 of the 1941 Compilation (Pocket Supplement) does authorize a school board to join with a municipality in conducting and maintaining a recreational system and to expend funds included in its maintenance budget for such purpose.

Section 71-1008 of the 1941 Compilation (Pocket Supplement) authorizes municipalities to issue bonds for the acquisition of lands or buildings for playgrounds, recreation facilities and other recreational purposes and for the equipment thereof.

However, this section does not authorize school districts to issue bonds for such purposes and under the Constitution the purpose for which school bonds may be issued is limited.

4. School District Warrants.

A. County Superintendent of Schools--approval of warrants issued by school directors.

1905-6 No. 325 W. C. Reed,
Attorney General

OPINION to Supt. Pub. Instruction on authority of county superintendent of school to approve warrants issued by school directors of Dist. No. 11 of San Juan County.

HELD: Where warrants are issued for indebtedness contracted in one year, and there are not sufficient funds in hands of treasurer for that year to pay same, they cannot be paid out of funds belonging to another year. If enough money should afterwards be collected for the current year in which debt was contracted, then the moneys so collected should be distributed pro rata among such creditors having such indebtedness. If there never is collected sufficient moneys to pay said indebtedness, then the same shall be void.

B. Annual levy--special levy--powers of school board.

1905-6 No. 344 W. C. Reed,
Attorney General

OPINION to Supt. Pub. Instruction, on construction of Sec. 3719, 380, 381, 1534, 1535, 1541, 1542, and 1543, C. L. '97; also Chap. 74, Laws 1905.

HELD: School district shall not become indebted for any purpose to an extent greater than 4 per cent of assessed valuation. 2. In cities and incorporated towns Board of Education has authority to make levy of five mills without submitting question to people. In district other than cities and towns I am of opinion that additional levy can be made only upon submission of question to people.

C. In rural districts $90 a month must pay salary of first grade teacher and other current expenses.

December 1, 1915 No. 1693 F. W. Clancy,
Attorney General

Warrant for teacher's salary, if not paid for want of funds, draws interest at 6%.

The fact that there are no funds in the county treasury to the credit of the district in which a teacher is employed, is not a sufficient reason for the county superintendent to refuse to approve a warrant drawn for teacher's salary. I can readily understand that a county superintendent might take this erroneous view on account of certain statutory provisions, prohibiting indebtedness of school districts beyond the amount which could be paid during the school year, but reference to sec. 4855 of the codification above referred to, shows that the legislature contemplated the possibility, and in effect, authorized the drawing of such warrants and their presentation to the treasurer even when there were no funds from which they could be paid. The treasurer, under such circumstances, is to indorse the fact of non-payment for want of funds upon the warrant, and thereafter the warrant draws interest at the rate of 6% per annum.

D. As to when road and poll taxes become delinquent.

January 27, 1916 No. 1724 H. S. Clancy, Asst. Atty. Gen.

This poll tax is collected under the provisions of Sec. 4936 of the Codification of 1915. The law last cited provides that if the poll tax is not paid within thirty days after the first demand has been made, the school district clerk is empowered to bring suit for the collection of the same.

Sec. 2678 provides that any person subject to a road tax, who, after notice has been given, refuses to pay the same or perform the work in lieu thereof for a period of ten days after being so notified, shall be considered delinquent and he may be sued in a separate action.

E. Eighteen mill limit for special school tax not altered by Chapter 54, Laws of 1915, providing for a full instead of a one-third assessment.

October 18, 1917 No. 2061 Harry L. Patton, Attorney General

After the passage of the law requiring full assessment of property instead of the one-third assessment the argument was presented that since the assessment was trebled the tax limitation of 18 mills should be reduced in the same ratio or to six mills.

The attorney-general answered in these words:

"It is a recognized rule of law that the provisions of a statute may be repealed by a subsequent statue, but I know of no rule of law by which the provisions of statute would be altered or modified, by a former statute. In my opinion the provisions of Chapter 79 referred to is in force as enacted and above quoted."

F. Unpaid teachers' warrants draw 6% interest, and a larger amount cannot be contracted for.

October 26, 1917 No. 2065 Milton J. Helmick, Attorney General

We have your favor of 25th instant wherein you ask if it is possible for the County School Board to include in contracts with teachers of their respective counties, a provision providing for payment of twelve per cent interest on school warrants which are not paid when presented because of the lack of funds. You state that the payment of only six per cent works a hardship on the teachers as the banks will not accept the warrants unless they draw twelve per cent . . .

The matter is governed by section 17 of Chapter 105 of the Laws of 1917, and reads as follows: "No board shall issue warrants or certificates of indebtedness of the school district, in excess of the amount of the levy for one year, but all school orders shall draw six per cent interest per annum after having been presented to the County Treasurer and not paid for want of funds, which fact shall be indorsed upon the order of the Treasurer; and when there is sufficient money in the treasury to pay any such order the president and secretary of the County Board of Education shall draw an order for the interest due on said order and further interest shall cease from date of such order."

It is our opinion that under the New Mexico statutes

no more than six per cent interest can be added to school warrants, and obviously such limitation cannot be changed by contract. It will be noted further that the Board of Education has no authority to fix any interest warrants at all, but when warrants are presented and not paid, the interest provision of the law automatically attaches. In other words, the interest is created by the statutes and not by any act of the school authorities.

G. Authority county boards of education to borrow money to pay warrants to school teachers.

January 14, 1921 No. 2785 Harry S. Bowman, Attorney General

In our opinion there is no prohibition or objection to the borrowing money by County Boards of Education for the above purpose, so long as such boards do not exceed the limitations prescribed by law for their expenditures for the year, and keep themselves within the amount named in the budgets filed by such board.

Section 1227, Code 1915, prohibits the expenditure of more funds in one year by any public board than are to be raised by taxation or other source of income for that year, and this, together with the limitations of the budget, would be the only limit upon County Boards of Education in the matter of the borrowing of money for the payment of salaries of school teachers.

H. Issuance of certificates of indebtedness by county boards of education.

August 30, 1921 No. 3107 A. M. Edwards, Asst. Atty. Gen.

. . . Chapter 46 of the Laws of 1921.

This Chapter provides specifically that the Board may "issue warrants or certificates of indebtedness of the school district" not in excess 90 per cent of the annual budget. If it seems more desirable to issue these evidences of indebtedness in the form of "certificates" of indebtedness rather than "warrants", we see no objection.

I. Budgets emergency fund in budget.

May 8, 1923 No. 3703 Milton J. Helmick, Attorney General

Increase in School Attendance.

Under School Code, Chap. 148 of Laws of 1923, estimated increase in school attendance may be anticipated by an emergency fund in budget.

J. Certificates of indebtedness to teachers.

August 1, 1923 No. 3725 John W. Armstrong; Asst. Atty. Gen.

Sec. 810 Chap. 148, S. L. 1923 in connection with Sec. 906 authorizes governing authorities of rural and municipal districts to borrow money and issue and deliver certificates of indebtedness, for the actual amount money necessary for school maintenance, for a period of 90 days limited, at 6 per cent per annum, not to exceed, from date of delivery, and to be discharged by first money thereafter credited to school maintenance fund. May be sold to creditors in satisfaction of any such maintenance obligation. Made payable on or before definite time. Holder gives specific address. No payment of interest after notice of discharge of certificate given.

K. Certificates of indebtedness valid.

July 17, 1924 No. 3773 Milton J. Helmick, Attorney General

Provision for certificates of indebtedness of school district in school code is constitutional.

Distinction between "borrowing money" and "advance of money."

Sec. 810, Chapter 148, Laws of 1923 . . .

"The plan outlined in Sec. 810 does not place any additonal liability upon the property of the district nor

require any additional tax levy . . . Strictly speaking, the anticipation of tax collections is not 'borrowing money.' It is rather an 'advance of money' and many courts have held that an advance of money does not necessarily constitute a loan . . ." Broch v. French, 116 Ill., App. 15.

L. School districts certificates of indebtedness.

July 18, 1930 Page 182 J. A. Miller, Asst. Atty. Gen.

Sec. 120-810 Codification of 1929:

In anticipation of collection of taxes for which levies have been made, county and municipal b. of ed. with consent of edu. budget auditor may borrow money for school maintenance expenses upon cert.of indebtedness bearing int. at rate not in excess of 8% per annum. Such certificates shall be issued on faith and credit and on behalf of district for which money is borrowed, and total amount of cert. issued and unpaid dist. shall not at any one time be in excess of budget allowance for maintenance of schools in such district for period of 90 days. Moneys thereafter first credited to the school maintenance fund of the respective debtor district shall be paid in satisfaction of such cert.

When tax levies for construct. of and repair to sch. buildings have been made, county and municipal boards may borrow on cert. of indebtedness for the purpose of meeting immediate contract payments for such repairs and impr. Such certificates, etc., 8%. Moneys thereafter first collected on such levies shall be paid in satisfaction of such certificate.

M. Issuance of certificates of indebtedness by municipal school board.

June 14, 1934 No. 776 Quincy D. Adams, Asst. Atty. Gen.

This has reference to the letter of E. E. Harrison addressed to you, under date of June 12, 1934. Mr.

Harrison wishes to know if the municipal board of education in Raton has the right to issue certificates of indebtedness under Section 120-810, 1929 Code, in view of the constitutional amendment adopted at the September 19, 1933, election which provides that before a school district can borrow money the proposition must be submitted to a vote of the qualified electors in the district who are owners of real estate.

In my opinion this amendment to the constitution does not affect the right of the school district to anticipate the collection of taxes by the issuance of certificates of indebtedness since the issuance of such certificates does not constitute "borrowing" within the meaning of said constitutional amendment. 56 C. J. 541.

N. Tax levy, expenditures under State Tax Commission.

August 18, 1938 No. 2032 Frank H. Patton, Attorney General

Regarding Tax levies raised for School purposes.

Act. , Chap. 44, of Session Laws of 1931--"proceeds therefrom to be expended under direction of State Tax Commission for construction and equipment of new buildings for school purposes in any district in the county in which said condition exists."

State tax commission could properly designate School Board as agent to take care of all necessary details and so long as general expense is approved by Tax Commission, we would have substantial compliance with the statutory provision.

O. School warrants, manner of drawing.

1942 No. 4050 Edward P. Chase, Attorney General

. . . You state that the County Superintendnet, as secretary of the County Board of Education, refuses to attest to the signature of the president of the Board. The warrant shows on its face to be signed by three board members. You inquire whether a warrant issued in this manner is legal.

No provision is made for the manner of signing and countersigning a warrant by a school board, but the only requirement is that such warrant or voucher be issued by order of the board of education. The ordinary manner of executing warrants, as shown by the warrant itself, is signature by the president of the Board of Education, attested by the secretary. However, in the absence of express legislative direction as to the manner of signature, any signature that shows the majority of the Board has concurred in the order for the issuance of the issuance of the warrant will be sufficient to make the warrant legal.

PP.. Emergency building and repair fund may not be used for purchase of land.

March 9, 1944 No. 4474 Harry L. Bigbee, Asst. Atty. Gen.

Sec. 55-629 of the Supplement to the NM 1941 Compilation specifies that the one-per cent of the maintenance fund specified in this sec. may be used only for emergency building and repair purposes. Sec. 55-720 of the NM 1941 compilation, which authorizes the issuance of school bonds, specifies that they may be issued for the erection of school buildings and purchase of school grounds. Sec. 55-629 only pertains to actual construction of building and does not authorize purchase of building site.

In view of the foregoing it is my opinion that use of this fund for emergency building and repair purposes is limited to the actual construction and repair of buildings.

CHAPTER X

ACQUISITION AND USE OF SCHOOL PROPERTY

1. Titles to Property and Bids on Contracts.

A. No bids required for building contract.

July 26, 1910 Page 151 Frank W. Clancy, Attorney General

No provision of law requiring school directors to call for bids of construction of school houses, but strongly of opinion that the practice of your department in advising directors to call for such bids is an excellent one and I believe that you should continue it. That course is so common with regard to erection of public buildings of all kinds that any different method is likely to create trouble and difficulties which can easily be avoided.

Statute with regard to the collection of poll tax and paying over the same to the county treasurer is, as you say, uncertain and indefinite, still it is clear that the clerks must on or before the first Monday in April, report to the county clerk and superintendent the list of persons liable to poll tax, and shall also report to the superintendent the amount collected. It appears to me that it then becomes his immediate duty to pay over the money collected to the county treasurer, and that he must do so within a reasonable time after he has made the report, and the implication is that the collection should be made between the first Monday in February, when he posts a copy of the lists, and the first Monday in April, when he is required to make a report.

B. School directors should not reject the lowest bid for building a school house without some substantial reason.

1912 No. 1125 Frank W. Clancy, Attorney General

. . . As far as I am aware, there is no absolute requirement that school directors must award a contract

for building a school house to the lowest bidder. The custom is, in advertising for binds, to reserve the right to reject any or all binds, and probably you did that in your advertisement. I think you would be justified in rejecting a bid, even though it may be the lowest, if you are satisfied that the bidder is incompetent and could not perform the work to your satisfaction, or if you believed him to be of such character that you would have trouble about the work. You ought to have substantial reason however, before you reject the lowest bid, as to do so would put you in such a position that you may be attacked and criticised if there were not good reason for what you do.

C. Obligatory upon city school authorities to provide a proper building for county high school.

June 15, 1914 No. 1245 H. S. Clancy, Asst. Atty. Gen.

By Sec. 8 of Chap. 57 of the Laws of 1912 it is provided that the erection and cost of a building to be used as a county high school shall be borne by the district where such high school is established, and I can see no objection whatever to the using of city school funds for the building of an addition to the present school house; in fact, it would seem to be obligatory upon the city school authorities to provide a proper building for the county high school.

D. School district should take title to property in fee simple.

August 3, 1917 No. 2039 Carl A. Hatch, Attorney General

In answer to your inquiry, as to whether or not a county board of education can erect a school building on land for which the title is a ninety-nine year lease to the Board, and also whether the Board could accept a deed and erect a building on land in the title of which there is a testrictive clause providing that if the land is used for other than school purposes it shall revert to the vendor, we advise as follows:

Section 5 of Chapter 105, Laws of 1917, reads in part as follows: "Said board shall also have power to contract for and purchase all sites, buildings, equipment or other property for schools."

You will notice that the power given in the above statute is to purchase but there is no authority given to lease. In our opinion, the policy of the law is for school districts to own fee simple to the land on which school buildings are erected.

As to whether a building may be erected on land the deed to which provides that if the land is used for other than school purposes, the title shall revert to the grantor, we see no objection to this provision in the deed, in that a school district can only acquire or hold property for school purposes.

E. Bids for construction of school building.

May 4, 1921 No. 2951 A. M. Edwards
Asst. Atty. Gen.

This office is in receipt of your letter of April 28th, in which it is stated that bids have been called for the construction of a school building in your district, and that since the binds were opened other bids have been submitted which offer to construct the building at a much less price. You desire to know whether the school board can accept these bids without further advertising.

Section 4893, 1915 Compilation requires that no contract for the erection of a public school building shall be let except upon sealed proposals to the lowest responsible bidder. There is no time fixed in the statute for which such advertising must run. The courts have held that a reasonable notice is sufficient. Under the circumstances in your case, we should judge that ten days notice would be a reasonable time. It would be much safer for you to re-advertise for binds on such short notice and then let a contract to the lowest responsible bidder.

F. Borrowing of money to complete construction of school buildings.

June 15, 1921 No. 3013 Harry S. Bowman, Attorney General

In our opinion, there can be no objection to the borrowing of money from banks to complete or construct a school building if the banks are willing to loan the money in that manner.

Of course, no warrants may be issued in excess of the amount provided for by the budget and tax levy for that purpose. But there is no objection to the anticipation of the collection of the future levy by the borrowing from banks if those institutions will make the loans.

G. Cost of construction of county high school must be borne by school district.

May 19, 1922 No. 3431 Harry S. Bowman, Attorney General

In reply to your letter of the 15th instant, asking upon whom is imposed the expense of the construction of a county high school, whether upon the entire county or upon the community wherein the high school is located, I wish to advise you:

Section 4970, Code 1915, specifically provides that the cost of the site, location of building and erection and cost thereof for any county high school shall be entirely borne by the district where such high school is established.

H. School land, title in state when vests.

December 6, 1937 No. 1832 Frank H. Patton Attorney General

Very long involved opinion re the Ferguson Act and Enabling Act. It explained that under those acts School Sections belonging to the State embraced in National forests,

surveyed before forests were nationalized are "hereby granted to said state for support of common schools.

I. Right to purchase and lease buildings.

June 7, 1945 No. 4734 Robert W. Ward, Asst. Atty. Gen.

You have requested an opinion of this office on the following matter:

Municipal School District No. 2, located in the city of Las Vegas, has for some years past been renting a building for school purposes for the sum of $1200.00 a year. It has on hand approximately $10,000.00 in the building fund. The school district desires to purchase this building by paying down the $10,000.00 and entering a contract by which it would agree to pay a sum certain until the purchase price had been paid out in full, at which time it would receive a deed to the premises.

You also state that at the present time a portion of the premises which the school district proposes to buy has been rented to another party under a five-year lease so that if the school district bought the building it would of necessity buy it subject to the lease. You ask our opinion as to whether or not the school district may legally enter this contract.

First, it is observed that Article 9, Section 11 of the Constitution of New Mexico relating to the indebtedness of school districts does not prohibit a school district from becoming indebted without a vote but merely prohibits it from borrowing money without such vote. Secondly, I do not believe that the Bateman Act, Section 7-607 of the 1941 Compilation, prohibits this type of transaction. All it does is make void any debt for any particular year for which there are not funds from that year's taxes to pay. It further prohibits the use of the funds belonging to any year for purposes other than paying expenses of that year. Under this contract, however, each year's payment would in fact be a debt due that year for which there would be ample revenues to assure payment.

I.

See Capital City Bank v. Board of County Commissioners, 27 N. M. 541 where the court held that the issuance of tax anticipation certificates payable in succeeding years did not offend the Bateman Act. See also Shipley v. Smith, 45 N. M. 23, where the court sustained a similar contract although not referring to the Bateman Act.

There is no provision in our statute specifically authorizing the school district to purchase school buildings. However, by Section 55-902 of the 1941 Compilation, municipal school boards are given like power in jurisdiction over schools in districts within their jurisdiction as those possessed by county boards of education over their respective schools and districts.

Section 85-807 relating to rural schools gives the board very broad powers in that it is given supervision and control over all rural schools and districts and of sites, buildings, equipment and funds of said districts. Further, Section 55-604, being the direct charge budget, includes items for the lease of school buildings and and purchase of school grounds. This, in itself, is, in my opinion, a sufficient authorization to a school board to either lease a school building or purchase school grounds.

That the language "purchase all school grounds" includes land with buildings attached is a necessary conclusion. Otherwise, the school district in a builtup area would never acquire additional school facilities since it could never buy vacant ground. This proposition is sustained by the case of Ferree v. Sixth Ward School District, 76 Pa. 376.

Only one other question occurs to me and that is as to the authority of a school district to stand in the position of a landlord. The authorities are divided as to whether or not the governing board of a school may lease school property for other purposes. A majority of the cases holding that the school cannot enter such leases appear to go on the fact that the use of the premises for the other purposes would or might interfere with the school functions. See, however, Cast v. Schinault, 113 Ark. 19, 166 S. W. 740, and Lagow v. Hill, 238 Ill, 428, 87 N. E. 369, which sustain the

power of a school board to lease unneeded school property. Here, however, the situation is different in that the governing authorities will not be executing the lease but will rather buy subject to an existing lease, that is to say, the school will not be able to buy the entire rights of ownership, but only the rights subject to the lease.

Despite the fact that I can find no cases in point on this matter, I see no reason why a school district could not buy property subject to a lease as to a part just as it might buy property subject to an easement.

In view of the foregoing, it is my opinion that municipal school district No. 2, San Miguel County, may legally purchase the premises. It is further my opinion that the fact that the premises are subject to a lease will not invalidate such a purchase unless the use of the leased premises substantially interferes with the use of the balance of the property for school purposes.

J. Right to reject bids for bond issue; right to sell to Treasurer after advertising for binds.

July 22, 1946 No. 4929 Asst. Atty. Gen. Robert W. Ward

We are in receipt of your letter of July 19, 1946, in which you relate the following facts: The Bernalillo County School Board published notice of sale for various school bond issues. It received two bids, one from a private concern, and one from the State of New Mexico. Upon opening the binds, it found that though the bids differed in form, they were substantially the same. In view of these circumstances, you ask our opinion as to whether the school board may reject both of these bids and then sell the bonds to the State Treasurer at private sale.

Section 7-618, governing the advertisement and sale of bonds, provides, in part, as follows:

"The bonds shall be sold to the bidder making the best bid, subject to the right of the corporate authorities to reject any and all bids and re-advertise."

This section also provides:

"Provided, that said bonds or any part thereof may be sold to the State of New Mexico at private sale without advertisement, for not less than par and accrued interest."

It is seen that this statue gives the school board the specific authority to reject all bids. It is further specifically given the right to sell to the State Treasurer without advertisement.

It is my opinion that this right to sell to the State Treasurer is not lost by the board of education through advertising the bonds for sale. Nor can I see how the right of the board of education to take advantage of a private sale to the Treasurer would be lost simply because the State Treasurer bids on the bonds at a public offering.

In view of the foregoing, it is my opinion that the school board may reject all bids received and later, if they see fit, sell to the State Treasurer, at private sale without advertisement.

K. Advertisement for bids for constfuction of building.

November 19, 1947 No. 5102 Wm. R. Federici, Asst. Atty. Gen.

This will acknowledge receipt of your letter of November 18, 1947 in which you request the opinion of this office on the matter of acceptance by a municipal board of education of a certain bid for construction of a building.

It appears that the Lovington Municipal Board of Education opened bids on the proposed construction of a gymnasium. The bids were submitted, but since the school did not have sufficient funds on hand, the Board temporarily declined to accept any bid. Now, at a later date, the Municipal Board of Education desires to accept the original low bid. However, the original low bid, according to facts submitted, would be increased by a sum not to exceed 5% of the original bid. It also appears that the school board is setting up fourteen

alternates to be considered by the low bidder.

From the facts as submitted, it appears to me that the bid now submitted by the original low bidder amounts to a new bid and an acceptance of that bid by the Municipal Board of Education would amount to letting of a contract involving expenditure of $500.00 or more without proper notice and advertisement as provided by Section 55-807, N.M.S.A., 1941 Compilation.

In view of the above, I am of the opinion that the Lovington Municipal Board of Education cannot accept the new bid for the erection of the gymnasium without re-advertising.

2. Maintenance and Operation of Schools.

A. Proceeds of bonds to build school houses may be used to purchase ground.

April 13, 1909 Page 18 Frank W. Clancy, Attorney General

You say a district school has voted five thousand dollars of bonds to build a new school house and ask if the board is authorized to use any portion of this money in purchasing a school site or additional lands adjacent to the present site. The law does not in terms authorize the borrowing of money for the purpose of purchasing school sites but only, "for the purpose of erecting and building school houses" and it is possible that a court might hold that the giving of the power to use money to erect a school house implies the power to use such money for the purchase of the ground upon which to put the school house, but of this I would not be certain. The general rule is that such corporations as school districts have such powers as are expressly conferred, and in addition thereto only such as are necessarily implied in the grant of express powers. Elsewhere in the law school directors are required to provide school house sites and proper school houses as long as practicable, when it comes to the question of borrowing money by the issuance of bonds no reference is made to school house sites.

I would say that in any district where objection by

the citizens is made to the expenditure of such money for the purchase of land, it would be unadvisable to make such expenditure as it might provoke litigation which would be embarrassing to the school interests of the place. If it were certain that no such action would be taken, no one outside of the district would be heard to complain if the land were bought, and no matter what disposition is made of the money, the validity of the bonds would not be affected thereby.

B. Maintenance and operation of county high school.

February 15, 1916 No. 1744 F. W. Clancy, Attorney General

Statute appears as sec. 4970 of new Codification of statutes, and is as follows:

It is hereby expressly provided that the cost of site, location of building and erection and cost thereof, for any such county high school shall be entirely borne by district where such high school is established, and the county high school fund hereinbefore provided will be used only for the maintenance and operation of the said county high school or schools.

Section is so drawn that there is great difficulty in determining where the cost which must be borne by the district, ceases, and where the expense to be borne from the county high school fund begins. County high school fund, which is in effect, a district school fund to be expended the same as other district school funds are expended, is "to be used only for the maintenance and operation of the high school." In the ordinary meaning of the words, and according to the judicial authorities, "maintenance and operation" would naturally refer to something already in existence, which is to be maintained and operated.

Conclusion is that legislature intended that the district where the school is located should furnish the ground and erect a school building sufficiently equipped so that a school can be therein maintained and operated, and that by a justifiable expansion of the meaning of the word "maintenance," the machinery, tools, and other appliances necessary for the additional branches, must

be supplied from the county high school fund.

C. County Boards of Education are now authorized to change districts and to select location of school houses.

July 24, 1917 No. 2029 Harry L. Patton, Attorney General

You ask as to where the authority is lodged for controlling the location of school houses and state that you have been unable to determine whether the same remains in the local school board, or whether it is given to the County Board of Education. Section 4898 Codification of 1915, authorizes school directors to procure sites for school purposes, and evidently, authorizes them to select same.

Section 4845, Codification of 1915, reads as follows:

"It shall be lawful for any district to take and hold in its corporate name so much real estate as may be necessary for the location and construction of a school house and convenient schools; Provided, that the real estate so taken, otherwise than by consent of the owner, shall not exceed one acre. The site so taken must be situated on some public highway or thoroughfare." . . . By section 15, Chapter 105, Laws of 1917, the last named section was amended to read as follows: "No public school houses or buildings shall hereafter be situated or erected except upon a public highway or thoroughfare."

By reading the provisions of Sections 7 and 8 of the Act of 1917, referred to, I am of the opinion that it was the intent of the legislature to vest in the County Board of Education the right to select and control the location of school houses in rural districts.

D. Authority Board of Education to expend school funds for repair buildings used for schools.

February 11, 1921 No. 2823 Harry S. Bowman, Attorney General

I am in receipt of your letter of the 8th instant,

requesting an opinion from this office regarding the right of Boards of Education to expend school funds on an Armory for the purpose of repairing the building so that it may be used by the Board of Education as a school building for a definite period.

The powers of the Boards of Education are define in section 4881, Code 1915, and therein it is provided that such Boards shall "exercise sole control over the schools and school property of the city or town."

While this section does not expressly authorize Boards of Education to lease or rent school buildings, such power is implied, and it is our opinion that if the moneys that would be expended in the repair of the armory are intended to be in lieu of rentals which would be necessary to be paid by the board for the lease of the building, then the expenditure of such funds for that purpose would be authorized.

E. Boards of Education, bids on contracts over $500.00

August 8, 1931 No. 235 Quincy D. Adams
Asst. Atty. Gen.

Must a Municipal Board of Education advertise for bids on repairs of school buildings involving the expenditure of more than $500.00?

In my opinion it must advertise for bids in the same manner as a County Board of Education, due to the following language of Section 120-906 of the 1929 Code, as amended by Section 10, Chapter 119, Laws of 1931.

"The said board shall have the same powers and duties respecting its districts and schools as are possessed by county boards of education."

F. Whether or not may purchase printing from non-resident.

September 18, 1934 No. 808 Quincy D. Adams,
Asst. Atty. Gen.

We have your letter of September 14, 1934. You state that the Artesia schools have been using a copyrighted

system of school records published by the World Book Company of New York. You wish to know if the purchase of such supplies from a firm not a resident of this state nor authorized to do business in this state is a violation of Chapter 32, Laws of 1934.

In the case mentioned by you I take it that it would be impossible to secure these supplies form a person or firm in this state since they are copyrighted by the World Book Company.

In the first place, I wish to state that it is my opinion that Chapter 32, Laws of 1934 is unconstitutional for the reason that the subject of this Act was not included in the Governor's Proclamation calling the special session of the eleventh legislature. If that be true, then Chapter 150, Laws of 1933 is still in effect and would apply to this case. However, Chapter 150 provides that such contracts shall be awarded to residents of this state "whenever practicable." In the case mentioned by you it would not be practicable since the supplies cannot be purchased in this state at all.

Even supposing that Chapter 32, Laws of 1934 is valid I doubt if it would apply in this case. Certainly the legislature did not intend to prevent the purchase of supplies from non-residents which cannot be obtained within the state.

Notwithstanding my opinion in this letter, I call your attention to Section 3, Chapter 32, Laws of 1934 which provides certain penalties for violation of the law. Some risk would necessarily be involved of its terms are not complied with.

G. School Boards--issuing bonds for repair of school building prohibited.

July 3, 1946 No. 4922 C. C. McCulloh, Attorney General

In your letter dated July 2, 1946, you inquire whether bonds may be voted for repairs to school buildings.

Article 9, Section 11 of the New Mexico Constitution provides that no school district shall borrow money except

for the purpose of erecting and furnishing school buildings, or purchasing school grounds. The Legislature has specifically authorized the issuance of school bonds for purpose of erecting school buildings and purchasing school grounds and, under the Constitution, could also authorize the issuance of bonds for furnishing school buildings. However, the Legislature has not authorized the issuance of school bonds for repairs to buildings, and could not authorize such bonds without violating the above mentioned constitutional provision.

3. Control and Use of School Property.

A. Holding of dances in public school houses.

November 7, 1921 No. 3181 Harry S. Bowman, Attorney General

The general authority and control over the property of schools in the county is vested with the County Board of Education (Chapter 105, Laws of 1917), and as the matter of whether or not dancing shall be permitted in school house is one which may be considered as somewhat local to the particular district in which the school is located, the County Board of Education may therefore delegate to the board of directors of the district the power to determine whether or not the school building may be used for dancing.

B. Power of district to procure loan under PWA or to lease building from Government.

Nov. 15, 1933 No. 685 E. K. Neumann, Attorney General

With reference to your letter of November 6, 1933, with relation to the power of School District No. 8, Eddy County, to procure from the Government a loan under the Public Works Act for the purpose of erecting a school and community hall and gymnasium, or, if there is no power to make the loan, the power to have same built by the Government and lease same upon an agreed rental until the funds expended are repaid by the Government.

Under the provisions of the Public Works Act, funds

for public works will be furnished by the United States Government, to be repaid under the following conditions:

1. By a bond issue of the borrowing governmental agency in the amount of Public Works Act funds furnished, to be paid out of proceeds of taxation.

2. By a bond or debenture ussue of the borrowing governmental agency in the amount of Public Works Act funds furnished, to be paid out of revenues derived out of the property built, acquired or improved.

3. By a mortgage of the property built, acquired or improved in the amount of the Public Works Act funds furnished.

4. By a lease of the property built, acquired or improved to the governmental agency, upon the basis of the rentals being considered as a repayment of the Public Works Act funds furnished.

Under Section 11 of Article IX of the State Constitution, as amended by Constitutional Amendment No. 2 adopted by the vote of the people on September 19, 1933, we find the following provision:

"No school district shall borrow money, except for the purpose of erecting and furnighing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to a vote of such qualified electors of the district as are owners of real estate within such school district, and a majority of those voting on the question shall have voted in favor of creating such debt. No school district shall ever become indebted in an amount exceeding six per centum on the assessed valuation of the taxable property within such school district, as shown by the preceding general assessment."

Under said Constitutional provision, unless a bond issue can be voted for the improvement contemplated, condition No. 1 could not be met. Even if a bond issue for such purposes can be had by vote, the amount of the bonds issued must be within the six percent limitation fixed by the Constitution.

Likewise, condition No. 2 cannot be met for the prop-

erty built, acquired or improved is not revenue property within the meaning of the Public Works Act, even though there might be authority in law, which I doubt, for school districts to issue revenue bonds or debentures for the purpose of borrowing money to build or acquire revenue property.

It would also be impossible to meet condition No. 3, for such procedure would be in violation of said Constitutional provision. For a full discussion of this proposition see the case of Palmer vs. City of Albuquerque, 19 N.M. 285.

This leaves for consideration only condition No. 4 as a possible chance to obtain the buildings desired. Various statutes have been examined, in addition to the above quoted constitutional provision, and we find the following that have some bearing upon the subject:

a. "After March 12, 1897, it shall be unlawful for any board of county commissioners, city council, town trustees, board of education, board of trustees, or board of school directors of any school district, for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year which, at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year, and any and all kind of indebtedness for any current year which is not paid and cannot be paid, as above provided for is hereby declared to be null and void, and any officer of any county, city, town, school district or board of education, who shall issue any certificate or other form of approval of indebtedness separate from the account filed in the first place, or who shall, at any time, use the fund belonging to any current year for any other purpose than paying the current expenses of that year, or who shall violate any of the provisions of this section, shall be deemed guilty of a misdemeanor and upon a conviction thereof shall be fined not less than one hundred nor more than one thousand dollars or be confined in the county jail for a period of not not more than six months or by both such fine and imprisonment, in the discretion of the court trying the case."

b. Under Sec. 33-4246, 1929 Code, the year refer-

red to for school districts if from September 1st to August 31st of the next year.

c. Under Sec. 33-5901, 1929 Code, the county commissioners of each county are required to make estimates of all county expenditures, including school districts, for the ensuing year. Such estimates to be made on or before May 1st of each year and may be termed as budgets. This power for school districts is placed in the hands of a school budget commission as provided for in Sec. 120-601, 1929 Code, Sec. 120-601 and Sec. 120-603, as amended by Sec. 3, Chapter 119, Laws of 1931, provide further procedure.

d. We come now to Sec. 120-600, Code of 1929, as amended by Sec. 4, Chap. 119, Laws of 1931, which in part is as follows:

"* * * District direct charge funds shall include property insurance, lease of school buildings, erection of school buildings, and repair to school buildings and equipment, new equipment, purchase of school grounds, improvement of grounds and buildings, transportation to supplement transportation allowance from the regular county maintenance fund, and interest on and sinking funds for district school bonds. * * *"

From the foregoing citations, it is apparent that school districts may budget for the cost of leasing school buildings, subject, in all cases and relating to any expenditures, to the approval of various boards and officials. First, the school commission (See Sec. 120-601, supra), secondly, the county commission (See Sec. 33-5901, supra), third, the educational budget auditor and lastly, the State Tax Commission (See Sec. 120-606, 1929 Code).

Consequently, subject to the annual approval of these officers and boards, broadly speaking there is a possibility of the officers of your school district meeting condition No. 4. Several things must be considered, however, before we can conclude that this power is an absolute power.

The first question that comes to mind in such consideration is: Does the Bateman Act, Sec. 33-4241, supra, prohibit a lease for longer than one year? We

think not, for reason that the rental, if fixed upon an annual basis and not as a lump sum for the entire term of the lease, coming due each year is a debt for the particular year, or current year, which can only be paid out of the money collected for that particular year and belonging thereto. We will not consider the possibility of failure of collections of such funds, for that alone has no bearing upon the right of the official to incur indebtedness budgeted for in any particular year.

"Similarly a rental contract under which the school organization undertakes to pay a yearly rental, which of itself does not exceed the constitutional limit, does not create a debt of the aggregate payments." 56 C. J. 540-41.

The most serious question presented is: Can the present set of officials legally enter into a long term lease beyond the terms of their office so as to bind future boards to pay the rentals contracted for the full term of such lease? There is no doubt that municipal school boards, and we are assuming that this particular district is a municipal district, have the power to lease buildings and grounds for needed school purposes. There is some limitation to this power even in absence of a specific statute. As we view it, there are in this state no statutes which imply that the powers of the board are limited to the current term, or that contracts entered into for a greater period would invalidate such contract. In the case of Board of Education vs. Board of Education, 24 S.W. (2d) 889, the Supreme Court of Tennessee states:

"Upon authorities cited, we hold that a county board of education, acting in good faith and without collusion, may lease a school building for a period extending beyond their term of office * * *."

Prior to the above statement, the court says: "In principle, there is no distinction between the power of a county board and a municipal board to enter in such a contract." The particular lease was for a period of 10 years.

Some difficulty perhaps might be experienced in order to have the various taxing boards and officials to provide funds to meet the annual rentals, but this diffi-

culty could be solved, we believe, by the application of the following rule as stated in 56 C. J. 555, to-wit:

"It is generally the duty of the particular board or officer empowered to appropriate the necssary funds available for educational purposes, and if for a proper purpose, may be compelled so to do."

We conclude, therefore, that your municipal school board may:

1. Safely contract to lease the building and grounds, erected and purchased by the government, for needed school purposes in good faith and for a term of years beyond the term of the members of the present board;

2. That the various taxing boards and officers must provide the annual rentals for such purposes.

There is, of course, the possibility that there might be a complete failure of funds available for such purposes, but this is so remote that we believe it will not operate as a bar to the transaction.

C. Authority to permit use of buildings.

October 27, 1934 No. 822 Quincy D. Adams, Asst. Atty. Gen.

This is in response toyour letter of today in which you ask for an opinion as to what authority has the right to permit or deny the use of a school building in a municipal school district for a public gathering of teachers.

Section 120-902 of the 1929 Code provides that municipal school boards shall have like powers as those possessed by county boards of education over rural school districts. Section 5 of Chapter 119, Laws of 1931 provides that such boards "shall have supervision and control of * * * sites, buildings, equipment, etc."

Consequently it is my opinion that in the case mentioned by you the municipal school board has the power to permit or deny the use of such school building for the purposes stated.

D. School boards may lease school building for public dances.

December 4, 1947 No. 5110 William R. Federici, Asst. Atty. General

This will acknowledge receipt of your letter of December 2, 1947 in which you request the opinion of this office as to whether or not there are any legal objections to the holding of public dances for profit in the school gymnasium when given by other than the school.

Section 55-907, N.M.S.A. 1941 Compilation provides that the municipal school boards shall have the same powers and duties respecting its districts and schools as are possessed by county boards of education.

Section 55,807, N.M.S.A. 1941 Compilation provides that county boards of education shall have supervision and control over all rural schools and of sites, buildings, and equipment of said schools and districts.

It follows that the municipal school board has full control over whether they will permit a public dance for profit in the school gymnasium.

There is a considerable conflict of authority as to whether the school buildings may be used for public dances. The rule is stated in 47 A.J., page 344, sec. 67 as follows:

"While there appears to be considerable conflict in the reported cases as to whether school property may be used for other than school purposes, or, if so, as to what uses are permissible, there is a "liberalizing tendency in favor of extending permissible uses. In determining the question, the courts may be governed by the wording and import of statutes prescribing the powers and duties of those charged with the care of school property, or, if the statute is general in nature, by considerations of public policy, depending largely on the attitude of the taxpayers in the district. Other considerations affecting the result may be found in the changing times, or in the historical recognition of the propriety of devoting school property to certain uses."

The weight of authority seems to be that a school building may be leased to organizations for the purpose of holding dances out of school hours where such use does not interfere with the proper conduct and management of the school or harm the buildings or other property of the district. (See Annotation in 86 A.L.R. page 1175).

The cases which old that leasing school buildings for a public dance is not authorized, do so on the basis that taxation is invoked to raise funds to erect the building and that taxation is illegitimate to provide for any private purpose. Other cases which hold to this latter view do so on the ground that it is against public policy.

In view of the fact that we have no statute prohibitin the use of school buildings for a public dance and in view of the fact that the municipal boards of education are given full supervision and control of school buildings and equipment, it is my opinion that a municipal school board of education may, if it so desires, lease a school building or permit the use of same for the purpose of a public dance for profit.

4. Disposal of School Property.

A. School Board--powers to sell present school house, etc.

1905-6 No. 352 W. C. Reed, Attorney General

OPINION to W. F. Dougherty, Chairman Board School Directors, District No. 12, Raton, N. M., regarding powers to sellpresent school house and grounds and erect new building and exchange present site for new one.

B. Sale of school lands, as to land sold by Commissioner of Public Lands to town of Portales for school purposes.

1913 No. 1047 Frank W. Clancy, Attorney General

. . . Section 8 and 9 of Chapter 106 of the Laws of 1909.

Those sections distinctly provide that the Commissioner of Public Lands shall sell and convey to the town of Portales the school section mentioned therein and that the school section shall be taken and handled by the town as trustee for the benefit of the common schools of the town. I do not see any authority for the Board of Education, but it might well be held that the money received thereof, which must be applied for the benefit of the schools, is to be expended under the direction of the Board of Education like any other school money.

C. Schools, disposal of property.

January 30, 1932 No. 369 Quincy D. Adams
Asst. Atty. Gen.

. . . You request an opinion upon the questions asked in the letter of Mr. J. Ethan Wright of Valedon, New Mexico, dated January 22nd, 1932. I believe that the questions asked by Mr. Wright are answered in Section 120-1414, 1929 Code, copy of which is as follows:

"Exept as otherwise provided by law, all property belonging to school districts and all property the title of which is or may be vested in the board of education, shall not be sold, transferred or disposed of, except for cash or its equivalent and with the written consent of the superintendent of public instruction."

D. Condemnation proceedings.

April 30, 1937 No. 1626 Patton by Fernandez,
Asst. Atty. Gen.

No statute giving power to Board (State) or State Superintendent to condemn school buildings or forbid conducting of school in unsafe buildings. Local boards have supervision and control. If they refuse to act, it should be called to attention of Board of Public Health, which are charged with inspection of public buildings.

E. Sale of lots or property.

August 9, 1938 No. 2027 Frank H. Patton, Attorney General

If school lots are not of class acquired under Act. of May 23, 1844, sale may be made for cash or its equivalent, without appraisal or public bidding, if approved by Superintendent of Public Instruction, by school district. I know of no authority to convey without consideration for any purpose.

F. Sale of school property.

February 25, 1946 No. 4861 C. C. McCulloh, Attorney General

In your letter dated February 20, 1946, you inquire for the procedure regarding the sale of school property.

Section 55-714 provides as follows:

"Except as otherwise provided by law, all property belonging to school districts and all property the title of which is or may be vested in the board of education, shall not be sold, transferred or disposed of, except for cash, or its equivalent, and with the written consent of the superintendent of public instruction."

Since the procedure is not set forth specifically for the sale of school property, if the school board has the approval of the State Superintendent, a sale of school property by the board may be made for cash, or its equivalent, at either public or private sale.

CHAPTER XI

THE TEACHER

1. Teacher Certification

A. Teacher's certificate--renewal of.

1905-6 No. 243 W. C. Reed, Attorney General

OPINION to Supt. Pub. Instruction, on right of a teacher of public schools to have his certificate renewed by a county school superintendent.

HELD: If certificate is not renewed within three years from date of issuance it is void; county superintendent cannot renew same.

B. Certificate by examination.

February 2, 1915 No. 1437 H. S. Clancy, Asst. Atty. Gen.

Whether holder of first grade teacher's certificate, upon application for a renewal must pass examination in history and civics.

"That the Board ask atty. genl. for opinion on question whether law requiring presentation of credits or taking of examination in history and civics of N. M. applies to renewal of certificate."

Opinion of this office that it was clearly legislative intent to make this examination compulsory upon persons who have applied for granting of first grade certificates for first time, and has no application whatever to person who is holder of first grade certificate under provisions of act of 1907, or can it be said that State Board of Edu. has any jurisdiction whatever in matter of granting renewal referred to in that act.

C. Issuance of teachers' certificates, examinations and qualifications of teachers absolutely under control of State Board of Education.

There is no doubt that Secs. 4863 to 4865 remain unchanged, and as the studies therein prescribed must be included in the course of instruction in the public schools, it is quite within the power of the Board, by regulation, to require evidence of ability to teach in those studies where instruction therein will be required of the teacher. It is within the power of the Board, if it sees fit to do so, to require examination in these branches, or it may adopt any other course in its discretion to ascertain whether applicants are qualified to give that class of instruction.

D. Issuance of teachers' certificates by State Board of Education.

June 15, 1916 No. 1825 F. W. Clancy, Attorney General

The view might be taken, even if we should hold that Sec. 4866 remains in force as to teachers generally, that the authority given in the last paragraph of Sec. 2 of said Chap. 81, to issue special certificates under such regulations as the State Board of Education may adopt, takes those special certificates out of the general class, so that the persons to whom such special certificates are given would not be required to pass the satisfactory examination provided for in Sec. 4866.

E. Certification of school teachers in municipal school districts.

April 7, 1922 No. 3366 Harry S. Bowman, Attorney General

In reply to your letter of the 3rd instant, asking what control the county superintendent of schools has over the certification of school teachers in incorporated cities, towns and villages, and inquiring further if the county superintendent has no authority over these matters, whether or not the state superintendent

or state board of education has power to require teachers in schools in incorporated cities, towns and villages to obtain certificates, I wish to advise:

The last clause in Section 1, of Chapter 81, Laws 1915, provides that teachers in incorporated towns and villages must secure certificates in accordance with the provisions of the Act, but boards of education of incorporated cities may issue teachers' certificates for such period of time and under such regulations as they may prescribe but such certificates shall be valid only in the city whose board issued them.

F. Teacher's certificate, when valid.

May 9, 1930 Page 195 M. A. Otero, Jr., Attorney General

Teachers contracting binding if school board has not exeeded authority conferred upon board by law in making of contract.

G. Administration certificates

April 29, 1937 No. 1624 Frank H. Patton, Attorney General

No certificate shall be issued by State Board of Edu. to teach in public schools in this state to any application unless such applicant in addition to meeting all other requirements now or hereafter prescribed by law or by regulation of State Board of Education have had at least six (6) semester hours or nine (9) term hours of satisfactory work in institution of higher learning in the State of N. M. of college or university rank. If applicant meets all other requirements except the six semester hours or 9 term hours in N.M. college or university, they may be granted one-one year temporary teaching certificate.

H. Teacher contract, changes made to conform with Chapter 60, Laws of 1943.

July 28, 1943 No. 4346 E. P. Chase, Attorney General

Under Chap. 60--governing board serves written notice upon each teacher on or before closing day of school for continuance or discontinuance of services--notices for teachers properly certified and serving 2 years in district shall specify hearing-teacher given right of appeal to State Board of Education. Teachers who have served less than 2 years may be given notice with no right of hearing or appeal. Failure to give notice is constructive renewal of employment for ensuing year, so far as governing board is concerned.

1943 law excludes from benefit of acts teachers holding War Emergency certificates, or whose professional qualifications are otherwise below normally required, and teachers employed to fill vacancies due to previous teachers entering military service.

2. Teacher Employment.

A. Teachers are employees, not officers.

February 11, 1910 Page 107 Frank W. Clancy, Attorney General

School teachers are not subject to the penalty declared in sec. 12 of Chapter 121 of the Laws of 1909. That section imposes a penalty upon any member of the Board of Education, county school superintendent, or other school officer. This is a penal act and must be strictly construed in accordance with well known rules and not expanded beyond its clear and definite meaning. It should be held that when it speaks of "other school officer" it would mean some officer similar to those previously mentioned and a school teacher certainly cannot be classed with members of the board of education or county school superintendents. In addition to this a teacher cannot be considered a school officer. Teachers are mere employees under agreement or contract with school directors or boards of education, and in no proper sense of the word can they be considered officers.

B. Election of school directors. Employment sons of directors as teachers.

May 9, 1921 No. 2955 A. M. Edwards,
Asst. Atty. Gen.

Your first question is whether an election for school directors is legal when held by one director. The law requires that the directors shall call the election and canvass the returns, and it is the custom of directors to act as judges of election. If all the other steps taken at the election were legal, the fact that the same was held by only one director would not invalidate it, and the directors elected at such election would legally hold the office.

Your second question is whether, in case an election is not held, will the old directors hold over, or will the vacancy have to be filled by the County Superintendent?

There seems to be no provision in our law by which directors may be appointed by the County School Superintendent. The present incumbents of the office will probably hold until their usccessors are qualified.

Your third question is if school directors, in selecting teachers, have the right to employ their own sons and daughters. Section 6 of Chapter 105 of the Laws of 1917 requires that teachers shall be employed by the Board of School Directors with the approval of the County Board of Education. There is nothing in the law to prevent the employment of children of school directors if such employment is approved by the County Board of Education.

C. Teachers within meaning of law--number allowed.

May 17, 1923 No. 3707 Milton J. Helmick,
Attorney General

Principals, Supervisors, Inspectors, etc., are not Teachers within the meaning of Sec. 1104 of School Code, Chap. 148 of Laws of 1923 fixing number of teachers which may be employed according to attendance.

The word teacher in this sec. is used in narrow sense, based on number of pupils per actual instructor.

D. Teacher as relative of board member.

May 9, 1930 Page 163 M. A. Otero, Jr., Attorney General

Wife or relative may teach in district where husband is member of rural board.

Teachers are not employed by board of directors of rural district, but by county board of education or county superintendent under authority granted by county board.

E. Employment of Rural School Supervisor and extra clerical help not permissible.

June 30, 1930 Page 161 M. A. Otero, Jr., Attorney General

. . . . . .

. . . Employment of rural school supervisor and extra clerical help is not permissible under law . . .

F. Teachers, employment of in school boards--rural vs. county boards.

June 15, 1931 No. 189 Frank H. Patton, Asst. Atty. Gen.

We understand, from Mr. Newkirk's letter, that the Folsom School has recently been converted into a municipal district; that before such change the local board hired teachers for the coming year; that their contracts were signed by members of the local board but not signed by the county board of education; that these teachers so hired were not wanted by the majority of the people and it is desired to know if the present municipal board can legally cancel these contracts and hire other teachers.

It is our opinion that the employment of teachers for rural schools is vested in the county board of education and it is provided that such county boards shall call upon the boards of school directors to nominate teachers and school employees and to submit recommendations as to

budget requirements.

We have always construed this to mean that the final employment is vested in the county board of education and that such county board should be governed by the recommendations made by the local boards when deemed proper and for the best interests of the school.

G. Board of Education, to employ teachers.

July 17, 1931 No. 210 E. K. Newmann, Attorney General

We have your letter of July 17th, 1931, requesting an opinion as to the power of the County Board of Education to employ teachers over the protest of the local board of a rural school district.

In connection with this opinion a reading of Section 5 of Chapter 119 Session Laws of 1931 will disclose that the county board has the absolute power to employ teachers in rural district. This section and section 120-809, 1929 Code must be read together, and same is, in part as follows:

" * * * the county board of education shall have supervision and control of all rural schools and districts . . . with the power to employ and discharge all teachers and school employees of said schools, subject to the limitations herein otherwise provided."

H. Board of Education, assignment of teachers; board member as janitor.

August 24, 1931 No. 247 Frank H. Patton, Asst. Atty. Gen.

1. It is desired to know whether the County Board of Education or the County Superintendent of Schools has the authority to assign principals and teachers to various grades in the individual schools.

"* * * the County Board of Education shall have supervision and control of all rural schools and districts and of sites, buildings, equipment and funds of said

district, with power to employ and discharge all teachers and all school employees of said school, provided that the County Board of Education may, in its discretion, delegate to the County School Superintendent the power to employ and discharge all teachers and school employees." In our opinion, therefore, the matter of assignment of principals and teachers to various grades and the employment of same is vested in the County Board of Education, unless such County Board delegates such duties to the County School Superintendent.

2. It is next desired to know whether the County Board of Education may delegate one of its members to employ janitors and wood-haulers without conference and recommendation by the Superintendent.

No doubt the County Board of Education may delegate one of its members to perform this service, but in each instance the actions of the individual member in employing woodhaulers, janitors and the like should be ratified by the County Board of Education.

I. Teacher in rural school may be member of municipal board.

January 25, 1939 No. 3007 Filo M. Sedillo, Attorney General

Teacher in rural school may be qualified to be a member of a municipal board of education.

J. Rural School Supervisor, appointment and qualifications.

April 18, 1939 No. 3106 Filo M. Sedillo, Attorney General

Rural School supervisors appointed by County Superintendents?

Re: Law taking effect June 10, 1939, Chapter 173, 1939 Laws--

Under old law, rural school supervisor employed by

county board of education at its discretion, subject to approval of state board of edu. St. board determines qualifications necessary for rural school supervisors.

Under new law-equivalent to B. A. degrees--under discretion of Board of edu.--degree or equivalent from fully accredited college or university.

Board may employ a rural school supervisor at expense of county, which supervisor shall be nominated by county superintendent of schools and must be approved by state board of education. Words underscored unconstitutional because introduced in bill redraft without being underscored as new matter.

K. Political activity of employees may be regulated by school board.

August 29, 1939 No. 3262 Filo M. Sedillo, Attorney General

County Board of Education

Whether county board of education may require all teachers, school bus contractors or other employees of board to resign from any or all political offices. Not except by impeachment or removal as may be prescribed by the county or state political party laws. In case of future or prospective teaching or school bus contracts, board can by express stipulation in contract provide for no political office-holding.

L. Teachers, married women may be barred by board. Board may pass rules as to employment.

June 8, 1940 No. 3541 Filo M. Sedillo, Attorney General

Married Teachers.

Board of education of Grants Union High School can enact rule to effect that married lady teachers shall not be employed.

M. Employment of Rural School Supervisor.

March 9, 1944 No. 4475 Harry L. Bigbee, Asst. Atty. Gen.

From your letter: "Will you please render an opinion as to whether or not a legal transfer of school funds can be made from the rural supervisor's fund to a visiting teacher's fund when there is a disagreement existing between the superintendent of the county and the county board as to the selection and appointment of a person for the psoition of rural school supervisor."

The County Board of Edu. has employed a so-called "visiting teacher" instead of a rural school supervisor and is using a rural school supervisor's salary fund to pay the visiting teacher's salary.

The County Board has no right to hire a visiting teacher instead of a rural school supervisor, therefore the visiting teacher is really another name for a rural supervisor and must be considered as such.

Sec. 55-807 of the NM 1941 Compilation provides: "Said Board may employ a rural school supervisor at the expense of the county, which supervisor shall be nominated by the County Superintendent of Schools and must be approved by the State Board of Education . . ."

This statue being mandatory, a County Board of Education only has the power to hire a rural school supervisor by complying with the provisions of the above quoted statute. In absence of a specific statute, a County Board could probably hire a "visiting teacher," but since the statute is set forth at such completeness it is my opinion that anyone hired to perform the functions contemplated by the statute to be performed by a rural supervisor must meet the qualifications provided in the statute and must be appointed as provided by statute.

N. Teacher--Reassignment of employed teacher.

September 7, 1944 No. 4573 C. C. McCulloh, Attorney General

Sec. 55-111 of 1941 Compilation, Sec. 1, Chapt. 60, Laws of 1943.

Failure to give notice results in renewal of existing contract in same school and same position. Giving of notice of continuance of services without any qualifications as to assignment also results in renewal of existing contract for same position, except salary and period employment may be modified in conformity with needs of school and budget.

3. Teacher Salaries.

A. School directors--powers of, to draw teachers' warrants.

1905-6 No. 247 W. C. Reed, Attorney General

OPINION to Supt. of Pub. Instruction as to whether School Directors have the right to draw warrants for teachers' wages when there are no funds in the Treasury to meet same.

HELD: May issue warrants to full amount of levy--This at discretion of Boards to School Directors.

B. School teacher's salary--when payment can be made.

1905-6 No. 355 W. C. Reed, Attorney General

OPINION to Supt. Pub. Instruction on the construction of Sec. 299, C. L. '97 with relation to the payment of teachers' salaries, etc.

HELD: The Bateman Act is in force relative to payment of salaries of school teachers.

C. Extra holidays--pay.

January 24, 1931 No. 24 E. K. Neumann, Attorney General

Regarding the inquiry you received from Irvin P. Murphy, Superintendent of Schools, Hope, N. M., I beg to advise that in my opinion the President of the Board should sign the warrants for the current monthly salaries due the teachers.

If the Board at Hope allowed a longer holiday at Christmas than is usual or than was contemplated by the authorities at the beginning of the school year, such allowance was in my opinion within its right and power.

It is my opinion that the intention of the Board at time of extra holiday was given is controlling in the matter, as to loss of time, etc., but the teachers should be paid the current month's salary, even tho the five days lost might later have to be made up to comply with the law.

D. Schools, closing of for lack of funds--bills and teahher salaries.

January 31, 1931 No. 40 Quincy D. Adams, Asst. Atty. Genl.

1. Is it legal for boards of education to close a part of the schools under their jurisdiction on account of shortage of funds without closing all at the same time? This question has special reference to the closing of the grade schools and keeping the high schools open for a longer period.

2. Must all outstanding bills up to date be paid before determining the amount that can be applied on teachers' salaries?

In answering your first question I wish to call your first question I wish to call your attention to section 4 or article 12 of the State Constitution, which provides that "a public school shall be maintained for at least five months in each year in every school district in the State."

As to the special question of closing grade schools in order to keep high schools open for a longer period, subject to the statutory limitations above referred to, I am of the opinion that this might be done where con-

ditions justify it.

In answer to your second question, I am of the opinion that this is a matter within the discretion of the board. Teachers' salaries are a maintenance expense and there is no statute requiring teachers' salaries to be deferred to other maintenance expenses. It would follow that the obligation to pay such salaries would be the same as with respect to other maintenance charges.

E. Teachers' salaries.

June 23, 1938 No. 1981 Patton by Fernandez Asst. Atty. Gen.

Re: Sec. 120-804 of 1929 Compilation, amended by Chap. 114, Laws of 19347--it is my opinion that in rural school districts the county board of education is the authority charged with fixing salaries for school teachers, which authority may be delegated to county school superintendent.

Budgets for salaries are made in conjunction with budget auditor, and State Tax Commission, amounts set by such budgets are a limitation upon the power of the board to expend the monies appropriated for salaries.

F. Teachers' summer salary, prorated on time taught.

January 14, 1943 No. 4213 E. P. Chase, Attorney General

If teacher resigns during school year upon giving of proper notice, he is entitled to prorated share of summer months pay. If teacher did not give notice required by contract of intent to resign, Board could withhold salary for 30 days immediately preceding date of resignation, but could not withhold teacher's pro-rata share of summer salary.

G. Teacher bonus--payment of bonus or increase in salary.

January 20, 1944 No. 4440 E. P. Chase, Attorney General

Bonus meaning sum of money not called for in teachers contracts to be given as additional emolument for services rendered. Under Sec. 27, Article 4, and Sec. 14, Art. 9, no bonuses could be paid. New contracts could be made under Sec. 7-120 of 1941, requiring budget transfers, under discretion of State Comptroller, and approval of State Educational Budget Auditor before any budget transfer can be made.

H. Teacher contracts, payment of salary on 12 months basis.

February 7, 1945 No. 4648 C. C. McCulloh, Asst. Atty. Gen.

In your letter dated February 5, 1945, you request an opinion from this office concerning a teacher's contract which does not state the closing date of school, and which states that the salary shall be paid in twelve (12) equal payments without specifying the date of payment.

You inquire whether such a contract is valid under the law, in view of the provisions of Section 55-1104 of the 1941 Compilation.

This section provides that all teachers shall be paid monthly. In my opinion, a teacher's contract providing for twelve equal payments should be construed with the above mentioned law to mean twelve equal monthly payments, and, as so construed, such contract would be valid.

4. Teacher Controls.

A. Teacher--probationary period.

March 16, 1944 No. 4483 E. P. Chase, Attorney General

Under Chap. 60 of Laws of 1943--See Opinion No. 4346 and No. 4408.

2nd Question: State board of education is given power to determine qualifications of teachers and teach-

ing certificates given to qualified teachers under Sec. 55-105 of 1941 Compilation.

B. Teacher tenure--service required for permanent tenure.

Sec. 55-111 of Supplement to 1941 Compilation, Chap. 50, Laws of 1943).

Opinion that a teacher serving two consecutive years in particular district, including the 1943-44 school year, is entitled to all the benefits of our Teacher Tenure Law.

C. Teacher may be member of legislature.

April 1, 1939 No. 3082 Filo M. Sedillo, Attorney General

Teacher employed in High school and member of H. of Representatives--

This employment of teacher while a member of House of Representatives of Fourteenth Legislature is not in violation of our Constitution.

D. Teacher--May serve on City Council.

March 9, 1944 No. 4473 E. P. Chase, Attorney General

Nothing in our law prohibits a teacher from running for or being elected and serving as a member of the City Council.

E. School teachers selling life insurance.

January 26, 1931 No. 29 Quincy D. Adams, Ast. Atty. Gen.

I do not believe that the Legislature intended to prevent teachers or school officials from earning a livelihood during the period when they are not employed

in school work, nor do I believe that during the summer vacation a person not employed in a school, although a teacher by profession during the school year, is included under the term "school officer or teacher," within the meaning of this Act.

G. Teachers selling supplies to schools and pupils.

April 28, 1947 No. 5014 Robert W. Ward, Asst. Atty. Gen.

We are in receipt of your letter of April 25, in which you ask whether it is legal for a school teacher to sell musical instruments and athletic goods to pupils or to the school at a profit.

Section 1. Chapter 119 of the Laws of 1943, which is compiled in the Supplement to Section 55-715 of the 1941 Compilation, provides as follows:

"No board of regents of state educational institutions, board of education, board of school directors, nor any member of any said boards, nor any school official nor teacher either directly or indirectly, shall sell, to any school or state educational institution that they are connected with by reason of being a member of a (1) board of regents of a state educational institution, (2) board of education, (3) board of school directors, or any school offical or teacher, any school books, school furniture, equipment, apparatus or any other kind of school supplies, property insurance or life insurance to any employee of such school or state educational institution, or do any work under contract, nor shall any such board of members thereof, or school officers or teachers, receive any commission or profit on account thereof, and all such persons are prohibited from being parties directly or indirectly to any such contract or transaction. Any person violating the provisions of this section shall be fined not exceeding one thousand ($1,000.00) dollars, or imprisoned not exceeding one (1) year in the penitentiray, or be fined and imprisoned as aforesaid in the discretion of the court."

You will observe that this section provides that "No * * * teacher either directly or indirectly shall sell

to any school * * * that they are connected with by reason of being a * * * teacher, any school * * * equipment, apparatus, or any other kind of school supplies * * *."

In view of this section it is my opinion that a teach- may not legally sell any kind of school supplies, including athletic equipment and musical instruments to the school with which they are connected but may legally sell such equipment to pupils.

G. Vaccination of teachers not compulsory.

November 18, 1931 No. 312 E. K. Neumann, Attorney General

Your letter of November 17th, asks for an opinion concerning the laws of this state in regard to compulsory vaccination of teachers, and states that there are few teachers who are not vaccinated and do not want to be unless it is compulsory.

. . . Isn't it rather queer that children should be required to be vaccinated and yet those directly in charge of such children during school hours are not required to be vaccinated? Any right thinking adult, teaching school, who has not been vaccinated so as to be immune from smallpox should surely be vaccinated and required to do so by the Board employing such person, in case they did not care to be. Certainly, teachers are not immune from smallpox any more than are children.

As stated, however, the law does not compel them to be vaccinated but certainly such teachers should be guided by common sense and should seek vaccination under the circumstances you mention.

H. Teachers--Certification of freedom from veneral disease and tuberculosis.

September 2, 1943 No. 4377 Edward P. Chase, Attorney General

Teachers must present certificate dated not more than 20 days prior to date of fall opening of yearly school

school term, that teacher is free of transmissible disease, with tubercular and Wasserman tests to be given, and laboratory reports, if test requires them.

5. Dismissal of Teachers.

A. Removal of teacher for lack of preparation for teaching.

January 25, 1917 No. 1927 Milton J. Helmick, Attorney General

You ask . . . whether (there are any)corrective powers in the case of a teacher who has taught for 18 years without having procured better than a third grade certificate, and who is related to one of the school directors.

. . . I can only say that I know of no direct manner in which you can deal with the teacher you mention. You might lay the matter before the State Board of Education, which is empowered to revoke the certificate of a County teacher for "incompetency." There has been introduced in the present session of the legislature a bill providing that all contracts between rural teachers and directors shall be approved by the County Superintendent before such contracts shall be valid.

B. Boards of Education to remove teachers.

February 17, 1931 No. 63 Frank H. Patton, Asst. Atty. Gen.

In your letter of February 16th, you request information as to your authority to revoke certificates and to remove teachers for incompetency.

By article 12, section 6, a State Board of Education was created to consist of seven members. The Superintendent of Public Instruction is ex-officio a member of that board.

It is the opinion of this office that the only authority which you have in matters of this kind is simply that

of a member of the State Board of Education, and you can only act with the other members of the board and that you have no powers in this connection as Superintendent of Public Instruction.

C. Manner of severance; raise in salary where tenure sole contract.

March 8, 1946 No. 4873 Harry L. Bigbee, Asst. Atty. Gen.

We have your letter of March 7, 1946, wherein you request an opinion of this office concerning the fact situation which involves an increase in salary of a rural school supervisor, which increase in salary was approved by the County Board, and the amount of the increase was duly budgeted. The rural school supervisor involved has not been working under the terms of a specific contract, but has obtained permanent tenure under the teacher tenure law, and holds her position by virtue of such law, rather than by the specific provisions of a current contract.

In view of the foregoing facts, we can see no legal question concerning the legality of this raise, since the teacher tenure law cannot be considered as a contract which would prohibit a teacher from obtaining a raise in salary after he obtains permanent tenure, under the provisions of the State Constitution prohibiting increases after contract made.

Since this amount has been budgeted and approved by the County Board, it is the opinion of this office that the salary, as raised, should be paid to the rural school supervisor involved.

March 8, 1946 No. 4874 Robert W. Ward, Asst. Atty. Gen.

You have handed to me the file on the above matter and asked my opinion as to whether Mrs. Allen has been discharged contrary to the provisions of the teacher tenure act. From the file it appears that Mrs. Allen had become qualified for permanent tenure sometime prior to January 1, 1945. On January 2, 1945, she received a letter from Mr. Murphy, tme Superintendnet of Schools stating that in accordance with the policy of the board of education not

to employ married women as regular teachers, that her status in the future would be on an emergency basis. On March 21, 1945, the municipal board sent Mrs. Allen a notice which will be discussed more fully hereafter. On the same date Mrs. Allen replied. On July 15, 1945, another letter was sent to Mrs. Allen, the gist of which was that Mr. Murphy could not tell her what, if any, employment would be offered her. This letter and the letter of August 20, 1945, telling her that they would not need to press her into service, could have no bearing on the case as they were written subsequent to the closing date of school.

Mrs. Allen has not been reemployed and has demanded a hearing from the municipal board on one or more occasions which demands have been rejected. In view of the foregoing, which I assume to be the correct facts in the case, it appears that Mrs. Allen's tenure was not severed in the manner required by Chapter 60 of the Laws of 1943, the tenure act then in force, since the provision that notice to a teacher who had acquired tenure of the board's desire to discontinue the services must "specify a place and date not less than 5 days or more than 10 days from the date of mailing such notice, at which time such teacher may, at his discretion, appear before the board for a hearing."

It is further very doubtful whether the various letters sent Mrs. Allen would amount to the notice of termination of services required by the tenure law. Thus, unless Mrs. Allen has waived her rights to permanent tenure, she was entitled to re-employment during the school year 1945-46.

I know of no reason why a teacher having acquired tenure could not waive such rights. A waiver is defined as "a voluntary and intentional relinquishment or abandonment of a known existing right." 67 C. J. 289.

To constitute a waiver, the action must be voluntary:

"The action is in no sense voluntary where a party cannot decline to take except at the peril of liberty or property and what one does in a dilemma forced upon him by the default of the other party cannot be counted upon as a waiver." 66 C.J. 289.

To constitute a waiver, the action must be based upon knowledge of the facts and existence of the rights:

"No one can be said to have waived that which he did not know * * * or to have waived a right, benefit or advantage where he acted under a misapprehension of the facts, especially where he had been put off his guard or mislead by the conduct of the other party." 67 C.J. 301.

The waiver must have been intentional:

"Waiver is mainly a question of intention which lied in the foundation of the doctrine * * *. To constitute a waiver, there must be an intention to relinquish a known right." 67 C.J. 302.

Further, the action relied upon must be unequivacal:

"Waiver must be manifested in some unequivacal manner by some distinct act, by some positive act or positive inaction inconsistent with the right in question. Thus, mere inadvertant speech is not a waiver. A mere withholding of the enforcement of the right to payment is not a waiver of anything, nor does a waiver arise from forebearance for a reasonable time." 67 C.J. 306.

"The acts, conduct or circumstances relied upon should make out a clear case of waiver. It will not be implied from slight circumstances, but must be evidenced by acts or conduct, by an unequivacal and decisive act, clearly proved; it will be implied only from an unequivocal and decisive act of the party, clearly showing his purpose to waive the right in question." 67 C.J. 309.

Turning now to the correspondence relied upon as amounting to a waiver, it is noted, first, that the letter of January 2, 1945, has no great importance except insofar as it tends to show knowledge upon the part of Mrs. Allen. The letter of March 21 to Mrs. Allen stated that the board took the action referred to in Items I, D, 1, 2, II, A, C, D, and F on the attached memorandum. The items mentioned as they appear on the memorandum are as follows:

"I. All teachers

D. Approved for employment (as emergency substitutes not eleigible to tenure) between now and the opening of school next fall

1. If they meet all requirements of 'regularly qualified' teachers as heretofore established by the board of education (and outlined in II, E below), or

2. If the present shortage of 'Regularly qualified' teachers continues.

"II. Re-election is subject to

A. Acceptance in writing by May 1, 1945.

C. The salary provided by the Eddy County uniform single salary schedule (and such amendments and interpretations as have been or may be made of it),

D. Assignment of the teachers to such grade, subject, or special duty and location within the district as the teacher may be qualified to accept and as may be to the best interests of the students, and

F. The special conditions (if any) as follows:"

I, D, you will note, has reference only to persons not eligible to tenure. D, 1 makes an exception in the event the teacher becomes qualified.

It is difficult to say how this language could apply to Mrs. Allen as she was qualified at all times. The only other item checked that could be of importance is II, D. However, it appears that the right to assign the teacher is not absolute but is based on the qualifications of the teachers and the interests of the students.

Mrs. Allen's reply is as follows:

"Carlsbad, New Mexico

March 21, 1945

"Superintendent of Schools
Carlsbad City Schools
Carlsbad, New Mexico

Dear Sir:

This acknowledges receipt of your letter and attached memorandum of March 21, regarding the election of teachers, and I (accept), (reject) said action subject to the terms set forth therein.

The only requirements of regularly qualified teachers as outlined in II, E, which I do not meet (if any) are .....

I do want employement for the year 1945-46 please.

Respectfully yours,

Mrs. Alberta J. S. Allen

(Signed) _____
Signature of Teacher."

The entire letter is a mimeographed form sent out by the superintendent except for the signature and the portion which I have underlined. It would be hard to say that this reply constituted an unequivocal, intentional relinquishment of any right. While Mrs. Allen struck out the word "reject" so that the mimeographed form read "I accept said action subject to the terms set forth therein." She added her own words, "I do want employment for the year 1945-46 please."

This would appear to be an expression of desire, not for some possible or special employment, but for employment for the entire school year.

In view of the foregoing, it is my opinion that upon the record as presented to me Mrs. Allen cannot be deemed to have waived her right to re-employment, as a waiver is primarily a matter of knowledge and intention. A hearing might disclose other facts tending to establish a waiver or the lack of one!

D. Right of soldier holding temporary certificate to re-employment.

August 16, 1946 No. 4942 Robert W. Ward,
Asst. Atty. Gen.

We are in receipt of your letter of August 14, 1946 in which you ask for a construction of Section 57-701 of of the 1941 Compilation. You state that a veteran was employed by the Torrance County Board of Education to teach in the public schools of Torrance County for the school year 1944-1945; that he taught for a period of nine weeks in the fall of 1944 until his induction into the Army about November 1st of that year. You further state that the certificate held by the veteran was a temporary one. However, I am familiar with the case and have been advised by the State Board of Education that the veteran, a Mr. Julio Chavez, held a new professional elementary certificate for the 1944-1945 school term and that he now holds a new professional elementary certificate; that both of these certificates show that he is two hours short in arithmetic and that he has one year to make up such shortage.

Under the certificate he is nonetheless fully qualified to teach. In view of these facts and the fact that he held a regular form of contract to teach at the time he was inducted into the army, it is my opinion that he is entitled to the same position or one of like seniority, status and pay.

Even if he held a temporary certificate, he would probably be entitled to re-employment. I find from the Board of Education that a temporary certificate is not the lowest form of certificate, and that it is contemplated that the holder of such a certificate will complete his requirements and eventually be issued a professional certificate.

Your attention is directed to the case of Kay v. General Cable Corp. 144 F. 2d 653, where the Circuit Court of Appeals, construing the Federal statute, which is identical, said:

"Every consideration of fairness and justice makes it imperative that the statute should be construed as liberally as possible so that military service should entail no greater setback in the private pursuit or career of the returning soldier than is unavoidable."

6. Teacher Pensions.

A. Effect of sick leave of absence on pension.

1941 No. 3970 Edward P. Chase, Attorney General

. . . You desire to know whether or not a leave of absence granted because of sickness would have the effect of breaking the tenure of service required by the provisions of the Retirement Act.

After careful consideration of the question which you have propounded, I have come to the conclusion that where a leave of absence is granted to a teacher in good faith, because of illness on the part of the teacher, that it would not have the effect of breaking the tenure of service of the teacher so as to prohibit the teacher from participating in the benefits set forth under Chapter 207 of the Laws of 1941 . . .

B. Teacher's pension, minimum pay.

The Attorney-General ruled that $600.00 was the minimum that a teacher might be paid as a pension, regardless of the amount figured for the pension using the regular formula.

All teachers paid less than this amount have been erroneously under paid and the State treasurer may be ordered to make up the difference from the pension and retirement fund.

C. Effect of leave of absence in army or pension.

1942 No. 4162 Edward P. Chase, Attorney General

"If a teacher should leave one of our public schools for the purpose of teaching, in the Army, would such a teacher lose his tenure in New Mexico as it pertains to our retirement law, that is, as concerns the time spent teaching in the Army?"

This problem has been studied heretofore by this office and in Opinion No. 3970, dated December 10, 1941 we stated that a leave of absence granted to a teacher in good faith would not affect a break in the tenure of service of a teacher so as to prohibit the teacher from participating in the benefits allowed under Chapter 207, Laws of 1941 . . . the Army teaching should not be considered as interrupting "consectuive" service in the public schools of New Mexico . . .

D. Teacher: Unpaid pension payable to estate at death.

April 28, 1943 No. 4277 Edward P. Chase, Attorney General

Person drawing emeritus employment salary, under a stated amount per month, dies. Estate is due the amount of money owing employee for the thirteen days of the month we worked prior to his death.

7. Teacher Retirement

A. Teachers, disabilities and retirement.

1941 No. 3698 Edward P. Chase, Attorney General

You inquire whether or not a school teacher who is not totally disabled is entitled to compensation as provided by chapter 237, Laws of 1939, if she cannot procure a medical certificate to the effect that she will also be totally and <u>permanently</u> disabled.

The question here involved is a play on words the key one being that of <u>permanently</u>.

It is my opinion that a school teacher who is otherwise qualified should not be denied relief under the so-called Retirement Act, if he is, at the time of making application for the benefits totally disabled and according to the medical examiners unable to perform his duties . . . I am of the opinion that total <u>temporary</u> disability is sufficient.

B. Teacher with twenty years experience but under age 60 cannot be retired.

1942 No. 4044 Edward P. Chase, Attorney General

. . . you request our opinion as to whether or not a teacher who has taught for twenty years or more in the state, may be retired . . . notwithstanding the fact that said teacher may not yet have attained the age of sixty years.

After some lengthy discussion of case says . . . I am of the opinion that it is necessary for a teacher to attain the age of sixty years before he will become eligible for retirement under our law as it now exists, regardless of the number of years of service he may have had prior to the time of his attaining said age.

C. Retirement plan, proportions for years of service rendered.

1942 No. 4189 Edward P. Chase, Attorney General

It has been called to our attention that some confusion has arisen as to the interpretation given in two opinions of this office with regard to the amount payable to teachers upon retirement. The Opinions are numbered 4007 and 4011 . . .

In explanation of the confusion which has arisen, I will state that it is the opinion of this office that a teacher who has served more than 15 years, but less than twenty years, and whose average salary for the last five years of service amounts to $800.00 per annum, is entitled to receive upon retirement that portion of $600.00 as his years of service bear to twenty years of service, For example, if the teacher had taught fifteen years, said teacher would be entitled to 15/20th of the $600.00

D. Teacher retirement--employment of retired teachers.

February 19, 1943 No. 4246 Edward P. Chase, Attorney General

Under Sec. 55-1114 to 55-1121 of Chap. 207, Laws of 1941, teacher who retires after five years service because of total disability, and receiving a retirement allowance during period of total disability, in event of being called back to active service and teaching actively, total disability no longer exists and teacher would not receive retirement allowance but regular teacher's salary.

Under Sub. sec. B, and Sec. 55-1115, if teacher retires after age of sixty and employed at least fifteen years, seven of which served consecutively and immediately prior to date of retirement, and is called back to active service he may receive regular salary in addition to retirement.

E. Retirement of employees.

March 31, 1943 No. 4262 Robert W. Ward, Asst. Atty. Gen.

Whether Senate Bill No. 36 offends against the constitution--an amendment of Section 55-1114 of the 1941 Compilation and provides for the retirement of School Employees after they have reached the age of sixty years when they have been employed in the public schools of this State for at least fifteen years or when they have, regardless of age, served in the public schools of this State for thirty years.

Three sections, if the bill became law, could be questioned: In part, they are:

No. 14, Article 9: "Neither the state, nor any county, school district, or municipality . . . shall . . . make any donation to or in aid of any person . . ."

Sec. 27, Article 4: "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contractor after services are rendered or contract made . . ."

Sec. 31, Article 4: "No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institu-

tion or community, not under the absolute control of the state, . . ."

In case of State v. Trujillo, 129 P. 2d 329, Supreme Ct. of NM refused claim of the pensioner therein since he had been retired before the effective date of Chap. 110 of the Laws of 1941, laid down the rule by which the validity of the pension laws should be tested when it said: "We adopt the theory that there must be some relation between the service and regard through pension, and some reasonable theory of public benefit accruing by virtue thereof . . ."

In outlining public benefit derived from pension of STATE Officers, the Court said: "A judiciously administered pension system is a potent agency in securing and retaining the services of able public civil officers and employees. Inducement to those who have grown old in the service to step down and make way for the more efficient.

Since Senate Bill No. 36 is made applicable only to Employees of the Schools and not former employees, it is my opinion that the Bill will be constitutional.

F. Teacher Retirement--retirement service outside of state.

April 21, 1943 No. 4271 Edward P. Chase, Attorney General

Under Sec. 55-1114 and 55-1115 of 1941 Compilation, teacher must serve required number of years in state of N. M. in order to receive retirement pay, and no outside experience can be applied to years.

G. Teacher Retirement--consecutive service necessary for retirement.

June 4, 1943 No. 4312 Edward P. Chase, Attorney General

Under 55-1114 (a) of 1941 Compilation--a teacher who served in public school for more than 40 years and is retirement age, but who having left public service to teach in Indian Service, has only taught 3 consecutive years, is not eligible for pension at present.

H. Teacher Retirement--reemployment of retired teachers.

June 17, 1943 No. 4316 Edward P. Chase, Attorney General

Re: Opinion No. 4246--person employed in emergency already receiving pension after retirement can be paid salary in addition to pension.

I. Teachers--employment of retired teachers.

May 19, 1944 No. 4522 Edward P. Chase, Attorney General

Re: Sec. 55-1114 and 55-2806, Teacher ceasing employment with public schools before completing seven year requirement will not be eligible for retirement, with last ten years of service in same institution.

J. Service for disability retirement.

June 30, 1944 No. 4540 Edward P. Chase, Attorney General

Sec. 55-1117 of 1941 Compilation: "Board of Education of any . . . county . . . may retire any teacher . . . when such person is totally disabled from continuing in his profession . . . provided such person has been employed in public schools of NM for not less than five years. No provision requires service to be consecutive or immediately prior to date of retirement.

K. Retirement--disability pensions for board members; member former teacher.

August 9, 1944 No. 4558 C. C. McCulloh, Attorney General

Service of teacher of Board of Education under Art. 9, Sec. 14 of Constitution would not add to eligibility for disability pension of teacher.

L. Age necessary for retirement.

May 11, 1945 No. 4713 Harry L. Bigbee, Asst. Atty. Gen.

I have your letter of May 3, 1945, wherein you request an opinion concerning the interpretation of Subsection (a) of Section 1 of House Bill No. 72, which will appear as Chapter 50 of the Laws of 1945, the same being an act relating to the pensions of teachers and certain other persons. Your two questions are:

1. How long does a person who has worked 30 years in the public schools have to be temporarily re-employed in order to qualify for retirement?

2. If a person has taught 30 years, does such person have to be 60 years of age in order to qualify for retirement?

Subsection (a) of Section 1 of the above mentioned provision, which is an amendment to Section 55-1114 of the 1941 Compilation, provides in part as follows:

"When the said teacher - - - who is over the age of sixty (60) years, and has been employed in the public schools - - - of this state for at least fifteen (15) years, said person may be retired. Provided that in either case, that half credit may be given for not more than ten (10) years of educational service in other states prior to serving in New Mexico, and that full time credit may be given to all persons with prior educational service in New Mexico for time served in the Armed forces of the United States who re-enter educational service in this state after honorable discharge from the armed service of the United States. In every case not less than fifteen (15) years of educational service in New Mexico is required of which the last five (5) years were educational service in New Mexico consecutively and immediately prior to the date of such retirement ment; provided, that any person who has been employed in any of said services in New Mexico for more than thirty (30) years, although such employment may have been in more than one of such services, shall be temporarily re-employed and retired under the provisions of this bill, notwithstanding any requirement that such person shall have served five (5) years consecutively and immediately prior to his or her retirement."

In answer to your first question, it is noted that the proviso included in Subsection (a) quoted above, such proviso being underlined for convenience, does not specify a length of time that a teacher should be temporarily re-employed prior to being pensioned. Since no time is specified, upon the re-hiring of any person who has more than 30 years service, such person immediately becomes eligible for retirement and may be retired at any time.

In answer to your question, I call your attention to the last portion of the proviso which states:

"Notwithstanding any requirement that such person shall have served five (5) years consecutively and immediately prior to his or her retirement."

If the proviso had intended to allow a person who otherwise comes within the act to be retired prior to reaching the age of 60 years, when such person had 30 years service, such intention would undoubtedly have been made clear in this portion of the proviso which specifically referred to the one requirement of five years consecutive service, but omitted any reference to the age of the person to be retired.

In view of the foregoing, it is my opinion that the proviso involved is only material in connection with waiving of the requirement of five years consecutive service immediately prior to a person's retirement and does not affect the additional requirement that a person otherwise eligible for retirement must be over the age of sixty.

M. Teacher retirement--right of teacher previously retired.

June 5, 1945 No. 4731 C. C. McCulloh, Attorney General

We are in receipt of your letter of June 4, 1945, in which you state that four of your teachers have requested and have been granted retirement, effective June 1, 1945. You state that these teachers have taught the full school year of nine months but have been paid only 9/12 of their salary since they are paid on a 12-month basis.

In view of this situation, you ask the following questions:

Whether or not these teachers are entitled to their three months' summer pay even though they then be drawing retirement pay.

In my letter of even date I enclosed a copy of Opinion No. 4213 in which it was held by this office that a teacher who had taught only a portion of the school year was entitled to her prorata share of the three months' summer pay. On the same theory, the retired teachers, having taught the full contract term, would be entitled to their full summer pay even though they were then drawing retirement pay.

In view of the language contained in Chapter 50 of the Laws of 1945 that "all present emeritus employees shall be paid as herein provided after July 1, 1945," you ask whether or not such retired teachers would be entitled to be paid out of the retirement funds created by Chapter 50 even though the institution which had employed them did not elect to come under Chapter 50 of the Laws of 1945.

By Section 6 of Chapter 50 the State Treasurer transfers to a retirement fund 3% of various tax moneys together with 3% of the payrolls of the institutions which elect to come under the act. This section then requires the State Treasurer to distribute to the Treasurers of the several counties and the Treasurers of the several institutions ("several institutions," of course, referring to the several institutions coming within the provisions of this act) their respective shares of the retirement fund.

Section 8 of Chapter 50 requires the several county and institution Treasurers to credit the same to the retirement fund items in their respective maintenance budgets. Disbursements are then made from these funds in the hands of the various institutions and county Treasurers on warrants drawn by the proper officials.

In view of the foregoing, it is apparent that if an institution did not come under the plan, that no moneys from the retirement fund in the State Treasury would be

transferred to such institution so that a retired teacher could not be paid out of the retirement fund created by Section 6. Instead, the employee and the institution would of necessity have to rely on direct appropriation by the Legislature.

Your next question is whether or not a teacher retired before the effective date of Chapter 50 would be entitled to the 50% retirement pay provided by the present law, or the 60% retirement pay provided by Chapter 50. In answer to this question your attention is directed to that portion of Section 2 which provides as follows:

"All present emeritus employees shall be paid as herein provided after July 1, 1945."

See also that portion of Section 9 which reads:

"all present emeritus employees (theretofore retired) shall be deemed to have been retired under the provisions of this act."

In view of the foregoing it is myopinion that a teacher who had been retired prior to the effective date of Chapter 50 would be entitled to the additional retirement pay provided by Chapter 50.

In your letter it appears that you assume that Sections 55-2804--55-2809 will remain in force so that if the institution did not elect to come under Chapter 50 its teachers could be retired under such provisions. Your attention is directed to Section 12 of Chapter 50 which specifically repeals the above mentioned sections. This repealing section has a saving clause, but the same is limited specifically to the rights of persons retired before the effective date of Chapter 50.

Thus, if an institution does not come under Chapter 50, there will be no law in force which will permit it to retire its teachers except for Section 7 of Chapter 50 which authorizes the carrying of group life insurance and Section 11 which provides for a contributory retirement plan.

N. Full time employee defined.

June 29, 1945 No. 4741 Robert W. Ward, Asst. Atty. Gen.

We are in receipt of your letter of June 25, 1945 and the enclosed letter from Tom Popejoy, business manager at the University. In connection with Chapter 50 of the Laws of 1945, which is the new retirement act, he asks three questions which are as follows:

"1. What is the definition of a regular, full-time employee? Would this include individuals who worked for a week or a month on a full-time basis, and were then replaced by someone else?

"2. Some of our faculty are employed on the basis of a nine months' term at a given annual salary, and they are then employed for the summer session with extra remuneration. Would the amount of the salary for the nine months' term and the summer session be used in the computation?

"3. We have a large number of individuals employed on projects for which we receive reimbursement from the Federal government. It is our theory here that they would probably be under the Retirement Act, since their employment here counts toward the retirement years."

In answer to his first question, no exact definition can be given of the term "regular full-time employee" which is used several times in Chapter 50. Each case would have to be determined on its individual circumstances. It is, however, apparent that by the term "regular full-time employee" the Legislature intended to distinguish such employees from special employees, temporary employees, and part-time employees. In the case of Cote v. Bachelder--Worchester Co. (N.H.) 160 Atl. 101, the Court said:

"In an industrial community, term 'full time' has acquired definite significance recognized by popular usuage. Like terms 'part time' and 'over time', it refers to customary period of work; and all three terms assume that a certain number of hours per day or days per week constitute respectively a day's or weeks's work within a given industry of factory. 'Full time' in

Compensation Law signifies normal and customary period of labor per day or week for kind of work employee performs."

See also American Tobacco Co. v. Grider, 47 S. W. 2d 735, 243 Ky. 87, where the Court held that the words "full time" meant a full working day for six days every week of the year, since such was the customary period of work of employees of the industry. Also see Aebli v. Board of Education, 145 P. 2d 601, 619; McCarty v. School District, 225 P. 835, 75 Colo. 305.

Thus, it appears that as used in this statute, the Legislature contemplated an employee as being a "regular full time employee" if he worked the hours in the day, the days in the week, and the months in the year customary to school employment. However, the mere fact that an employee, in addition to his school work, has another occupation would not prevent him from being a regular full time employee, if he, in fact, works the customary time. See the case of Johnson v. Stoughton Wagon Co., 95 N. W. 394, 397, 118 Wis. 438., where the court held that an employee gave his full time to the company's service even though he did not devote all his waking hours to such occupation. The Court held this inasmuch as he devoted his entire business day of approximately nine hours and a portion of his evenings to the company's service. Thus, the fact that he at other times of the day attended to other business did not make him less than a full-time employee anymore than if he had devoted such time to recreation.

In the second portion of his first question, Mr. Popejoy inquires with respect to an individual who worked for a week or a month on a full time basis and was then replaced by someone else. This phase of the question is covered in part by the foregoing. Further, if the employee was hired for a week or a month to do a special job, he would not be a regular employee, but rather a special one. If he took a position that was an integral part of the institution and was replaced by someone else, the position would be one held by a regular full time employee so that the 3% contribution provided by Section 6 of Chapter 50 would include the salary to the successive employees holding such position.

The only other phase of the act under which this question would arise would be in computing how many years

the person had been employed by the schools of this state. It appears that a portion of a year in which a person was employed by one of the schools of this state could be added to the portion of year worked at a different time in determining the number of years the person had been employed by the schools of this state.

In answer to Mr. Popejoy's second question, it appears to the writer that the salary of the faculty members should be the total salary received during the year, even though a portion is paid for the teaching of nine months and another portion paid for the teaching of the three months summer session. It appears that this situation is just the same as though one contract were entered into for the combined salary or as though during the term the salary of the teachers were increased.

In answer to his third question, there are only two issues involved; First, is the individual a regular full time employee of the institution? If so, and if such person were employed the required length of time, he would be entitled to retirement.

Secondly, is such person on the payroll of the institution as its regular full time employee? If so, his salary should be included in computing the 3% contribution of the institution as provided by Section 6 of Chapter 50.

O. Drawing warrants for salaries of teacher retirement.

July 20, 1945 No. 4759 C. C. McCulloh, Attorney General

We are in receipt of your letter of July 18, 1945 in which you call attention to the fact that by Section 10, Chapter 50 of the Laws of 1945, being the new teacher retirement law, it is provided that the payment of salary to the State Director of retirement and payment of actual expenses to members of the retirement board shall be made on warrants drawn by the State Superintendent of Public Instruction and State Educational Budget Auditor. You ask whether or not such procedure is lawful.

While it is unusual to have warrants for the payment of state funds drawn by anyone other than the State

Auditor, I see no reason why the Legislature cannot legally make such provision. The Legislature has the power to make any provision it sees fit except where limited by the Constitution. The Constitution does not prescribe the duties of the State Auditor. The only provision of the Constitution which could have application is Article 4, Section 30 which provides in part as follows:

"Ecept interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the Legislature. No money shall be paid therefrom except upon warrants drawn by the proper officer."

Since the Constitution does not prescribe any particular person as being the proper person to draw warrants, it is my opinion that the Legislature may constitutionally designate any official it sees fit to draw warrants. This being so, it is my opinion that Section 10 of Chapter 50 is constitutional.

It occurs to me that it might be possible if the officers involved deemed it advisable, to have you countersign the warrants so that an independent set of books would not have to be set up.

P. Computing out of state service.

October 1, 1945 No. 4798 Robert W. Ward, Asst. Atty. Gen.

We are in receipt of your letter of September 23, 1945, and the enclosed data prepared by one of the members of your faculty.

From the attached data, it appears that the faculty member taught from 1909 to 1935, inclusive, in various universities in Germany; that he held a position as research fellow and lecturer at the University of Michigan from March, 1940 to March 1941, and that he was first employed by the University of New Mexico in January, 1942. In view of this situation, two questions are asked:

1. May half credit be given for the prior education-

al service of this man outside of the United States?

2. What is the meaning of the passage at the end of Section 1(a), Chapter 50, Laws of 1945, "In every case, not less than 15 years of educational service in New Mexico is required?"

Section 1(a), Chapter 50, Laws of 1945 provides:

"When the said teacher, supervisor, custodian, nurse, principal, superintendent, other regular full time employee of the aforesaid state institutions, or said departments and boards, who is over the age of sixty (60) years, and has been employed in the public schools, or in said institutions or departments, or in a combination of such services, of this state for at least fifteen (15) years, said person may be retired. (Provided that in either case, that half credit may be given for not more than ten (10) years of educational service in other states prior to serving in New Mexico,) and that full time credit may be given to all persons with prior educational service in New Mexico for time served in the armed forces of the United States who re-enter educational service in this state after honorable discharge from the armed service of the United States. In every case not less than fifteen (15) years of educational service in New Mexico is required, of which the last five (5) years were educational service in New Mexico consecutively and immediately prior to the date of such retirement;"

In answer to your first question, it is observed that the Legislature refers to this state, which is the State of New Mexico, U. S. A. Thus, it appears that when the Legislature refers to other states, it means states in the U. S. A. other than the State of New Mexico. Had the Legislature intended to cover states in foreign countries, it would have used the words "foreign countries" or something similar, since in common legislative parlance, by "state" the Legislature means state of the United States, and not a foreign country.

In view of the foregoing, it is my opinion that the faculty member should be given one-half credit for his year's service at the University of Michigan, but that he should not be given credit for his educational service in foreign countries.

In answer to your second question, it is noted that in the first part of the above quoted section the requirement is made that the teacher be over the age of 60 years and have been employed in this state for at least 15 years. Immediately following this comes the proviso that half credit may be given for not more than ten years of educational service in other states prior to serving in New Mexico.

This section then goes on and repeats the first mentioned language, saying "in every case, not less than 15 years of educational service in New Mexico is required." This is the identical language used in the first part of the section and should be given the same meaning, that is to say, it should be construed subject to the proviso.

In order not to render the proviso meaningless, it is necessary to consider that ten years educational service outside the State of New Mexico will be construed as five years educational service in New Mexico within the meaning of the two clauses requiring 15 years educational service in New Mexico.

In view of the foregoing, it is my opinion that in calculating whether a teacher has had 15 years educational service in New Mexico, it is necessary to give one-half credit for the prior educational service in other states. That is to say, it is my opinion that a teacher who has taught ten years in the State of New Mexico and prior to that time taught ten years in other states will be considered to have 15 years educational service in New Mexico.

Q. Salary for retirement as basis for adjustment.

December 11, 1945 No. 4825 Robert W. Ward,
Asst. Atty. Gen.

We are in receipt of your letter of November 21, 1945 and the enclosed letter from Mr. L. H. Rhodes, Superintendent of the Tucumcari Public Schools. In his letter Mr. Rhodes asks the following two questions:

"1. Will the time that the emeritus employment status becomes effective terminate the tenure rights

of the emeritus employee, thus eliminating the possibility of including a year's earned salary in the five year average which determines the amount of the emeritus employment salary?"

"2. In the event an emeritus employee serves one or more years at regular salary, after being placed on the emeritus basis, will it be possible for the salary of these regular years of service to be added in the five year's average to bring up the monthly average of the retirement pay?"

I have read and re-read the first of these two questions and have not been able to ascertain the exact question Mr. Rhodes has in mind. However, I would make these observations:

First, after a teacher has 15 years educational service in New Mexico, such teacher may be retired. This retirement is not mandatory.

Second, after a teacher has been retired, of course, the teacher would not be able to invoke the teacher tenure law, Chapter 125, Laws of 1945. The two acts are entirely inconsistent. The teacher is no longer an active employee but is merely on an emeritus status and so would have no right to re-employment.

Third, retirement pay is based on the average annual salary paid to him on account of his employment during the five years of full-time employment at full-time salary next preceding the date of retirement. Thus, it would be impossible to consider any salary other than the full-time salary received for such five years prior to retirement.

In answer to the second question, attention is directed to Section 2 of the retirement law which sets up the basis of the retirement salary. This section provides in part:

"When any person who has served as an employee * * * for 20 years or more is retired as herein provided, he shall be entitled to receive annually for the remainder of his natural life and beginning at the date of such retirement 60% of the average salary paid to him on account of his employment during the five years of full-

time employment at full-time salary next preceding the date of retirement."

In view of this section, only the salary received prior to the date of retirement can be considered. Since the retirement salary is for life nothing that occurs after the retirement can affect it.

In view of the foregoing, it is my opinion that the salary received by an emeritus employee after the date of his retirement cannot be considered in determining the amount of subsequent retirement pay to be received by him.

R. Length of service--last five years defined.

December 11, 1945 No. 4826 Robert W. Ward, Asst. Atty. Gen.

In writing the opinion I referred to in my recent letter, I find that the same did not cover the question asked by you. In your letter of December 5th, you ask if there are different ways of qualifying under Chapter 50, Laws of 1945, the teacher retirement act. For instance, are the number of years of service rendered required to be consecutive years?

Under Section 1, the requirement is established that before a teacher or other full-time employee becomes eligible for retirement, such person must be over the age of 60 and have been employed 15 years in this state, the last five years of which must be consecutive and immediately prior to the date of such retirement.

Except as hereinafter noted, no distinction is made between teachers and other employees who have been employed 15 years and those who have been employed for a greater length of time, as was the case in previous statutes. In determining whether the employee has the necessary 15 years educational service, one-half credit may be given for not more than 10 years of educational service in other states prior to serving in New Mexico, and full-time credit may be given to all persons with prior educational service in New Mexico for time served in the armed forces of the United States who re-enter educational service in this state after honorable dis-

charge.

In every case, the five years must be educational service in New Mexico consecutively and immediately prior to the date of such retirement. This section however, contains a proviso to take care of persons otherwise qualified who were no longer employed on the effective date of this act. If such person had been employed for 30 years, such employee may be temporarily re-employed and retired under such circumstances. The last five years of service need not be consecutive.

In determining the amount of the retirement pay, the salary for the last five years of consecutive service immediately prior to retirement is not considered. Instead, the last five years during which such person was employed as a full-time employee at full-time annual salary next preceding the retirement is used.

S. Retirement of teachers at State Institutions.

March 20, 1946 No. 4883 Robert W. Ward, Asst. Atty. Gen.

We are in receipt of your letter of March 20, 1946 in which you ask our opinion as to whether a teacher at a state educational institution may be retired under Chapter 131 of the Laws of 1945. You further ask if it is possible for a teacher at an institution which has accepted Chapter 50 of the Laws of 1945 to be retired under Chapter 50 if he meets the qualifications prescribed by Chapter 131.

Chapter 131 was Section 3 of Chapter 210 of the Laws of 1941. This entire chapter being compiled as Sections 55-2804 to 55-2809, both inclusive, was repealed by Chapter 50. Thus, even though it be held that the attempt to amend Section 3 (which had already been repealed) was effective, still Chapter 131 could not be given effect as it is not a complete law, but is rather merely a provision with respect to the ages of certain persons who under other provisions of the original law (now repealed) were given certain benefits.

It is therefore my opinion that no person could be retired under Chapter 131.

As Chapter 50 is a complete act in and of itself, it is my opinion that the qualifications of a person receiving benefits under such act must be determined solely by such act.

T. Credit allowed for out of state service.

June 12, 1947 No. 5039 Robert W. Ward, Asst. Atty. Gen.

We are in receipt of your letter of June 9, in which you state the following:

"Dr. T. H. Schutte, age 63, New Mexico State Teachers College, Silver City, has submitted an application for age retirement. The application is being submitted on the basis of ten years of service in New Mexico and twenty-five years of school work in other states. All of the out-of-state service is prior to any New Mexico work. His service for the last five years is consecutive."

In view of this situation you ask our opinion as to whether you may allow five years credit for out-of-state service in order to bring up the total service to fifteen years so that Dr. Schutte may qualify for retirement under Chapter 50 of the Laws of 1945.

Section 1 (a) insofar as is material, is as follows:

"When the said teacher, supervisor, custodian, nurse, principal, superintendnet, other regular full time employee of the public schools or any regular full time employee of the aforesaid state institutions, or said departments and boards, who is over the age of sixty (60) years, and has been employed in the public schools, or in said institutions or departments, or in a combination of such services, of this state for at least fifteen (15) years, said person may be retired. (Provided that in either case, that half credit may be given for not more than ten (10) years of educational service in other states prior to serving in New Mexico) and that full time credit may be given to all persons with prior educational service in New Mexico for time served in the armed forces of the United States. In every case not less than fifteen (15) years of educational service

in New Mexico is required, of which the last five years were educational service in New Mexico consecutively and immediately prior to the date of such retirement . . ."

On the face of this statute it might appear that there is some slight ambiguity because of the clause "In every case not less than fifteen years of educational service in New Mexico is required." However, it appears from the proviso underlined above that in ascertaining whether the employee has had fifteen years service in New Mexico, one-half time credit for service in other states is allowed as service in New Mexico.

It is therefore my opinion that Dr. Schutte is entitled to retirement since he has had fifteen years educational service in New Mexico within the contemplation of the Act.

U. Application to full-time and part-time employees.

June 14, 1946 No. 4908 C. C. McCulloh, Attorney General

We are in receipt of your letter of June 10, 1946 in which you recite the following facts:

"One of the members of the faculty joined the staff of the University in September 1929. He is now fifty-five years of age. Up to 1941 he served on a part-time basis. In 1941 he was placed on a full-time basis. His salary year for each fiscal year since then has been as follows:

1941-2	$1800
1942-3	$1800
1943-4	$2000
1944-5	$2200
1945-6	$2400

In February this year he was notified, for reasons of teaching policy, that it would be necessary to put his teaching contract on a half-time basis at $1200 per annum beginning on July 1, 1946, but that the University could probably make use of the other half of his time in a non-teaching capacity at an annual stipend of $1200, making his total compensation $2400 for the fiscal year. The

administration of the University feels a moral responsibility not to take away, if it is legally possible to safeguard them, the inchoate rights of this employee (who has served the University faithfully for almost seventeen years) to a pension under the law."

In view of thse facts,you ask several questions as to the applicability of Chapter 50 of the Laws of 1945, the present retirement law. The pertinent portions of this chapter are as follows:

"Section 1. The board *** may *** retire from active service and establish an emeritus employment status with any teacher, supervisor, custodian, nurse, principal, superintendent or other regular full time employee of the public schools or regular full time employee of the aforesaid state institutions under the following conditions:
* * *

When the said teacher, supervisor, custodian, nurse, principal, superintendnet, other regular full time employee of the public schools or any regular full time employee of the aforesaid state institutions, or said departments and boards, who is over the age of sixty (60) years, and has been employed in the public schools, or in said institutions or departments, or in a combination of such services, of this state for at least fifteen (15) years, said person may be retired."

"Section 2. When any person who has served as an employee of the public schools, the state educational institutions, the State Board for Vocational Education, the state department of education, as state education budget auditor, as state director of retirement, or in any combination of said employments for (20) years or more is retired as herein provided, he shall be entitled to receive annually for the remainder of his natural life and beginning at the date of such retirement 60% of the average annual salary paid to him on account of his employment during the five years of full time employment next preceding the date of retirement;"

As a preliminary to answering your questions I would like to analyze the statute generally. It appears that the Legislature created two classifications of employees entitled to retirement: First: teachers, supervisors, custodians, nurses, principals and superintendents; and,

secondly, other regular full time employees. The first classification is limited to professional employees, while the second might include non-professional as well as professional employees. To qualify under the latter classification, the employee must be arregular and full time employee as distinguished from a part-time or special employee. I enclose herewith a copy of Opinion No. 4741 dealing with this distinction.

Next the question arises whether the two classifications of employees must have worked full time throughout their entire 15 years in order to be entitled to retirement. Section 2 of this act demonstrates that the Legislature contemplated the retirement of a least some employees, even though they had not worked full time during their entire tenure, since it provides that their retirement shall be based on the average annual salary paid on account of employment "during the 5 years of full time employment at full time annual salary next preceding the date of retirement." Had the Legislature not contemplated that some employees entitled to retirement might not have worked full time during all of their last 15 years of employment, there would have been no need for this provision.

Therefore, it is my opinion that a teacher or other person falling within the first classification may be retired even though not employed at full time during all of the 15 years. The same results will not necessarily follow as to a regular full time employee since to be entitled to retirement, such employee must be classified as a full time employee. Such a result seems strange, but must necessarily be true in order to give effect both to the language "regular full time employee" and the obvious legislative intent shown by the language "full time employment at full time annual salary" quoted above.

I turn now to your specific questions:

1. Does not the Act, Chapter 50, Seventeenth Legislature, providing for the retirement of superannuated or disabled employees, etc. of state educational institutions apply to part-time as well as full-time employees?

It is my opinion the act applies to part-time employees who fall within the first classification, but not to those

who fall within the second.

2. Does a year of part-time service count as a full year under the act named?

It is my opinion that it does as to employees within the first classification, but not as to those within the second.

3. Assuming that the employee referred to is employed on a full-time basis as above set forth (one-half time at teaching and one-half time at other duties) and is re-engaged on a full-time basis each year until he attains the age of sicty, will he be entitled to a pension under the act if he then retires?

It is my opinion that the proper answer to this question is "yes" . . .

V. Retirement of teacher drawing Federal compensation for injuries.

September 14, 1948 No. 5169 Walter R. Kegel, Asst. Atty. Gen.

We have your letter of recent date in which you request the opinion of this office on the following question:

"A teacher is drawing compensation from the Federal Government as a result of injuries sustained in active duty. Should this individual draw the full sixty percent of the average of the last five years offull time employment at full time salary, or must that amount paid for compensation by the government be deducted from the retirement computation?"

This matter is covered by Section 55-1118, 1941 Compilation, NMS.A. (Pocket Supplement), which provides as follows:

"If any person retired under the provisions of this act shall also be entitled to benefits under any state or national retirement or old age benefit law, then the amount to be paid such person under this act shall be only the difference between the amount received under

such other retirement or old age benefit law and the amount provided in this act." (Emphasis Mine.)

The question presented is whether or not the words "national retirement or old age benefit law" include disability compensation received by a veteran from the Federal Government for injuries received while in military service.

Retirement or old age benefit constitutes a pension, which is defined in 48 Corpus Juris, Pensions, Section 1, as "a periodical allowance of money granted by the government in consdieration of services rendered or of loss or injury sustained in the public service."

In 38 U.S.C. Sec. 700, it is provided that ". . . monetary benefits other than retirement pay for service connected disability or death shall be designated 'compensation' and not 'pension.'" Therefore, since Sec. 55-1118, as amended, contemplates reduction in teacher retirement pay where a pension is received from another source, it has no application to compensation received by the retired teacher from any other source, because the words "pension" and "compensation" are not synonymous. See Dickey vs. Jackson, 181 Iowa 1155, 165 N.W. 387, where the court held: "The words 'pension' and 'compensation' are not synonymous . . . the latter is ordinarily a gratuity from the government or some of its subordinate agencies in recognition of, but not in payment for, past services."

Further, even if the payments in question here were to be classified, as a pension, they would still not constitute a retirement or old age benefit law since the compensation is rendered by the Federal Government under the terms of Title 38, U.S.C. which is a veteran's benefit law. It is not a retirement law or an old age benefit law. There is no age requirement as a basis for receiving this compensation or pension, and neither is length of service a factor.

It is, therefore, my opinion that the amount received by a disabled veteran as disability compensation for injuries received while in military service cannot be deducted from the amount due him under the provisions of the Teacher Retirement Act.

CHAPTER XII

SCHOOL ATTENDANCE

1. Compulsory Attendance

A. Enforcement of Law requiring school attendance.

October 14, 1921 No. 3156 Harry S. Bowman, Attorney General

In compliance with your oral request for an opinion involving the application of section 7, Chapter 69, Laws of 1919, being a part of the education law, I wish to advise you as follows:

The first part of the section mentioned provides for a penalty for failure of parents or guardians to have children under their control in school during the regular school session.

In addition to the foregoing penalties, the latter part of the section authorizes a suit in mandamus at the expense and in the name of the county or municipal boards of education or county or city superintendents of schools to compel such parents or guardians to place such children in school at once. The latter part of the section mentioned grants a quick and effective method to compel the attendance of pupils of school age in schools and thus obviate the objection to the act as it primarily existed which did not have the effect mentioned.

B. Law prohibiting selling tobacco to minors; age of pupils subject to compulsory school law, and length of required school attendance.

October 11, 1922 No. 3606 Harry S. Bowman, Attorney General

Section 2916, Code of 1915, prohibits the sale of intoxicating liquor, cigars, cigaretts or tobacco in any form, to minors under the age of 18 years, or to any pupil of any school or educational institution within this state.

. . . It has been previously ruled by this office that children between the ages of sixteen and seventeen years are required to attend school under the provisions of the compulsory school act, but this ruling has been questioned, and I am now inclined to the view that the compulsory school law does not include children that have reached the age of sixteen years.

C. Schools, age of children.

September 3, 1931 No. 261 E. K. Neumann, Attorney General

"Do school boards have authority to refuse admission of children to the first grade throughout the entire school year if they are not six years of age at the opening of the school year?"

Section 120-1203 of the 1929 Code is as follows in part:

"Children between the ages of six and sixteen, both inclusive, shall attend public schools of the state for as many weeks as the public schools in the district, in which such children reside, shall be in session."

. . . If the conditions do not warrant local boards with accepting children before they are six years of age it is probably within their discretion to refuse to do so.

November 18, 1931 No. 313 E. K. Neumann, Attorney General

1. As the law reads, school attendance is compulsory between the ages of 6 and 16 inclusive, does that include the 17th year or merely through the 16th and up to the 17th?

From a reading of the statute involved, it is clear that the law intends to include, in such compulsory attendance, the ages 6 to 16 and no others. In other works, anyone having arrived at his 17th birthday is not required to attend public schools.

2. Please give us an interpretation of the law which permits children working under the work permit law. What about children who sell newspapers after 7 o'clock? We are anxious to know if newspaper carriers can deliver before 7 in the morning and after 7 at night.

. . . A careful reading of said section definitely discloses that it is intended by the legislature that in no case, under any circumstances, shall a child be permitted to commence work before seven o'clock in the morning nor continue working after seven o'clock in the evening of any one day, and, consequently, your second question must be answered in the negative.

D. Attendance, age requirements.

1942 No. 4190 Edward P. Chase, Attorney General

Law says . . . "Children between the ages of six and sixteen years both inclusive, shall attend public schools of the state for as many weeks as the public schools in the district in which such children reside shall be in session . . ."

Attorney-General asked to define "inclusive."

Since the term "both inclusive" is used, it is apparent on the face of the section that a child must attend school throughout his sixteenth year, and until he reaches his seventeenth birthday.

E. Schools not required to accept child six years old.

June 6, 1947 No. 5036 Robt. W. Ward, Asst. Atty. Gen.

You have handed to me for an opinion, a letter from John Milne, Superintendent of the Albuquerque Public Schools. In his letter Mr. Milne asks whether Chapter 28, Laws of 1947, amending Section 55-1203 of the 1941 Compilation, makes it mandatory upon the part of a school to take a child in when he passes his sixth birthday.

This law makes it mandatory for children between the ages of six and seventeen to attend school. However, it does not appear that this statute, which does not materially change the previous law, was intended to force the various schools to take in children during the school term as soon as they reach the age of six. It is directed toward the children and does not appear to be designed to limit the powers of the various school boards to make reasonable rules and regulations.

It is therefore my opinion that the various school boards have the power to prescribe rules and regulations setting forth when and under what circumstances they will take children who attain the age of six during the school term.

2. Married children attending school.

A. Compulsory attendance law applies to married children under 17. Local boards may decide who attends school after age 16 is passed.

February, 1936 No. 1310 Frank H. Patten, Attorney General

. . . We have your letter of Feb. 17th in which you ask our opinion on the following questions . . .

1. Can married people under the compulsory school age be compelled to attend school?

2. Can married women under twenty-one years of age be excluded from school?

Section 120-1203, 1929 Compilation provides for the compulsory attendance at public schools of children between the ages of six and sixteen years, both inclusive. There are certain exceptions made but I find nothing in the law excepting children within the ages mentioned above who happen to be married. I think the first question stated above should be answered in the affirmative.

I find nothing in the law which provides that children may be excluded from school because they are married. However, it was stated in an opinion written by this

office on Sept. 3rd, 1931, Opinion No. 261, that children over the age of sixteen years may or may not be permitted to attend school, in the discretion of the local governing board . . .

B. Married persons, when excluded from school.

October 21, 1937 No. 1790 Frank H. Patton, Attorney General

Marriage of infant does not exclude from school,

Under Enabling Act public schools are open to all children of state--and children is interpreted to mean all persons under 21.

This has been denied in another opinion No. 111. Therefore, if there should be a great rush of married infants seeking free education, and facilities inadequate, the board would be justified in resolving all doubt in favor of unmarried children by giving them preference.

C. Married minor is permitted to attend school.

1942 No. 4134 Edward P. Chase, Attorney General

The Supreme Court of Kansas had the following to say:

"There is no controversy as to a minor being entitled to an education in the public schools. The question of her statutory right to enter school is not questioned, provided, of course her moral standards are not objectionable . . .

In view of the foregoing which I believe reflects the overwhelming weight of authority, I conclude that neither the State Board of Education, nor the local governing authority, may exclude from its student body any minor student merely because such student may be married . . . so far as the writer is aware there is nothing immoral or licentious in getting married.

3. Right of attendance as Affected by Residence.

A. School directors may admit non-resident pupils to their school upon payment of tuition fee.

November 4, 1916 No. 1896 H. S. Clancy, Asst. Atty. Gen.

Difficulty in this school district arises over the fact that several families who do not reside in the school district of which Mr. Edgell is a director, but who pay school taces in his district, insist upon sending their children to his school, rather than to the school of the district where they reside. The law of NM upon this subject appears quite clear. Sec. 4847 of the Codification of 1915 provides that pupils who are actual residents of a district shall be permitted to attend school in the same, regardless of the time when they acquire such residence, while Sec. 4859 provides that school directors may admit non-resident pupils to the school under their charge, provided accommodations are sufficient to justify the same, charging a sum to be determined for tuition, and the same section also provides that when the parents of non-resident pupils pay a school tax in any district, such pupils shall be admitted to the school, and the amount of school tax shall be credited to their tuition.

B. Parent not reimbursed for pupils expense.

January 18, 1923 No. 3661 Milton J. Helmick, Attorney General

Parent Lodging Child at Distance from Home for School.

No law either directly or indirectly permits a reimbursement to parents for sending boy to school at county seat because he lives too far away from school house in district, for expenses of lodging for boy.

C. Tuition for foreign pupils.

March 7, 1923 No. 3682 John W. Armstrong, Asst. Atty. Gen.

School Districts.

Consolidated Districts--if two or more districts have consolidated as provided in Sec. 4840, NM Statutes, Annotated, Codification 1915, it is neither more nor less than one district. Sec. 4847 of said Code provides "pupils who are actual residents of district shall be permitted to attend school in same. Directors have no discretion as to whether they may or may not admit such pupils, and may not require tuition. Under Sec. 4859 of said Code, directors may exercise their discretion in admitting non-resident pupils and may charge tuition as provided in said section.

D. Tuition, when charged.

April 29, 1930 Page 193 No signature.

Tuition may be charged pupils attending school in districts in which they are non-resident, no greater than average cost per capita for education based on average daily attendance of the district for the previous school term.

E. Tuition, who collects.

August 27, 1930 Page 184 J. A. Miller, Attorney General

Governing authorities of schools are without authority to collect tuition from pupils non-resident of the district, but residents of state who may be permitted to attend the schools. Authorities may collect tuition not greater than average cost per capita for edu. based on average daily attendance of district for previous school term from pupils non-resident of the state who are permitted to attend schools in such district.

F. Children attending school out of district.

April 16, 1937 No. 1601 Frank H. Patton, Attorney General

Admission of non-resident pupils is matter within dis-

cretion of board, and school facilities, space, etc., are questions for consideration by the board.

G. Assessment for pupils of another district.

April 22, 1943 No. 4273 Harry L. Bigbee, Asst. Atty. Gen.

You request an official opinion concerning correct method of computing per capita cost relative to the amounts assessed against one School District as a result of such School District sending their children to a School in another district.

Only statutory provision directly pertaining to this problem is Sec. 55-604 (10) of the NM 1941 Compilation which provides:

"Tuition for pupils attending schools in other districts (shall not exceed direct charge per capital cost in district where pupils are attending.)"

Per capital charge can only be computed according to the Direct Charge Budget and cost determined according to the budget for the current year and the estimated daily attendance. If expenditures under a particular budget are based on a 6-6 school plan, in order to properly compute the accurate per capita cost the same plan should be followed in determining the average daily attendance as is used in computing the expenditures in order to accurately determine the proper per capita cost.

Formula to determine per capita cost is not set out. Legislature contemplated giving the Educational Budget Auditor discretion in this matter under which the E. B. A. can set up any formula he sees fit that can reasonably be expected to accurately determine actual per capita cost under Sec. 55-604 (10). What would be a workable and proper formula for one School District may not necessarily give an accurate result under the particular conditions of another School District.

You state that there is a practice of certain schools to build up a cash surplus in their Direct Charge Fund from year to year and when they have finally accumulated

sufficiently large surplus to use such amounts for the building of buildings, etc. In view of usch a situation when such surpluses are used they cannot be considered in arriving at a per capita cost because such funds are accumulated from year to year in the Direct Charge Budget and in such years would have already been properly utilized in arriving at the per capita cost under the Direct Charge Budget. If such amounts are used for a building program, to once more consider such figures in determining the per capita cost would in effect result in a double levy.

H. Admission of non-resident students.

January 17, 1944 No. 4439 C. C. McCulloh, Asst. Atty. Gen.

Sec. 55-1202 of 1941 Compilation authorizes the governing authorities of the schools to admit pupils who are non-resident of the district to the schools under their charge provided school accommodations are sufficient for that purpose.

Sec. 55-1203 of the 1941 Compilation provides that children between 6 and 16 inclusive shall attend public schools in the State. There is no law requiring pupils to attend school in any particular district and it is within the discretion of the governing board of a school district whether they shall admit pupils non-resident in that district.

4. Race Segregation in the Public Schools.

A. Exclusion of children belonging to colored race from public schools.

October 19, 1915 No. 1658 F. W. Clancy, Attorney General

You inform me that your children are excluded from the public school because they belong to the colored race. There is no doubt that this is a gross violation of the rights of the children, and I have no doubt whatever that if proceedings are instituted in the courts,

as you say you have decided to do, the court will undoubtedly compel the school board to receive your children unless they have some other reason for excluding them than on account of race.

B. Compulsory attendance as applied to Pueblo Indians.

October 23, 1916 No. 1889 F. W. Clancy, Attorney General

The Supreme Court of NM has several times declared that the Pueblo Indians were citizens of Mexico, and by virtue of the treaty of 1848 became citizens of the US. I feel certain that they are to be considered as subject to all state laws the same as any other citizens, subject to the provisions of the Enabling Act, under which NM was admitted to statehood.

By a somewhat strained construction of the statute it might be held that the school furnished by the govt. for the Pueblos is a public school. However, that may be, I think you can properly receive the complaint which the local Indian Agent wishes to file and have the Indians brought in under a warrant, and the chances are great that no such defense will be interposed, and it will be of value, I assume, to have the children go to school.

C. Exclusion of negro children.

April 28, 1930 Page 194 M. A. Otero, Jr., Attorney General

Unless district is prepared with approval of local board and state board of edu. to provide separate rooms for negro pupils and maintain the same on the same standard of comfort and efficient service and efficient teaching as those used by other pupils, you will not be justified in refusing admittance to negro pupils.

D. Indian children in schools.

October 31, 1930 Page 163 J. A. Miller, Attorney General

"A uniform system of free public schools sufficient for education of and open to all children of school age in the state."

Their not being tax payers has no bearing on subject.

5. Transportation of Pupils to and From School.

A. Use of public school trucks to transport pupils of private schools.

October 27, 1921 No. 3170 A. M. Edwards, Asst. Atty. Gen.

The funds used for the purchase and operation of these trucks belong to the taxpayers and can only be used for the benefit of the public schools. Part of the school funds in each county come from the proceeds arising from the sale and disposal of the lands granted to the state by Congress.

Section 3, Article XII of our Constitution provides that:

"No part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college, or university."

While it may be contended that the money expended for the purchase and maintenance of trucks is not used for the support of the schools directly, yet it is contrary to our scheme of government, directly or indirectly, to devote the school funds provided by taxation or from the state lands to any sectarian school.

The school board of your district, therefore, would have no authority to authorize the use of the trucks for the transportation of children to private or denominational schools.

B. Transportation of children not within motor carriers act.

June 28, 1933 No. 613 Quincy D. Adams, Asst. Atty. Gen.

This is in response to your letter of June 27, 1933. In my opinion Chapter 154 of the Session Laws of 1933 has no effect upon the transportation of children in school busses since it is provided by Section 15 thereof as follows:

"This act shall not apply . . . to contract motor carriers of passengers engaged exclusively in the transportation of children to or from school."

C. School busses--exempt from registration fee.

February, 1935 No. 878 Quincy D. Adams, Asst. Atty. Gen.

In your letter of January 30, 1935, you ask for an opinion as to whether or not motor vehicles owned and used by school districts are exempt from payment of a registration fee, under the provisions of Section 8, Chapter 169, Laws of 1933.

Said Section refers to "motor vehicles or trailers owned by and used in the services of the State of New Mexico or any county of Municipality thereof." A school district is a division of the State of New Mexico for governmental purposes. There is also authority to the effect that a school district is a municipality. In Olsen v. Ind. School District (Minn.), 220 N.W. 606, the court says that, "In ordinary parlance and general understanding, a school district is a municipality. . .

. . . It is, therefore our opinion that the Legislature intended, by Section 8, Chapter 169, Laws of 1933, to exempt from payment of registration fees all motor vehicles owned and used by school districts within this state.

D. 1. Minor can drive a school bus.
2. Board members not responsible for accident unless negligence can be proved.
3. County Board may pay for transportation of children living in a National Park.

March, 1935 No. 922 Frank H. Patton, Attorney General

. . . In answer to your first question as to whether or not it is lawful for a minor to act as a driver of a school bus transporting school children, you are informed that we have no state law prohibiting this . . . The State Corporation . . . has not prescribed any rules applicable to the school buses but I am informed that it is now formulating certain rules which will be put into effect before any other contracts are let to operate school buses.

. . . Your second question asks whehter or not the members of the County Board of Education can be held responsible if an accident should happen on the bus while a minor is driving same. Our answer to this is that the members of the board would not be responsible merely because the bus was being driven by a minor, but if it were shown that the contract to carry the children has been let to a person who was known to be negligent and to have unsafe equipment for transporting the children, then under the general laws of negligence the members might be held responsible and also the school district or county. Phillips vs. Hardgrove, et al 161 Wash. 121, 296 Pac. 559 . . . also Rankin vs. School District No. 9, 143 Ore. 449, 23 Pac. 2nd 132.

. . . In answering your third question as to whether or not a County Board may pay out county school funds for the transportation within a National Park, we see no reason why this may not be done in the event that it is necessary to transport children entitled to transportation through or from a National Park.

E. School board member cannot operate school bus route.

June, 1936 No. 1389 Frank H. Patton, Attorney General

. . . We have your letter of June 18th asking an opinion from this office as to whether or not it is permissible under the law for a member of the Municipal school board to have a truck route for his school.

We are of the opinion that this is not permissible.

Section 120-1415 of the 1929 Code prohibits any school official from making contracts in connection with the operation or maintenance of such public schools and we feel that a school truck route transporting children to and from the school in question could not be operated by a member of the school board under the provisions of this section of the law.

F. Transportation contracts, approval of.

January 8, 1938 No. 1858 Frank H. Patton, Attorney General

Transportation of Pupils.

Under Chapt. 29 of the 1937 Session laws--governing boards of education have power to designate and establish transportation routes with approval of State Board of Education.

G. Bus drivers, local board determines salaries.

June 21, 1939 No. 3182 Filo M. Sedillo, Attorney General

Bus drivers salaries.

Matter of salaries of school bus drivers, or at least the matter of contracting for the transportation of pupils, is one for the local governing boards subject to the approval of State Board of Education. State Board may by proper resolution delegate to State Director of Transportation duty of looking after the interests of state board of education in such matters.

H. Transportation, state and county boards responsible for routes.

September 27, 1939 No. 3288 Filo M. Sedillo, Attorney General

Transportation (long opinion)

. . . If routes must be established from rural dis-

tricts into municipal or independent school district, which would serve only the rural districts, county board of education would have right to establish routes subject to approval of state board of edu. In case the the routes must serve both local districts and municipal or independent district, and in such cases two or more boards of county and municipal or independent district to be served clearly have right to establish them with approval of state board of edu. Final responsibility rests with state board.

I. School bus drivers--qualifications.

August, 143 No. 4353 Harry L. Bigbee, Asst. Atty. Gen.

We have your letter of August 1943, wherein you state Section 68-306 of the New Mexico 1941 Compilation has been amended by chapter 54 of the Laws of 1943 by changing the minimum age of school bus drivers from 21 years to 17 years.

You further point out that our chauffeurs law prohibits issuing a license to any one under the age of 18 years.

You further state that a chauffeurs license is required for school bus drivers.

In our opinion then a school bus driver must receive a chauffeurs license and since a 17 year old person is not eligible for this then he would be denied the privilege of operating asschool bus. He would have to qualify under the provisions of Section 68-305 in order to obtain such a license . . .

J. School bus drivers--right of retirement.

July 30, 1946 No. 4933 Robert W. Ward, Asst. Atty. Gen.

We are in receipt of your letter of July 19, 1946, relating to the application for retirement of a Colfax County school bus driver. It appears that this driver has made application for retirement under Chapter 50 of

of the Laws of 1945. He is 71 years of age and has completed 30 years of service as a school bus driver, operator and contractor for the Colfax County Board of Education. It also appears that for the last two years he has held a contract for the operation of two school busses.

In view of these facts, you ask our opinion as to whether this school bus driver is entitled to retirement.

Chapter 50 of the Laws of 1945 provides, in part, as follows:

"Section 1. The board of education of any municipality, county . . . upon request of any employee entitled to the benefits of this act . . . may . . . retire from active service and establish an emeritus employment status with any teacher, supervisor, custodian, nurse, principal, superintendnet or other regular full-time employee of the public schools. . ."

"Section 2. When any person who has served as an employee of the public schools . . . for 20 years or more is retired as herein provided, he shall be entitled to receive annually for the remainder of his natural life and beginning at the date of such retirement, 60% of the average annual salary paid to him on account of his employment during the five years of full-time employment at full-time annual salary next preceding the date of retirement." (It then provides for maximum and minimum retirement salaries.)

In view of these sections, it is seen that to be entitled to retirement, a person other than a professional employee must be a regular full-time employee. Retirement pay is based on full-time employment at full-time annual salary. A very serious question exists as to whether a school bus driver is an employee of the school board. By far the majority of the courts that have considered this question hold that a school bus driver is an independent contractor rather than an employee. See Arthur v. Marblerock Consolidated School School District (Ia.) 238 N. W. 70; Ludlow v. Industrial Commission, 65 Utah 168, 235 P. 884; Davis v. Board of School Commissioners (Ala.) 178 S. 63; Olsen v. Cushman,

(Ia.) 276 N. W. 777.

Certainly no salary is paid to a school bus driver as such, which is necessary for the existence of an employer--employee relation. However, in the case of Ridgell v. T. P. S. B., 17 So. 2d 55, the Louisiana Court held that insofar as a school bus driver contracted to furnish transportation for school pupils, he was an independent contractor, but insofar as he furnished labor and personal services, he was an employee. But even if it be assumed that a school bus driver is an employee of the school board, this is not sufficient to entitle him to retirement. To be entitled to retirement, an employee must be a regular and full-time employee.

In Opinion No. 4741, we attempt to define what was meant by the language "regular full-time employee." We there held that the Legislature intended to distinguish such employees from special employees, temporary employees and part-time employees.

In many instances school bus drivers do not devote their full time to transporting pupils. Thus, it would appear that even though school bus drivers be considered employees, that many of them could not be considered fulltime employees. In many other instances, the person holding the contract does not drive the bus at all. In fact, in some instances, one individual holds all the contracts for a particular school district. He, in turn, employs drivers to drive the busses so that he performs no personal services. Further, it appears that even though school bus drivers be considered employees, they could not be considered regular fulltime employees since their employment is of a special nature.

The Legislature, by Section 2 of Chapter 50, set forth above, provided that the retirement pay should be based on full-time salary for full-time employment. As noted above, school bus drivers are not paid a salary as such. Rather, they are given a lump sum which covers both their services and the operation and maintenance of the bus. No procedure is set out by the statute to determine how much of this is for personal service. Any figure must of necessity be arbitrarily arrived at.

If the Legislature had specifically intended to cover

school bus drivers, some provision would have been made to determine his salary basis for retirement. It has been suggested that it would be unfair to permit a janitor to retire and not a school bus driver. On the other hand, it would be just as unfair to permit a school bus driver who holds a contract in his own name to retire and not permit the retirement of a person who actually has driven a school bus for 30 years as an employee of a person holding a school bus contract. Yet, such a driver could not conceivably be an employee of of the school board, since he is employed by a private individual. It would also be unfair to permit a person to receive retirement pay who had actually operated his own bus and not permit a person who has held a great many contracts, but who has not personally driven the bus.

In view of the foregoing, it is my opinion that it was not the legislative intent as expressed in Chapter 50 of the Laws of 1945 to include school bus drivers in the category of "other regular full-time employees." so that a school bus driver is not entitled to the benefits of the Retirement Act. I enclose herewith an additional copy of this opinon for your use.

K. Driver education and training courses.

September 29, 1948 No. 5172 Walter R. Kegel, Asst. Atty. Gen.

We have your letter of September 27, 1948 requesting the opinion of this office upon a matter which may be summarized as follows:

Some twenty schools throughout the state are offering Driver Education and Training Courses. Students obtain instruction permits from the Driver's License Division under the provisions of Section 68-307 N.M.S.A. 1941 Compilation. The equipment used is a specially built passenger car with dual controls--one set for the student driver and one set for the instructor, who is present in the car at all times.

You ask whether it is permissible for students other than the one driving to ride in the car during the instruction period and state that it will be impossible to

complete the course of training if such a practice is impossible.

This matter is covered by Section 68-307 N.M.S.A. 1941 Compilation, which reads as follows:

"The department, upon receiving from any person over the age of fourteen (14) years an application for a temporary instruction permit may issue such permit entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of sicty (60) days when accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver and there is no other person in the vehicle."

If this section is applicable to the Driver Education and Training Program, other passengers, including students, would be violating the act by riding in the car, for the wording "and there is no other person in the vehicle" is all inclusive. While this act was passed before such a program as this was instituted, and the Legislature probably did not contemplate it, it is my opinion that the act is broad enough to cover the program in question.

Section 68-302 N.M.S.A. 1941 Compilation, provides in part as follows:

"No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur under the provisions of this act."

The instruction permits referred to in Sec. 68-307 are the only applicable exception in this particular instance. Therefore, student drivers would necessarily have to have instruction permits, which are only valid when a licensed operator or chauffeur is sitting beside the driver and no other person is in the car.

I call your attention to the fact that this section refers only to driving upon the highways. If the course could be conducted upon roads other than highways, Section 68-307 would not apply and the presence of student passengers would be permissible. In this connection, highways are defined by Section 68-301 (i), N.M.S.A. 1941

Compilation, as follows:

"Every way or place of whatsoever nature open as a matter of right to the use of the public for the purpose of vehicular travel. The term 'highway' shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions."

Further, Section 68-327 N.M.S.A., 1941 Compilation provides:

"(a) It shall be a misdemeanor for any person to violate any of the provisions of this act, unless such violation is by this act or other state law declared to be a felony.

(b) Unless another penalty is by this act or other laws of the state provided every person con-victed of a misdemeanor for the violation of any provision of this act shall be punishable by a fine of not more than one hundred dollars ($100.00) or by imprisonment in the county jail of the county wherein the offense is committed for not more than ninety (90) days, or by both such fine and imprisonment."

It is therefore, my opinion that students in Driver Education courses in the schools of the state, in order to validly operate a motor vehicle upon the highways must possess an operator's or chauffeur's license, or an instruction permit. If such students have an operator's or chauffeur's license, other students may accompany the driving student and the instructor. If, however, the student driver possesses merely an instruction permit, he may be accompanied only by the instructor, who must be a licensed operator or chauffeur and who must occupy the seat beside the driver.

It is further my opinion that a violation of the above would constitute a misdemeanor as defined in Section 68-327.

6. Average Daily Attendance Requirements.

A. Special subjects and daily attendance.

April 20, 1923 No. 3695 John W. Armstrong, Asst. Atty. Gen.

Under Sec. 1418 of Bill No. 112 (1923 Act.) teachers for special subjects are authorized for instruction of high school pupils only.

Regular subjects are such only when confined to a specified grades designated by State Board.

Sec. 1104 of School Code: one teacher of speical subjects is authorized for every 50 regularly enrolled high school pupils or any major portion thereof above that number in average daily attendance. When average daily attendance may be 76 pupils notwithstanding pupils may belong to more than one high school, law authorizes 2 teachers of special subjects. If teacher is qualified to teach English and Spanish and does teach classes in in Spanish, such school may hire one more teacher of special subjects. No high school, however, may have more than 6 teachers of special subjects.

Law will permit combining average daily attendance and employment of Agricultural and Home Economics teachers, provided such combined attendance will equal or exceed 138.

B. School boards, may designate district children to attend.

December 11, 1931 No. 327 M. A. Otero, Jr., Attorney General

"Under New Mexico laws, can the board of Municipal Schools say that a child shall or shall not attend a certain school within the municipal district, or may it (the child) not attend any school within the district which the parents may select?"

Section 120-1201 of the 1929 Code in part is as follows:

"Pupils who are residents of a district shall be permitted to attend school in the same regardless of the time when they acquire such residence, whether before or after the enumeration."

The power of municipal school boards would seem by reading Section 5 of Chapter 119 of the Laws of 1931, to be that they have control and s pervision of all municipal schools within their respective districts and the sites, buildings, equipment and funds of said district, with the power to employ and discharge all teachers and all school employees of said schools.

I see no reason why it is not within the power of the municipal board to designate the school to be attended by the children of the district in such districts where more than one school is provided.

C. Schools average attendance to maintain.

April 22, 1932 No. 446 E. K. Neumann, Attorney General

. . . I refer you to Sec. 120-1422, 1929 Code, which provides that "No school shall be maintained or budget allowance be made in any school district of this state unless said school shall have an average daily attendance of at least eight (8) pupils."

In the particular case you mention, apparently the average daily attendance has been at least eight pupils up until the present time when it has dropped to six. There is only one more month of school and you wish to know if the school should be closed for the remainder of the term.

The statute above referred to does not specifiy over what period of time the average daily attendance is to be determined. Since the budget allowance is made for the period of the school fiscal year, it is my opinion that this statute contemplates an average daily attendance to be determined for the period of the entire school year.

Assuming that only six pupils attend for the remainder of the school year, if nevertheless, the average daily attendance for the entire year will be eight or more, I think the school should be kept open; otherwise, it should be closed.

D. Method of computing average daily attendance.

February 25, 1944 No. 4465 Harry L. Bigbee, Asst. Atty. Gen.

You want our opinion if the Board of Education's action on the question set forth in the following excerpts is legal:

In the minutes it is noticed that among other things the State Board provides for the computation of the average daily attendance for the eight highest months during the session of 1943 and 1944 by all schools of the state.

Sec. 55-638 of the NM 1941 Compilation provides, in part, as follows:

"Average daily attendance . . . shall be the total number of days which all pupils enrolled in any public school of any school district attended school for the entire school year, divided by the total number of days the school was in session for the entire school year.

"In computing average daily attendance the following f ctors shall be used: "(e) a school year shall constitute 180 teaching days, less not to exceed 5 regular holidays and 3 days for holding the "Annual State Teachers' Convention.' Provided, however, nothing herein contained shall prevent any school teaching more than the minimum number of days required hereunder.

"(f) .. . (This paragraph is not effective until after June 30, 1945).

"On or before the 10th day of June of each year each superintendent shall make an annual report to the state superintendnet of the average daily attendance of all schools under his supervision. The yearly average daily attendance in any school district shall be obtained by dividing the total number of days all pupils of the school district attended by the number of days school was held in the district during the year, subject, however, to the provisions of subsections (3) and (f) above. Annual average daily attendance in each county, determined as herein provided, shall be certified by the state superintendent of public instruction to the educational budget auditor on or before the first

day of July of each year."

It is clear that our statute specifies in detail the manner in which the average daily attendance shall be computed.

E. Number of pupils necessary for schools.

March 21, 1945 No. 4682 C. C. McCulloh, Attorney General

You have referred to Section 55-1107 of the 1941 Compilation, and to Section 55-1901 of the 1941 Compilation, and request an opinion relative to the question of which law governs in the case of high schools having less than 30 pupils.

The portion of Section 55-1107 which is pertinent to your question is as follows:

". . . Provided, that in high schools established on or before March 13, 1923, and having less than 31, and more than 18, regularly enrolled high school pupils in average daily attendance, two (2) teachers may be employed, . . ."

The portion of Section 55-1901 which is pertinent to your question is as follows:

". . . and whenever any high school, being the 9th to the 12th grades, inclusive, shall have less than 30 pupils in average daily attendance for the preceding school year, the pupils in such schools shall be transferred to the nearest schools having facilities to properly care for such pupils. Provided, however, whenever the State Board of Education shall determine that in any isolated case it is not economically feasible to transport such pupils and that no material saving can be made thereby, or that proper educational facilities are not available to properly care for such pupils, and shall so certify to the governing boards of education affected, such schools having less than the required number above provided shall be permitted to continue until such time as conditions may justify the transportation of said pupils to other schools as hereinabove provided."

Section 55-1901 covers the same subject matter as the above mentioned portion of Section 55-1107, and insofar as the latter section is in conflict with the earlier law, the later section would supersede the earlier law, and be controlling.

Under Section 55-1901, when the average daily attendance in high school falls below 30 pupils, such pupils shall be transported to the nearest school having facilities to properly care for them. unless the State Board of Education determines that is not economically feasible to do so, or that proper educational facilities are not available in another school, in which case the school involved is authorized to be continued, and, when so continued, would be entitled to the te chers as provided in Section 55-1107.

CHAPTER XIII

THE COUNTY SUPERINTENDENT

1. The Duties and Powers of the Office.

A. Powers of County Superintendents of Schools.

1905-6 No. 246 W. C. Reid, Attorney General

OPINION to Supt. Pub. Instruction in relation to persons who should report moneys paid out for school purposes, and whether County Supt. of Schools should approve warrants for "Interest on School-house Bonds," before they are paid.

HELD: All school warrants should be approved by County Superintendent.

B. County School Superintendent Eddy Co.--increased salary.

1905-6 No. 258 W. C. Reid, Attorney General

OPINION to Supt. Pub. Instruction on authority of Co. Commissioners to pay Co. School Supt. of Eddy Co. increased salary as provided by "Law of Limitation, March 14, 1905" before Eddy Co. has been classified.

HELD: County must be classified first.

C. School Boards--powers; County Superintendents--powers.

1905-6 No. 293 W. C. Reid, Attorney General

OPINION to Supt. Pub. Instruction on powers of school boards to employ teachers and fix their compensation, and defining powers of county superintendents with relation thereto.

HELD: County Superintendent may investigate legality of accounts before approving; may reject warrant of school

directors if he deems same illegally issued; nothing to do with employment of teachers, nor with fixing their compensation.

D. County School Supt.--approval of school warrants by.

1905-6 No. 354 W. C. Reid, Attorney General

OPINION to Prof. Hiram Hadley, Supt. Pub. Instruction, on construction of Chap. 37, Sec. 2, Laws 1903, regarding approval of warrants by county superintendent before being honored by treasurer.

HELD: County Supt. should approve warrants before being honored by treasurer.

E. County Superintendent--can he legally teach school and draw public moneys for same.

1905-6 No. 373 W. C. Reid, Attorney General

OPINION to Hon. Hiram Hadley, Supt. Pub. Instruction on question of whether a County School Superintendent of Schools can be employed to teach school and draw public money for the same, during his term of service as service as superintendent, in county in which he resides?

HELD: Yes.

F. County School Superintendent--eligibility of female to hold office.

1905-6 No. 376 W. C. Reid, Attorney General

OPINION to Hon. Hiram Hadley, Supt. Pub. Instruction, on question of whether female is eligible to hold office of County Superintendent of schools?

HELD: No.

G. May County Superintendent conduct county institutes.

April 10, 1909 — Frank W. Clancy, Attorney General

I am unable to find anything in the law prohibiting the above, and receiving pay for their services. Inasmuch as section 6, Chapter 97 of the laws of 1907 prohibits the selection of any conductor or instructor who does not hold a certificate from the Territorial Board of Education, I do not see that there can be any risk of an abuse of the superintendents should act as such conductors, because I assume that the Territorial Board would not give any county superintendent such a certificate unless he was qualified.

H. County superintendent to appoint directors if no election held.

April 10, 1909 Page 17 — Frank W. Clancy, Attorney General

Answer to your letter rel. to the failure to hold election of school directors on the day fixed by law, I understand this question has been passed upon by the Judge of the Dist. Court of Taos County, that court holding that the failure to elect directors operated to create a vacancy because there is no holdover in the office of school director, This being so the county superintendent is authorized by law to fill the vacancies by appointment.

Another question what the effect would be if the election would be conducted by persons other than the board of school directors, who are the persons designated in section 153 of the Compiled Laws, to hold the election. As a general proposition the misconduct or the failure of the proper officials to hold an election must not be permitted to defeat the expressed will of the voters if an election has actually been held, and probably no general rule can be declared which would be applicable in all cases, as the circumstances might greatly vary.

I. County Superintendents, qualifications.

June 11, 1910 Page 143 Frank W. Clancy, Attorney General

Your letter asking for opinion as to the right and duty of the Territorial Board in the matter of passing upon the qualifications of county superintendents as prescribed in sec. 18 of Chap. 97 of the Laws of 1907. You say that the prospective candidates are asking by what plan the board will pass upon them and whether the certificates to be filed with the county treasurer are to be made by the board or the candidates and whether the qualifications should be definitely prescribed now or after the election.

It appears to me that the plan to be adopted by the Territorial Board rests largely in its discretion and is a practical question to be answered by the board in a practical way, and that it would be going beyond the scope of my dutyto undertake to indicate just what plan should be adopted.

The wording of the statute as to what is to be filed with the county treasurer calls it "a certified statement of the qualifications hereinbefore mentiond." It could not have been the intention of the legislature that a person elected should certify to his own qualifications and taking the whole section together it is apparent that the certification must be made by the authority authorized to pass upon the qualifications.

It would be advisable that the qualifications should be as definitely as possible prescribed by the Territorial Board prior to the election in order to avoid the difficulty and confusion which might otherwise arise from the election of unqualified persons. I do not think that the board is necessarily called upon to pass upon the qualifications of prospective candidates, but I see no objection to its doing so if it should decide that it would be desirable and practical.

You further ask whether I regard the Territorial Board as acting wholly within its authority if it were to require examinations in the branches specified in in sec. 1529 of the Compiled Laws of 1897, as evidence of qualification covered by the expression "practical experience and learning in those branches of education taught in public schools as provided by law." It seems

to me that requireing such examinations might put the question of qualification of county superintendents too nearly on the same basis as the qualifications of teachers in the public schools. It is very difficult precisely to define what is meant by "practical experience and learning," and I am in no position to assist the board in making such a definition. It would seem necessary that the board should require some evidence that the superintendent possesses the qualifications prescribed in the statute and there can be no reasonable objection that I can see to requiring such evidence to be in the form of answers to questions propounded upon examinations by the board, but I believe that it will be well to avoid putting those examinations on anything like the same basis as examinations of teachers.

J. County School Superintendents, qualifications.

January 3, 1912 Page 220 Frank W. Clancy, Attorney General

My opinion is that the qualifications for county school superintendents fixed by the Act of 1907, are abrogated by the constitution, because they are inconsistent with Sec. 2 of Article VII of the constitution, which provices that "Every male citizen of the U. S. who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this constitution." Therefore, school superintendents are not required to submit themselves to the Territorial Board of Education as to their qualifications.

K. County School Superintendent can continue to receive salary under the territorial law.

1912 No. 905 Frank W. Clancy, Attorney General

Following statehood the question of payment of Superintendents and manner of, was raised. Held . . . continue to receive salary under the territorial laws. . . .

L. Salaries of county officers.

July 4, 1912 No. 918 Frank W. Clancy, Attorney General

Letter sent to all district attorneys on the subject of salaries of county officers.

. . . what, if anything can be done for the relief of county officers in view of failure to provide by legislation for their salaries in accordance with requirements of Section 1 of Article X of the Constitution as construed by the Supreme Court of the State . . .

. . . Lengthy letter describing means of relief . . .

M. Vacancy in County Superintendent's office.

1912 No. 944 Frank W. Clancy, Attorney General

Vacancy in office of county school superintendent is filled by County Commissioners. At an election a candidate's name cannot be placed upon more than one ticket.

The school supt. selected will fill out the unexpired term of his predecessor.

N. Disposition of fines and election of county superintendent.

1912 No. 956 Frank W. Clancy, Attorney General

Under a change in law all fines and forfeitures collected under general laws, together with other moneys, shall constitute the current school fund of the state . . . this must do away with all previous statutory provisions as to what should be done with such fines and forfeitures.

At the present time the election of all county officers, including the school superintendent, is to be held at the same time, and the only provision in the constitution on the subject is that to be found in Section 2 of

Article X where it is declared that all county officers shall be elected for a term of four years . . . there is no constitutional obstacle to separate that election from the others.

O. County School Superintendent has no control over schools in incorporated towns.

April 18, 1914 No. 1195 Frank W. Clancy, Attorney General

Information as to the extent of authority of the county school superintendent in school matters in your incorporated town. You are correct in saying that the latest law seems to make the Board of Education free from any dictation from the superintendent. Chapter 67 of the Laws of 1913 makes provision for the election of a board of education in each incorporated town and village, which board is to have sole control over schools, and school property within each incorporated town, the territory attached thereto for school purposes, and the school district of which the town was a part before incorporation.

Any possible difference of opinion on this subject is probably due to the fact that Sec. 20 of Chap. 97 of the Laws of 1907 provided that the county superintendent of schools should have jurisdiction over all public schools within his county, excepting those in cities. The act of 1913, however, by clear implication, does away with the effect of the act of 1907 as to the jurisdiction of county superintendent with regard to schools in incorporated towns or villages.

P. County Superintendent may vote as member of governing board of county high schools.

April 24, 1914 No. 1202 Asst. Atty. Gen. Ira L. Grimshaw

Sec. 4 of Chap. 57 of the Laws of 1912 provides that the management and government of the high schools shall be under the control of the Board of Edu. or school directors of the city or district. Sec. 5 provides that the county superintendent shall be a member of that

that board. The conclusion is that the county superintendent has the same right to vote upon matters affecting the school as that had by other members of the governing body.

Q. Failure of County Superintendent of Schools to take action against directors who fail to hold election.

October 8, 1914 No. 1359 Frank W. Clancy, Attorney General

I know of no specific penalty imposed upon a county superintendent who failed to take any action against school directors after being notified that the directors had failed, properly, to hold an election. It might be made the basis of charges against the superintendent for his removal from office under Chap. 36 of the Laws of 1909. Your best chance is to lay the matter before the grand jury or the district attorney . ...

R. Legal qualifications of County School Superintendents.

October 3, 1916 No. 1875 F. W. Clancy, Attorney General

By Sec. 18 of Chap. 97 of the Laws of 1907 it was declared that no person should be eligible to the office of county superintendent of schools who is not a person of culture and practical experience and learning in those branches of education taught in public schools, as provided by law, and a person of good moral character. With the adoption of the constitution, however, these requirements have disappeared as Sec. 2 of Article VII of the constitution provides that every male citizen of the US who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in the constitution, but it is further provided in the same section, that women possessing the qualifications of male electors prescribed in Sec. 1 of the same Article, shall be qualified to hold the office of county school superintendent or the office of school director or member of a board of education.

S. Increase of school districts automatically increases the County Superintendent's salary.

August 3, 1917 No. 2040 Carl A. Hatch, Attorney General

We have your favor of recent date concerning certain conditions in McKinley County, and in reply thereto advise as follows:

Chapter 12 of the 1915 Session Laws provides that the County Superintendents in counties of the third class shall receive an annual salary of $1500. Further in the same act, it is provided that counties having less than 11 schools the preceding year, the annual salary of the County Superintendent shall be $750.00. The above provisions governed the salary of the Superintendent in McKinley County during the years 1915 and 1916, assuming, as stated in your letter, that this county was in the third class. You ask, in a case where the number of school districts in a county is increased to more than 11, if such increase automatically entitles the Superintendent the succeeding year to the salary as provided by the classification of counties, or whether the limitation of $750.00 still controls. We think . . . that the County Superintendent of McKinley County was entitled to the salary of $1500 for the year 1916.

The attorney-general here makes reference to the opinion of Harry L. Patton, No. 2017, in regard to what had been decided regarding the number of school districts in McKinley County.

T. Duties of County Superintendent of Schools.

April 29, 1921 No. 2938 A. M. Edwards, Asst. Atty. Gen.

Mr. Brinton claims a traveling allowance of over $500.00 which the Traveling Auditor has reduced to $125.00 under the provisions of Chapter 101 of the Laws of 1917.

In the opinion rendered by Attorney General Patton on July 21, 1917, addressed to Mr. Wagner, then Superintendent of Public Instruction, it was held that under

the provisions of section 4873 of the 1915 Codification the sole control over all schools within municipalities was given to the County Boards of Education and was taken away from the County School Superintendent.

The schools in Artesia, Dayton and Hope are classed as "independent districts" by Mr. Brinton in his letter to you..

Assuming that these so-called "independent districts" are schools within municipalities, they, together with the schools in Carlsbad, are not under the jurisdiction of the County Superintendent.

U. Allowances to County School Superintendents.

June 3, 1921 No. 2994 A. M. Edwards, Asst. Atty. Gen.

As we understand the law, the county school superintendent has jurisdiction only over the rural schools. His jurisdiction does not extend to the districts within incorporated municipalities.

Under Chapter 101, Laws 1917, the county school superintendent shall receive an allowance only for traveling expenses incurred in visiting rural schools upon the basis of school rooms therein as scheduled in that chapter.

V. County Superintendent to be elected.

March 13, 1924 No. 3764 John W. Armstrong, Attorney General

Sec. 401, Chap. 148, Sess. Laws, 1923 is unconstitutional. Sec. 2, Art. 10 constitution provides all county officers shall be elected. Our constitution seems not to imply that "elected" and "appointed" are synonymous terms.

W. County Superintendent's salary provided by Act of 1923.

June 8, 1925 No. 3833 J. W. Armstrong, Attorney General

County Boards of Education shall fix compensation of County School Superintendents at not less than $1500, nor more than $2500 per annum to conform to No. 401, Chap. 148, Session Laws 1923. This construction will conform to provisions of #27, Art. 4, St. Const. which provides that no law shall be enacted affecting officers whereby their compensation may be increased or diminished during their terms of office.

X. County Superintendent's salary during a certain period.

August 3, 1926 No. 3904 Robert C. Dow, Asst. Atty. Gen.

Three features are unconstitutional--legislature attempts to make appointive officer out of an officer who must be elected under #2 of Article 10 of Constitution, which says all county offiers be elected for a term of two years, and after having served two consecutive terms, shall be ineligible to hold any county office for two years thereafter. The statute held that county school superintendent could be employed for two years, or two and one-half years.

Statute attempts to delegate to County Board power to fix compensation of superintendent at not less than $1,500 or more than $2500 per annum. Under constitution legislature alone is vested with power to fix salaries. (One feature mentioned as unconstitutional was not described.)

CHAPTER XIV

RULES AND REGULATIONS OF BOARDS OF EDUCATION

1. Religion in the Public Schools.

A. Convent Sisters--teaching public schools--proviso.

1905-6 No. 375 W. C. Reid, Attorney General

OPINION on eligibility of Convent Sisters to teach public school in building where Parochial School is taught.

HELD: Yes. But Sisters must be regularly licensed and school must remain under control of regular directors and County Superintendent of Schools.

B. Use of public moneys in aid of denominational and charitable institutions.

September 29, 1914 No. 1344 Frank W. Clancy, Attorney General

No public money can be used for support of any denominational school, under Sec. 3 of Article XII of the Constitution.

Some donations under territorial form of government were made to denominational charitable institutions, which are now limited in Sec. 31 of Article IV of the Constitution to the following, under Legislative Assembly of 1909: Orphans' School of Santa Fe; Children's Home Society; St. Vincent's Hospital, Santa Fe; Grant County Hospital, Silver City; Sisters of Mercy Hospital, Silver City; Ladies' Hospital, Deming; Eddy County Hospital, Carlsbad; Relief Society, Las Vegas; Sisters' Hospital, Albuquerque, Gallup Hospital; St. Mary's Hospital, Roswell; Sisters of Loretta, Mora; and Sisters of Loretta, Las Cruces.

State legislature has made appropriations for 11 of 13, two being omitted, Orphans School, Santa Fe, and

Children's Home Society. Amounts run from 1000 dollars to 3600 dollars.--Sec. 11 of Chapter 83 of the Laws of 1912 and Sec. 4 of Chapter 83 of Laws of 1913.

C. Reading Bible at school assemblies.

May 9, 1922 No. 3423 Harry S. Bowman, Attorney General

In reply to your letter of the 5th instant, asking if it would be a violation of law to read the Bible at assembly exercises, without comment thereon, I wish to advise you:

Section 9 of Article XII of the State Constitution provides that:

"No religious test shall ever be required as a condition of admission into the public schools or any education institution of this state, either as a teacher or student, and no teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever."

Your inquiry involves the question as to whether the reading of the Bible would be in conflict with that part of the section of the Constitution quoted, which provides that no student shall be required to attend or participate in any religious service whatsoever.

. . . It is my opinion that there is no objection to the reading of the Bible in the public schools, provided that the pupils whose parents or guardians object to their being present may be excused during such period as the Bible is being read, and provided further that no comment or remark may be indulged in relating thereto.

D. Transportation, when refused, parochial issue involved.

January 28, 1931 No. 36 Quincy D. Adams, Asst. Atty. Gen.

This is in response to your letter of January 28, 1931, asking whether the driver of a school bus can legally refuse to transport school children attending a Catholic school.

In this connection, I wish to call your attention to section 3 of Article XII of the Constitution of the State of New Mexico.

It would appear from the above provision of the constitution that a County Board of Education is prohibited from using public school funds for the benefit of sectarian schools.

. . . even though the contract should provide for transportation of pupils attending a sectarian school, such provision could not be enforced by the County Board of Education for the reason that it would be invalid.

E. Religious Sisters, when may be employed.

April 18, 1939 No. 3101 Filo M. Sedillo, Attorney General

Sisters teaching in public school.

Nothing in law prohibiting payment of Sisters who are qualified and employed to teach in public schools.

F. School property, use by parochials.

December 7, 1936 No. 1479 Quincy D. Adams, Asst. Atty. Gen.

Whether it is legal for school board to permit use of public school gymnasium for dramatic purposes, musical recitals, etc., under auspices of parochial school. Under provisions of state constitution no funds appropriated levied or collected for educational purposes shall be used for support of any sectarian, denominational or private school, college or university.

It would be proper for school board to permit students from parochial schools to use a gymnasium if such use does not interfere with regular school activities--but not public school property and funds for support of activities of parochial school--(just entertainment and other like purposes.)

G. Religion--children, saluting flag.

1941 No. 3971 Edward P. Chase, Attorney General

May a school child be compelled to salute the flag of the United States where the parents object for some religious reason?

. . . the Supreme Court has held that as between two conflicting rights that the right to use appropriate means in order to promote patriotism and a unifying sentiment without which there can be no liberties, civil or religious, is paramount to the right of religious freedom which may conflict with the means to such patriotism . . . Many cases cited . . .

In view of the foregoing authorities, I am of the opinion that a school child may be compelled by school authorities to salute the Flag of the United States of America regardless of the objections of parents for some religious reason, and upon refusal to do so such child may be excluded from the public schools of this state.

H. Religion, released time for instruction.

April 13, 1942 No. 4066 Edward P. Chase, Attorney General

You request an opinion of this office concerning a proposed "Released Time Plan for Religious Education in Connection with Public Schools,""and you outline the proposal as follows:

. . . . . .

. . . In view of the Constitutional provisions and of the statutes above mentioned, it is my opinion that the plan proposed in your letter is not legal, and cannot be done without violating said statutes and constitutional provisions and violating the intent of the legislature expressed therein in spirit, if not in letter.

I. Legality of prayer in schools.

In your letter dated April 3, 1945 you enclose a letter from a city superintendent asking an interpretation of the law prohibiting the teaching of any sectarian doctrine in the public schools. The letter further states that in some school rooms the opening exercises include a prayer and a reading from the Bible without comment, the prayer being a printed one taken from some outside source and not read directly from a denominational publication or prayer book.

Article 12, Section 9 of the New Mexico Constitution provides as follows:

"No religious test shall ever be required as a condition of admission into the public schools or any educational institution of this state, either as a teacher or student, and no teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever."

On May 9, 1922, the Attorney General wrote an opinion, a copy of which is enclosed, relative to this matter in which he held that this constitutional provision did not prohibit the reading of the Bible without comment in the public schools, or the repeating of a prayer and singing of religious songs. The Legislature, in 1923, immediately after the opinion was given, passed Section 55-1102 of the New Mexico 1941 Compilation which provides as follows:

"No teacher shall use any sectarian or denominational books in the schools or teach sectarian doctrine in the schools, and any teacher violating the provisions of this section shall be immediately discharged, his certificate to teach school revoked, and be forever barred from receiving any school moneys and employment in the public schools in the state. Provided, that this section shall not be construed to interfere with the use of school buildings, for other purposes authorized by the county board after school hours."

The subject of sectarianism in schools is exhaustively annotated in 5A.L.R. 866, and the great weight of opinion seems to agree with the opinion of the Attorney General rendered in 1922, to the effect that Bible reading without comment and exercises which merely tend to inculcate fundamental morality in the pupils and quiet them in their

studies are not prohibited under constitutional and statutory provisions similar to ours. However, the school boards and school authorities should exercise care to prohibit such exercises being carried so far as to emphasize the teaching of a particular sect or denomination as this would result in a violation of the constitutional provision above quoted.

Emphasis should also be laid upon the fact stated in the former opinion that the pupils whose parents or guardians object to their being present during such exercises should be excused therefrom.

J. Employment of sectarian teachers.

May 8, 1947 No. 5020 C. C. McCulloh, Attorney General

This is in response to your letter of May 7, 1947, in which you request the opinion of this office as to whether a municipal board of education may legally palce on its list of salaried teachers two sectarian teachers who devote their full time to teaching classes at a sectarian or parochial school.

Section 3, Article 12 of the New Mexico Constitution provides that:

"The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational puproses, shall be used for the support of of any sectarian, denominational or private school, college or university."

Section 31, Article 4 of the New Mexico Constitution provides that:

"No appropriation shall be made for chairtable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state, but the legislature may, in its discretion, make appropriations for

the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the legislative assembly of nineteen hundred and nine."

Section 14, Article 9 of the New Mexico Constitution provides that:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

The general rule supported by the decided cases is that under constitutional restrictions such as ours that neither the legislature nor any county, city or other public corporation can make any appropriation or pay from any public fund, anything in aid of any church or sectarian purpose, or to help support or sustain any institution controlled by any church or sectarian denomination whatever. (42 Am. Jr. p. 767, Sec. 66).

Also according to the great weight of authority, a contract between a state, county, city or other political subdivision and a sectarian institution, whereby the former agrees to pay the latter for services rendered, or expenses incurred thereunder, is within the meaning of a constitutional provision prohibiting the use of public funds in aid or support of sectarian institutions and void. (42 Am. Jr. p. 767, Sec. 66; 5 A.L.R. 879; 22 A.L.R. 1319; 55 A.L.R. 320; 141 A.L.R. 1148).

I have also considered the case of Everson v. Board of Education, 91 L. Ed. 472, decided by the Supreme Court of the United States on February 10, 1947, relating to transportation of children to parochial schools; however, in my opinion, that decision does not deviate from the general rule set out above to an extent that the same court would uphold paying of salaries to sectarian or parochial school.

In view of our constitutional provisions which limit the purposes for which public funds may be spent, and in view of the construction placed upon similar constitutional provisions throughout the courts of the Unite States, we are of the opinion that a municipal board of education is without legal authority to place on its list of salaried teachers, two sectarian teachers who devote their full time to teaching classes at a sectarian or parochial school.

K. Legality of religious instruction on premises.

September 9, 1947 No. 5075 C. C. McCulloh, Attorney General

In opinion No. 5066, dated August 14, 1947, I stated that in view of the constitutional and statutory provisions and the policy of this State to prohibit the teaching of sectarian religion in the public schools and state educational institutions, you should not permit religious instruction in the School for the Deaf by representatives of local churches.

Due to the fact that this broad statement seems to have been construed so as to prohibit religious training or services on the grounds or property of state educational institutions, after school hours and entirely separate and apart from the school curriculum, and several questions have been raised concerning the same, I desire to clarify the former opinion.

In your request, you state that for many years it has been the policy of the School to have all religious instruction given off the school grounds. Such a policy is and remains a matter for the Board to determine.

In the former opinion, I quoted Article 12, Section 9 of the Constitution which prohibits religious tests for teachers or students as a condition for admission to public schools or educational institutions, and provides at the end of said section as follows: "and no teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever."

Section 55-1102 of the 1941 Compilation prohibits a

teacher in the public schools from using sectarian books or teaching sectarian doctrines; however, this section does authorize the use of school buildings for other purposes after school hours when authorized by the County Board. Such "other purposes" would include use for religious worship.

Section 55-2822 of the 1941 Compilation provides:

"All the said institutions shall forever remain strictly non-sectarian in character, and no creed or system of religion shall be taught in any of them."

This section would certainly prohibit the teaching of any creed or system of religion by the institution as a part of its course of instruction or curriculum, and prohibit religious training by anyone during school hours, but I do not believe it was intended by the Legislature by this section to prohibit the use of school grounds or property after regular school hours by representatives of local churches, not associated with the institution, for religious instruction on a purely voluntary basis so far as the students are concerned.

The former opinion is thus modified to the extent that in my opinion neither the constitution nor statutes prohibit religious training given by someone not connected with a state educational institution after school hours. Use of the grounds and property of the institution, of course, are subject to control of the governing board. Such religious instruction must be wholly voluntary on the part of the students and entirely dissociated from the curriculum or course of instruction of the institution and its faculty. If use of tax supported institutional grounds or buildings is permitted to one denomination, the same privilege should be granted to all denominations seeking the privilege, without discrimination.

2. Authority of Teachers Over Pupils.

A. Control to be exercised by teacher over pupils outside of school hours, and right to inflict corporal punishment.

October 27, 1916 No. 1890 H. S. Clancy, Asst. Atty. Gen.

Different courts of this country have held that as a general rule a school teacher, to a limited extent at least, stands in loco parentis to pupils under his charge, and may exercise such control and correction over them as may be reasonably necessary to enable him to properly perform his duties as a teacher, and such control by the teacher over the conduct of pupils is not confined to the school room and school premises, but extends over the pupil from the time he leaves home to go to school until he returns home from school, as to acts which pertain to duties within the school room, and where the effect of acts done out of a school room, while the pupil is coming or going from school, is detrimental to good order and the best interests of the school, the teacher may punish such offending pupil when he comes to school.

As a general rule a school-teacher, in so far as it may be reasonably necessary to the maintenance of the discipline and efficiency of the school, and to compel a compliance with reasonable rules and regulations, may inflict reasonable corporal punishment upon a pupil for insubordination, disobedience, or other misconduct.

B. Authority of school teachers to inflict corporal punishment upon pupils.

January 12, 1921 No. 2777 Harry S. Bowman, Attorney General

I have before me a letter from Mrs. J. U. McBurney, of Abbott, New Mexico, addressed to you, asking if a school teacher is permitted to administer corporal punishment to a pupil in opposition to the wishes of the parents of such pupil.

. . . The general rule upon the subject is that a school teacher, in so far as it may be reasonably necessary to maintain discipline and efficiency in the school, and to compel a compliance with reasonable rules and regulations, may inflict corporal punishment upon a pupil for insubordination, disobedience or other misconduct. A teacher, however, may not inflict cor-

poral punishment to enforce an unreasonable rule, or to compel a student to pursue a study forbidden by the parents.

. . . The infliction of corporal punishment by a teacher is largely within the discretion of the teacher, but he must exercise cound discretion and judgement in determining the necessity for corporal punishment and the reasonableness thereof under the varying circumstances of each particular case.

C. Jurisdiction school authorities over children after school hours. Date which school bonds should bear. Use of credited school funds for building school buildings.

August 4, 1921 No. 3076 Harry S. Bowman, Attorney General

You ask if the County Board of Education has any authority of law to prevent children of school age from spending their time in the streets and public places after school hours.

After school hours the school authorities have no jurisdiction over the students of the school. The question of the custody and discipline of the school children, after school hours, is one for the parents.

Your second inquiry involves the date which school bonds issued by the school district should bear. You state that School District No. 17 voted $5,000. worth of bonds for the purpose of erecting a school building. You ask if the bonds may be dated before the day upon which the election authorizing the bonds is held.

The bonds must not be dated prior to the date of election; they must be dated subsequent to the time the election was held; otherwise they would not be valid.

D. Teacher responsible for discipline.

April 2, 1929 No. 192 M. A. Otero, Jr., Attorney General

Discipline: teacher responsible. Power: in proper cases to inflict corporal punishment. Limited to his jurisdiction and responsibility. Each case considered in its own light. A teacher inflicting in a proper case moderate punishment with a proper instrument is as a rule protected from civil liability and, as well, protected from a charge of assault and battery. For wanton and excessive punishment, a teacher may be held in civil action and also in a criminal prosecution.

E. Recourse for hazing.

November 20, 1944 No. 4617 Robert W. Ward, Asst. Atty. Gen.

Re: Serious hazing that took place in Carlsbad High School about the time of the opening of school.

No statute covers the situation. Haxing should be handled as other disciplinary matter by the Principal, Superintendent and local Board of Education. Of course, if any criminal offense has been committed, such as assault and battery, it would be a matter for the local District Attorney.

F. Truant officers,whence is authority derived?

March 18, 1939 No. 3056 Filo M. Sedillo, Attorney General

Truant officer is under direction and authority of board of education, which generally leaves matter of enforcement powers to superintendent for his supervision.

3. Health Regulations and Control

A. Vaccination.

March 14, 1929 Page 186 M. A. Otero, Jr. Attorney General

All children in each county of school age (duty of

county superintendent) shall be vaccinated against smallpox, with teachers having to see that it is done, and person failing to have his children vaccinated shall be fined upon conviction not less than 10.00 nor more than 100.00 or imprisioned in county jail 100 days or less.

Unless physician's certificate states that vaccination would imperil health of child.

B. Chiropractor cannot prevent vaccination of school child.

1941 No. 3972 Edward P. Chase, Attorney General

May a school child be exempted from the requirement of vaccination against small pox upon the certificate of chiropractor that such vaccination would be injurious to health of the child?

. . . . . .

This office in construing the original section before amendment as well as the section quoted above, in two opinions, being no. 294 written October 14, 1931, and no. 3327, written November 8, 1939, has held that the words "duly licensed and practicing physician" do not include chiropractors. However in Opinion No. 3441, written February 23, 1941, former Attorney-General Filo M. Sedillo has held otherwise without referring to the two previous opinions.

. . . Since chiropractors are not authorized under the law to in any manner sever or penetrate any of the tissues of the human body, in treating disease they would be excluded from performing a vaccination except under the direction of a physician.

. . . For these reasons, this office feels that the two former opinions above mentioned correctly construe this section of law, and, therefore, Opinion 3441 is hereby overruled.

C. Expense of medical examination for students.

August 10, 1944 No. 4559 Harry L. Bigbee, Asst. Atty. Gen.

Re: medical examination for physical fitness program.

Under specific provisions of Secs. 55-603 and 55-604 of the NM 1941 Compilation expense of physical examinations may be properly paid out of either the maintenance fund allocated to the county or the direct charge fund.

Under Sec. 71-104 of the NM 1941 Compilation which provides that the State Department of Public Health shall be responsible for the administration of the public health activities of the state, the public health department should supervise any program concerning physical examination of the students, and that the various phases of such programs such as the nature of the physical examinations and the amounts to be paid for such services, as well as the persons qualified to give such examinations, must be approved by the public health department.

D. Extent of Health Department jurisdiction over school and municipal personnel.

February 27, 1948 No. 5132 Robert V. Wollard, Asst. Atty. Gen.

We wish to acknowledge receipt of your letter of February 25, 1948 pertaining to the extent of jurisdiction your Department was given by Section 7, Chapter 172, Laws of 1947 over municipal and school personnel.

Section 7, Chapter 172, Laws of 1947, provides as follows:

"The jurisdiction and powers of the district health officer shall extend to all incorporated municipalities within the district, as well as to the unincorporated area of the district, and all municipal public health or sanitation personnel and all school health personnel (not physical education personnel) shall work under the direct supervision and control of, and shall make such reports to the District Health Officer as he may direct, insofar as it affects the public's health. He shall possess the same powers with respect to the preservation of the public health and the administration and enforcement of the health laws as those conferred upon

the State Department of Public Health, except that said powers shall be exercised within his jurisdiction only and in subordination to and with the approval of the State Department of Public Health. He shall be charged with the execution within his jurisdiction of the Health laws and all rules and regulations promulgated by the State Board of Public Health, be under its supervision and control and make such reports to the State Department of Public Health as it may direct and shall at all times perform such duties and execute such policies and programs as may be directed by the State Board of Public Health."

From the aforementioned section, it is our conclusion that the extent of control your department has over municipal and school health personnel is that you have authority to require reports of such personnel and to request them to execute such policies and programs as may be promulgated by your department.

The right to hire and fire such personnel is still lodged with the proper municipal or school authorities.

In other words, Section 7 of this aforementioned act merely requires all municipal and school health personnel to cooperate with the District Health Officer so that any policies or programs presented by the District Health Officer will receive full support from those concerned with public health problems.

CHAPTER XV

MISCELLANEOUS OPINIONS

1. Summer Schools and Institutes.

A. Chapter 121, Laws of 1909, held to apply to summer schools as well as county institutes.

April 28, 1909 Page 28 Frank W. Clancy, Attorney General

. . . Whether a teacher attending four weeks at a summer school held in connection with one of our normal schools, is entitled to fifteen dollars under chapter 121 of the Laws of 1909, which provides for the payment of that sum to each teacher who has taught at least three months of school during the twelve months previous to the time of holding a county institute, and has attended a county institute for a full term of four weeks . . .

. . . close attention to the exact words of the provision might lead to an opinion that as to this class of teachers, the attendance must be upon a county institute, but the consideration of the whole statute makes it clear that the legislature intended to provide that attendance at summer schools should be the equivalent of attendance at the county institutes, and it would do violence to the general legislative intent to say that these teachers should not be entitled to the fifteen dollars when they have attended a summer school approved by you . . .

B. Appropriation bill of 1909 authorized payment of railroad fare of students to certain summer schools.

May 6, 1909 Page 32 Frank W. Clancy, Attorney General

. . . By what authority boards of regents of the normal schools may pay railroad fare of students enrolled for the summer school of eight weeks, beginning in June. Only statutory authority that I know of with regard to payment of railroad fare of students is contained in the

last appropriation bill, and I have before me a copy of the paragraphs relating to that subject. The wording of the principal paragraph is not at all clear. First part would seem applicable only to students who enroll themselves generally in the normal schools, just as any regular student might. Next clause seems to indicate that one-half on the fare only may be paid to the students, if they should leave after eight weeks of continuous attendance, although it might be construed as meaning that students shall have one-half on condition that they remain not less than eight weeks, which would, of course, imply that in no case would they get more than one-half, although the preceding clause indicates payment of all the railroad fee. I am not prepared to say whether or not the summer schools of eight weeks, to which you refer, can be considered as coming under the general language used in the appropriation bill concerning "all persons who enroll in said normal schools with a view of preparing for teaching in the public schools of New Mexico." Further provision that the fare shall be paid but once each year appears to indicate that a legislative intent to provide students who enroll for the year. Seems at least doubtful whether this statute confers authority to pay railroad fare for students who come to summer school only . . .

C. Summer Institutes, pay.

June 18, 1909 Page 57 Frank W. Clancy, Attorney General

. . . The questions you submit are as to whether under the recent act of the legislature, providing for the payment of fifteen dollars to teachers attending county institutes, is or is not applicable to three different cases, the first of which you state as follows:

A. Attended four weeks institute. Taught three months on third grade certificate or permit previous to Jan. 1909, examination. Secured first or second grade license as a result of examination in Jan. Third grade certificate on which applicant taught issued Sept. 1909. Permit expires, of course, on first day of January examination.

. . . In this case it appears to me that the third grade certificate or permit under which the teacher taught previous to the examination of last January, must be considered as merged in the higher grad certificate given in January, and while the third grade certificate by its terms would run until next September, yet it was taken up and superceded by the higher certificate, and the statute as to the payment of the fifteen dollars would not be held applicable.

Second case as follows:

B. Attended four weeks institute. Taught three months on first grade certificate previous to January, 1909. Taught three months on permit or third grade certificate since January 1909.

. . . This is much more difficult than the first question, and in order to effectuate what you correctly state, as I believe, to be legislative intent, it would be necessary to go outside of the statute and consider each case upon its own individual facts. I cannot concede that this is a proper method of construing a statute. As you say in your letter to Supt. Stroup, such a case comes under the letter of the statute, and I believe must be governed by it. It might well be the case that a person had a first grade certificate prior to Jan. 1909, which has been given through inadvertance or mistake and to which the teacher was not really entitled, and the reverse of this might be true. I believe that it would not be safe to have varying and different decisions dependent upon an investigation of these facts as that would make the application of the statute varying and uncertain . . .

Third case as follows:

C. Same condition as B., except taught two months on first grade certificate previous to January, 1909, and one month on third grade certificate or permit since January, 1909.

. . . Substantially same reasons given for second case--third one comes under provisions.

D. Institute Instructors, pay.

August 4, 1909 Page 61 Frank W. Clancy, Attorney General

. . . Question of whether it will be legal for the various school districts in Luna County to draw warrants on their balances in favor of an institute instructor so as to make up to him an additional sum of $55.00, which the county superintendant wishes to pay in addition to a payment already made which you approved as required under sec. 6 of Chap. 97 of the Laws of 1907.

. . . My understanding is that all funds appropriated to school districts and subject to warrants drawn by school directors, are to be used entirely for the conduct of district schools, and I believe that there is no provision of law by which they can be diverted to any other purpose. I am unable to see how the expense of a county institute can be considered as an expense incurred in the conduct of the public schools . . .

. . . As it appears to be the duty of the county superintendant to reject any warrants illegally issued by school directors, it may be that the superintendent would be liable on his bond for knowingly giving his approval to any illegal warrant, but as the statute with regard to the superintendant's bond does not directly specify what shall be done on these conditions there is a possibility of some doubt about such liability. He might, however, be held criminally liable under sec. 12 of Chap. 121 of the Laws of 1909 . . .

E. Laundry bills not included in $20.00 per month allowed for expenses of student teachers.

November 3, 1916 No. 1895 Frank W. Clancy, Attorney General

. . . Upon re-examination of statute I am of opinion that the letter of Oct. 30 from this office to you is quite correct, Money provided in the statute can be used only for the purposes specified in the statute. Those purposes are "board, books, school supplies, lodging, matriculation and tuition, while in attendance." Three hundred dollars are appropriated for each student

teacher for the purposes specified, and in the first part of the paragraph the expenditures are limited to actual and necessary expenses. I am unable to see how any part of that money can be used for any other purpose such as paying for laundry . . .

F. Inspirational Institute attendance in lieu of summer or county institute attendance.

May 16, 1921 No. 2974 Harry S. Bowman, Attorney General

. . . Replying to your letter of the 14th instant, asking if there is any legal authority whereby attendance upon a 5 day Inspirational Institute by a teacher may be accepted in the issuance of a teacher's certificate in place of minimum of two weeks' attendance upon a county institute or summer school, I would advise you that:

By virtue of the provisions of sec. 4813, Code 1915, persons who expect to teach in this State are required "to attend at least two weeks of the county institute or show a certificate of attendance upon some county institute or summer school approved by the superintendant of public instruction held within the year," before such persons shall be entitled to a teacher's certificate.

You will note that the act permits an attendance upon some county institute of summer school in place of the 2 weeks attendance at the county institute and I am of the opinion that such a certificate may be used as a substitute for a certificate showing attendance upon the county institute in the event that such former institute or summer school is approved by the Superintendant of Public Instruction . . .

2. School Books

A. Designation of Text Books by State Board of Education

March 15, 1921 No. 2858 A. M. Edwards, Asst. Atty. Gen.

. . . You first ask with reference to the correction or change of the minutes of the former board, which have been signed but not approved. At these minutes were the basis of the contract entered into with the publishers and contained the specifications of the books upon which the publishers made bids, it would not be proper to attempt to change these minutes.

. . . From an examination of the minutes and particularly from the clause in the minutes quoted in your letter, it would seem that any of the "basal optional" lists mentioned in your letter and covered by the contracts can be used . . .

B. Department of Education; Use of Rural Aid Fund for library books.

April 27, 1931 Page 100 E. K. Neumann, Attorney General

. . . In your letter of August 26th, you ask if the Department of Education may purchase with Rural Aid Funds library books that are not included in the list of suggested supplementary readers approved by the State Board of Education when the state adoption of textbooks was approved.

The answer to such question, as stated, must be No,, but it may be modified as hereinafter outlined. The Rural Aid Fund is under the control of the State Board of Education exclusively and the powers to administer such fund are found in Sec. 1 of Chap. 119 of the Session Laws of 1931, under sub-paragraph 2 which is as follows:

"If and when the legislature shall create a state school building, text book and rural aid fund, or make any funds available for such purposes;

A. To purchase and loan text books to all pupils in public day and evening schools of all elementary, junior high and high school grades.

B. To adopt a multiple list of books to be used for such loaning purposes. . . ."

C. Text Books, changes in, how made, when.

March 16, 1932 Page 149 Frank H. Patton, Asst. Atty. Gen.

. . . In your letter of March 16th, you wish to know the opinion of this office as to whether or not it is possible to make changes in text books in any year so long as changes are not made in more than two subjects, and in this connection you direct our attention to the laws of 1923 and the laws of 1925 relative to this matter.

It is our opinion that the State Board of Education is bound by the provisions of Chap. 119 of the Laws of 1931, and that under this act no change can be made within six years after the adoption of a uniform system of text books and no subjects can be changed as formerly provided in the 1925 law . . .

3. The School Census

A. Indian Children--enumeration of.

1905-6 No. 280 W. C. Reid, Attorney General

OPINION to Hon. Hiram Hadley, Supt. of Public Instruction, as to legality of enumeration of Indian children, the same as if their parents were citizens . . .

HELD: Not required by statute and useless.

B. Census, who is responsible for.

September 9, 1909 Page 80 Frank W. Clancy, Attorney General

. . . Chapt. 23 of the Laws of 1905 refers to directors of schools in school districts, and it makes it the duty of the clerk of such school directors to enumerate all unmarried persons once in each year, between the age of five and twenty-one years. I believe that a careful examination of all the statutes relative to schools will

disclose that in no section of the law is an incorporated city or town referred to as a school district, with the single exception of sec. 1584 of the Compiled Laws. Public schools of each city are made a body corporate, under the name of Board of Education, and provision is made for the election of members of such a board, but they are never referred to as school directors. I believe, also, there is no statutory provisions requiring the enumeration of school children in cities and towns. If your city clerk of the Board of Education made the enumeration under the authority contained in Law of 1905, he would be limited to the compensation provided in that law. Sec. 1575 of the Compiled Laws of 1897 requires the clerk to perform such duties as the Board of Education or its committees may require, and sec. 1570 provides that the clerk shall receive such compensation for his services as the board may allow.

I have been under the impression that, usually, such city clerks are given a regular salary to cover all of their services, but there is no statute which requires the compensation to be in that form.

It appears to me that, under sec. 1575 of the Compiled Laws, the Board of Education might properly require the clerk to make an enumeration of school children and might, under sec. 1570, allow him compensation for such services. In view of the fact, however, that the legislature has, in Chap. 23 of the Laws of 1905, fixed a rate of compensation for such services, in ordinary school districts, it would seem that a city board ought to take that legislative action as a guide, and limit the compensation accordingly.

It does not seem to me that we can consider chap. 23 of the Laws of 1905 as directly applicable to the enumeration of children in incorporated cities and towns . . .

C. School census, how and by whom taken.

March 27, 1939 No. 3070 Filo M. Sedillo, Attorney General

. . . Chap. 120, Sec. 816 of N.M. Statutes annotated, 1929 Compilation:

On or before August 1st of each year, clerk of board of school directors shall make and certify to county school superintendent a complete census, etc. amended by Chap. 62, Laws of 1939: duty removed from hands of clerk and placed in hands of proper superintendents, so that clerks of municipal school board will have nothing to do with taking enumeration as duties are in hands of county or municipal superintendent. . .

D. Census to include those who will be five years of age beginning school year.

April 25, 1939 No. 3115 Filo M. Sedillo, Attorney General

Under Chap. 62 of Laws of 1939, amending Sec. 120-816, 1929 Compilation:

. . . Census be taken on or before April 15th of each year for distribution of school monies for the following fiscal year. Age used with respect to admission of school children is 5-21. Census should be taken of children between ages of 5 and 21 at the time when school term begins . . .

4. Survey of School Districts.

A. When charges of $50.00 may be increased for survey of a school district.

1913 No. 1063 Frank W. Clancy, Attorney General

Statutory limit was $50.00 for the survey of a district; actual cost of markers and survey was $127.50.

Opinion notes . . . that each of the two districts now to be surveyed has about 20 angles, so that each will require an equal number of markers, which the law says shall be permanent and be marked with the number of the school district. While this is correct from a surveyor's point of view, considering that there is a corner at each change of courses, I do not believe it was the intention of the legislature to require a monu-

ment at each of the surveyor's corners, but that it would be sufficient to make four monuments at what would be approximately the corners of the districts to the northeast, northwest, southeast, and southwest. The way the statutes read it would seem that the legislature had in mind something approximating right-angled districts . . .

B. The cost of survey of a school district limited to $50.00 payable out of general county fund, but additional payment for expenses may be made by school district.

May 6, 1914 No. 1223 Frank Clancy, Attorney General

. . . Under sec. 23 of chap. 97 of the Laws of 1907, $50.00 is to be paid out under the general fund for a district for survey, and in cases where the welfare of district required that it should be surveyed, additional payments for expenses might be made by the district itself under sec.66 of chap. 51 of the Laws of 1912 . . .

5. Indigent Student Aid.

A. As to power of school directors to furnish clothes and shoes to pupils and failure to hold school election.

September 17, 1914 No. 1327 Frank Clancy, Attorney General

Re: Parents not financially able to get clothes and shoes to send children three miles to school, and what is the duty of a trustee in case of that kind.

No provision of law in New Mexico is applicable to any such condition. Sec. 25 of Chap. 97 of Laws of 1907 requires school directors of every school district to provide suitable school houses; to keep them in repair; to provide necessary furniture and fuel; to pay teachers' wages and interest on school bonds "and to defray all other contigent expenses connected with the proper conduct of the schools in the district." Then follows a further provision as to how necessary funds shall be ob-

tained. Provision leaves considerable discretion to school directors. I would submit the question to State Superintendent of Public Instruction, who is, by law, adviser of all school officers.

Re: Penalty if director should tack up notices to hold elections and then would not come to hold same, with no reason, and whether the county superintendent then has the power to appoint trustees to fill the vacancies. In case of failure to hold elections, it has been decided by one district court in N. M. that vacancies which thereby exist must be filled by appointments to be made by county school superintendent.

Penalty: the law is not plain: "Any school director who shall fail to call election and post notices therefor, or to correctly certify the result of such election as required in this section, shall be deemed guilty of malfeasance in office, and shall be disqualified from again holding said office by appointment or otherwise for a period of one year thereafter, and shall be summarily removed by superintendent of schools, and shall be fined not less than $25.00 or more than $100., or imprisioned in county jail not less than 25 or not more than 100 days, said funds to go to and become part of school fund of district in which such person was director. County school superintendent must make affidavit of facts to district judge, or before any justice of peace, and act as prosecuting witness against said director.

As no election is held he could not certify the result of it, and a court might hold the offense of failure to hold the election was not within the letter of statute so that he could be punished for that. You might complain to county school superintendent and ask him to take action against defaulting officer. Another statute, Chap. 121 of the Laws of 1909, might be held applicable, as Sec. 12 of that act provides generally for punishment or fine of any school officer who may violate provisions of any act as to his duties, or who shall not faithfully perform all such duties . . .

B. Indigent student appropriation not repealed.

June 26, 1923 No. 3713 John W. Armstrong, Attorney General

. . . Appropriations made for indigent students under Chap. 201, S.L. 1921, should be paid notwithstanding Sec. 1431, Chap. 148, S.L. 1923. That portion of act of 1923 which attempts to repeal Chap. 201 is unconstitutional in view of Supreme Court holding that subject of every bill must be clearly expressed in title and no bill embracing more than one subject shall be passed. Attempted repeal is hidden away in "School Code Chapter. . ."

7. Distance of Saloon from School.

A. No law regarding the distance that a saloon must be from a school building.

July 16, 1914 No. 1276 Frank W. Clancy, Attorney General

Brother G. Francis:

. . . There is not a statute on the subject of the distance that a saloon must be from a school building. An impression has spread abroad that there is such a statute, probably due to the fact that in bills introduced in the state legislature there is a limit . . .

8. Labor Permits to School Child.

A. Labor permits, who responsible.

August 9, 1946 No. 4938 C. C. McCulloh, Attorney General

. . . In your letter of August 7, 1946, you request the opinion of this office as to who is responsible for issuing labor permit certificates to children under 16 years of age during the summer months when a school might not be in session.

Sec. 57-501 to 57-515 of the 1941 Compilation provide for the issuance of labor permit certificates. Sec. 57-508 provides in part that:

"Permit certificates shall be issued only by the city school superintendent or by the principals of

schools in towns of two thousand (2000) inhabitants or over, and by the county school superintendent in all other cases. No permit certificate shall be issued to any child until satisfactory proof has been furnished that the work in which the child is to engage is not dangerous to the child nor injurious to its health or morals; and any such application for such certificate shall show that the child is in good physical health and that the work to be performed is not such as would result in injury to the health, morals or mental development of such child, and the satisfactory proof of the age of the child at the date of application, shall be furnished: Provided, however, that in case of children over the age of fourteen (14) years and under the age of sixteen (16) years, any application for the employment of children at any gainful occupation during the session hours of the public school of the district in which the child resides, shall set forth in addition to the foregoing, the necessity, to the family or to the dependents of said child, or for his own support, of the income to be derived from such employment or labor."

Since Sec. 57-508, cited above, is exclusive in its authorization, and since no other provision is made in the statutes authorizing any other official to issue labor permit certificates for children under 16 years of age, I am of the opinion that city school superintendents in town of 2,000 inhabitants or over, and the county school superintendent in all other cases, are the officials responsible for issuing labor permit certificates to children under 16 years of age, and that this responsibility extends throughout twelve months of the years . .

9. School Holidays.

A. A public school shall not be conducted on Saturday.

April 30, 1914 No. 1211, Ira L. Grimshaw, Asst. Atty. Gen.

Sec. 1557 of the Compiled Laws of 1897, with its amendments, provides that a school month shall consist of four weeks, of five days each, and a school day shall consist of six hours. Three months is the minimum

school term. School officials must teach school thirty hours a week. No one week shall consist of more than five days. A pupil in public school during a course of a school month shall receive instruction for at least 120 hours, in twenty periods or installments, but not to exceed five periods or installments of six hours each during any one week. Term cannot be shortened, by teaching an extra day each week.

B. Legal Holidays.

February 21, 1929 Page 166 M. A. Otero,
Asst. Atty. Gen.

. . . Armistice Day, November 11; Arbor Day, second Friday in March; Washington's Birthday, February 22; Columbus Day, October 12; Flag Day, February 12 . . .

D.T.

IMPORTANT!

Special care should be taken to prevent loss or damage of this volume. If lost or damaged, it must be paid for at the current rate of typing.

MA

A

DIETER
BINDS
BETTER
DENVER, COLO