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## Chapter 21: Education Law

Stephen F. Roach

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## C H A P T E R 21

# Education Law

STEPHEN F. ROACH

**§21.1. General.** This chapter will consist of three parts, relating to legislation, court decisions, and the opinions of the Attorney General, as these sources of law were concerned with education within the Commonwealth during the 1966 SURVEY year, September 1, 1965 through August 31, 1966. Legislative acts relating to education which were enacted after August 31, 1966, will be reported in the next ANNUAL SURVEY.

### A. LEGISLATION

**§21.2. Collective bargaining for school employees.** Significant legislation enacted by the General Court during the 1966 SURVEY year governs collective bargaining by municipal (including school) employees.<sup>1</sup> Under this act, municipal employees are guaranteed the right to form, join, or assist any employee organization, and to bargain collectively through representatives of their own choosing "on questions of wages, hours and other conditions of employment," free from interference, restraint, or coercion. "Municipal employees," as defined, include both professional and nonprofessional employees. "Professional employees" are those engaged in work which is "predominantly intellectual and varied in character . . . and which requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized . . . instruction and study in an institution of higher learning . . ." <sup>2</sup>

The enactment specifically provides that in bargaining collectively with an employee organization for school employees, the municipal employer shall be represented by the school committee "or its designated representative." Professional and non-professional employees are to be represented by separate bargaining agents unless a majority of the professional employees vote to the contrary.

Procedures are established under which the employee bargaining agents are to be designated, under which the employer and employee representatives are to meet and execute written contracts of agreement, and under which funds necessary for implementation of such agree-

STEPHEN F. ROACH is Professor of Education at Boston College and editor of the *School Law Review* newsletters.

<sup>1</sup> Acts of 1965, c. 763.

<sup>2</sup> Id. §178G.

ments may be sought from the local legislative body. Also established are procedures under which collective bargaining disputes are to be investigated, and fact-finding, conciliation, and arbitration services made available.

Finally, the act makes it unlawful for any employee "to engage in, induce, or encourage any strike, work stoppage, slowdown or withholding of services" by municipal employees.

**§21.3. School funds: State aid for public schools.** Additional important legislation enacted during the 1966 SURVEY year imposed a retail sales tax and a temporary excise, established a local aid fund, and provided for the distribution of funds therefrom to cities and towns.<sup>1</sup> Under this act, changes were made in the following Chapters of the General Laws: Chapter 59, School Tax Rate; Chapter 60, Printing of School Tax Rate on Tax Bill; Chapter 69, Powers and Duties of the Department of Education; Chapter 70, School Funds and State Aid for Public Schools; Chapter 71, Public Schools; Chapter 72, School Registers and Returns; and Chapter 74, Vocational Education.

While some of the changes are only minor in nature, many involve detailed procedural changes which can not be adequately discussed in the space available here. A careful reading of the act itself, particularly Sections 38 through 40, and 44 through 74, is therefore recommended. Illustrative of the foregoing, Section 40 of the act amended the General Laws by striking out the previously existing Chapter 70, School Funds and State Aid for Public Schools, and inserted in place thereof an entirely new chapter.

**§21.4. School-day opening exercises: "Silent meditation."** A third enactment of significance, which added a new Section 1A to Chapter 71 of the General Laws, provided for the opening of each school day with a period of silent meditation.<sup>2</sup> The act reads: "At the commencement of the first class each day in all grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."<sup>2</sup>

Prior to the enactment of this legislation, the Attorney General, on April 4, 1966 — in reply to a question raised by the Governor — had given the opinion that the act would not conflict with the provisions of the Constitution of the United States or the Constitution of the Commonwealth. In his opinion, the Attorney General commented:

. . . [A] moment of meditation amounts neither to a state endorsement of any form of religion or deity nor state prohibition of any matter of conscience. A principal function of secular education

§21.3. <sup>1</sup> Acts of 1966, c. 14. This enactment is treated in more detail elsewhere in the 1966 SURVEY. Only those parts of major concern to education will be considered here. See §§ 22.3-22.7 *infra*.

§21.4. <sup>1</sup> Acts of 1966, c. 130.

<sup>2</sup> G.L., c. 71, §1A.

is to encourage students to reflect upon problems of serious moment. A pause during the school day for the purpose of encouraging serious thought is entirely consistent with the functions of the state in education and therefore would be permissible.

The opinion warned, however, that the

actual administration of this statute on a local basis will be of extreme significance; the attitudes and approaches taken by school committees and especially by individual teachers will be crucial in determining whether this statute is to have an effect consistent with the First Amendment guarantees. The "period of silence . . . for meditation" must not be simply a camouflage for a school prayer. Educators upon all levels who may be concerned with the administration of this legislative directive must maintain at all times a strict neutrality and indifference to the subject upon which the individual student may choose to reflect.

**§21.5. Racial imbalance in the schools.** A fourth enactment of importance, pertaining to General Laws, Chapter 76, Section 12, permits a local school committee to adopt a plan for attendance in its public schools of children residing in other cities or towns in which racial imbalance<sup>1</sup> exists in a public school.<sup>2</sup>

The plan, which must "tend to eliminate" the existing racial imbalance, must be approved by the State Board of Education. The school committee need not proceed with the plan unless and until it agrees with the state board on the amount and terms of the financial assistance which shall be provided by the Commonwealth. Such financial assistance may include full or partial tuition payments, full or partial transportation expenses, and full payment of salaries of teachers and others who may be required under the plan. However, the school committee of the town accepting a non-resident student into one of its schools must be paid a sum equal to the average expense per student for such school for the period of the child's attendance.

**§21.6. Commonwealth Teachers' Corps.** The General Court also established a teachers' corps, to consist of 25 carefully selected teachers of ability and experience who volunteer to serve for one or two year terms, as teachers in the public schools of any city, town, or regional school district which requests teaching assistance.<sup>1</sup> Each member of the teachers' corps would be paid, by the Commonwealth, a teaching salary equivalent to that received by him at the time of his application as a member of the corps, or, if not teaching at the time, a salary commensurate with his education and experience as a teacher. Members would also be paid moving expenses and an annual bonus, as an addition to

§21.5. <sup>1</sup> As defined in G.L., c. 71, §37D.

<sup>2</sup> Acts of 1966, c. 506.

§21.6. <sup>1</sup> Acts of 1966, c. 517.

salary, of \$500. Teachers would be assigned to work under local school committees "most deserving of educational assistance." Their rights, if any, would be protected. The corps would be administered by a director, to be appointed by the Teachers' Corps Commission. The three commissioners are to be named by the Governor.

§21.7. **Other legislation.**<sup>1</sup> Other enactments during the 1966 SURVEY year which also affected education were related to the following chapters of the General Laws.

Chapter 15, Sections 1E and 1H: Making certain changes in the membership of the State Board of Education and the Advisory Council on Education.<sup>2</sup> Section 1F: Authorizing the establishment of job training and retraining centers.<sup>3</sup> Section 1H: Establishing the office of Director of Research for the Advisory Council on Education.<sup>4</sup>

Chapter 19, Section 6A: Establishing an interagency Council on Mental Retardation.<sup>5</sup>

Chapter 40, Section 4A: Authorizing a school committee to enter into an agreement with school committees of other cities or towns to participate in certain educational programs involving federal funds.<sup>6</sup>

Chapter 44, Section 53A: Authorizing school committees to expend certain federal funds without including the purpose of such expenditure in, or applying such amount to, budget or appropriation requests.<sup>7</sup>

Chapter 69, Section 7D: Establishing education scholarships for children of police officers and fire fighters who die in the performance of duty.<sup>8</sup> Section 29B: Providing for the reimbursement of cities and towns for transporting children to community clinical nursery schools.<sup>9</sup>

Chapter 71, Section 1: Prohibiting the holding of "double sessions" in public schools, under certain circumstances.<sup>10</sup> Section 3: requiring daily physical education in the public schools, including calisthenics, gymnastics, and military drill, but permitting pupils to be excused for religious or health reasons.<sup>11</sup> Section 15: Validating the establishment of regional school districts because of defects in the creation or organization of the district planning committee or board.<sup>12</sup> Section 16: Relating to the holding of town meetings to express disapproval of indebtedness authorized by a regional district school committee.<sup>13</sup> Section 38G: Requiring the State Board of Education to grant teacher

§21.7. <sup>1</sup> This section reviews the Acts of 1966 through c. 729, approved September 12, 1966.

<sup>2</sup> Acts of 1966, c. 251.

<sup>3</sup> Id., c. 549.

<sup>4</sup> Id., c. 428.

<sup>5</sup> Id., c. 160.

<sup>6</sup> Id., c. 286.

<sup>7</sup> Id., c. 412.

<sup>8</sup> Id., c. 712.

<sup>9</sup> Id., c. 501.

<sup>10</sup> Id., c. 187.

<sup>11</sup> Id., c. 150.

<sup>12</sup> Id., c. 136.

<sup>13</sup> Id., c. 137.

or administrator certificates under certain circumstances.<sup>14</sup> Section 381: Authorizing school committees to reimburse teachers for costs incurred in "up-grading skills and improving proficiency."<sup>15</sup>

Chapter 71, Sections 42 and 42D: Setting up procedures under which a school committee may suspend a teacher or superintendent.<sup>16</sup> Section 46: Permitting certain children over age sixteen to continue to attend a special class for the mentally retarded if their parents or guardians so request.<sup>17</sup> Section 46: Requiring school committees to establish occupational training programs for mentally retarded children under eighteen years of age and permitting the establishment of such programs for children over eighteen years of age.<sup>18</sup> Section 46J: Setting up procedures for the instruction and training of children with learning disabilities resulting from perceptual-motor handicaps.<sup>19</sup> Section 55C: Requiring the wearing of eye protective devices in certain classes in public or private schools.<sup>20</sup> Section 71: Requiring that a school committee award food concessions "at any field under its control" to the highest responsible bidder.<sup>21</sup> Section 78: Relative to state reimbursement for students enrolled in certain extended courses of study.<sup>22</sup>

Chapter 76, Section 1: Fixing 7-16 inclusive as the ages for compulsory school attendance, pending the establishment of minimum and maximum ages by the State Board of Education.<sup>23</sup>

Chapter 90, Sections 7 and 7B: Requiring school buses to be equipped with front and rear red blinker lights which are to be left flashing when children are entering or leaving the buses.<sup>24</sup> Section 7A: Requiring additional periodic inspection of school buses.<sup>25</sup> Section 7B: Restricting the emergency operation of school buses to properly licensed operators of at least 21 years of age.<sup>26</sup> Section 20: Establishing penalties for persons operating or permitting the operation of overloaded school buses.<sup>27</sup>

Chapter 119, Section 57: Requiring that in cases involving certain delinquent children, attendance officers secure from the Bureau of Special Education the records of performance of such children.<sup>28</sup>

Chapter 123, Section 13B: Providing for the establishment of com-

<sup>14</sup> *Id.*, c. 58.

<sup>15</sup> *Id.*, c. 143.

<sup>16</sup> *Id.*, c. 185.

<sup>17</sup> Acts of 1965, c. 701.

<sup>18</sup> Acts of 1966, c. 72.

<sup>19</sup> *Id.*, c. 647.

<sup>20</sup> *Id.*, c. 21.

<sup>21</sup> *Id.*, c. 344.

<sup>22</sup> *Id.*, c. 724.

<sup>23</sup> Acts of 1965, c. 741.

<sup>24</sup> Acts of 1966, c. 149.

<sup>25</sup> *Id.*, c. 268.

<sup>26</sup> *Id.*, c. 74.

<sup>27</sup> *Id.*, c. 110.

<sup>28</sup> *Id.*, c. 147.

munity clinical nursery schools for retarded children of preschool age.<sup>29</sup>

Chapter 144, Sections 44G and 44H: Relating to the exclusion of general bidders by sub-bidders on the construction of public buildings.<sup>30</sup>

Chapter 167, Section 61: Concerning the making of federally insured student loans by banking institutions.<sup>31</sup>

Other statutes of general interest were also enacted. The State Department of Education, in cooperation with local superintendents of schools and others, is made responsible for the development and supervision of nutrition education programs in the schools.<sup>32</sup> The State Higher Education Assistance Corporation is authorized to make student loans.<sup>33</sup> The personnel procedures for the Division of State Colleges were amended.<sup>34</sup> A program of financial aid was established for Vietnam veterans attending state institutions of higher education.<sup>35</sup> In addition a number of special acts that involved particular aspects of educational operations in various towns, cities, counties, regional school districts, and institutions of higher learning were adopted, but being of only local application are not noted here.

## B. COURT DECISIONS

§21.8. **Exclusion of pupils.** In *Leonard v. School Committee of Attleboro*,<sup>1</sup> a seventeen year old senior in the Attleboro High School brought suit to restrain the school authorities from excluding him from school. Leonard — a proficient professional musician who wore an extremely long “Beatle-type” haircut — had been told by the principal that until his hair was cut he would not be allowed in school. A letter from the principal to his parents, advising them of the suspension “until such time as he returns to school with an acceptable haircut,” also stated: “School dress regulations do not allow ‘extreme haircuts or any other items which are felt to be detrimental to classroom decorum.’”<sup>2</sup> Subsequently, after a hearing, the school committee sustained the action taken by the principal and notified Leonard’s parents to that effect.

A lower court judgment sustaining the action of the school authorities was appealed to the Supreme Judicial Court. In its opinion, the Court noted that at all times during his attendance at school, prior to his suspension, Leonard had been a conscientious, well-behaved, and properly dressed student. Leonard’s father had expended large sums

<sup>29</sup> Id., c. 501.

<sup>30</sup> Acts of 1965, c. 836.

<sup>31</sup> Acts of 1966, c. 348.

<sup>32</sup> Acts of 1965, c. 836.

<sup>33</sup> Id., c. 164.

<sup>34</sup> Id., c. 356.

<sup>35</sup> Acts of 1966, c. 601.

§21.8. 1 349 Mass. 704, 212 N.E.2d 468 (1965).

2 Id. at 705, 212 N.E.2d at 470.

in furtherance of his son's musical career, and Leonard's image as a performer, which was in part based on his hair style, had been an important factor in his professional success. Also the Court noted that the main thrust of Leonard's argument "is that a ruling or regulation which bars a student from attending classes solely because of the length or appearance of his hair is unreasonable and arbitrary, since these matters are in no way connected with the successful operation of the public school."<sup>3</sup>

Although the Court found that the statutory remedy for tort damages in General Laws, Chapter 76, Section 16, was not meant to be an exclusive remedy, it held that on the substance of his claim, Leonard could not recover in this action to compel readmission. The school committee's powers to make reasonable regulations clearly includes the power to exclude a child from school for sufficient cause. Nevertheless, Leonard argued that a regulation must be publicized to take effect. The Court, however, responded that the nature of the disciplinary and decorum problems school administrators and committees face does not permit imposing a requirement of formal adoption and promulgation before a regulation becomes effective.

As to the contention that the rule was arbitrary the Court first of all held that it would not pass on the "wisdom or desirability" of the rule and that the rule would be upheld as long as a rational basis could be found for it. Such a rational basis existed since any unusual hair style could disrupt the maintenance of a proper classroom decorum. Hence the rules do have a reasonable connection to the successful operation of a public school. Although the rule clearly affected Leonard's appearance outside school, any argument that it invaded family privacy had to give way to the "paramount" interest of the schools in running an efficient system.

The Court also critically noted the "regrettable lack of appreciation for the gravity of the hearing on the part of two school committee members." Since, however, the petitioner had ample opportunity to present his case, the isolated lack of decorum did not prevent the hearing from being before an impartial tribunal "actuated by a spirit of judicial fairness."

**§21.9. Use of federal funds in school budget.** Because of an alleged deficiency in the amount appropriated by the town of Sudbury for the support of its schools for the year 1964, ten taxpayers of the town brought suit. The Superior Court ordered the town to restore \$16,700 to the school committee budget, and further awarded a penalty of 25 per cent of the restored amount. On appeal, in *Harvey v. Town of Sudbury*,<sup>1</sup> the Supreme Judicial Court noted that, in the estimated school budget submitted to the town meeting, the school committee had deducted from total operating costs \$48,000, which represented

<sup>3</sup> Id. at 709, 212 N.E.2d at 472.

§21.9. <sup>1</sup> 350 Mass. 312, 214 N.E.2d 718 (1966).



\$43,000 already on hand plus \$5,000 (of some \$25,000 anticipated) to be received from federal sources<sup>2</sup> during 1964. Upon the recommendation of the Sudbury finance committee, the town meeting had voted \$16,700 less than the school committee's request. The town's position was that the school committee's expectations (as to federal money to be received during 1964) left approximately \$20,000 to cover the \$16,700 by which the town meeting had reduced the budget while the school committee contended that federal funds received or anticipated under Public Law 874 need not be taken into consideration in preparing its annual budget, "except to the extent that it sees fit."

The Court rejected the school committee's contention that federal funds to be received need not be considered in the preparation of its annual budget. The appropriate statutes<sup>3</sup> indicate that the federal funds were to be expended only for items included in the school committee's annual budget, and not for the unauthorized and unlisted items for which the school committee had used the funds. Even though this is not specifically required by statute, as it is with state funds,<sup>4</sup> the basic policy controls federal funds as well as funds from other sources. The Court in explaining this policy stressed that its purpose was to require the school committee to put before the community a complete statement of expected expenditures and anticipated revenue and thereby give everyone an opportunity to evaluate the committee's financial policy for the ensuing year. It added a cautionary note, however, that its opinion was not to be interpreted as in any way interfering with the committee's ultimate right to control the financial burden which a town may have to bear for its school system, but only related to the committee's accounting obligations.

**§21.10. Termination clause in superintendent's contract.** In June of 1962, the Nantucket School Committee appointed Minnich as Superintendent of Schools under a "one year contract with one year notice of termination." In April, 1963, he was reappointed on the same terms for the school year 1963-1964. On March 31, 1964, he was notified that his services would be terminated on June 30, 1964. Thereupon, Minnich brought suit, claiming he was entitled to salary to March 31, 1965 — one year from the March 1964 notice — under the one-year notice-of-termination clause in his contract. The Superior Court held that Minnich was not entitled to any salary for 1964-1965, since the one-year notice of termination exceeded the school committee's statutory authority.

In affirming the lower court ruling in *Minnich v. Town of Nantucket*,<sup>1</sup> the Supreme Judicial Court noted that a school committee's power to employ a superintendent is governed by General Laws, Chapter 71, Section 41. Under this section a superintendent may not be

<sup>2</sup> Pub. L. 81-874, 64 Stat. 1100, 20 U.S.C. §§236-244 (1964).

<sup>3</sup> Acts of 1953, c. 621, §§1, 2, as amended by Acts of 1956.

<sup>4</sup> G.L., c. 70, §10.

§21.10. 1966 Mass. Adv. Sh. 799, 216 N.E.2d 427 (rescript opinion).

hired other than from year to year, unless he has tenure because of appointment to the position for the three previous consecutive school years. Minnich had only two years of service as superintendent, and the attempt of the school committee to bind itself to a one-year notice-of-termination provision was ultra vires its statutory authority. The March 1964 notice was therefore valid to terminate the employment on June 30, 1964.

§21.11. **Salary reclassification of tenure teachers.** In *A'Hearne v. City of Chelsea*,<sup>1</sup> 13 teachers in the Chelsea public schools sued to recover for loss of salary resulting from their reclassification by the Chelsea School Committee. On May 31, 1962, the committee voted to increase the salary schedule for teachers by \$500 effective January 1, 1963, and \$400 effective January 1, 1964. The committee also adopted a recommendation "that the salary schedule pertaining to Master's and Doctorate degrees shall apply only to those individuals who have obtained their Degrees from Colleges or Universities accredited by the New England Association of Colleges and Secondary Schools or the 5 other [regional] accrediting institutions."<sup>2</sup> Six of the teachers bringing suit had doctorate degrees and the other seven, master's degrees from unaccredited institutions. For at least three years prior to 1962, the 13 teachers had been included in the salary schedule for their highest degree. The statutory period required for tenure was "three . . . consecutive school years."

In their suit, the teachers contended that to apply the school committee vote to those already having tenure on the salary schedules applicable to Masters and Doctors degrees was an invalid impairment of the obligations of contracts. The Superior Court ruling in favor of the school committee action, was upheld by the Supreme Judicial Court.

The basic issue was whether the reclassification of the plaintiffs violated General Laws, Chapter 71, Section 43, which provides that "the salary of no teacher . . . shall be reduced without his consent except by a general salary revision affecting equally all teachers of the same salary grade . . ." The Court concluded, on the basis of its previous decisions, that salary is only one factor in determining whether specified teachers are of the same salary grade. Other factors include tenure of service, position held, and preparation and training. Persons with degrees from accredited and unaccredited institutions are reasonably classified as having different preparation and training. Thus the school committee action did constitute a general salary revision affecting equally all teachers of the same salary grade, i.e., that group whose advanced degrees were earned at unaccredited schools. The new classification of teachers with advanced degrees from accredited schools had a rational relation to the furthering of the statutory objectives for which the school committee was created.

§21.11. <sup>1</sup> 1966 Mass. Adv. Sh. 965, 217 N.E.2d 767.

<sup>2</sup> Id. at 966, 217 N.E.2d at 768.

§21.12. **Other litigation.** Several other cases decided during the 1966 SURVEY year contained one or more issues that concerned education law. In *Westinghouse Electric Corp. v. J. J. Grace & Son, Inc.*<sup>1</sup> the plaintiff brought suit in equity to enforce a claim for materials furnished in the building of a school in Cambridge. The bill sought to reach the security of the bond required by General Laws, Chapter 149, Section 29, given by the general contractor and its surety. The master's findings that the plaintiffs claim was filed within the 90-day statutory period was sustained notwithstanding the somewhat conflicting evidence. Contentions that the materials involved separate contracts for which separate claims would have to be filed, that the subcontractor's debts to the plaintiff was commingled with other of its debts, and that certain items being specially fabricated were not within the notice filed, were rejected by the Court, and the lower court decree was affirmed.

In a second case involving suit by a materialman against a school contractor, its subcontractor, and their sureties, *Mosaic Tile Co. v. Rusco Products of Massachusetts, Inc.*,<sup>2</sup> the Supreme Judicial Court received orders of the lower court. The Court first held, on pleading matters, that certain claims of the plaintiff were not contested by the demurrers. More importantly, it refused to hold that a materialman who shipped goods to a subcontractor before November 14, 1962, had therefore "ceased to furnish" the goods as of that date, when the "cease to furnish" date would under the statute start the running of the 90-day prescriptive period. Thus, the claim filed on June 4, 1963, may have been filed within the 90-day statutory prescriptive period set out in General Laws, Chapter 149, Section 29, and the plaintiffs claim was not subject to dismissal on demurrer. The Court noted that the broad remedial nature of the statute could well embrace within the concept of "ceases to furnish" the last date of receipt of the materials by the consignee.<sup>3</sup>

In *Carnegie Institute of Medical Laboratory Technique, Inc. v. Approving Authority for Schools for Training Medical Laboratory Technologists*,<sup>4</sup> the crucial issue involved the validity of the actions of defendant board pursuant to General Laws, Chapter 112, Section 2B. Because the legislative bill as actually passed and the engrossed bill differed because of unauthorized alterations inserted, the act had no validity and the board and its ruling thus had no legal existence.

*M.I.T. Student House, Inc. v. Board of Assessors of Boston*<sup>5</sup> held that a co-operative-type student boarding and rooming institution, run by a not-for-profit corporation, and devoted to helping needy students

§21.12. <sup>1</sup> 349 Mass. 664, 212 N.E.2d 213 (1965).

<sup>2</sup> 350 Mass. 433, 215 N.E.2d 171 (1966).

<sup>3</sup> The Court cited in this connection the Westinghouse case briefly discussed immediately above.

<sup>4</sup> 350 Mass. 26, 213 N.E.2d 225 (1965), same case, 1965 Mass. Adv. Sh. 1522, 213 N.E.2d 229.

<sup>5</sup> 350 Mass. 539, 215 N.E.2d 788 (1966).

attend M.I.T., was exempt from property taxation. The Court discussed the various standard doctrines governing interpretation of this exemption section, (General Laws, Chapter 59, Section 5, Third) and found, upon rather close interpretation of the facts, that the doctrines supported exemption in the present case.

In *Radcliffe College v. City of Cambridge*<sup>6</sup> the Court upheld the city's requirements for off-street parking in connection with a proposed college library. The major issue involved General Laws, Chapter 40A, Section 2, which prevents local zoning from prohibiting or limiting the use of land for any educational purposes. The Court properly determined that this section does not totally forbid a municipality from regulating uses of land owned by educational institutions. Regulation is permissible as long as the imposed requirements can be properly treated as involving a secondary or incidental educational purpose; parking for staff and students does involve such a purpose.

### C. OPINIONS OF THE ATTORNEY GENERAL

§21.13. **General.** The following significant items relating to education appeared in opinions issued by the Attorney General between September 1, 1965, and August 31, 1966.

§21.14. **Reimbursement for pupil transportation.** Sums paid under General Laws, Chapter 71, Section 7A — enacted in 1947 to help reimburse cities and towns for expenses incurred in transporting children to and from school — are subject to the following limitations: the sum paid is only the amount in excess of five dollars per pupil per year paid by a town for school transportation calculated on the basis of the net average membership of the town; the payment is limited to those pupils living more than one and one-half miles from their school; the amount paid on a per pupil basis for transportation to private schools may not exceed the amount paid for like transportation to public schools; all school transportation contracts must be awarded on the basis of sealed bids; and when a town accepts a bid other than the lowest, the town must file a written explanation with the State Department of Education.

Section 7B of General Laws, Chapter 71, enacted in 1964 was clearly an amendment to Section 7A. It was intended to deal with "additional reimbursement . . . to meet the cost of maintaining a public transportation system used for the transportation of pupils." It was not intended "to be a general subsidy of public carriers." It expresses the legislative intention of reimbursing cities and towns for part of the cost, not reimbursable under Section 7A, incurred: (a) *directly* by their school departments by payments to a public transportation system for the transportation of school children on regularly licensed public transportation carrier routes, and (b) *indirectly* by cities and towns through the payment of an "assessment" made to meet the cost of main-

<sup>6</sup> 1966 Mass. Adv. Sh. 661, 215 N.E.2d 892.

taining a regularly licensed public transportation system used for the transportation of school children.

Similar to Section 7A, Section 7B is restricted to those pupils who live more than one and one-half miles from the school they attend. Unlike Section 7A, however, Section 7B provides a rule-of-thumb or approximation for determining those pupils who live outside the one and one-half mile limit where a more precise measurement is "impractical."<sup>1</sup>

The fact that an estimate may be used does not relieve the State Department of Education, when practical, from making an exact determination. Since Section 7A requires a precise, rather than an estimated basis, the figures under Section 7A would be available for use under Section 7B and should be used for determining payments under the latter section. The period of the "assessment" referred to in the *indirect* costs portion of Section 7B encompasses "the calendar year next prior to the school year in question." Cities and towns will not be reimbursed under this provision until the end of the school year in 1967 and on or before November 1, 1967. With regard to costs incurred *directly* by a school department, the amount to be considered is the amount paid for the school year in question commencing with the school year ending 1965.

In the MBTA 64 city-and-town area there will be no assessment until the calendar year commencing January 1, 1966, except for the 14 cities and towns in the old MTA District. These latter would have an assessment for the calendar year 1964, and would be entitled to Section 7B reimbursement on or before November 1, 1965 for the school year ending June 30, 1965. When a town uses only private carriers, rather than the public transportation system, for the transportation of pupils, no reimbursement under Section 7B is available. Bus companies which are public carriers are not included within the statutory definition of "railways." Hence they are not included within the statutory provision<sup>2</sup> which extends to school pupils the privilege of riding at half fare on street or elevated railroads.

(Attorney General's opinion dated September 20, 1965; questions raised by the Commissioner of Education.)

**§21.15. Taxes on property occupied by community college.** When the Commonwealth is the lessor of real property, it must pay appropriate local taxes on such property unless excused by statute or agreement. The Commonwealth engages in the affairs of the marketplace on the same terms as any other party. It is "legal," i.e., constitutionally and statutorily permissible, for the Legislature to provide that the Commonwealth pay local taxes on property that it occupies — in this instance, property taxes levied by the city of Boston on real estate

§21.14. <sup>1</sup> Section 7B provides that in such case "the commissioner shall estimate the number . . . which number shall not exceed ten per cent of [the] net average membership."

<sup>2</sup> G.L., c. 161, §108.

leased by the Massachusetts Bay Community College from Boston University — if under the terms of a lease it agrees to be responsible for such taxes.

(Attorney General's opinion dated November 4, 1965; question raised by President, Board of Regional Community Colleges.)

**§21.16. "State college" reorganization.** The term "state colleges," as used in the act reorganizing the Department of Education and the state colleges,<sup>1</sup> does not include the office and personnel within the Division of State Colleges. These employees do not come within the reorganization act and their status was unaffected by this legislation. The rights of persons who have gained tenure by election to the faculty of a state college are retained by the reorganization act. Under the act, however, professional persons not elected to the faculty at the effective date of the act (September 26, 1965) and persons employed thereafter serve "at the pleasure of" the Board of Trustees under an employment relationship stemming entirely from this new act, which supersedes General Laws, Chapter 73, Section 4B.

The "approval" of certain employee transfers, which the reorganization act requires to be given by the Director of Civil Service and the Director of Personnel and Standardization, does not imply an independent determination of the requirements of the various state colleges. The needs of a specific institution or the colleges collectively are a matter for the Board of Trustees. The "approval" here referred to is no more than a thorough check to insure that the transfer papers are in order and that the administrative procedures have been complied with.

Only those persons employed by the state colleges on the effective date of the new legislation as civil servants and persons covered by General Laws, Chapter 30, Sections 9A and 9B, retain their respective coverage thereafter. The provisions of these sections and General Laws, Chapter 31, have no application to persons not covered on the effective date or persons employed thereafter.

(Attorney General's opinion dated November 22, 1965; questions raised by Director, Division of State Colleges.)

**§21.17. Employment practices in state colleges.** The state college reorganization act<sup>1</sup> specifically exempts from the coverage of civil service laws<sup>2</sup> persons employed at the state colleges subsequent to the effective date of the act. The General Court thus, apparently, sought to establish employment practices at the state colleges which would more closely resemble the practices at private institutions, as opposed to the ordinary civil service appointment procedure which exists in most other branches of the Commonwealth's public service. Employees in the Division of State Colleges itself are not to be exempted from the civil service laws.

§21.16. <sup>1</sup> Acts of 1965, c. 572. See 1965 Ann. Surv. Mass. Law §§19.2, 20.2.

§21.17. <sup>1</sup> Acts of 1965, c. 572, noted in 1965 Ann. Surv. Mass. Law §§19.2, 20.2.  
<sup>2</sup> G.L., cc. 30, 31.

The provisions of General Laws, Chapter 31, Sections 15A and 15B, relating to promotions for permanent civil service employees, are, however, no longer applicable to civil service employees who occupy positions in the state colleges. Civil service employees who accept appointments to higher positions in a state college will thereby lose all rights to return to the permanent positions they held on the effective date of the Acts of 1965, Chapter 572, unless they have protected their civil service tenure by obtaining a leave of absence from their permanent positions.

(Attorney General's opinion dated November 29, 1965; questions raised by Director of Civil Service.)

**§21.18. Advisory Council on Education.** Article LXV of the Constitution of the Commonwealth would prohibit acceptance by a present member of the Legislature of appointment to one of the new positions on an enlarged Advisory Council<sup>1</sup> created by an amendment passed during a term of the General Court in which he served.

(Attorney General's opinion dated December 21, 1965; question raised by the Governor of the Commonwealth.)

**§21.19. Racial imbalance in public schools.** The provision in General Laws, Chapter 15, Section 11, under which the State Department of Education is to render "technical and other assistance" in connection with efforts to eliminate or reduce racial imbalance in the public schools, does not authorize the Department to make payments to cities and towns for the purpose of aiding pupil transportation plans developed to correct such imbalance. The phrase "technical and other assistance" is intended to include only those services which the Department might be able to render within the framework of its normal operations. It is not intended to constitute a new and separate program of state aid to municipalities.

It would be entirely within the purview of the Department of Education to recommend, in appropriate situations, as a device to combat racial imbalance in the public schools, that pupils be transported. And assuming that no written protests against such transportation have been lodged by parents with the school committee, under General Laws, Chapter 71, Section 37D, it could lawfully be provided by the local school committee.

While General Laws, Chapter 71, Section 68, states that school committees shall be required to furnish transportation in certain specific instances, it in no way prohibits school committees from choosing to provide transportation at other times as well. Nothing therein would in any way compel a school committee to withhold transportation in cases, for example, in which pupils resided less than two miles from their school.

(Attorney General's opinion dated January 18, 1966; questions raised by the Commissioner of Education.)

**§21.20. Regulations for construction of schoolhouses.** The Board

§21.18. <sup>1</sup> G.L., c. 15, §1H.

of Schoolhouse Structural Standards<sup>1</sup> has the authority to make regulations "relating to structural safety . . . in connection with the construction, reconstruction, and alteration or remodeling of all public and private schoolhouses and relating to the standards of materials to be used therein." While a city or town may, pursuant to General Laws, Chapter 143, Section 3, regulate the construction of school buildings to the extent of imposing restrictions *not covered* in the regulations of the Board of Schoolhouse Structural Standards, if any provisions of a municipal code is in conflict with the Board's regulations, the latter must apply. A contrary interpretation would permit a city or town to frustrate the clear legislative intent of the Acts of 1960, Chapter 596, that the Board provide reasonable *uniform* requirements of safety throughout the Commonwealth. Local municipal authorities may lawfully make requirements for the licensing and inspection of schoolhouse construction and for assessing a local licensing fee therefor. The powers of the Board, or of the cities and towns with regard to the construction of schoolhouses, apply equally to the construction of private as well as of public schools.

(Attorney General's opinion dated February 4, 1966; questions raised by Chairman, Board of Schoolhouse Structural Standards.)

**§21.21. Alleged discrimination in employment of practice teacher.** It was alleged that the Springfield School Committee had denied a student at the American International College a position as "practice teacher" in the Springfield school system because of her race and color. Whether this would create an employer-employee relationship, so as to bring the student's complaint filed with the Massachusetts Commission Against Discrimination under General Laws, Chapter 151B, Section 4(1), required the ascertainment of additional factual information beyond that furnished to the Attorney General. It would not be proper for the Attorney General to conduct an investigation in order to determine whether probable cause exists, and then to decide whether the complaint comes within the statute. This should be answered by the Commission itself after a full agency hearing at which all interested parties may appear and present evidence.

In this regard, I would call to your attention the very real possibility that a practice teaching position falls within G.L., Chapter 151C, relating to fair educational practices, rather than G.L., Chapter 151B . . . relating to employment. It may be that the teacher training afforded by the Springfield school system is an educational program to which Mrs. Griffin [the student] was seeking admission. Refusal, on grounds of color or race, to admit a qualified student to such program might well be a violation of the Fair Educational Practices Act.

(Attorney General's opinion dated February 16, 1966; question raised by Executive Secretary, Massachusetts Commission Against Discrimination.)

§21.20. <sup>1</sup> Under Acts of 1960, c. 596, §1, and Acts of 1964, c. 546, §2.



**§21.22. Interpretation of Willis-Harrington Act.<sup>1</sup>** To the extent that General Laws, Chapter 15, Sections 9, 13, and 15A, would appear to continue the existence of the Divisions of Library Extension, of the Blind, and of Special Education within the State Department of Education, after the effective date of the Acts of 1965, Chapter 572, Section 8, these sections of Chapter 15 must be regarded as impliedly repealed with the reorganization of the Department pursuant to this act. However, the Division of Youth Services, while created within the Department by General Laws, Chapter 120, Section 4A, is not under its control. This division continues, with the same functions as before, notwithstanding that the Willis-Harrington Act does not provide for this as one of the five named divisions within the Department. The act, however, clearly abolishes the position of the assistant commissioner of education in charge of the education of mentally handicapped, physically handicapped, and emotionally disturbed children. Chapter 75C of the General Laws, providing for the licensing of private correspondence schools, has not been amended or repealed by the act and all license requirements and all authority to grant licenses remain in effect.

It is the legislative intent under the act that degree-oriented extension courses, or such courses as are usually oriented toward persons working toward degrees or other academic status, be offered by the University of Massachusetts and that other extension courses be offered directly by the Board of Higher Education. The determination of which courses shall be offered through the University and which shall be offered directly by the Board is, however, largely a matter for the Board's discretion. In general, it seems to have been the Legislature's intention that the reorganized Board of Education concern itself mainly with primary and secondary education in the Commonwealth.

There is no conflict in the act between the provisions of Section 23 and those of Section 1D relating to teacher training, since the latter refer to teacher training generally and the former to the training of vocational teachers. Although it appears that the authority of the Board of Higher Education under Section 1D to establish and maintain classes for teacher training is broad enough to include vocational training, it must be assumed that the Board will as far as possible avoid duplication of facilities and courses in the training of vocational teachers offered pursuant to Section 23.

Responsibility for the courses which the Department of Education now sponsors, and which are not related to adult primary and secondary education nor to the training of vocational teachers, should be transferred to the Board of Higher Education.

(Attorney General's opinion dated March 9, 1966; questions raised by Commissioner of Education.)

**§21.23. Dissolution of superintendency union.** A vote under

<sup>1</sup> Acts of 1965, c. 572, noted in 1965 Ann. Surv. Mass. Law §§19.2, 20.2.

General Laws, Chapter 71, Section 15, of all of the towns in a superintendency union to form a regional school district for *all* grade levels does not automatically dissolve the union. Although such a vote may well indicate the desire of the member towns to dissolve the union, it does not comply with the strict statutory standards set out in Section 61 of Chapter 71, which requires both a vote of dissolution by the school committees of the participating towns *and* the consent of the Department of Education. Nor would membership in a regional school district, subsequent and supplementary to membership in the superintendency union, automatically dissolve the earlier affiliation with the union. A town may not unilaterally withdraw from a superintendency union.

(Attorney General's opinion dated April 11, 1966; questions raised by Commissioner of Education.)

**§21.24. Regional public library service.** The Board of Library Commissioners may not enter into a contract pursuant to which the Boston Public Library would serve as a reference and research center, as defined in General Laws, Chapter 78, Section 19C, under which the library was to receive from the Board monthly payments "unrelated to actual expenditures." The Board may enter into an agreement pursuant to which the Boston Public Library would provide books and services to several towns and cities in eastern Massachusetts, and under which the library would receive monthly reimbursement, so long as the Board spends no more than 50 cents per year for each resident of each community for which provision is made.

(Attorney General's opinion dated April 13, 1966; questions raised by Commissioner of Education.)

**§21.25. Recruitment of professional personnel.** The State Department of Education may not act under General Laws, Chapter 30, Section 46, to recruit and appoint a supervisor in education on July 27, 1965, at a rate above the minimum of the grade, when the person so appointed had served as a lifeguard for the Department of Natural Resources for the period May 29, 1965 to June 15, 1965. The existing statutory prohibition against such recruitment when the proposed employee has been in the service of the Commonwealth within a twelve-month period prior to the date of the proposed recruitment bars the appointment.

(Attorney General's opinion dated April 14, 1966; question raised by Commissioner of Education.)

**§21.26. Membership on state education boards.** Persons who perform remunerative work for any educational institution, or school system, public or private, in whatever capacity, whether full or part-time and whether for all or part of the calendar or academic year, along with retired employees of any such institution or school system who receive regular retirement benefits therefrom, are precluded from sitting on the Board of Higher Education by the statutory language.<sup>1</sup>

<sup>1</sup>§21.26. 1 G.L., c. 15, §1E.

Such persons, however, may be appointed to the Board of Education<sup>2</sup> or as Trustees of the Board of State Colleges<sup>3</sup> if the institutions or school systems by which they are employed or from which they receive compensation are located outside the Commonwealth.

(Attorney General's opinion dated April 18, 1966; question raised by Commissioner of Education.)

**§21.27. Salaries within Department of Education.** In establishing salaries for the Associate and Assistant Commissioners of Education, under General Laws, Chapter 15, Section 1F, the State Board of Education is not subject to the powers of the Director of Personnel and Standardization, or those of the Commissioner of Administration under General Laws, Chapter 30, Section 46. The latter legislation, enacted in 1963, is a general statute fixing salaries for employees of the Commonwealth; whereas the former, enacted in 1965, is a specific statute governing the establishment of salaries for the Assistant and Associate Commissioners. It is a well-settled principle of statutory construction that a special statute will control one that is general. The salary of the Deputy Commissioner, however, must be fixed pursuant to the authority vested in the Director of Personnel and Standardization under General Laws, Chapter 30.

(Attorney General's opinion dated May 3, 1966; questions raised by Commissioner of Education.)

**§21.28. Joint applications for federal funds.** Under existing Massachusetts law, two or more school committees may not join together for the purpose of application for or the enjoyment of the benefits of the Federal Elementary and Secondary Education Act of 1965.<sup>1</sup> While federal grants for educational purposes may be accepted by a single school committee,<sup>2</sup> nothing in existing Massachusetts laws indicates that such grants may be applied for or used on a cooperative basis. Ordinarily, when school committees have been empowered to act jointly, the General Court has made specific provision to this effect. It must be concluded that the lack of specific statutory authorization indicates that the General Court has not "to this time" contemplated the kind of joint cooperative action in connection with application for federal funds.

(Attorney General's opinion dated May 12, 1966; questions raised by Commissioner of Education.)

**§21.29. Board of Library Commissioners.** Although under the Willis-Harrington Act the Division of Library Extension ceased to exist upon reorganization of the Department of Education,<sup>1</sup> the Board of Library Commissioners, as organized by General Laws, Chapter 15,

<sup>2</sup> Id. §1H.

<sup>3</sup> Id. §20A.

§21.28. <sup>1</sup> Pub. L. 89-10 (1965).

<sup>2</sup> G.L., c. 44, §53A.

§21.29. <sup>1</sup> Acts of 1965, c. 572, §2.

Section 9, did not go out of existence with the Division. The Division of Library Extension was not made synonymous with the Board of Library Commissioners. The latter board continues to exist and to perform all the various functions and duties assigned to it by General Laws, Chapter 78.

(Attorney General's opinion dated May 13, 1966; questions posed by Commissioner of Education.)

**§21.30. Emotionally disturbed children.** When the State Department of Education, with the concurrence of the Governor, finds that an emotionally disturbed child will benefit from attending a particular institution, it may, upon the request of the parents, send the child to that institution for *any* term up to 12 years.<sup>1</sup> Thus, attendance at an institution during the summer months by certain children who may or may not be attending institutions during the rest of the year is permissible under the provisions of the statute.

(Attorney General's opinion dated May 26, 1966; question raised by the Lieutenant Governor.)

**§21.31. School cafeterias.** Nothing appears in General Laws, Chapter 111, Section 5, or in the State Sanitary Code which would indicate that a school committee has the right to accept or reject rules or regulations adopted by the Department of Public Health. Accordingly, the Code is applicable to the operation of a school cafeteria. School cafeterias, therefore, are not exempted from the provisions of Article X of the Code and must apply for permits and meet minimum operating standards for food service establishments.

(Attorney General's Opinion dated June 3, 1966; questions raised by Commissioner of Public Health.)

**§21.32. Implementation of U.S. Public Law 89-10.** In implementing the 1965 Federal Elementary and Secondary Education Act, the Attorney General rules on various issues as follows:

(1) A school committee may offer a part-time educational program under which students of non-public schools living in the town would attend a public school in the town on a part-time ("shared time" or dual enrollment) basis if it wishes;

(2) A local school committee has no authority to provide a program of in-service training for teachers of non-public schools;

(3) A local school committee may send public school guidance counsellors, paid by local funds, to non-public schools to give the students in those schools the benefit of such counsellors' guidance services.<sup>1</sup>

(4) While neither state nor local funds may be used for the installation or improvement of laboratories, shops, kitchens, and cafeterias in private elementary schools, no provision in the Massachusetts Constitution prohibits state or local officials from distributing federal funds for such purposes;

§21.30. 1 G.L., c. 71, §46I.

§21.32. 1 G.L., c. 71, §38A.

(5) Library resources, textbooks, and other instructional materials purchased with state or local funds may not be loaned to private institutions but if purchased with federal funds, no provision in the Massachusetts Constitution prohibits the local or state officials from lending such materials.

(Attorney General's opinion dated June 13, 1966; questions raised by Commissioner of Education.)

§21.33. **Non-public schools and personnel under Public Law 89-10.** Specially garbed members of religious orders may be hired as teachers in a program conducted in public schools under the auspices of a school committee, and to be financed by monies under Title I of Public Law 89-10. However, pursuant to General Laws, Chapter 71, Section 38, a school committee need not hire such specially garbed teachers if it feels that the effect of their attire would be to inspire sympathy for the religious denomination to which they belong. The constitutional prohibition against granting to non-public schools funds raised by taxation<sup>1</sup> has no applicability to grants of federal funds. A school committee may under General Laws, Chapter 44, Section 53A, enter into a contract with non-public, sectarian schools under which those schools provide programs on their own premises for the educationally disadvantaged, when the services thus rendered are to be supported entirely by funds contributed by the federal government under Title I of Public Law 89-10.

(Attorney General's opinion dated July 11, 1966; questions raised by Commissioner of Education.)

§21.34. **Federal Manpower and Development Training Act.** Amendment Article 46 of the Massachusetts Constitution prohibits the expenditure of state funds for training in private schools, or the donation of state funds or other state property to private institutions, in order to achieve the purposes of the Federal Manpower and Development Training Act of 1962.

(Attorney General's opinion dated August 12, 1966; questions raised by Commissioner of Education.)

§21.33. <sup>1</sup> Mass. Const., Amend. Art. XLVI.